



<b><u>Decision Ref:</u></b>	2022-0256
<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 at point of sale 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**

##### **Background**

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainant's residential investment property.

The loan amount was €325,000.00 and the term of the loan was 35 years. The **Letter of Offer**, which was signed by the Complainant on **07 June 2006**, outlined that the interest rate applicable to the loan was to be fixed at 4.49% for the first 3 years of the loan.

##### **The Complainant's Case**

The Complainant submits that he negotiated the terms of his mortgage loan with the Provider through a broker in **March 2006** and was subsequently issued with a **Letter of Offer** from the Provider in **June 2006**. The Complainant notes that this **Letter of Offer** provided that a fixed interest rate of 4.49% would apply for the first 3 years of the term of the loan.

The Complainant details that he “*accepted the only offer made to [him] from [the Provider]. [He] was not given any additional options regarding interest rates or loan to value*”.

The Complainant contends that had he “*been presented with further sufficient information, [he] may have decided on an alternative option, based on an informed decision. [He] had savings along with family support if required. The main reason [the Provider] was chosen was the loan term*”.

The Complainant asserts that he enquired about the option of a tracker rate of interest, but he submits that he was informed that such rates were not available. The Complainant notes that despite being advised that tracker interest rates were not available, a tracker rate “*was listed as one of [his] options in the mortgage handbook issued with [his] loan pack from [the Provider]*”.

The Complainant submits that the Provider had tracker interest rates and fixed interest rates available when he accepted and signed the **Letter of Offer** in **2006**, however on the expiry of the initial fixed interest rate period in **June 2009**, “*the offer of a tracker rate was still not given as an option*”. The Complainant maintains that the Provider’s “*prevailing variable rate*” at the end of the fixed interest rate period “*was in fact a tracker rate*” and therefore, he had a contractual entitlement to be offered a tracker interest rate on the expiry of the fixed rate period in **June 2009**.

In addition, the Complainant submits that the **Fixed Interest Rate Instruction Form** that was signed by him on **18 April 2010** did not contain any information in relation to the interest rate options available. The Complainant states that in the absence of an “*informed discussion or information on the interest rates available*”, he was afforded an “*inadequate time period to make an informed decision*” in relation to his interest rate selection.

The Complainant submits that the “*Code of Conduct states that all available rates must be offered*” and on that basis, the Complainant contends that the Provider failed to comply with its regulatory requirements regarding disclosure and transparency of information and documentation.

In response to the Provider’s submission that the term “*prevailing variable rate*” refers to the Provider’s standard variable interest rate, the Complainant states that the Provider’s mortgage handbook details “*under the heading of TRACKER RATE*” that it is a “*variable type mortgage*”.

The Complainant has also submitted a copy of a “flyer” in evidence which he states indicates that “[the Provider’s] fixed rates will now roll onto tracker rate upon expiry”. The Complainant however submits that “[t]his did not materialise and there was never any further information or options provided to [the Complainant] as the customer”.

In response to the Provider’s submission that it did not engage directly with the Complainant but rather the Complainant’s broker during the application process, the Complainant states that “the 35 year contract is between [the Complainant] and [the Provider] and therefore there is an onus of responsibility on the financial institution to ensure the client is getting the most appropriate product by providing sufficient information to lead to an informed decision”.

The Complainant is seeking the following:

- (a) Compensation for the alleged failure on his mortgage loan account; and
- (b) A refund of the difference between the interest he has paid on his mortgage loan account and the interest he would have paid had his mortgage loan account been operating on a tracker interest rate since draw down in **June 2006**.

### **The Provider’s Case**

The Provider notes that it received a mortgage loan application from a broker on behalf of the Complainant on **31 March 2006**, seeking a 3-year fixed interest rate. The Provider explains that the Complainant “did not select or request a Tracker Rate” in the mortgage loan application form “but rather applied for a 3-year fixed rate product”. The Provider further explains that the Complainant “would not have qualified for a tracker rate option based on the 100% Loan to Value financing requested”.

