An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2023-0131
Sector:	Banking
Product / Service:	Tracker Mortgage
Conduct(s) complained of:	Failure to offer a tracker rate throughout the life of the mortgage
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8039*** describes the loan type as "*Variable Annuity*" and the interest rate as a "*STAFF PREF HOME LOAN ANNUITY*" at 3%. The term of the loan was 25 years, and the total loan amount was €190,460.00. The Complainants drew down mortgage loan account ending ***8039*** on **23 December 2008**.

The Complainants have a second mortgage loan (account ending ***8542***). The **Mortgage Loan Offer** dated **01 August 2008** with respect to that loan provides for a loan in the sum of €299,840.00 repayable over a term of 25 years. The "*loan type*" is described as "*Variable Annuity*". This mortgage loan is a tracker interest rate loan.

The complaint is in relation to mortgage loan account ending ***8039*** only, which remains active with the Provider.

The Complainants' Case

The Complainants submit that they "*topped up [their] home loan in August 2008 to build an extension*" and that the loan amount was €490,300.00. The Complainants explain that the First Complainant was a staff member of the Provider at the time and so "*had an option to put an amount of 190,460 euro on a staff preferential Fixed rate of 3%*". The Complainants detail that the loan was "*split in two*" as follows:

1. Mortgage loan account ending ***8039*** in the sum of €190,460.00 on a fixed interest rate of 3%; and
2. Mortgage loan account ending ***8542*** on a tracker interest rate of 4.25%.

The Complainants maintain that they received correspondence from the Provider on **19 January 2009** to advise that it *"was no longer beneficial to remain on the staff preferential rate".* The Complainants outline that they were offered a range of options including the option to *"either remain on the rate, switch to variable or switch to a fixed rate."* The Complainants state that there was *"no mention or offer to switch to a tracker rate, even though [the Complainants] had an existing tracker (remainder of the original top up was on tracker)."*

The First Complainant details that she engaged with a representative of the Provider on two occasions "*to query if [she] would fall under the terms for review for tracker redress*". The First Complainant states that on the first occasion she was *"advised"* by a staff member of the Provider that she "*would not have been offered a Tracker in Jan 2009 as it was no longer a product they sold."* The First Complainant states that on the second occasion a staff member of the Provider informed her the reason she was *"not offered a tracker in Jan 2009 was because the staff preferential rate [the Complainants were] coming off was not a fixed rate loan so [they] did not qualify."* The Complainants are of the view that the terms and conditions in the **Mortgage Loan Offer** dated **01 August 2008** "*contradict*" what the First Complainant was "*told on both occasions on the phone*".

The Complainants submit that they received a document from the Provider in which it *"states clearly that [name of product] is a preferential Home Loan up to 190,460 at a Fixed interest rate of 3%."* The Complainants are of the view that the fact that they *"paid Benefit in Kind in relation to the staff preferential rate"* is further proof that the staff preferential rate had a *"fixed rate status".*

The Complainants state that they are of the view that they were *"coming out of a Fixed Rate period"* when the staff preferential rate was coming to an end. The Complainants maintain therefore that when they were "*moved from a fixed rate mortgage"* in **2009**, *"there was a contractual obligation on the part of [the Provider] to offer a tracker*

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mortgage". The Complainants seek to rely on **General Condition 3.2** of the **Mortgage Loan Offer** dated **01 August 2008** in terms of their entitlement to a tracker interest rate on mortgage loan account ending ***8039***. The Complainants further assert that because they were existing tracker interest rate holders, they should have been given the option "*to put full loan on tracker in January 2009*" as per **General Condition 3.2** of the **Mortgage Loan Offer**.

The Complainants are of the view that the Provider is making "*a simple straightforward complaint into something complicated*".

The Complainants are seeking the following:

i. For mortgage loan account ending ***8039*** to be put on the same tracker interest rate as mortgage loan account ending ***8542***, the rate "*it should have been on since January 2009"*; and
ii. To have any overpayments made over the *"last 11 years, refunded and account [ending 8039] put in order."*

<u>The Provider's Case</u>

The Provider details that the Complainants previously held two mortgage loan accounts on their private dwelling house. Mortgage loan account ending ***8112*** was on the SPR of 3%, and mortgage loan account ending ***8385*** which was on a variable interest rate of 5.25%. The Provider submits that the Complainants submitted a mortgage loan application by way of "*telephone application and discussion*" on **18 April 2008** for a mortgage top up of €250,000.00 "*for the purpose of home renovations*". The Provider notes that following discussions with the First Complainant in **July 2008**, the First Complainant advised that she wished to spread the cost of the home renovations between their private dwelling house (€150,000.00) with the remaining amount as a top up to the Complainants' mortgage loan on their investment properties (€100,000.00).

The Provider explains that because of "*legislative changes in respect of the taking of security*", it was required to seek a first legal charge in the form of an all-sums mortgage as security for the Complainants' mortgage loan at the time of their application. The Provider states that in order to facilitate this, the Complainants' existing mortgage loan "*was required to be re-contracted*".

