



<u>Decision Ref:</u>	2019-0408
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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 is secured on the Complainants' private dwelling house.

The Complainants' Case

The Complainants accepted and signed the Provider's loan offer on **31 August 2004** and the mortgage loan account was drawn down on **11 October 2004**. The interest rate applicable at draw down was a three year fixed rate of 4.15%.

When the 3 year fixed interest rate period expired in **October 2007**, the Complainants' mortgage loan account defaulted to a tracker rate of 4.80% (ECB + 0.80%). The tracker rate was applied to the Complainants' mortgage loan account until **July 2008** when the Complainants opted to apply a 4 year fixed rate of 5.50%.

The Complainants submit that "*at the time when we were fixing.....the tracker rate was high*" and they "*feel that the warning*" in the Provider's letter of **13 June 2008**, "*did not explain the consequence of losing the tracker rate.*" The Complainants submit that the "*warning...advised that the margin commitment would definitely expire, but it did not*

specifically state that the tracker would also definitely expire, instead it just indicated that it may or may not default to a tracker”.

Prior to the expiration of the fixed rate period in **July 2012** the Complainants submit that they contacted the Provider in **March 2012** to request that the previously held tracker rate would be applied to their mortgage loan account. They submit that the Provider refused their request on the basis that their mortgage loan documentation did not contain a tracker rate entitlement. The Complainants submit that as the Provider had defaulted their mortgage loan to a tracker interest rate in 2007 their “*entitlement*” to a tracker interest rate had “*changed*” during the term of the loan.

The Complainants’ mortgage loan account subsequently defaulted to a variable rate on the expiry of the fixed rate period in **July 2012**.

The Complainants submit that they again contacted the Provider in **March 2015** to request that their previously held tracker rate would be restored. This was again rejected by the Provider as the mortgage loan documentation did not hold a tracker entitlement.

The conduct complained of is that the Provider failed to allow the Complainants to revert to a tracker rate of interest following the expiration of the fixed period in **July 2012**. In this regard the Complainants submit;

“We feel that even though there was no tracker condition evident on our loan agreement, that we should be entitled to be reinstated back to the tracker rate as we entered into a tracker rate agreement on the 11/10/2007, which subsequently followed the initial loan agreement.”

The Complainants detail in their complaint form that they are seeking to have the tracker interest rate restored to their mortgage loan account, from **July 2012** when the 4 year fixed rate period expired, and they are seeking to be reimbursed for any additional overpayment in interest from that date.

Since the investigation of this complaint commenced the Complainants have further submitted, as follows;

“In summary, we feel that we should have been offered the tracker interest rate as part of our loan agreement as a new customer in October 2004. Furthermore we also feel that we should be entitled to keep our tracker interest rate entitlement throughout the term of the loan as the [Provider] defaulted our loan to a tracker interest rate during the loan. And finally we feel that we should have been provided with clear and timely information and warnings about the consequences of changing

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our mortgage to a fixed rate mortgage and also should have received advanced notification of withdrawal of tracker interest rates in the market.”

The Provider’s Case

The Provider submits that during the loan application process *“all available loan products and interest rates are discussed with our customers”*. The Provider submits that the Mortgage Quotation and the Provider’s lending interest rate sheet *“clearly detail rate options that were available to the Complainants during their mortgage application.”* The Provider submits that over two months after the provision of the illustration in the Mortgage Quotation to the first named Complainant, and following a full credit application by both of the Complainants and its assessment by the Provider, the Provider offered a 3 year fixed rate to the Complainants.

The Provider submits that the Complainants were issued a Letter of Approval on **6 August 2004** which was accepted by the Complainants, with the benefit of legal advice, on **31 August 2004**. The Provider submits that the Letter of Approval did not provide that a tracker mortgage would be offered or made available at any stage during the term of the mortgage loan.

The Provider submits that the loan was drawn down on the **11 October 2004** on a 3 year fixed interest rate of 4.15%. The Provider submits that there was *“no specified default rate or contractual interest rate in respect of the period following a fixed rate period.”* The Provider submits that the fixed interest rate period expired on **11 October 2007**. The Provider submits that *“it was provided in General Condition 5 of the Complainants’ contract with the [Provider] that, at the end of a fixed rate period applying to the loan, [the Provider] could change the rate of interest to a variable rate.”*

The Provider submits that approximately 20 days before the expiry of the Complainants’ 3 year fixed rate on **11 October 2007**, the Provider issued the Complainants an automated options letter and form which outlined the available rate options at the time. The Provider submits that it has *“no record of the options form being returned and as a result the Complainants’ interest rate defaulted to a tracker variable rate of 4.80% (ECB + 0.8%)”* on **11 October 2007**. The Provider submits that it was *“not contractually obliged to offer the Complainants a tracker rate in 2007, but did so as an initiative which was taken by the [Provider] in an effort to remain competitive in the marketplace at the time.”*