The Provider details that “the interest rate matrix provided to the Broker in the period preceding the submission of [the Complainant’s] mortgage application” contained the interest rates that were offered by the Provider at that time, to include a tracker rate of interest.

The Provider submits that for “Broker introduced cases such as this, it was not the [Provider’s] 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 issued a **Letter of Offer** dated **02 June 2006** to the Complainant which confirmed that *"the Lenders prevailing rate will apply"* on the expiry of the fixed interest rate period. The Provider notes that there is no reference to its prevailing interest rate being linked in any way to the ECB refinancing rate. The Provider states that the **Letter of Offer** contains *"no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate"*. In addition, the Provider notes that the **Letter of Offer** includes a recommendation that the Complainant should seek independent legal advice regarding the mortgage loan documentation.

The Provider asserts that it issued an automated system notification letter to the Complainant on the expiry of the fixed interest rate period, to notify the Complainant of the revised repayment from **01 July 2009** when the Provider's prevailing variable interest rate was applied to the mortgage loan account. The Provider notes that it did not receive a response to this notification from the Complainant.

The Provider submits that the Complainant was not offered a tracker interest rate on the mortgage loan account following the expiry of the fixed interest rate period in **2009** because the Complainant did not have any contractual entitlement to be offered a tracker interest rate. In addition, the Provider notes that, save for where a customer was contractually entitled to a tracker rate, the Provider did not offer tracker interest rates to customers in **2009** because it had ceased offering tracker rates in **late-2008**.

The Provider submits that it is satisfied that the mortgage loan documentation issued to the Complainant was *"sufficiently clear"* insofar as there is no reference to the variable interest rate being linked in any way to the ECB rate. The Provider further submits that if a tracker rate of interest was to apply to the Complainant's mortgage loan, *"this would have been clearly indicated in the Special Conditions to the letter of offer"*.

The Provider notes that the Complainant has *"referenced the mention of tracker rate options in the mortgage handbook that he received with his loan offer"* prior to his decision to accept the terms and conditions of the **Letter of Offer** in **June 2006**. The Provider states that this document *"clearly explains"* the relationship between a tracker interest rate and the ECB refinancing rate.

In relation to the Complainant's contention that the Provider's *"prevailing variable rate"* was in fact a tracker interest rate and therefore he had a contractual entitlement to be offered a tracker interest rate on the expiry of the fixed rate period in **June 2009**, the Provider submits that this term referred to the Provider's standard variable interest rate. The Provider states that this term was *"a widely used term and one that denoted the ordinary, usual variable rate of interest that was offered"* by the Provider at the time.

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In response to the Complainant's submission in relation to the "flyer" that was circulated to its broker network on **7 November 2006**, the Provider states that this flyer informed brokers of a new fixed interest rate product that was available from **November 2006 to February 2008** to "new private dwelling home mortgage applications". The Provider explains that this new fixed interest rate product "provided a specific guarantee of a tracker rate on expiry of an initial fixed rate period in the loan offer documentation"

The Provider submits that Complainant's mortgage loan application "was received a number of months prior to the introduction of the product and the circulation of the flyer". The Provider asserts that "this broker communicate did not form any part of an advertisement from the Bank to the general public, rather it was a communicate provided to brokers only."

The Provider details that it issued a **Fixed Rate Instruction Form** to the Complainant by post on **14 April 2010** on foot of a telephone request from the Complainant. The Provider outlines that a copy of this document was also emailed to the Complainant on **15 April 2010**. The Provider states that the Complainant subsequently signed the **Fixed Rate Instruction Form**, which "clearly outlined that [the Provider was] not providing the Complainant with any advice" in relation to his decision to fix the interest rate on his mortgage. The Provider submits that the Complainant was "under no obligation to complete the form and avail of the fixed rates available at that time". The Provider notes that it informed the Complainant that he should seek legal advice before completing the form. The Provider submits that it did not place any pressure on the Complainant to select a fixed interest rate. The Provider states that the Complainant, of his own volition, opted to apply a fixed interest rate to his mortgage loan account.

