



<u>Decision Ref:</u>	2020-0223
<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 Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan is secured on the Complainants' private dwelling house.

The loan amount was €303,600.00 and the term of the loan was 30 years. The particulars of the mortgage loan offer accepted by the Complainants on **29 September 2005** detailed that the loan type was a "1 Year Fixed Rate Home Loan".

The Complainants' Case

The Complainants submit that "When we took a loan from the bank for our house in 2005, the broker assured us that the interest rate is regulated by the European Central Bank". They submit that they "were convinced by the [Provider's] employees" that the tracker interest rate would "always" be available to them and "would never be higher" than ECB + 1.00%. They further state that the **Approval in Principle** they received from the Provider in **March 2005** "stated, that loan is Tracker."

The Complainants state that the terms of their mortgage loan agreement provide that at the end of the initial fixed interest rate period they were entitled to a variable rate. They state that "The broker and the lawyer have explained then, that the VARIABLE rate (not

strictly Tracker Variable, o[r] Standard Variable, or different) gave us a chance to choose, variable tracker, standard variable etc.” They outline that “We remember our lawyer explained to us that after a fixed period, we would have a choice: a fixed rate (for 1, 3, 5 or 10 years), or variable rates (tracker or standard), and he noted, that we are lucky, we have a tracker choice. Then we can choose any. But no one explained that these offers can be cancelled. We have always been sure that we can take advantage of these offers at any time.”

The Complainants submit that prior to the expiry of the fixed interest rate period in **October 2006** they were offered a list of interest rate options by the Provider which included a tracker interest rate. The Complainants submit that they were *“advised by the bank’s employees that the interest rate at that time had a tendency to grow up to 6% and it would be better to fix it, and after that we will easily be able to switch to the Tracker Variable rate.”* They state that based on this advice they opted to apply a 3-year fixed interest rate of 4.85% to the mortgage loan account.

The Complainants submit that when the 3-year fixed interest rate period expired in **October 2009** they discovered that the Provider had withdrawn its tracker interest rate offering. They submit that *“nobody had warned us that this choice could be ceased.”* They state that the mortgage loan account automatically converted to the Provider’s LTV variable rate on the expiry of the fixed rate period.

The Complainants further submit that they asked their broker in **2009** why they were not offered a tracker interest rate and *“He said “I don’t understand what happened. You must have the tracker rate. We organised this loan for tracker rate.””*

The Complainants submit *“Also, bank indicated, that we didn’t contact them. It is not true. We had three appointments with [the Provider] in [Named Branch].”* They submit that the first appointment was in **October 2006** when they sought advice from the Provider as to which rate to choose. They detail that they had two further appointments with the Provider in **2010** when *“We applied and restructured our repayment for one year, and [paid] interest only.”*

The Complainants submit that they have suffered *“deep depression for at least 10 years”* because of this issue. They state that *“Of course, we would never fix our rate if we know, that the bank was going to reject tracker rate. We also would more carefully think before taking this mortgage if we suspect that the bank can be so manipulative.”* They further submit that *“we consider ourselves that we are cheated by the bank, and as a result our family is now just surviving from salary to salary.”*

The Complainants are seeking the following;

- (a) That a tracker interest rate be applied to their mortgage loan account and backdated to **November 2009**, and
- (b) Compensation for the period since **November 2009**.

The Provider's Case

The Provider states that the Complainants were not offered a tracker interest rate when the fixed interest rate period expired in **October 2009** because they did not have a contractual entitlement to be offered a tracker interest rate when the fixed interest rate period expired.

The Provider states that as the loan application was made to the Provider by an independent financial broker the Provider did not engage directly with the Complainants when they were negotiating the terms of their new mortgage. It states that in such circumstances, the issue of financial advice and completion of the mortgage application are handled independently by the broker who also assists the applicants with all the available loan options to best suit their financial needs. It submits that in **2005** it had a dedicated online broker portal containing comprehensive information relevant to the Provider's mortgage loans, rates and document requirements. It states that further, communications regarding process or rate changes were issued to brokers on the online portal who also contacted the Provider by telephone with any queries they had.

