



<b><u>Decision Ref:</u></b>	2022-0216
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	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 is secured on the first Complainant's principal private residence.

The loan amount is €225,000.00 and the term of the loan is 30 years. The **Amended Letter of Offer** dated **09 November 2005** outlined that the interest rate applicable to the loan was a fixed interest rate of 2.69% for a period of 12 months, with the Provider's "*prevailing variable rate*" to apply thereafter.

**The Complainants' Case**

The Complainants submit that they drew down their mortgage with the Provider in **November 2005** on an initial discounted fixed interest rate of 3.44%. The Complainants detail that the "*mortgage agreement stated at the end of the fixed rate period, the mortgage shall revert to the lenders prevailing variable rate*".

The Complainants outline that the Provider issued correspondence to them dated **11 November 2006**, which advised the Complainants "*that the one year discounted fixed rate was coming to an end*".

The Complainants detail that this letter also offered them *“the opportunity of pre-booking another fixed rate option”*. The Complainants contend that there was no reference to any other rate options, including tracker rates, *“notwithstanding the fact various Tracker rate options were available from the [Provider] at the time”*.

The Complainants submit that following the conclusion of the one-year fixed interest rate period in **December 2006** they were not offered a tracker interest rate nor were they informed by the Provider that a tracker rate was available to them.

The Complainants detail that the Provider issued correspondence to them on **05 December 2006**, advising them *“of the imminent end of the one year discounted fixed rate period and that [their] mortgage will roll onto the Standard Variable Interest rate of 4.70%”*. The Complainants submit that they subsequently *“opted to avail of a five year fixed rate of 4.89% APR”*. The Complainants outline that the Provider confirmed to them, in a letter dated **20 December 2006**, that the five-year fixed interest rate would remain in place until **01 December 2011**.

The Complainants assert that their *“loan agreement states the prevailing variable rate would apply at the end of the fixed rate period”*. The Complainants submit that their loan documentation *“does not specifically state that the Standard Variable Rate would apply”*. The Complainants contend that it is therefore *“reasonable to conclude”* that tracker rates of interest were the *“prevailing variable rate”* referenced in their loan documentation. The Complainants dispute that the term *“prevailing variable rate”*, as stated in their loan documentation, means a standard variable rate.

The Complainants note that *“[c]ondition number seven in the loan agreement states ‘at the expiry of the fixed rate period the Lenders prevailing variable rate will apply’. It does not specifically state that the one year discounted fixed rate will roll onto the Standard Variable Rate.”* The Complainants maintain that the loan documentation or correspondence received by them from the Provider, does not state that they would be *“precluded from availing of a tracker interest rate at the end of the one year discounted fixed rate term in November 2006”*.

The Complainants outline that on **07 November 2006**, the Provider published a flyer which stated that *“all [the Providers] fixed rates will now roll onto tracker rate upon expiry”*. The Complainants assert that there is no reference to new customers only in the flyer. The Complainants submit that they should have been offered a tracker rate of interest at the end of the one-year fixed interest rate period in **December 2006** *“in line with [the Provider’s] policy as indicated in the ‘flyer’ to Brokers dated 07/11/06”*.

The Complainants outline that the influencing factors at the time they drew down their mortgage would have included the Provider's handbook and information received from their mortgage broker.

The Complainants note that the Provider issued correspondence to them dated **04 December 2011**, which advised them that the five-year fixed rate period was coming to an end and that their mortgage would convert to *"the Standard Variable Rate of 4.50% from 1<sup>st</sup> January 2012"*.

The Complainants assert that their entitlement to a tracker interest rate is based on the following:

- (a) The terms contained in a flyer issued by the Provider on **07 November 2006** which provided that all fixed rate mortgages would switch to a tracker rate at the end of the fixed rate period.
- (b) The Provider has misapplied the term *"prevailing variable rate"* in the mortgage loan documentation as relating to a *"standard variable rate"*. The Complainants submit that the *"prevailing variable rate"* is not defined anywhere in their loan agreement and that tracker interest rates *"were very much the prevailing variable rate at the time my one-year fixed rate ended."*

The Complainants contend that the Provider *"fell short in the various requirements and standards regarding disclosure and transparency"* owed to them as consumers, in relation to the interest rates offered to them. The Complainants submit that the language used in the loan documentation was *"loose ended & ambiguous"*. The Complainants also assert that the material issued by the Provider was *"misleading, confusing and not conducive to making a full informed decision"* regarding their mortgage.

