



<u>Decision Ref:</u>	2020-0005
<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 account which is the subject of the complaint is secured on the Complainants' private dwelling house.

The Loan Amount was €265,000 and the term was 25 years. The Letter of Approval which was signed on **13 December 2004** outlined the Loan Type as "*One Year Fixed Rate Home Loan*". The mortgage loan was redeemed by the Complainants in **January 2009**.

The Complainants Case

The Complainants submit that they had approached their local branch of the Provider in **May 2004** to apply for a mortgage. The Complainants accepted a Letter of Approval dated **16 August 2004** by signing an Acceptance of Loan Offer on **13 December 2004**. The particulars of the mortgage loan offer detailed that the interest rate applicable was a one year fixed interest rate of 2.74%.

The Complainants outline that they were not offered the option of a tracker rate when they applied for the mortgage in 2004. They submit that the only interest rate options discussed with them during the application process were fixed rates and variable rates. They assert that the Branch Manager who dealt with their mortgage application *“never at any stage”* informed them of the option of a tracker interest rate *“which was/is our constitutional right”*. They believe that information relating to tracker rates was *“deliberately withheld”* from them in 2004.

The Complainants submit that the *“offers and acceptance made in relation to the mortgage in question with [the Provider] in 2004 were made and accepted in the absence of any information provided to [the Complainants] in relation to a tracker mortgage option which [they] were entitled to. Had this information been provided [they] most certainly would have chosen this option as an obvious choice as it would have been more financially beneficial”*.

The Complainants outline that their decision to opt for a fixed interest rate on the mortgage loan in **May 2004** *“in the absence of all of the information being provided”* has been *“financially devastating”*. They state that the high variable interest rates on the mortgage loan, together with a *“substantial reduction in salary in April 2019”*, meant they had to make the *“devastating decision to sell [their] home of 15 years and source a cheaper, smaller and undesirable alternative”*.

The Complainants assert that if they had been offered the opportunity to avail of a tracker interest rate on the mortgage loan account in 2004, they would have had more disposable income and would not have needed to secure a top up loan from the Provider in 2008 (mortgage loan account ending **7774**).

The Complainants outline *“we are credible honest people and the [Provider] ha[s] proven time and time again that they are not credible in how they have dealt with customers regarding tracker mortgages and this is also the case here.”*

The Complainants want to be reimbursed for the interest they state they have overpaid on the mortgage loan account from **May 2004** until the date the mortgage loan account was redeemed in **January 2009**.

The Provider's Case

The Provider submits that a tracker interest rate was one of the options available for selection by the Complainants in **2004** but they chose a fixed rate loan on **26 May 2004**.

The Provider outlines that in 2004, the Complainants were existing customers of the Provider as they held a mortgage at that time (account number ending **4900**). It submits that on **26 May 2004**, the Complainants completed an application for credit in respect of a mortgage loan of €265,000 repayable over 25 years for the purpose of part-funding the acquisition of a new home. It submits that the Complainants proposed to redeem the mortgage loan account ending **4900** through the sale of their existing home and to use the remainder of the proceeds of the sale towards the purchase of their new home.

The Provider outlines that when a customer applies for a lending facility, the staff will provide all necessary information regarding the available products and interest rates which they could avail of. The Provider submits that all available interest rate options would have been discussed with the Complainants during their application process with the Provider and arising from those discussions, the Complainants chose to apply for a 1 year fixed rate home loan.

The Provider issued a loan offer to the Complainants on **16 August 2004** for a mortgage loan of €265,000 repayable over 25 years from the date of drawdown. It states that the interest rate for the first year was a fixed rate of 2.74%, after which the rate was variable unless the Complainants chose another fixed rate period (if a fixed rate was made available). The Provider relies on **Special Condition A** of the Complainants' **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** to support this. The Provider states that at the end of any fixed rate period applying to the loan, both the Provider and the Complainants had an option to convert the loan to a variable rate in accordance with **Condition 5.4**. The Provider submits that the **General Mortgage Loan Approval Conditions** also stated "*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 Provider submits that this loan offer was accepted on **13 December 2004** by the Complainants with the benefit of independent legal advice. It submits that when signing the acceptance of the offer, the Complainants confirmed that their Solicitor had fully explained the terms and conditions of the loan to them.

The Provider states that it was of the view that the 1 Year Fixed Rate Home Loan was a suitable mortgage loan product for the Complainants in **May 2004** because they had applied for this rate and they had a required proven repayment ability. It submits that during their discussions with the Provider at the time of the application, the Complainants had explained

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their personal family circumstances to the Provider, which may have been the reason for their requiring that the rate of interest would be fixed for one year. It submits that the fixed rate which they selected was also the most favourable rate the bank was offering at that time.

The Provider does not accept that the Complainants were never advised at any stage by the Provider's branch that it was offering tracker interest rates when they applied for their mortgage in **May 2004**. It rejects the Complainants' assertion that it "*deliberately withheld*" offering a tracker rate to the Complainants.

