



<b><u>Decision Ref:</u></b>	2020-0064
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	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 is secured on the Complainant's Principal Private Residence.

The loan amount was €175,000 and the term of the loan was 32 years. The particulars of the Loan Offer dated **26 August 2005** detailed that the loan type was a "2 Year Fixed Rate Home Loan".

**The Complainant's Case**

The Complainant submits that she applied for a mortgage loan with the Provider in **August 2005**. She states that the Provider gave her a **Mortgage Quotation** dated **8 August 2005** which outlined the available rate options, including a one year fixed rate of 2.55%, a two year fixed rate of 3.15%, a variable rate option of 3.55% and a tracker rate option of 3.40% (ECB + max 1.40%).

The Complainant states *"Initially I was advised to take the 1 year fixed rate as it was lower and at the end of the year it would revert to a tracker rate ... In the intervening weeks this changed and I was only offered the 2 year Fixed rate at 3.15% on 26/8/2005."* She further submits *"I was advised by the staff member to take the Tracker Option that would be offered when the 2 years were up."*

The Complainant accepted the Provider's Loan Offer on **28 September 2005** and drew down the mortgage loan account on a two year fixed rate of 3.15% on **23 June 2006**.

The Complainant submits that prior to the expiry of the two year fixed rate period she received an options letter from the Provider dated **3 June 2008**, which included a tracker interest rate option of 5.50% (ECB + max 1.5%), *"as expected"*. She submits that the letter stated that the tracker rate *"will never be more than 1.5000% over the European Central Bank Refinancing Rate"*.

The Complainant states that the options letter detailed that if she did not select another rate option her mortgage would automatically *"default"* to the tracker rate on **23 June 2008**. She submits that she took this to mean that *"this was the default position of this loan"*. She states that on **6 June 2008** she decided to opt for a further 5 year fixed rate of 5.50% due to *"economic conditions"* and *"external circumstance at this time was volatile in regard to Rates – they were high and rising"*. She states that she only opted for a further five year fixed rate *"on the understanding that my Mortgage would revert back to Tracker"* at the end of that fixed rate.

The Complainant submits that prior to the expiry of the five year fixed rate period on **23 June 2013**, she received another options letter from the Provider dated **22 May 2013** which did not include a tracker rate option. The Complainant submits that she was *"very annoyed and disappointed"* that a tracker rate was not offered to her *"but did not respond at all because I felt it was pointless"*. The mortgage loan account automatically defaulted to the LTV variable rate of 4.34% in **June 2013**.

The Complainant states that *"I believe I should have been offered a Tracker Mortgage at no more than 1.5 over the ECB rate as was advised and understood during my mortgage application process"*. She states that the first options letter dated **3 June 2008** confirmed and *"solidified"* her understanding that her mortgage *"would revert to Tracker Variable rate"* as this was the *"default"* rate. The Complainant states that the Provider's *"description"* of the variable rate in her contract is *"general"* and *"does not exclude the Tracker option as that too is a type of variable rate"*.

She is seeking *"recompense"* for the interest overpaid on the mortgage loan account since **June 2013**.

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### **The Provider's Case**

The Provider states that following a loan application process, it issued a **Letter of Approval** to the Complainant on **26 August 2005** for a 2 Year Fixed Rate Home Loan. It states that this loan offer was accepted by the Complainant with the benefit of independent legal advice on **23 September 2005**.

The Provider submits that the Letter of Approval provided for an initial period of a fixed interest rate and for a variable rate subsequently. It relies on **Special Condition A** of the Complainant's **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this. The Provider further submits that the term "*variable rate*" is defined on **page 1** of the **General Mortgage Loan Approval Conditions**.

The Provider states that the loan offer did not contain an entitlement to a tracker mortgage at the end of the fixed rate period or at any time during the term of the loan. It notes that the Complainant has acknowledged in her submissions that the contract does not refer to a tracker interest rate.

The Provider does not accept that the Complainant was advised during the loan application process in **2005** that a tracker rate of interest would apply to her mortgage loan account at a future fixed rate period maturity date. It submits "*the Complainant provides no details whatsoever of this.*" It states that the Provider's rate offerings to new customers during this period did not include a tracker maturity rate, and no such rate would have been discussed as it would not have been possible to discuss a "*non-existing lending product*" with the Complainant at that point in time. It states "*The only tracker-related loan which could have been discussed with, described to or offered to the Complainant in 2005 by the Bank was a tracker rate at the commencement of her loan. Such a rate is described in the quotation furnished by the Complainant*".

The Provider submits that in **mid-2006** it introduced a policy of offering tracker interest rates as one of the options in the options letters to existing customers maturing from a fixed rate period, irrespective of whether or not the customer had a contractual entitlement to be offered a tracker interest rate. It states that if the customer did not elect from the options offered to them at the end of a fixed rate period, the Provider applied a tracker interest rate automatically as the default rate. It states that it continued this policy 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 offer.

The Provider states that one of the current available rate options offered on **3 June 2008**, which was not selected by the Complainant, was a tracker variable rate of ECB + maximum 1.5%. It submits that this option was based on a rate change that had taken place on **31 May 2008**. The Provider details that prior to 31 May 2008, the Provider did not offer a tracker mortgage product with an interest rate of ECB + 1.5%.

