



<b><u>Decision Ref:</u></b>	2019-0380
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Partially upheld

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

##### **Background**

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

##### **The Complainants' Case**

The Complainants accepted a loan offer from the Provider on **18 August 2008** for their mortgage loan account. The interest rate applicable was fixed for a period of 2 years at 6.1%.

The Complainants submit that during the mortgage application process in **July 2008**, they discussed their interest rate options with an employee of the Provider. They submit that they selected a 2 year fixed interest rate for the mortgage loan, on the basis of advice they received from the Provider's employee that the 2 year fixed rate was "*a very competitive rate*" and that "*interest rates were about to increase*". The Complainants submit that they signed a Suitability Statement on **7 July 2008**, which provided for the application of a fixed rate to the mortgage loan.

The Complainants' mortgage loan account was drawn down on **5 September 2008** on the 2 year fixed rate of 6.1%. The Complainants submit that at the time of drawdown, the Provider did not afford them an opportunity to review the interest rates available at that time or to consider whether the Suitability Statement they signed on 7 July 2008 was still appropriate. The Complainants submit that the Provider would have been aware in September 2008 that the fixed rate of 6.1% was no longer the most advantageous rate option available, in circumstances where variable rates were then decreasing. The Complainants submit that the Provider displayed a lack of duty of care to them by failing to inform them that the fixed rate of 6.1% was no longer the most advantageous interest rate at the time of drawdown in September 2008.

The Complainants disagree with the Provider's submission that it does not provide advice to customers as to what rate option to select for their mortgage. The Complainants submit that the Provider has made no reference to any investigations into employee malpractice with regard to administering advice in respect of product suitability, and has instead relied on its policy stated to be in effect during the relevant period as proof that the Complainants did not receive direct advice on the suitability of the products available to them. The Complainants also submit that it is worth noting that the title of the Provider's employee who dealt with them was "Mortgage Advisor".

The Complainants submit that they contacted the Provider "*shortly after*" the mortgage account was drawn down in September 2008, to advise that they were unhappy with the information they received from the Provider prior to drawing down the mortgage and to request to exit the fixed rate period. They submit that they were unable to exit the fixed rate as the Provider informed them that they would be required to pay a breakage fee of €5,000.00 to do so. They further submit that the Provider "*declined to waive*" the breakage fee to allow them to exit the fixed rate.

The Provider wrote to the Complainants prior to the expiry of the two year fixed rate period on **31 July 2010**, to set out the interest rate options available to them. The Complainants submit that they were not offered the option to switch to the tracker variable rate at the end of the fixed rate period and the mortgage account was placed on the Provider's variable rate.

The Complainants submit that they had understood that the mortgage account would be switched to the tracker variable rate at the end of the 2 year fixed interest rate period in July 2010. They submit that the Loan Acceptance document dated 11 July 2008, which they signed and accepted on 18 August 2008, refers to the mortgage loan as a "*Tracker Mortgage*". They further submit that the Mortgage Quotation furnished to them by the Provider in 2008, outlined what their repayments would be on the tracker variable rate after the fixed rate period ended. They further submit that they were never advised by the

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Provider that the tracker variable rate would not be available at the end of the fixed rate period.

The Complainants want the Provider to do the following;

- a) Reimburse them for the interest they have overpaid since the drawdown of the mortgage loan in September 2008; and
- b) Adjust the mortgage loan account to a tracker interest rate.

### **The Provider's Case**

The Provider submits that when the Complainants applied for the mortgage loan in **July 2008**, and that there was a range of interest rate products available to them.

The Provider does not accept the Complainants' submission that the Provider "*advised*" them, when they applied for the mortgage loan in July 2008. It submits that at that time, the practice in the Provider was that the range of interest rate options that were available to customers, subject to credit criteria, eligibility and terms and conditions, were outlined to the customers. It submits that the Provider provided "*information*" to customers, when requested, in relation to the various interest rate options that may have been available at that time. It submits that the Provider did not give advice to customers as to what interest rate to select and states that the decision as to what interest rate to select rested at all times with the customer based on what suited their individual circumstances.