The Provider submits that it "is satisfied with regard to its obligations regarding transparency of information/ documentation in relation to this June 2006 mortgage loan account". The Provider also details that the Complainant's mortgage loan account was advanced to him prior to the introduction of the **Consumer Protection Code 2006** and that the relevant legislation is therefore the **Consumer Protection Act 1995**. The Provider submits that it is satisfied that it "has complied with the requirements of the CCS 1995 regarding the Important Information to be included in a housing loan agreement as detailed at Section 129".

### **The Complaints for Adjudication**

The complaints are as follows:

- (a) The Provider incorrectly failed to offer the Complainant a tracker interest rate when he drew down his mortgage loan account in **June 2006**; and
- (b) The Provider incorrectly failed to offer the Complainant a tracker interest rate upon the expiry of the fixed interest rate period in **June 2009**.

### **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 Complainant was 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 **06 July 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.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

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Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant 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. The Complainant was informed of the parameters of the investigation by this office, by correspondence dated **30 September 2019**, which outlined as follows:

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third-party broker engaged by the Complainant, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainant’s mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider between **2006** and **2010**.

The Complainant applied for a mortgage loan with the Provider by way of an **Application Form** which was signed by the Complainant on **26 February 2006**. Under the heading “*Your mortgage type, rate & term details*” of the **Application Form**, the Complainant had the option to select from a “*Variable*”, “*Fixed*”, “*Tracker*” interest rate or a split mortgage loan. The Complainant applied for a mortgage loan in the amount of €325,000.00, repayable over a term of 35 years on a 3 -year fixed interest rate. The **Application Form** submitted in evidence details as follows:

### Your mortgage type, rate & term details

Amount of total loan required € 325,000 100%.

Please tick repayment method Annuity  Endowment  Flexi  Pension  Other  (please specify)

Mortgage term 10yrs  15yrs  20yrs  25yrs  30yrs  35yrs (first-time buyers only)  Other (please specify)

Please tick your choice of interest rate Variable  Fixed  Tracker  Fixed rate term 3 years fixed.

If you wish to split your loan over different type, rate or terms, please provide details FIXED RATE FOR 2-3 YRS (FIRST) &  
THEN CURRENT ACCOUNT (POSSIBLY)

NOTE: WRITTEN CONFIRMATION WILL BE REQUIRED FOR ANY CHANGES TO THE ABOVE.  
FOR ENDOWMENT LOANS AND FIXED LOANS - PLEASE READ THE GENERAL INFORMATION, CONSUMER CREDIT ACT 1985 NOTICE ON PAGE 6

The Complainant's broker issued a letter to the Provider dated **30 March 2006** enclosing the completed **Application Form**, which details as follows:

*"Please find enclosed mortgage application for [Complainant] for Approval in Principle for 100% finance of EUR 325,000 under your 100% Professional Scheme. He has put a booking deposit on a property [address] – purchase price EUR 325,000. He will part let this property. He already has a loan offer issued by [name of another financial service provider] but the max they would give was EUR 299k (representing 92% finance). He would like 100% finance under [Provider's] professional scheme.*

...

*I would appreciate if you could review and approve the following supporting documentation for approval in principle for 100% finance of EUR 325,000..."*

The Provider issued a letter to the Complainant's broker dated **5 April 2006** which details as follows:

*"Thank you for your recent application in relation to loan facilities for the above client(s). We are delighted to advise that facilities of up to €325,000.00 will be considered subject to:*

1. 3 year fixed rate to be taken
2. Photo of Property – Initial
3. Satisfactory current payslip confirming income of [income amount]
4. Satisfactory valuation report carried out by [Provider's] panel valuer

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*On receipt of the above, we will then be in a position to fully assess your client's requirements and hope to be in a position to issue you a Letter of Loan Approval.*

*We would like to thank you for choosing [Provider] for your client's requirements and look forward to receiving the above information."*

A further letter issued from the Provider to the Complainant's broker dated **17 May 2006** which details as follows:

*"We acknowledge receipt of a loan application for the above. To enable us to process it further we would be obliged if you would forward the following information.*

- 1. 3 year fixed rate to be taken*
- 2. Photo of Property – Initial*
- 3. Satisfactory valuation report carried out by an [Provider's] panel valuer*