The Provider states that the Complainants' existing staff preferential rate ("SPR") on mortgage loan account ending ***8112*** "*was re-contracted as part of this application into new SPR Mortgage Loan Account ending 8039*".

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The Provider submits that the product which the Complainants applied for in **April 2008** was a "*variable rate product which attracted the SPR, which remained static for the life of the loan contingent on certain conditions".* The Provider explains that staff customers could borrow up to a maximum amount of €190,460.00 on the SPR "*with the remainder (if any) on either the Bank's Variable interest rate, Fixed interest rates or, while available, Tracker interest rates based on the preference of the customer for their PDH mortgage loan".* The Provider states that the SPR was an "*option available to staff customers in addition to the Bank's Variable interest rate, Fixed interest rates and, while available, Tracker interest rates*". The Provider details that the practice within its staff business unit was to provide details to staff of the interest rates available when requested to enable them to make an informed decision and it did not "*offer advice in relation to interest rates".* The Provider states that its staff business unit only provided information on interest rate options to customers when they requested such information. The Provider is of the view that the "*customer has the final decision on the choice of interest rates applicable to their mortgage*".

The Provider outlines that it issued two **Mortgage Loan Offers** to the Complainants on **28 July 2008**, one for the loan sum of €190,460.00 on the SPR of 3% and the balance in the sum of €231,450.00 on a tracker interest rate of 5% comprising the ECB rate of 4.25% plus a margin of 0.75%, with a discounted margin of 0.45% for the first year. The Provider submits that these **Mortgage Loan Offers** "*provided the incorrect Mortgage Loan amount*".

The Provider notes that on **01 August 2008** it sent an internal mail to the First Complainant to apologise for the mistake and advised her that she would receive two new **Mortgage Loan Offers**. The Provider details that the internal mail "*contained a typographical error*" as it should have noted the amount of €340,300.00 instead of €240,400.00.

The Provider submits that it issued two new **Mortgage Loan Offers** to the Complainants on **01 August 2008**, one for a loan in the sum of €190,460.00 on the SPR of 3% and the other for a loan in the sum of €299,840.00 on a tracker interest rate of 4.70%, comprising the ECB rate of 4.25% plus a margin of 0.75%, with a discounted margin of 0.45% for the first year.

The Provider asserts that the **Special Conditions** attached to the **Mortgage Loan Offer** in relation to mortgage loan account ending ***8039*** "*clearly outlines that the SPR would only apply to the Complainants' Mortgage Loan Account so long as the first named Complainant remained an employee of the Bank".*

The Provider submits that the Complainants accepted and signed both **Mortgage Loan Offers** on **12 September 2008**. The Provider details that the Complainants' solicitor sent a

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letter to the Provider on **30 September 2008** "*requesting drawdown of the first stage payment*".

The Provider notes that mortgage loan account ending ***8039*** was drawn down on **23 December 2008** on the SPR of 3% in the amount of €190,460.00. The Provider outlines that the amount of €169,071.35 "*was transferred to clear Mortgage Loan Account ending 8112 and the account was closed on 2 January 2009".*

The Provider states that mortgage loan account ending ***8971*** drew down on **23 December 2008** on a 1-year discounted tracker interest rate of 2.5% in the amount of €38,612.00. The Provider details that the discounted tracker interest rate margin of 0.45% "*was not applied to the account at this time*". The Provider is of the view that while the tracker interest rate that applied to mortgage loan account ending ***8971*** was incorrect "*there was no detriment to the Complainants*".

The Provider states that mortgage loan account ending ***8542*** (in the amount of €38,612.00) drew down on **05 January 2009** on a 1-year discounted tracker interest rate of 2.95% (ECB 2.5% plus a margin of 0.45%). The Provider notes that upon drawdown of mortgage loan account ending ***8542***, the Complainants' mortgage loan account ending ***8971*** was cleared and closed.

The Provider details that on **05 January 2009** it wrote to the Complainants' solicitor "*confirming that €60,000 was lodged to their client account and not €190,460 as was previously stated*". The Provider explains that the letter also indicated that "*€169,071.35 was transferred from Mortgage Loan Account ending 8039 to clear the Complainants' Mortgage Loan Account ending 8112 with the balance of €21,388.65 lodged to the solicitor's client account, making a total of €190,640 drawn on Mortgage Loan Account ending 8039".*

The Provider submits that it issued a letter on **19 January 2009** to inform staff customers that the Provider's standard variable rate of interest of 3.25% was lower than the SPR and therefore a "*switch*" to the standard variable rate would occur at the end of **January 2009**. The Provider explains that this "*switch"* was prompted by the publication of the *"Government's 2009 Budgetary Changes impacting BIK*". The Provider outlines that the Complainants were given the option to remain on the SPR in **January 2009** and explains that this interest rate "*remained available to the Complainants as long as the first named Complainant remained in the employment of the Bank*".

