



<u>Decision Ref:</u>	2022-0042
<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 Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan is secured on the Complainant's private dwelling house.

The loan amount was €349,600.00 the term of the loan was 40 years. The Letter of Offer dated **5 June 2008** provided that the loan type was a "Disc Tracker Further Adv Home Loan" and the interest rate was ECB + 0.75% for the first 12 months, with the then current tracker interest rate to apply thereafter.

The Provider transferred its interest in the Complainant's mortgage loan account to a third party provider in **May 2019**.

The Complainant's Case

The Complainant details that the Provider "*confirmed approval*" of his mortgage on **05 June 2008** as a Discounted Tracker Further Advance Home Loan. The mortgage loan account was drawn down in **November 2008**.

The Complainant submits that the Provider states that he had an entitlement to a tracker rate of interest at two points in time; firstly, at the time he drew down the mortgage on a 12-month discounted tracker interest rate in **November 2008**, and again, when he received a rate options letter from the Provider on the expiry of the discounted tracker period in **October 2009**.

The Complainant asserts that this is *“incorrect”* and that under the terms and conditions of the loan offer he is *“entitled to a Tracker Mortgage for a 40 year term”*.

The Complainant submits that his mortgage contract with the Provider *“definitively stated that [the Provider’s] prevailing tracker rate was to apply after the initial discount period”*. He submits that **Special Condition 9** of the Letter of Offer *“did not make any reference to an “introductory” rate, to a “rate option” that would end, or to a requirement on [his] part to make a further choice of interest rate”*. [Complainant’s emphasis].

The Complainant submits that *“Special Condition 9 stated in clear terms that the interest rate margin (ie: the percentage charged in addition to the ECB rate) would be altered by [the Provider] from the beginning of year 2 onward without any requirement on [his] part”* and *“that the “undiscounted” margin over the ECB rate would then be applied.”* He submits that there *“is no reference to a requirement on [his] part to make a further rate selection or to the presence of a “rate option”.”*

The Complainant states that he *“cannot understand”* the Provider’s argument that the tracker interest rate to apply at the end of the discounted period would apply *“by default”* in accordance with **Special Condition 9**, as the condition did *“not contain any reference to or contain a phrase referring to a default rate of interest.”*

The Complainant sets out that his mortgage loan agreement should have either *“clearly stated that the 12 month discount period was a rate “option” and that the long term option would have to be selected thereafter from a range of options to be made available in writing”* or that *“the long term tracker rate should have applied automatically and the rate options letter should not have issued at all (or any communication on alternative rate options should never have contained the inaccurate statement that a rate option was expiring and given appropriate warnings for the implications of selecting the LTV Variable Rate).”*

The Complainant further states that the **European Standardised Information Sheet** (“ESIS”) which accompanied the loan offer, states as follows under the heading *“Description of Product”*:

“This is a mortgage on a property situated at [Complainant’s address] and the security may also include liens on deposits, bonds or other such security as may be specified in the special conditions of the Approval Letter.

This is a repayment home loan where the capital is repaid over the term of the loan.

Where the home loan is being advanced for the purpose of house purchase, the borrower will be required to provide the balance of the purchase price where not provided for in the loan amount.” [Complainant’s emphasis]

The Complainant states that the definition of “product” in the **ESIS** is “consistent” with his understanding of the term in the context of his mortgage. He states that he “*certainly would not deduct that the term product actually meant interest rate.*” The Complainant submits that the definition of “product” in the **ESIS** is “*clearly distinct and different from [the Provider’s] use of the term “Product” as an appropriate term to describe different types of interest rates*” in its later correspondence to him.

The Complainant further states that the **Letter of Suitability** dated **05 June 2008** which accompanied the loan offer, refers to all “products” available after the discounted tracker rate period. He submits that he had a tracker mortgage and he “*cannot understand*” what other products are referred to.

The Complainant submits that despite “*the definitive manner in which the treatment of [the] interest rate after the discount period was spelled out on the contract*”, the Provider wrote to him 11 months into his mortgage term, stating that his “*current mortgage rate option*” would end on **20 November 2009** and that he was required to select a fresh rate option. He details that on **30 October 2009** the Provider sent him a rate options letter which stated:

“I am writing to remind you that the current rate option on your mortgage account will end on 20 Nov 2009.”

The Complainant states that the rate options letter was “*unsolicited*” and that “*he had neither requested the rate options from [the Provider], nor had [the Provider] detailed its intention to issue a range of rate options to [him] or a further requirement to make a rate choice within the contract*”. He states that he “*did not make a request verbally or in writing to [the Provider] in October 2009 for their range of rate options.*”

The Complainant details that the rate options contained in the letter included *“a number of fixed rates, their tracker rate at ECB + 3.25% (4.25%) and a lower LTV Variable rate of 3.65%”*. He states that while the Provider’s correspondence *“included a warning that a tracker rate may not be available on the end of any fixed rate chosen, no such warning was given about choosing a LTV variable rate or no warning was given that [the Provider] could adjust that rate entirely at its own discretion.”*

The Complainant submits that he selected the LTV variable rate option, which has resulted in him *“paying many thousands more in interest charges on [his] account than would have been the case had the rate been applied in line with **Special Condition 9** to the **Letter of Approval**.”*

The Complainant states that the Provider should not have issued a rate options letter to him at all in **October 2009**, *“as the condition of [his] contract relating to [the] applicable interest rate was very specific: the rate to apply after the discount period of 12 months was to be the “the prevailing [Provider] tracker rate” as outlined under condition 9 [of the Special Conditions to the Letter of Approval].”* The Complainant rejects the Provider’s claim that the purpose of the letter was to remind him *“of the expiry of the first 12 months interest rate on **20 November**.”*

The Complainant further submits that the Provider *“used fundamentally incorrect language in its options letter that did not reflect how [the] interest rate was to be handled after the discount period ended as per **Special Condition 9**.”* He outlines that, the Provider was implying that the Complainant *“had made a temporary rate choice from the outset”* by stating that the *“rate option”* was expiring in **November 2009**. The Complainant rejects this and states that he *“had a Tracker mortgage with an initial discount period”* with *“the then current [Provider] Tracker rate”* to apply thereafter.

The Complainant states that, given what is now known about the Provider’s withdrawal of tracker interest rates from customers, he believes that the options letter issued to him in **October 2009** *“was deliberately crafted to coax [him] away from the tracker to the advantage of [the Provider].”* He asserts that the letter was a *“deliberate attempt to lure [him] off [the Provider’s] tracker rate”* which he states the Provider knew was *“less favourable to [the Provider] commercially than [its] Variable Rate.”*

The Complainant has queried *“the discrepancy in the language between the original contract and [the Provider’s] letter dated **30th October 2009**”*. He states that the Provider’s explanation that this was *“an automated letter”* listing all the rate options available to him at that time, is *“a less than satisfactory response”*. He states that *“any correspondence issued from a regulated Lender should be consistent with the terms of the contract”* and the *“contract was silent on the need to make further rate choices”*.

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The Complainant submits that in **November 2009** he *“chose the LTV variable rate in good faith, believing that it was a better value choice (cheaper) than other rates and without any understanding of the implications.”* He states that he *“(wrongly) did not question [the Provider’s] assertion that the current rate option on [his] mortgage was to end on 20/11/2009”*.

The Complainant states that the *“dramatic”* increases in the LTV variable rate since **2009**, resulted in a *“panicked decision”* on his part to fix the interest rate on the mortgage loan in **2010** at a rate of 5.75%, adding thousands of euros to his repayments *“over what should have applied.”*

The Complainant details that his account fell into arrears in **2014**. He states that he had lost his job, and *“faced with reduced earnings”*, he engaged with the Provider and ultimately entered into a restructure agreement to split the mortgage in **2016**. He details that throughout the period between **2008** and **2016** he *“engaged in complete good faith with [the Provider] and did not review the original contract ... on the presumption and assumption that the issue of interest rate was correctly handled and applied by [the Provider.”* The Complainant contends that if the tracker rate had *“been applied as set out in the contract”* he would never have had to engage with the Provider to seek a restructure arrangement and his *“mortgage would be performing and never included in a loan transfer.”*

The Complainant submits that in **January 2017**, he took time to review his loan documentation and *“noted the very specific wording [in his] contract re: the prevailing tracker rate to be applied on the end of the discount period.”* He details that he wrote a letter of complaint to the Provider on **30 January 2017**. He submits that the Provider stated in its **Final Response Letter** that a **Letter of Suitability** was issued to him on **05 June 2008** along with the **Letter of Approval**, and referred him specifically to the following paragraph contained in the **Letter of Suitability**:

“You have been advised that at the end of discounted/fixed rate period you will receive a maturity options letter. This letter will provide you with a list of all products available to you at that time. This may or may not include your original product selection.”

