



<b><u>Decision Ref:</u></b>	2020-0273
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

##### **Background**

This complaint relates to a mortgage loan account held by the Complainant with the Provider.

The loan amount was €130,000 and the term of the loan was 20 years. The particulars of the Letter of Approval dated **04 November 2005** detailed that the loan type was a “1 Year Fixed Rate Home Loan”.

##### **The Complainant’s Case**

The Complainant applied for a mortgage loan account with the Provider, the bank against which this complaint is made, through a Broker in **June 2005**. The Complainant submits that as the Broker was acting as an agent for the Provider, it was his responsibility to get “*the best possible rate*” for her. The Complainant outlines that the Provider has indicated that “*...part of the reason that [she] wasn’t entitled to be offered a tracker*” was because she dealt with a Broker.

The Complainant details that she was not offered a tracker interest rate when she applied for the mortgage loan between **June** and **November 2005**. The Complainant was provided with a letter of offer for mortgage loan account on **4 November 2005** providing for a one

year fixed interest rate of 2.55%. The Complainant submits that she met with the Provider for a financial review on **16 November 2005** and feels that due to the fact her entire finances were scrutinised, she did not receive the necessary advice regarding her mortgage options.

The Complainant drew down the mortgage loan account on **12 April 2006** on a one year fixed rate of 3.45%.

The Complainant submits that on **12 March 2007**, she was provided with a list of interest rate options available to her. The Complainant outlines she was not offered the option of a tracker interest rate at this time. She details that as she was totally unaware of any other option other than a variable rate, she opted for a three year fixed rate of 5.10% and that it was *"totally unfair"* that she wasn't offered a tracker rate. The Complainant details that her neighbour also applied for a mortgage through a Broker with the same Provider and was offered a tracker interest rate on the expiry of the initial fixed rate period.

The Complainant submits that when the tracker mortgage issue was highlighted in the media she was *"advised by local branch"* of the Provider that she *"should have been offered a tracker"*.

The Complainant submits that she has *"suffered a financial loss"* as she was on a *"much higher rate of interest"* than if she had been on a tracker interest rate.

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

The Provider submits that the Complainant completed a loan application form on **28 June 2005** for a mortgage loan in the amount of €130,000.00 repayable over a period of 20 years.

The Provider states that the Complainant applied for her loan through her chosen Broker, who was not a tied agent of the Provider. The Provider submits that the Broker was not acting as an agent for the Provider and had no ties to the Provider. The Provider details that the broker was independent of the Provider and was engaged by the Complainant to act on her behalf in respect of her application to the Provider. The Provider outlines that it was not a party to the discussions between the Complainant and her Broker in respect of the interest rates available and had no direct involvement with the Complainant during the application process.

The Provider details that it was the Broker's responsibility to provide all relevant information to the Complainant and the *"ultimate choice as to which product to choose"* was up to the Complainant. The Provider submits that the Complainant submitted an

/Cont'd...

Application Form through her chosen Broker for a one year fixed interest rate in **2005** and the Provider is of the view that this was suitable product for the Complainant because it was the loan type she applied for with the assistance of her Broker and it was a loan type for which she was eligible.

The Provider submits that tracker, fixed, variable, discount and split interest rate types were available for selection by the Complainant in her Application Form. The Provider submits that the loan offered to the Complainant was the loan she selected in her application to the Provider. The Provider submits that the Complainant applied for a "*1 Year Fixed Rate Home Loan*".

The Provider submits that the Complainant attended a financial review with the Provider on **11 November 2005** and discussed the mortgage and loan product as well as protection (life cover and illness cover). The Provider submits that this meeting was not in relation to the provision of a mortgage loan but in respect of other financial arrangements. The Provider submits that when a financial review occurs in or around the time of a mortgage loan application, it normally related to life assurance required in the loan approval conditions.

The Provider submits that it issued a Letter of Approval dated **04 November 2005** to the Complainant for a 1 year fixed rate of 2.55% repayable over 20 years. The Provider states that the Letter of Approval was accepted by the Complainant on **22 November 2005**, and when signing the **Acceptance of Loan Offer**, the Complainant confirmed that her solicitor had fully explained the terms and conditions of the Loan Offer to her. The Provider submits that the mortgage was drawn down on **12 April 2006** on a 1 year fixed rate of **3.45%**.

