



<u>Decision Ref:</u>	2020-0003
<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>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant holds two mortgage loan sub accounts with the Provider. This complaint relates to the “*top up*” mortgage loan sub account held by the Complainant with the Provider. Both mortgage loan sub accounts are secured on the Complainant’s principal private residence.

The Complainant’s Case

The Complainant holds a mortgage loan account with the Provider, which is split into two “sub” accounts, namely:

1. Sub account ending **9401** which is the primary mortgage loan account; and
2. Sub account ending **9201** which is the “*top up*” mortgage loan account.

The Complainant accepted a mortgage loan offer from the Provider on **21 October 2004** for sub account ending **9401**. The interest rate applicable was fixed for 24 months on a discounted variable rate. The discounted variable interest period was due to expire in **October 2006**.

The Complainant accepted a “top up” mortgage loan offer from the Provider on **02 March 2006** for sub account ending **9201**. The interest rate applicable was fixed for 24 months at 3.94%. The Complainant submits that he was not offered a tracker interest rate on the expiry of the 24 month fixed interest rate period in **March 2008**. In March 2008, sub account ending **9201** rolled on to the Provider’s standard variable interest rate.

In **2011**, the Provider identified that an error had occurred in respect of sub account ending **9401**. The Provider had failed to remove the discounted variable rate on it’s expiry in **November 2006**. In 2011 the Provider offered the Complainant the range of interest rate options which would have been offered to him in November 2006. These options included a tracker interest rate of ECB +1.15%.

The Complainant submits that the error in respect of sub account ending **9401** prompted him to enquire about the status of sub account ending **9201**, several years ago, whilst on the telephone to the Provider, although he did not lodge an official complaint at that time.

The Complainant submits that in 2015, the publicity regarding tracker interest rates caused him to lodge an official complaint about the fact that a tracker interest rate was not applied to mortgage loan sub account ending **9201**. On **18 August 2015**, the Provider wrote to the Complainant confirming that there was no contractual entitlement for sub account ending **9201** to roll on to a tracker interest rate on the expiry of the fixed rate period. The Provider offered the Complainant a cheque for €250 as a goodwill gesture for the time taken to deal with his complaint.

The Complainant submits that he believes he ought to have been offered a tracker interest rate for sub account ending **9201** on the expiry of the fixed interest rate period in **March 2008**, as he was entitled to a tracker interest rate for the primary mortgage loan sub account ending **9401**.

The conduct complained of is that the Provider failed to offer the Complainant a tracker rate of interest on his mortgage sub account ending **9201** on the expiry of the fixed interest rate period in **2008**.

The Complainant is seeking that a tracker interest rate be applied to his mortgage loan account ending **9201** from **March 2008**.

The Provider’s Case

The Provider submits that the Complainant’s two sub accounts “*were issued to the customer on different terms and conditions*” and that each sub account “*followed a different mortgage journey*”.

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With respect to sub account ending **9201**, the Provider submits that while tracker interest rate products were available at the time of the Complainant's mortgage loan application in **2006**, the mortgage loan offer clearly confirmed that the Complainant's sub account would issue on an initial fixed rate period and did not specify that a tracker interest rate would be available to the Complainant at a future date.

The Provider submits that the Complainant applied for the mortgage loan by completing a "*Top-Up Application Form*" which he signed on **27 February 2006**. The Provider submits that page 1 of the "*Top-Up Application Form*", contained options of products available to the Complainant, and the Complainant could select which one he wished to apply for. The options included the option for a "*Standard Top-Up mortgage*" as well as a "*Tracker Mortgage Top-Up*". The Provider submits the Complainant chose to apply for a Standard Top-Up mortgage and this was "*...his personal preference as to the type of mortgage he required*".

In section 6 of the *Top Up Application Form*, the Complainant selected the type of interest to be applied to sub account ending **9201** and the Complainant selected an interest rate of 3.94% fixed for a period of two years. The Provider submits that the Complainant signed and accepted the Top-Up Loan Offer on **02 March 2006**.

The Provider submits that the Complainant was not entitled to a tracker interest rate on sub account ending **9201** upon the expiry of the fixed interest rate period in **March 2008**, as the mortgage loan offer clearly confirmed that the sub account would roll to the Provider's standard variable interest rate. The Provider submits that the mortgage loan offer contained no reference to a tracker interest rate at a future date and such a reference would have been necessary for a tracker interest rate to apply.