The Provider states that this letter "*clearly stated*" that if staff customers wished to opt out of the "*switch*", they needed to send a written instruction to the Provider by **26 January 2009**. The Provider outlines that in circumstances where it did not receive an instruction

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from the Complainants, mortgage loan account ending ***8039*** was converted to a standard variable rate of interest of 3.25% on **29 January 2009**. The Provider details that the letter of **19 January 2009** also informed the Complainants that they could "*switch back to the SPR at any time by submitting a request in writing*".

The Provider maintains that the Complainants requested that the interest rate on mortgage loan account ending ***8039*** be switched back to the SPR on **02 August 2012**. The Provider submits that on **30 August 2012** it sent an email to the First Complainant seeking confirmation as to whether "*she wished to proceed with the switch back to the SPR of 3% plus BIK*". The Provider states that on **31 August 2012** the First Complainant sent an internal email requesting that mortgage loan account ending ***8039*** should remain on the variable interest rate.

The Provider asserts that on **25 October 2012** the Complainants made a further request that the interest rate on mortgage loan account ending ***8039*** be switched back to the SPR. The Provider submits that it complied with this request on **08 November 2012**, and it issued a letter to the Complainants on **12 November 2012** in this regard.

The Provider explains that the document titled "*Information about your Distance contract*" was an "*information page*" included in the loan offer pack with the **Mortgage Loan Offer**. The Provider submits that this document described the SPR loan as a preferential home loan of up to €190,460.00 on a fixed interest rate at 3% "*in order to reflect the fact that the SPR would remain at the interest rate referred to in the Complainants' Letter of Offer".* The Provider submits that the SPR is "*a Variable interest rate product and, therefore, was not applied*" to the Complainants' mortgage loan account ending ***8039*** for a defined period like a fixed interest rate product. The Provider details that the Complainants could switch from the SPR "*to any other available interest rate product at any time without incurring a penalty*". The Provider further submits that the Complainants were not "*subject to any of the reciprocal restrictions attached to a Fixed interest rate*".

The Provider notes that the SPR period did not come to an end in **January 2009**, rather staff customers who were on the SPR "*were transferred to a more favourable*" standard variable rate, "*while retaining the right to switch back*" to the SPR at any time, provided they remained an employee of the Provider.

The Provider states that it refutes the First Complainant's assertion that the fact she *"paid benefit in Kind in relation to the staff preferential rate is further proof of its fixed rate status."* Rather, the Provider states that the benefit-in-kind implication of availing of the SPR clearly demonstrates that the SPR is not a fixed interest rate. The Provider explains that *"a Benefit in Kind is any non-cash benefit of monetary value that an employer provides for their employee."* The Provider details that the benefits are also known as notional pay,

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friend benefits or perks. The Provider details that *"these are benefits that an employee receives that cannot be converted into cash but have a cash value."* The Provider maintains that *"the SPR was and is not a Fixed interest rate product".*

The Provider is of the view that the Complainants' mortgage loan documentation is clear in that the SPR is a variable interest rate "*that would remain static*" and that staff customers could benefit from the rate so long as they remained employed by the Provider. The Provider states that the First Complainant resigned on **18 December 2018** and, in line with the **Special Conditions** attached to the **Mortgage Loan Offer**, mortgage loan account ending ***8039*** "*converted from the SPR of 3%"* to a standard variable interest rate of 3.15%.

The Provider asserts that the **Mortgage Loan Offer** in relation to mortgage loan account ending ***8039*** is clear in terms of the Complainants' interest rate entitlements and "*does not suggest in any way that Mortgage Loan Account ending 8039 could convert to a Tracker interest rate*". The Provider contends that **General Condition 3.2** of the **Mortgage Loan Offer** for mortgage loan account ending ***8039*** is not applicable because mortgage loan account ending ***8039*** "*has never been on a fixed interest rate*". The Provider states that the SPR is not a fixed interest rate, and the Complainants were "*not committed to pay an interest rate of 3% for a defined period*". The Provider submits therefore that it was under "*no contractual obligation*" to offer the Complainants a tracker interest rate in respect of mortgage loan account ending ***8039*** when the SPR "*was no longer a more favourable interest rate for staff customers*" in **2009**.

The Provider states that the words *"track", "tracker"* or *"tracks"* do not appear in the particulars of **Mortgage Loan Offer** for mortgage loan account ending ***8039***, which is in contrast to the **Mortgage Loan Offer** for mortgage loan account ending ***8542*** which "*clearly specifies that the interest rate tracks movements in the ECB rate and also specifies the agreed margin that will apply over the ECB rate*".

The Provider details that the Complainants have not availed of any alternative repayment arrangement on mortgage loan account ending ***8039*** since drawdown on **23 December 2008** to present.

The Provider outlines that mortgage loan accounts ending ***8039*** and ***8542*** remain active with the Provider.

<u>The Complaint for Adjudication</u>

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on mortgage loan account ending ***8039*** in **January 2009** despite that Complainants having a contractual entitlement to tracker interest rate.