The Complainants maintain that the Provider *"did not treat [them] fairly and failed to show any regard for [their] best interests regarding the interest rates"* offered to them at the end of the one-year fixed interest rate period in **December 2006**. The Complainants submit that the Provider's *"withholding of various interest rate options"* at the end of the fixed interest rate period, was not in their *"best interests"*.

In addition, the Complainants submit that they *"did have a contractual right to be offered a tracker rate at the end of the one year discounted fixed period"* as there *"is nothing in [their] loan agreement which says [they] couldn't be offered a tracker rate"*. The Complainants assert that the Provider *"had no contractual obligation to offer [them] fixed interest rates only"* at the end of the one year discounted fixed rate term.

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The Complainants maintain that the Provider *“failed to adequately advise”* them of the implication of fixing their mortgage from the beginning and *“failed to advise [them] of the rate restrictions thereafter”*.

The Complainants are seeking the following:

- (a) That the Provider acknowledges that there was no contractual or other reason why the Complainants were not offered *“all Interest Rate options (Including Tracker Rates)”* on the expiry of the discounted fixed interest rate period in or around **December 2006**; and
- (b) To be retrospectively offered a tracker interest rate, backdated to **December 2006**.

### **The Provider’s Case**

The Provider outlines that it received an application from a broker, on behalf of the Complainants on **03 October 2005**. The Provider details that the Complainants *“had the benefit of both independent legal and financial advice”* at the time of the loan application.

The Provider asserts that in relation to broker introduced cases, *“it was not the [Providers] practice to engage directly with the applicant with the exception of the issue of the requisite loan assessment and approval documentation”*.

The Provider submits that it *“notified brokers of the interest rates available through the issue of Broker Communicates with interest rate matrices”*. The Provider further submits that the broker engaged by the Complainants *“would have been fully aware of the types of rates and products available”* from the Provider.

The Provider submits that it issued a **Letter of Offer** dated **25 October 2005** and a copy of an **Amended Letter of Offer** dated **09 November 2005** to the Complainants. The Provider outlines that it wrote directly to the Complainants on **19 December 2005** *“to confirm that the loan had completed and to provide details of the payments due”*. The Provider details that the Complainants drew down their mortgage loan account on a one-year fixed interest rate of 2.69%, as per the terms of the mortgage loan offer.

The Provider submits that it wrote to the Complainants on **11 November 2006** to confirm that the Provider’s standard variable rate would apply to the Complainants’ mortgage loan account from **01 January 2007** *“as the fixed rate period was coming to an end”*. The Provider notes that this letter also provided *“details of the fixed rates on offer at that time”* and also *“invited the Complainants to contact the [Provider] to discuss their options and for assistance in choosing the rate and features that would suit them best”*.

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The Provider outlines that it wrote to the Complainants on **05 December 2006** *“to confirm the revised payment at the standard variable rate of 4.70%”*. The Provider submits that the First Complainant telephoned the Provider on **07 December 2006**, and the Provider *“confirmed [the] interest rate information for him”*.

The Provider notes that the Complainants subsequently elected to fix the rate of interest on their mortgage loan account *“for a further five year period and this fixed rate agreement was confirmed in writing to the Complainants”* on **20 December 2006**. The Provider outlines that the First Complainant telephoned the Provider on **21 December 2006** and the Provider *“confirmed that the fixed interest rate agreement had been implemented”*.

The Provider contends that the Complainants were not offered a tracker rate of interest on the expiry of the fixed interest rate period in **2006** because the Complainants *“had no default or contractual entitlement to a tracker rate at the end of the fixed rate period”*. The Provider also maintains that it *“was under no obligation to offer a tracker rate”* at this time.

