



<u>Decision Ref:</u>	2020-0034
<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 mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The loan amount was €180,000 and the term was 35 years. The Letter of Approval which was signed on **29 May 2006** outlined the Loan Type as "*2 Year Fixed Rate Home Loan*".

The Complainant indicated to this office that she was selling the property and purchasing a new property in March 2019.

The Complainant's Case

The Complainant submits that she wants to complain about the "*financial advice*" she received from the Provider when taking out her mortgage and also after two years on the fixed interest rate.

On **02 June 2006**, the Complainant's mortgage loan account was issued as a 2 Year Fixed Rate Home Loan at the interest rate of 4.25%. On the expiry of the 2 year fixed period in **2008**, the Complainant submits that the interest rate on the mortgage loan account "*automatically transferred*" to a standard variable rate. The Complainant submits that she was not given the option to transfer to a tracker interest rate on the expiry of the fixed interest rate period in **May 2008**.

The Complainant in later submissions details that a copy of a completed Interest Rate Options Letter has been furnished to her by the Provider and that;

"I have no recollection of this form that I was to have signed in 2008. I don't remember being given the option of a tracker. If I had been aware of a tracker I would have went with that."

The Complainant asserts that she has been treated unfairly in comparison to other customers of the Provider. She submits that a family member, who is also a customer of the Provider, was automatically transferred to a tracker interest rate at the end of her two year fixed rate period on the mortgage that she took out in November 2015.

The Complainant details that she is "*extremely annoyed*" because she believes she is at a huge disadvantage by being on a variable interest rate loan from May 2008, as opposed to being on a tracker rate "*which is a significantly lower rate of interest*". In this regard, she details that as of **January 2019**, her mortgage of €180,000 had "*only come down*" €36,000 over 12 and a half years.

The Complainant submits that she is being "*severely hit financially at every angle and it is not a fair system*". She outlines that she was paying a mortgage on a variable rate, she couldn't afford to sell her property as she was in negative equity and as she and her partner were on "*low wages*" it was "*difficult to save a larger amount for a deposit*" to buy a new house, suitable for her family. The Complainant details that this is causing her "*stress and anxiety*".

The Complainant is seeking compensation from the Provider equivalent to the amount she would have saved if she was granted a tracker interest rate in 2008. She estimates that this equates to approximately €30,000.

The Provider's Case

The Provider details that the Complainant's mortgage loan drew down on a 2 Year Fixed Rate Home Loan of 4.25% on **02 June 2006** and the **Letter of Approval** outlined that at the end of the fixed interest rate period, the interest rate would be variable. 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 **Letter of Approval** was accepted by the Complainant with the benefit of independent legal advice and the Complainant confirmed that her solicitor had explained the terms and conditions to her. The Provider submits that the Letter of Approval did not contain an entitlement to a tracker interest rate at the end of the initial fixed interest rate period, or at any time during the term of the loan.

The Provider outlines that prior to the expiry of the 2 year fixed rate period on **02 June 2008**, it issued a rate options letter and form to the Complainant advising her of the interest rates available for selection at the time. The Provider submits 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 **June 2008**, included a tracker rate of ECB + 1.25%. The Provider details that from **mid-2006** to **mid-2009** the Provider, as a matter of policy, included a tracker rate as an interest rate option available for selection on rate options forms to existing customers maturing from a fixed rate period. The Provider submits that it did this as a matter of policy at the time, irrespective of whether a customer had a contractual entitlement to a tracker rate or not.

The Provider states that the Complainant signed and returned the rate options form opting to apply the standard variable rate of 5.69% to her mortgage loan and the mortgage loan was switched to the variable rate as per her instructions. The Provider further submits that it wrote to the Complainant on **31 May 2008** acknowledging receipt of the signed rate options form and confirmed that her mortgage loan account had switched to the standard variable rate of 5.69%.

The Provider states that it does not accept the Complainant's submission that she has been treated unfairly in comparison to other customers and that it has treated the Complainant fairly at all times in a manner that has been consistent. The Provider further submits that it cannot comment on the Complainant's submissions regarding the loan account of her family member due to customer confidentiality and data protections reasons.

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The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant a tracker interest rate on her mortgage loan account on the expiry of a fixed interest rate period in **May 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 **24 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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's loan documentation. It is also necessary to set out the interactions between the Complainant and the Provider in **May 2008** prior to expiry of the initial fixed rate period.

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The **Letter of Approval** dated **20 April 2006** details as follows;

<i>“Loan Type:</i>	<i>2 Year Fixed Rate Home Loan</i>
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...

