



<u>Decision Ref:</u>	2022-0204
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage Application of interest rate
<u>Outcome:</u>	Rejected

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' principal private residence.

The loan amount was €584,000.00 and the term of the loan was 35 years. The particulars of the Letter of Approval dated **19 May 2008** detailed that the loan type was a "Disc Tracker (LTV>80%/500K-1m) Homeloan".

The Complainants' Case

The Complainants submit that when they applied for their mortgage loan with the Provider, they were offered a discounted tracker interest rate at ECB + 0.7%, followed by a tracker rate of ECB + 0.9%. The Complainants note that the mortgage loan account drew down on a tracker interest rate of ECB + 0.85% in **December 2008**.

On the expiry of the discounted period in **December 2009**, the Complainants submit that a tracker interest rate of ECB + 3.25% was applied to their mortgage loan account which they considered to be too high. They maintain that it was not calculated in a "fair and reasonable" manner in accordance with the conditions of the **Letter of Approval**.

The Complainants submit that **Special Condition 9** of the **Letter of Approval** provides that the interest rate would convert to the *“current [Provider’s] tracker mortgage rate”* when the discounted period ended. The Complainants assert that the interpretation of the **Special Conditions** by the Provider is *“quite simply wrong”*. The Complainants submit that they do not understand how the tracker rate could be so high when the Provider was no longer offering tracker interest rates when the discounted period ended in **December 2009**.

The Complainants detail that the mortgage loan documentation did not allow the Provider *“to increase the margin agreed at the outset of the loan”* and that the *“margin applicable to this loan is ECB plus 1.05% which was discounted to 0.85% for the first 12 months.”* The Complainants further assert that this margin *“also created the APR quoted in the Loan Offer as well as being the margin used to populate the ESIS Sheets attaching to the loan.”*

The Complainants detail that the Provider’s underwriting of their mortgage loan is *“the clearest confirmation”* that:

- “i. the introductory discount applied to the loan was in fact a discount off the interest rate matrix;*
- ii. the Bank, and the customer, expected that, after the expiry of the discount period, the loan would revert to a certain long-run margin of 1.1%.”*

The Complainants detail further that in **2008**, both the Complainants and the Provider *“had an expectation”* that following the expiration of the discount period *“the loan would revert to a margin of 1.1%. The Bank’s own underwriting calculations are objective evidence of this fact”*. The Complainants refer to the Provider’s rate matrix document which they maintain indicates that the applicable interest rate to the mortgage loan following the initial interest rate period was a tracker interest rate of ECB + 1.1%.

The Complainants, in later submissions, detail that they *“were sold a mortgage with a certain long-run interest rate margin of 1.05% (I wrongly stated 1.1% in my September submission)”* and *“The bank’s underwriting calculations prove that both the bank and the customer understood that, after the expiry of the initial discount period, the loan would revert to a certain long-run margin of 1.05%.”*

The Complainants submit that the Provider is *“now asserting that they sold customers a product labelled a tracker mortgage and the customers were completely in the dark about the interest rate margin on their loan and the bank was at large to set any margin it desired on the loan after 12 months.”*

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The Complainants state that the doctrine of contra proferentem should apply in this complaint as it is *“utterly wrong that customers can then have the understanding of their loan conditions entirely altered by [the Provider] after the 12-month period.”*

The Complainants submit that they did not agree to, nor did they sign any documentation agreeing to the tracker interest rate of ECB + 3.25%.

The Complainants are seeking for the Provider to compensate them for the financial loss suffered as a result of being placed on the tracker interest rate of ECB + 3.25%.

The Provider’s Case

The Provider submits that the Complainants submitted a loan application through their broker in or around **14 January 2008**. The Provider states that a Letter of Approval was issued to the Complainants on **19 May 2008** providing for a mortgage loan of €584,000.00 over a term of 35 years. The Provider details that the Letter of Approval provided that a tracker interest rate of 4.85% (ECB + 0.85%) would apply to the mortgage loan account for the first 12 months in accordance with **Special Condition 9**.

The Provider submits that the Complainants accepted the Provider’s loan offer on **14 July 2008** confirming *“that their solicitor had fully explained the terms and conditions of the loan offer to them.”* The Provider details that the Complainants’ solicitor returned the signed mortgage loan to the Provider on **9 December 2008**. The Provider states that the Complainants drew down the mortgage loan on **18 December 2008**, at which point the applicable tracker interest rate was 4.10% (ECB + 0.85%).

