



<u>Decision Ref:</u>	2019-0429
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<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 Complainant with the Provider.

The loan amount was €95,000 and the term was 20 years. The Letter of Approval which was signed on **30 April 2005** outlined the Loan Type as “*1 Year Fixed Rate Home Loan*”. This mortgage loan was redeemed by the Complainant on **28 September 2017**.

The Complainant’s Case

The Complainant submits that she took the option of a “*5 yr standard variable rate fixed @ 4.99% on 11/8/2006*” on her mortgage loan. She submits that “*as it turned out I was paying over the odds for this period but endured it as this was the gamble I took on. I was eagerly looking forward to August 2011 when my fixed term would end.*”

The Complainant submits that on the expiry of that term on **15 August 2011** that she was only offered 3 options: LTV variable rate at 5.80%, 2 year fixed rate at 7.25% or 5 year fixed rate at 8.75%. She outlines that these rates were “*way above the current rate of interest at the time*” and “*there was no option to transfer to a tracker rate offered*”.

The Complainant states the mortgage loan account moved to the variable rate of 5.80%, which was *“nearly 1% higher than my fixed rate”*. The Complainant outlines that she queried the high variable interest rate on her mortgage loan with the Provider. She submits that the Provider’s response to her query was that *“There was nothing that could be done”*. The Complainant says that she could not *“change to another [Provider] as they were not taking on people in my situation even though their rates were much lower”*. She outlines that it was a well-known fact in **July 2011** that the Provider’s interest rates were higher than other Providers, and this was evident from a letter that she received from the Provider’s CEO in **May 2012** which stated that the Provider had not preformed to an acceptable standard in *“recent years”* and that *“Standard Variable Rate was significantly out of line with the rest of the Market”*.

The Complainant submits that she was advised that the Provider had ceased offering tracker rates to existing customers on the expiry of their fixed interest rate periods since **2009** and that *“she felt aggrieved”* by this. The Complainant outlines that she got a letter explaining the situation and offering help if she was in financial difficulties *“but thankfully [she] wasn’t”*. The Complainant says she was *“treated badly”* and *“taken advantage of”* as a *“loyal customer”* of the Provider.

The Complainant is seeking that she be *“refunded some of the mortgage repayments [she] made”*.

The Provider’s Case

The Provider submits that it issued a Letter of Approval to the Complainant on **12 April 2005**. It submits that the loan offer was for €95,000 repayable over a period of 20 years. It submits that there was an initial fixed rate of 2.74% applicable for a period of one year.

The Provider outlines that the Acceptance of Loan Offer was signed by the Complainant on **30 April 2005** and returned to the Provider by the Complainant’s solicitor with her confirmation that the terms and conditions had been explained to her by her solicitor. It submits that the loan was drawn down on **12 August 2005**.

The Provider states that the Loan Offer did not contain a contractual entitlement to a tracker rate at the end of the initial fixed rate period, or at any subsequent time during the term of the loan, but provided that, at the end of a fixed rate period, the Provider or the Complainant could select a variable rate to be applied. The Provider relies on **Special Condition A** of the Complainant’s **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** to support this. The Provider outlines that the General Conditions also provide that *“If the loan is a variable rate the following applies; “the payment rates on this housing loan may be adjusted by the lender from time to time”*.

The Provider outlines that the fixed interest rate period of one year was due to expire on **12 August 2006**. The Provider issued an interest rate options letter and form to the Complainant prior to the maturity date which detailed the rate options available for selection by the Complainant. It submits that the letter also explained that if the Complainant did not select a rate prior to 12 August 2006, the interest rate on the loan would be changed to a variable rate. The Provider outlines that while there was no contractual entitlement to a tracker rate in the Complainant's contract with the Provider, the rate options provided by the Provider to the Complainant in **July 2006** included a tracker rate of ECB + 1.35%.

The Provider asserts that the inclusion of the tracker rate in the options provided to the Complainant in August 2006 arose because tracker rates for new business had been launched by the Provider in **early 2004**, and in 2006 the Provider made a commercial decision that, effective from **mid-2006**, a tracker interest rate would be one of the options listed in rate options issued to existing mortgage customers of the Provider prior to expiry of the fixed rate and discount rate periods. It submits that the Provider continued this until **mid-2009**, and after that date, customers who did not have a contractual entitlement to be offered a tracker interest rate at maturity did not receive such an option.

The Provider submits that the initial fixed rate period matured on the mortgage account on **11 August 2006** and the interest rate on the mortgage account was changed by default to a variable rate of 4.35% in accordance with the mortgage contract. The Complainant, in the intervening period returned a signed options form dated **10 August 2006** indicating that she wished to opt for a five year fixed rate of 4.99%. It submits that the form was received by the Provider on **15 August 2006** and the fixed rate was duly applied on that date.