The Provider accepts that the Complainants were not offered a tracker rate in 2005 or in 2007. It submits that the Complainants had no entitlement to be offered a tracker rate in 2005 or in 2007. It submits that in **mid-2006**, the Provider introduced a policy of offering a tracker rate option to certain existing customers who had no entitlement to a tracker rate as one of the options in the Provider's automated fixed rate expiry options letter. It submits that it continued this policy until **mid-2009**. It submits that it was before this 2006 – 2009 period that the Provider issued a list of available expiry rate options to the Complainants in December 2005. It submits that therefore, the options available to the Complainants on the expiry of the initial fixed rate period did not include a tracker rate as an option. It submits that on **23 December 2005** the mortgage account defaulted to the variable rate of 3.70% in accordance with the terms and conditions of the loan.

The Provider states that its records show a 3 year fixed rate of 5.10% was selected by the Complainants and applied to the mortgage account on **2 July 2007** following a request from the Complainants for fixed rate options. It submits that the mortgage loan account remained on the fixed rate until the loan was redeemed in full on **22 January 2009**.

The Provider denies the Complainants' allegation that it is "*not credible in respect of its dealings with customers regarding tracker mortgages or in any respect, including in its responses to the Complainants*".

The Complaint for Adjudication

The complaint for adjudication is that the Provider did not offer or inform the Complainants about the option of a tracker interest rate when they applied for their mortgage loan in **May 2004**.

Decision

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

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

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

A Preliminary Decision was issued to the parties **03 January 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The issue to be determined is whether the Provider failed to offer or inform the Complainants about the option of a tracker interest rate when they applied for their mortgage loan in **May 2004**. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and details of certain interactions between the Complainants and the Provider between 2004 and 2009, when the mortgage loan was redeemed.

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The Complainants applied for a mortgage for €265,000 in **May 2004** by way of **Application for Credit**. I note **Section 2** of the **Application for Credit** which was signed by the Complainants on 26 May 2004 details as follows;

“Type of Loan:

<i>Amount of Loan required</i>	<i>EUR 265,000.00</i>
<i>Purchase price/Value of property</i>	<i>EUR 345,000.00</i>
<i>Loan type</i>	<i>1 Year Fixed Rate Home Loan</i>
<i>Repayment Term required</i>	<i>25 Years”</i>

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 4th May 2004*”.

This document outlines as follows;

“Rates applicable to new Home Loans

<i>1 Year Discounted Variable Rate</i>	<i>2.69%</i>	<i>3.5%</i>
<i>1 Year Discounted Variable Rate (when borrowing <50% of the property value)</i>	<i>2.49%</i>	<i>3.5%</i>
<i>1 Year Fixed Rate</i>	<i>2.54%</i>	<i>3.5%</i>
<i>2 Year Fixed Rate</i>	<i>3.45%</i>	<i>3.6%</i>

Tracker Mortgage (Home Loan and Residential Investment Property)

<i>Loan Amount €150,000 - €249,999</i>	<i>3.40%</i>	<i>3.5%</i>
<i>Loan Amount of €250,000 or more</i>	<i>3.10%</i>	<i>3.1%”</i>

I understand that the 1 Year Fixed Rate of 2.54% had subsequently changed to 2.74% by the time the Letter of Offer issued in **August 2004** and was drawn down in **December 2004**.

I note that tracker interest rates were on offer generally by the Provider when the Complainants applied for the mortgage loan in **May 2004**. 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 **Application for Credit** was made by the Complainants in May 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.

It appears from the Complainants’ submissions that the Complainants are of the view that if a tracker interest rate was discussed with them at that time, that the Complainants would have proceeded to make an application for a tracker interest rate loan.

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The **Lending Interest Rates** document was published by the Provider at the time and it clearly outlined the types of interest rates that were available for new loans, including discounted variable rates, fixed rates and tracker rates. I note that the one year fixed interest rate, was the Complainants' selected preference in the Application for Credit. This was a lower rate at 2.54% than the tracker rate of 3.10% that would have been on offer at that time. Fixed and variable type 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, possibly monthly and potentially upwards, such an applicant would elect to apply for a variable type loan. In the case of the Complainants' application, they chose the fixed rate, even over the lower discounted variable rate. In the circumstances, it is difficult to accept the Complainants' argument that if a tracker interest rate, which was higher than the fixed and variable interest rates on offer, was discussed with them at that time that the Complainants would have proceeded to make an application for a tracker interest rate loan.

The Complainants submit that the tracker interest rate would have been "*an obvious choice as it would have been more financially beneficial to us*". The Complainants are referring to the longer term comparison between an ECB tracker interest rate and other rate options, fixed and variable. The ECB base rate was 2.00% at the time that the Complainants applied for their mortgage loan in **2004**, however it subsequently rose intermittently to a maximum of 4.25% in **2008**, before it began to fall and ultimately reduced to 0% in 2016. I have no evidence or reason to believe that the Complainants' could have known of the future changes of the ECB base rate in 2004, such as to make the option of a tracker interest rate an "*obvious choice*" for what was a future financial benefit.