The Provider asserts that, as set out in the Complainants' loan documentation, the *“default rate”* applicable to the Complainants' mortgage loan account on the expiry of the fixed rate period is the Provider's variable interest rate. The Provider contends that there is *“no reference”* to the Provider's variable rate being *“linked in any way to the ECB rate”* and that there is also *“no commitment”* that the prevailing variable rate specified in the Complainants' loan documentation *“would track the ECB rate or any other quoted rate”*. The Provider further states that there was *“no commitment to provide interest rate options to the Complainants on the expiry of the fixed rate period or indeed at any other time”* contained in the mortgage loan documentation.

In relation to the Complainants' contention that the *“prevailing variable rate”* is not defined anywhere in their loan agreement and that tracker interest rates *“were very much the prevailing variable rate at the time [the Complainants] one year fixed rate ended”*, the Provider submits that it is satisfied that the term *“prevailing variable rate”* was sufficiently clear in its ordinary meaning, and *“refers to the [Provider's] standard variable rate”*. The Provider contends that if the Complainants had been afforded an entitlement to a tracker rate of interest *“this would have been clearly stated in the Special Conditions to the letter of offer”*.

The Provider submits that the Complainants *“have referenced the Mortgage Handbook received by them from the [Provider] in November 2005 with their Letter of Offer”* and notes that this document *“provided an explanation of the various types of interest rates generally available, including a variable and a tracker rate”*. The Provider further notes that this document provided an explanation of both tracker and variable rates *“which clearly demonstrated the difference between these types of variable rate”*.

The Provider details that it had *“an established practice for the notification of new business products and interest rates”* to its broker network *“with the circulation email inviting brokers to contact their Mortgage Managers”* with any queries in relation to new mortgage products. The Provider explains that it circulated a communication to its broker network on **07 November 2006** which provided details of a new fixed rate product that would roll onto a tracker interest rate on the expiry of the fixed interest rate. The Provider contends that this communication did not amount to an advertisement by it to the general public. The Provider submits that the communication that issued in **November 2006** *“did not apply”* to the Complainants’ mortgage loan account *“as the loan application was received in the year prior to this flyer”* and *“prior to the introduction of [the] particular product”* to which the flyer applied.

In addition, the Provider asserts that it *“is satisfied that the documentation”* which governs the Complainants’ mortgage loan account was *“sufficiently clear and transparent and that there is no reference to the variable rate referenced in the mortgage loan documentation being linked in any way to the ECB rate as would be the case where a tracker rate entitlement was being established.”*

### **The Complaints for Adjudication**

The complaints are as follows:

- (a) The Provider failed to advise the Complainants that in applying a one-year discounted fixed interest rate, they would not be entitled to the option of a tracker interest rate upon the expiry of the discounted fixed interest rate period in or around **December 2006**; and
- (b) The Provider failed to offer the Complainants the option of a tracker interest rate upon expiry of the discounted fixed rate period in or around **December 2006**.



## 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 **25 March 2022**, 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, the parties made further submissions, copies of which were exchanged between the parties.

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

Before dealing with the substance of the complaint, I note 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. Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

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In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants' mortgage loan. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2005** and **2006**.

An **Application Form** was completed and signed by the Complainants on **29 September 2005** and submitted to the Provider via a third-party broker. I note that the **Application Form** provided a choice of interest rate options under the section titled "*Your Mortgage type, rate and term details*" including variable, tracker and fixed interest rate options. It does not appear that the Complainants selected a choice of interest rate on the application form. However, I note that "*2.69%*" was written beside this section on the application form.

In circumstances where the Complainants engaged the service of a broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainants in relation to the application form or the interest rate options that the Complainants could have sought for the mortgage loan.

A **Letter of Offer** dated **25 October 2005** issued to the Complainants for an amount of €225,000.00 repayable over a term of 30 years on a 12-month fixed interest rate of 2.69%. The Provider's internal notes from the application stage have been furnished in evidence.

The internal notes show that interactions took place between the broker and the Provider regarding adding the second Complainant as a mortgage account holder as opposed to a guarantor for the loan. These interactions took place following the issuing of the **Letter of Offer** dated **25 October 2005**. It would appear that the **Letter of Offer** dated **25 October 2005** was not accepted and signed by the Complainants and therefore is not relevant to the determination of this complaint.

