



<b><u>Decision Ref:</u></b>	2020-0213
<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 Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' then Principal Private Residence. It appears that the Complainants have since taken up residence at a new address and the mortgage loan which is the subject of this complaint was redeemed in **2019**.

The Letter of Approval detailed that the loan amount was €400,000 and the term was 25 years. The Letter of Approval which was signed on **20 October 2005** outlined the loan type as *"3 Year Fixed Rate Home Loan"*.

##### **The Complainants' Case**

The Complainants outline that they agreed to a 3 year fixed rate mortgage.

The Complainants submit that the Provider did not supply them with any information regarding the interest rate options available to them prior to the expiry of the fixed interest rate period in **September 2009**. They detail that the Provider *"imposed [its] own choice"* on the Complainants and placed the mortgage loan account on a *"very high"*

tracker interest rate of 3.25% (ECB + 2.25%) in **September 2009**. The Complainants outline that this is contrary to the Consumer Protection Code and the Provider's own policies.

The Complainants submit that as a result of the Provider's failure to send them a rate options letter, they were never offered any option or choice regarding the interest rate applicable to their mortgage loan account and instead, the Provider has imposed a higher tracker rate which was higher than the average tracker interest rate on offer at the time.

Furthermore the Complainants detail that the Provider has not furnished any evidence that a rate options letter did issue to them in **2009**. They state that they have made two separate freedom of information requests to the Provider regarding their mortgage loan account over the years and on both occasions, the Provider has been unable to provide the Complainants with a copy of the rate options letter which issued. The Complainants outline that the Provider is obliged to maintain all correspondence pertaining to its interactions with its customers and in the Complainants' case, the Provider has failed to do so by failing to produce a copy of the rate options letter in **2009**. It is the Complainants' view that the Provider is unable to produce a copy of the rate options letter because it never issued and therefore, this contradicts the Provider's own policy of allowing their customers the choice to select an interest rate.

The Complainants submit that due to the application of the tracker interest rate of 3.25% to their mortgage loan account by the Provider in **2009** they have *"been over charged by circa 1% to 1.25% over and above other rates"* that were available at the time the fixed interest rate period expired. The Complainants detail that they *"have seen a large number of tracker rates applied to various mortgages from Buy to Lets to Principal Private Dwellings, all of the tracker rates that I have seen to date have been much lower than my rate of 2.25%, in fact I have seen tracker rates issued by [the Provider] as low as .6% above ECBR"*.

The Complainants outline that the overcharge of 1.25% represented a significant amount of money each month and the Complainants ended up falling into arrears on another mortgage loan account, secured on an investment property, with a different financial service provider. The Complainants further detail that the ultimate arrears amounted to €33,000 which would not have occurred if the Complainants had been charged the correct interest rate on their mortgage loan account with the Provider as they would have had the extra funds to repay the other mortgage loan account in full. The Complainants state they were forced to sell this property in **2016** which resulted in a loss of €90,000. The Complainants say they had invested in the property as a pension for their future.

The Complainants are seeking *"financial recompense"* from the Provider. They estimate that they have paid *"circa €30,000.000"* in overcharged interest between **October 2009**

/Cont'd...

and **April 2018**. They also outline that they suffered “*some detrimental financial consequences*” by the loss of the investment property.

### **The Provider’s Case**

The Provider submits that following a loan application process, a Letter of Approval was issued to the Complainants on **15 October 2005** for a loan in the amount of €400,000 on an initial 3 year fixed interest rate. The Provider details that the loan offer was accepted by the Complainants with the benefit of independent legal advice on **20 October 2005**. The Provider outlines that the Letter of Approval and accompanying documents 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. The Provider details that the mortgage loan was drawdown on **07 September 2006**.