The Complainant submits as follows in respect of the **Letter of Suitability**:

“1) Is a Letter of Suitability a contract that governs [his] mortgage? [He understands] the contract to be the Letter of Approval with the attaching Special Conditions.

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2) The Letter of Suitability and **Special Condition 9** state two different things. The **Special Condition 9** states the then current [Provider] tracker rate “will be” the applicable rate on expiry of the discount period. The Letter of Suitability states that after the discount period, [the Provider] will provide a list of “products” available at that time.

3) The Letter of Suitability stated that on expiry of the discount period on the interest rate, [the Provider] would “provide [him] with a list of all **products** available to [him] at that time”. Referring to the term “product” makes no sense to [the Complainant]. As [he understands] it, the product was the mortgage to purchase [his] home at [Complainant’s address] and that the applicable interest rate was a contractual feature within the product.” [Complainant’s emphasis]

The Complainant states that “most importantly, [his] contract wording does not state that such a range of options would apply.” The Complainant submits that the “contract stated that the long term margin would automatically apply from month 13 onwards” and that had the Provider “applied the interest rate on this basis (as per the contract), then its interest charge would have been many thousands of euro less than what has transpired.”

The Complainant further submits that the **Amortisation Table** provided by the Provider shows that in **July 2016** (Year 8 of the mortgage), the balance on his loan, assuming the tracker interest rate was applied, would be €306,680.14. He states that this contrasts with the illustrative amortisation table in the **ESIS** appended to the **Letter of Approval**, which stated that the balance would be “c. €325,000 at the end of year 8.” He states that his actual mortgage balance at that time was “c. €343,000.”

The Complainant further submits that after he signed his loan offer on **5 June 2008**, the Provider updated its Mortgage Special Conditions in **mid-2008** with an updated Condition governing interest rates upon the conclusion of a discounted period, which read as follows:

“On expiry of the Discount Period, the interest rate will be such rate as may be selected by the Applicant(s) from the [Provider’s] rates then offered by [the Provider] for selection by the Applicant(s) or such variable rate (which may not be a tracker variable rate) as will apply in the absence of such selection.”

[Complainant’s emphasis]

The Complainant submits that this wording is “*fundamentally different*” to that of his mortgage loan agreement as it refers to “*the requirement to make a rate selection after the discount period*” and his mortgage loan agreement “*made no such reference.*” He submits that the Provider has handled his account “*in a manner consistent with this different mortgage contract and not in a way that was consistent with **Special Condition 9** of [his] contract.*”

The Complainant contends that it is his “*assessment therefore that [the Provider] issued its letter dated **30 October 2009** either in error (at best) or as a deliberate mechanism to remove [him] from the rate that was to apply per the contract (the then current [Provider] tracker mortgage rate).*”

The Complainant further submits that it is clear to him that the Provider has failed to adhere to the **Consumer Protection Code** in its communications with him and in its handling of his mortgage account. He states that as a consumer, no warning or explanation of the implications of selecting the LTV rate instead of the tracker rate were given to him.

The Complainant states that he signed the rate options form in **November 2009** “*in good faith*” and that this “*single act has resulted in profound costs that have impacted on [his] life in a way far beyond the monetary cost.*” He submits that the Provider’s actions have “*had a profound negative impact on [his] personal health, quite aside from the financial loss suffered.*”

The Complainant is seeking the following:

- (a) an acknowledgment from the Provider that it erred in its communication with him in **October 2009**;
- (b) the tracker interest rate of ECB + 3.25% applied retrospectively to the mortgage loan account from **21 November 2009**; and
- (c) redress and compensation for losses incurred during the period the alleged incorrect interest rate applied to his mortgage loan account.

The Provider’s Case

The Provider states that following a loan application period, during which the Provider discussed various available loan options with the Complainant, a **Letter of Approval** was issued to the Complainant on **05 June 2008** for the loan amount of €349,600.00 over a term of 40 years.

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It states that the Letter of Approval provided for an initial discounted interest rate of 4.75% (ECB + 0.75%) for the first 12 months. It details that the Complainant accepted the terms and conditions, indicating that they had been fully explained to him by his solicitor. It states that the mortgage loan was drawn down on **20 November 2008**, at which time the ECB rate was 3.75%, meaning the interest rate applied to the loan was 4.50%.

The Provider submits that **Special Condition 9** of the loan offer entitles the Complainant to avail of a tracker rate of interest on the date of expiry of the initial 12-month discounted tracker interest rate of ECB + 0.75%, and that there *"was no entitlement in the Complainant's contract to avail of a tracker rate on any other date in the future."*

The Provider submits that a **Letter of Suitability** dated **05 June 2008** was also issued to the Complainant, which *"outlined the product chosen by the Complainant and stated that on expiry of the 12 months discount period the Complainant would receive a maturity options letter detailing a list of all products available to him at that time."*

The Provider submits that it did not state that the **Letter of Suitability** or the **ESIS** *"were part of the Complainant's contractual documents or had contractual effect"* and that it is *"clear that these documents accompanied and explained events relating to the loan offer in the contract documents."* It submits that there is *"no conflict, as claimed by the Complainant or otherwise, between the Letter of Suitability and **Special Condition 9** of the Letter of Approval"* and that the *"application of interest rates to the account of the Complainant was done in accordance with his contract."*

The Provider submits that the Complainant *"appears to attempt to draw a distinction between a reference to 'products' available to him and differing rate types (ie variable, tracker, fixed rates)"*. It submits that both the **ESIS** and the **Letter of Suitability** *"clearly informed the Complainant that, when the rate of ECB+0.75% for the first 12 months would expire, the Bank would provide information relating to rate options available to him"*, and that *"in so informing the Complainant, it was acting consistently with **Special Condition 9** of the Letter of Approval."* The Provider states that it *"at no time indicated that it would elect to apply any other rate to the loan account than that identified in **Special Condition 9**, nor did it in fact do so"*, and that the *"choice to select the LTV Variable rate was the Complainant's alone."*

The Provider states that it acted in accordance with the terms and conditions of the Complainant's **Letter of Approval** at all times.

The Provider details that the following interest rates have been applied to the Complainant's mortgage loan account since drawdown:

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Date	Rate Applied
20 November 2008	4.50% (ECB + 0.75%)
05 December 2008	4.00% (ECB + 0.75%)
02 January 2009	3.25% (ECB + 0.75%)
13 February 2009	2.75% (ECB + 0.75%)
03 April 2009	2.25% (ECB + 0.75%)
30 April 2009	2.00% (ECB + 0.75%)
05 June 2009	1.75% (ECB + 0.75%)
20 November 2009	3.65% LTV Variable Rate
01 February 2010	4.15% LTV Variable Rate
03 August 2010	4.65% LTV Variable Rate
10 February 2011	5.75% 5 Year Fixed Rate
10 February 2016	4.50% Standard Variable Rate
25 February 2016	4.30% Managed Variable Rate
16 July 2018	3.70% 2 Year Fixed Rate

The Provider details that prior to the expiry of a fixed or discounted interest rate period applying to a mortgage loan account, it issues a letter to customers reminding them of the date on which the current interest rate will end with a rate options detailing interest rate options which the customer can select when the current interest rate expires. This form must be ticked, signed and returned by the customer in order to select one of the options. The Provider details that the form identifies the “*default rate*” and explains that this default rate will be applied to the mortgage loan account automatically if the form is not completed and returned. The Provider notes that if the completed form is returned to the Provider, then the customer’s chosen rate is applied to the account on the date of expiry of the current rate period.

The Provider contends that the “*practice and process of issuing options letters ... is not a policy of which the bank retains a specific policy document.*” The Provider finds it “*difficult to see how the Complainant could have interpreted the Bank’s reply*” in such a way that that Provider was admitting that no such policy existed.