*On receipt of the above, we will contact you to progress the application."*

The Complainant's broker issued a letter to the Provider dated **31 May 2006** detailing as follows:

*"Please find enclosed the following in relation to above referenced application:*

- Original Valuation & Photo*
- Certified Address Verification*
- Certified ID*

*I would appreciate if you could issue offer letter as follows at your earliest convenience:*

*Property Address: [address]  
Purchase Price: EUR 325,000  
Mortgage EUR 325,000  
Rate: 3 year fixed 4.49%  
Term: 35 years  
Product: Flexi-Annuity – Interest Only  
..."*

The Provider has submitted a document in evidence titled **"[The Provider's] Homeloans – NEW BUSINESS RATES – 16th March 2006"**. The Provider states that this document was

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issued to its broker network. The “[ Provider’s] Homeloans – NEW BUSINESS RATES – 16th March 2006” illustrates the interest rates generally on offer by the Provider at the time of the Complainant’s mortgage loan application in 2006:

**NEW BUSINESS RATES - 16th March 2006**

**Cost per €'000**

Term	Variable	discount variable (12 mths)	Tracker <75% LTV, Over €300k	Tracker up to 92% LTV:€150k - 250k	Tracker up to 92% LTV:Over €250k	Tracker up to 92% LTV; less €150k	1yr fixed	2 yr fixed	3yr fixed	5yr fixed
<b>YR</b>	<b>3.95%</b>	<b>3.19%</b>	<b>3.45%</b>	<b>3.75%</b>	<b>3.60%</b>	<b>3.90%</b>	<b>3.49%</b>	<b>4.09%</b>	<b>4.19%</b>	<b>4.39%</b>
1	€ 85.13	€ 84.78	€ 84.90	€ 85.04	€ 84.97	€ 85.10	€ 84.92	€ 85.19	€ 85.24	€ 85.33
2	€ 43.40	€ 43.07	€ 43.18	€ 43.31	€ 43.25	€ 43.38	€ 43.20	€ 43.46	€ 43.51	€ 43.60
3	€ 29.50	€ 29.17	€ 29.28	€ 29.41	€ 29.35	€ 29.48	€ 29.30	€ 29.56	€ 29.61	€ 29.70
4	€ 22.56	€ 22.22	€ 22.33	€ 22.47	€ 22.40	€ 22.53	€ 22.35	€ 22.62	€ 22.66	€ 22.75
5	€ 18.39	€ 18.05	€ 18.17	€ 18.30	€ 18.24	€ 18.37	€ 18.19	€ 18.46	€ 18.50	€ 18.59
6	€ 15.62	€ 15.28	€ 15.40	€ 15.53	€ 15.46	€ 15.60	€ 15.41	€ 15.69	€ 15.73	€ 15.82
7	€ 13.65	€ 13.30	€ 13.42	€ 13.55	€ 13.49	€ 13.62	€ 13.44	€ 13.71	€ 13.76	€ 13.85
8	€ 12.17	€ 11.82	€ 11.94	€ 12.07	€ 12.00	€ 12.14	€ 11.95	€ 12.23	€ 12.28	€ 12.37
9	€ 11.02	€ 10.66	€ 10.78	€ 10.92	€ 10.85	€ 10.99	€ 10.80	€ 11.08	€ 11.13	€ 11.23
