



<b><u>Decision Ref:</u></b>	2020-0282
<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 appropriate compensation or redress CBI Examination Failure to apply a tracker rate at a point in time CBI Examination
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

The complaint relates to a mortgage loan account ending **9286** held by the Complainant with the Provider and an overcharge of interest in the amount of €785.33. The mortgage loan account is secured on the Complainant's principal private residence.

The loan amount was €125,000 and the term of the loan was 20 years. The Offer of Mortgage Loan dated **11 December 2012** detailed that the interest rate applicable was "PDH LTV Var <=50%". The purpose of the loan was to redeem an existing joint home loan held by the Complainant and a third party (mortgage loan account ending **9045**) which had a balance of €13,663.56 and purchase the third party's share in the property. Mortgage loan account ending **9045** was on a tracker interest rate of ECB + 0.95% at the time of redemption.

The Complainant's mortgage loan account ending **9286** was considered by the Provider as part of the Central Bank directed Tracker Mortgage Examination (the "Examination"). The Provider identified that an error had occurred on the €13,663.56 portion of the Complainant's mortgage loan account that had been used to redeem mortgage account ending **9045**. The mortgage loan account was deemed to be "impacted" as part of the Examination.

The Provider contacted the Complainant by letter dated **6 December 2016** advising her of the error that had occurred on the mortgage loan account. The Provider detailed *“the circumstances that caused this failure to happen”* as follows;

*“When you requested to change the borrowers named on your mortgage account, we didn’t offer you the option to keep a tracker interest rate. This was because we had withdrawn trackers in October 2008. While we agreed a different interest rate with you at the time, we now believe this approach was unfair to you.”*

With respect to the effect of the failure on the mortgage loan account, the Provider outlined as follows;

*“What does this mean for you?  
Now that we have completed the detailed review of your mortgage account and reduced your interest rate, we have been able to calculate the redress and compensation that is due from 02/01/2013, which was when your account was first impacted.”*

The Complainant’s mortgage loan account was switched to a tracker interest rate of ECB + 0.95% in **August 2016**.

The Provider made an offer of redress and compensation to the Complainant by letter dated **6 December 2016**. The offer of €1,917.72 comprised of the following;

1. Redress of €802.72 covering;
  - The amount overpaid while on the incorrect rate
  - Interest to compensate for not having access to the money overpaid on the mortgage loan account (Time Value Money).
2. Compensation of €500.00 for the failure on the mortgage loan account
3. Independent Professional Advice payment of €615.00.

The Complainant’s mortgage loan account balance was also adjusted by €498.55.

In **November 2017** the Complainant appealed the redress and compensation offer to the Independent Appeals Panel. The Appeals Panel decided on **21 February 2018** that the appeal was unsuccessful on the basis that *“there was insufficient evidence to support the claims”* for financial and non-financial losses.

As the Complainant completed the Provider’s internal appeals process, this office is in a position to progress the investigation and adjudication of the complaint.

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The conduct complained of that is being adjudicated on by this office, is as follows;

- A. That the Provider failed to apply a tracker interest rate of ECB + 0.95% to the mortgage loan account from the correct point in time (**January 2013**).
- B. That the Provider has not offered adequate redress and compensation to the Complainant for the failure identified on her mortgage loan account.

### **The Complainant's Case**

The Complainant submits that she drew down a mortgage loan account with the Provider in her sole name in **January 2013**, secured on the family home. She states that she had previously held a mortgage loan account with the Provider in joint names with her husband, which was also secured on the family home. She details, *"The only reason for the Remortgage was a legal separation from my [e]x-spouse. I have been penalised because of this."*

The Complainant states that the Provider's offer of redress and compensation for the failure identified on her mortgage loan account is *"wholly inadequate"*. She submits that during the period of the overcharge her mortgage repayments were *"€765 per month"* as against the sum of *"€596 per month"* that she pays now. She submits that she has not received any compensation *"for paying the higher amount for nearly 4 years"*.

The Complainant submits that the Provider has overcharged her an estimated €11,259.21 on the mortgage loan account. She submits that if the mortgage loan account had been on the correct tracker rate from **January 2013** she would not *"be at a loss of €11,259.21"*. She states that she and her family are *"at the loss of the use of this money"*.

The Complainant submits that the tracker interest rate of ECB + 0.95% should have been applied to the entirety of her mortgage loan account from the date of drawdown in **January 2013** and she has only been compensated in relation to the sum of *"€13,663.56 used to pay off the initial mortgage."* She asserts that she *"should have been on the correct Tracker Rate from Jan. 2013 for the full amount (€125,000) of my mortgage not €13,663.56."*

The Complainant submits that the *"weighted average interest rate"* that was used by the Provider to calculate her redress and compensation offering is *"highly advantageous"* to the Provider, but not to her as the customer. She further submits that the sum of €17.39 offered by the Provider in respect of the Time Value of Money, is *"an insult"*.