The Provider states that the initial 12-month discounted tracker rate period was due to expire on **20 November 2009**. It states that a rate options letter was issued to the Complainant on **30 October 2009** to remind him that the 12-month discounted period would end on **20 November 2009** and to inform him of the various rate options available to him. The Provider notes that the letter stated that the tracker variable rate was the default rate that would apply to the Complainant’s account if he did not select another rate.

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The Provider submits that an options form setting out the interest rate options available to the Complainant upon the expiry of the initial 12-month discounted period was attached to the rate options letter and detailed the following interest rate options:

Rate Name	Rate	Monthly Repayment
Tracker Variable Rate*	Currently 4.25%	€1,510.34
LTV Variable Rate**	Currently 3.65%	€1,382.80
2 Year Fixed Rate	Currently 5.25%	€1,734.12
5 Year Fixed Rate	Currently 5.75%	€1,850.79
7 Year Fixed Rate	Currently 6.10%	€1,934.18
10 Year Fixed Rate	Currently 6.10%	€1,934.18

The Provider details that the Complainant returned the completed options form dated **03 November 2009** in which the LTV variable rate of 3.65% had been selected, and the Provider accordingly applied this rate of interest to the mortgage loan account on **20 November 2009**.

The Provider submits that the Complainant, in his own words, *“rushed into ticking a box in good faith”* and seeks to place responsibility on the rate options letter which the Complainant alleges was inconsistent with his mortgage contract. The Provider submits that *“no such inconsistency existed and the customer chose to avail of an alternative rate to that which he would revert to by default.”*

The Provider states that the reason it did not apply a tracker interest rate automatically to the Complainant’s mortgage loan account on the expiry of the discounted period is because the Complainant positively requested that the Provider apply a different rate. The Provider asserts that it is clear from the rate options letter that a tracker rate of interest would be applied to the Complainant’s mortgage loan account on **20 November 2009** in the absence of any alternative instruction by the Complainant. The Provider asserts that *“no positive steps were required from the Complainant”* in order for the tracker rate to be applied, and that he at his *“own discretion, chose a different interest rate.”*

The Provider details that the rate options letter *“recommended that the Complainant would consider carefully the available rate options before making a selection”* and explained that *“if a fixed rate period was selected, the tracker rate of interest available for application on **20 November 2009** may or may not be an available option at the end of any fixed rate period.”*

The Provider states that it has *“not asserted that the Complainant requested the available rate options”*. The Provider states that it provided this information to the Complainant in the **Letter of Suitability** and **ESIS of 5 June 2008**.

The Provider states that the rate options letter notified the Complainant of the tracker interest rate that would apply to his mortgage loan account 20 days later and also outlined other fixed and variable interest rate products which were available for selection at the time.

The Provider submits that providing this information to the Complainant was *“entirely consistent with **Special Condition 9**, in identifying the previously unspecified then current tracker rate appropriate to the loan”*. It further states that *“whether or not the **Rate Options Letter** had been solicited ... the bank provided the Complainant with important information regarding his mortgage loan account”* and *“did not interfere with any entitlements of the Complainant.”*

The Provider submits that it continually changes the lending products which it offers to new and existing customers and it does not notify every customer individually of every change. It states however that current interest rates available are prominently displayed throughout the Branch network and are also available through the Provider’s online banking and telephone banking portals. The Provider submits that the tracker rate option which was discontinued in **late 2009** was a rate option provided to customers who did not have a contractual entitlement to a tracker rate on expiry of a fixed rate period or a discounted tracker period. It details that customers with a contractual entitlement to be offered a tracker rate continued to be offered a tracker rate. The Provider states that it provided a tracker interest rate to the Complainant on **30 October 2009** in accordance with the conditions of his mortgage contract.

The Provider submits that neither the wording of **Special Condition 9** nor the rate options letter suggests that the Complainant made a *“temporary rate choice from the outset.”* The Provider states that the Complainant had an entitlement to a tracker interest rate *“at two points in time”* as follows:

- On **20 November 2008**, when he was entitled to a tracker rate of ECB + 0.75%, the date on which he drew down the loan.
- On **20 November 2009**, when the discounted interest rate period ended.

The Provider submits that the Complainant did not have an entitlement to have a tracker rate applied at any other time, and therefore *“he did not ‘lose’ such an entitlement.”*

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The Provider does not accept the Complainant's *"apparent contention"* that the reference to *"discount"* was a reference to any specified *"long term contracted rate"*.

It submits as follows:

- *"The Complainant has introduced the phrase "long term contracted rate." While the meaning of this is unclear we understand this to refer to the unspecified tracker rate rate [sic] in **Special Condition 9** which was to be identified and applied [i]n **November 2009** for an indefinite period into the future.*

Indeed, the Complainant has apparently clarified this in referring to, "i.e. the then current tracker rate".

- *When the Bank clearly identified the then current tracker rate in its letter of **30 October 2009** and informed the Complainant that it would apply this rate to the loan on **20 November 2009** when the initial 12 months ended, the Complainant chose another rate instead.*

The Provider does not accept the Complainant's submission that it *"disguised, diminished and obscured important information"*. The Provider asserts that it provided *"clear and comprehensive information to the Complainant in the course of its communications with him."*

The Provider submits that the Complainant was not *"removed"* from a tracker rate and that it did not engage in *"aggressive increases in the LTV Variable Rate"* as alleged by the Complainant.

The Provider submits that the *"Complainant has contrasted the loan balance in the Alternative Table to a loan balance in the illustrative amortisation table ... accompanying the Complainant's Letter of Approval"* and that the illustrative table is a model which was provided for *"illustrative purposes only."*

The Provider details that on **6 July 2016** the mortgage loan was placed on a split mortgage and the arrears were capitalised. An amount of €88,962.00 was placed in a warehoused loan account ending **7372** at an interest rate of 0.00% with no monthly repayments. It states that the Complainant continued to make payments in relation to the residual balance on loan account ending **6983**.

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The Provider states that the Complainant's mortgage loan was sold as part of a portfolio of loans in **May 2019** in order to reduce the Provider's stock of non-performing loans. It states that the Provider was entitled to sell the loan at its absolute discretion and relies on **Condition 1.15** of the **General Mortgage Loan Approval Conditions** and **Condition 6.7** of the Provider's **Mortgage Conditions** in support of this.

The Provider details that at the date of transfer in **May 2019**, the combined balance outstanding on the loan accounts was €332,449.01, made up of €243,537.01 with respect to mortgage loan account and €88,962.00 on the warehoused account. The Provider states that there were no arrears on the Complainant's mortgage loan account when the mortgage was sold.

The Provider details that the Complainant holds another mortgage loan account with the Provider (which is not the subject of this complaint) on which he was offered, and accepted, a tracker rate of interest in **2008** following the conclusion of a two-year fixed rate period, despite not having a contractual right to a tracker rate on the expiry of the fixed rate period.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- a) That the Provider failed to warn the Complainant in **October 2009** that by opting for the LTV Variable Rate, he would not be able to avail of a tracker interest rate in the future.
- b) That the Provider made an unsolicited communication with the Complainant on the expiry of the 1-year discounted tracker interest rate period in **October 2009**, with "*deliberate intent*" to remove the tracker offering from the Complainant's mortgage loan account.

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.

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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 **5 October 2021** outlining my preliminary determination 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 my Preliminary Decision, the parties made further submissions to this Office, 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, I set out below my final determination.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainant and the Provider between **2008** and **2016**.

I note from the evidence that the Provider issued a letter dated **05 June 2008** to the Complainant, which the Provider refers to as a **Letter of Suitability**, and which details as follows:

"...

The following outlines our proposal based on the information you have given us regarding your personal circumstances, financial needs and plans. The loan preferences and options you have chosen are also listed, as at June 4th, 2008.

Proposal

We propose the following:

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Tracker – A variable interest rate that is linked to ECB rates.

...

You have been advised that at the end of any discounted /fixed rate period you will receive a maturity options letter. This letter will provide you with a list of all products available to you at the time. This may or may not include your original product selection.

Please review the information in this letter and ensure the mortgage features and details best suit your requirements and wishes, given the advice from [the Provider] staff and the information you provided. You should take the necessary time to consider and query any information provided to you in relation to your loan application. If you have chosen a fixed rate loan term and you feel your personal circumstances may potentially change soon, then a fixed interest loan term may not be the best option for you. Further details on the range of mortgage options available are enclosed.

..."