Furthermore in circumstances where **the Lending Interest Rates** document was published by the Provider, in its branches, on its website and in the national press, the Complainants could have accessed that document and appraised themselves of the interest rate options available generally by the Provider before proceeding with any application for a mortgage loan with the Provider.

There is also nothing to say that if a request was submitted by the Complainants seeking the application of a tracker interest rate loan that this would have resulted in the Provider acceding to that request and issuing a Letter of Offer on that basis.

There was no obligation on the Provider, contractual or otherwise to give the Complainants the option of a tracker interest rate on their mortgage loan when they made their application to the Provider.

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If the Complainants wished to pursue the potential option of applying for a tracker interest rate mortgage loan at the time in **May 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 the Provider offered the Complainants a fixed rate, which was accepted by the Complainants, having acknowledged that the terms and conditions of the mortgage loan were explained to them.

The Complainants' mortgage loan was drawn down on the one year fixed interest rate in **December 2004**. When the initial one year fixed interest rate period expired in **December 2005**, the Complainants' mortgage loan account defaulted to a variable rate of 3.70%. The Provider has submitted that it has no record of receiving a request from the Complainants in respect of the rate to be applied on expiry of the fixed rate period. The Provider has not indicated whether it issued a letter to the Complainants containing the then available rate options prior to the expiry of the initial fixed rate period and no such letter has been furnished in evidence. In any event, both parties agree that the Complainants were not offered a tracker rate in or around **December 2005**.

The **Letter of Approval** dated **16 August 2004** details that the "Loan Type" is a "1 Year Fixed Rate Home Loan" with an interest rate of 2.74%.

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;

"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.

...

5.4 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."

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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 **13 December 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 one year fixed rate of 2.74% and thereafter a variable rate. The variable rate in this case made no reference to a tracker or the ECB 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 the Loan Offer had been explained to them by their solicitor in **December 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, constitutional or other obligation on the Provider to offer the Complainants a tracker interest rate on the expiry of the one year fixed interest rate period in **December 2005**.

The Provider has summarised its tracker rate offering 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

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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 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."

The expiry of the Complainants' fixed interest rate term on their mortgage loan account in **December 2005**, pre-dated the Provider introducing the policy that it would offer a tracker interest rate to customers on the expiry of the fixed interest rate, where mortgage holders had no contractual right to a tracker interest rate. This policy was not introduced until mid-2006 and ceased in mid-2009. There was a further revision to the Provider's policy later in 2006, whereby a tracker interest rate became a default rate where fixed interest rates were expiring on mortgage loans, even though there was no contractual obligation on the Provider to do so.

I note that the Complainants contacted the Provider in **2007** requesting details of the available fixed interest rates. The Provider has supplied in evidence a copy of its letter to the Complainants dated 4 May 2007 which details as follows;

"Thank you for contacting the Mortgage Servicing Team in relation to the above mortgage account

I am attaching a list of our current fixed rate options as requested."

A list of fixed rate options was enclosed with the Provider's letter dated **4 May 2007**.

The Provider wrote to the Complainants again on **11 June 2007**, as follows;

"Thank you for contacting the Mortgage Servicing Team in relation to the above mortgage account

I am attaching a list of our current fixed rate options as requested."

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A list of fixed rate options was enclosed with the Provider's letter dated **11 June 2007** which was identical to the list of fixed rate options enclosed with the Provider's letter dated **4 May 2007**.

A copy of the fixed rate options form signed by the Complainants on **12 June 2007** has been supplied in evidence. I understand that the Complainants did not mark a clear rate options preference on the form and it was subsequently confirmed that the "three year fixed rate of 5.10%" was the rate to be applied to the mortgage loan by the Provider. The Provider confirmed this rate in its letter to the Complainants of **25 July 2007**, as follows;

"We have now amended your mortgage as follows;

Product Type: 3 Year Fixed Rate Home Loan
...
Interest rate: 5.10%"

While it does not appear to be in dispute between the parties that the Complainants requested information relating to fixed interest rate options only in 2007, the Complainants have submitted that this was because they "*had no knowledge then or previous of a tracker mortgage option.*" I have been provided with no evidence that the Complainants contacted the Provider at any time while the Provider was offering tracker interest rates to seek to apply a tracker interest rate to the mortgage loan, even though there was no underlying contractual right to a tracker interest rate. The Complainants' mortgage loan was on a variable interest rate at the time. Having considered the Complainants' mortgage loan documentation, I find the Complainants did not have any contractual entitlement to switch their mortgage loan account from the variable rate to a tracker rate at any stage. There was no obligation on the Provider in 2007 or indeed at any stage during the life of the mortgage 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 at any stage during the life of the mortgage, the Complainants could have contacted the Provider in this regard. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan. It was within the Provider's commercial discretion not to accede to that request, if it was made. The mortgage loan was redeemed by the Complainants in **January 2009**.

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

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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**

27 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.