The Provider subsequently issued an **Amended Letter of Offer** to the Complainants, dated **09 November 2005**.

The **Amended Letter of Offer** details as follows:

*"We are pleased to advise you that [the Provider] has approved facilities amounting to €225,000.00 secured on the above property subject to the attached special and standard conditions. A copy of this Letter of Offer has been sent to your Solicitor [redacted] whom you should contact to arrange completion of the loan.."*

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The **Particulars of Advance** contained in the **Amended Letter of Offer** detail as follows:

***“IMPORTANT INFORMATION AS AT 9<sup>th</sup> November 2005***

<i>Amount of Credit Advanced</i>	<i>€225,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>30 – 0</i>
<i>...”</i>	

The **Additional Particulars of Advance** detail:

<i>“ ...</i>	
<i>Type of Advance</i>	<i>FLEXI ANNUITY</i>
<i>Interest Rate</i>	<i>2.69</i>
	<i>Fixed For 12</i>
	<i>months”</i>

The **Special Conditions** attaching to the **Amended Letter of Offer** dated **09 November 2005** detail as follows:

*“This Letter of Offer replaces the Letter of Offer dated 25/10/05 which is hereby cancelled.”*

**General Condition 5** of the **Loan General Conditions** details as follows:

*“The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant’s Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate..”*

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**General Condition 7** of the **Loan General Conditions** details as follows:

*“The rate of interest applicable to this loan will be fixed for 12 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant(s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”*

**General Condition 17** of the **Loan General Conditions** details as follows:

***“THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER, THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED ...”***

The **Loan General Conditions** also detail as follows:

***“WARNING:***

***...***

***THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”***

The **Form of Acceptance** was signed by the Complainants on **17 November 2005** on the following terms:

*“I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-*

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

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*copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s)."*

It is clear to me that the **Amended Letter of Offer** provided for a fixed interest rate of 2.69% for a period of 12 months with the "*Lender's prevailing variable rate*" applying thereafter. The variable rate made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted and signed the **Form of Acceptance** on **17 November 2005** having confirmed that their solicitor advised upon the terms and conditions of the loan.

The **mortgage loan statements** provided in evidence indicate that the mortgage loan was drawn down on **20 December 2005**. I note that the Complainants in their submissions state that the interest rate applied was a "*one year discounted fixed rate of 3.44%*" however the documentary evidence shows that a fixed interest rate of 2.69% applied. This was the same percentage that was handwritten on the application form.

The Provider has submitted a copy of its **Mortgage Handbook** in evidence which details as follows:

*"This handbook is intended to assist our customers in understanding detailed aspects of the mortgage they have taken with [the Provider] and aims to provide in plain English a clear understanding of how mortgages work".*

**Page 8** of the **Mortgage Handbook** details as follows:

### ***"3. Rates Explained***

#### ***FIXED RATE***

*With a fixed rate loan, the repayment you make is fixed for an initial term, (such as 1, 2, 3, or 5 years). When you choose a fixed rate, it's often easier to budget because you will know exactly how much the mortgage repayment will be for some time ahead. A fixed rate is not affected by changes in general market interest rates. When the fixed rate you chose comes to an end you can agree another fixed rate, or you can switch to the variable rate at the time. The choice is yours.*

#### ***VARIABLE RATE***

*With a variable rate, your monthly repayments may rise or fall from time to time, in line with general market interest rates. If rates fall, your monthly repayment reduces, but if rates rise, you pay more.*

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*A variable rate may suit you if you are in a financial position where an increase in interest rates would not adversely affect your ability to repay.*

*You may also benefit from the fact that unlike fixed rate mortgages a fee will not be applicable if you wish to change to another mortgage type or voluntarily increase your repayments.*

### **TRACKER RATE**

#### **'LOCK IN' TO CURRENT MARKET RATES**

*With a Tracker Mortgage, movements in the European Central Bank (ECB) rate are fully transmitted in a defined timeline to the customer. In effect, from the customer's perspective this is a 'lock in' to current market rates.*