Prior to the expiry of the fixed rate period on **7 September 2009**, the Provider outlines that it automatically issued a letter and rate options form to the Complainants, reminding the Complainants that their fixed rate period was due to expire and contained a list of the then available interest rates. The Provider submits that the “*following variable interest rates, (together with a number of higher fixed rate options) were included in the options form automatically issued in respect of the Complainants’ account:*

*Variable Rate LTV<80% 3.55%*

*Variable Rate LTV>80% 3.65%*

*Tracker Rate LTV < and > 80% 3.25%”*

The Provider details that the Complainants were provided with the “*only tracker option, which was the lowest available variable rate option, when their fixed rate period matured in September 2009*”. The Provider outlines *there was no other tracker rate option available to which the [Provider] could have changed the account at the date of expiry of the fixed rate period and no other tracker rate for the Complainants to choose.*”

The Provider submits that the calculation of the tracker margin changed over time and was based on a “*commercial decision*” made by the Provider, dependent on market conditions and taking into account a number of factors such as, “*wholesale lending and borrowing rates*”, “*Interest rates paid on deposits*” and the Provider’s “*competitive position*”.

The Provider submits that the options letter informed the Complainants that in the absence of the Provider receiving the Complainants’ rate preference, the mortgage loan account would switch to the tracker rate of 3.25% (ECB + 2.25%). On **7 September 2009**, the Provider submits the fixed rate period ended and the interest rate switched to the default tracker interest rate.

/Cont’d...

The Provider outlines that the Complainants had no contractual entitlement to be offered a tracker interest rate at the end of the fixed interest rate period and that the tracker interest rate was applied as the default rate as a matter of policy at the time.

With respect to the Complainants' submission that the Provider never issued the options letter to them, the Provider details that the sending of an options letter is an automated process performed by the Provider's mortgage account processing system. The Provider states that the process "*worked correctly*" during the time that the fixed interest rate period on the Complainants' mortgage loan account was due to expire and therefore the system did not fail to issue the Complainants' options letter. The Provider submits that as it did not retain a copy of the letter issued in **2009**, it is not possible to furnish it to the Complainants. Instead, the Provider furnished the Complainants and this office with a sample copy of an automatically generated letter issued during the same period with the same terms as that of the Complainants.

The Provider rejects the Complainants' submission that it has breached the Consumer Protection Code and submits that it has complied with all its contractual and regulatory obligations in relation to the Complainants' mortgage loan account.

### **The Complaints for Adjudication**

The complaints for adjudication are as follows:

- (a) The Provider incorrectly failed to issue the Complainants with a rate options letter prior to the expiry of the fixed interest rate period in **September 2009**.
- (b) The Provider incorrectly imposed a tracker interest rate of 3.25% (ECB + 2.25%) on the Complainants' mortgage loan account in **September 2009**.

### **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.

/Cont'd...

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 Decision was issued to the parties on **27 May 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, my final determination is set out below.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2009**.

The Letter of Approval dated **17 October 2005** details as follows;

<i>“Loan Type:</i>	<i>3 Year Fixed Rate Home Loan</i>
--------------------	------------------------------------

<i>Purchase Price / Estimated Value:</i>	<i>EUR 425,000.00</i>
<i>Loan Amount:</i>	<i>EUR 400,000.00</i>
<i>Interest Rate:</i>	<i>3.49%</i>
<i>Term:</i>	<i>25 year(s)”</i>

The **Special Conditions** to the Letter of Approval details as follows;

***“Special Conditions***

- A. *GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 “CONDITIONS RELATING TO FIXED RATE LOANS” APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE.”*

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

- “5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified 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 variable rate loan agreement which will carry no such redemption fee.”*

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

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

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **20 October 2005**. The Acceptance of Loan Offer states as follows:

/Cont’d...

- “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 three-year fixed rate and thereafter the option of a variable 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 Offer, having confirmed that the Loan Offer had been explained to them by their solicitor. It appears that the Complainants’ mortgage loan was drawn down on **07 September 2006** on an interest rate of 4.69%. The variation in the interest rate from that outlined in the Letter of Offer is permitted under **General Condition 5.2.**

The Provider submits that it issued a rate options letter and form to the Complainants prior to the expiry of the fixed interest rate period in **August 2009**. The Provider submits that it did not retain a copy of these documents. The Complainants dispute receiving these documents from the Provider.

**Provision 49 of the Consumer Protection Code 2006 (the “CPC 2006”)** (which was fully effective from **01 July 2007**) outlines 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;*
- 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.*

/Cont’d...

