



<u>Decision Ref:</u>	2020-0238
<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 Complainants with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainants' private dwelling house.

The loan amount was €270,000 and the term of the loan was 35 years. The particulars of the mortgage loan offer signed by the Complainants on **30 May 2006** detailed that the loan type was a "2 Year Fixed Rate Home Loan".

The Complainants' Case

The Complainants submit that they were offered and accepted a mortgage from the Provider in **May 2006**. The mortgage loan account drew down on a two year fixed interest rate.

The Complainants state "*We believe we were denied a Tracker rate mortgage on several occasions after finishing fixed rate terms. On one occasion we were defaulted to a Tracker rate for 2 days by the bank after we did not respond in time to a request re direction after a fixed rate term.*"

The Complainants submit that on the expiry of the initial two year fixed interest rate period in **June 2008**, their mortgage loan account automatically defaulted to a tracker interest rate for two days. They requested to apply a three year fixed interest rate of 5.55% to the mortgage loan.

The Complainants have outlined that the Provider *"...was well placed to forecast the economic situation unfolding and [the Provider] purposely and wilfully broke [its] own rules, codes and regulations by accepting an out of date correspondence from us on 9th June 2008. [The Provider] were fully aware of the consequences that would have on us as customers and it suited the bank to break their own rules and move us from a loss making tracker rate for [the Provider] onto a fixed rate 3 full days after a strict deadline set by [the Provider] had passed which has suited the bank immensely in terms of financial gain."*

The Complainants further state that a tracker interest rate option should have been made available to them on the expiry of the three-year fixed interest rate period on the mortgage account in **June 2011**.

The Complainants submit that the Provider has *"consistently denied our requests to be reoffered"* a tracker rate. They further detail that *"It took several requests for information from the bank before they actually acknowledged that we were ever on a Tracker rate. We believe they hid this purposely from us to deny us the opportunity to access a tracker rate and as a result we have we have been financially impacted hugely on appallingly high rates. On the final occasion after our fixed rate term expired we were not offered the Tracker rate even after prior offers."*

The Complainants submit *"We are seeking to be allowed to choose a Tracker rate mortgage as we believe we have overpaid by approximately €42,000.00. We are looking for redress and repayment of this gross overpayment."*

The Provider's Case

The Provider submits that it did not offer the Complainants a tracker interest rate at the end of the fixed rate period in **June 2011** as the Complainants had no contractual entitlement to be offered a tracker interest rate at that time or at any time during the term of the loan.

The Provider details that it issued a **Letter of Approval** to the Complainants on **25 May 2006** for a home loan in the amount of €270,000 repayable over a term of 35 years. It states that the rate of interest was fixed for the first two years at 4.39%, after which the Provider or the Complainants could elect to apply a variable rate. The Provider relies on **Special Condition A** of the **Letter of Approval** and **General Condition 5** of the **General**

Mortgage Loan Approval Conditions in support of this. It states that the **Letter of Approval** did not contain any entitlement to a tracker rate. It outlines that the proceeds of the loan were drawn down on **8 June 2006**.

The Provider submits that on **16 May 2008** it issued a letter to the Complainants, enclosing an options form which provided fixed rate options for 2, 3, 4, 5, 7 and 10 year terms, the standard variable rate option of 5.69%, and a tracker variable rate option of 5.30% (ECB + 1.30%). It states that the letter informed the Complainants that the fixed rate period was due to expire and also informed them that if they did not return the signed options form confirming their preference for a particular rate, either on or before **8 June 2008** the mortgage would default to the tracker variable rate. It states that this in fact occurred on **6 June 2008** (as **8 June 2008** was a Sunday, the interest rate changed on the previous business day).

The Provider submits that on **6 June 2008**, it received via fax a completed and signed options form dated **5 June 2008** from the Complainants, in which they elected to apply a three year fixed rate of 5.55% to the mortgage loan account. This rate was applied to the account on **9 June 2008**, being the next working day.

The Provider outlines that the tracker variable rate was offered to the Complainants on the expiry of the initial fixed interest rate period because since **mid-2006** the Provider was *“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.”* It outlines that during the period between **mid-2006** and **mid-2009**, these customers, including the Complainants, were automatically issued with a tracker interest rate option on the expiry of a fixed rate period. It states that from **mid-2006** it also provided in options letters that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest on maturity of the fixed rate period.