The Provider submits that on **27 November 2009**, prior to expiration of the 12-month discounted period of interest, it issued a rate options letter to the Complainants which *“confirmed that in the absence of a rate being selected by the Complainants, their mortgage account would default to the Tracker Variable Rate”*. The Provider details that when the 12-month period from the date of draw down expired on **18 December 2009**, the *“then current [Provider’s] tracker mortgage rate”* of 4.25% (ECB + 3.25%) was applied to the Complainants’ mortgage loan account as per **Special Condition 9** of the Complainants’ loan agreement.

The Provider submits that it was entitled to exercise its discretion and make a commercial decision in terms of setting the prevailing tracker interest rate when calculating the margin to be applied on the expiration of the discounted interest rate period.

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The Provider submits that the terms and conditions of the Letter of Approval did not *“guarantee a specific tracker rate nor did they contain any reference to any specific margin to be applied above the ECB rate, either on the expiry of the 12 month discount period, or otherwise”*. The Provider states that the tracker interest rate of 4.25% offered to the Complainants was the appropriate rate and the Provider *“fully complied”* with its contractual obligations by offering this rate.

In response to the Complainants' submission that the Provider's underwriting of their mortgage loan shows that the applicable margin for the mortgage loan following the expiration of the discounted period was ECB + 1.05%, the Provider states that it is unclear *“which specific “interest rate matrix” [the Complainants are] referring to.”* In this regard, the Provider details that it assumes the Complainants are either referring to the European Standardised Information Sheet (ESIS) or the rate matrix which was submitted by the Complainants. The Provider states that the ESIS clearly states that the table provided is an illustrative amortisation table *“assuming the loan runs full term and interest rates that currently prevail are available for the term of the loan”*. In relation to the underwriting calculations carried out in assessing the Complainants' loan application, the Provider details that these calculations *“do not form part of their contractual interest rate entitlements throughout the term of their mortgage loan.”*

The Provider does not accept the Complainants' submission that the tracker interest rate of ECB + 3.25% is not *“fair and reasonable”*. In this manner, the Provider asserts that the offer of ECB + 3.25% *“was in accordance with the wording of Special Condition No. 9 of the Loan Agreement.”* The Provider states that the Complainants confirmed their understanding of the terms and conditions of the Letter of Approval by signing the Loan Acceptance on **14 July 2008** *“with the benefit of independent legal advice”*.

The Provider submits that there was *“no guarantee”* as to what the tracker interest rate appropriate to the Complainants' mortgage loan would be on the expiration of the 12-month discounted tracker interest rate period. The Provider states that the *“lack of reference to a specific tracker interest rate is not unfair or unreasonable”*. The Provider asserts that it *“acted at all times in good faith and in full compliance with the terms and conditions governing the Complainants' mortgage.”*

The Complaint for Adjudication

The complaint is that the Provider applied a tracker interest rate of ECB + 3.25% to the Complainants' mortgage loan account on the expiry of the discounted period in **December 2009**, when it was not *“fair and reasonable”* to do so.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **15 November 2021**, outlining the preliminary determination of this Office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of the Preliminary Decision of this Office, submissions were received from the Complainants' representative and the Provider between **December 2021** and **May 2022**.

Copies of these additional submissions were exchanged between the parties.

Having considered the additional submissions and all of the submissions and evidence furnished by both parties to this Office, I set out below the final determination of this Office.

Before dealing with the substance of the complaint, I note that the application for the mortgage loan was submitted by the Complainants to the Provider through a third-party broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision.

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I note that the Complainants' representative has furnished redacted documents to this Office pertaining to mortgage loans offered to customers of other financial service providers. In addition, the Complainants' representative, in his post Preliminary Decision submissions, refers to mortgage loan products offered to other customers of the Provider, as well as other customers of other financial service providers and financial service products offered by financial service providers in other jurisdictions. The terms and conditions of mortgage loans issued by other financial service providers or to other customers and mortgage products offered by financial service providers in other jurisdictions are of limited relevance to the determination of this particular complaint. In adjudicating this complaint, I cannot make determinations as to the entitlements (contractual or otherwise) of other individuals who hold mortgage loans with the Provider or indeed other financial service providers. This decision is in relation to the Complainants' mortgage loan only.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2009**.