The Provider submits that there was no contractual entitlement to a tracker interest rate in either the Special or General Conditions of the Letter of Approval. The Provider further submits that on the expiry of the fixed rate period the contract provided that a variable rate may be applied by either the Complainant or the Provider. The Provider relies on **Special Condition A** and **General Condition 5** in this regard. The Provider submits that **General Mortgage Loan Approval Condition 5** states that the Provider could change the rate of interest on the loan to a variable rate at the end of any fixed rate period.

The Provider submits that the Complainant wrote a letter to the Provider on **12 March 2007** stating that she wished to fix the interest rate on her account for 3 years with immediate effect and this was sent by fax to the Provider. The Provider details that this written request was likely on foot of a telephone call made by the Complainant to the Provider requesting a fixed interest rate. The Provider outlines that due to the passage of time, it is not in a position to retrieve a recording of any telephone call with the Complainant which may have taken place on **12 March 2007**.

/Cont'd...

The Provider details that it responded on the same day, providing the Complainant with a list of the current fixed rate options and the Complainant returned the signed rate options form dated **14 March 2007** indicating that she wished to avail of a 3 year fixed rate of 5.10%. The Provider outlines that it received the signed rate options form on **21 March 2007** and the mortgage loan account was amended on the same date, effective from **01 March 2007**.

The Provider submits that it did not issue a letter to the Complainant in **March 2007** relating to the maturity of the initial fixed rate period which commenced in **April 2006**, as the Complainant had already broken from the 1 year fixed interest rate prior to its maturity. The Provider contends as there was no fixed rate expiry on **12 April 2007**, no options letter issued. The Provider details that had the Complainant not broken from her fixed rate, she would have received the Provider's usual options letter 20 days prior to the date of the expiry of the fixed rate which would have included variable, fixed and tracker interest rates. The Provider outlines that although the Complainant did not have a contractual entitlement to a tracker interest rate at any point during the term of her loan, the Provider began including tracker rates as an option on interest rate forms from **mid-2006**. The Provider details that this policy stopped in **mid-2009**.

The Provider submits that the Complainant's 3 year fixed interest rate was due to expire on **01 March 2010** and it issued a reminder letter and rate options form to the Complainant 20 days before **01 March 2010**.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- (a) The Provider failed to offer the Complainant the option of a tracker interest rate when she applied for the mortgage loan between **June** and **November 2005**; and
- (b) The Provider failed to offer the Complainant the option of a tracker rate at the end of the initial fixed rate period in or around **April 2007**, or at any other stage, prior to the withdrawal of the tracker rate offering in **mid-2009**.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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.

/Cont'd...

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 **22 July 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 Complainant 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 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. If you have any complaint to make in relation to the advice given by your Broker, any such conduct must form the basis of a separate 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.

Furthermore there is no evidence that the Broker was acting as an agent for the Provider at the time of the Complainant’s application as she suggested. The Complainant has submitted into evidence a letter that she purports is from the Broker on Provider headed

/Cont’d...

paper. The letter is in fact a letter from the Provider to the Broker in relation to the Complainant's mortgage application, enclosing the mortgage loan documentation. In circumstances where the Broker submitted the application on behalf of the Complainant, it was appropriate for this letter to issue to the Broker, for onward transmission to the Complainant.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2005** and in **2009**.

I have considered the **Loan Application** and the **Application for Credit**. The **Loan Application** details as follows under the heading "**mortgage details**";

**"rate type**

*tracker:*  *fixed:*  *variable:*  *discount:*  *split*  *other:*  "

The "*fixed*" option was selected and beside it in handwriting is "*1 yr.*"

It is clear that a tracker interest rate was one of the available rate options for selection when the Complainant was applying for her mortgage loan through the Broker. However the Complainant did not elect this option and rather proceeded with an application for a mortgage loan on a fixed interest rate.

The Complainant in her submissions appears to indicate that she was treated differently by the Provider with respect to the possibility of availing of a tracker interest rate mortgage because her application for a mortgage loan was submitted through a Broker. There is no evidence before me to indicate that this was the case. The tracker rate option was available for selection, but the Complainant did not chose it.