*This is a 'variable rate' type mortgage which guarantees to track the ECB reference rate within a specified margin (percentage points), which means you will not be subject to any rate increases in the fixed period or any rate reductions that may be passed to variable rate customers.*

### **PRICE GUARANTEE**

*Our Tracker Mortgage is a variable rate product that guarantees full European Central Bank (ECB) rate changes will be passed on to customers within 30 working days. This product gives a price guarantee to customers locking them in at various rates above the ECB rate, dependent on other factors, such as loan amount, loan-to-value, and the type of securities against which the loan is held (i.e. primary residence or residential investment property).*

*..."*

**Page 17** of the **Mortgage Handbook** details as follows:

### **"IMPORTANT INFORMATION**

**NO LEGALLY BINDING LOAN AGREEMENT SHALL COME INTO EXISTENCE UNTIL SUCH TIME AS A FORMAL LETTER (WHICH INCLUDES [THE PROVIDER'S] STANDARD TERMS AND CONDITIONS) HAS BEEN SIGNED BY BOTH THE CUSTOMER AND [THE PROVIDER].**

**..."**

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The **Mortgage Handbook** does not form part of the mortgage loan agreement between the parties in circumstances where there is no reference to the **Mortgage Handbook** forming part of the terms and conditions of the **Amended Letter of Offer** dated **09 November 2005**.

Despite the **Mortgage Handbook** not forming part of the mortgage loan agreement, I accept that the **Mortgage Handbook** was provided to the Complainants by way of information and the Complainants, as confirmed in their submissions, had considered its contents during the application stage. I am satisfied that the definitions of “*variable rate*” and “*tracker rate*” contained in the **Mortgage Handbook** show the difference between these two types of rates.

Furthermore, the particulars of the **Amended Letter of Offer** dated **09 November 2005** were sufficiently clear as to the type of mortgage offered to the Complainants and clearly set out that the applicable interest rate was a 12-month fixed interest rate with the Provider’s “*prevailing variable rate*” to apply thereafter. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate or a price guarantee locked in at a rate above the ECB rate, rather it was a variable rate which could be adjusted by the Provider. In fact, there is no mention whatsoever in the Complainants’ mortgage loan documentation that a tracker rate of interest would apply to the Complainants’ mortgage loan at any stage during the term of the loan. It is important to highlight that the Complainants had the benefit of seeking advice from their broker and their solicitor at the time of the mortgage loan application. If the Complainants wished to apply for a mortgage loan on a tracker interest rate, then it was a matter for the Complainants to make an application for a mortgage seeking that type of rate to the Provider. It would then have been a matter for the Provider to decide whether to approve the mortgage loan application or not. There was no obligation on the Provider to offer the Complainants a mortgage loan commencing on a tracker interest rate, or one where a tracker interest rate applied at the end of the initial fixed interest rate period.

I note that the Provider issued a letter to the Complainants dated **11 November 2006**, prior to the expiry of the initial fixed interest rate period noting that the Provider’s standard variable interest rate would apply from **01 January 2007**. The letter details as follows:

*“...The fixed rate or discount period on your mortgage is coming to an end shortly which means that your rate will change to our current standard variable rate for the 1<sup>st</sup> January 2007 repayment. This will change the amount of your monthly mortgage repayment.*”

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Given the current environment of rising interest rates many customers are choosing to fix their interest rate to allow peace of mind.

...

I am enclosing a 'Fixed Rate Instruction Form' listing all the fixed rates you can choose from. To complete please tick the appropriate rate, sign the form and return it to us by **Monday 18 December 2006**.

...

If you want to discuss your options please call us on [redacted] .... We'll be more than happy to help you choose the rate and features that suits your lifestyle needs best."

The enclosed **Fixed Rate Instruction** form listed the following fixed interest rate options:

**"Fixed until 1st December 2007 at 4.69% (4.80% Typical APR) ...  
Fixed until 1st December 2008 at 4.69% (4.80% Typical APR) ...  
Fixed until 1st December 2009 at 4.69% (4.80% Typical APR) ...  
Fixed until 1st December 2011 at 4.89% (4.90% Typical APR) ..."**

The **Fixed Rate Instruction** form also detailed as follows under the heading "Terms":

**"Fixed rate repayments from the 1<sup>st</sup> January 2007 for the term as indicated above thereafter reverting to the company's standard variable rate"**.