An **Application for Credit**, which was signed by the Complainants on **14 December 2007** details as follows under the heading "*details of mortgage required*":

<i>"purchase price / value of property</i>	<i>amount of loan required</i>
<i>€635,000</i>	<i>€584,200</i>
<i>Loan type</i>	<i>repayment term required</i>
<i>Annuity</i>	<i>35 yrs"</i>

The application form, signed by the Complainants on **27 November 2007** details as follows under the heading "*Type of loan required*":

13. Type of loan required

Amount of loan € **584,200**

Repayment Interest only Encumbrance Interest only Pension Interest only Other Other

Additional loan types available from specific institutions, if other please specify

Type of rate Tracker Fixed Variable Split Rate % Term/year 5-55 years

If fixed please specify the fixed period sought **ECB + .70% yr 2 followed by ECB + .90%**

For your endowment, pension or mortgage protection policy, please specify life company...

Please state the estimated or actual endowment / mortgage protection premium...

Repayment frequency Monthly Fortnightly If monthly, nominate preferred payment date

If your mortgage is an endowment loan, and the insurer does not guarantee that the proceeds of the policy will be enough to repay the loan when due, please note:

Warning: There is no guarantee that the proceeds of the insurance policy will be sufficient to repay the loan in full when it becomes due for payment.

Please also note that in the case of some kinds of endowment loans, early surrender of the policy may result in a return to you which is less than you have paid in premia and other charges.

In circumstances where the Complainants were engaging with a broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainants at the time of the mortgage loan application or advise on the interest rate options available.

On foot of receipt of the mortgage loan application, the Provider issued a **Letter of Approval** to the Complainants on **18 January 2008** providing for a loan amount of €584,000.00. However, the Complainants did not accept that particular loan offer.

The Provider subsequently issued a letter dated **19 May 2008** to the Complainants through their third-party broker, enclosing a copy of an amended loan approval.

The letter dated **19 May 2008** details as follows:

“Dear [Complainants]

I have enclosed a copy of your amended loan approval. I have also sent a copy to your solicitor.

If you want to accept our offer, please sign the Acceptance of the Loan which has been sent with the mortgage documentation to your solicitor. You should sign the acceptance of loan in the presence of your solicitor who must witness your signature. Then return it to the Mortgage Processing Centre as soon as possible so we can process your loan.

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I have also enclosed the "European Standardised Information Sheet" which further explains the details of the loan.

If you require any further clarification on the content of this letter, please contact your financial advisor, who will be more than happy to deal with your query."

The **Letter of Approval** dated **19 May 2008** details as follows:

<i>Loan Type:</i>	<i>Disc Tracker (LTV>80%/500K-1M) Homeloan</i>
<i>"Purchase Price/Estimated Value:</i>	<i>€635,000.00</i>
<i>Loan Amount:</i>	<i>€584,000.00</i>
<i>Interest Rate:</i>	<i>4.85%</i>
<i>Term:</i>	<i>35 year(s)"</i>
<i>...</i>	
<i>LTV:*</i>	<i>92%"</i>

The **Special Conditions** attached to the **Letter of Approval** detail as follows:

4. The interest rate and mortgage repayment indicated in the letter of approval are based on the ECB rate applicable at the date of the letter of approval and take into account the discount period referred to above. The ECB rate may change on or before drawdown.

5. If, for whatever reason, an event occurs which fundamentally affects the use of the ECB rate as a reference rate for this loan, [the Provider], in its sole discretion, shall be entitled to use such other reference rate or other method or basis of calculation as it deems fair and reasonable and notwithstanding the use of such other reference rate or method or basis of calculation, the rate so calculated by [the Provider] shall be and apply as the reference rate applicable to this loan in place of the ECB rate.

...

9. The interest rate applicable to this tracker loan may be varied by [the Provider] provided it will not exceed 0.85% over the European Central Bank (the "ECB") refinancing rate (the "ECB rate") for the first 12 Months (the discount period) from the date of loan issue. The ECB rate may be varied from time to time by the ECB. In the event of any variation of the ECB rate during the discount period, the interest rate will not be more than 0.85% over the ECB rate as varied by the ECB.

