



<b><u>Decision Ref:</u></b>	2019-0391
<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
<b><u>Outcome:</u></b>	Rejected

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

**Background**

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

**The Complainant's Case**

The Complainant accepted a Loan Offer Letter from the Provider on **4 October 2004**. The interest rate applicable was a variable interest rate of 3.53%.

The Complainant submits that she met with a representative of the Provider during the application process to discuss the interest rate options for the mortgage loan account. She submits that the Provider's representative offered her either the variable interest rate of 3.53%, or a fixed interest rate of 2.74%. She submits that she was not offered a tracker interest rate option.

The Complainant submits that her solicitor was not present when she met with the Provider to discuss her interest rate options. She submits that she signed the Loan Offer in the presence of her solicitor, but she did not meet with her solicitor until after she had chosen an interest rate from the options she was given by the Provider's representative.

The Complainant submits that "*at no stage*" was the option of a tracker interest rate offered to her by the Provider. She submits that it is her belief that the Provider's failure to offer or to inform her about the option of a tracker rate was intentional.

The Complainant submits that she has been financially disadvantaged due to the Provider's failure to present her with all of the interest rate options available to her for the mortgage loan, which has caused her stress. She submits that she lives day to day and strives to pay bills, without the enjoyment of being able to "*relax*" or have the "*odd treat*".

The Complainant submits that she feels "*victimised*" as she knows several people who received the option to choose a tracker rate mortgage at the same time that she started her mortgage journey. She submits that as a result there is a disparity between her financial position and the financial position of other people she knows who benefited from a tracker mortgage.

The Complainant submits the Provider's failure has affected her self-confidence. She submits that she believes that the Provider's representative formed the opinion in **September/October 2004** that the Complainant was "*not as well educated*" as other customers of the Provider and did not afford her the same level of "*respect*" as was afforded to other customers of the Provider. She submits that she has been treated unfairly by the Provider.

The Complainant submits that she is entitled to "*back pay*" on her mortgage in the form of a "*lump sum*".

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

The Provider submits that at the date of the Complainant's mortgage application in **October 2004**, tracker interest rates were available from the Provider for a customer to select, subject to lending criteria terms, eligibility and terms and conditions.

The Provider submits that the Complainant applied for a mortgage of €106,000 over a term of 30 years by completing a mortgage application form which she signed on **28 September 2004**. The Provider submits that on page 1 of the application form, the Complainant confirmed her wish to apply for a Standard Mortgage. The Provider submits that the

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Complainant had the option of selecting to apply for a tracker mortgage, but chose to apply for a Standard Mortgage. The Provider submits that this was confirmed again in Section 8a of the application form, where the Complainant requested that the interest type of her mortgage was to be a variable interest rate and the interest rate was input as 3.53%. The Provider submits that the Tracker Variable option was not chosen.

The Provider submits that the Complainant signed the Loan Acceptance form on **4 October 2004** and in doing so confirmed that she had *“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 hereby accept the Loan Offer on the terms and conditions specified...”*

The Provider submits that the Loan Offer did not contain any specific condition referring to a tracker interest rate or confirming that a tracker interest rate would be made available to the customer on another future date. It submits that such a reference would have been necessary for a tracker interest rate to apply. It submits that Section 3 of the ‘European Standardised Information Sheet’ which was issued in conjunction with the Loan Offer confirmed the interest rate of the Complainant’s mortgage loan account as follows;

*“Interest Rate: 3.53%  
Interest Rate Type: VARIABLE”*

The Provider submits that the Complainant’s mortgage loan account drew down on **6 October 2004** on the Standard Variable Rate (SVR). It submits that details of the draw down interest rate were contained at the start of the Complainant’s Loan Offer, as follows;

*“Interest Rate: 3.53%  
Interest Rate Type: VARIABLE”*

The Provider submits that tracker interest rate products were available from the Provider from **early 2004** until **mid-2008** when they were withdrawn from the market. The Provider submits that its staff were not authorised to provide advice or recommendations to customers as to what interest rate option or product to select. It submits that bank staff were trained to provide information in relation to the various interest rate options that were available when such information was requested. The Provider submits that the decision as to what interest rate to select rested solely with the customer based on what suited their individual circumstances.

