



<u>Decision Ref:</u>	2020-0222
<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 is secured on the Complainant's private dwelling house.

The loan amount was €127,000 and the term of the loan was 30 years. The Letter of Approval dated **19 December 2002** detailed the loan type as "*Variable Rate Home Loan*".

The Complainant's Case

The Complainant submits that she accepted the Loan Offer from the Provider on **21 January 2003**. The Letter of Approval detailed the interest rate applicable as 3.70%, with a discounted rate applicable for the first 12 months "*at a rate of 1% below the variable rate normally applicable to loans of this type*".

The Complainant submits that in **December 2006**, she sought to change the interest rate applicable to the mortgage loan account and submits that the Provider wrote to her to outline the interest rates available to her, which included a variable interest rate option, fixed interest rate options and a tracker interest rate option. On **11 December 2006**, the

Complainant completed the rate options form and opted to apply the three year fixed interest rate of 4.85% to the mortgage loan account.

The Complainant submits that when the three year fixed interest rate period expired in **November 2009**, she was not offered the option of a tracker interest rate by the Provider. The Complainant submits that she was only offered fixed rates or a Loan to Value ('LTV') variable interest rate. The mortgage loan account automatically defaulted to the LTV variable rate in **December 2009**, in the absence of a signed instruction from the Complainant.

The Complainant submits that she should have been offered a tracker interest rate of *"circa 1.15% above ECB rate"* on the expiry of the fixed rate period in **November 2009**, as she had previously been offered a tracker interest rate in **December 2006**, but opted for the 3 year fixed interest rate. The Complainant also submits that she understood that she would be offered a tracker interest rate on the expiry of the fixed rate period in **November 2009**, because tracker interest rates were the default interest rate on the expiry of all fixed interest rate periods when she selected the 3 year fixed interest rate in **December 2006**. She submits that *"she took up the fixed rate in December 2006 knowing that the tracker rate was the default rate on expiry of the fixed rate"*.

The Complainant submits that the rate options form she signed in **December 2006** stated that the default interest rate offering on the *"termination of the interest only period would be a tracker @ ECB+1.25%"*. The Complainant further contends that the Provider *"admits"* that on **11 September 2006**, tracker interest rates became *"the default rate on expiry of all fixed discounted rates"*. The Complainant contends that the Provider has *"completely ignored the fact that they had changed these original terms with a legal signed document in 2006"*. The Complainant submits that the Provider never issued her with any written notification that the default interest rate had changed or would no longer be available to her on the *"termination of the fixed rate"*

The Complainant submits that the Provider, in its response to this office, has been *"economical"* with the full facts and that the only conclusion that can be drawn from the Provider's letter dated **11 September 2006**, and the Provider's response to this office, is that the tracker rate had become the default interest rate on the account.

The Complainant submits that the Provider notes on numerous occasions that it is bound by the General Mortgage Conditions and specifically that General Condition 5.1 provides *"the interest rate applicable to this advance shall be fixed from the date of advance for the period specified in the letter of approval and thereafter will not be changed at intervals of less than 1 year."* She contends that the Provider raised the interest rate by 0.5% six weeks after the expiry of the fixed rate period in **December 2009**. The Complainant further

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submits that the Provider again raised the interest rate by 0.5% five months later, and by a further 1% six months after that. The Complainant submits that her interest rate peaked at 6.15% at a time when the ECB rates were between 1% and 1.50% and contends that Provider breached its own General Mortgage terms and conditions. The Complainant submits that on this basis, the mortgage loan agreement should be annulled.

The Complainant submits that nowhere in the various clauses of the mortgage loan agreement does it provide that the default variable option would not be available, only that the default rate may be subject to change. She details that that in the letter of loan offer of **September 2006**, the Provider notes that the rate will change in line with the ECB rate. The Complainant submits that making note that the rate will change in line with the ECB rate is clear evidence that the Provider intended to make the tracker rate the default rate.