<b>10</b>	<b>€ 10.10</b>	<b>€ 9.74</b>	<b>€ 9.87</b>	<b>€ 10.01</b>	<b>€ 9.94</b>	<b>€ 10.08</b>	<b>€ 9.88</b>	<b>€ 10.17</b>	<b>€ 10.22</b>	<b>€ 10.31</b>
11	€ 9.35	€ 8.99	€ 9.11	€ 9.26	€ 9.19	€ 9.33	€ 9.13	€ 9.42	€ 9.47	€ 9.57
12	€ 8.73	€ 8.37	€ 8.49	€ 8.63	€ 8.56	€ 8.71	€ 8.51	€ 8.80	€ 8.85	€ 8.95
13	€ 8.21	€ 7.84	€ 7.96	€ 8.11	€ 8.04	€ 8.18	€ 7.98	€ 8.28	€ 8.32	€ 8.42
14	€ 7.76	€ 7.39	€ 7.51	€ 7.66	€ 7.59	€ 7.73	€ 7.53	€ 7.83	€ 7.88	€ 7.98
<b>15</b>	<b>€ 7.37</b>	<b>€ 7.00</b>	<b>€ 7.12</b>	<b>€ 7.27</b>	<b>€ 7.20</b>	<b>€ 7.35</b>	<b>€ 7.14</b>	<b>€ 7.44</b>	<b>€ 7.49</b>	<b>€ 7.59</b>
16	€ 7.03	€ 6.66	€ 6.78	€ 6.93	€ 6.86	€ 7.01	€ 6.80	€ 7.11	€ 7.16	€ 7.26
17	€ 6.74	€ 6.36	€ 6.49	€ 6.64	€ 6.56	€ 6.71	€ 6.51	€ 6.81	€ 6.86	€ 6.97
18	€ 6.48	€ 6.09	€ 6.22	€ 6.37	€ 6.30	€ 6.45	€ 6.24	€ 6.55	€ 6.60	€ 6.71
19	€ 6.24	€ 5.85	€ 5.99	€ 6.14	€ 6.06	€ 6.22	€ 6.01	€ 6.32	€ 6.37	€ 6.47
<b>20</b>	<b>€ 6.03</b>	<b>€ 5.64</b>	<b>€ 5.77</b>	<b>€ 5.93</b>	<b>€ 5.85</b>	<b>€ 6.01</b>	<b>€ 5.79</b>	<b>€ 6.11</b>	<b>€ 6.16</b>	<b>€ 6.27</b>
21	€ 5.85	€ 5.45	€ 5.58	€ 5.74	€ 5.66	€ 5.82	€ 5.60	€ 5.92	€ 5.97	€ 6.08
22	€ 5.67	€ 5.28	€ 5.41	€ 5.57	€ 5.49	€ 5.65	€ 5.43	€ 5.75	€ 5.80	€ 5.91
23	€ 5.52	€ 5.12	€ 5.25	€ 5.41	€ 5.33	€ 5.49	€ 5.27	€ 5.60	€ 5.65	€ 5.76
24	€ 5.38	€ 4.97	€ 5.11	€ 5.27	€ 5.19	€ 5.35	€ 5.13	€ 5.46	€ 5.51	€ 5.62
<b>25</b>	<b>€ 5.25</b>	<b>€ 4.84</b>	<b>€ 4.98</b>	<b>€ 5.14</b>	<b>€ 5.06</b>	<b>€ 5.22</b>	<b>€ 5.00</b>	<b>€ 5.33</b>	<b>€ 5.38</b>	<b>€ 5.50</b>
26	€ 5.13	€ 4.72	€ 4.86	€ 5.02	€ 4.94	€ 5.10	€ 4.88	€ 5.21	€ 5.27	€ 5.38
27	€ 5.02	€ 4.61	€ 4.75	€ 4.91	€ 4.83	€ 5.00	€ 4.77	€ 5.10	€ 5.16	€ 5.27
28	€ 4.92	€ 4.50	€ 4.65	€ 4.81	€ 4.73	€ 4.90	€ 4.67	€ 5.00	€ 5.06	€ 5.18
29	€ 4.83	€ 4.41	€ 4.55	€ 4.72	€ 4.63	€ 4.80	€ 4.57	€ 4.91	€ 4.97	€ 5.09
30	€ 4.75	€ 4.32	€ 4.46	€ 4.63	€ 4.55	€ 4.72	€ 4.48	€ 4.83	€ 4.88	€ 5.00
31	€ 4.67	€ 4.24	€ 4.38	€ 4.55	€ 4.47	€ 4.64	€ 4.40	€ 4.75	€ 4.81	€ 4.92
32	€ 4.59	€ 4.16	€ 4.30	€ 4.48	€ 4.39	€ 4.56	€ 4.33	€ 4.67	€ 4.73	€ 4.85
33	€ 4.52	€ 4.09	€ 4.23	€ 4.41	€ 4.32	€ 4.49	€ 4.26	€ 4.61	€ 4.66	€ 4.79
34	€ 4.46	€ 4.02	€ 4.17	€ 4.34	€ 4.25	€ 4.43	€ 4.19	€ 4.54	€ 4.60	€ 4.72
35	€ 4.40	€ 3.96	€ 4.10	€ 4.28	€ 4.19	€ 4.37	€ 4.13	€ 4.48	€ 4.54	€ 4.66
<b>APR</b>	<b>4.02%</b>	<b>3.94%</b>	<b>3.51%</b>	<b>3.82%</b>	<b>3.66%</b>	<b>3.97%</b>	<b>3.74%</b>	<b>3.85%</b>	<b>3.92%</b>	<b>4.11%</b>