The Provider submits that twenty days prior to the expiry of the fixed interest rate period, it issued an options letter and form to the Complainants on **20 May 2011** to remind them of the expiry of the then current fixed interest rate applying to their mortgage loan account and to offer them a number of interest rates, including the LTV variable rate of 5.90% and fixed interest rate options for 2, 5, 7 and 10 year terms. It states that the letter also informed the Complainants that if no instruction was received from them prior to the expiry of the fixed rate period, the mortgage loan account would default to the LTV variable interest rate. The Provider states that in the absence of any instruction from the Complainants, the account defaulted to the variable rate of 5.10% on **9 June 2011** as per the terms and conditions of their mortgage.

The Provider states that in **June 2011** there were existing customers who had a tracker rate of interest on their accounts and there were also existing customers on a fixed rate where the mortgage terms and conditions included a contractual entitlement to be offered a tracker rate on expiry of the fixed rate term. It states that tracker rates were not otherwise available to existing customers at that time.

In response to the Complainants' submission that it took several requests for information before the Provider disclosed that the mortgage loan account was on a tracker interest rate in **June 2008**, the Provider states that the Complainants emailed the Provider on **2 October 2015** "*in relation to their mortgage and their expectation to be allowed to apply a tracker or SVR on expiry of their fixed rate in 2008 and 2011*". The Provider states that it responded on **10 December 2015** "*addressing the Complainants query and confirming they had no contractual entitlement to a tracker rate either on expiry of the fixed rate or at any time during the term of the loan.*" The Provider states that it received further correspondence from the Complainants on **16 December 2015** in relation to the matter, to which it responded to on **20 January 2016**, again advising that there was no contractual entitlement to a tracker rate.

The Provider states that it received a further email from the Complainants on **24 October 2017** in which, the Complainants stated that they had sent "*several emails in relation to their complaint.*" The Provider states that it responded to this email on **8 February 2018**. The Provider submits however that it has found no record of any emails from the Complainants other than their communications in **October 2015** and **December 2015**. The Provider submits that in its responses it has informed the Complainants that on **6 June 2008** their mortgage loan account had defaulted to a tracker rate of ECB + 1.30% and that on **9 June 2008** the selected three year fixed interest rate was applied to the account following receipt of the signed options form from the Complainants.

The Provider rejects the Complainants' submission that it "*purposely hid*" information from the Complainants in order to deny them the opportunity to avail of a tracker interest rate. It states "*Under no circumstances did the Bank behave in the manner alleged by the Complainants*". It submits that there were no circumstances in which the Complainants could avail of a tracker rate other than on the one occasion when it was offered to them in **May 2008**.

The Complaint for Adjudication

The complaint for adjudication is the Provider incorrectly failed to allow the Complainants to avail of a tracker interest rate on the expiry of fixed rate periods on "*several occasions*".

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 **17 June 2020** outlining my preliminary determination 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’ loan documentation. It is also necessary to set out the interactions between the Complainants and the Provider between **June 2008** and **June 2011**.

The **Letter of Approval** dated **25 May 2006** details as follows;

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

<i>Purchase Price / Estimated Value:</i>	<i>EUR 270,000.00</i>
<i>Loan Amount:</i>	<i>EUR 270,000.00</i>

/Cont’d...

Interest Rate: 4.39%
Term: 35 year(s)

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

“Special Conditions

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

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

“CONDITIONS RELATING TO FIXED RATE LOANS

- 5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*
- 5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- 5.3 *Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:*
- (a) *A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*
- (b) *A sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum 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.*

/Cont’d...

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 **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **30 May 2006**. The Acceptance of Loan Offer states as follows:

"1. I/we the undersigned accept the within offer on the terms and conditions set out in
i. Letter of Approval
ii. the General Mortgage Loan Approval 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.

...

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

It is clear to me that the Letter of Approval envisaged a two-year fixed rate of 4.39% and thereafter the option of a variable rate. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to them by their solicitor and they understood the Loan Offer.

I note from the evidence that prior to the expiry of the two year fixed rate period on **8 June 2008**, the Provider wrote to the Complainants to set out its current available interest rates on **16 May 2008**. The Provider's letter enclosing the rate options form detailed as follows;

"I am writing to remind you that the current rate option on your mortgage account will end on 08 Jun 2008.