The Complainant suggests that there is no mention in **Clauses 5.1 to 5.4** of the mortgage loan agreement or in the Provider's letter of **September 2006** that the tracker rate would not be available upon completion of the period of fixed rate. The Complainant further submits that the Provider never mentions that it would not be in a position to foresee what rates will be available. She submits that the only mention made in the letter regarding the termination of the fixed term is the link to the ECB rate.

The Complainant submits that due to the failure on behalf of the Provider to offer her a tracker rate of interest in **December 2009**, her mortgage loan account fell into arrears due to the "*exorbitant interest rates*" being charged. The Complainant submits that had a tracker interest rate been applied to her mortgage loan account in **December 2009**, the repayments would have been more manageable and her account would not have fallen into arrears and, therefore, would not have accrued the fines that follow. The Complainant further submits that the actions of the Provider "*magnified stress levels to totally unbearable levels*"

The Complainant is seeking the following;

- (a) That the Provider assess fairly the amount of interest overcharged from **December 2009** to date and the interest overcharged be either refunded or for her mortgage loan account balance to be reduced by that amount;
- (b) That her mortgage loan account be reinstated to the correct applicable tracker interest rate for the duration of the loan;
- (c) That the arrears on mortgage loan account ending **4467** be written off;
- (d) That the Provider redress and refund any expenses the Complainant has incurred as a result of the Providers alleged error; and

- (e) That the Provider offer adequate and generous compensation to the Complainant for putting her through this *“harrowing ordeal”*.

The Provider’s Case

The Provider states that following a loan application process, it issued a **Letter of Approval** to the Complainant on **19 December 2002** for a Variable Rate Home Loan. It submits that this loan offer was accepted by the Complainant with the benefit of independent legal advice on **21 January 2003**.

The Provider submits that the Letter of Approval provided for an initial 12 month period of a discounted variable rate and for the standard variable rate subsequently. It relies on **Special Condition A** of the Complainant’s **Letter of Approval** in support of this.

The Provider submits that it only commenced offering tracker interest rate products from **January 2004**, and therefore the Complainant’s loan predated the launch of the Provider’s tracker rate mortgage products and did not contain a contractual entitlement to a tracker rate. 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 states that the mortgage loan account drew down on **02 May 2003** on a 1 year discounted variable interest rate of 3.05%. The Provider submits that on **23 June 2003**, the interest rate changed to 2.55% and on the expiry of the 1 year discounted rate period on **4 May 2004**, it switched to a variable interest rate of 3.55%. The Provider submits that the mortgage loan account remained on the variable interest rate until **December 2006**.

The Provider submits that on **14 December 2006**, it received the Interest Rate Options Form from the Complainant which indicated the Complainant’s choice to avail of the Provider’s 3 year fixed interest rate of 4.85%. The Provider submits that although the Complainant had no contractual right to a tracker interest rate, it had included the option of a tracker interest rate on this Options Letter because from **mid-2006** to **mid-2008**, the Provider was including tracker interest rates among the options provided to customers who were applying to switch their loan to a different interest rate.

The Provider submits that prior to the expiry of the 3 year fixed rate period applying to the mortgage loan account in **December 2009**, it issued correspondence to the Complainant dated **27 November 2009** to inform her that the fixed rate was due to end and provided a list of the rate options available at that time. It submits that this correspondence did not

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include a tracker rate option as the Provider had no contractual obligation to offer the Complainant the option of a tracker rate. The Provider submits that it did not receive a returned option form from the Complainant and the mortgage loan account was switched to an LTV variable rate of 3.65% on **18 December 2009** in accordance with the mortgage loan contract. It relies on **Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this.