The **Letter of Approval** dated **05 June 2008** details as follows:

"Loan Type:	Disc Tracker Further Adv Homeloan
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Purchase Price / Estimated Value:	€380,000.00
Loan Amount:	€349,600.00
Interest Rate:	4.75%
Term:	40 year(s)"

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 takes into account the discount period referred to above. The ECB rate may change on or before drawdown."

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9. The interest rate applicable to this tracker loan may be varied by [the Provider] provided it will not exceed 0.75% 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 0.75% over the ECB rate as varied by the ECB. [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] tracker mortgage rate (comprising 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 rate will apply not later than 1 calendar month from the effective date provided by the ECB.

..."

General Condition 1.15 of the **General Mortgage Loan Approval Conditions**, states as follows:

"[the Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."

General Condition 5 of the **General Mortgage Loan Approval Conditions**, states as follows:

"CONDITIONS RELATING TO FIXED RATE LOANS.

5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.

5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.

5.3 Whenever repayment of a loan in full or in part is made before the time agreed the applicant shall, in addition, pay a sum equivalent to one half of the amount of interest which would have been payable on the principal sum repaid for the remainder of the fixed rate period, or

[The Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between the interest which would have been payable on the principal sum repaid for the remainder of the fixed rate period and the gross redemption yield (semi-annual basis) obtaining on the principal sum repaid, from a marketable Government security, in the currency of the loan, with a maturity date next nearest the end of the fixed rate period whichever is the lesser."

5.4 Notwithstanding Clause 5.1, [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."

The **General Mortgage Loan Approval Conditions** attached to the Letter of Approval note as follows:

IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

Condition 4.13 of the **Provider's Mortgage Conditions 2002** attaching to the Letter of Approval states as follows:

"[The Provider] may from time to time increase or reduce the Appropriate Rate ... A reduction in the Appropriate Rate may be made without notice or formality and so as to take effect from such date as [the Provider] may determine but [the Provider] reserves the right not to permit a reduction in the Monthly Repayment".

The "Appropriate Rate" is defined at **condition 1.10** in the "Interpretation" section to the **Provider's Mortgage Conditions 2002** as "the rate or rates of interest per centum per annum for the Advance as specified in the Letter of Approval, or such increased or reduced rate or rates of interest as may from time to time be payable on the Advance and any Additional Advance under the terms hereof".

Condition 4.14 of the **Provider's Mortgage Conditions 2002** attaching to the Letter of Approval states as follows:

"An increase in the Appropriate Rate shall not come into force unless or until notice of the increase has been either:

4.14.1 served on the Mortgagor in writing or

4.14.2 advertised in a national newspaper, provided always that the advertisement need only specify the fact of an increase, the date on which it becomes effective and that details may be obtained from any branch office of [the Provider].”

Condition 6.7 of the **Provider’s Mortgage Conditions 2002** attaching to the **Letter of Approval** states as follows:

“[the Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person and from and after such transfer:

...

(d) Subject to the foregoing all powers and rights of [the Provider] so far as applicable after the transfer shall be exercisable by the transferee.”

Page 1 of the **European Standardised Information Sheet (“ESIS”)**, which is appended 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.

...

Description of Product

This is a mortgage on a property situated at [Complainant’s address] and the security may also include liens on deposits, bonds or other such security as may be specified in the special conditions of the Approval Letter.

This is a repayment home loan where the capital is repaid over the term of the loan.

/Cont’d...

Where the home loan is being advanced for the purposes of house purchase, the borrower will be required to provide the balance of the purchase price where not provided for in the loan amount."

Page 2 of the ESIS details:

"...

Nominal Rate

...

The interest rate applicable to this loan is a variable rate loan but will not exceed 0.75% over the European Central bank refinancing rate ("the ECB Rate") for the first 12 months from the date of issue of the loan ("the Discount Period"). On expiry of the Discount Period you may exercise an option to contract for a fixed rate period (if available) or to move to a variable rate which you may select from the then current [Provider] rates offered to you by [the Provider].

..."

Page 4 of the ESIS details:

"Illustrative Amortisation Table

Summarised amortisation table illustrating the capital outstanding and the monthly repayments for the first year followed by the yearly figures over the term of the loan and based on the assumptions referred to below.

Note: Where the loan is a variable rate loan, the payment rates on the loan may be adjusted by the lender from time to time.

...

Assumptions:

The table 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.

/Cont'd...

The rate will not be more than a certain 0.75% over the ECB rate for the first 12 months from the date of drawdown. The above table assumes that the loan will roll over into a tracker mortgage rate appropriate to the loan at the end of the discount period but the interest rate may be a variable rate other than a tracker mortgage rate depending on the choice of rates offered to you by [the Provider] for selection at the end of the discount period.

..."

The **Acceptance of Loan Offer** was signed by the Complainant on **18 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.

...

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

It is clear to me that the **Letter of Approval** envisaged a discounted tracker interest rate that would not exceed 0.75% above the ECB rate for the first 12 months of the term of the loan. **Special Condition 9** of the **Special Conditions** attaching to the **Letter of Approval** provides that on the expiry of the discount interest rate period, the Provider's "*then current*" tracker interest rate "*appropriate to the loan*" would apply. There is no reference in **Special Condition 9** to alternative rates of interest being offered to the Complainant at the discretion of the Provider on expiry of the discount period. The Complainant accepted the terms of the Letter of Approval together with the **Special Conditions**, the **General Mortgage Loan Approval Conditions** and the **Provider's Mortgage Conditions 2002** by signing the **Acceptance of Loan Offer**. By signing the **Acceptance of Loan Offer**, the Complainant confirmed that his solicitor fully explained the terms and conditions to him.

The Complainant submits that he is entitled to rely on the information provided in the **ESIS**. He states that the Illustrative Amortisation Table stated that the balance would be "*c. €325,000 at the end of year 8*" however his "*actual mortgage balance at the corresponding time of my mortgage was c. €343,000.*"

/Cont'd...

Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider is required to provide certain standard pre-contractual information to borrowers by means of a personalised **ESIS**. The purpose of a **ESIS** is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider, by comparing the credit available from the Provider to what is available in the market.

I note that it is specifically detailed on **page 1** of the **ESIS** that issued to the Complainants that the document is not a legally binding offer. Furthermore, on **page 1** of the **ESIS**, it is set out clearly that the figures have been prepared based on current “*market conditions*”, but that those figures could “*fluctuate*”. The information contained in the “*Illustrative Amortisation Table*” was for illustrative purposes only and was prepared on the basis of the rates applicable at the time the loan offer issued in **June 2008**. It is important to note that the figures shown in the “*Illustrative Amortisation Table*” to include the loan balances at year end, were specifically outlined to be based on the assumption that the interest rates that “*prevailed*” at the time would be available for the term of the loan. This did not amount to a guarantee that the interest rate used in the “*Illustrative Amortisation Table*” would be the interest rate that would apply to the Complainant’s mortgage loan account at the end of the 12- month discounted tracker interest rate period. **Special Condition 9** provided that the Provider’s then current tracker interest rate would apply at the end of the discount period which may not have necessarily been the same as the interest rate used in the “*Illustrative Amortisation Table*”.

The Complainant has asserted that after he signed his loan offer on **5 June 2008**, the Provider updated its **Mortgage Special Conditions** in respect of its mortgage offerings. In adjudicating on this complaint, I cannot consider the entitlements (contractual or otherwise) of other individuals who hold mortgage loans with the Provider. The Complainant’s mortgage loan which is the subject of this complaint, was accepted by him, having confirmed that his solicitor had explained the terms and conditions of the loan to him. I must adjudicate the complaint on the basis of his contract with the Provider.

The Provider submits that an options form and accompanying cover letter issued to the Complainant in **October 2009** before the expiry of the 12-month discounted tracker interest rate period. The Provider explains that it was its practice at the time to provide interest rate options 20 days before the expiry of an interest rate period.

The Provider wrote to the Complainant by way of letter dated **30 October 2009**. This letter detailed as follows:

"I am writing to remind you that the current rate option on your mortgage account will end on 20 Nov 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. [my emphasis]*

If we do not receive a written instruction from you in relation to the above on or before the 20 Nov 2009, the interest rate on your mortgage will be the Tracker Variable Rate.*

We value your business highly at [the Provider] so if you have any questions regarding your options, please contact our dedicated mortgage team on [PHONE NUMBER]. They will be happy to help you.