The Provider submits that on foot of the Complainants' initial mortgage enquiry, a Mortgage Quotation was provided to the Complainants, which was prepared by the branch based on information the Complainants themselves had submitted. The Provider submits that the purpose of this document was to summarise the Complainants' intended mortgage application and provide them with mortgage approval in principle if possible. The Provider submits the document did not constitute a formal loan offer and contained the following proviso;

*"This quotation is based upon the information you have given above and is neither an approval in principle nor an offer of a loan. This quotation is for illustrative purposes only and is subject to change."*

The Provider submits that the Complainants submitted their mortgage application in July 2008. It submits that the Application Form dated **7 July 2008**, confirms that the Complainants applied for a Capital and Interest (Repayment) Mortgage for €214,000 over a

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term of 24 years. It submits that the Complainants ultimately chose a fixed interest rate option for their mortgage. It further submits that the Complainants completed and signed a Suitability Statement on 7 July 2008, confirming that the various interest rate options had been discussed with them and that the option they chose, a fixed rate, was based on their own requirements.

The Provider submits that details of the interest rate that the Complainants' mortgage drew down on are contained at the beginning of the Letter of Loan Offer dated **11 July 2008**. It submits that the Loan Offer clearly confirmed that the mortgage was to draw down on a fixed rate. It submits that the document did not contain any condition indicating that a tracker interest rate would be made available to the customers when the fixed interest rate period ended, or at any other future date. It submits that it is the Provider's view that such a condition would have been necessary for a tracker interest rate to apply. The Provider submits that the Complainants signed and accepted the Letter of Loan Offer on **18 August 2008** in the presence of their solicitor.

The Provider submits that Condition 14 (c)(ii) of the Standard Mortgage General Terms and Conditions, clearly explains that on expiry of the fixed interest rate period the borrower may opt to choose a fixed interest rate for a further fixed rate period, and goes on to explain that in the event that no option was made available by the Provider, or if the borrower failed to exercise the option, the interest rate that would apply would *"be a variable interest rate which may be increased or decreased by the Lender at any time."*

The Provider submits that the variable interest rate as described in the Standard Mortgage General Terms and Conditions is the Provider's standard variable rate. It submits that this is a variable rate which can be increased or reduced by the Provider from time to time at any time. It submits that by comparison, a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider.

The Provider submits that the Loan Offer Acceptance document signed by the Complainants erroneously referred to the term "Tracker Mortgage". It submits that the reference to a "Tracker Mortgage" in the Loan Offer Acceptance has been considered by the Provider as part of the Tracker Mortgage Examination. It submits that the reference to the "Tracker" was a typographical error. The Provider submits that the purpose of the paragraph that the typographical error was contained in was for *"customers to confirm that they fully understand the specific nature of the mortgage, that the debt owed to [the Provider] is secured on the mortgaged property and must be repaid in full before the title deeds will be returned or the security released."* The Provider submits that following the Examination, it was determined that this incorrect reference to a tracker was not capable of transforming the entire basis of the loan to a tracker interest rate when there was no

reference to a tracker in other documentation evidencing the agreement and there was also no reference within any documentation to the ECB base rate or the margin above the ECB Rate which interest would be charged to the customers.

The Provider submits that it does not accept that it failed in its duty of care to the Complainants by not informing them that the fixed rate of 6.1% was not the most advantageous rate at the time of drawdown in **September 2008**. The Provider denies that it had a duty to advise the Complainants on the best interest rate for them up until drawdown. The Provider submits that the Complainants completed the application for the mortgage on 7 July 2008, at the point when the ECB base rate was 4.00%. It submits that notwithstanding that on **14 July 2008** the ECB base rate increased to 4.25%, the mortgage application previously made would have continued to proceed on the basis of the selection already made. The Provider submits that it does not, and never has had a practice of contacting mortgage applicants when variable interest rates rise, however, the customer may at any time until drawdown change their mind and request to make a different selection from the available rates.