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Decision

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

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

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

A Preliminary Decision was issued to the parties on **29 May 2023**, 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.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainants' mortgage loan documentation in relation to mortgage loan account ending ***8039***. It is also necessary to consider details of certain interactions between the Complainants and the Provider between **2008** and **2009.**

The evidence shows that the Complainants applied for a top-up mortgage loan with the Provider in **April 2008**. The Provider's internal notes which have been submitted in evidence detail as follows:

> *"Loan [8112] to be placed in joint names and pref topped to max and balance on commercial tracker rate."*

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At the time of the mortgage loan application in **April 2008**, the Complainants held two mortgage loan accounts on their private dwelling house. Mortgage loan account ending ***8112*** was held in joint names and operated on a staff preferential rate of 3.00%. This mortgage loan was "*re-contracted*" into a new staff preferential mortgage loan under mortgage loan account ending ***8039***.

Mortgage loan account ending ***8385*** was held in the name of the First Complainant and operated on a variable interest rate. This mortgage loan account was cleared with the funds from the new mortgage loan account ending ***8542*** which drew down on a tracker interest rate.

The Provider subsequently issued two **Mortgage Loan Offers** dated **28 July 2008** to the Complainants. The first **Mortgage Loan Offer** dated **28 July 2008** relates to mortgage loan account ending ***8039***, which is the subject of this complaint. The second **Mortgage Loan Offer** dated **28 July 2008** relates to mortgage loan account ending ***8542***, which is not the subject of this complaint.

The Provider issued an internal mail to the First Complainant dated **01 August 2008** outlining that there was an error with the amounts contained in the **Mortgage Loan Offers** dated **28 July 2008** and that two new loan offers would issue as follows:

> *"…*
> *Apologies for mistake in letters – You have*
> *existing loans of 240,300 against [address of property] and new funds are*
> *Eur150k – total 490,400…*
> *You will received 2 new letters for*
> *190,460 and 299840 in this respect.*
>
> *Apologies for any*
> *Inconvenience.*
> *…"*

The Provider has submitted that the internal mail dated **01 August 2008** contained an error as the amount should have been €340,300.00 as opposed to €240,300.00.

The Complainants did not accept and sign the **Mortgage Loan Offers** dated **28 July 2008** and the Provider proceeded to issue new loan offers with the correct amounts.

The Provider issued two new **Mortgage Loan Offers** dated **01 August 2008** to the Complainants**.** The first **Mortgage Loan Offer** dated **01 August 2008** relates to mortgage

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loan account ending ***8039***, which is the subject of this complaint. The second **Mortgage Loan Offer** dated **01 August 2008** relates to mortgage loan account ending ***8542***, which is not the subject of this complaint.

The **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8039*** details as follows:

> *"…*
>
> *I am pleased to offer you a mortgage loan of the principal sum specified in Part 1 attached….*
>
> ***IMPORTANT INFORMATION AS AT 01 August 2008***
>
> 1. *Amount of Credit Advanced* — *€190,460.00*
> 2. *Type of Loan* — *Annuity*
> 3. *Period of Agreement* — *25 years/ 300 months*
> 4. *Number of Repayment Instalments* — *300*
> 5. *Amount of Each Instalment* — *(1) 300@ €902.68*
>
> *…*
>
> ***LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS DOCUMENT IS SIGNED****."*

Part 1 - Particulars of Offer of Mortgage Loan details as follows:

"…

Repayment Details as at date of Offer

	Term	*Loan Type*	*Interest Rate Description*	*Rate*	*Margin*	*Net Rate*	*Amount of Each Instalment*
1	*25 Years*	*Variable Annuity*	*STAFF PREF HOME LOAN ANNUITY*	*3%*	*0%*	*3%*	*€902.68*

…"

The relevant sections of **Part 2 - Special Conditions** detail as follows:

> *"…The existing Home Loan, account number [ending 8112], must be cleared in full on drawdown of the facility now approved. (If the existing loan is on a fixed rate of interest a Breakage cost may occur).*

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In respect of a Staff Mortgage on a Preferential Rate the following conditions will apply:

While the Customer (or, if the Offer is addressed to more than one person, all of them) remains in the service of the Bank, a Staff Preferential Fixed Home Loan interest rate of 3% will apply to the Mortgage Loan.

The fixed interest rate early breakage cost referred to in Clause 3.3 of the General Terms and Conditions will not apply if for any reason the interest rate applicable to the Mortgage Loan Ceases to be the Staff Preferential Fixed Home Loan interest rate.

Without prejudice to the Bank's right to demand repayment at any time, if the Customer (or, if the Offer is addressed to more than one person, all of them) resigns or is dismissed from the service of the Bank, the Bank may at its discretion:

Forthwith terminate the Mortgage Loan and demand repayment, or transfer the Mortgage Loan to [the Provider] absolutely, and Clause 14.2 of the General Terms and Conditions will not apply.

Interest from the date of resignation or dismissal will be charged on the Mortgage Loan at the Bank's advertised variable Home Mortgage loan rate applicable from time to time.