A **Letter of Approval** dated **04 November 2005** was issued to the Complainant which details as follows;

<i>"Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
--------------------	------------------------------------

<i>Purchase Price / Estimated Value:</i>	<i>EUR 230,000.00</i>
<i>Loan Amount:</i>	<i>EUR 130,000.00</i>
<i>Interest Rate:</i>	<i>2.55%</i>
<i>Term:</i>	<i>20 year(s)"</i>

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

/Cont'd...

***“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.*

*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:*

/Cont’d...

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

The **European Standardised Information Sheet** which accompanied the Loan Offer letter outlined the below:

***“Nominal Rate***

*The interest rate is 2.55 percent.*

*This is fixed for 1 year(s)*

*At the end of the fixed rate period you may exercise an option to contract for another fixed rate period (if available) or to move to a variable rate. In the event of the rate becoming variable, THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.*

*The lock-in period for this product is the fixed rate term. However this can be broken subject to payment of a redemption fee as described in the section on Early Repayment below.”*

I understand that a meeting took place between the Complainant and the Provider on **16 November 2005**. The Complainant has submitted into evidence her notes of that meeting which include an overview of payment protection and mortgage protection options. The Provider issued a letter to the Complainant dated **16 November 2005**, which outlines as follows:

*“The purpose of the meeting was to review your current financial arrangements and to analyse your other financial needs. Based on the information you gave me, I made a number of recommendations to you. We looked at the following area(s):*

- *Protection (Life Cover, Illness Cover)*
- *Mortgages and Loans”*

The Complainant submits that she should have received advice from the Provider with respect to interest rate options at this time. By this time, the Complainant had already applied for and had been issued a **Letter of Approval** for a one year fixed interest rate mortgage loan. There is no evidence to suggest that the Complainant had sought advice or information from the Provider, during this meeting about the potential of exploring other

/Cont'd...



interest rate options and revising the offer that had been made to her. There was no obligation on the Provider to instigate any such conversation with the Complainant.

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **22 November 2005**. The Acceptance of Loan Offer states as follows:

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*  
*i. Letter of Approval*  
*ii. the General Mortgage Loan Approval Condition*  
*iii. [the Provider's] Mortgage Conditions.*  
*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*  
*...*  
*4. My/our Solicitor has fully explained the said terms and conditions to me/us."*

It is clear to me that the Letter of Approval envisaged a one year fixed rate of 2.55% and thereafter a variable rate. The variable rate in this case made no reference to a tracker or the ECB rate, rather it was a variable rate which could be adjusted by the Provider. The Complainant accepted the Letter of Approval having confirmed that the Loan Offer had been explained to her by her solicitor on **22 November 2005**. If the Complainant was not happy with the terms of the Letter of Offer, including the type of interest rate, the Complainant could have decided not to accept the offer made by the Provider.

It is unclear from the submissions made by both parties whether or not the Complainant contacted the Provider by telephone on **12 March 2007** to discuss the interest rate that applied to her mortgage loan account. If it is the case that telephone contact was made, it is disappointing to note that the Provider did not maintain some record of this.

In any event, the Complainant's intentions are clear as she wrote to the Provider by fax on **12 March 2007** stating the following:

*"I wish to fix my mortgage for 3 yrs at 5.1% with immediate effect. [Illegible], please forward this information to [named person]."*

An internal email issued between representatives of the Provider at 12.29 on **12 March 2007**, with the Complainant's mortgage loan account number in the subject line, stating:

*"[Named Person],*  
*Can you send out a standard options form the above with no admin fee"*

/Cont'd...

The Provider then issued a letter to the Complainant dated **12 March 2007** stating:

*"Dear [Complainant],*

*You recently contacted us about the mortgage account shown above.*

*I am attaching a list of our current fixed rate options. Please tick the rate you would like and return it, signed to:*

*[Provider's address]*

*If you have any questions please contact us on [Provider's phone number]."*

The letter to the Complainant enclosed a rate options form, which listed the below rates:

<b><i>"Approximate repayment</i></b>		<b><i>eur €</i></b>
<i>Current Rate</i>	<i>3.45%</i>	<i>812.38</i>
<i>1 Year fixed rate Mortgage currently</i>	<i>4.99%</i>	<i>915.21</i>
<i>2 Year fixed rate Mortgage currently</i>	<i>5.15%</i>	<i>926.30</i>
<i>3 Year fixed rate Mortgage currently</i>	<i>5.10%</i>	<i>922.82</i>
<i>5 Year fixed rate Mortgage currently</i>	<i>5.15%</i>	<i>926.30</i>
<i>7 Year fixed rate Mortgage currently</i>	<i>5.15%</i>	<i>926.30</i>
<i>10 Year fixed rate Mortgage currently</i>	<i>5.15%</i>	<i>926.30"</i>

The Provider has submitted into evidence a copy of the rate options form, signed by the Complainant dated **14 March 2007**. The Complainant has selected the *"3 Year fixed rate Mortgage currently"* at 5.10%.