The Provider subsequently issued a letter to the Complainants dated **05 December 2006** which set out the revised repayment at a standard variable interest rate of 4.70% as follows:

**"An adjusted interest period has now expired on your mortgage account. Your repayment for 1<sup>st</sup> January 2007 will be €812.25 and is charged as follows:**

Loan Type	Balance (€)	Term (Mths)	Interest Rate	Repayment (€)	Fixed Rate (Y/N)
FLEXI INTEREST ONLY	225,000.00	349	4.70%	881.25	N

....

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*Please find enclosed a list of our competitive fixed rate options. Should you wish to avail of one of these rates please complete the form and return to our Customer Services Department or if you have any other queries you can contact us directly on [redacted]"*

It appears that another copy of the **Fixed Rate Instruction** form was enclosed with the above letter.

While the Provider has not furnished this office with a copy of the **Fixed Rate Instruction** form signed by the Complainants, it does not appear to be in dispute between the parties that the Complainants elected to apply a five-year fixed interest rate of 4.89%.

The Provider subsequently issued a letter to the Complainants on **20 December 2006**, which details as follows:

*"Thank you for your recent request to fix your mortgage account.*

*Your mortgage interest rate is fixed at 4.89% until 1st December 2011.*

*Your monthly repayment will be €916.88 from 1st January 2007"*

It is clear that the Provider wrote to the Complainants prior to expiry of the fixed interest rate period to inform them that the interest rate would default to the "standard variable rate" and also detailing options of fixed interest rates available. I understand that tracker interest rates were available as a product from the Provider at this time, however there is no evidence to show that the Complainants made a request to the Provider for a tracker interest rate.

In any event, there was no obligation on the Provider to offer the Complainants a tracker interest rate option in circumstances where the **Amended Letter of Offer** dated **09 November 2005** did not provide the Complainants with a contractual entitlement to a tracker interest rate.

Further, the Complainants refer to a communication that was issued by the Provider to brokers generally on **07 November 2006**.

This broker communication states as follows:

All [REDACTED] fixed rates will now **roll onto** tracker rate upon expiry. Offering your clients even better value.

**Product Features**

- ✓ For loan amounts greater than €150k the tracker applicable will be 1.25%.
- ✓ For loan amounts less than €150k the tracker that will apply will be 1.40% tracker.

**New Tracker Product 0.9%**

[REDACTED] is delighted to launch a **NEW Tracker product**.

Offering excellent value to you and your clients, this **Tracker product** is available to **ALL NEW CUSTOMERS**, who wish to take out a mortgage with [REDACTED].

**Product Features**

- ✓ This product is available for Loans Greater than €500K and LTV less than 80%
- ✓ Normal lending criteria apply.

This Office understands that this communication was issued to brokers rather than directly to customers of the Provider. The Complainants appear to be of the view that the product offering applied to all customers, including them.

The Provider submits that it had a “*product in the period November 2006 to February 2008 for new private dwelling home mortgage applications that provided a specific guarantee of a tracker rate on expiry of an initial fixed rate period in the loan offer documentation. The communication did not apply in this case as the loan application was received in the year prior to this flyer and prior to the introduction of this particular product*”.

The Provider further states that “*brokers clearly understood the criteria and availability of the product*”.

This Office accepts the Complainants’ submission that the detail in the flyer is unclear and certainly does not provide the detail of the parameters of its application which has since been detailed by the Provider in response to the Complainants’ complaint.

The Complainants have not confirmed to this Office how the “*flyer*” came into their possession. But, in any event, a “*flyer*” communication does not amount to a mortgage loan contract between the Complainants and the Provider. The Complainants’ mortgage loan is governed by the terms and conditions of the **Amended Letter of Offer** which was signed and accepted by the Complainants on **17 November 2005** which provided for a fixed interest rate for period of 12 months that would convert to the Provider’s prevailing variable rate on expiry of that fixed interest rate period.

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In those circumstances I cannot accept the Complainants' submission that the broker communication was applicable to their mortgage loan account to the extent that it conferred an entitlement to a tracker interest rate on the Complainants' mortgage loan.