The Complainant is seeking;

- Compensation of €11,259.21 for interest overcharged on the mortgage loan account.
- Compensation of €3,000.00 for the loss of the use of money overpaid on the mortgage loan account.
- Compensation of €1,000.00 for the stress and worry caused to the Complainant as a result of the Provider's failure on her mortgage loan account.

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

The Provider details that on **1 October 1999** a Letter of Offer for a joint mortgage loan account ending **9045** issued to the Complainant and a third party. The loan amount was £87,000 (€110,467) for a term of 20 years on a variable interest rate of 3.99%. The Provider states that on **7 July 2006** it received a request to apply a tracker interest rate of ECB + 0.95% which was applied on **10 July 2006**. The mortgage loan account ending **9045** remained on the tracker interest rate of ECB + 0.95% until it was cleared in full and closed on **8 January 2013**.

The Provider states that on **3 August 2012** the Complainant submitted a loan application in her name only. It details that it issued a **Letter of Offer** to the Complainant on **11 December 2012** for the mortgage loan account ending **9286** which was accepted and signed by her on **19 December 2012**. The loan amount of €125,000.00 was repayable over a term of 20 years and subject to a LTV variable rate of 3.84%.

The Provider details that the Complainant's mortgage loan account ending **9286** was drawn down in two separate portions, as follows;

- The first portion of drawdown in the sum of €13,663.56, was used to refinance the existing mortgage loan account ending **9045** in the name of the Complainant and the third party, which had been on the tracker rate of ECB + 0.95%; and
- The second and final portion in the sum of €111,336.44, was drawn down by way of equity release on the mortgaged property and was used by the Complainant to purchase the third party's share of the property.

The Provider submits that it confirmed to the Complainant in its letter dated **6 December 2016** that she "*should have had the option to keep a tracker interest rate following a request to change one of the borrowers named on Mortgage Loan Account (account ending 9045)*".

The Provider submits that the criteria it considered in setting the level of redress and compensation offered to the Complainant, align to the principles of redress outlined under

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the Central Bank directed Tracker Mortgage Examination guidelines, in particular that redress will result in impacted customers being returned to the position they should have been in if the issue had not occurred, and that compensation is to be reasonable and reflect the detriment incurred.

The Provider states that as the impacted account relates to a home (PDH) that is still in the customer's possession and is not in a legal process, the percentage of compensation applied would usually have been 15% of the interest overcharged plus the Time Value of Money payment. It states however that as the compensatory payment would have fallen below €500 as a result, it increased the compensation paid to the Complainant to €500. The Provider states that it has refunded the Complainant €785.33, which is the amount that she overpaid, and it also made a Time Value of Money (TVM) payment of €17.39. The Provider details that it also made a payment towards Professional Advice of €615. It states that it reduced the balance of the mortgage by €498.55, which is the balance that would have applied had the Provider's failure not occurred.

The Provider states that the basis on which compensation was calculated as part of the Examination to compensate the Complainant for not having access to the money which she overpaid, or Time Value of Money, was calculated by selecting the best annual deposit rates the Provider offered during the impacted period and applying these monthly to the amounts overpaid during the impacted period.

The Provider outlines that the Complainant's mortgage loan account ending **9286** was deemed to be impacted as part of the Central Bank directed Tracker Mortgage Examination ("the Examination") because the first portion of drawdown in the sum of €13,663.56 had been used to repay the balance on mortgage loan account ending **9045**, which at the time was on a tracker interest rate. The Provider states that it decided that it was *"unfair not to have offered the tracker rate on the amount of €13,663.56 as it was a direct replacement for a then existing tracker mortgage"*.

The Provider details that the second portion of drawdown in the sum of €111,333.44, was not impacted by the Provider's failure, as this balance was never on a tracker interest rate and was not used to replace the balance of the tracker mortgage (account ending **9045**). It states that this portion drew down on a standard variable rate and remained on a standard variable rate up until the rectification date on **3 August 2016**.

The Provider submits that for the calculation of the Complainant's redress, it applied a *"weighted interest rate"* to the mortgage loan account for the impacted period (**02 January 2013 – 03 August 2016**), which was calculated by combining the tracker rate on the amount of €13,663.56 and the standard variable rate on the balance of €111,336.44. It outlines that the reason a weighted average rate was applied for this period was due to

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the fact that only the portion of €13,663.56 of the €125,000 borrowing on the mortgage loan account was impacted as part of the Examination. The Provider states that by adopting this weighted average or “blended” approach *“the same result was achieved as if the Provider had applied the correct rate to the impacted portion and the actual contracted rate to the non-impacted portion of the Mortgage Loan Account”*.