The above table shows that tracker interest rates were only available as part of the Provider’s suite of products at the time of the mortgage loan application.

The Provider subsequently issued a **Letter of Offer** to the Complainant dated **02 June 2006**, which details as follows:

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<b>IMPORTANT INFORMATION AS AT 2nd June 2006</b>		
1	Amount of Credit Advanced	€325,000.00
2	Period of Agreement (Years – Months)	35 - 0

...

<b>Additional Particulars of Advance</b>		
18	Type of Advance	FLEXI ANNUITY
19	Interest Rate	4.49
		Fixed For 36 months

The **Loan General Conditions** attached to the **Letter of Offer** provide as follows:

*“1. These General Conditions should be read in conjunction with the Letter of Offer (“the Letter of Offer”) the Particulars of the Advance (“the Particulars”) and the Special Conditions (if any) to which they are attached.*

...

*7. The rate of interest applicable to this loan will be fixed for 36 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 a variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender. The break funding fee is calculated using the following formula: Mortgage Balance Outstanding x Break Funding Cost\* x (No. of unexpired months of fixed term period/12)\* Break Funding Cost is calculated by subtracting the current fixed rate on offer for the remaining fixed term from the original fixed rate. The Lender reserves the right to (A) cancel the arrangements for fixed interest rate payments if before the expiry of the fixed term the Applicant(s) account falls two or more months in arrears, or (B) vary the rate applicable to the Advance in order to comply with any reserve asset requirements imposed by any regulatory authority at any time.*

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*Any change in the applicable rate will be brought to the attention of the Applicant(s) within a reasonable period. At the expiry of the fixed rate period the Lenders prevailing 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** section of the **Letter of Offer** was signed by the Complainant and witnessed by his solicitor on **07 June 2006**, and provides as follows:

*"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;*

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

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The Provider also issued a **Mortgage Handbook** to the Complainant with the **Letter of Offer** which provided information on the different types of interest rates on offer by the Provider.

This **Mortgage Handbook** described a fixed interest rate as follows:

*“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.”*

A variable interest rate is described in the Provider’s **Mortgage Handbook** as follows:

*“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.*

*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.”*

A tracker interest rate is described in the Provider’s **Mortgage Handbook**, as follows:

*“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.”*

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 **Letter of Offer** dated **02 June 2006**. I

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accept however that the **Mortgage Handbook** was provided to the Complainant to provide the Complainant with information. I note that the definitions of “*variable rate*” and “*tracker rate*” contained in the **Mortgage Handbook** show the difference between these two types of rates.

The **Statement of Account** provided in evidence shows that mortgage loan account ending **268/1** was subsequently drawn down by the Complainant on **12 June 2006**.

It is clear to me that the **Letter of Offer** dated **02 June 2006** provided for a fixed interest rate of 4.49% for the first 36 months/3 years of the term of the loan. **General Condition 7** clearly details that the Provider’s prevailing variable interest rate will apply at the end of the fixed interest rate period. The variable rate in this case 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. In fact, there is no mention whatsoever in the Complainant’s mortgage loan documentation that a tracker rate of interest would apply to the Complainant’s mortgage loan at any stage during the term of the loan. The Complainant accepted the **Letter of Offer**, and in doing so detailed that they had been advised upon the terms and conditions of the mortgage loan by his solicitor.