The Provider states that on **26 July 2011**, it issued an options letter and form to the Complainant which reminded her that the fixed rate period was due to expire on **15 August 2011**. It submits that the letter and form also described the various interest rates available for application to the account on 15 August 2011 and explained which rate would be applied by the Provider if the Complainant did not make a selection. The Provider submits that it has no record of receiving a signed options form from the Complainant and the interest rate on the mortgage account changed to the variable rate of 5.80% on 15 August 2011. The Provider submits that the mortgage account remained on a variable rate until it was redeemed in full on **28 September 2017**.

The Provider submits that, following a commercial decision, it ceased offering tracker rates to new business customers as of **mid-2008**, and to customers maturing from fixed rates and discount rates as of **mid-2009** unless the customer had a contractual entitlement to a

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tracker rate. It submits that as the Complainant did not have a contractual entitlement to a tracker rate at any point during the term of her loan, the Provider did not offer a tracker rate as an option on the interest rate options form in **July 2011**.

The Provider submits that the Complainant has not furnished any comparative details in respect of her assertion that the rate options offered to her in **2011** were “*very expensive in comparison to the market rates at that time.*” and it does not accept that this was so. The Provider outlines that it sets interest rates at its discretion and such decisions are commercial in nature. It submits that its interest rates change over time and are based on commercial decisions, made by the Provider, which are depending on market conditions taking into account a number of factors, such as, wholesale lending and borrowing rates, interest rates paid on deposits, and the Provider’s competitive position.

The Provider submits that it is satisfied that the rates applied to the mortgage loan account were correct.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant the option of a tracker interest rate on her mortgage loan account on the expiry of the five year fixed interest rate period in **August 2011**.

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.

A Preliminary Decision was issued to the parties on **25 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

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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 Provider failed to offer the Complainant the option of a tracker interest rate on her mortgage loan account on the expiry of the five year fixed interest rate period in **August 2011**.

The Letter of Approval dated **12 April 2005** details as follows;

<i>"Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 200,000.00</i>
<i>Loan Amount:</i>	<i>EUR 95,000.00</i>
<i>Interest Rate:</i>	<i>2.74%</i>
<i>Term:</i>	<i>20 year(s)"</i>

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 DATE OF COMPLETION OF THE MORTGAGE."*

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

- "5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified in the Letter of Approval and thereafter shall 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:*

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- (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 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 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 Complainant and witnessed by a solicitor on **30 April 2005**. 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 one year fixed rate of 2.74% and thereafter the option of a variable rate. The variable rate, in the Complainant's 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.

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The Complainant accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to her by her solicitor.

On the expiry of the initial fixed rate period in **August 2006**, the Complainant was issued with a letter and a rate options form. I am disappointed to note that a copy of the letter which issued to the Complainant prior to the expiry of the initial fixed interest rate period, has not been furnished to this office. However the rate options form has been submitted in evidence.

The rate options detailed as follows;

“Current options available:

You may only select one option.

Account Number: [XXX]

			<i>*Monthly repayment*</i>
			<i>EUR</i>
<i>Tracker variable rate</i>	<i>- Currently:</i>	<i>4.10%</i>	<i>388.71</i>
<i>(ECB + maximum 1.3500%)*</i>			
<i>Standard variable rate</i>	<i>- Currently:</i>	<i>4.10%</i>	<i>388.71</i>
<i>1 year fixed rate</i>	<i>- Currently:</i>	<i>4.45%</i>	<i>398.64</i>
<i>2 year fixed rate</i>	<i>- Currently:</i>	<i>4.65%</i>	<i>404.38</i>
<i>3 year fixed rate</i>	<i>- Currently:</i>	<i>4.85%</i>	<i>410.18</i>
<i>5 year fixed rate</i>	<i>- Currently:</i>	<i>4.99%</i>	<i>414.27</i>
<i>7 year fixed rate</i>	<i>- Currently:</i>	<i>5.15%</i>	<i>418.97</i>
<i>10 year fixed rate</i>	<i>- Currently:</i>	<i>5.25%</i>	<i>421.93</i>

...

- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).*
- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 1.3500% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.**

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading **“Fixed Rate Loans”**. Under the heading **“Tracker Mortgage Loans”** the reverse of the rate options form contained the following;

“1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the

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amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.

4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”

The Complainant chose the 5 year fixed interest rate option of 4.99% and signed the options form on **10 August 2006**. This options form was stamped received by the Provider on **11 August 2006**.

I note that on the expiry of the one year fixed interest rate period on **11 August 2006** the Complainant's mortgage loan account was automatically defaulted to the Provider's standard variable rate of 4.35%. However, the five year fixed interest rate was then put into effect by the Provider on **15 August 2006**.