The Provider submits that an **Approval in Principle** issues when the Provider pre-approves a borrower who meets the Provider's mortgage criteria, based on proof of income, evidence of repayment capacity and savings, among other requirements. It states that an Approval in Principle means the Provider can give the applicants a credit approval and while it is not legally binding, it helps the Provider determine how much can be borrowed by the borrower. The Provider submits that the **Approval in Principle** dated **16 March 2005** that issued to the Complainants required further information before the Provider would issue a full mortgage approval. This would only happen once the assessment of all required information to meet the Provider's mortgage lending criteria was carried out. It states that the Approval in Principle was not a legally binding document as the quoted terms for the mortgage approval in principle were adaptable at any stage during the mortgage application process. This could happen for example if the Complainants sought, to amend the amount, term or rate within the Provider's mortgage related criteria.

The Provider submits that it issued a **Letter of Approval** to the Complainants on **26 May 2005** for the loan amount of €303,600, repayable over a term of 30 years. It details that the initial rate of interest was fixed at 2.55% for 1 year after which the rate would be variable. It relies on **Special Condition A** and **General Mortgage Loan Approval Condition 5** in support of this. It also refers to **page 2** of the **General Mortgage Loan Approval Conditions** which states that if the loan is a variable rate loan the payment rates on the loan may be adjusted by the lender from time to time. It states that the Letter of Approval was accepted by the Complainants on **29 September 2005**, and when signing the **Acceptance of Loan Offer** the Complainants confirmed that their solicitor had fully explained the terms and conditions of the Loan Offer to them. The loan drew down on **3 November 2005**.

The Provider submits that it is satisfied that the term “*variable rate*” in the Complainants’ mortgage loan account was sufficiently clear and transparent in its meaning. It relies on **Condition 1.10** and **Condition 4.13** of the Provider’s **Mortgage Conditions** in support of this. The Provider states that **page 1** of the **European Standardised Information Sheet** that accompanied the Letter of Approval also stated that the Complainants would be offered a fixed rate option with a variable rate thereafter that could be adjusted by the lender from time to time. The Provider further states that when the Complainants made their **Application for Credit** on **7 July 2004** they received the “*addendum Consumer Credit Act 1995 document*” which clearly stated that the variable rate on the housing loan may be adjusted by the lender from time to time.

The Provider details that the Complainants did not have any contractual entitlement to be offered a tracker rate option. However it states that between **mid-2006** and **mid-2009** the Provider’s standard fixed rate expiry letters for certain existing customers included an option of a tracker rate at maturity of the fixed term. It states that it commenced the withdrawal of its tracker mortgage interest rate offering in **mid-2008**. However 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.

The Provider submits that prior to the expiry of the fixed rate period, it issued the Complainants a **rate options letter and form** in **October 2006** which listed the mortgage interest rates that were available to the Complainants for application at the end of the fixed rate period in **November 2006**, including the tracker variable rate of 4.35% (ECB + 1.10%). It states that the options letter and form advised the Complainants that in the event the Provider did not receive the signed form with their preferred rate, the mortgage account would automatically default to the tracker rate option of 4.35% (ECB +1.10%).

The Provider states that on **25 October 2006** the Complainants signed the options form and opted for the 3-year fixed rate mortgage rate of 4.85%. It states that the Provider received the signed form on **26 October 2006** and this rate was duly applied to the Complainants' mortgage loan account on **3 November 2006**. It details that the fixed rate was due to expire on **3 November 2009**, by which time the Provider was no longer offering a tracker rate option to customers who did not have a contractual entitlement to be offered a tracker rate option.

The Provider states that it is not in a position to confirm what may have been discussed with the Complainants when they returned the options form to the Provider in **October 2006** and has no record of a meeting at this time. It states that even if they discussed the options form with a staff member of the Provider, the Complainants had to examine the various options, including the tracker rate, and ultimately choose an interest rate to suit their needs. It submits that this is the basis of every discussion between the Provider and a customer who is considering the interest rate options made available by the Provider.

The Provider states that it was not in a position in **2006** to provide information to the Complainants regarding future rate options which would be available on expiry of any of the fixed rate periods offered to the Complainants in **2006** and, in particular, could not say whether a rate available in **2006** would be available in **2009**. It states that the Provider may from time to time introduce or withdraw products or interest rates it offers and is not in a position to know in advance the interest rates or products it would be offering on future dates, and further, it could not say for how long it would continue to offer an expiry rate option of a tracker rate to customers who had no contractual entitlement to such an option.