Upon the expiration of the 36-month fixed interest rate period in **June 2009**, the interest rate on the Complainant’s mortgage loan account switched to the Provider’s prevailing variable interest rate which was 3.49% in **June 2009**, in line with **General Condition 7** of the **Loan General Conditions**. The Provider’s prevailing variable interest rate reduced to 3.24% from **10 June 2009**.

The Complainant completed a **Fixed Rate Instruction Form** on **18 April 2010** which details as follows:

*“Please amend the interest rate on my/our homeloan account as outlined below*

**Fixed until 1<sup>st</sup> April 2012 at 3.99% (3.45% Typical APR)**

**Fixed until 1<sup>st</sup> April 2013 at 3.99% (3.53% Typical APR)**

*I/We hereby agree once a letter is issued by [the Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then the terms below shall be binding on me/us and shall amend the existing interest rate terms and conditions of my/our mortgage.*

**Terms**

/Cont’d...



*Fixed rate repayments from 1<sup>st</sup> May 2010 for the term as indicated above. From the date of expiry of this fixed rate term the Lenders prevailing Standard Variable Rate will apply.*

...

*I/we have specified that I/we wish to amend certain terms of our mortgage with [the Provider]. I/we acknowledge that I/we have not received any advice from [the Provider] in respect of this change request. I/we do not wish to provide any further information in respect of my/our financial history and financial objectives to determine the suitability of these amendments for my/our purposes but wish to proceed with the amendment on an execution only basis."*

The Provider issued a letter to the Complainant dated **23 April 2010**, which states as follows:

*"Thank you for your recent request to amend your mortgage account. I can confirm that your account has been amended as requested with your revised account details outlined below. Your repayment for 1<sup>st</sup> May 2010 will be €1,495.34 and is charged as follows:*

<i>Loan Type</i>	<i>Balance (€)</i>	<i>Term (Mths)</i>	<i>Interest Rate</i>	<i>Repayment (€)</i>	<i>Fixed Rate (Y/N)</i>	<i>Fixed Rate End Date</i>
<i>Flexi Annuity Homeloan"</i>	<i>320,207.29</i>	<i>375</i>	<i>3.99%</i>	<i>1,495.34</i>	<i>Y</i>	<i>01 Apr 2013"</i>

A 3-year fixed interest rate of 3.99% was applied to the Complainant's mortgage loan account from **22 April 2010**.

Upon the expiration of the 3-year fixed interest rate period in **April 2013**, the interest rate on the Complainant's mortgage loan account switched to the Provider's prevailing variable interest rate which was 4.5% in **April 2013**, in line with **General Condition 7** of the **Loan General Conditions**. The Provider's prevailing variable interest rate reduced to 4.25% from **01 December 2015**.

In response to a request from the Complainant to apply a further fixed interest rate to his mortgage loan account, the Provider issued a letter dated **14 September 2017** to the Complainant which states as follows:

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*"Thank you for your recent enquiry about the option of fixing the interest rate on your mortgage account.*

*We are enclosing the following information*

- 1) A quotation outlining what your mortgage repayments would be based on fixed rate options currently available (including insurance policy premiums where applicable)*
- 2) A table illustrating the effect on your mortgage repayment if interest rates were to vary by 0.5%, 1%, 2% or 3%*
- 3) Information outlining the advantages and disadvantages of the various interest rate options*
- 4) A Fixed Rate Instruction form(s) for you to complete and return*

*Should you wish to proceed with the option of fixing the interest rate on your mortgage account please complete the Fixed Rate Instruction form(s) and return the signed instruction(s) to us.*

*Please read all the enclosed documents very carefully before you make any decisions."*

The Complainant completed a **Fixed Rate Instruction for Homeloan Standard Variable Rate Loan** on **14 September 2017**. The **Fixed Rate Instruction Form** details as follows:

*"Please amend the interest rate on my/our homeloan account as outlined below*

**Fixed until 1st Sep 2019 at 3.90% (4.27% Typical APR)**

**Fixed until 1st Sep 2020 at 3.95% (4.25% Typical APR)**

**Fixed until 1st Sep 2022 at 4.00% (4.23% Typical APR)**

<input type="checkbox"/>
<input type="checkbox"/>
<input checked="" type="checkbox"/>

*I/We hereby agree once a letter is issued by [the Provider] to me/us, confirming that the interest rate on my/our mortgage account has been fixed for the period requested by me/us at the interest rate specified in the letter, then the terms below shall be binding on me/us and shall amend the existing interest rate terms and conditions of my/our mortgage.*

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### **Terms**

*Fixed rate repayments from the 1<sup>st</sup> October 2017 for the term as indicated above. From the date of expiry of this fixed rate period, your account will revert to the Lenders prevailing Standard Variable rate at the time.”*

A 5-year fixed interest rate of 4.00% was applied to the Complainant’s mortgage loan account from **20 September 2017**.

The Complainant refers to a communication that was issued by the Provider to brokers on **07 November 2006**. This broker communication states as follows:

*“All [the Provider’s] 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 €15k the tracker that will apply will be 1.40% tracker.*
- ...”*

I understand that this communication was issued to brokers rather than to customers of the Provider and provided details of a fixed rate product that would roll onto a tracker interest rate on the expiry of the fixed interest rate. The Complainant appears to be of the view that this product offering should have been applied to his mortgage loan.

However, while I accept that the content of the flyer is not entirely clear that the First section applies to mortgage loans where there is a contractual entitlement to a tracker interest rate, a “flyer” communication does not amount to a mortgage loan contract between the Complainant and the Provider. The Complainant’s mortgage loan is governed by the terms and conditions of the **Letter of Offer** which was signed and accepted by the Complainant on **07 June 2006** which provided for a fixed interest rate for period of 36 months with the Provider’s prevailing variable rate to apply thereafter. In those circumstances, I cannot accept the Complainant’s submission that the broker communication was applicable to his mortgage loan account to the extent that it conferred an entitlement to a tracker interest rate on the Complainant.

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It is clear to me that in circumstances where the Complainant 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 Complainant in relation to the application form or the interest rate options for the mortgage loan. Further, there was no obligation on the Provider to offer the Complainant all interest rates, as he has suggested.

The evidence shows that while tracker interest rates were on offer generally by the Provider when the Complainant applied for his mortgage loan, the Complainant selected a 3-year fixed interest rate and that is the interest rate that was provided for in the **Letter of Offer** dated **02 June 2006**. It was open to the Complainant to decline the Provider's offer if he was dissatisfied with the applicable interest rate. The Complainant could have sought an alternative interest rate with the Provider or indeed with another financial service provider. However, the Complainant did not do so, and chose to sign the **Form of Acceptance** attached to the **Letter of Offer** dated **02 June 2006** and drew down the mortgage loan on a fixed interest rate.

The **Letter of Offer** dated **02 June 2006** 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 Complainant was 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 **June 2009**. Therefore, I cannot accept the Complainant's submission that the Provider incorrectly failed to apply a tracker interest rate to the mortgage loan account on the expiry of the initial 36-month fixed interest rate period. The Provider's prevailing variable interest rate was applied to the Complainant's mortgage loan account upon the expiry of the fixed interest rate period pursuant to the terms and conditions of the mortgage loan agreement.

In order for the Complainant to have a contractual right to a tracker interest rate either on drawdown or on expiry of the fixed interest rate period in **June 2009**, that right would need to be specifically provided for in the Complainant's mortgage loan documentation. However, no such right was set out in writing in the **Letter of Offer** dated **02 June 2006**, which was accepted and signed by the Complainant on **07 June 2006**.

I am of the view that the Complainant's mortgage loan documentation is sufficiently clear and transparent regarding the Complainant's interest rate entitlements, and I am satisfied that the Provider acted in accordance with the terms and conditions of the **Letter of Offer** dated **02 June 2006** in its dealings with the Complainant.

For the reasons outlined above, I do not uphold the complaint.

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## **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.**



Handwritten signature of Jacqueline O'Malley in black ink.

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

29 July 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.

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**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.