The Provider further submits that at the point of selection of the interest rate, it could not have been predicted that tracker interest rates would decrease to the extent and at the speed they did. It submits that with the benefit of hindsight, it is clear that the selection of a tracker interest rate would have been more financially advantageous in the long run. However, it submits that it is satisfied that the Complainants made an informed decision to select and apply a fixed rate of interest to their mortgage at the relevant point in time and before the decreases in the ECB base rate.

The Provider submits that it does not accept the Complainants' submission that they were excluded from the option of selecting a tracker rate shortly after drawdown due to penalties if they exited the fixed rate. The Provider submits that an early breakage cost is a legitimate cost, based on the fixed rate agreement which the Complainants entered into when they drew down their mortgage loan. The Provider submits that it is faced with interest rate exposure issues in its daily operations and so is required to mitigate these potential exposures by matching the re-pricing of money lent with the re-pricing of money borrowed. It submits that in accordance with the terms and conditions of the Complainants' loan agreement, if a customer chooses to redeem a fixed rate earlier than scheduled, the Provider is obliged to assign the cost of this arrangement to the borrower. The Provider submits that irrespective of the balance outstanding, it calculates this cost as the lower of:

- (i) Six months interest or
- (ii) The total economic breakage cost to customers wishing to break the terms of the fixed rate contract.

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The Provider submits that the terms of the breakage costs are included in Section 14 (c) (ii) of the standard mortgage General Terms and Conditions of the Complainants' mortgage.

The Provider submits that prior to the expiry of the fixed interest rate period, it issued a Product Expiry letter to the Complainants on **12 July 2010**. It submits that this letter informed the Complainants of the impending expiry date of their fixed interest rate and also confirmed that the mortgage would default to the Provider's standard variable rate when the fixed interest rate period expired. The letter also outlined the alternative interest rate products available at that time, both fixed and variable. The Provider submits that tracker interest rate products had been withdrawn from the market by the Provider in **2008**, and therefore this interest rate product type was not included in the Product Expiry letter. The Provider submits that all interest rate products were subject to change and can be withdrawn by the Provider at any time and this is what happened in September 2008. It submits that the Provider's decision to remove tracker interest rate products was a commercial decision which it was entitled to make.

The Provider submits that the Complainants subsequently completed and signed the Rate Change Letter of Authority on **16 July 2010**, which was received by the Provider on **26 July 2010**. It submits that in completing the Rate Change Letter of Authority the Complainants gave an instruction to the Provider to apply a "*Discounted Variable with [Product Name] <80% LTV*" rate to their mortgage, which was duly applied and confirmed in writing to the Complainants on **2 August 2010**.

The Provider submits that when all of the facts and information, inclusive of the Complainants' mortgage documentation and mortgage journey, are reviewed holistically, there is no ambiguity as to whether or not a tracker interest rate product should apply to the Complainants' mortgage account.

### **The Complaints for Adjudication**

The complaints for adjudication are as follows;

- (a) The Provider misadvised the Complainants between **July and September of 2008** in relation to the interest rate options for their mortgage.
- (b) The Provider failed to offer the Complainants a tracker interest rate on the expiry of the fixed interest rate period in **September 2010**.

## **Decision**

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

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

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

A Preliminary Decision was issued to the parties on 21 October 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

**The first issue to be determined is whether the Complainants were misadvised by the Provider in relation to the interest rate options for their mortgage loan between July and September 2008.**

It is understood that the Complainants met with a representative of the Provider in a branch of the Provider on **07 July 2008**. The Provider submits that there were a range of products available to customers at that time, as follows;

***"Tracker Interest Rate Products***

*(ECB Base Rate 4.00%)*

***[Product Name] Flexible\* Interest Rate Products***

*Loan to Value <80%*

*ECB base rate + 1.85% margin (5.85%)*

*Loan to Value >80%*

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ECB base rate + 2.05% margin (6.05%)

\*[Product Name] Flexible tracker products were only available to customers who held a [Provider Product Name] current account.