The Provider submits that it provided information to customers, on request, in relation to the various interest rate options that may have been available at the time of the request. The Provider submits that the Complainant did not enquire or request information, in or around **March 2008**, about applying a tracker interest rate to sub account ending **9201**. This was despite being issued with a Product Expiry letter in or around March 2008 which stated he should contact the Provider if he wished to discuss "*the availability of tracker variable rate options*". The Provider submits that they did not received a response to the Product Expiry letter, and therefore sub account ending **9201** rolled on to the standard variable rate of interest.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant the option of a tracker interest rate for sub account ending **9201** on the expiry of the fixed rate interest period in **March 2008**.

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 15 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. Email from the Complainant to this office on 21 October 2019;
2. Letter from the Provider to this office dated 15 November 2019;
3. Email from the Complainant to this office on 28 November 2019; and

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4. Letter from the Provider to this office dated 12 December 2019.

Having considered these additional submissions and all of the submissions and evidence furnished to this office, I set out below my final determination.

The issue to be determined is whether the Complainant should have been offered a tracker interest rate on his sub account ending **9201** on the expiry of the fixed interest period in or around **March 2008**.

In order to ascertain if the Provider did incorrectly fail to offer the Complainant a tracker interest rate on his sub account ending **9201** it is relevant to consider the interactions with the Complainant during both the mortgage loan application process in 2006 and also when the fixed interest rate period on sub account ending **9201** expired in March 2008. I will also set out certain details with respect to the Complainant's mortgage sub account **9401**, which is not the subject of this complaint.

Mortgage loan sub account ending 9201

I note that the Complainant applied for a "top up" mortgage for €65,000 by way of application form entitled "Top-Up Application Form". The Application Form, which has been submitted in evidence, was signed by the Complainant on **27 February 2006**.

On page 1 of the **Application Form**, just above Section 1: "Personal Details", the Complainant, in response to a list of three types of "top up" mortgages, selected the "Standard Top Up" option. I note that the two other options available were: "Current Account Mortgage Top Up" and "Tracker Mortgage Top Up".

Under **Section 6: Details of Loan Required**, of the Application Form the Complainant, in response to "Type of New Loan" has selected "Fixed Rate" and for a term of 2 years. I note that the other option available was: Variable.

It appears that the Provider issued the **Top-Up Loan Offer Letter** dated **02 March 2006** to the Complainant. The Letter of Offer outlined that the loan type as a "[Product name] Top Up Loan" with the interest type as "fixed for 24 months".

I further note that **Condition 5 and 6** of the **Terms and Conditions** details as follows;

"5. INTEREST – FIXED RATE LOAN

The rate of interest applicable to this loan will be fixed at the rate and for the period as specified in the loan offer. The applicant(s) on the expiry of the fixed term, may

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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, if available, the applicant(s) fail to exercise the option, the **interest rate applicable will be the rate of interest which may be increased or reduced by the Company from time to time and at any time (the variable rate of interest)** and in this respect, the decision of the company will be final and conclusively binding on the applicant(s).*

6. INTEREST VARIATION – VARIABLE RATE LOAN

*The rate of interest **may be varied by us during the currency of the loan by reference to prevailing market rates or commercial criteria.** Notice of changes will be advised in our Branches or in the National Press or by Notice to you. Changes in the rate of interest before this Agreement becomes effective will not affect the Rate of Interest payable until Notice of change is given to you. We may vary the Amount of Each instalment or the number of Repayment instalments to take into account variations in the Rate of Interest and any interest variations resulting from the date of draw down.” **[my emphasis]***

The Complainant signed this Letter of Offer, undated, on the following terms;

*“I/We have read and understand the terms and conditions set out above and overleaf, and **HEREBY ACCEPT** the loan offered on those terms and conditions and agree to be bound by them.”*

It is clear from the above that, on expiry of the fixed interest rate period on sub account ending **9201**, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainant. The variable interest rate in this case was clearly set to be a rate, which may be increased or decreased by the Provider, at any time, by reference to prevailing market rates or commercial criteria. It did not refer to a tracker or to any link with the ECB rate.

The Complainant accepted the Letter of Offer, having confirmed that he understood the terms and conditions of that offer. If the Complainant was not happy with the terms of the Letter of Offer, including the type of interest rate, the Complainant could have decided not to accept the offer made by the Provider. The loan type offered by the Provider was the loan type that the Complainant had selected in the application form.