…

In respect of a Staff Mortgage Loan on the Bank's Standard Commercial Rates the following condition will apply:

Without prejudice to the Bank's right to demand repayment at any time, if the Customer (or, if the Offer is addressed to more than one person, all of them) resigns or is dismissed from the service of the Bank, the Bank may at its discretion:

forthwith terminate the Mortgage Loan and demand repayment, or transfer the Mortgage Loan to [the Provider] Mortgage Bank absolutely, and Clause 14.2 of the General Terms and Conditions will not apply."

Part 4 – General Terms and Conditions of Offer of Mortgage Loan details as follows:

"3 INTEREST RATES
3.1 RATE NOT GUARANTEED TO DRAWDOWN

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Due to fluctuations in interest rates, the Bank does not warrant or guarantee that the rate specified in the Particulars will apply on drawdown:

(a) In the case of an offer at a variable rate or tracker rate, the initial rate which will apply to the Mortgage Loan will be the rate prevailing at the date of drawdown.

(b) In the case of an offer at a fixed interest rate, the appropriate fixed rate which prevails at the date of drawdown will apply to the Mortgage loan if this is different from the rate specified in the Particulars. The Customer may accept this rate or within 21 days of drawdown, opt to switch to the variable or tracker rates prevailing at the time without incurring any early breakage cost under Clause 3.3.

3.2 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE

At the end of any fixed interest rate period, the Customer may choose between:

(a) a further fixed interest rate period, or

(b) conversion to a variable interest rate Mortgage Loan, or

(c) conversion to a tracker interest rate Mortgage loan.

at the Bank's then prevailing rates appropriate to the Mortgage Loan. If the Customer does not exercise this choice, then the Mortgage Loan will automatically convert to a variable interest rate Mortgage Loan.

3.3 FIXED INTEREST RATE EARLY BREAKAGE COSTS PAYABLE BY CUSTOMER

The Customer will be entitled, subject to prior advice to the Bank, to withdraw from a fixed interest rate agreement either:

(a) By repayment in full of the Mortgage Loan and interest accrued to the date of repayment, or

(b) by conversion to a variable interest rate or another fixed interest rate, or

(c) by making a partial out-of-course payment.

In any of the foregoing events, subject to the provision of Section 121 (2) of the Consumer Credit Act, 1995, an early breakage cost is usually payable to the Bank. The early breakage cost shall be fairly and conclusively determined by the Bank on the basis of the formula contained in Part 5.

3.4 FIXED INTEREST RATE MORTGAGE LOAN

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In the case of a fixed interest rate Mortgage loan, the interest rate is the appropriate rate which prevails at the date of drawdown, and will be fixed for the period of time stated in the Particulars, subject to these conditions.

3.5 VARIABLE INTEREST RATE MORTGAGE LOAN

In the case of a variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the Bank from time to time, subject to these conditions.

3.6 TRACKER INTEREST RATE MORTGAGE LOAN

3.6.1 The tracker interest rate is made up of two parts:

(a) the European Central Bank's main refinancing operations minimum bid rate (the "ECB Rate") which is variable, and
(b) the Tracker Margin as stated in Part 1 of the Particulars of Offer of Mortgage Loan, subject to 3.6.3 below.

3.6.2 The tracker interest rate applicable at any time will change within 5 working days of a change in the ECB Rate.

3.6.3 The [Provider] may adjust the Tracker Margin upwards if the Valuation Report values the property at less than the Property Price/Estimate Value shown in the Particulars of Offer of Mortgage Loan. The [Provider] will notify the Customer in writing of the new Tracker Margin.

3.6.4 The Customer may at any time convert a tracker interest rate Mortgage Loan to a fixed interest rate Mortgage Loan or a variable interest rate Mortgage Loan at the [Provider's] then prevailing rates appropriate to the Mortgage Loan. However, the Customer may not convert the tracker interest rate Mortgage Loan directly or indirectly from one tracker interest rate to another tracker interest rate in order to avail of a lower prevailing Tracker Margin.

…

5 INTEREST CLACULATION AND CHARGING

…

5.3 NOTICE OF VARIATION

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Save for any period of a fixed interest rate loan, the Bank shall give notice to the Customer of any variation in the interest rate applicable to the Mortgage Loan, either by specific notice in writing served on the Customer in accordance with the Lenders Mortgage, or generally by newspaper advertisement published in at least one National Daily Newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will apply.

…

18. TOTALITY OF THIS AGREEMENT/NON-MERGER

These General Terms and Conditions shall be read in conjunction with the Particulars of this Offer, the Special Conditions, the Pre-Draw-down Requirements and the Statutory Notices and Other Notices incorporated in this document, and this agreement (or any supplemental agreement concluded between the Bank and the Customer) shall not merge in the Lenders Mortgage over the property.

…"

Part 5 - Statutory Notices and Other Notices (A) All Mortgage Loans of the **Letter of Offer** details as follows:

"WARNING

…

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

*(**Note**: The above notice in respect of adjustments to payment rates will not apply during any period when the Mortgage Loan is at a fixed interest rate.)*

The **Acceptance and Consent** section of the **Mortgage Loan Offer** dated **01 August 2008** was signed by the Complainants and witnessed by their solicitor on **12 September 2008**, on the following terms:

"I/We accept the conditions of this Offer and agree to mortgage the property to the Lenders as Security for the Mortgage Loan.