**Flexible Interest Products**

Loan to Value <80%

ECB base rate + 2.05% margin (6.05%)

Loan to Value >80%

ECB base rate + 2.25% margin (6.25%)

**Fixed Interest Rate Products**

6.10% Fixed until 31/07/2010

6.20% Fixed until 31/08/2011

6.27% Fixed until 31/08/2013".

A **Suitability Statement** was signed by the Complainants and the Provider's representative on **07 July 2008**. This suitability statement outlined as follows;

*"Based on the information you have provided us we have determined that you are an existing home owner looking to purchase a new home.*

*Having discussed all [Provider] mortgage options available to you, you have chosen to avail of our [Product Name] Mortgage. The various rate and repayment options were also discussed with you and **you have chosen the option below based on your requirements [my emphasis]**. This option has also been confirmed as affordable by us:*

<b>Select option chosen</b>	<b>Repayment Type/Rate</b>	<b>Reason</b>
✓	Fixed Rate	<i>You wish to fix your repayments over a fixed term to allow you to budget your monthly outgoings and to ensure your repayments remain unaffected by rate changes over the fixed term</i>
	Variable Rate	<i>You wish to have the flexibility of making additional repayments to your mortgage and to be able to take repayment breaks without any penalties.</i>
	Tracker Variable Rate	<i>You wish to have a variable rate which is based on the European Central Bank base rate plus a fixed percentage. You would also like to have</i>

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		<i>the flexibility of making additional repayments to your mortgage and to be able to take repayment breaks without any penalties.</i>
	<i>Interest Only</i>	<i>You wish to avail of lower repayments over a fixed term by only repaying the interest portion of your mortgage. At the end of this term the capital of your mortgage will be outstanding.</i>

*Note: The above is for illustration purposes only based upon the information you have given and is neither an approval in principle nor an offer of a loan. Your mortgage will be processed subject to normal lending criteria and relevant credit scoring approval, as appropriate."*

The Complainants also completed a **General Mortgage Application Form** on **07 July 2008**. The Complainants signed the Application form and in doing so declared amongst other things, as follows;

*"The rate of interest will be that which the Company is charging on the date on which the funds release is issued and subsequently the rate may vary within the terms of the mortgage."*

I note that the Provider furnished a **Mortgage Quotation Summary** document to the Complainants in or around July 2008. It is unclear whether this document was furnished to the Complainants during the meeting in the Provider's branch, however I understand that this was furnished by the Provider to the Complainants at some stage between **07 July 2008** (when the application was completed) and **11 July 2008** (when the loan offer issued).

The **Mortgage Quotation Summary** details amongst other things, as follows;

<i>"Product</i>	<i>Fixed Rate</i>
<i>Option</i>	<i>2 year fixed until 31/07/2010</i>
<i>Fixed Rate</i>	<i>6.1% (APR 6.3%)</i>
<i>Fixed Until</i>	<i>31-Jul-2010</i>
<i>Follow on Rate*</i>	<i>6.1% (APR 6.3%)</i>

**Quotation Summary**

*Based on the information you have given, your basic monthly repayment, excluding assurances and insurances would be €1,416.77.*

*This repayment is based on your fixed rate period selected.\* Once the fixed rate term has ended your repayments will be based on the Standard Variable rates. Your*

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repayments, excluding assurance and insurance, for the remaining term on the Tracker Variable rate would be €1,416.76.

Taking Tax Relief at Source into consideration, based on the information you supplied, your monthly outgoings would amount to €1,316.77.