Thank you for your valued business"

The **rate options form** enclosed with the **options letter** detailed as follows:

"Current options available:

You may only select one option.

Account number: [XXX]

		Monthly Repayment EUR
- Tracker Variable Rate*	- Currently 4.2500%	1103.38
✓ LTV Variable Rate **	- Currently 3.6500%	1088.62
- 2 year fixed rate	- Currently 5.2500%	1377.78
- 5 year fixed rate	- Currently 5.7500%	1461.37
- 7 year fixed rate	- Currently 6.1000%	1521.13

/Cont'd...

- 10 year fixed rate - Currently 6.1000% 1521.13

....

- Please note, if you chose 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 ("LTV") ratio, we use the current loan balance and the most recent valuation on file for this mortgage."

The reverse page of the **rate options form** details as follows under the heading "Tracker Mortgage Loans":

1. "The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.
2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.
3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.
4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB Rate."

I note that the Provider's letter dated **30 October 2009** informed the Complainant to consider his options carefully before making his selection and invited him to contact the Provider if he had questions. It does not appear that the Complainant contacted the Provider with any queries at the time. I note that there was no warning contained in the Provider's letter dated **30 October 2009** or the rate options form recommending that the Complainant seek independent legal and/or financial advice.

The **rate options form** offered the Complainant a tracker variable rate, a LTV variable rate and a range of fixed interest rate options. The Provider's letter dated **30 October 2009** outlined what would occur if the Complainant chose a fixed interest rate option. The letter dated **30 October 2009** explained that if the Complainant chose a fixed interest rate, he would be provided with a list of product options at the end of the selected fixed interest rate period, which may or may not include the option of a tracker interest rate.

/Cont'd...

The rate options form also detailed that if the Complainant chose a fixed interest rate, **General Condition 5** relating to fixed interest rates would apply.

The reverse side of the options form contained detail about the tracker variable rate offering. The Provider had set out in a clear and comprehensible manner that the interest rate applicable to a tracker mortgage loan is made up of *"the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate"*. As such, in circumstances where the Complainant decided to opt for the tracker interest rate or allowed the mortgage loan to default to the tracker interest rate by not making a rate selection, the margin of 3.25% above the ECB rate would not be exceeded during the term of the loan.

I accept that the Provider offered the Complainant a tracker variable interest rate of 4.25% (ECB +3.25%) in the rate options form which was *"the then current [Provider] tracker mortgage rate (comprising a certain percentage over the ECB rate) appropriate to the loan"*, in accordance with **Special Condition 9** of the Letter of Approval.

The Complainant however did not select the tracker interest rate option and instead placed a tick beside the LTV variable rate of 3.65% and signed the **rate options form** on **03 November 2009**. A LTV variable interest rate of 3.65% was subsequently applied to the Complainant's mortgage loan account on **20 November 2009**, on the expiry of the 12-month discounted tracker interest rate period.

Special Condition 9 of the **Letter of Approval** indicates that the Complainant had a right to *"the then current [Provider] tracker mortgage rate (comprising a certain percentage over the ECB rate) appropriate to the loan"* on the *"expiry of the discount period"*. Therefore, the Complainant was automatically contractually entitled to a tracker interest on expiry of the 12-month discount period in **November 2009**.

The Provider appears to maintain that the Complainant of his *"own discretion"* decided to choose a different interest rate.

However, having considered the evidence before me, it appears to me that prior to the expiry of the discount period, it was the Provider who decided to offer a range of interest rate options to the Complainant. The Provider was not obliged to do so under the terms of the original mortgage loan agreement. Consequently, if the Complainant did not tick the option of a LTV variable interest rate on the rate options form, the Complainant's mortgage loan account would have rolled onto a tracker interest rate of ECB + 3.25% on **20 November 2009**. While the offer of alternative interest rates by the Provider to the Complainant may have been *"unsolicited"*, that of itself does not make it wrong.

/Cont'd...

In the circumstances of this complaint, it is important to examine how those interest rates were presented to the Complainant and whether the Complainant had sufficient information to make a fully informed decision at that time.

Chapter 2, Common Rules for all regulated entities of the Consumer Protection Code 2006 (CPC 2006), outlines as follows:

Provision of Information to the Consumer

12. *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."*

Upon considering the mortgage loan documentation and the submissions from both parties, it appears to me that the Provider informed the Complainant what would happen if he chose a tracker variable interest rate or a fixed interest rate on expiry of the discount interest rate period, but failed to inform the Complainant of the implications, if any, in choosing a LTV variable rate. The Provider, in the rate options form that issued in **October 2009**, merely explained how the loan to value ratio is calculated. The Provider gave no explanation whatsoever to the Complainant as to what would occur if he chose to apply the LTV variable rate to his mortgage loan account in **November 2009**. The Provider's letter dated **30 October 2009** was silent as to what product options "*may or may not*" be available in the future if the Complainant chose the LTV variable rate. This is in stark contrast with the very specific information made available by the Provider if the fixed interest rate option was chosen.

Most importantly, the letter and rate options provided no warning to the Complainant that he was forgoing the entitlement to apply "*the then current [Provider] tracker mortgage rate (comprising a certain percentage over the ECB rate) appropriate to the loan*" if he chose the LTV variable interest rate and that this entitlement would not arise again. **Special Condition 9** conferred a contractual entitlement to a tracker interest rate on the Complainant's mortgage loan account at the end of the discounted interest rate period. I would have expected the Provider to have explained in clear and unambiguous terms to the Complainant that the nature of his contract would change if he chose a LTV variable interest rate.

In my Preliminary Decision dated **05 October 2021**, I noted that I did not accept the Provider's submission that **Special Condition 9** only relates to the expiry of the discounted tracker interest rate period in **November 2009** and that *"There was no entitlement in the Complainant's contract to avail of a tracker rate on any other date in the future"*.

In addition, I noted that **Special Condition 9** cannot be said to have clearly and comprehensibly communicated to the Complainant that his entitlement to the tracker interest rate only applied on the expiry of the initial discounted period, as has been advanced by the Provider. I further noted that if it was intended, as the Provider has submitted it was, that **Special Condition 9** only guarantees a tracker entitlement on expiry of the initial discounted tracker interest rate period and not on any other date in the future, this is something I would consider to be a "key item" which was not "brought to the attention of the consumer" in the Special Conditions. The Provider, in its post Preliminary Decision submission dated **26 October 2021**, describes my interpretation of **Special 9** as "sophisticated". In this regard, the Provider asserts that the wording used in **Special Condition 9** "could not be clearer as regards the Complainant's entitlement" and that it only becomes unclear when "an alternative to the ordinary meaning of the words "on expiry of" is sought". The Provider is of the view that the Complainant's loan documentation is clear in that "the Complainant was entitled to a tracker rate at two points during the term of his loan: (i) at drawdown; and (ii) "on expiry of the discount period"". The Provider submits that the words "on expiry of" in the context of **Special Condition 9** indicate "that this is a one-off entitlement to apply at the time the discount tracker period ended." The Provider is of the view that if **Special Condition 9** was intended to "create an enduring contractual right to a tracker interest rate at any point in the future, this would have been clearly expressed."

Following a careful consideration of the Provider's post Preliminary Decision submissions, I accept that the wording of **Special Condition 9** is clear as to the Complainant's entitlement to a discounted tracker interest rate at draw down and is clear as to the Complainant's entitlement to the Provider's prevailing tracker interest rate on expiry of the 12-month discount period. I accept that **Special Condition 9** does not refer to any other future entitlement to a tracker interest rate beyond the Complainant's entitlement to a tracker rate on expiry of the discount period. It appears to me therefore that if the Complainant's mortgage loan automatically converted to the tracker interest rate of ECB + 3.25% on **20 November 2009** in accordance with the terms of the loan agreement, that interest rate would have applied for the remainder of the term of the mortgage loan.

However, the Provider, of its own discretion, decided to offer the Complainant alternative interest rate options rather than converting the mortgage loan to a tracker interest rate of ECB + 3.25% on **20 November 2009**, as was envisaged by the mortgage loan contract entered into by the parties.

/Cont'd...

The rate options form issued by the Provider prior to the expiry of the discount period does not explain that given the Complainant's contractual entitlement to a tracker interest rate was a *"one-off entitlement"*, any right to be offered a tracker interest rate will be extinguished on foot of selecting the LTV variable rate. In fact, no information is provided as to the consequences of choosing a LTV variable interest rate.