…

I/We acknowledge and accept that the rate of interest which applies to the Mortgage loan may be different from the rate shown in the Offer, and in the case of

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fixed interest rates, the rate which prevails at the date of drawdown is the rate which will apply for the period of time stated in the Particulars.

I/We hereby confirm, that I/we have read the within Terms and Conditions attaching to this Offer, and acknowledge that I/we have received a copy thereof."

It is clear to me that the **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8039*** envisaged a staff preferential interest rate of 3% to apply to the mortgage loan that was variable in nature. The Letter of Offer specifically outlined the "*Loan Type*" to be a "*Variable Annuity*". The staff preferential interest rate in this case made no reference to varying in accordance with variations in the European Central Bank refinancing rate (the "ECB rate"), rather it was a variable rate which could be adjusted by the Provider. For staff preferential interest rate loans, the variable rate "*remained static*" at 3%. If the staff customer resigned or was dismissed from the Provider, the mortgage loan would move to the Provider's standard variable interest rate. The Complainants accepted the **Mortgage Loan Offer** dated **01 August 2008** having confirmed that they had read the terms and conditions applicable to the mortgage loan, to include the applicable interest rate.

The mortgage loan account statements in relation to mortgage loan account ending ***8038*** show that the mortgage loan was drawn down on a staff preferential interest rate of 3.00% on **23 December 2008** in the amount of €190,460.00. Upon drawdown, the sum of €169,071.35 was transferred to clear mortgage loan account ending ***8112*** in accordance with the **Special Conditions** attached to the **Mortgage Loan Offer**. The Provider issued a letter to the Complainants dated **05 January 2009** in this regard which outlines as follows:

"…
Please note that funds to the amount of €169,071.35 were lodged from account [ending 8039] to clear Staff Business loan [ending 8112], remaining funds of 21,388.65 were lodged to your [name of alternate provider] Client Account along with €38,611.35 from loan [ending 8971]. Therefore only a total of €60,000.00 was lodged to your Client Account not the full balance of €190,460.00 as was previously stated
…."

Prior to the drawdown of funds in respect of mortgage loan account ending ***8083,*** the Provider issued a second **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8542***. This **Mortgage Loan Offer** dated **01 August 2008** provides for a loan in the sum of €299,840.00 repayable over a term of 25 years and specifically provides for a discounted tracker home loan interest rate comprising the ECB rate which was 4.25% at the time plus a margin of 0.45% for a period of one year, with a tracker interest rate comprising the ECB rate plus a margin of 0.75% to apply thereafter for the remainder of the term of the loan.

The **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8542*** is governed by separate and distinct terms and conditions and is not the subject of this complaint.

While the staff preferential interest rate of 3% was to apply for the term of the loan while the First Complainant remained in the employment of the Provider, the Provider submits that when the Provider's standard variable interest rate for private dwelling house mortgage loans became lower than the staff preferential interest rate, the Provider carried out a "*switch*" so that staff customers who were availing of the staff preferential rate benefitted from the lower standard variable interest rate. Having considered the evidence before me, it appears to me that this "*switch*" occurred on the Complainants' mortgage loan account ending ***8039*** in **January 2009**. This was following the Government's budgetary changes which had an impact on benefit-in-kind**.** In this regard, the Provider issued a letter to the Complainants dated **19 January 2009** which details as follows:

> *"Dear Colleague,*
>
> *With effect from 1st January 2009, the Benefit in Kind (BIK) reference rate reduced to 5%.*
>
> *For staff with a Preferential Rate Mortgage Loan, this means that the net rate payable is:*
>
> | | |
> |---|---|
> | *Higher Rate of Income Tax (41%)* | ***3.86%*** |
> | *Lower Rate of Income Tax (20%)* | ***3.52%*** |
>
> ***Note:*** *The above figures excludes PRSI and the new Income Levy.*
>
> *This compares to the Bank's Standard Variable Rate for Owner Occupiers of 3.25% (APR 3.3%) (effective close of business 27th January) and means that the Staff Preferential Mortgage Rate of 3% (APR 3.05%) with the addition of BIK is no longer a more favourable rate for staff.*
>
> *Staff Business commits to ensure that Staff are not at a disadvantage by availing of the Staff Preferential Mortgage Rate and as a result Staff Business will carry out a switch of* ***ALL*** *Staff Preferential Rate Staff Mortgage Loans to the Bank's Standard Variable Rate for Owner Occupiers on 30th January 2009.*
>
> *You have the following options:*

/Cont'd…

Option	*Action Required*
*You wish to switch your Staff Preferential Home Loan to the Bank's Staff Variable Rate**	*NO ACTION IS REQUIRED*
You wish to remain on the Staff Preferential Mortgage Rate (i.e. Opt out of the switch)	*You will need to confirm in writing that you want to opt out of the Switch and send to Staff Business by 26th January 2009, co signed by any guarantor or co-owner*
You wish to switch to a Fixed Rate (current rates detailed overleaf) instead of the Bank's Standard Variable Rate	*You will need to confirm in writing that you want to opt out of the Switch and send to Staff Business by 26th January 2009, co signed by any guarantor or co-owner*

**Your repayments may increase at the interest rate is changed from 3%.*

Once your Staff Preferential Rate Mortgage is switched to any of the Bank's commercial rates, Benefit in Kind (BIK) will automatically cease to be applied. As BIK is posted monthly in arrears, the BIK due up to the date of conversion will be applied as normal in your February salary. After this time no BIK will be applied unless you have opted to remain on the Staff Preferential Mortgage Rate.