The Provider submits that from **mid-2006** to **mid-2009** it offered a tracker interest rate as one of its options listed in rate options letters issued to customers "*irrespective of whether or not a customer had a contractual entitlement to be offered a tracker interest rate*" and the tracker interest rate was the default rate which would apply in the absence of a rate selection by a customer. It states that the decision to offer tracker rates to these existing customers during this time was commercial in nature and made at the Provider's absolute discretion against a background of marketplace competitiveness. It submits that from **mid-2009** the Provider ceased offering tracker rates to customers expiring from fixed rates unless the customer had a contractual entitlement to a tracker rate option. The Provider submits that by the time the 3 year fixed rate on mortgage loan account expired in **December 2009**, the policy of offering tracker rates to customers expiring from fixed rates had ended.

The Provider states that it did not issue a specific notification to the Complainant that it was withdrawing its non-contractual tracker rate option from its fixed rate expiry options because as outlined above, the Provider's decision to introduce and to cease offering tracker rates to existing customers maturing from fixed and discount rates with no tracker entitlement were made at the Provider's discretion. It states however that the "*current interest rate available would be on display in the Branches, through [online web service] or telephone Banking*".

The Provider submits that it did not notify the Complainant of the withdrawal of tracker interest rates because the Complainant's fixed rate period was due to end on **19 December 2009** and to have informed the Complainant 4 months prior to the expiry would not have benefitted the Complainant. The Provider further submits that a tracker interest rate was not available for application to the account if she had applied to break the fixed rate period in **August 2009**.

The Complaint for Adjudication

The Complaint for adjudication is that the Provider wrongly failed to offer the Complainant a tracker interest rate in or around **December 2009** following on the expiry of a three year fixed interest rate period.

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 **06 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.

Following the issue of my Preliminary Decision, the Complainant made a submission to this office dated **21 May 2020**, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submissions.

Having considered the Complainant's additional submission and all of the submissions and evidence furnished to this Office, I set out below my final determination in respect of this complaint.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this

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Decision. The Complainant was informed of the parameters of the investigation by this office, by letter, which outlined as follows;

“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”

Therefore, the conduct of the third party Broker engaged by the Complainant, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant’s mortgage loan documentation.

The **Letter of Approval** dated **19 December 2002** in respect of the mortgage loan account details as follows;

<i>“Loan Type:</i>	<i>Variable Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 138,401.45</i>
<i>Loan Amount:</i>	<i>EUR 127,000.00</i>
<i>Interest Rate:</i>	<i>3.70%</i>
<i>Term:</i>	<i>30 year(s)”</i>

Special Condition A of the **Special Conditions** outlines;

“THE INTEREST RATE APPLICABLE TO THIS LOAN WILL FOR A PERIOD OF 12 MONTHS FROM THE DATE OF THE ISSUE OF THE LOAN BE CHARGED AT A RATE OF 1 % BELOW THE VARIABLE RATE NORMALLY APPLICABLE TO LOANS OF THIS TYPE. THIS CURRENTLY EQUATES TO THE INTEREST RATE SHOWN ABOVE.”

General Condition 5 of the **General Mortgage Loan Approval Conditions**, states as follows;

“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.

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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 the one hand of the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum 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 of a similar principal sum 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"

The **European Standardised Information Sheet** outlines;

"The interest rate is 3.70 percent.

The interest rate may vary from time to time."

The **European Standardised Information Sheet** further outlines;

"As a Discount Variable product, a reduction of 1.00 percentage points applies for the first 12 months. This loan will roll over into the Standard Variable Rate at the end of this period".

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The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **21 January 2003**. 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 conditions*
- iii. the [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.”

It is clear that the Letter of Approval envisaged a discounted standard variable rate for 1 year. **Special Condition A** of the **Special Conditions** does not specifically outline what would happen at the end of the discounted period. However as the loan was a “*Variable Rate Home Loan*”, it is clear that the variable rate would then apply. The variable rate in this case was a variable rate which could be adjusted by the Provider. The **European Standardised Information Sheet**, although non-binding, outlines that a standard variable rate was to apply at the end of the discounted period. As tracker interest rates were not part of the Provider’s suite of products in **2002**, it was not possible for the mortgage loan documentation which issued at that time to include a contractual entitlement to a tracker interest rate.