The Complainants, in their post Preliminary Decision submission dated **06 April 2022**, refer to a press release issued by the Provider in **December 2017** which relates to an update on the Provider's review of mortgage loan accounts under the Central Bank of Ireland directed Tracker Mortgage Examination. The Complainants, in their previous submissions to this Office and in their post-Preliminary Decision submissions, make particular reference to a cohort of private dwelling home mortgage loan accounts that were identified by the Provider as being impacted under the Tracker Mortgage Examination. The mortgage loan accounts identified as impacted related to new mortgage applications that were made to the Provider between **November 2006** and **February 2008** that drew down on a fixed interest rate with a standard variable rate to apply on the expiry of the fixed interest rate period. The Provider decided to offer a tracker interest rate product to the customers whose mortgage loan accounts were identified as impacted as part of the Central Bank directed Tracker Mortgage Examination. The Complainants, in their post Preliminary Decision submissions, maintain that their mortgage loan contract "*appears to be the same*" as that of the cohort of customers whose mortgage loan accounts were identified by the Provider as being impacted under the Tracker Mortgage Examination. The Complainants are therefore of the view that they "*should be treated in the exact same way*" as those customers.

The Provider, in its post Preliminary Decision submission dated **26 April 2022**, explains the difference between the Complainants' mortgage loan account and the cohort of customers referred to above, as follows:

*"[T]here is a fundamental difference between the Complainants' position and the position of the referred group of customers, that being the date of the new mortgage loan application to the Bank.*

The Provider details in its post Preliminary Decision submissions that it "*had a product for new private dwelling home mortgage applications in the period November 2006 to February 2008 that provided a specific guarantee of a tracker rate on expiry of an initial fixed rate period in the loan offer documentation for this product*". The Provider notes that the "*existence of this product was communicated to the Broker Network in November 2006*" and this product was only available to "*new PDH customer applications in this period and was not available to existing customers*". The details of this broker communication is, as set out in the preceding paragraphs.

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The Provider details that the cohort of customers to which the Complainants refer to, were deemed impacted as they had applied for a new private house dwelling mortgage loan with the Provider “between November 2006 and February 2008” and the loan was drawn down within a specific period on a fixed interest rate. The Provider, in its post-Preliminary Decision submissions dated **26 April 2022**, explains that this cohort of customers might have had an expectation that they had an entitlement to a tracker interest rate at the end of the fixed interest rate period given the particular circumstances of the cohort of customers. In this regard, the Provider submits as follows:

*“The customers found impacted in this Cohort, would have met the qualifying terms to have been eligible for the product and while they did not receive the offer of a tracker rate in their loan offer documentation, the Bank, in the course of the Tracker Mortgage Examination, made a policy decision that, while the loan documentation concerned did not give rise to an express contractual entitlement to have a tracker rate, this cohort of customers, who obtained their mortgage via a Broker, might have had an expectation that they had an entitlement to a tracker interest rate at the end of the fixed rate period due to the particular circumstances of the cohort. As such it was decided to provide the offer of a tracker rate to the customers that did meet the qualifying criteria for the product. The Complainants situation was markedly different from the impacted group in that they did not meet the qualifying terms to have been eligible for the product and therefore they were not included in the group of customers found impacted”.*

The Complainants, in their post Preliminary Decision submission dated **04 April 2022**, state as follows:

*“The press release confirms the Provider is selectively disregarding the contractual terms of the loan agreements in the case of the 650 customers. This renders the date I drew down my mortgage (i.e. prior to the flyer dated 7<sup>th</sup> November 2006 when the fixed rate rolling to tracker product was announced) completely irrelevant...*

*The Provider has behaved unethically and has discriminated against me in its application of my loan contract when compared to how it has regarded the contractual obligations of the [redacted number] customers.”*

The Complainants appear to place great emphasis on the fact that a number of other customers of the Provider were deemed impacted under the Central Bank of Ireland directed Tracker Mortgage Examination and the fact that the Provider has retrospectively applied a tracker interest rate to those mortgage loan accounts.