Having considered the mortgage loan documentation, it is my view that the Complainant did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period which applied from **August 2005** to **August 2006**. It appears that the Provider, in line with its own policy at the time, offered the Complainant the option of a tracker interest rate of 4.10% (ECB + 1.35%) on the mortgage loan. The expiry of the fixed interest rate period in **August 2006** also pre-dated the introduction of the Provider's policy of the tracker interest rate becoming the default rate at the end of a fixed interest rate period, as such the Complainant's mortgage loan correctly defaulted to the variable interest rate between **11 August 2006** and **15 August 2006**. The Provider 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

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absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [...] 2006 until [...] 2009, in the absence of a 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 offerings 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.”

The Complainant of her own volition opted not to apply a tracker rate of interest and instead applied the 5 year fixed interest rate of 4.99% to her mortgage loan in **August 2006**.

The Provider wrote to the Complainant on **26 July 2011** to inform the Complainant that the fixed interest rate option would expire on **15 August 2011**. The following interest rate options were outlined to the Complainant at the time;

<i>“Option</i>	<i>Monthly Repayment – (EUR)</i>
<i>LTV Variable rate CURRENTLY 5.80%</i>	<i>761.78</i>
<i>2 Year Fixed Rate CURRENTLY 7.25%</i>	<i>822.74</i>
<i>5 Year Fixed Rate CURRENTLY 8.75%</i>	<i>888.80”</i>

Having considered the mortgage loan documentation, it is my view that that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of any fixed rate period, including the end of the fixed rate period which applied from **August 2006** to **August 2011**. The fact that the Provider had previously offered the Complainant a tracker interest rate on her mortgage loan as a matter of policy did not oblige the Provider to offer a tracker interest rate at a later point in time. By August 2011, the Provider was no longer offering tracker interest rates at the end of fixed interest rate periods, and the Complainant did not have a contractual entitlement to be offered a tracker interest rate.

The Complainant did not complete the interest rate options form at the time and the loan defaulted to the LTV Variable rate of 5.80% on **15 August 2011**.

The CEO of the Provider wrote to the Complainant on **9 May 2012**. I note that this letter detailed as follows;

“We will be competitive with our rates.

We have a Standard Variable Rate (SVR) that is significantly out of line with the rest of the market. From 14th May we are reducing the home loan SVR and Loan to Value (LTV) Variable Rate by 0.5% to 4.69%...We will continue to review all of our rates at regular intervals to make them as competitive as possible”.

The Complainant responded to this correspondence by way of letter dated **14 June 2012**. In this letter she detailed as follows;

“In 2008 I took out a mortgage and selected a fixed rate for 4 years @ 4.99% interest. As it turned out I was paying over the odds for this period but endured it as this was the gamble I took on. I was eagerly looking forward to August 2011 when my fixed term would end.

...

To my horror my new rate was set at 5.8%. Nearly 1% higher than my fixed rate.

...

I believe I am still paying over 1% too much at least in comparison to people with Mortgages in other Banks.”

The Provider responded to the Complainant by way of letter dated **20 June 2012**, as follows;

“Variable Interest Rates on Mortgages charged by [the Provider] are dependent on the cost of funding to the Bank. We source funds from a variety of places, including a limited level of funding from the ECB, but also from customers’ deposits and the wholesale money market. Rates on customers’ deposits and the wholesale market are considerably higher than ECB rates. While ECB rates are currently low, interest rates continue to remain high in the wholesale money markets, retail and corporate deposit markets.

Home Loan rates are lower than Investment property rates, mainly because of the lower risk attached to the Family Home

Many commentators have made reference to the lower rates being charged by some other banks in this market and questioned why our rates are higher. While it would not be appropriate for me to comment on the rates set by other Banks, I do note that these rates are often below the interest rates offered to their deposit customers and I suggest therefore that they are having similar issues to us in terms

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of the broken relationship between the cost of funds and the rates they charge. In time, I suggest they too will have to address this issue”.

The Provider submits that the purpose of the letter issued to the Complainant in May 2012 was to inform the Complainant and other customers, of the Provider’s position at the time and of any updates and changes that were taking place.

The Complainant submits that the interest rate options made available to her in 2011 were “way above current rates of interest at the time” and as such, feels she was “treated badly” by the Provider.

As set out above, it is clear that the Letter of Approval provided for a contractual entitlement to a variable rate, which could be adjusted by the Provider from time to time. The Provider was entitled to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if she was dissatisfied with the terms and conditions of that loan. I note the Provider did offer the Complainant the option of a tracker interest rate of ECB + 1.35% in **August 2006**, but the Complainant did not accept the Provider’s offer to apply that interest rate at that time. There was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate on the mortgage loan account at the end of any fixed rate period, including the end of the five year fixed interest rate period in **August 2011**. The mortgage loan account defaulted to the LTV variable rate of 5.80% in accordance with the terms of the loan. It was within the Provider’s commercial discretion to set that variable interest rate at the time. The interest rates offered by other financial service providers to their customers, are irrelevant, insofar as they relate to the interest rates offered to the Complainant by the Provider.

For the reasons set out above, I do not 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**

17 December 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.