…"

The letter dated **19 January 2009** also included a **"Questions and Answers"** information sheet which details as follows:

"

…

Questions & Answers on Switch of Preferential Mortgage Accounts		
No	*Question*	*Answer*
…	…	…
…	…	…
3.	*Can I switch funds to my existing Tracker Mortgage?*	*Tracker mortgages were withdrawn on [Redacted] 2008 and balances **cannot** be topped up.*
…	…	…
…	…	…

/Cont'd…

Questions & Answers on Switch of Preferential Mortgage Accounts		
6.	*What happens when rates change?*	*Changes in the Bank's Standard Variable Rate will be passed onto Staff Mortgage Loans where you have opted to switch from the Staff Preferential Mortgage Rate.* ***Note**: Staff Business commits to switch eligible accounts back to the Staff Preferential Mortgage Rate if rates increase or BIK reference rates decrease making the Staff Rate more beneficial.*
…	…	…
…	…	…
…	…	…
10	*Can I switch back to preferential rate at any time?*	*Yes – you will need to request this in writing, co signed by co-owner or guarantor*
11.	*If I opt out now, can I convert to commercial rates later.*	*Yes – you will need to request this in writing, co signed by any co-owner or guarantor. As you have not been included in the switch, the onus is on you to request to change back to preferential rates.*
…	…	…
…	…	…

…"

The letter dated **19 January 2009** also listed the fixed interest rate options that were available from the Provider at that time as follows:

Table of Owner Occupiers Mortgage Interest Rates (as at 15th January 2009)		
Rate Category	*Rate for Owner Occupier*	*APR over 20 years*
…	…	…
Fixed rates (as at 18th December 2008)		
1 year existing customer	*4.00%*	*3.84%*
2 year	*3.55%*	*3.77%*
3 year	*3.9%*	*3.86%*
4 year	*4.10%*	*3.95%*
5 year	*4.20%*	*4.03%*

/Cont'd…

10 year	*4.75%*	*4.62%*

I note from the **mortgage account statements** that the Provider's standard variable interest rate of 3.25% was applied to mortgage loan account ending ***8039*** on **29 January 2009**. There is no evidence to suggest that the Complainants instructed the Provider that they wished to opt out of the "*switch*" by choosing to remain on the staff preferential interest rate or by choosing to switch to one of the fixed interest rates on offer by the Provider at the time.

In line with the variable nature of the Complainants' mortgage loan, I note from the **mortgage account statements** that the Provider's standard variable interest rate fluctuated between 2.25% and 3.25 % between **March 2009** and **August 2012**.

The Complainants wrote to the Provider on **02 August 2012** requesting to return to the staff preferential rate as follows:

> *"…*
> *Please be advised that we wish to amend the rate on the above account from the current standard Variable Rate of 3% to the staff preferential rate of 3.25%. This was the original fixed rate for this account prior to the change in 2009.*
>
> *We are fully aware of the implications this change will mean regarding benefit in kind tax liability.*
> *…"*

The Provider emailed the First Complainant on **30 August 2012** as follows:

> *"…*
> *As per phone call, please confirm if you wish to proceed with your request to return to the staff preferential rate of 3% plus benefit in kind.*
> *Please also refer to the Staff Business Questions & Answers available through the [Provider] Intranet which addresses the staff rate, benefit in kind and when it may be beneficial to switch back to the staff rate.*
> *…"*

The First Complainant emailed the Provider on **31 August 2012** requesting that the Provider ignore the previous letter dated **02 August 2012** as follows:

> *"…*
> *Thanks for the phone call and I followed up with a look at the Q&A's and if it is okay I would now ask staff business to ignore the letter I sent requesting to go back to*

/Cont'd…

the fixed 3.25% and leave our account as it currently is on a variable rate. I was incorrect in my interpretation of the financial implications of changing at this stage so again I appreciate your guidance in this matter. I know the repayments will now go up by .5% from sept and our new repayment will be approx. 944euro each month
Again thanks for the call and the email
…"

The Complainants made a further request to return to the staff preferential rate on **25 October 2012** as follows:

"…
We wish to request that the above account be changed from its current variable rate back to the staff preferential rate of 3%.
…"

The Provider wrote to the Complainants by way of letter dated **12 November 2012** confirming that the staff preferential rate of 3% had been applied with effect from **08 November 2012** as follows:

"…
We refer to your recent request to convert the above Home Mortgage Loan Account to the Bank's Staff Preferential rate of 3.00%. We confirm that we have applied the staff rate as requested with effect from the 8th November.