***This quotation is based upon the information you have given above and is neither an approval in principle nor an offer of a loan. This quotation is for illustrative purposes only and is subject to change.***

	<b><u>QUOTATION DETAILS</u></b>		
	<b>Repayment</b>	<b>Repayment (Incl. Insurances etc)</b>	<b>Repayment (Taking TRS into Account)</b>
<i>Initial Payment</i>	€1,416.77	N/A	€1,316.77
<i>After Fixed Rate Period</i>	€1,416.76	N/A	€1,316.76
	<b>Total Cost of Credit</b>	<b>Total Amount Repayable</b>	
	€194,026.51	€408,026.51	

The last page of the **Mortgage Quotation Summary** contains contact details for the Provider together with the following;

*"Loan Advisor/Mortgage Advisor*

*[Name of Provider's Representative]"*

The Provider issued the **Loan Offer Letter** dated **11 July 2008** to the Complainants. The Letter of Offer outlined that the loan type as a *"2Y Fixed Rate 6.10% until 31/07/10 95% Capital and Interest"* with the interest type as *"Fixed"*. The Complainants signed the Loan Acceptance on **18 August 2008** and the loan drew down on **05 September 2008**.

The Complainants submit that they opted for the fixed interest rate of 6.1% on the basis of *"advice"* received from an employee of the Provider in **July 2008**. They say the Provider's representative informed them that the two year fixed rate was *"a very competitive rate"* and that *"interest rates were about to increase"*. The Provider submits that no advice or recommendation regarding products or suitability of products was provided to the Complainants by the Provider. It submits that its staff were not authorised to provide advice to customers but they were trained to provide information in relation to various interest rate options that were available. The Provider submits that *"the decision as to what interest rate to select rested at all times with the customer based on what suited their individual circumstances."*

There is a dispute between the parties as to the role of the Providers' representative in **July 2008**. The Complainants submit that they understood that the representative was

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providing “*advice*” whereas, the Provider asserts that its representatives gave “*information*”. I note that the Provider’s final response letter of **24 March 2009**, details that the Provider’s representative “*advised*” the Complainants of all the interest rate options available to them and “*Staff members can only give advice on information available to them at the time.*”

In circumstances where the Provider’s representative held the title “*Loan Advisor/Mortgage Advisor*”, I am of the view that it was reasonable for the Complainants to believe that they were receiving advice from the Provider’s representative at that time. However, given that the representative was a person employed by the Provider and selling the Provider’s mortgage products, I am of the view that it was not reasonable for the Complainants to expect that any advice or information given to them was independent. If the Complainants wanted independent advice about rates available in the market or the market generally, the Complainants should have been aware that they could only get that advice from an independent third party advisor.

In any event the Provider does not appear to dispute that its representative may have informed the Complainants that the two year fixed rate was “*a very competitive rate*”. I do not accept that labelling an interest rate as “*very competitive*” amounts to advice to choose that rate type over another rate type. The nature of variable type rates and fixed type rates are very different. The Statement of Suitability outlines the different rate types together with the reasons why a customer might chose a particular rate type. I note that the 2 year interest rate option chosen by the Complainants was the lowest fixed rate option available with the Provider at that point in time. The decision as to what interest rate best suited the Complainants, rested with the Complainants. By signing the Suitability Statement, the Complainants confirmed that the Provider’s representative had discussed all product options available to the Complainants (to include tracker interest rate options) and that the various rates and repayment options were discussed. I note that the Complainants selected the “*Fixed Rate*” option and confirmed in the Suitability Statement that the option was chosen by the Complainants based on their requirements. In this regard, I note that the Complainants submit that “*we acknowledge, and always have, that it was our decision to select the mortgage type*”. For the reasons set out above, I do not accept the Complainants’ complaint that the Provider mis-advised them in July 2008.

The Complainants also take issue with “*advice*” given to them in relation to the increases in interest rates. It is understood that this “*advice*” was given in July 2008. I note the manner in which this “*advice*” has been framed by the Complainants has been described in their submissions to the Provider and to this office, as follows;

- **Letter from the Complainants to the Provider in February 2018:** “*interest rates were about to increase*”

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- **Complaint Form received by this office in November 2018:** *“the expectation was that interest rates would increase”*
- **Submission received on 12 July 2019:** *“that rates were likely to increase and therefore a fixed price mortgage would be the best way to go to protect against this uncertainty.”*

With respect to the movement in interest rates, the Complainants submit *“our assertion [is] that the Bank would have known that interest rates were about to drop was not based on information available to the Bank in July 2008 but in September 2008 prior to when we drew down the mortgage.”* It appears that the Complainants do not take any issue with any comment made by the Provider’s representative about increases in interest rates during the process when the Suitability Statement and Application Form were completed in **July 2008**.