The Complainant’s mortgage loan account drew down on **2 May 2003** on the one year discounted variable interest rate of 3.05%. On **23 June 2003**, the interest rate changed to 2.55%. Following the expiry of the one year discounted rate period, the mortgage loan account moved to the standard variable rate of 3.55% on **4 May 2004**. These rate changes have not been disputed by the parties.

The interest rate remained on the standard variable rate for over three and a half years, and on **27 November 2006** the Provider issued a rate options form to the Complainant which contained the following interest rate options:

“Repayment Rate	Interest Rate/ APR	Cost per€000 (20 years)	Please tick the option you want
<i>Current standard variable rate loan</i>	<i>4.6%/ 4.7%</i>	<i>€6.38</i>	<input type="checkbox"/>
<i>Tracker rate (€100,000 - €249,000)</i>	<i>4.5%/ 4.6%</i>	<i>€6.33</i>	<input type="checkbox"/>
<i>2-year fixed rate</i>	<i>4.85%/4.8%</i>	<i>€6.52</i>	<input type="checkbox"/>
<i>3-year fixed rate</i>	<i>4.85%/4.8%</i>	<i>€6.52</i>	<input type="checkbox"/>
<i>5-year fixed rate</i>	<i>4.85%/ 4.8%</i>	<i>€6.52</i>	<input type="checkbox"/>

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The above figures only give a guide to repayments based on a cost per thousand euros over a 20-year term. We will send you details of your new repayment if you choose a new rate. If you chose a fixed rate or a tracker rate, the standard fixed rate or tracker rate conditions will apply. The above rates are valid as of 15th November 2006 but may change if the European Central Bank rate changes.”

The reverse side of the **options form** outlined as follows with respect to fixed interest rate loans;

“Fixed Rate Loans

Wherever repayment of a loan in full or in part is made or 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 principle 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 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.”*

The reverse side of the **options form** outlined as follows with respect to tracker mortgage loans;

“Tracker Mortgage Loans

- 1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinance 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.*

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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 reverse side of the options form which the Complainant signed on **11 December 2006**, 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 above the ECB would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank.

I note that the Complainant did not select the tracker interest rate option, rather she selected a 3 year fixed interest rate of 4.85%, and signed this rate instruction form on **11 December 2006**. The Provider received this rate instruction form on **14 December 2006**, and on **19 December 2006** applied a 3 year fixed interest rate of 4.85% to the Complainant's mortgage loan account.

The Provider wrote to the Complainant on **27 November 2009** to inform the Complainant that the fixed interest rate option would expire on **19 December 2009**. The following interest rate options were outlined to the Complainant at the time;

"Current options available:

You may only select one option.

Account Number: [XXX]

			<i>Monthly repayment</i>
			<i>EUR</i>
<i>LTV Variable Rate</i>	<i>- Currently:</i>	<i>3.6500%</i>	<i>592.87</i>
<i>2 Year Fixed Rate</i>	<i>- Currently:</i>	<i>5.2500%</i>	<i>692.95</i>
<i>5 Year Fixed Rate</i>	<i>- Currently:</i>	<i>5.7500%</i>	<i>725.90</i>
<i>7 Year Fixed Rate</i>	<i>- Currently:</i>	<i>6.1000%</i>	<i>749.42</i>
<i>10 year fixed rate</i>	<i>- Currently:</i>	<i>6.1000%</i>	<i>749.42</i>

The Complainant did not complete the interest rate options form at the time and the loan defaulted to the LTV Variable rate of 3.65% on **18 December 2009**.

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The Complainant takes issue with the fact that she was not given the option of a tracker interest rate on the expiry of the fixed interest rate period in **December 2009**, in circumstances where the Complainant had been offered a tracker interest rate in **December 2006**.