/Cont'd...

Please find attached the current options available to you, including our competitive tracker variable rate. In calculating the new tracker rate we use the original loan amount to calculate your balance band and we use your current balance and the original valuation of your home to calculate the loan to value.

If we do not receive a written instruction from you in relation to the above on or before the 08 June 2008, we will automatically default your loan to 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]. They will be happy to help you."

The **rate options form** enclosed with the letter outlined as follows;

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

- | | | |
|---|--------------------|-----|
| - Tracker variable rate
(ECB + maximum 1.3000%)* | - Currently: 5.30% | ... |
| - Standard variable rate | - Currently: 5.69% | ... |
| - 2 year fixed rate | - Currently; 5.70% | ... |
| - 3 year fixed rate | - Currently; 5.55% | ... |
| - 4 year fixed rate | - Currently; 5.50% | ... |
| - 5 year fixed rate | - Currently; 5.50% | ... |
| - 7 year fixed rate | - Currently; 5.60% | ... |
| - 10 year fixed rate | - Currently; 5.70% | ... |

....

- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).
- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 1.3000% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans."

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading **“Fixed Rate Loans”**.

Under the heading **“Tracker Mortgage Loans”** the reverse of the rate options form contained the following;

“1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.

4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”

The Complainants did not opt to accept the tracker interest rate option of 5.30% (ECB + 1.30%) which they were offered by the Provider and instead signed the **rate options form** on **5 June 2008** electing to accept the 3 year fixed interest rate of 5.55%. The signed form was received by the Provider’s branch on **6 June 2008 at 15:41PM**. This was before the **8 June 2008** date specified by the Provider in its letter. I note from the Complainants’ mortgage loan statement that a rate of 5.30% was applied to the account on **6 June 2008**, which accords with the tracker interest rate (ECB + 1.3%) that was available at the time. I note that the fixed interest rate of 5.55% selected by the Complainants was subsequently applied to the account on **9 June 2008** in accordance with the Complainants’ instructions. The Complainants have submitted that the Provider should not have actioned their rate options form as it was *“out of date”*. There is no evidence of this. The rate options form was received on **Friday 6 June 2008** by the Provider and was actioned on the next business day after the fixed interest rate period expired on **Monday 9 June 2008**.

Having considered the mortgage loan documentation, it is clear that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed interest

/Cont’d...

rate period in **June 2008** or at any other time. It appears that the Provider offered the tracker rate option of 5.30% (ECB + 1.30%) 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;

“... on [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. In the absence of a customer selection, the variable rate was applied to the mortgage. The Bank also provided in options letters issued from [mid] 2006 that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest on maturity of the fixed rate period.”

The reserve side of the options form which the Complainants signed on **5 June 2008** 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 1.30% above ECB would not be exceeded during the term of the loan and the ECB rate would fluctuate as set by the European Central Bank. The Complainants however opted not to choose the tracker interest rate of 5.30% (ECB + 1.30%) and instead chose to apply a 3 year fixed interest rate of 5.55% to the mortgage loan in **June 2008**.

The Complainants have suggested that the Provider was “*fully aware of the consequences*” of the Complainants electing to apply the fixed interest rate to the mortgage loan in **June 2008** instead of the tracker interest rate. It appears to me that the Complainants believe that they have paid more in interest on the mortgage loan, than they would have had a tracker interest rate applied to the mortgage loan account. Whilst it may be the case that with hindsight the Complainants are of the view that a tracker interest rate option would have been preferable and in the long term may have proven to be less costly, there is no evidence that the Provider could have known this in **2008**. The Complainants, themselves,

/Cont’d...

chose not to select the tracker interest rate option of ECB + 1.30% that was offered to them by the Provider at that time and instead elected to apply the three year fixed interest rate. The Provider acted on the Complainants' instructions.

I have considered the Provider's internal emails on **26 January 2010**. The first email is sent at **11:07AM** and details as follows;

"Can you please forward Interest penalty figures to [the Complainants] on the above account"

A second email was sent at **13:56PM** and details as follows;

"[Illegible] this to pay the mortgage in full or switch to a variable rate as these figures differ as per [Redacted]"

A further email sent at **13:57PM** details as follows;

"Sorry, its to switch to a variable rate."