I note that the Provider’s variable interest rate types were rising at that time and the ECB base rate had increased from 4.00% to 4.25% during the period from July 2008 to September 2008. The Complainants are of the view that the Provider would have known that interest rates were *“about to drop”* in September 2008 when they drew down the mortgage loan. I note that the Letter of Offer had issued to the Complainants on **11 July 2008**. The Complainants then signed the Loan Acceptance over a month later on **18 August 2008** and the loan drew down on **05 September 2008**.

I have no evidence that the Provider would have known or could have anticipated that interest rates would fall. Furthermore, the Provider was under no positive obligation to review the type of interest in the period in between when the Letter of Offer issued on **11 July 2008** and when the Loan Acceptance was signed on **18 August 2008** or when the mortgage loan was drawn down on **05 September 2008**. I note the Complainants signed the Letter of Offer on **18 August 2008** on the following terms;

*“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our solicitor and I/we fully understand them. I/We undertake to complete the Mortgage Deed as soon as possible.*

If the Complainants were not happy with the fixed interest rate on offer by the Provider in the Letter of Offer dated **11 July 2008**. The Complainants were under no obligation to sign the Loan Acceptance and thereafter draw down the mortgage loan in **September 2008**.

If the Complainants wished to seek an alternative rate from the Provider, before the Letter of Offer was signed or drawn down, the Complainants could have approached the Provider

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and requested the Provider to make them a mortgage offer with their then preferred interest rate type. It would then be a matter for the Provider to decide whether it wished to accede to that request to change the terms of the mortgage loan by the Complainants and if so, issue a revised Letter of Offer. It is possible in those circumstances that the Provider may have required the Complainants to submit a fresh mortgage application to the Provider. There would have been no obligation on the Provider to accede to any such request by the Complainants. In any event, the Complainants did not approach the Provider to seek a revision to the interest rate in advance of signing or drawing down the mortgage loan. The Complainants signed the Letter of Offer on **18 August 2008** with the benefit of legal advice, as acknowledged in the Loan Acceptance.

The Complainants submit that within weeks of them drawing down the mortgage loan on **05 September 2008**, they became aware that variable interest rates were reducing and the Complainants approached the Provider's branch to enquire if their mortgage loan could be removed from the fixed interest rate and placed on a variable interest rate. The Complainants were advised that in order to break the fixed interest rate that the Complainants would incur an early breakage fee of circa €5,000.

The Complainants submit that the Provider *"did not advise us that it would remove the Tracker interest rate as an option during the Fixed rate term prior to us accepting the Fixed rate; neither did it provide us the opportunity to change to a Tracker interest rate prior to removing it from the market without incurring penalties should we exit the Fixed rate early."*

**Condition 14** of the **Standard Mortgage General Terms & Conditions** outlines as follows;

***Interest Rate***

...

(c) *In the case of a fixed interest rate Mortgage, the following conditions will apply:*

...

(iii) *Balance on a daily basis. Where during a Fixed Rate Period, the Lender **accepts:***

(A) *Early repayment of the Loan in full,*

(B) *A Lump Sum Repayment, or*

(C) ***The conversion of a fixed interest rate Loan to a variable interest rate Loan (or other fixed interest rate Loan), the Borrower must pay to the Lender a redemption fee. The redemption fee will be the equivalent of a sum equal to six months interest, calculated at the fixed interest rate applicable prior to the conversion or redemption, on the Mortgage Balance at the date of conversion or the date of redemption or part redemption, whichever is applicable"*** [**my emphasis**]