The Provider submits that on **4 October 2004** it sent the Complainant's Loan Offer to the Complainant's solicitor prior to the Complainant signing it. It submits that the Complainant's solicitor confirmed in their letter dated **4 October 2004** that "*the Loan Offer completed by my client*" was returned to the Provider along with a number of other documents. The Provider also submits that in section 13 of the Application Form the Complainant had already advised the Provider that she had engaged the services of a solicitor to act on her behalf in this matter and had provided details in this regard e.g. the solicitor's name and address. The Provider submits that while it did not specifically advise the Complainant to seek legal advice prior to her signing the Loan Offer, it considers that such advice was not necessary given that the Complainant was already in contact with her solicitor and had to provide details of her solicitor to the Provider on the mortgage application form.

The Provider submits that on **1 November 2004**, the Complainant chose to remove her mortgage loan account from the SVR and place it onto a fixed interest rate of 3.84% for a period of 2 years. The Provider submits that to enable this change to take place, a Letter of Authority/Acknowledgement was completed and signed by the Complainant. The Provider submits that this form contained all relevant information, including what would transpire at the end of the fixed interest rate period, as follows;

*"TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF FIXED NOTICE*

*On expiry of the fixed rate period I/We may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/We fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the company from time to time and at any time in line with market interest rates (the variable rate)."*

The Provider submits that the interest rate described in the Letter of Authority/Acknowledgement form was the Provider's Standard Variable Rate. It submits that the Provider's Standard Variable Rate 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 base rate cannot be changed by the Provider.

The Provider submits that in advance of the expiry of the fixed interest rate period on the Complainant's mortgage loan account in **October 2006**, the Provider wrote to the customer. The Provider submits that this letter confirmed the expiry date of the fixed interest rate period and that the Complainant's mortgage loan account would automatically roll to the Provider's Standard Variable Rate unless the Complainant chose one of the interest rate options available to her. The Provider submits that the letter also outlined the fixed interest rate products which were available to the Complainant for selection at that time and enclosed a blank Letter of Authority/Acknowledgement form should the customer wish to select a fixed interest rate option as outlined. The Provider submits that the letter also advised the customer of the following;

*"Should you have any specific queries in relation to refixing your mortgage, or the availability of tracker variable rate options, please contact us".*

The Provider submits that the Complainant completed and signed the Letter of Authority/Acknowledgement form on **16 October 2006**, selecting a fixed interest rate of 4.99% for a period of 5 years.

### **The Complaint for Adjudication**

The conduct complained of is that the Complainant was not offered a tracker interest rate in 2004 when she applied for a mortgage loan with the Provider.

### **Decision**

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

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

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

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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 issue to be determined is whether the Complainant should have been offered a tracker interest rate on her mortgage loan account during the application process in **2004**.

The Complainant applied for a mortgage by way of **Mortgage Application Form**. On page 1 of the Application Form, in response to the question "*Mortgage Type*" the Complainant selected the "*Standard Mortgage*" option. The other option available was "*Tracker Mortgage*".

In the Application Form at **Section 8a**, which is headed **Loan Details**, the Complainant outlined in response to the question "*Rate Type*" selected the "*Variable*" option. I note that the other options available were Tracker Variable, Fixed, and Discount.

The Complainant has furnished an undated handwritten note which she submits was a handwritten note made by the Provider's representative who processed her loan application and details the details the interest rate options that were made available by the Provider at the time;

<i>"Variable</i>	- 3.53%
<i>6 mth Dis. Rate</i>	- 2.53%
<i>1 yr Fixed Rate</i>	- 2.74%
€106,000	-6 mth Dis - €462 – Gross
	-1yr Fix - €474 – Gross"

I note that the Provider has indicated that it does not hold any record of notes, minutes, memoranda etc. in relation to the meeting(s) between the Provider's representative and the Complainant when the mortgage loan application was completed on **28 September 2004**. On the basis of the above note, it appears to me that only variable, including discount variable rates and fixed interest rates were discussed by the Provider's representative with the Complainant during the meeting on 28 September 2004.