The Complainant did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period which applied from **December 2006** to **December 2009**. The evidence indicates that the Provider, in line with its own policy at the time, offered the Complainant the option of a tracker interest rate of 4.5% on the mortgage loan in **December 2006**. The Complainant of her own volition opted not to apply the tracker interest rate offer and instead applied the 3 year fixed interest rate of 4.85% to her mortgage loan in **December 2006**. The expiry of the fixed interest rate period in **December 2009** post-dated the Provider's policy of the tracker interest rate becoming the default rate at the end of a fixed interest rate period and the Provider applied a variable interest rate to the Complainant's mortgage loan in **December 2009**. This was in accordance with **General Condition 5.4** of the Complainant's mortgage loan.

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 and whose contract did not specify an entitlement to be offered a tracker rate at maturity. From that date, until [mid] 2009, the Bank's rate options letter sent automatically to such customers prior to expiry of a fixed rate period included a tracker variable rate. This initiative was taken against the backdrop of the competitive mortgage market at that time. Between [...] 2006 and [...] 2006, while the options letter included the offer of a tracker interest rate, the letter stated that, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [...] 2006 until [...] 2009, options letters stated that, in the absence of a customer selection, the listed tracker variable rate was applied to the mortgage as the default interest rate.

While the Bank commenced the withdrawal of its tracker mortgage interest rate offerings in [mid] 2008, the Bank 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 interest rates to maturing fixed rate loans where customers had a contractual right to a tracker interest rate.”

In my Preliminary Decision I stated:

*“With respect to the Complainant’s submission that “she took up the fixed rate in December 2006 knowing that the tracker rate was the default rate on expiry of the fixed rate”. It appears that the Complainant is submitting that she knew the Provider’s policy in **2006** was to apply the tracker interest rate as a default rate at the end of fixed interest rate periods where the customer did not select another interest rate option made available at the time. The Complainant has not indicated how she knew of this policy. However regardless of how the Complainant was aware of the policy, she would or should have known that the application of the tracker rate as a default rate was a matter of policy as opposed to a matter of contractual entitlement and in those circumstances that policy was subject to change at the Provider’s discretion. The Provider did in fact change that policy in **2009** and when the Complainant’s fixed interest rate period ended in **December 2009** a tracker interest rate was no longer the default rate as a matter of policy. The Complainant did not have a contractual or other entitlement to be offered a tracker interest rate in **December 2009.**”*

The Complainant’s representative in the post Preliminary Decision Submission dated **21 May 2020** details as follows:

“[The Complainant] is just an ordinary person who works as a secretary in a [details of business] and not a financial or legal professional. The only knowledge or any assumptions she made here were based on the documentation she received from the bank. In the banks letter offer in 2006, while it described, as you stated all the interest rates on offer.....To infer that [the Complainant] would or should have known that this was not a matter of contractual entitlement is a large leap to make and we believe it is an unfair assumption. The letter did not mention this fact or make it clear as was the case with the letter of 2009. We are stating therefore that it was a logical assumption for [the Complainant] to make in the absence of information to the contrary that the options offered including the Tracker option would logically be offered in the future.”

It appears that the Complainant is now submitting that she did not know of the Provider’s policy to offer tracker interest rates on mortgage loans on the expiry of fixed interest rate periods contrary to what she had indicated during the investigation of this complaint. The Complainant now states that she made the assumption that because she was offered a

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tracker interest rate of 4.5% in **December 2006** when she sought to move from the variable interest rate, that she “*assumed*” that she would be offered a tracker interest rate again. There was no reasonable or logical basis on which to make this assumption. At the time in December 2006, the Complainant was seeking to change the interest rate applicable to her mortgage loan. The Provider gave her a number of options, including a tracker option, and the Complainant decided of her own volition not to accept it and instead selected the 3 year fixed interest rate option.