I note the Provider submits that it issued a letter, known as a “*Product Expiry Letter*”, to the Complainant in relation to the expiry of the fixed interest rate period in **March 2008**.

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With respect to the “*Product Expiry Letter*”, applicable to the Complainant’s mortgage loan, the Provider submits as follows;

“We do not have a copy of the Product Expiry Letter that the customer received in March 2008. 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. For information, we attach a template of the Product Expiry Letter (Appendix C) which was in use at the time i.e. March 2008.

The Bank did not receive a response from the customer in relation to this letter and as such his mortgage sub-account rolled onto the Standard Variable Rate (SVR) on 02 March 2008.”

It is disappointing that the Provider did not keep such an important document in respect of the Complainant’s sub account ending **9201**. In this regard, I note that the Provider has indicated that data retention “*may*” be the reason for the Provider not holding this document. 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 that that legislative regime. However, it appears to me that instruction letters that issue by the Provider to a mortgage holder during the term of a loan and 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;*

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- 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.”

In this regard, mortgage sub account ending **9201** was inceptioned for a term of **23 years** commencing from **March 2006** and the Product Expiry Letter purportedly issued in **March 2008**. It is understood that mortgage sub account ending **9201** remains presently active with the Provider. As such, it appears to me that with respect to the Complainant’s mortgage loan account that the Provider has failed to maintain consumer records in compliance with the Consumer Protection Code.

I note from the Provider’s submissions, there appears to be some discrepancy as to when the Complainant purportedly received the Product Expiry Letter. The Provider submits that the Complainant received the Product Expiry Letter in **March 2008**. It does not seem plausible that the Product Expiry Letter issued to the Complainant at some point in **March 2008**, given the Provider goes on to submit that the sub account ending **9201** rolled on to the Provider’s standard variable rate on **02 March 2008** on the basis that the Complainant did not submit a response to the Product Expiry letter.

The template Product Expiry Letter that has been submitted in evidence details as follows;

“On the [] the current fixed rate of []% on your mortgage will expire and you may at that time choose to transfer your mortgage to either a variable rate or a new fixed rate term. The choice is yours.

The fixed rate options available at present are as follows;

...

If you decide that a fixed rate option is best for you, simply complete the enclosed Letter of Authority and return it to us.

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We will then transfer your existing Mortgage to the option chosen. Should you have any specific queries in relation to refixing your mortgage, or the availability of tracker variable rate options please contact us at...

If you choose a variable rate you do not need to contact us as your loan will automatically revert to a variable rate. The current rate is []% and the total monthly repayment(s) is outlined in the payment plan below..."

I note that following the receipt of the Preliminary Decision, the Complainant made an additional submission on **21 October 2019** stating that he has *"absolutely no recollection of ever receiving the Product Expiry letter in or around March 2008"*. The Provider then made further submissions dated **15 November 2019** contending that *"despite extensive searches we have not been able to locate a copy of the letter in question"* and as such submitted *"a template of the Product Expiry Letter which was in use at that time"*. The Provider has also submitted that despite the Complainant's *"contention of having not received the Product Expiry Letter in March 2008...the customer was put on notice as to what would transpire on the expiry of his fixed interest rate period when he agreed to the terms and conditions as set out in his signed Loan Offer dated 02 March 2006."* The Provider goes on to submit that the Complainant does not have an entitlement to a tracker interest rate as per the terms and conditions in his Loan Offer. The Complainant made further submissions on **28 November 2019** stating that the Provider *"seem to be basing their case"* on a letter which the Complainant submits he did not receive.

In circumstances where the Complainant disputes receipt of a Product Expiry Letter in March 2008, the Provider does not hold a copy of the letter which was purportedly sent to the Complainant and the Provider has not submitted any evidence to support its submission that a letter did issue in the same form as the template Product Expiry Letter, I am proceeding on the basis that a Product Expiry Letter was not issued to the Complainant in respect of his sub account ending **9201** in or around **March 2008**.

I have considered the Terms and Conditions of the Complainant's mortgage sub account ending **9201** and **Condition 5** of the **Terms and Conditions** clearly sets out what would happen with respect to the interest rate on the mortgage loan sub account on the expiry of the fixed interest rate period in **March 2008**. That is, the Complainant may choose a further fixed rate, if such an option is available. As referenced above, it is unclear whether or not the Provider made fixed rate options available to the Complainant at that time and so I am proceeding on the basis that it did not.