It is important for the Complainant to be aware that although tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainant applied for the mortgage loan in **September 2004**, there was no obligation on the Provider to provide the Complainant with information on the tracker interest rate offering at that time. I note that the **Mortgage Application Form** outlined the types of interest rate options available generally on mortgage loans, including the tracker rate. If the Complainant wished to seek a tracker interest rate on the mortgage loan at the time, the Complainant could have selected this option on the application form. However the Complainant selected a preference for a variable option for the loan.

The Complainant appears to be of the view that she was “*not advised*” by the Provider’s representative that she was “*entitled to and should have been offered a tracker rate mortgage*”. For the avoidance of doubt, the Complainant did not have an entitlement to be offered a mortgage loan on a tracker interest rate, when the Complainant was applying for a mortgage loan during the meeting with the Provider in September 2004.

With respect to the meeting between the Complainant and the Provider’s representative, the Complainant submits that “*I feel victimised, as I know several people who received the option to choose a Tracker rate mortgage at the very same time I started my mortgage journey*”. The Complainant submits that she feels that she “*was targeted by the Bank Official who chose not to enlighten me about the Tracker Rate Mortgage. I feel that, in her eyes, I came across as not being as well-educated as others may be. I feel that I was treated with less respect than others. Because I did not ask enough questions and I put my financial future in her hands at the time, I now feel foolish and at my age, it is hard to regain any of this confidence back.*”

No evidence has been provided to me to suggest that the Complainant was “*victimised*”, “*targeted*” or in any way treated with “*disrespect*” by the Provider’s representative when the loan application was completed in **September 2004**.

The material and evidence on the file indicates to me that the Provider’s representative was supportive of the Complainant’s application for a mortgage loan with the Provider. I note that the Branch sections of the **Mortgage Application Form** detail as follows;

**19. For Branch Use Only**

**Repayment Capacity**

- |  |                              |                          |          |              |
|--|------------------------------|--------------------------|----------|--------------|
| 1. (i) Qualifying Income   | €16,831                      | (ii) Total loan required | €106,000 | (iii)(ii) as |
|  | a multiple of (i) 6.29 Times |                          |          |              |
| 2. (i) Total average net monthly income  |                              |                          | €1546    |              |
| (ii) Total monthly repayments on all loans/credit cards/leasing/H.P., etc including proposed home loan |                              |                          | €496     |              |

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(iii)(ii) as a percentage of (i) 32% 39% at Stress Rate

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## **20. Branch Development Manager's/Loans Advisor's Comments/Recommendations**

*Having discussed the case in great detail with [the Complainant's] solicitor, I am very happy to recommend same. [The Complainant] herself is known to me, is a sound individual + very hard working. [The Complainant] currently paying rent of €520 pm mtg will be €496 p.m*

*Recommended"*

This section of the **Mortgage Application Form** was signed by the Provider's representative who had the title Branch Development Manager.

The Provider issued a **Loan Offer Letter** dated **4 October 2004** to the Complainant, which outlined as follows;

<i>Loan Type:</i>	<i>STANDARD ANNUITY</i>
<i>Loan Amount:</i>	<i>€106,000.00</i>
<i>Interest Rate:</i>	<i>3.53%</i>
<i>Interest Type:</i>	<i>Variable</i>
<i>Term:</i>	<i>30 YRS"</i>

The Complainant signed this Letter of Offer on **4 October 2004** on the following terms;

*"I/We acknowledge receipt of the General & Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, Terms and Conditions explained to us by our solicitor and I/We fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. We undertake to complete the Mortgage Deed as soon as possible."*

In this particular matter, the Complainant applied for a mortgage loan on a variable interest rate and the Provider offered the Complainant a variable interest rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loan were explained to her by her solicitor. If it was the case that the Complainant was of the view that the variable interest rate loan was not suitable for her, then the Complainant could have decided not to sign and draw down the loan and instead seek an alternative rate with the Provider or with another mortgage provider. However the Complainant did not do so.

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It appears shortly after drawdown in **October 2004** the Complainant requested information on fixed interest rate options and a 2 year fixed interest rate was applied. I note that the Provider submits that it does not hold a copy of the Letter of Authority/Acknowledgement signed by the Complainant in or around **October 2004**. The Provider has furnished a template of the Letter of Authority/Acknowledgement which it submits was in use at the time the Complainant completed and signed the Letter of Authority/Acknowledgement in **October 2004**. While it is disappointing that a copy of the signed Letter of Authority/Acknowledgement has not been furnished in evidence, it does not appear to be in dispute between the parties that the mortgage loan account was moved to a fixed rate for two years in **November 2004**.