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[The Provider] reserves the right to alter the said percentage over the ECB rate at any time prior to drawdown. On expiry of the discount period, the interest rate will be the then current [Provider's] tracker mortgage rate (comprising of a certain percentage over the ECB rate) appropriate to the loan as may be varied in accordance with variations to the ECB rate. In the event of any variation of the ECB rate the revised interest will apply not later than 1 calendar month from the effective date provided by the ECB."

Page 1 of the European Standardised Information Sheet attaching to the **Letter of Approval** details as follows:

"This document does not constitute a legally binding offer.

*The figures are provided in good faith and are an accurate representation of the offer that the lender would make **under current market conditions** based on the information that has been provided. **It should be noted, however, that the figures could fluctuate with market conditions.***

The provision of this information does not oblige the lender to grant credit.

...

Nominal Rate

The interest rate is 4.85 percent.

The interest rate may vary from time to time. Notice will be given in respect of rate increases. No notice will be given for decreases in rate.

The option to apply for a fixed rate product (if available) may be exercised by you at any time otherwise the rate will remain a variable rate

*The interest rate applicable to this loan is a variable rate loan but will not exceed 0.85% over the European Central Bank Refinancing Rate (The ECB Rate) for the first 12 months (the Discount Period) from the date of issue of the loan. On expiry of the Discount Period, the interest rate applicable to the loan will be the then current [Provider's] tracker mortgage rate (comprising of a certain percentage over the then ECB rate) appropriate to the loan as may be varied by the European Central Bank. **THE PAYMENT RATE ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."***

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Pages 4 and 5 of the **European Standardised Information Sheet** contain an *“Illustrative Amortisation Table”* illustrating the capital outstanding and the monthly repayments for the first year of the term of the loan, followed by yearly figures over the term of the loan based on the following assumptions as detailed in the **European Standardised Information Sheet**:

“Assumptions:

The table above illustrates the amortisation of the loan assuming the loan runs full term and interest rates that currently prevail are available for the term of the loan”.

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by their solicitor on **14 July 2008** on the following terms:

“1. I/we the undersigned accept the within offer on the terms and conditions set out in

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. [the Provider’s] Mortgage Conditions*

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

...

4. My/our Solicitor has fully explained the said terms and conditions to me/us.”

The mortgage loan account was drawn down on **18 December 2008** on a tracker interest rate of 4.10% comprising the ECB refinancing rate at the time which was 3.25%, plus a margin of 0.85%.

The Complainants’ representative, in his post Preliminary Decision submission dated **12 January 2022**, refers to the application form detailed above that was completed by the Complainants’ broker wherein an interest rate of *“ECB plus 0.70% year 1 followed by ECB plus 0.90%”* was requested by the Complainants’ broker. The Complainants’ representative queries *“how or why did the provider never correct the broker on this as he reflected the applicable margins at the time.”*

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The Provider, in its post Preliminary Decision submission dated **26 January 2022**, details that “[w]hile the Complainants may have stated “*ECB+.70% yr 1 followed by ECB+.90%*” in the loan application form dated 27 and 28 November 2007 in reply to the type of rate, the contractual relationship between the Bank and the Complainants is governed by the terms and conditions agreed and accepted by the Complainants in the Loan Agreement.” In this regard, it is important to highlight that the application form does not form part of the formal mortgage loan agreement between the parties. While the Complainants’ broker may have applied for an interest rate of “*ECB+.70% yr 1 followed by ECB+.90%*” it was a matter for the Provider to assess the mortgage loan application and it was within the Provider’s commercial discretion whether to accede to such a request. In determining this complaint, I must consider the formal mortgage loan agreement in the form of the **Letter of Approval** dated **19 May 2008** that issued from the Provider and terms of which, the Complainants accepted and signed.

It is clear to me that the **Letter of Approval** dated **19 May 2008**, provided for a discounted tracker interest rate, comprising the ECB refinancing rate plus a margin of 0.85%, for the first 12 months of the term of the loan, with the Provider’s then current tracker mortgage rate to apply thereafter.