The Provider states that the options letter of **3 June 2008** clearly states that the options available to the Complainant at that time were current options, and does not refer either expressly or by implication, to any future interest rate that may apply at any future date. The Provider states that the Complainant subsequently returned the signed options form on **6 June 2008**, opting for a five year fixed rate.

The Provider states that it may from time to time introduce or withdraw products or interest rates it offers to new and existing customers and would not be in a position to know in advance what interest rates or products it would be offering at a later stage. The Provider submits that therefore when the Complainant chose to switch the mortgage to a fixed rate in **June 2008**, it was not in a position to know in advance what interest rates or products it would be offering five years later. The Provider further submits that in **mid-2009**, when it ceased offering tracker interest rates to existing customers maturing from fixed interest rates who did not have such an entitlement in their contract, the Complainant was in a fixed rate period of 5 years which had begun 14 months earlier and was not due to expire for almost four years.

The Provider submits that the five year fixed rate was due to expire on **23 June 2013** and the Provider issued a further options letter and form to the Complainant on **22 May 2013**. It details that the options included the LTV variable rate of 4.34%, a two year fixed rate of 7.25% and a five year fixed rate of 8.75%. The Provider submits that a tracker interest rate was not included in these options as it was no longer offering tracker interest rates at that time, unless there was a contractual entitlement to be offered such a rate.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainant the option of a tracker interest rate of ECB + 1.5% on her mortgage loan account on the expiry of a five year fixed rate period in **June 2013**.

## **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 **29 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 incorrectly failed to offer the Complainant a tracker interest rate on the expiry of the five year fixed rate period in **June 2013**. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainant's loan documentation. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2005, 2008 and 2013**.

The **Mortgage Quotation** dated **8 August 2005** that was issued to the Complainant details the following rate options;

***“2.55% 1 Year Fixed Rate Home Loan***

...

***3.55% Variable Rate Home Loan***

...

***3.40% Tracker Mortgage (ECB + max 1.40%) – Home Loan***

...

***3.15% 2 Year Fixed Rate Home Loan”***

The Complainant has indicated that subsequently she was offered the two year fixed rate and a member of the Provider’s staff advised her that a tracker rate *“would be offered when the 2 years were up”*. The Provider has indicated that it is *“unable to confirm the dates of the meetings prior to the loan approval being issued”*. It is disappointing that the Provider does not hold detailed records of the discussions or meetings with the Complainant at the time the mortgage was applied for. Nonetheless it is clear that the mortgage quotation that issued by the Provider to the Complainant contained an outline of the type of interest rates that were available to the Complainant at that time.

The **Letter of Approval** dated **26 August 2005** details as follows;

<b><i>“Loan Type:</i></b>	<b><i>2 Year Fixed Rate Home Loan</i></b>
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<b><i>Purchase Price / Estimated Value:</i></b>	<b><i>EUR 175,000.00</i></b>
<b><i>Loan Amount:</i></b>	<b><i>EUR 175,000.00</i></b>
<b><i>Interest Rate:</i></b>	<b><i>3.15%</i></b>
<b><i>Term:</i></b>	<b><i>32 year(s)”</i></b>

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

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

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

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

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The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **23 September 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 two-year fixed rate of 3.15% and thereafter the option of a variable rate. The variable rate in this case 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 *"from time to time"*.

I note that the Provider has furnished in evidence a file note of a telephone call between the Provider and the Complainant on **1 September 2005** which details as follows;

*"[The Complainant] did receive the approval and is happy with same. she will be contacting her sols to sign legal docs soon"*

The Complainant has submitted that she *"was advised and understood during my mortgage application process"* that she was entitled to be offered a tracker rate at the end of the fixed interest rate period in **2008**. Again I note that there is no documentary evidence of the discussions that took place in **2005** where it is purported that the understanding on the part of the Complainant was formed that the rate *"would revert to Tracker Variable rate."* In any event, regardless of any discussion that may have taken place between the parties at that time, or any confirmation said to have been given by the Provider, of which there is no evidence, in order for the Complainant to have a contractual right to a tracker interest rate on her mortgage loan at the end of the fixed interest rate periods in **2008** and **2013**, that right would need to have been specifically outlined in the mortgage loan documentation that was signed by the parties. However no such right was set out in writing in the **Letter of Approval** dated **26 August 2005** which was signed by the Complainant on **23 September 2005**. The fact that the Provider had outlined the option of taking out a mortgage loan on a tracker interest rate of ECB + 1.4% in **2005**, when the Complainant submitted her application for a mortgage loan, did not oblige the Provider to offer that tracker interest rate (ECB + 1.4%) or any other tracker interest rate at a later point in time.