The Provider has also submitted a letter issued to the Complainant dated **21 March 2007** which details the following:

*I am writing to you again about your mortgage.*

*We have now amended your mortgage as follows*

<i>Product Type</i>	<i>3 Year Fixed Rate Home Loan</i>
<i>Term Remaining:</i>	<i>229 Months</i>
<i>Due date:</i>	<i>12/04/2007</i>
<i>New repayment:</i>	<i>€861.05</i>
<i>*Balance outstanding</i>	<i>€126,473.75</i>
<i>**Loan type</i>	<i>Annuity</i>

/Cont'd...

*Interest rate: 5.10%*  
*The above repayment includes TRS and insurance where relevant*

*I hope this is to your satisfaction. If you have any questions, please phone our [Provider's] Mortgage Servicing on [Provider's number]"*

The evidence is clear that, in **March 2007** the Complainant requested a three year fixed interest rate of 5.10% and the Provider made that interest rate option available to the Complainant. There was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate when she contacted the Provider in March 2007.

The Provider has however submitted that had the Complainant's mortgage loan reached the maturity of the initial one year fixed interest rate period in **April 2007** that the Provider would have then offered the Complainant a tracker interest rate, as it was its policy to do so at that time. The Provider has summarised its policy as follows;

*"...[in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period. Between [...] 2006 and [...] 2006 while the options letter included the offer of a tracker interest rate, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, in the absence of a customer selection the tracker interest rate was applied to the mortgage as the default interest rate.*

*While the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008 (it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.*

*After [mid] 2009, the Bank continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to same."*

The Provider has submitted the following interest rates were available on the expiry of fixed interest rate periods, at the time:

/Cont'd...

<i><b>“Repayment Home Loans</b></i>	<i><b>Rate</b></i>
<i>Variable rate</i>	<i>3.55%</i>
<i>1 year fixed rate</i>	<i>3.60%</i>
<i>2 year fixed rate</i>	<i>3.95%</i>
<i>3 year fixed rate</i>	<i>4.30%</i>
<i>4 year fixed rate</i>	<i>4.70%</i>
<i>5 year fixed rate</i>	<i>4.90%</i>
<i>7 year fixed rate</i>	<i>5.30%</i>
<i>10 year fixed rate</i>	<i>5.60%</i>
<i>Tracker mortgage (€150,000 - €249,999)</i>	<i>3.40%</i>
<i>Tracker mortgage (€250,000 or more)</i>	<i>3.10%”</i>

In the context of the Complainant’s mortgage loan, this is not relevant. The fact remains that the Complainant contacted the Provider and requested the application of a 3 year fixed interest rate of 5.10% to the mortgage loan. The Provider complied with the Complainant’s request and applied the interest rate sought.

The Complainant did not request that the Provider apply a tracker interest rate to her mortgage loan at any point in time either before or after she drew down the mortgage. There was no obligation on the Provider to contact the Complainant at any stage to offer a tracker interest rate to the Complainant on her mortgage loan. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainant on her mortgage loan account. Nonetheless, if the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainant could have contacted the Provider at the time. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainant to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider’s rights not to accede to that request, if it was made.

The Complainant did not have a contractual or other entitlement to a tracker interest rate on the mortgage loan at any point in time. The Complainant applied for and was offered a mortgage loan on a one year fixed interest rate with the Provider in **November 2005**. The Complainant then sought for a 3 year fixed interest rate of 5.10% to be applied to the mortgage loan in **March 2007**. The Provider acted on the Complainant’s instructions in applying the fixed interest rates to the Complainant’s mortgage loan in **November 2005** and **March 2007**.

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

/Cont’d...

**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.

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

17 August 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.