The Letter of Authority/Acknowledgement outlined;

*“TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF FIXED NOTICE  
On expiry of the fixed rate period I/We may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/We fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the company from time to time and at any time in line with market interest rates (the variable rate).”*

The Provider submits that in advance of the fixed interest rate period on the Complainant's mortgage loan account, it issued a Product Expiry letter to the Complainant in **October 2006**. I am again most disappointed to note that the Provider does not hold a copy of the Product Expiry letter which the Complainant received in **October 2006**. I note that the Provider has furnished in evidence a template of the Product Expiry letter which it submits was in use at the time, i.e. October 2006. While it is disappointing that the Product Expiry letter received by the Complainant has not been furnished in evidence, I note that the Provider has furnished a copy of the Letter of Authority/Acknowledgement signed by the Complainant on **16 October 2006**. Taking this into consideration I have no reason to doubt that the Product Expiry letter was issued to the Complainant in **October 2006**. I note that the letter outlined;

*“Should you have any specific queries in relation to re-fixing your mortgage, or the **availability of tracker variable rate options**, please contact us [**my emphasis**]”*

Although there was no contractual or other obligation on the Provider to do so, it appears that the Provider indicated to the Complainant about the availability of a tracker variable rate in the Product Expiry Letter in **October 2006**. If the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan at the time, the Complainant could have contacted the Provider at that time. The Complainant however did

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not do so. The Complainant returned a fixed rate instruction at the time requesting that the mortgage be placed on a 5 year fixed interest rate. The mortgage loan account was on foot of that instruction placed on a 5 year fixed rate of interest.

The Provider gives the following reason for not holding both a copy of the Letter of Authority signed by the Complainant in **October 2004** and the Product Expiry Letter issued in **October 2006**;

*“The reason for a particular document not being retained on the customer’s file may be due to the expiration of the Bank’s agreed period for retention of documents and consequently, the Bank may have securely disposed of the relevant document. The Bank’s agreed period for retention of documents is in line with our obligations under data protection and other legislation. In light of the above, we are not in a position to provide a copy of this document and we apologise for any inconvenience this may cause.*

*Where a document has not been retained on a customer’s file, the Bank conducts a review of the mortgage account, taking into account the appropriate documents that would have issued to the customer during the relevant time period.”*

It is disappointing that the Provider did not keep such important documentation. In this regard, I note that the Provider has indicated that data retention “*may*” be the reason for the Provider not holding these documents. I recognise the importance of complying with data protection and other legislation and it is a matter for the Provider to set its retention periods, having regard to that legislative regime. However, I believe that instruction letters that were issued by the Provider to the Complainant during the term of the loan and where that loan remains active with the Provider, that the Provider should retain that documentation on file for six years from the date the relationship with the mortgage holder ends. In this regard, **provision 49 of the Consumer Protection Code 2006** and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

*“A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*

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- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”*

In this regard, the Complainant’s mortgage loan was incepted for a term of **30 years** commencing from **October 2004**, the Letter of Authority was signed in **October 2004** and Product Expiry Letter purportedly issued in **October 2006**. It is understood that the Complainant’s mortgage remains presently active with the Provider. I note that the **CPC 2006**, was published by the Financial Regulator in August 2006. In this regard, the Provider was required to have fully implemented the CPC 2006 by **01 July 2007**. In the circumstances, it appears to me that the Provider should have been aware in **October 2006** of the requirement to maintain records and retain the correspondence with the Complainant at the time. As Chapter 2 of the CPC 2006, was not fully effective in October 2006, I cannot make a finding that the Provider has failed to maintain consumer records in compliance with the Consumer Protection Code. Nonetheless I am disappointed about the failure by the Provider to maintain a copy of this letter.

For the reasons outlined above, I do not propose to uphold the Complainant’s complaint with respect to an entitlement to a tracker interest rate on her mortgage loan account.

## **Conclusion**

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

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

**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.**