The Provider submits that on **14 October 2009**, prior to the expiry of the fixed rate period in **November 2009**, it issued the Complainants an options letter and form which contained the mortgage rate options available at the time, including the LTV variable rate and fixed rates for 2, 5, 7 and 10 year terms. It states that the options letter explained that in the absence of a completed form being returned to it that the default rate which would be applied was the LTV variable rate. The Provider submits that on **3 November 2009**, when the Complainants' mortgage account expired from the 3 year fixed rate term, it defaulted to the LTV variable rate of 3.65% in the absence of an instruction from the Complainants.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants the option of a tracker interest rate upon the expiry of the fixed interest rate period in **October 2009**.

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Decision

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

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

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

A Preliminary Decision was issued to the parties on **20 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.

Before dealing with substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is only the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this Office, by letter, which outlined as follows;

"I note that in the detail of your complaint you also make reference to particular assurances and advices given by your Broker, which it would appear from the

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documentation furnished, was [third party Broker]. Please be advised that the conduct of the Broker will not be dealt with under this complaint.”

Therefore, the conduct of the third party Broker engaged by the Complainants, 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 Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2006** and in **2009**.

It appears that there are two parts to the **application form**. The first part is Broker branded and was signed by the Complainants on **2 June 2004**. The second part is the Provider branded application form called *“Application for Credit”* which was signed by the Complainants on **7 July 2004**.

The Broker section of the application form details;

“This application form is divided into two parts. The first part captures information about you, the applicant. The second part gives important information about the mortgages offered by a given mortgage lender, including statutory warnings.”

The *“Explanatory text”* section of the form states *“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME”*.

I note that in *“Section 7: Mortgage Required”* of the Broker-branded part of the application, the Complainants in response to the question *“Rate Type”* did not select any of the rate types, from those available, which included Tracker, Fixed, Variable, Discount, Split and Other.

In *“Section 2: DETAILS OF MORTGAGE REQUIRED”* of the Provider-branded part of the application, the Complainants left the question *“Loan Type”* blank.

The Provider-branded part of the application also states as follows;

“VARIABLE RATE LOANS

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

The **Approval in Principle** dated **16 March 2005** detailed as follows;

<i>“Loan Purpose:</i>	<i>Purchase Price:</i>	<i>Loan Amount:</i>
<i>Homeloan –Ftb</i>	<i>€330,000</i>	<i>€303,600</i>

<i>Ltv:</i>	<i>Rate:</i>	<i>Term:</i>
<i>92%</i>	<i>Tracker</i>	<i>25/30 Years</i>

Please ensure the rate and term quoted are correct

Approval in Principle subject to:

- ✓ [the Provider’s] normal terms and conditions*
- ✓ Satisfactory valuation*
- ✓ Satisfactory ICB Credit check*
- ✓ Satisfactory [Provider] credit score*
- ✓ Up to date salary certificate, 2004 P60 and one up to date payslip for [the Second Complainant] reflecting her new basic of €22,369 is to be furnished and reviewed by an underwriter prior to cheque issue.”*

I note that tracker interest rates were on offer generally by the Provider when the Complainants applied for the mortgage loan in **July 2004**. The Complainants availed of the services of a third party Broker during the application stage of the mortgage loan application. I again note that the Broker’s application form outlined the types of interest rate options available generally on mortgage loans, including the tracker rate.

In circumstances where the Complainants were engaging with a Broker with respect to the mortgage loan application, I accept that there was no requirement for the Provider to communicate directly to the Complainants at that time. Furthermore the fact that tracker interest rate options were available generally as part of the Provider’s suite of products at the time, did not oblige the Provider to offer the Complainants a tracker interest rate on this loan application. There is no evidence before me which suggests that the Provider’s employees informed the Complainants that they would “*always*” be entitled to a tracker interest rate “*no higher*” than ECB + 1.00%, as the Complainants have submitted.

I note that the Provider’s internal note recorded on **25 May 2005 at 14:31:09PM** details as follows;

“VALUATION FAXED TO IMAGING. ^PLEASE ISSUE OFFER FOR 303,600 AS PER AIP BY [REDACTED]. APPLICANTS WANT THE 1YR FIXED RATE OVER 30 YEARS.”

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

<i>“Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>€340,000.00</i>
<i>Loan Amount:</i>	<i>€303,600.00</i>
<i>Interest Rate:</i>	<i>2.74%</i>
<i>Term:</i>	<i>30 year(s)”</i>

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

“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** details as follows;

“5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified in 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 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

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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".