The Complainants’ representative, throughout his post Preliminary Decision submissions, maintains that the “*discount*” on the tracker interest rate is a “*defined discount from a ‘Parent’ margin rate*”. The Complainants’ representative therefore is of the view that it is this “*Parent*” margin rate that ought to apply to the mortgage loan account on the expiry of the discounted interest rate period. In this regard, the Complainant’s representative, in his post Preliminary Decision submission dated **9 December 2021**, has submitted a copy of an e-mail of **18 April 2008** which appears to have been forwarded from the Provider to intermediaries. This email details the launch of “*new discounted and roll on LTV Tracker rates*” as well as other interest rate for new business customers that were effective from **early June 2008**. Two “*LTV Tracker*” rates are detailed in this email to include “*1 Yr Disc LTV<80% 5.05%*” with a “*Maturity Rate LTV<80% 5.25%*” and a “*1 Yr Disc LTV>80% 5.30%*” with a “*Maturity Rate LTV>80% 5.50%*”. The Complainants’ representative details that this document indicates that “*a discount did apply from a ‘Parent’ ‘Maturity’ or ‘Roll to Rate’, namely the maturity rates following an initial discount period.*” The Provider, in its post Preliminary Decision submission dated **31 March 2022**, details that the prevailing tracker interest rates and maturity rates at the time that the **Letter of Approval** dated **19 May 2008** was issued “*have no relevance to the tracker rate that was offered to the Complainants upon the expiry of the 12 month discount period*”. Moreover, the Provider submits that it “*is not in a position (nor would it be appropriate) to comment upon, or address, any correspondence that does not refer to the Complainants’ mortgage*” and that “*no reliance can be placed on any of the contents of this email in these circumstances*”.

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The Complainants' representative appears to place great emphasis on this e-mail communication of **18 April 2008** to the extent that he asserts that this communication *"supports and proves beyond any doubt or further debate, that [his] position is 100% accurate and it needs to be considered as the preliminary decision as issued is wrong"*. However, it is important to note that there is no reference whatsoever in the **Letter of Approval** dated **19 May 2008** to a LTV tracker interest rate of *"1 Yr Disc LTV<80% 5.05%"* or *"1 Yr Disc LTV>80% 5.30%"* or a *"Maturity Rate"*. While these LTV variable interest rates may have been available for selection by new customers in **2008** subject to certain lending and eligibility criteria, the Provider offered the Complainants a discounted tracker interest described as a *"Disc Tracker LTV>80%/500K-1M) Homeloan"* at 4.85% (comprising the ECB refinancing rate at the time which was 4.00%, plus a margin set by the Provider at 0.85%) and the Complainants accepted this interest rate and subsequently drew down the mortgage loan. Consequently, this communication referred to by the Complainants' representative does not in any way entitle the Complainants to a specific *"Maturity Rate"* on the expiry of the discounted period. This communication does not form any part of the Complainants' mortgage loan documentation. It is the terms and conditions attaching to the **Letter of Approval** dated **19 May 2008** that form the basis of the contractual agreement between the Complainants and the Provider and not the e-mail communication of **18 April 2008**.

I note that there is no reference whatsoever in the particulars of the **Letter of Approval** or indeed the **Special Conditions** or **General Conditions** that any specific tracker interest rate or *"Parent"* margin rate would be available following the expiry of the discounted period. Rather, **Special Condition 9** details that the *"then current [Provider's] tracker mortgage rate (comprising of a certain percentage over the ECB rate) appropriate to the loan"* will apply on the expiry of the 1-year discounted tracker interest rate period.

The Complainants' representative, in his post Preliminary Decision submissions dated **03 February 2022**, states that *"If the provider has not stipulated a specific Tracker Mortgage Rate that would apply after the 12 months, then that cannot at the same time be described as a Tracker Mortgage"*. I do not accept this assertion by the Complainants' representative, given **Special Condition 9** clearly states that a tracker mortgage rate comprising a certain percentage over the ECB rate will apply at the end of the discounted period. The fact that **Special Condition 9** does not specify what that certain percentage over the ECB rate will be on the expiry of the discounted period, does not in any way change the very nature of the applicable tracker interest rate.

The Complainants accepted the terms of the **Letter of Approval** together with the **Special Conditions** and the **General Mortgage Loan Approval Conditions** by signing the **Acceptance of Loan Offer**. By signing the **Acceptance of Loan Offer**, the Complainants confirmed that their solicitor fully explained the said terms and conditions to them.