*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.”*

**Provision 11.4 and 11.5 of the Consumer Protection Code 2012** contain terms to the same effect as **Provision 49** of the **CPC 2006**. The Complainants’ mortgage loan was incepted for a term of **25 years** commencing from **September 2006** and the options letter and form purportedly issued in **August 2009**. It appears that the mortgage loan was redeemed in **2019**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to this office, in the absence of any explanation, why this documentation has not been held by the Provider.

The Provider has submitted in evidence a copy of a template letter it details it issued customers in **2009**. This letter details as follows:

*“I am writing to remind you that the current rate option on your mortgage account will end on [DATE].*

*Please find attached the current options available to you.*

*We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.*

*If we do not receive a written instruction from you in relation to the above on or before the [DATE], the interest rate on your mortgage will be the tracker variable rate.”*

The Provider details that the following rate options were contained in the **rate options form** that accompanied the letter:

<i>“LTV Variable rate</i>	<i>3.65%</i>
<i>2 Year Fixed rate</i>	<i>5.25%</i>
<i>5 Year Fixed rate</i>	<i>5.75%</i>
<i>7 Year Fixed rate</i>	<i>6.10%</i>

/Cont’d...



10 Year Fixed rate	6.10%
Tracker Variable rate	3.25%

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 27<sup>th</sup> July 2009”. This document outlines as follows;

**“Home Loans Rates for Existing Business**

**LTV Variable applicable to existing Home Loans**

**since 27/07/09. LTV Tracker Maturity Rates**

**applicable to Existing Home Loans since 05/06/09**

	<b>RATE</b>	<b>APR</b>
Variable Rate LTV <80%	3.55%	3.6%
Variable Rate LTV >80%	3.65%	3.7%
Tracker Rate LTV <80%	3.25%	3.3%
Tracker Rate LTV >80%	3.25%	3.3%

**Fixed Rates Applicable to Existing Home Loans**

	<b>RATE</b>	<b>APR</b>
2 Year Fixed	5.25%	4.1%
5 Year Fixed	5.75%	4.8%
7 Year Fixed	6.10%	5.3%
10 Year Fixed	6.10%	5.8%

*Existing business LTV Variable rates pre 27/07/09 and existing business LTV Tracker rates pre 05/06/09 available on request. The rate applicable to individual customers is determined in accordance with their loan documentation.”*

The Provider has summarised its policy with respect to tracker interest rate offerings 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 [mid] 2006 and [later in] 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.*

/Cont’d...

- *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.”*

There is a dispute between the parties as to whether the rate options letter and form were issued by the Provider and received by the Complainants. The Complainants submit as follows:

*“I am adamant that I never received such a letter giving me the option / choice to change my interest rate to a fixed, variable or tracker mortgage interest rate. Also the bank have still been unable to furnish your office or me with a copy of the supposed rate options letter that they sent to me, instead they have tried to muddy the water by offering you a generic “template” version of the letter.*

*The essence of my complaint is that the bank never offered me a chance to decide on an interest rate for the mortgage that I had with them after the expiration of the initial 3 year fixed rate.*

*Instead the bank imposed a higher tracker rate on me, which was higher than the average / standard tracker rate being offered at the time by 1.25%.”*

On the basis of the evidence before me it is unclear whether the Complainants received the options letter and form that the Provider submits it issued to the Complainants in **September 2009**, however, it is not in fact central to the issue for determination whether these documents were or were not received by the Complainants at that time. The reason for this is that the Complainants did not have a contractual entitlement to be given the option of any rate other than a variable interest rate in accordance with **General Condition 5.4**. As detailed above, that variable rate was a variable rate which could be adjusted by the Provider and was not a tracker interest rate. It appears that the Provider, in line with its own policy at the time, applied the tracker interest rate of 3.25% to the Complainants mortgage loan from **07 September 2009** as the default rate, as it argues that the tracker interest rate was a “competitive” rate. I note that at the time in **September 2009**, the tracker interest rate of 3.25% (ECB + 2.25%) was lower than the variable rate of 3.65% that the Provider could have converted the mortgage loan to, in accordance with **General Condition 5**.