Condition 1.10 of the Provider's **Mortgage Conditions** outlines as follows;

"The Appropriate Rate" means the rate or rates of interest per centum per annum for the Advance as specified in the Letter of Approval, or such increased or reduced rate or rates of interest as may from time to time be payable on the Advance and any Additional Advance under the terms hereof."

Condition 4.13 of the Provider's **Mortgage Conditions** outlines as follows;

"[The Provider] may from time to time increase or reduce the Appropriate Rate (and may do so where the Appropriate Rate includes a differential by increasing or reducing either or both of the relevant Basic Rate and the differential). A reduction in the Appropriate Rate may be made without notice or formality and so as to take effect from such date as [the Provider] may determine but [the Provider] reserves the right not to permit a reduction in the Monthly Repayment."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **29 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 conditions*
 - 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.*

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4. *My/our Solicitor has fully explained the said terms and conditions to me/us.*”

It is clear to me that the **Letter of Approval** envisaged a one year fixed rate and thereafter the option of conversion to 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 Approval having confirmed that it had been explained to them by their solicitor in **September 2005**. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the expiry of the one year fixed interest rate period in **October 2006**.

The Complainants have submitted that the **Approval in Principle** dated **16 March 2005** provided for a tracker interest rate. It is important for the Complainants to understand that in order for them to have a contractual right to a tracker interest rate on their mortgage loan at the end of the fixed interest rate periods in **2006** and **2009** 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 May 2005** which was signed by the Complainants on **29 September 2005**. The fact that the Provider had outlined the option of taking out a mortgage loan on a tracker interest rate in the **Approval in Principle** document in **March 2005**, after the Complainants submitted their application for a mortgage loan, did not oblige the Provider to offer that tracker interest rate in the Letter of Approval. The evidence in the form of the Provider’s internal note recorded on **25 May 2005** shows that the Complainants requested a one year fixed interest rate mortgage loan **and the Letter of Approval** dated **26 May 2005** provided for the one year fixed rate.

The Complainant have also submitted *“that the VARIABLE rate (not strictly Tracker Variable, o[r] Standard Variable, or different) gave us a chance to choose, variable tracker, standard variable etc.”* 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 Complainants 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 Complainants were of the view that the **Letter of Approval** dated **26 May 2005**, was not specific as to the type of interest rate that would apply at the end of the fixed interest rate period, the Complainants 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 them by their solicitor.

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I note that the Complainants have indicated that their broker and solicitor “*explained*” to them that the variable interest rate as defined in their **Letter of Approval** included a tracker variable rate. I again re-iterate that this complaint is maintained against the Provider and in these circumstances this office cannot consider any conduct of the third party broker. Furthermore this office does not have any jurisdiction over information or advice given by their solicitor.

I note from the evidence that prior to the expiry of the 1 year fixed interest rate period on **03 November 2006**, the Provider wrote to the Complainants to set out its current available interest rates on **13 October 2005**. The Provider’s letter enclosing the **rate options form** details as follows;

“I am writing to remind you that the current rate option on your mortgage account will end on 03 Nov 2006.

Please find attached the current options available to you, including our competitive tracker variable rate.

If we do not receive a written instruction from you in relation to the above on or before the 03 Nov 2006, we will automatically switch your loan the Tracker Variable Rate.*

We value your business highly at [the Provider] so if you have any questions regarding your options, please contact our dedicated mortgage team on [PHONE NUMBER].”

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

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

		<i>Monthly Repayment EUR</i>
- Tracker Variable Rate* (ECB + maximum 1.1000%)*	- Currently 4.35%	1573.35
- Standard variable Rate	- Currently 4.60%	1546.80
- 1 year fixed rate	- Currently 4.75%	1573.35
- 2 year fixed rate	- Currently 4.85%	1591.17
- 3 year fixed rate	- Currently 4.85%	1591.17
- 4 year fixed rate	- Currently 4.89%	1598.33

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- 5 year fixed rate	- Currently 4.99%	1616.29
- 7 year fixed rate	- Currently 5.15%	1645.24
- 10 year fixed rate	- Currently 5.25%	1663.45

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- Please note, if you chose 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 1.1000% 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 "**Variable Rate Loans**" the reverse side of the form outlined "The payment rates on this housing loan may be adjusted by the lender from time to time."

Under the heading "**Tracker Mortgage Loans**" the reverse of the rate options form 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 Complainants did not opt to accept the tracker interest rate option of 4.35% (ECB + 1.10%) and instead signed the **rate options form** on **25 October 2006** electing to accept the 3 year fixed interest rate of 4.85%. The Provider applied the requested interest rate to the mortgage loan account on **3 November 2006**.