Prior to expiry of the discounted tracker interest rate period, the Provider issued correspondence to the Complainants on **27 November 2009** which details as follows:

"I am writing to remind you that the current rate option on your mortgage account will end on 18 Dec 2009.

Please find attached the current options available to you. We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you. These options may or may not include a tracker option and if included, may have a higher percentage margin over the ECB rate than that applying to your loan prior to the fixed rate period. Therefore at the end of the fixed rate period, our rates, in respect of any product options, could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.

If we do not receive a written instruction from you in relation to the above on or before the 18 Dec 2009, the interest rate on your mortgage will be the Tracker Variable Rate."*

The **rate options form** attached to the Provider's correspondence dated **27 November 2009** detailed the following available interest rates:

"Current options available:

You may only select one option.

Account Number: [ending 2750]

*Monthly
Repayment
EUR*

<i>Tracker variable rate</i>	<i>- Currently: 4.2500% 2661.0.</i>
<i>LTV variable rate **</i>	<i>- Currently: 3.6500% 2456.45</i>
<i>2 year fixed rate</i>	<i>- Currently: 5.2500% 3019.39</i>
<i>5 year fixed rate</i>	<i>- Currently: 5.7500% 3206.14</i>
<i>7 year fixed rate</i>	<i>- Currently: 6.1000% 3339.66</i>
<i>10 year fixed rate</i>	<i>- Currently: 6.1000% 3339.66</i>

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[...]

Please fill in and return the attached form before the expiry date to: [Provider's address]

[...]

- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).
- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 3.2500% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans.
- **In calculating your loan to value ratio we use your current loan balance and the most recent valuation on file for this mortgage."

In circumstances where the Complainants did not select to move to a fixed interest rate or a LTV variable rate, the Complainants' mortgage loan account moved to a tracker interest rate of 4.25% on **18 December 2009**. This tracker interest rate comprised the ECB main refinancing rate at the time which was 1.0% and an interest rate margin of 3.25%, as set by the Provider. In accordance with the terms of the **rate options form** outlined above, the interest rate margin that would apply to the mortgage loan from **18 December 2009** would never be more than 3.25% above the ECB refinancing rate.

The Provider has submitted into evidence a copy of a document titled **Lending Interest Rates**, which is noted as being "effective from the start of business on the 4th December 2009".

This document outlines as follows:

"Home Loans Rates for Existing Business

LTV Variable applicable to existing Home Loans since 27/07/09. LTV Tracker Maturity Rates applicable to Existing Home Loans since 31/08/09

....

	Rate	APR
Tracker Rate LTV <80%	4.25%	4.3%
Tracker Rate LTV >80%	4.25%	4.3%"

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The evidence shows that the tracker interest rate that the Provider had available in **December 2009** was 4.25% (ECB + 3.25%) which is in line with the interest rate referred to in the rate options form detailed above. The tracker interest rate in this instance, comprises the ECB refinancing rate of 1.0% (having reduced from 1.25% in **April 2009** bearing in mind that the ECB rate may be increased or decreased from time to time by the European Central Bank) and the relevant margin appropriate to home loans which was 3.25%, again in line with the **rate options form**. Based on my review of the Provider's lending interest rates applicable in **December 2009** to its existing customers, I accept that the Complainants were offered the option of the then current tracker mortgage rate as appropriate to their loan at the time of expiry of the discounted tracker interest rate period and in accordance with **Special Condition 9** of the **Letter of Approval**.

The Complainants' representative, in his post Preliminary Decision submission dated **29 November 2021**, asserts that the Provider "*has not adhered to the principles of the Codes and Directives*". In particular, the Provider refers to the **Consumer Protection Code 2006, Article 5** of the **Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts** and **Article 6** and **Article 7** of the **Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market**. In this regard, it is appropriate to firstly consider **Article 5** of the **Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts** which details as follows:

"In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2)."