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The Provider was under no obligation to accede to the Complainants' request to break the fixed interest rate period on their mortgage loan account in **September/October 2008**. If the Provider accepted the conversion of the fixed interest rate to a variable interest rate type, then in accordance with **Condition 14 (c)(iii)**, the Provider was entitled to charge the redemption fee that it proposed to charge the Complainants. Further if the redemption fee was paid by the Complainants, it appears to me, that there was no contractual obligation on the Provider under **Condition 14 (c)(iii)** to offer the Complainants a tracker interest rate at that time. Whether the Provider offered the Complainants a tracker interest rate loan, would have depended on whether the tracker interest rate was a rate that the Provider offered in its suite of variable interest rate products at the time of the break in the fixed interest rate period. It is understood that the Provider ceased offering tracker interest rates in **2008**. The Provider was under no obligation to inform the Complainants of the removal of the tracker interest rates from their suite of products. From the evidence available to me, it is unclear whether the Complainants' approached the branch to query breaking the fixed interest rate period in advance of 30 September 2008. In any event it was at the Provider's commercial discretion to decide what interest rates it wished to offer the Complainants in the event of them proceeding to break out of the contractual two year fixed interest rate period.

I understand that the Complainants did not elect to proceed any further with their query about breaking out of the fixed interest rate period in **September/October 2008** and the fixed interest rate period matured in **July 2010**.

**The second issue to be determined is whether the Complainants should have been offered a tracker interest rate when the fixed interest rate period on the mortgage loan account expired in July 2010.**

In order to ascertain whether the Complainants should have been offered a tracker interest rate when the fixed interest rate period on the mortgage loan account expired in July 2010, I will first set out the relevant provisions of the Complainants' mortgage loan documentation.

The Provider issued the **Loan Offer Letter** dated **11 July 2008** to the Complainants. The Letter of Offer outlined that the loan type as a *"2Y Fixed Rate 6.10% until 31/07/10 95%"* with the interest type as *"Fixed"*.

Two sets of Terms and Conditions have been furnished in evidence by the Provider. The first set of Terms and Conditions are titled *"Standard Mortgage General Terms and Conditions"* and stated to be effective from *"01/06/2008"*. The Standard Mortgage General Terms and Conditions detail as follows;

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**“1. Introduction**

- (a) These General Mortgage Terms and Conditions apply in all circumstances to the Lender’s Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions. In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply.”*

Therefore it appears to me that the Standard Mortgage General Terms and Conditions are supplemental to the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Complainants’ Loan Offer dated 11 July 2008.

**Condition 14** of the **Standard Mortgage General Terms and Conditions** details as follows;

**“14. Interest Rate**

- (a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank’s Mortgage Rate at the date the Loan is drawn down.*
- (b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:*
- (i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement.*
  - (ii) There will be no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.*
- (c) In the case of a fixed interest rate of mortgage, the following conditions will apply;*
- (i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer.*
  - (ii) The Borrower upon expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender, or if available, where the borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the*

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*Lender at any time and in this respect the decision of the Lender will be final and conclusively binding on the Borrower”.*

The **Loan Acceptance** which was signed by the Complainants on **18 August 2008** outlines as follows;

*“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our solicitor and I/we fully understand them. I/We undertake to complete the Mortgage Deed as soon as possible.*

*I/We fully understand and accept the specific nature of this Purchase Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the **Tracker Mortgage** and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.” [my emphasis]*

The Provider issued a letter to the Complainants dated **12 July 2010**, which outlined that the fixed rate period on the mortgage loan was coming to an end on **31 July 2010** and that *“any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate (APR 3.9%) of 3.85%**”*. The letter also detailed that the Complainants *“might choose a new variable rate or alternatively you could select a new fixed rate”*. The letter contained a list of fixed and variable rates. The Complainants signed the Rate Change Letter of Authority and elected for the Discounted Variable Rate of 3.65% on **16 July 2010**.

It is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainants. The variable rate in Condition 14(c) was clearly set to be one which may be increased or decreased by the Provider at any time. Condition 14 (c) does not mention the application of a tracker interest rate to the Complainants’ mortgage loan.