The Provider submits that the Complainants made an enquiry in **June 2008** which resulted in a rate options form being forwarded to the Complainants outlining the available fixed rates on **13 June 2008**. The Provider submits that it received the signed rate options form, dated **3 July 2008**, and the Provider changed the interest rate from a tracker interest rate

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to a 4 year fixed interest rate as per the Complainants' instructions. The Provider submits that its correspondence "*noted the Complainants should carefully consider their options before opting for a fixed interest rate*" and it indicated that "*on the expiry of the fixed rate period for their mortgage, their loan account would default to a variable rate which may not be a tracker rate.*" The Provider submits that it is satisfied that the rate options form that issued to the Complainants on **13 June 2008** clearly indicated that upon expiry of the fixed rate the Complainants' interest rate would default to a variable rate "*which may or may not be a tracker rate*".

The Provider submits that it ceased offering tracker rates to customers maturing from fixed and discount rate periods in **mid-2009**, with the exception of customers who had a contractual right to be offered a tracker rate. In this regard, the Provider submits that it "*introduces and withdraws loan products and interest rates from time to time. The [Provider] would not be in a position to know in advance what interest rates or lending products it would be offering at a future date to customers maturing from a fixed rate of interest.*"

The Provider submits that prior to the expiry of the 3 year fixed rate period the Complainants contacted the Provider requesting to revert back to the previously held tracker interest rate. The Provider submits it responded on **22 March 2012** confirming that it had stopped offering tracker interest rates as of **mid-2009** and as the Complainants did not have a tracker entitlement in their loan offer it was not applicable to them.

The Provider submits that when the 4 year fixed rate chosen by the Complainants was due to expire in **July 2012** the Provider issued an options letter to the Complainants dated **13 June 2012**. The rate options offered to the Complainants were as follows:

- LTV Variable Rate of 4.69%
- 2 Year Fixed Rate of 7.25%
- 5 Year Fixed Rate of 8.75%

The Provider submits that the tracker variable rate was not included as the Provider was no longer including tracker interest rates in rate option letters being sent to customers who didn't have a contractual entitlement a tracker interest rate.

The Complaints for Adjudication

The complaints for adjudication are;

- (a) The Provider failed to offer the Complainants a tracker interest rate on their mortgage loan when they applied for a mortgage loan between **June and October 2004**.

- (b) The Provider refused to offer the Complainants a tracker interest rate on their mortgage loan account in **July 2012** when the fixed interest rate period expired.

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 do 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 are 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 **7 November 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 Provider failed to offer the Complainants the option of a tracker interest rate when they applied for the mortgage loan between June and October 2004

The Complainants approached the Provider in **June 2004** to take out a mortgage loan with the Provider. It is understood that a meeting took place in or around **June 2004** between the Complainants and the Provider's branch manager. The Provider issued a **Mortgage Quotation** to the Complainants dated **23 June 2004**. This Mortgage Quotation provided an illustration of the gross and net monthly payments, tax relief and APR across different

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interest rate products (fixed and variable) for a loan amount of €240,000 and property price value of €300,000 over terms of 25 and 30 years. The Mortgage Quotation did not provide any illustration for a tracker interest rate.

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being “*effective from the start of business on the 20 July 2004*”.

This document outlines as follows;

“Rates applicable to new Home Loans		Rate	APR
	<i>1 Year Discounted Variable Rate</i>	2.69%	3.5%
	<i>1 Year Discounted Variable Rate (when borrowing <50% of the property value)</i>		
2.49%	3.5%		
	<i>1 Year Fixed Rate</i>	2.74%	3.5%
	<i>2 Year Fixed Rate</i>	3.55%	3.6%
Tracker Mortgage (Home Loan and Residential Investment Property)			
	<i>Loan Amount €150,000 - €249,999</i>	3.40%	3.5%
	<i>Loan Amount of €250,000 or more</i>	3.10%	3.1%”

The Complainants applied for a mortgage of €196,500 in **August 2004**, by way of **Application for Credit**. In the **Mortgage Details** section of the **Application for Credit** the options were Fixed Rate and Variable Rate. The Complainants selected the Fixed Rate option and noted a preference for a period of 3 years.

There is a dispute between the parties as to whether a tracker interest rate was discussed between the parties as a potential option at the time the **Mortgage Quotation** issued to the Complainants in **June 2004** and prior to the commencement of the mortgage loan in **October 2004**. There is no documentary or other evidence available from either party that shows the specific discussions that took place between the Provider and the Complainants about the interest rates that were generally available at that time.