The Complainants appear to be operating under the misconception that they are entitled to a lower tracker interest rate on their mortgage loan account. The basis of the Complainants' argument is that they perceive that tracker interest rate of ECB + 2.25% to be "*higher than the average / standard tracker rate being offered at the time by 1.25%*". In this regard, it appears that the Complainants are referring to tracker interest rates that were available generally across the banking industry and also to tracker interest rates that they purport the Provider had available. The Complainants have not however proffered any evidence to this office in support of this claim.

Firstly, it is important to be aware that even if it was the case that other financial service providers were offering a lower tracker interest rate at the time, that does not mean that the Provider is obliged to offer that same rate to customers generally or to the Complainants specifically. Secondly, the evidence in the form of the **Lending Interest Rates** document, which is extracted above, shows that the tracker interest rate that the Provider had available at the time was a tracker interest rate of 3.25% (ECB + 2.25%). There was no contractual obligation on the Provider to offer the Complainants that tracker rate or any tracker interest rate at all. However the Provider did apply the then available tracker interest rate to the Complainants' mortgage loan account as a matter of policy. The evidence shows that the tracker rate of 3.25% (ECB + 2.25%) was the tracker rate that the Provider had available for existing business home loans. There is no evidence that the Provider had a lower tracker interest rate available as the Complainants have submitted. The fact that there may be other customers of the Provider who may have availed of a lower tracker interest rate margin, as set by the Provider at an earlier point in time, and remained on that tracker interest rate margin by the time the Complainants' fixed interest rate period expired in **September 2009** does not create an obligation on the Provider to offer that earlier margin or any particular margin to the Complainants as they have suggested.

The Complainants have submitted that the Provider "*simply imposed*" the tracker interest rate of 3.25% (ECB + 2.25%) on their mortgage loan without providing the Complainants with any other option. However the Complainants have not indicated that they would have foregone the option of the tracker interest rate of ECB + 2.25% in favour of the higher variable rate (3.65%) or any of the fixed rates that were then available to the Complainants in **September 2009**. The Complainants are correct in their assertion that the Provider incorrectly "*automatically*" imposed a tracker interest rate of 3.25% (ECB + 2.25%) on the Complainants' mortgage loan account in **September 2009**. The only interest rate that the Provider had the contractual option to convert the mortgage loan to in **September 2009** was the variable rate, which was 3.65% at the time.

I note that the following tracker interest rates have applied to the Complainants' mortgage loan since **September 2009**:

/Cont'd...

Date	Rate Applied (ECB + 2.25%)
07 September 2009	3.25%
18 April 2011	3.50%
18 July 2011	3.75%
21 November 2011	3.50%
29 December 2011	3.25%
30 July 2012	3.00%
31 May 2013	2.75%
29 November 2013	2.50%
30 June 2014	2.40%
30 September 2014	2.30%
31 March 2016	2.25%

If the Provider had converted the mortgage loan to the variable rate of 3.65% in **September 2009** as it was contractually entitled to, rather than “*imposing*” a tracker rate as asserted by the Complainants, the Complainants would most likely have paid more in interest, than the Complainants have paid to date on the tracker interest rate of ECB + 2.25%. The tracker interest rate of ECB + 2.25% seems to be lower than any variable rate that may have applied.

Having considered the evidence in this matter, the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan. At the end of the 3 year fixed interest rate period the Complainants’ mortgage loan defaulted to a tracker interest rate of 3.25% (ECB + 2.25%), which was the Provider’s then available tracker interest rate. This default rate was applied as a matter of policy and not as a result of any contractual entitlement. The Complainants were not contractually entitled to any tracker interest rate or any lower tracker interest rate margin as they have submitted.

The Provider did not have a contractual entitlement to apply a tracker interest rate to the Complainants’ mortgage loan in **September 2009**. However, as the Complainants have had the benefit of a tracker interest rate, I do not intend to uphold this complaint as the application of the variable interest rate to the Complainants’ mortgage loan from **September 2009** may result in the Complainants paying more interest to the Provider than they have paid on the tracker interest rate of ECB + 2.25%.

### Conclusion

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

/Cont’d...

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**

19 June 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.