Your new repayment on the 25th November 2012 will be €901.48.

As you are now on a preferential rate product, Benefit in Kind (BIK) is chargeable and will be charged through payroll on a monthly basis. Please note BIK is charged one month in arrears. The first month a BIK charge will appear on your payslip for this mortgage loan account will be December 2012.

We trust the above meets with your approval.
…"

The evidence shows that the First Complainant ceased employment with the Provider in **December 2018**. The Provider issued a letter to the Complainants dated **19 December 2019**, which details as follows:

"…

/Cont'd…

> *I wish to advise that you are no longer eligible for the Staff Preferential Rate as we have been notified by [the Provider] Human Resources that you ceased employment with [the Provider] on 18/12/2018.*
>
> *As detailed above, your mortgage account is now on the Standard Variable Rate (SVR), currently at 3.15%.*
> *…"*

In circumstances where the First Complainant ceased employment with the Provider in **December 2018**, the staff preferential fixed interest rate was removed from the Complainants' mortgage loan account ending ***8039*** and the Provider applied its standard variable interest rate which was 3.15% in **December 2018**.

The Complainants submit that they had an entitlement to be offered a tracker interest rate in respect of their mortgage loan account ending ***8039*** when it was switched from the staff preferential rate of 3%. In this regard, the Complainants appear to be of the view that the staff preferential interest rate was "*fixed*" in nature, but they were not offered a tracker interest rate by the Provider despite coming off a fixed rate of interest.

I note that **Mortgage Loan Offer** dated **01 August 2008** contains references to both the words "*fixed"* and "*variable*". Part 1 refers to the "*loan type*" as a "*variable annuity*". In the **Special Conditions** there is a reference to the **"***Staff Preferential Fixed Home Loan interest rate of 3%"* and the **Special Conditions** also includes certain detail disapplying **General Condition 3.3**, which relates to fixed interest rate early break costs.

I accept that these varying references create a limited degree of ambiguity as to the nature of the interest rate, when looked at in isolation and I am of the view that in this respect the Provider should have drafted the **Mortgage Loan Offer** with more precision to ensure there could be no ambiguity.

However, having considered the evidence before me, when the details in the **Mortgage Loan Offer** dated **01 August 2008** in relation to mortgage loan account ending ***8039*** are considered in the round it appears that the mortgage loan was one that was variable in nature given that it was described as a variable annuity loan. The reference to the term "*fixed*" in this context refers to the fact that the staff preferential interest rate would remain static or fixed at the rate of 3% for the term of the loan, while the First Complainant remained in the employment of the Provider.

It is understood that the design of the staff preferential rate was of such a nature that it would be more competitive than an ordinary rate offered to customers who were not staff, even when benefit-in-kind was factored in. The Provider moved the Complainants'

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mortgage loan to the standard variable interest rate offering when the staff preferential rate became less advantageous, so the Complainants were not disadvantaged at that time by the application of the staff rate.

As detailed above, this is what occurred on the Complainants' mortgage loan account in **January 2009** when the mortgage loan was switched to the Provider's standard variable interest rate.

There was no obligation on the Provider to apply a tracker interest rate to the Complainants' mortgage loan in **January 2009** as the Complainants were moving from a variable interest rate product to a more competitive variable interest rate product. The Complainants were not moving off a fixed interest rate therefore **General Condition 3.2** of the **Mortgage Loan Offer** dated **01 August 2008** did not apply. Rather, the nature of the variable interest in this instance is set out in **General Condition 3.5** and is one varied in accordance with the prevailing rates set by the Provider. In order for the Complainants to have a contractual right to be offered a tracker interest rate while operating on a variable interest rate, that right would need to have been specifically outlined in the mortgage loan documentation. However, no such right was contained in the mortgage loan agreement in relation to mortgage loan account ending ***8039.***

The Complainants submit that they also had an entitlement to be offered a tracker interest rate on mortgage loan account ending ***8039*** because they held mortgage loan account ending ***8542*** with the Provider which was operating on a tracker interest rate. In this regard, it is important to highlight that the while mortgage loan accounts ending ***8039*** and ***8542*** are secured against the same mortgaged property, both mortgage loans are separate and distinct from one another and are governed by different terms and conditions. Consequently, the Complainants were not entitled to be offered a tracker interest rate on mortgage loan account ending ***8039*** simply because a tracker interest rate applied to mortgage loan account ending ***8542.***

Having considered the Complainants' mortgage loan documentation in its entirety, I am satisfied that the Provider was under no obligation to apply a tracker interest rate to mortgage loan account ending ***8039*** in **January 2009**, or at any other time.

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

Conclusion

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

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

Jacqueline O'Malley

JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

27 June 2023

PUBLICATION

Complaints about the conduct of financial service providers

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

(a) ensures that—

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

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

and

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

Complaints about the conduct of pension providers

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

(a) ensures that—

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

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

and

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