The Provider submits that the **Lending Interest Rate** document shows that tracker interest rates were available at the time. The Provider submits that reason for the “*non-inclusion*” of the tracker interest rate from the Lending Interest Rate document in the **Mortgage Quotation** “*is not fully clear at this point in time, at such a remove from the day on which the quotation was prepared. However it is likely that, following a discussion with the Complainants, the staff member with whom they were dealing understood the products in which they were most interested on the day in question and prepared a quotation on that basis.*”

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The Complainants submit that a “*tracker rate mortgage*” was never discussed with them at the time and if it had been they “*may have choose this option and it would have then been included in our loan agreement which would result in us having a contractual right/entitlement to a tracker rate throughout the term of the mortgage.*”

It may be that tracker interest rates were not discussed by the Provider with the Complainants in **June 2004**. However there is no evidence that the Complainants would have proceeded to make an application for a tracker interest rate loan, had that particular option been discussed. The Complainants themselves acknowledge that they only “*may*” have chosen this option. In this regard, I note that although variable and fixed interest rate options were outlined to the Complainants in the **Mortgage Quotation**, the Complainants elected to apply for a 3 year fixed interest rate mortgage loan in the **Application for Credit** submitted in **August 2004**. Fixed and variable type interest rates are different in nature. An applicant for a mortgage loan would seek a fixed interest rate if that person had a preference for their mortgage repayments to be fixed and certain for a specified period of time. Whereas if an applicant is willing to take the risk of mortgage repayments varying, possible monthly and potentially upwards, such an applicant would elect to apply for variable type loan. A tracker interest rate is a variable type loan.

Furthermore there is no evidence that if an application was submitted by the Complainants seeking the application of a tracker interest rate loan that the application would have resulted in the Provider acceding to that application request and issuing a Letter of Offer on that basis.

If the Complainants wished to pursue the potential option of applying for a tracker interest rate mortgage loan in **2004**, the Complainants could have indicated to the Provider that they had a preference for a tracker rate. The Complainants however did not do so. The Complainants applied for a mortgage loan on a fixed interest rate and that is what the Provider offered the Complainants.

The second issue to be determined is whether the Provider refused to offer the Complainants a tracker interest rate on their mortgage loan account in July 2012, when the fixed interest rate period expired.

In order to ascertain if the Provider did apply an incorrect interest rate to the Complainants’ mortgage at the end of the fixed rate period in **July 2012**, it is necessary to review and set out the relevant provisions of the Complainants’ loan documentation. It is also relevant to set out the interactions with the Complainants in **June 2008** when the rate options form was issued and signed.

The Complainants also take issue that the Provider failed to provide the Complainants with “clear and timely information and warnings” about the consequences of applying a fixed interest rate to their mortgage loan in **June 2008** and that the Provider failed to inform the Complainants about the withdrawal of tracker interest rates from the market in **2009**.

The Letter of Approval dated **6 August 2004** details that the “Loan Type” is a “3 Year Fixed Rate” with an interest rate of 4.15%.

The **Special Conditions** to the Letter of Approval detail as follows;

“Special Conditions

- A. *General Mortgage Loan Approval condition 5 “conditions relating to Fixed Rate loans” applies in this case. The interest rate specified above may vary before the completion of the mortgage.”*

General Condition 5 of the **General Mortgage Loan Approval Conditions** outline;

“CONDITIONS RELATING TO FIXED RATE LOANS

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

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

5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:

- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*
- (b) A sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a*

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Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.

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

The **General Mortgage Loan Approval Conditions** also outline;

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

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **31 August 2004**. I note that the Acceptance of Loan Offer states as follows:

"1. I/we the undersigned accept the within offer on the terms and conditions set out in

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval Condition*
- iii. [the Provider's] Mortgage Conditions.*

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

...

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

It is clear to me that the Letter of Approval envisaged a three year fixed rate of 4.15% and thereafter the Complainants or the Provider could exercise an option for a variable rate. The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the **Letter of Approval** having confirmed that it had been explained to them by their solicitor in **August 2004**. If the Complainants were not happy with the terms of the Letter of Offer, including the type of interest rate, the Complainants could have decided not to accept the offer made by the Provider. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the expiry of the three year fixed interest rate period in **October 2007**.

The Provider states that it issued an **options letter and form** to the Complainants prior to the expiry of the three year fixed rate period in **October 2007**. The Provider has not

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furnished a copy of these documents in evidence. The Provider has submitted a copy of a "template letter issued in or around 2007/2008".