<i>Purchase Price/Estimated Value:</i>	<i>EUR 210,000.00</i>
<i>Loan Amount:</i>	<i>EUR 180,000.00</i>
<i>Interest Rate:</i>	<i>4.25%</i>
<i>Term:</i>	<i>35 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;

“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 one hand the total amount of interest (calculated on a reducing basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate

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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 a variable rate loan agreement which will carry no such redemption fee."

The **General Mortgage Loan Approval Conditions** outlined;

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 **29 May 2006**. 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 two year fixed rate of 4.25% and thereafter the option of "conversion" to 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. 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 **May 2008**, 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 form details as follows;

*“Current options available:
You may only select one option.
Account Number: [XXX]*

		<i>Monthly Repayment EUR</i>
<i>Tracker variable rate</i>	<i>- Currently: 5.25%</i>	<i>1003.15</i>
<i>(ECB + maximum 1.2500%)*</i>		
<i>Standard variable rate</i>	<i>- Currently: 5.69%</i>	<i>1052.90</i>
<i>2 year fixed rate</i>	<i>- Currently 5.30%</i>	<i>1008.75</i>
<i>3 year fixed rate</i>	<i>- Currently 5.25%</i>	<i>1003.15</i>
<i>4 year fixed rate</i>	<i>- Currently 5.25%</i>	<i>1003.15</i>
<i>5 year fixed rate</i>	<i>- Currently 5.10%</i>	<i>986.45</i>
<i>7 year fixed rate</i>	<i>- Currently 5.25%</i>	<i>1003.15</i>
<i>10 year fixed rate</i>	<i>- Currently 5.25%</i>	<i>1003.15</i>
<i>...</i>		

*- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 1.2500% 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 under the heading **“Variable Rate Loans”** outlined as follows;

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

Under the heading “**Tracker Mortgage Loans**” the reverse of the rate options form outlined as follows;

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 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 decrease 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 standard variable rate option of 5.69% and signed the options form on **23 May 2008**. This options form was stamped received by the Provider on **26 May 2008**.

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 **May 2006** to **May 2008**. 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 5.25% (ECB + 1.25%) on the mortgage loan. 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 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.”

The Complainant of her own volition opted not to apply the tracker rate of interest option made available by the Provider and instead elected to apply the standard variable rate of 5.69% to her mortgage loan in **May 2008**.

I note that with regard to the completed interest rate options form, which was signed by the Complainant on **23 May 2008**, the Complainant states;

"I have no recollection of this form that I was to have signed in 2008. I don't remember being given the option of a tracker. If I had been aware of a tracker I would have went with that."

Whilst it may be the case that the Complainant now does not recall the rate options form or being given the option of a tracker interest rate on her mortgage loan account on that form, it remains the case and the evidence shows that she was given the option at the time and she did not choose that option. The reverse side of the options form which the Complainant signed on **23 May 2008**, contained detail about the tracker interest rate offering, such that the Complainant could have made an informed decision as to which interest rate to choose at the time. The Provider had set out in a clear and comprehensible manner that the interest rate applicable to a tracker mortgage loan is made up of *"the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate"*. The Complainant ought to have been aware that in circumstances where she opted for the tracker interest rate, the percentage of 1.25% would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank. Consequently, there is no reasonable basis for the Complainant's submission that she was not *"aware"* of a tracker.

The Provider confirmed the Complainant's interest rate selection by letter dated **31 May 2008**, which outlined as follows;

"I acknowledge receipt of your acceptance of [the Provider's] loan offer and confirm that the rate of interest applicable to your loan account has been switched from a fixed rate to a variable rate currently 5.690%."

I note that the Complainant has also made a submission about a mortgage loan account of her family member which was *"automatically transferred"* to a tracker interest rate at the end of a two year fixed rate period on the mortgage which was taken out in **November 2015**. It is important for the Complainant to be aware that the Complainant's mortgage loan is governed by the terms and conditions of her mortgage loan documentation and not by reference to the terms and conditions of another person's mortgage loan. Whilst the Complainant may feel that she has been *"treated unfairly"* or has been at a *"disadvantage"* in comparison to her family member, there is no evidence of this.

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Having considered the Complainant's mortgage loan documentation, I find the Complainant did not have any contractual or other entitlement to a tracker interest rate on her mortgage loan. The Provider as a matter of policy offered the Complainant a tracker interest rate of ECB + 1.25% in **May 2008**, however the Complainant elected not to accept that offer and instead elected to apply a standard variable rate to the mortgage loan at the time.

For the reasons outlined above, I do not propose to uphold this complaint.

Conclusion

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

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 February 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.