I note that the Complainants are of the understanding that a tracker interest rate would be applied to the mortgage loan account when the fixed interest rate period expired in **July 2010**. The Complainants submit that they formed this assumption on the basis of the reference to *“Tracker Mortgage”* in the **Loan Acceptance** and because the quotation details in the **Quotation Summary** document, appears to calculate the repayment after the fixed interest rate on the basis of the Tracker Variable Rate.

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Having considered the Complainants' mortgage loan documentation in its entirety, it appears to me that the mortgage loan was a fixed interest rate loan. A fixed interest rate loan was the type of loan that the Complainants had applied for in July 2008. If it was intended that the loan would be a Tracker Mortgage then, the Loan Offer conditions applicable to the loan would have contained details of the loan to value applicable to the tracker interest rate, in accordance with Condition 14(b). However, there was no reference to a fixed margin or an ECB rate in the Complainants' Loan Offer Letter. In the circumstances, I accept that the reference to "*Tracker Mortgage*" in the **Loan Acceptance** was a "*typographical error*" on the part of the Provider. Whilst this error on the part of the Provider is entirely unsatisfactory, it is my view that it would not be reasonable to conclude that a singular reference to the term "*Tracker Mortgage*" in the Complainants' mortgage loan documentation where all other references were to fixed and variable, is sufficient to supersede the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Loan Offer. As set out above, Condition 14 (c) clearly outlines that a variable rate that would apply to the Complainants' mortgage loan at the end of the fixed period and that variable rate was "*one which may be increased or decreased by the Provider at any time*".

Further I am of the view that the calculation of the repayment after the fixed interest rate on the basis of the Tracker Variable Rate in the **Quotation Summary** document, cannot have the effect of altering the terms and conditions of the Complainants' mortgage loan documentation, such as to entitle the Complainants to a tracker interest rate. The Quotation Summary, does not form part of the Complainants' mortgage loan contract and is for illustration purposes only. In this regard, I note that the document outlines as follows;

*"Once the fixed rate term has ended your repayments will be based on the Standard Variable rates. Your repayments, excluding assurance and insurance, for the remaining term on the Tracker Variable rate would be €1,416.76."*

In circumstances where the Quotation Summary, outlines that once the fixed interest rate period ends then the repayments would be based on a Standard Variable Rate. It is unclear to me why, even for "*illustration purposes*" the Quotation Summary would go on to quote what the repayments would be on the Tracker Variable Rate. In any event the Quotation Summary does not and cannot affect the contractual position that there was no entitlement to a tracker interest rate on the expiry of the fixed interest rate period in **July 2010**.

Whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants' mortgage loan account in July 2010, I am also of the view that the

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information provided to the Complainants in the **Quotation Summary** and **Loan Acceptance** was somewhat confusing. The **Consumer Protection Code 2006**, outlines that;

*“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers”*

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainants. The information in the **Quotation Summary** should have been more explicit and outlined clearly that whilst there was no contractual entitlement to a tracker interest rate at the end of the fixed interest rate period that the illustration was showing that rate as it was part of the Provider’s then available suite of products. Further, whilst I accept that “*typographical*” errors can occur and in this circumstance that error did not affect the Complainants’ underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this “*typographical*” error to the Complainants’ attention and highlighted how the error occurred, in advance of the Complainants making their complaint to this office.

For the reasons set out above, I am of the view that this complaint is partially upheld. To mark the Provider’s shortcomings under the Consumer Protection Code 2006, I direct that the Provider pay to the Complainants a sum of €2,500 compensation.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**

Pursuant to **Section 60 (4) (d)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to pay a sum of €2,500 compensation to the Complainants, (to an account of the Complainants’ choosing, within a period of 35 days of the nomination of account details by the Complainants 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.**

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**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

13 November 2019

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

**(a) ensures that—**

**(i) a complainant shall not be identified by name, address or otherwise,**

**(ii) a provider shall not be identified by name or address,**

**and**

**(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**