Condition 5 goes on to say where such an option is not made available, or in circumstances where the Complainant failed to exercise the option, the applicable rate would be the Provider's variable rate. It is clear that under the terms and conditions of mortgage sub

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account ending **9201**, there was no contractual obligation on the Provider to offer the Complainant a tracker interest rate on sub account ending **9201** when the fixed interest rate period expired.

Mortgage loan sub account ending 9401

The Loan Offer on the Complainant's mortgage sub account ending **9401** details as follows;

*“Loan Type: Standard Annuity
Loan Amount: €60,000
Interest Type: 2 YR DIS VARIABLE”*

The Special Conditions of that mortgage loan outlined, *“The interest rate will revert to the appropriate variable interest rate 24 months after the issue of the loan cheque”*.

The mortgage sub account ending **9401** was drawn down by the Complainant in November 2004.

The Provider wrote to the Complainant by letter dated **07 July 2011** and outlined as follows;

“We are writing to you to advise you that following an internal review we have identified an error in relation to your mortgage account.

On 04/11/2004 a discounted variable rate of 4.55% was applied to your mortgage. On 03/11/2006, you were due to roll to your default rate which was our Standard Variable Rate. However, due to an internal processing error, your account remained on this discounted rate.

You have been paying a lower rate of interest since 03/11/2006 and have benefitted financially as a result. As the error was our fault, we will not be seeking reimbursement for the funds you have benefitted from during this period.

The Provider wrote to the Complainant again by letter dated **02 November 2011** and outlined as follows;

“Further to our conversation, we recently wrote to you informing you that following an internal review we identified an error in relation to your mortgage account. To help rectify this you were given a suite of products and rates to choose from. On the 09/08/2011 we confirmed to you in writing that your account had now been transferred to the Standard Variable Rate.

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Since our last contact, we have reviewed the range of products that was offered to you, the Bank has decided that the European Central Bank Rate Tracker (ECB +1.15%) that was available on the market, at your original maturity date, should have been offered to you.

Refund due to you

Should you have opted to take the tracker product at the original maturity date you would have been on a lower interest rate since then, therefore you have overpaid your mortgage and are now due a refund of €2243.76, which includes compensation interest of €337.49.

....

Moving to a tracker

You now have the option to avail of the tracker rate detailed overleaf by signing the attached letter of authority and returning it to us within 30 days from the date of this letter.”

The Complainant signed the Letter of Authority to apply a tracker interest rate of ECB + 1.15% to mortgage sub account ending **9401** on **04 November 2011**.

The Complainant submits that he believes he ought to have been offered a tracker interest rate for sub account ending **9201** on the expiry of the fixed interest rate period in **March 2008**, as he was entitled to a tracker interest rate for the primary mortgage loan sub account ending **9401**. The Complainant's two mortgage sub-accounts were drawn down at two different points in time (2004 and 2006), they commenced on different interest rates (fixed rate and discount variable) and were subject to different terms and conditions.

The fact that the Provider identified an error on mortgage sub account ending **9401** and offered the Complainant the application of a rate that was available on the market in retrospect to remediate that error does not create an obligation on the Provider to offer the same rate on the Complainant's separate mortgage loan (sub account ending **9201**).

As set out above the Complainant has no contractual or other entitlement to a tracker rate of interest on mortgage sub account ending **9201**. For this reason, I do not propose to uphold this aspect of the complaint.

However, I am concerned that the Provider does not appear to be aware of the very important obligations under the Consumer Protection Code in relation to the retention of records. For this reason, I propose to partially uphold the complaint and direct the Provider, in accordance with **Section 60(4)(a) of the Financial Services and Pensions Ombudsman Act 2017** to review its practice in relation to records retention and in accordance with **Section 60(4)(c) of the Financial Services and Pensions Ombudsman Act**

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2017 to change its practice in relation to records retention to comply with the Consumer Protection Code. Given the potential implications for other customers of the practice, I propose to submit my legally binding decision to the Central Bank of Ireland for any action it may deem appropriate.

Conclusion

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

I intend to direct pursuant to **Section 60(4)(a) and (c)** of the **Financial Services and Pensions Ombudsman Act 2017**, that the Respondent Provider review and change its practice in relation to maintaining consumer records to ensure that the Provider acts in accordance with the Consumer Protection Code.

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**

3 January 2020

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.