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Having considered the mortgage loan documentation, it is my view that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period in **October 2006**. It appears that the Provider offered the tracker rate option of 4.35% (ECB + 1.10%) to the Complainants in line with its own policy at the time.

The Provider has summarised its policy with respect to tracker interest rate offerings as follows;

"...[in mid] 2006, the [Provider] 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 a tracker interest rate, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, in the absence of a customer selection the tracker interest rate was applied to the mortgage as the default interest rate.

While the [Provider] 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 [Provider] continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to same."

The reverse side of the options form which the Complainants signed on **25 October 2006** contained detail about the tracker interest rate offer, such that the Complainants 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"*. Therefore, the Complainants ought to have been aware that, in circumstances where they opted for the tracker interest rate or did not select another rate and allowed the mortgage loan to default to the tracker interest rate, the percentage of 1.1000% above ECB would not be exceeded during the term of the loan and the ECB rate would fluctuate as set by the

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European Central Bank. The Complainants opted not to choose the tracker interest rate of 4.35% (ECB + 1.10%) and instead applied a 3 year fixed interest rate of 4.85% to the mortgage loan in **November 2006**.

The Complainants submit that they decided to apply the fixed interest rate as they were *“advised by the bank’s employees that the interest rate at that time had a tendency to grow up to 6% and it would be better to fix it, and after that we will easily be able to switch to the Tracker Variable rate.”* There is no evidence before me regarding any such discussion between the Provider’s employees and the Complainants at that time and therefore in the absence of such evidence I am unable to comment. However it appears to me that Complainants were aware of the moving nature of variable type rates and elected to apply the three-year fixed interest rate in **2006** to protect themselves from the uncertainty of a variable type rate. The Complainants of their own volition decided not to choose the option of a tracker interest rate of ECB + 1.10% (4.35%) at the time and instead selected the higher three year fixed interest rate offered (4.85%).

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. Having considered those options the Complainants selected the 3 year fixed interest rate. There was no contractual obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan and as such the Complainants could not reasonably have expected to be offered a tracker interest rate that they did not elect to apply to their mortgage loan in **2006**, at a later point in time.

I note from the evidence that prior to the expiry of the 3 year fixed interest rate period on **03 November 2009**, the Provider wrote to the Complainants to set out its current available interest rates on **14 October 2009**. The Provider’s letter enclosing the **rate options form** details as follows;

“I am writing to remind you that the current rate option on your mortgage account will end on 03 Nov 2009.

Please find attached the current options available to you.

We recommend that you consider your options carefully before making your selection. If 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. Our rates at that time could be higher or lower

/Cont’d...

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 03 Nov 2009, the interest rate on your mortgage will be the LTV Variable Rate**.

We value your business highly at [the Provider] so if you have any questions regarding your options, please contact our dedicated mortgage team on [PHONE NUMBER].”

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

“Current options available:

You may only select one option.

Account number: [XXX]

		Monthly Repayment EUR
- LTV Variable Rate**	- Currently 3.6500%	1417.66
- 2 Year Fixed Rate	- Currently 5.2500%	1679.21
- 5 Year Fixed Rate	- Currently 5.7500%	1765.55
- 7 Year Fixed Rate	- Currently 6.1000%	1872.22
- 10 Year Fixed Rate	- Currently 6.1000%	1872.22

....

- Please note, if you chose a fixed rate, the standard fixed-rate conditions will apply (see over the page).

- **In calculating your loan to value (“LTV”) ratio, we use the current loan balance and the most recent valuation on file for this mortgage.”

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 “**Variable Rate Loans**” the reverse side of the form outlined “The payment rates on this housing loan may be adjusted by the lender from time to time.”

It does not appear that the Complainants completed or returned the **rate options form** to the Provider. The Provider wrote to the Complainants by letter dated **3 November 2009** as follows;

/Cont’d...

"I wish to advise you that in accordance with the terms of your loan, the rate of interest has been amended to a variable rate currently 3.650%."

As outlined above, the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at the end of the three year fixed interest rate period in **November 2009**. The Provider as a matter of policy had offered the Complainants a tracker interest rate of ECB + 1.10% on the expiry of the initial fixed interest rate period in **October 2006**, however the Complainants did not select this option.

For the reasons outlined above, I do not uphold this 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**

16 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.

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