In its post Preliminary Decision submission dated **26 October 2021**, the Provider submits that the interpretation of **Special Condition 9** was not questioned by the Complainant *"who never once put forward a suggestion that Special Condition 9 created an enduring contractual entitlement to be offered a tracker rate at any given time in the future."*

The Complainant maintains that he was never informed that a tracker interest rate may or may not be available for selection in the future if he opted for the LTV variable rate, rather than allow his mortgage loan account automatically switch to the non-discounted tracker interest rate, which he was contractually entitled to do. This key piece of information should have been clearly explained to the Complainant for him to be able to make a fully informed decision before selecting a LTV variable rate. In circumstances where the Complainant was in fact contractually entitled to a tracker interest rate on expiry of the discount period in accordance with **Special Condition 9**, it is my view that it was extremely important for the Provider to make it clear to the Complainant that, by selecting a LTV variable interest rate instead of the tracker interest rate, he was effectively making a fundamental change to the nature of his mortgage loan. I am of the view that the failure on the part of the Provider to warn the Complainant that the effect of selecting the LTV variable rate was that the then contractual entitlement to the tracker interest rate was to be forgone, was both unreasonable and improper.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, submits that it is not its *"position that the Complainant effected any change at all to the terms and conditions of his mortgage loan by requesting to move to an LTV variable rate in November 2009."* I find this observation by the Provider to be most confusing given the Complainant's mortgage loan had a contractual entitlement to a tracker interest rate at draw down and on expiry of the initial 12-month discount period. However, it was the Provider who offered a LTV variable interest rate, at its discretion, but did not explain the implications of choosing that interest rate over the contractually agreed tracker interest rate to the Complainant.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, submits that its position is that *"the contractual terms simply do not provide the Complainant with an entitlement to be provided with any particular rate options after a switch to a variable rate."*

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By making this assertion, it appears to me that the Provider fails to recognise that the contractual loan documentation, to include the rate options form signed by the Complainant on **03 November 2009**, does not provide any detail as to the implications of selecting a LTV variable rate on the expiry of the 12-month discount period instead of the tracker interest rate, to which the Complainant was contractually entitled to at the time.

While I do not expect the Provider to have listed specific interest rates available after a switch to a LTV variable rate, the Provider, at the very least, should have clearly stated that that the effect or consequence of choosing the LTV variable rate was that the contractual entitlement to the tracker interest rate would be forgone. However, the Provider did not do so. This failure on the part of the Provider to set out the consequences of choosing an alternative interest rate that was not provided for in the original loan agreement was unreasonable and improper.

In its post Preliminary Decision submissions, the Provider is of the view that it is *“incorrect to state that the Complainant did not receive any information as to what rates would be available in the future where the loan was on a variable rate”* and relies on **page 2** of the **ESIS** in this regard, as detailed above. **Page 2** of the **ESIS** describes the tracker interest rate applicable to the Complainant’s mortgage loan as a *“variable rate loan but will not exceed 0.75% over the European Central bank refinancing rate for the first 12 months from the date of issue of the loan (“the Discount Period”)*”. I am surprised that the Provider seeks to rely on **page 2** of the **ESIS** in this regard, as it merely stipulates that on expiry of the 12-month discount period, the Complainant may exercise the option of moving to a fixed interest rate period (if available) or a variable interest rate. The **ESIS** does not state what rates will or will not be available if the Complainant selected a LTV variable rate on expiry of the 12-month discount period and chose to move from a LTV variable rate in the future.

In any event, it would appear to me that the **ESIS** is at odds with **Special Condition 9** of the **Letter of Approval** which definitively states that the applicable interest rate at the end of the 12-month discount period will be the Provider’s then current tracker mortgage interest rate. As previously stated, and as the parties will be aware, the **ESIS** is not legally binding. It is the **Letter of Approval** together with the terms and conditions therein which form the basis of the contract between the parties and it is those documents that I must consider and have considered in my determination of this complaint.

The Provider also submits in its post Preliminary Decision submissions that **General Condition 5.4** of the Letter of Approval *“expressly and clearly provides that at the end of the fixed rate periods, the Complainant’s entitlement is to convert to a variable rate loan.”*

The Provider maintains that this does not “*envisage that the Complainant would have an enduring entitlement at the end of any future fixed rate period to a tracker rate, or indeed any rate other than a variable rate.*” The Provider appears to fail to recognise that although the terms of the Complainant’s mortgage loan documentation indicated that a tracker interest rate may or not be available to the Complainant at the end of a fixed interest rate period, nowhere is it expressly stated in the loan documentation that a tracker interest rate would not be available if the Complainant chose to switch from a LTV variable interest rate in the future.

If the Provider did not “*envisage*” that the Complainant would be offered a tracker interest rate option in the future by consequence of selecting a LTV variable interest rate, then this should have been expressly stated in the rate options form.

It appears that the Complainant contacted the Provider in **January 2011** in relation to his mortgage loan account and the Provider issued a letter dated **19 January 2011** which details as follows:

“You recently contacted us about the mortgage account shown above.

I am attaching a list of our current rate options. Please note that the fixed rates listed are valid for 7 days. Please tick the rate you would like and return it, signed to [the Provider].

If you want to change rate, you should also send us a transfer fee of €100.00.

...

We recommend that you consider your options carefully before choosing a rate. If you are currently on a tracker rate mortgage with a price promise please note that our current margin commitment to you may expire, if you convert to a fixed rate. At the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time 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.

Please note that if you apply to switch to a different mortgage repayment type for a limited period and the Bank has agreed to such change, e.g. from a fixed rate to a variable rate or vice versa, your interest rate may not revert to that applicable [sic] prior to the change and that any commitment on our part to a future interest rate or percentage margin which may have been specified in the Special Conditions of your Mortgage may no longer apply.

/Cont’d...

We strongly suggest you consult your financial or legal advisor before making a decision on this matter.

*To discuss your options with a mortgage advisor please drop into your local [Provider] branch or contact us on [number] to arrange an appointment.
..."*

The **rate options form** that accompanied the letter dated **19 January 2011** detailed as follows:

*"Current Rate 4.65% Current Repayment €1,595.70
Current Options Available:*

..."

Account Number: [XXXXXX]6983

<i>Option</i>	<i>Monthly Repayment</i>	<i>...</i>
<i>LTV Variable Rate** Currently 4.65</i>	<i>1,595.70</i>	
<i>2 Year Fixed Rate Currently 5.25</i>	<i>1,728.74</i>	
<i>5 Year Fixed Rate Currently 5.75</i>	<i>1,824.98</i>	
<i>7 Year Fixed Rate Currently 6.10</i>	<i>1,924.65</i>	
<i>10 Year Fixed Rate Currently 6.10</i>	<i>1,924.65</i>	

In choosing the option above I/We acknowledge that I/We may incur higher interest over the term of the loan.

*I/We have read the warnings, the contents of the covering letter attached and any other information relating to housing loans printed on the reverse side of this form.
..."*

Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page)."

I note that the Provider wrote to the Complainant again by letter dated **03 February 2011** enclosing another rate options form. The contents of this letter and the rate options form were identical to the Provider's letter and rate options form of **19 January 2011** and for the sake of brevity I do not propose to repeat the contents here.

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The Complainant signed the **rate options form** dated **03 February 2011** on **09 February 2011** and ticked the 5-year fixed interest rate option of 6.10%.

It is unclear whether the Complainants were required to pay the transfer fee of €100.00 to switch from a LTV variable interest rate to a fixed interest rate in **2011**. I note that there was no reference in the rate options form that issued to the Complainant in **October 2009**, that if he opted for a LTV variable interest rate, he would have to pay a to a transfer fee if he wished to switch to another interest rate in the future.

The Provider has furnished in evidence a copy of its **Lending Interest Rates** stated to be effective from the start of business on **20 September 2010**, which outlines as follows:

“ ...

Home Loans Rates for Existing Business

	<i>RATE</i>	<i>APR</i>
...		
<i>Tracker Rate LTV <80%</i>	4.25%	4.3%
<i>Tracker Rate LTV >80%</i>	4.25%	4.3%

...”