The Complainants' representative, in his post Preliminary Decision submissions, states that he is "*lost to understand where the **"interpretation most favourable to the consumer"** has been applied*" and appears to question whether the determination of this Office is "*really attempting to claim and agree with the provider that there was no doubt or confusion on the part of the Complainants?*". The Provider, in its post Preliminary Decision submissions dated **22 December 2021**, submits that the "*Unfair Terms Directive does not create an unencumbered right that all terms must be interpreted in favour of the consumer*", as alleged by the Complainants' representative. The Provider submits that "*Article 5 does not apply on the basis that there is no doubt as to the meaning of the terms of the Loan Agreement, in particular Special Condition No. 9 which clearly states, in plain intelligible language that "on expiry of the discount period, the interest rate will be the then current...tracker mortgage rate...appropriate to the loan"*".

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The Complainants' representative also refers to **Articles 6 and 7 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market**, which deal with misleading actions and misleading omissions with respect to commercial practices. **Directive 2005/29/EC** was transposed into Irish Law by way of the **Consumer Protection Act 2007**. With regard to **Articles 6 and 7 of Directive 2005/29/EC**, the Complainants' representative states that *"to be misleading, an omission of material information must be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise". I firmly believe that the Provider has both an Omission that is both a Misleading omission as well as a Misleading Action*". In respect of **Article 6**, the Provider, in its post Preliminary Decision submissions, submits that *"the terms of the Loan Agreement were clear and did not contain any information which was "false", "misleading" or "likely to deceive the average consumer"*". In relation to **Article 7**, the Provider states that it is *"satisfied that all material and relevant information was provided to the Complainants in clear and comprehensible manner"*.

In relation to the **Consumer Protection Code 2006**, the Complainants' representative, in his post Preliminary Decision submissions dated **29 November 2021** refers to **Chapter 1- General Principles** and **Chapter 2- Common Rules for all Regulated Entities** and in particular **provision 12** which deals with the provision of information to the consumer. **Provision 12 of Chapter 2- Common Rules for all Regulated Entities** states as follows:

"A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information".

The Complainants' representative states that the *"Preliminary decision as presented does not take account of this key part of the code as the key items of this case were absolutely presented by the provider in a way to disguise diminish and obscure if the Preliminary decision and its content stand"*. The Complainants' representative in later submissions of **10 March 2022** again refers to the **General Principles** and **provision 12 of Chapter 2- Common Rules for all Regulated Entities** of the **Consumer Protection Code 2006** and states that *"the provider has utterly failed in this regard with its disguising and obscuring of the margin despite reassuring my clients they were getting a Tracker Mortgage"*. The Provider, in its post Preliminary Decision submission dated **22 December 2021**, submits that it refutes the allegation by the Complainants' representative that the *"key items of this case"* were presented *"in a way to disguise diminish and obscure"*.

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The Provider also states that *“these allegations are made without reference to any provisions of the Loan Agreement and amount, in the Bank’s opinion, to baseless and unsubstantiated claims”* by the Complainants’ representative. The Provider, in its post Preliminary Decision submission dated **31 March 2022**, states its position *“remains that the Loan Agreement was clear and comprehensible in relation to the terms of the loan, and submits that it has fully complied with its obligations under the Consumer Protection Code in relation to the Complainants”*.

I have carefully reviewed and considered the mortgage loan documentation that issued from the Provider to the Complainants to include the **Letter of Approval** dated **19 May 2008** and the terms and conditions attaching thereto. I accept that the mortgage loan documentation is drafted in a clear manner. In these circumstances, there is no obligation on this Office to interpret the mortgage in any manner other than on the basis of the meaning of the words in that mortgage loan.

As outlined above, it is clear that the terms and conditions of the **Letter of Approval** dated **19 May 2008** provided for a tracker interest rate, comprising the ECB refinancing rate plus a margin of 0.85%, for the first 12 months of the term of the loan. The first 12 months was defined as the discount period. The Provider’s then current tracker mortgage rate appropriate to the loan to apply on the expiry of the discounted interest rate period in **2009**.