It is disappointing that the Provider has failed to furnish a copy of the options letter and form that issued to the Complainants. Furthermore it is disappointing that the Provider has failed to offer any explanation to this office as to why it does not hold a copy of this documentation in its records.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from 01 July 2007) 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;*
- 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."

The Complainants' mortgage loan was incepted for a term of **30 years** commencing from **October 2004** and the options letter and form purportedly issued in **October 2007**. It is understood that the mortgage account remains presently active with the Provider. As such it appears to me that the Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to this office, in the absence of any explanation, why this documentation has not been held by the Provider.

In any event, it is not in dispute between the parties that an **options letter** issued to the Complainants in or around **October 2007**, in the same form as the template letter provided

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in evidence to this office. It is understood that the default rate outlined was a tracker variable rate of ECB + 0.80%.

The template letter which has been supplied in evidence details as follows;

*"I am writing to remind you that the current rate option on your mortgage account will end on **DATE**.*

Please find attached the current options available to you, including our competitive tracker variable rate. In calculating the new tracker rate we use the original loan amount to calculate your balance band and we use your current balance and the original valuation of your home to calculate the loan to value.

*If we do not receive a written instruction from you in relation to the above on or before the **DATE**, we will automatically default your loan to the tracker variable rate."*

It is understood that as the Complainants did not respond to the letter that issued to them and the mortgage loan "defaulted" to the tracker variable rate of ECB + 0.80% (4.80%) on **11 October 2007**. The Complainants' mortgage loan documentation did not provide for a default rate. **General Condition 5.4** provided that either party would have the "option" of converting the loan to a variable rate loan at the time. The Complainants had no contractual right to a tracker interest rate on their mortgage loan and the Provider had no obligation to apply a tracker interest rate to the mortgage loan at that time. It is understood that the Provider applied the tracker interest rate as the "default rate", as a matter of policy at the time.

The Provider has informed this office that it does not hold an individual policy document in relation to its tracker rate offering, it has summarised its policy as follows;

"...[in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period. Between [...] 2006 and [...] 2006 while the options letter included the offer of a tracker interest rate, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, in the absence of a

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customer selection the tracker interest rate was applied to the mortgage as the default interest rate.

While the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008 (it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.

After [mid] 2009, the Bank continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to same."

It appears that the Provider acted in accordance with that policy in **October 2007**, in applying the tracker interest rate of ECB + 0.80% as a "default rate" to the Complainants' mortgage loan.

The Complainants contacted the Provider in **June 2008** with respect to applying a fixed interest rate to their mortgage loan. On **13 June 2008**, the Provider issued a letter to the Complainants, which attached a list of fixed interest rate options and outlined as follows;

"We would strongly recommend that you consider your options carefully before choosing to fix your mortgage. If you are currently on a Tracker Rate Mortgage please note that our current margin commitment to you will expire if you convert to a fixed rate. At the end of the Fixed Rate period your mortgage will default to a variable rate which may not be a tracker rate. Your new rate could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan."

The **rate options form** included with the letter listed the following rates:

<i>"Current Rate</i>	<i>4.80%</i>	<i>€1,123.88</i>
<i>2 year fixed rate Mortgage currently</i>	<i>5.70%</i>	<i>€1,222.58</i>
<i>3 year fixed rate Mortgage currently</i>	<i>5.55%</i>	<i>€1,205.81</i>
<i>4 year fixed rate Mortgage currently</i>	<i>5.50%</i>	<i>€1,200.25</i>
<i>5 year fixed rate Mortgage currently</i>	<i>5.50%</i>	<i>€1,200.25</i>
<i>7 year fixed rate Mortgage currently</i>	<i>5.60%</i>	<i>€1,211.39</i>
<i>10 year fixed rate Mortgage currently</i>	<i>5.70%</i>	<i>€1,222.58"</i>

The rate options form further detailed, as follows;

"If you choose a fixed rate, the standard fixed rate conditions will apply."

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The Complainants' mortgage loan was on the tracker variable interest rate at the time and the Complainants elected to apply the 4 year fixed rate of 5.5%, by signing the **rate options form** on **27 June 2008**. I am of the view that the warning contained in the Provider's letter of **13 June 2008**, was sufficiently clear to warn the Complainants firstly, that the "*current margin commitment*" of 0.80% would expire if the Complainants elected to apply a fixed interest rate and secondly, that the mortgage loan would default to "*variable rate which may not be a tracker rate*". The **rate options form** clearly stated that if the Complainants chose a fixed rate that the standard fixed rate conditions would apply. These fixed rate conditions were clearly the fixed rate conditions that were contained in **General Condition 5** of the **General Mortgage Loan Approval Conditions**.