The Provider has submitted details in relation to the withdrawal of its tracker rate offering in evidence. The Provider details that the tracker option which was discontinued in **early autumn 2009** was a rate option provided to customers who did not have a contractual entitlement to a tracker rate on expiry of a fixed rate period or a discount tracker period. The Provider states that customers with a contractual entitlement to be offered a tracker rate continued to be offered a tracker interest rate therefore the Complainant was offered a tracker interest rate on **30 October 2009**.

In my Preliminary Decision dated **05 October 2021**, I made certain comments with respect to the application of a tracker mortgage rate from **February 2011** and noted that I did not consider it appropriate to restore the tracker interest rate from **November 2009** as the Complainant had a preference for the LTV variable interest rate in **November 2009** given that this was the lowest interest rate made available for selection by the Provider. However, following a careful consideration of the documentary evidence and the post Preliminary Decision submissions from the parties to the complaint, I now consider the appropriate course of action to rectify the conduct complained of is to direct that the tracker interest rate and margin applicable in **November 2009** (4.25% (ECB +3.25%)) be reinstated to the Complainant’s mortgage loan account from **20 November 2009**.

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It is clear to me that the failure on the part of the Provider occurred at that time, when the Provider failed to warn the Complainant of the consequences of choosing a LTV variable interest rate instead of allowing his mortgage loan account roll over to the Provider's then prevailing tracker interest rate in accordance with the terms of the loan agreement.

I note that the Complainant completed a **Moratorium / Payment Holiday request** on **6 February 2011**, seeking a 3-month moratorium *"To finance construction of a garage at our home at [Location]. Also, to enable full internal completion/furnishing of our home."* I note from the mortgage loan statement that the moratorium was applied from **February 2011 to April 2011**.

I note that on **9 December 2014** the Complainant completed a further **Payment Holiday Application Form**. In response to 'Reason for request' he stated *"...Fixed form contract of employment with [Redacted] ends on 16th January '15. New job will substantially lower pay beginning with [Redacted] on 9th February '15. Will receive partial wages in Jan/Feb '15 and lower monthly income going forward. Will complete SFS in March and discuss longer-term options at that juncture"*.

The Provider wrote to the Complainant by letter dated **22 December 2014** and stated *"...I can confirm we have amended your monthly repayments for the agreed period of 3 month(s) commencing from 20/01/2015."* I note from the mortgage loan statement that the payment holiday was applied from **January 2015 to March 2015**.

The Complainant completed a **Standard Financial Statement (SFS)** on **25 March 2015** which stated that the *"Reason(s) for Review/Arrears"* was *"Significant drop in income following change from [former employer] to [new employer]"*. **Page 7** of the SFS detailed that the Complainant's monthly net income was €4,064.62, his total monthly expenditure was €2,245.00, and his total monthly debt payment was €672.94, leaving a monthly surplus of €1,146.68.

The Provider section of the **SFS** detailed:

"Customer currently on a 23 month contract @ €45k pa to [employer] expiring [01/redacted] having previously worked on a contract basis for [former employer] @ €80k pa ... as he was on contract with [former employer] there was no redundancy. Also, he took decision in 02/2011 to transfer from a tracker rate on his home mortgage ([ending] 6983) to a 5 year fixed rate @ 5.75%."

He is currently on a 3 month moratorium due to unforeseen circumstances, namely, car trouble, heating trouble, + only on half pay for Jan & Feb due to change over from [former employer] to [current employer]. He is looking to go on CPH Minus of €1,250pm on this mortgage until the current fixed rate period expires in 01/2017 ... His other mortgage is an IO BTL."

I note that when the three-month payment holiday expired, the Complainant's mortgage loan account entered into arrears on **20 April 2015** when the direct debit of €1,895.55 was returned unpaid. I note that the mortgage repayment on the tracker interest rate of ECB + 3.25% would have been €1,360.21 in **April 2015**.

The Provider wrote to the Complainant on **27 April 2015** as follows:

"Mortgage Restructure

After reviewing your situation we are pleased to confirm that we have identified a 'Part Capital and Interest Arrangement' as the appropriate restructure option for your circumstances. This option allows you to pay the full interest on your mortgage as well as make substantial repayments towards your mortgage balance. At the end of the mortgage term, the outstanding mortgage balance will be due. We will review your situation, at a minimum every three years, to ensure you continue to be on the most appropriate option for your circumstances.

...

We will initially set you up a 'Short Term Restructure Agreement' on your account for a trial period of six months.

..."

The Complainant wrote to the Provider by letter dated **1 May 2015** as follows:

"...

I am writing to express my complete dissatisfaction with this offer and my reasons for this.

...

In 2011, following a considerable increase in the interest rate you were charging, I entered into a 5 year fixed rate at 5.75%. This was done out of fear of rates increasing yet further.

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At the time, I knew I could manage the repayments (c. €1,750 per month) and decided that it was better to fix rather than run the risk of variable rates increasing to 6%+ as had been widely predicted at the time.

...

*The present position is that I now have an “offer” of a restructured facility in which monthly repayments will amount to €1,807 per month ... You are proposing that I now repay a greater amount each month than I have ever made in the past.
...”*

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, submits that the Complainant, in his letter dated **1 May 2015**, by his own admission, “*valued the certainty of a fixed interest rate and yet the direction issued by the Preliminary Decision takes no account of this fact and assumes that the Complainant would have selected a tracker interest rate had he been offered one in February 2011*”.

In his post Preliminary Decision submissions dated **29 October 2021**, the Complainant states that, in **2011**, he “*did not carry out any detailed review of [his] mortgage contract and was unaware of [his] entitlement to the then current [Provider] tracker rate.*” As detailed above, I have considered the submissions made by the parties since the issue of the Preliminary Decision and do not consider it necessary to make any comment with respect to the application of an interest rate in 2011.

The Provider wrote to the Complainant by letter dated **24 June 2015** stating that the Complainant’s appeal letter of **01 May 2015** was reviewed by the Appeals Board. The letter stated that “*I regret to inform you that the Appeals Board has declined your appeal and upheld the decision made by our Arrears Support Unit.*”

It appears from the evidence that the Complainant did not sign or accept the **Restructure Agreement** offered by the Provider in **April 2015**.

The Complainant completed a further **Standard Financial Statement (SFS)** on **6 October 2015** which again stated that the “*Reason(s) for Review/Arrears*” was “*Significant drop in income following change from [former employer] to [new employer]*”. **Page 7** of the SFS detailed that the Complainant’s monthly net income was €4,158.35, his total monthly expenditure was €2,285.11, his total monthly mortgage repayment was €1,200.00 and his total monthly debt payment was €672.94, leaving a monthly deficit of €199.70.

The Provider's section of the **SFS** detailed:

"[Complainant] did an SFS earlier this year but didn't accept an offer of repayments of €1,809 pm as the contractual repayments on his mortgage were lower at €1,745. ..."

The Provider wrote to the Complainant by letter dated **6 November 2015** as follows:

"Mortgage Restructure

We are pleased to confirm that we have assessed the information that you provided to us and have identified a 'Split Mortgage' as the appropriate restructure option for your circumstances with a 'Split Mortgage', your mortgage is split into two accounts: a 'Main Mortgage Account' and a 'Warehouse Account'.

You will make monthly capital and interest repayments on your Main Mortgage Account. You will not make monthly repayments on the Warehouse Account. This means that your monthly repayments will be more closely aligned to what you can currently afford to repay. At the end of the mortgage term, the outstanding balance on your Warehouse Account will be due in full.

...

We will initially set up a 'Short Term Restructure Agreement' on your account for a trial period of six months.

..."

I note that by **20 November 2015** the arrears balance on the Complainant's mortgage loan was €5,832.78.

The Complainant signed and accepted the **Restructure Agreement** on **25 November 2015** which amended his monthly repayment to €1,186.78 for a trial period of 6 months. This arrangement commenced from **25 January 2016**.

The Complainant signed and accepted the **Restructure Agreement: Split Mortgage** on **21 June 2016** which split the mortgage balance between the Main Mortgage Account (€254,232.43) and the Warehouse Account (€88,962.00). The monthly repayment amount on the Main Mortgage Account was €1,189.16.

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The Provider submitted an **Amortisation Table** setting out the mortgage balance from **28 February 2011** to **27 May 2019**, the date the mortgage loan account was sold to a third party. The *“As is Loan Balance”* set out a final mortgage balance of €243,994.10 and the *“Modelled Loan Balance”*, were the mortgage to be placed on a tracker rate throughout the period, set out a final mortgage balance of €196,912.24, a difference of €47,081.86.