I note that the Provider wrote to the Complainants by letter dated **27 January 2010**, which detailed as follows;

"I refer to your recent query in relation to switching out of your fixed rate mortgage contract.

In order to break your current 3 year fixed rate contract, we require that all parties to the loan sign this form below and return to [the Provider].

A consequence of your wish to switch from your fixed rate is that the funding arrangements that the bank has put in place for your mortgage will have to be unwound. The cost to the bank of doing this is €11,201.44 to allow us to proceed with your switch request we require payment of this amount."

The form enclosed with the Provider's letter detailed as follows;

"I/We confirm we wish to change the fixed interest rate applicable to my/our mortgage to the current variable rate applicable to my/our mortgage."

It does not appear from the evidence that the Complainants opted to break from the fixed interest rate period and did not sign the above form in **January 2010**. In addition there is no evidence that the Complainants requested to switch to a tracker interest rate at that

/Cont'd...

time and the Provider did not “allow” them to avail of a tracker interest rate on their mortgage loan as they have suggested.

I note from the evidence that prior to the expiry of the three year fixed rate period on **9 June 2011**, the Provider wrote to the Complainants to set out its current available interest rates on **20 May 2011**. The Provider’s letter enclosing the rate options form detailed as follows;

“I am writing to remind you that the current rate option on your mortgage account will end on 09 Jun 2011.

Please find attached the current options available to you.

...

*If we do not receive a written instruction from you in relation to the above on or before the 09 Jun 2011, the interest rate on your mortgage will be the LTV Variable Rate**.”*

The **rate options form** enclosed with the letter outlined as follows;

<i>“LTV Variable Rate **</i>	<i>CURRENTLY 5.90%</i>	<i>...</i>
<i>2 Year Fixed Rate</i>	<i>CURRENTLY 7.25%</i>	<i>...</i>
<i>5 Year Fixed Rate</i>	<i>CURRENTLY 8.75%</i>	<i>...</i>
<i>7 Year Fixed Rate</i>	<i>CURRENTLY 9.10%</i>	<i>...</i>
<i>10 Year Fixed Rate</i>	<i>CURRENTLY 9.10%</i>	<i>...</i>

...

If you choose a fixed rate, the standard fixed rate conditions will apply – see overleaf

...”

I am disappointed to note that the Provider has not furnished the reverse side of the rate options form in evidence. Nonetheless I do not consider it to be material to the conduct complained of in this complaint.

It does not appear from the evidence that the Complainants completed or returned the options form to the Provider. I note from the mortgage loan statement that on **9 June 2011** the interest rate was switched to the LTV variable rate of 5.90%.

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 **June 2011** or at any other time. The Provider as a matter of policy had offered the

/Cont’d...

Complainants a tracker interest rate of ECB + 1.30% on the expiry of the initial fixed interest rate period in **June 2008**, however the Complainants did not select this option. The tracker interest rate of ECB + 1.30% was automatically applied to the account on **6 June 2008**. On the same day the Provider received the completed rate options form which was signed by the Complainants on **5 June 2008** electing to apply a three year fixed interest rate to the mortgage loan account. The fixed interest rate was applied to the mortgage loan on **9 June 2008**, in accordance with the Complainants instructions.

I note that the Complainants have submitted that it took several requests for information from the Provider before the Provider disclosed to them that the mortgage loan account was operating on a tracker interest rate in **June 2008** and that the Provider "*hid this purposely*" from them in order to deny them the opportunity to avail of a tracker interest rate.

I note the Provider has referred in its submissions to communications from the Complainants received on **2 October 2015**, **16 December 2015** and **24 October 2017**. The Provider states that it responded to the Complainants' communications on **10 December 2015**, **20 January 2016** and **8 February 2018**. Having considered the correspondence furnished in evidence, I am disappointed to note that the Provider has furnished only the Complainants' email to the Provider dated **16 December 2015** and the Provider's response to same dated **20 January 2016**. Notwithstanding this, there is no evidence before me that the Provider "*hid*" information from the Complainants as to the application of interest rates on their mortgage loan account, as the Complainants have suggested. As set out above, it is clear to me that the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan at any stage during the term of the mortgage.

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

Conclusion

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

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

9 July 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.