The Complainants were advised in the letter to consider their "*options carefully*". If it was the case that the Complainants were unsure about their underlying contractual entitlements and the effect of applying a fixed interest rate to the mortgage loan, the Complainants could have sought advice from an independent third party in advance of signing the rate options form in **June 2008**. However the Complainants did not do so.

The Complainants were not obliged to alter the interest rate at the time. However, they elected to apply a four year fixed interest rate period to the mortgage loan by signing the **rate options form**. In doing so the Complainants were on full notice that the tracker rate of ECB + 0.80% that had been applied as a "*default rate*" from **October 2007** no longer applied to the Complainants' mortgage loan from **June 2008** and would not be available in the future. The Complainants were also on notice that the "*default rate*" might not be a tracker interest rate in the future.

The Complainants have submitted that if the Provider had "*notified*" them that "*tracker rate options were due to be withdrawn from the market*", it would have given them the "*option to break out of the fixed interest rate early and switch back to a tracker interest rate before it was withdrawn from the market.*"

Throughout the period that a fixed interest rate applied to the Complainants' mortgage loan (from **June 2008**) to the point in time that the Provider withdrew its tracker interest rate offering in **mid-2009**, there was no obligation on the Provider to contact the Complainants at any stage to offer a tracker interest rate to the Complainants on their mortgage loan. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainants on their mortgage loan account. Nonetheless, if the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainants could have contacted the Provider during this time. In these circumstances the Complainants would have been subject to a breakage fee under **General Condition 5.3** in the **General Mortgage Loan**

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Approval Conditions. The **General Mortgage Loan Approval Conditions** do not provide for a contractual entitlement to any specific rate type in the event of a break in a fixed interest rate period. As such, it would have been at the Provider's commercial discretion as to whether to offer the Complainants a tracker interest rate. It would have been entirely within the Provider's rights not to accede to a request to apply a tracker interest rate if it was made by the Complainants. The Complainants however did not contact the Provider at any time while the Provider was offering tracker interest rates up to **mid-2009** to seek to apply a tracker interest rate to the mortgage loan.

The Complainants contacted the Provider by letter dated **06 March 2012** and outlined "*On cessation of our fixed rate in July, 2012, I wish to request the option of returning to our previous tracker rate.*" The Provider wrote to the Complainants by letter dated **22 March 2012**, and detailed that the Provider had "*ceased offering a tracker rate to existing business*" as of **mid-2009**, "*unless the appropriate tracker condition was evident on their loan agreement*". The Provider advised that it had "*reviewed your loan offer and can confirm that you do not have a tracker condition; therefore [the Provider] would not be in a position to offer you a tracker rate at this time.*"

The Provider then wrote to the Complainants on **13 June 2012**, in relation to the expiry of the fixed interest rate period on **03 July 2012**, and offered the Complainants fixed and variable interest rate options. A tracker interest rate was not included in the Provider's offering to the Complainants at this time. The Complainants did not select a rate from the options form and the interest rate was amended to a variable interest rate of 4.69% on **03 July 2012**.

The Provider was not under any obligation to offer the Complainants a tracker interest rate at the end of the fixed interest rate period in **July 2012**. The Complainants' mortgage loan documentation did not provide for a tracker interest rate entitlement at the end of the fixed interest rate period. **General Condition 5.4** in the **General Mortgage Loan Approval Conditions** provided that either party would have the "*option*" of converting the loan to a variable rate loan at the time. There was no contractual right or obligation on the Provider to apply a tracker interest rate to the mortgage loan at that time.

The Complainants have submitted that their "*entitlement*" to a tracker interest rate changed during the term of the loan, by virtue of the fact that the mortgage loan defaulted to a tracker interest rate. I do not accept this argument. The fact that the mortgage loan "*defaulted*" to a tracker interest of ECB + 0.80% in **October 2007**, did not have the effect of establishing a default rate with respect to the Complainants' mortgage loan, nor did it change the underlying contractual position with respect to interest rate entitlements on the Complainants' mortgage loan at the end of any fixed interest rate period.

The Complainants could have remained on the tracker interest rate of ECB + 0.80%, however in **July 2008**, they chose to change the interest rate to a fixed interest rate. When the Complainants elected to apply the fixed interest rate in **July 2008** they had been advised by the Provider to consider their options “*carefully*”, and that if a fixed interest rate was applied to the mortgage loan that the margin commitment of 0.80% would expire and at the end of the fixed interest rate the mortgage loan would default to a variable rate that may not be a tracker interest rate.

For the reasons set out above, I do not propose to uphold the complaint.

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**

29 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.**