I note that the Complainant has also submitted that the Provider has “*completely ignored the fact that they had changed these original terms with a legal signed document in 2006*”. The Complainant appears to be operating under the misconception that the options form that she signed on **11 December 2006**, somehow entitled her to a tracker interest rate at a later point in time. This however is not the case, as the Complainant did not select that tracker interest rate option of 4.5% in **2006**. The rate options form that she signed in **December 2006** clearly outlined that the implications of choosing a fixed rate meant that the standard fixed rate conditions would apply or alternatively if the Complainant chose a tracker rate, the tracker rate conditions would apply. The Complainant did not select the tracker option. There is no reasonable interpretation of the documentation that supports the outcome that the Complainant was entitled to the tracker interest rate option as contained in that form at a later point in time in circumstances where she did not select that option.

The Complainant’s representative in the post Preliminary Decision Submission dated **21 May 2020** details as follows:

“What happened in 2009 at the end of the fixed rate period is that as none of the fixed rates offered appealed to [the Complainant], and she did not want to return to an LTV Variable Rate (LTVVR) so she returned no option. This should have resulted in General Condition 5.1 kicking in and ensured that the interest rate would not be changed at intervals of less than one year. But as no options were chosen the bank imposed a return to the LTVVR in line with General Condition 5.4.

.....

It is our contention that General Condition 5.4 constitutes such an unfair term. While it allows both the bank and the customer to choose an LTVVR, there are virtually no instances that we can think of when a consumer would choose this option. However, in doing so, it prohibits the consumer from choosing to avail of General Condition 5.1 at the end of a fixed rate period. This General Condition 5.1 could give considerable security to the consumer without adversely affecting the banks position.

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There is no doubt that this results in an unfair advantage to the bank to the detriment of the consumer as we have outlined to you in previous submissions, allowing the bank to apply onerous interest rate increases at will while the consumer has no input. He/she is at the mercy of the bank as stated in Article 3.1 from the directive, a significant imbalance to the detriment of the consumer."

It appears to me the Complainant has misconstrued the application and meaning of **General Conditions 5.1** and **5.4**. Both conditions only apply when a fixed interest rate is applied to the Complainant's mortgage loan. **General Condition 5.4** outlines what will happen at the end of a fixed interest rate period, that is, that both the Provider and the Complaint shall each have the option to convert to a variable rate loan. While the Complainant may believe there "*virtually no instances.....when a consumer would choose*" a variable rate option, that is the contractual entitlement that the Complainants' mortgage loan provides for at the end of a fixed interest rate period. It is also important to note that the Complainant's mortgage loan was issued and drawn down on a variable interest rate type loan and remained on a variable interest rate between **May 2003** and **November 2006**. The Provider was entitled under **General Condition 5.4** to apply the variable interest rate to the Complainant's mortgage loan in **December 2009**.

With respect to the application of **General Condition 5.1** to the Complainants mortgage loan, the Complainant's mortgage loan did not draw down on a fixed rate so the part of the condition with respect to the application of the interest rate from the "*date of advance*" does not apply to the Complainant's mortgage loan. The balance of the condition means that a fixed interest rate "*will not be changed at intervals of less than one year*". This means that where a fixed interest rate is applied to the loan that the fixed interest rate period will not be less than one year. The Provider did not offer the Complainant a one year fixed interest rate in December 2009 and there was no obligation on the Provider to do so.

There is no evidence that **General Conditions 5.1** or **5.4** are unfair terms under **Article 3** of the **EU Council Directive 93/13/EEC** as the Complainant has submitted.

Having considered all of the evidence and submissions including the mortgage loan documentation, it is my view that that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of any fixed rate period, including the end of the fixed rate period which applied from **December 2006** to **December 2009**. The fact that the Provider had previously offered the Complainant a tracker interest rate on her mortgage loan as a matter of policy, which she did not accept, did not oblige the Provider to offer a tracker interest rate at a later point in time. By **December 2009**, the Provider was no longer offering tracker interest rates at the end of fixed interest rate periods, to

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customers who did not have a contractual entitlement to a tracker rate of interest. The Complainant did not have a contractual entitlement to be offered a tracker interest rate.

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

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**

30 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.**