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The Complainant has also submitted “because my Contract was so general about Variable rates this also includes the Tracker”. As outlined above, the **General Mortgage Loan Approval Conditions** outlines the variable rate to be one which may be adjusted by the Provider from time to time. There was no basis for the Complainant to reasonably expect that the term “variable rate” would relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the Letter of Approval. If the Complainant was of the view that the **Letter of Approval** dated **26 August 2005**, was not specific as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainant could have decided not to accept the offer made by the Provider, or sought clarification from the Provider as to the type of interest rate that would apply and sought to have a tracker interest rate entitlement included in the mortgage loan documentation. Instead the Complainant signed the **Acceptance of Loan Offer** on **23 September 2005** acknowledging that the terms and conditions had been fully explained to her by her solicitor.

The Provider issued a **letter and Rate Options Form** dated **03 June 2008** to the Complainant prior to the expiry of the fixed interest rate period on **23 June 2008**. The Provider’s letter detailed as follows;

*“If we do not receive a written instruction from you in relation to the above on or before the 23 Jun 2008, we will automatically default your loan to the tracker variable rate.”*

The **rate options form** outlined as follows;

*“Current options available:  
You may only select one option.  
...*

			<i>Monthly Repayment EUR</i>
- Tracker variable rate (ECB + maximum 1.5000%)*	- Currently:	5.50%	1007.79
- Standard variable rate	- Currently:	5.69%	1028.16
- 2 year fixed rate	- Currently;	5.70%	1029.24
- 3 year fixed rate	- Currently;	5.55%	1013.13
- 4 year fixed rate	- Currently;	5.50%	1007.79
- 5 year fixed rate	- Currently;	5.50%	1007.79
- 7 year fixed rate	- Currently;	5.60%	1018.49
- 10 year fixed rate	- Currently;	5.70%	1029.24

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- *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 1.5000% 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 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 did not opt to accept the tracker interest rate option and instead signed the options form on **6 June 2008** electing to apply the 5 year fixed interest rate of 5.50%.

The Provider has summarised its policy in relation to tracker rates at the time 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*

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*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.”*

Having considered the evidence before me, including the mortgage loan documentation, it is my view that 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 **June 2006 to June 2008**. It appears that the Provider, in line with its own policy at the time, offered the Complainant a tracker interest rate. The Complainant elected to apply the 5 year fixed interest rate to the loan and this instruction to apply the fixed interest rate was actioned by the Provider on receipt of the options form signed by the Complainant on **6 June 2008**.

The Complainant submits that she believes that “[she] should have been offered a Tracker Mortgage at no more than 1.5 over the ECB rate ... when my 5 year fixed rate was complete.” The evidence does not support the Complainant’s submission in this respect. The Complainant was informed in the letter dated **3 June 2008**, that the mortgage loan would default to the tracker variable rate, if the Complainant did not select an alternative rate. The reverse side of the options form which the Complainant signed on **6 June 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”. As such, the Complainant ought to have been aware that, in circumstances where she opted for the tracker interest rate, the percentage of 1.5% would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank.

The Complainant, by her own admission, decided to apply the fixed interest rate as “external circumstances at this time was volatile in regard to Rates – they were high and rising”. The Complainant was thus aware of the moving nature of variable type rates and elected to apply the fixed interest rate period in **2008**, to protect herself from the uncertainty of a variable type rate. The Complainant of her own volition decided not to choose the option of

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a tracker interest rate of ECB + 1.5% (5.50%) at the time and instead selected the five year fixed interest rate offered (also 5.50%). The rate options form clearly outlined that the options set out were the “*current options available*” and that if the Complainant chose a “*fixed rate, the standard fixed-rate conditions will apply*”. 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 Provider issued a **letter and rate options form** dated **22 May 2013** to the Complainant prior to the expiry of the fixed interest rate period. The Provider’s letter detailed as follows;

*“If we do not receive a written instruction from you in relation to the above on or before the 23 Jun 2013, the interest rate on your mortgage will be the LTV Variable Rate”*

The **rate options form** outlined as follows;

“...

*Please tick the option you want below. You may only pick one option and everyone signed up to the mortgage must sign.*

...

<i>Option</i>		<i>Monthly Repayment</i>	
<i>LTV Variable Rate **</i>	<i>CURRENTLY</i>	<i>4.34%</i>	<i>876.96</i>
<i>2 Year Fixed Rate</i>	<i>CURRENTLY</i>	<i>7.25%</i>	<i>1,153.99</i>
<i>5 Year Fixed Rate</i>	<i>CURRENTLY</i>	<i>8.75%</i>	<i>1,310.35”</i>

I note from the evidence submitted that the Complainant did not return the completed options form and the LTV variable rate of 4.34% was applied to the mortgage loan on **21 June 2013**.

As outlined above the Complainant did not have a contractual or other entitlement to a tracker interest rate on her mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate on her mortgage loan account at the end of the five year fixed interest rate period in **June 2013**.

I note that the Complainant has submitted “*I have no doubt that if I was offered a Tracker Rate of no more than 1.5% over the ECB rate in May 2013 I would have taken it*”. However the Complainant had twice previously been given the option of a tracker interest rate, firstly when she was submitting her application for a mortgage loan in **2005** of ECB + 1.4%, and

again on the expiry of the initial two year fixed rate period in **2008** of ECB + 1.5%. She did not pursue this option on either occasion.

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

20 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.**