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In this regard, it is important to highlight that each complaint that is made to this Office is decided on its own merits and by reference to the evidence and material made available to this Office in the course of the individual complaint investigation. Each mortgage loan account that is operated by the Provider is governed by the terms and conditions applicable to that particular mortgage loan.

While the terms and conditions of the Complainants' mortgage loan account may appear to be similar to the mortgage loans held by the cohort of customers found to be impacted as part of the Tracker Mortgage Examination, this does not automatically entitle the Complainants to the application of a tracker interest rate on their mortgage loan account.

Furthermore, this Office does not have any role in the Central Bank directed Tracker Mortgage Examination. Under **s44 of the Financial Services and Pensions Ombudsman Act 2017, as amended** this Office can investigate complaints about the conduct of a financial service provider involving the provision of a financial service, the offer of a financial service or the failure to offer a financial service. The Provider's consideration of the Complainants' mortgage loan as part of the Central Bank directed Tracker Mortgage Examination does not fall within the type of complaints that this Office can consider under **s44 of the FSPO Act** and as such, is not something that this Office can investigate. This Office is not the appropriate forum to consider a complaint that the Complainants have been "*discriminated*" against when compared with other customers of the Provider as part of the Central Bank directed Tracker Mortgage Examination.

The evidence shows that the Provider received an application from a broker, on behalf of the Complainants on **03 October 2005** in relation to a new private dwelling home loan, the **Amended Letter of Offer** issued on **09 November 2005** and the mortgage loan account was drawn down on **20 December 2005**. All of these events took place prior to the launch of the mortgage product offering that provided a specific guarantee of a tracker interest rate on expiry of an initial fixed rate period in the loan offer documentation. This mortgage product was available from the Provider in respect of new private dwelling home loan applications from **late 2006 to February 2008**. Therefore, the Complainants would not have been able to avail of this new product from **late 2006 to February 2008** as they were existing customers of the Provider. The "*flyer*" communication that issued from the Provider to brokers on **07 November 2006** is not applicable to the Complainants' mortgage loan entitlements. That "*flyer*" issued 11 months after the Complainants applied for and agreed the terms of their mortgage loan with the Provider and then drew down that mortgage on those terms.

The terms and conditions of the Complainants' mortgage loan agreement are most relevant to determining the entitlements between the Provider and the Complainants.

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In this regard, although tracker interest rates were on offer by the Provider at the time the Complainants applied for their mortgage loan, subject to certain qualifying criteria, the **Amended Letter of Offer** dated **09 November 2005** did not contain an offer of a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown or at any other time during the term of the mortgage loan. It follows that the Complainants were not entitled as a matter of policy or contract to a tracker interest rate on the mortgage loan at the end of the fixed interest rate period in **December 2006**. Therefore, this Office cannot accept the Complainants' submission that they "*did have a contractual right to be offered a tracker rate at the end of the one year discounted fixed period*".

In order for the Complainants to have a contractual right to a tracker interest rate either on drawdown or on expiry of the fixed interest rate period, that right would need to be specifically provided for in the Complainants' mortgage loan documentation. However, no such right was set out in writing in the **Amended Letter of Offer** dated **09 November 2005**, which was accepted and signed by the Complainants on **17 November 2005**. It was open to the Complainants to decline the Provider's offer if they were dissatisfied that the terms and conditions did not provide that a tracker interest rate would apply at the end of the initial fixed interest rate period. If the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan account at any stage before tracker interest rates were withdrawn by the Provider in **mid-2008**, the Complainants could have contacted the Provider and requested such an interest rate. However, this Office has not been provided with any evidence to suggest that the Complainants contacted the Provider to explore such an interest rate. Even if the Complainants had contacted the Provider, it would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan.

This Office is of the view that the Complainants' mortgage loan documentation is sufficiently clear and transparent regarding the Complainants' interest rate entitlements, and this Office is satisfied that the Provider acted in accordance with the terms and conditions of the **Amended Letter of Offer** dated **09 November 2005** in its dealings with the Complainants.

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.

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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*

**JACQUELINE O'MALLEY  
HEAD OF LEGAL SERVICES**

28 June 2022

## **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—

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(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.