The percentage margin over the ECB rate that would apply to the mortgage loan after the discounted period ended was not specified in the **Letter of Approval**. However, I do not consider this to be a *“misleading omission”* or *“misleading action”* on the part of the Provider. Further, I do not consider that the Provider deliberately set out to *“disguise diminish and obscure”* the margin that would apply at the end of the discounted interest rate period. The **Special Conditions** clearly stated that the interest rate that will apply in **December 2009** (marking the end of the discounted interest rate period) will be the Provider’s then current tracker mortgage rate appropriate to the mortgage loan and this is the tracker mortgage interest rate that the Complainants were correctly offered by the Provider in **December 2009**. The Provider could not have known in **2008** what tracker interest rate margin it had planned to set in respect of its tracker mortgage product offering in **2009**. If the Complainants were not satisfied with the terms of the mortgage loan agreement or with what would transpire at the end of the discounted interest rate period, the Complainants could have declined to accept the Provider’s loan offer. However, the Complainants did not do so and signed the **Acceptance of Loan Offer** confirming that their solicitor fully explained the terms and conditions of the loan agreement to them.

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In these circumstances, I do not accept that there has been a breach of the Code or other laws specified by the Complainants' representative.

The Complainants and the Complainants' representative, throughout his post Preliminary Decision submissions, maintain that the mortgage loan account should have defaulted to a tracker interest rate of ECB + 1.05% at the expiry of the discounted interest period on **18 December 2009**, in the absence of a written instruction from them choosing an alternative rate. The Complainants appear to base their reasoning on the Provider's "*undertaking calculations*".

It appears to me that the "*undertaking calculations*" to which the Complainants refer to are contained in the **European Standardised Information Sheet** that accompanied the **Letter of Approval** which the Complainants seek to rely on. The **European Standardised Information Sheet** in relation to mortgage loan account ending **2750** was generated on **19 May 2008** and contains a table illustrating the amortisation of the loan assuming that the loan will roll over onto the tracker mortgage rate appropriate to the loan. The tracker mortgage rate appropriate to the Complainants' mortgage loan account ending **2750** in **December 2008** differed from the tracker mortgage rate appropriate to the loan in **December 2009**. In this regard, **page 1** of the **European Standardised Information Sheet**, clearly sets out that the figures provided, to include the figures in the illustrative amortisation table, are based on "*current market conditions*" as of **December 2008**, but that those figures could "*fluctuate*". It is therefore important to highlight that the information provided in the **European Standardised Information Sheet** was provided for illustration purposes only and was not a formal offer.

However, it is important to highlight that the agreed terms of the mortgage loan were clearly set out in the **Letter of Approval** accepted and signed by the Complainants in the presence of their solicitor as opposed to any "*undertaking calculations*" prepared by the Provider or any other party, which do not form part of the mortgage contract.

For the avoidance of any doubt, the Complainants were in no way entitled to, or guaranteed a tracker interest rate of ECB + 1.05% or any other specific tracker interest rate at the end of the discounted tracker interest rate period in **December 2009** simply because the illustrative amortisation table may have been prepared using this rate. It is the **Letter of Approval** that was issued to the Complainants and signed by the Complainants on **14 July 2008** in respect of mortgage loan account ending **2750** and the terms and conditions attaching to the **Letter of Approval**, that form the basis of the contractual agreement between the Complainants and the Provider.

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The **Letter of Approval** did not provide for a tracker interest rate of ECB + 1.05% at the end of the discount period and despite the Complainants' submissions and the Complainants' representative's post Preliminary Decision submissions, there is no evidence to suggest that the Provider created an expectation that the Complainants would be entitled to a tracker interest rate of ECB + 1.05% in **December 2009**.

Upon a careful consideration of the evidence before me, it is clear to me that the Complainants did not have a contractual or any other entitlement to a tracker interest rate of ECB + 1.05% (or ECB + 1.1% as referred to by the Complainants in their earlier submissions to this Office) on the expiry of the discounted tracker interest rate period in **December 2009**.

The Complainants had a contractual entitlement to the "*the then current [Provider's] Tracker Mortgage rate appropriate to the Loan*" which was 4.25% (ECB + 3.25%) on the expiry of the discounted tracker interest rate period in **December 2009**. It is clear to me that the Provider duly offered the appropriate tracker interest rate to the Complainants pursuant to the terms of the **Letter of Approval** and this rate was correctly applied to the Complainants' mortgage loan account.

For the reasons outlined in this Decision, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

21 June 2022

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PUBLICATION

Complaints about the conduct of financial service providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish legally binding decisions** in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
 - (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
 - and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension providers in such a manner that—

- (a) ensures that—
 - (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
 - and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.