In my Preliminary Decision of **5 October 2021**, I stated that during the period between **August 2011** and **January 2013** the repayments on the tracker interest rate of ECB + 3.25% would have been higher. However, from **February 2013** to **December 2015** the repayments on the tracker interest rate would have been significantly less than the actual mortgage payments charged. The split mortgage arrangement was applied from **January 2016** onwards. The Complainant, in his post Preliminary Decision submissions dated **9 October 2021**, submits that this is an *“incorrect”* statement. The Complainant is of the view that from **February 2011**, for a period of 5 years, the fixed rate was 5.75%. The Complainant states that if the correct tracker rate had *“been offered and applied”* then the tracker rates applied during this period *“would have ranged from 4.25% in Feb 2011 and falling to 3.3% in September 2014”*. I accept that had the Complainant been availing of a tracker interest rate during the period between **August 2011** and **January 2013**, the repayments on the tracker interest rate of ECB + 3.25% would have been lower than the repayments which he paid.

The *“As is Schedule Balance”* columns set out a final mortgage balance of €242,487.00, and the *“Modelled Schedule Balance”* column, were the mortgage to be placed on a tracker rate throughout the period, set out a final mortgage balance of €226,413.81, a difference of €16,073.19. The Provider has submitted that the *“Schedule Balance”* *“captures the expected reduction in principal over the lifetime of the mortgage as it amortises”*.

I note that the Provider wrote to the Complainant on **22 February 2019** confirming the sale of his mortgage loan account to a third-party Provider. The **mortgage loan statement** shows that the mortgage account was transferred to a third-party Provider in **May 2019** when the outstanding balance was €243,537.01.

The Complainant, in his post Preliminary Decision submissions, contends that his mortgage *“was sold due to it being on a split arrangement entered into following 4 years of overcharging.”* The Complainant is of the view that he consequently lost the *“opportunity to avail of attractive long term fixed rates offering long term certainty, peace of mind and financial advantage.”* The Provider, in its post Preliminary Decision submissions, states that the *“Complainant has no entitlement to be offered any particular fixed rate and nor did the Bank give the Complainant any such guarantee.”* The Provider is of the view that this is a *“hypothetical scenario”* in which the Complainant *“may or may not have been able to avail of a particular rate.”*

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The Complainant, in his post Preliminary Decision submission dated **9 October 2021**, submits that the mortgage loan that he held with the Provider was sold to a third-party Provider 2 years after he lodged a complaint against the Provider with this Office.

The Complainant has made a number of post Preliminary Decision submissions in relation to his recent dealings with the third-party Provider and the conduct of the third-party Provider.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, submits that it *“has no control over or connection with these alleged issues between the Complainant and this service provider and they should not therefore have any bearing on the present complaint”*.

It is important to note that in circumstances where the conduct complained of in respect of this complaint relates to the conduct of the respondent Provider only, any issues arising between the Complainants and a third-party Provider have not been considered in the determination of this complaint.

Condition 1.15 of the **General Mortgage Loan Approval Conditions** which formed part of the Complainant’s Letter of Approval dated **5 June 2008**, states as follows:

“[the Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions.”

It is clear from the **General Mortgage Loan Approval Conditions** that the Provider did not require the consent of the Complainant prior to the sale of the mortgage.

The Provider, in its post Preliminary Decision submissions dated **26 October 2021** submits that there is no evidence to support the complaint being upheld on the grounds prescribed in **Section 60(2)(g)** of the **Financial Services and Pensions Ombudsman Act 2017**. The Provider is of the view that the directions in the Preliminary Decision *“require the Bank to offer tracker interest rate in accordance with the contractual entitlements of the Complainants”* and *“it would be only on the basis of findings under Section 60(2)(a) or (e) that the Ombudsman could make the directions that are set out in the Preliminary Decision.”* The Provider seeks to rely on the High Court decision of Mr Justice Simons in **Utmost PanEurope DAC v FSPO [2020] IEHC 538** in this regard.

In this regard, it is important to note that I uphold part (a) of the conduct complained of, as detailed above, on the basis that the Provider failed to adequately notify the Complainant in **October/November 2009** that by selecting a LTV variable interest rate, rather than allowing his mortgage loan account automatically switch to contractually agreed tracker interest rate in accordance with the terms of his loan agreement, that he would not be able to avail of a tracker interest rate in the future.

As detailed throughout this Decision, the Complainant was not given sufficient information by the Provider to be able to make a fully informed decision as to the implications of selecting the LTV variable interest rate in **November 2009**. As a result, it was not made clear to the Complainant that he was forgoing his entitlement to the tracker interest rate at that time. If the Complainant was informed that his tracker rate mortgage loan would be converted to a LTV variable interest rate mortgage loan and would never be offered a tracker interest rate again, then it is possible that the Complainant might have reconsidered choosing the lowest interest rate option that was presented to him at the time. However, the Complainant was not informed of the implications of choosing a LTV variable interest rate therefore he was not able to make a fully informed decision as to his rate selection in **November 2009**. The Provider should have informed the Complainant of the significant implications that would ensue by him simply placing a tick beside the LTV variable interest rate. It is this conduct on the part of the Provider, whereby it did not fully inform the Complainant as to the implications of his rate selection in **November 2009**, that I consider to be unreasonable and improper.

In light of the Provider's submission in relation to my directions as to the appropriate redress, it is important to note that **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017** identifies the redress that I may direct, including directing a financial service provider to review, mitigate or change the conduct complained of or its consequences, provide reasons for the conduct, change a practice relating to the conduct, pay compensation to the complainant, or "*take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint*". The Provider appears to rely to the High Court decision of Mr Justice Simons in **Utmost PanEurope DAC v FSPO [2020] IEHC 538** to suggest that there is a limit to my jurisdiction to uphold a complaint and direct redress in the form of restoration of a tracker interest rate in respect of conduct, which, while not contrary to law, I consider to be improper under **Section 60(2)(g)** of the **Financial Services and Pensions Ombudsman Act 2017**.

In this regard, it is important to consider the recent High Court decision of Ms Justice Hyland in **Danske Bank A/S v FSPO [2021] IEHC 116**, wherein the learned judge, in rejecting the appeal taken by the Danske Bank A/S, noted that **Section 60 (2)(g)** allows me to uphold a complaint “*irrespective of whether the appellant had acted in accordance with law*” and made it clear that “*a customer may be bound by their contract with the bank but nonetheless may obtain redress which amounts in substance to a setting aside of those contract terms*”. Judge Hyland concluded that “*the statutory scheme and the case law on same make clear that the mere absence of a breach of law does not immunise a financial services provider from a finding of unreasonable and improper conduct under s. 60(2)(b) and (g)*” carrying with it an obligation to make specified redress.

In light of all the foregoing and for the reasons outlined above, I substantially uphold this complaint on the basis that the Provider failed to adequately warn the Complainant in **October/November 2009** that by selecting a LTV variable interest rate, he was forgoing the entitlement to the tracker interest. While I had indicated my intention to make a certain direction in my Preliminary Decision, having considered the Post Preliminary Decision submissions made by the parties, I believe that a more appropriate remedy is to direct that the Provider rectify the conduct from **20 November 2009**.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld on the grounds prescribed in **Section 60(2)(b) and (g)** because of the unreasonable and improper conduct on the part of the Provider.

Pursuant to **Section 60(4)** and **Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to do the following:

- (i) Apply a tracker interest rate of ECB + 3.25% to the Complainant’s mortgage loan account from **20 November 2009** in accordance with the original terms and conditions;
- (ii) Repay to the Complainant the interest overpaid between **20 November 2009** and **27 May 2019**, the date of sale of the mortgage loan to an account of the Complainant’s choosing within a period of 35 days of the nomination of account details by the Complainant to the Provider; and

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- (iii) To facilitate my direction at (i) above, the Provider is to come to an arrangement with the purchaser of the loan to ensure the tracker interest rate of ECB + 3.25% is applied to the mortgage loan account from **27 May 2019** to the maturity of the loan in accordance with the original terms and conditions;
- (iv) Pay a sum of €3,500 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered as a result of the Provider's conduct to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

31 January 2022

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,

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(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.