The Provider acknowledges that *“it could have been made clearer”* in its redress and compensation letter to the Complainant dated **06 December 2016** *“as to how the weighted average rate was calculated and why it was applied”*. It states that this was explained more clearly in its Response to the Complainant’s appeal to the Independent Appeals Panel. The Provider states that it believes that it was clear in communicating the point that only part of the Complainant’s mortgage loan account was deemed to be impacted under the Examination.

The Provider states that the fact that a portion of the mortgage account was not impacted by the failure and is not entitled to redress, presented a *“redress challenge”* for the Provider, and as such it considered two options;

1. Separate out the €13,663.56 amount from the date of failure and have the Complainant agree to loan documentation for two separate mortgages for €13,663.56 and for €111,336.44. However the Provider states this approach would place a burden of effort on the Complainant in terms of the legal documentation required to turn one mortgage account into two separate accounts.
2. Do not separate out the €13,663.56 amount, given the inconvenience this would place on the Complainant, and exercise the Provider’s commercial discretion to *“go beyond its redress requirements”* and place the full loan balance on a tracker rate going forward.

The Provider details that the Complainant should have been entitled to retain the tracker rate only on the €13,663.56 portion of the loan, but the Provider chose not to separate this portion from the total balance going forward. Instead the Provider outlines that it applied the tracker rate of ECB + 0.95% to the full remaining balance of the mortgage loan from **03 August 2016** until maturity. It states that by choosing this option the Complainant has been placed in a better position going forward than she would have been in if the failure had not occurred and removes any inconvenience for her to separate out her loan between two accounts. It outlines that the two options *“were not offered to the Complainant”* and the Provider *“chose the option that was more beneficial to the Complainant”*.

The Provider states that the Complainant’s claim of €11,259.21 is based on figures supplied to the Complainant by an independent advisor. It submits that *“While the rate*

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*used to calculate the figures provided by [Redacted] is not clear, it would appear that a tracker rate of ECB plus a margin of 0.95% may have been applied to the entire balance of Mortgage Loan Account (account ending 9286) on a look back basis, rather than just to the impacted portion of the mortgage (€13,663.56)".* The Provider submits that the actual interest overcharged, using the weighted average rate basis, is €758.33, as opposed to €11,259.21. The Provider states that it believes that the correct interest rate adjustments have been applied to the Complainant's mortgage loan account for the impacted period **(02 January 2013 - 03 August 2016)**.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- A. That the Provider failed to apply a tracker interest rate of ECB + 0.95% to the Complainant's entire mortgage loan account from the correct point in time **(January 2013)**.
- B. That the Provider has not offered adequate redress and compensation for the failure identified on the Complainant's mortgage loan account.

### **Decision**

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

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

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

A Preliminary Decision was issued to the parties on **31 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

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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, the final determination of this office is set out below.

In order to determine this complaint, it is necessary to review and set out details of the Complainant's mortgage loan documentation and details of certain interactions between the Complainant and the Provider in **2012/2013**, when mortgage loan ending **9045** which was held by the Complainant and a third party was redeemed and the Complainant's mortgage loan account ending **9286** was applied for and drawn down.

**A Mortgage Loan Application** was signed by the Complainant on **3 August 2012**.

In **Section F: Mortgage Loan Details**, in response to the question "*Purpose of Mortgage Loan*" the Complainant has written "*Buy out Partner*". There is no reference to interest rate options in the application form.

A letter from the Complainant to the Provider dated **13 September 2012**, details as follows;

*"Please note that I am now seeking a loan of €125K, as per valuation supplied by [Redacted]"*.

The Provider wrote to the Complainant by letter dated **21 September 2012** which detailed as follows;

*"I refer to your recent application for a [Provider] Home Mortgage and I am pleased to advise that the Bank has provisionally approved Mortgage facilities for you to a figure of EUR 125,000.00, over 20 years.*

...

*I await receipt of the following information, which must be to our satisfaction prior to issuing a formal Letter of Loan Offer.*

...

*For separated/divorced parties, we require a copy of the separation agreement or solicitor's written confirmation of any maintenance payments stipulated in the maintenance agreement."*

The Complainant's representative wrote to the Provider on **26 November 2012** as follows;

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*"We refer to the above matter and now enclose herewith certified copy Deed of Separation for your attention."*

**Page 1** of the **Letter of Offer** dated **11 December 2012** details as follows;

**"IMPORTANT INFORMATION AS AT 11/12/2012"**

- |                                    |                       |
|------------------------------------|-----------------------|
| 1. Amount of Credit Advanced       | €125,000              |
| 2. Loan Type                       | Annuity for the Term  |
| 3. Period of Agreement             | 20 years / 240 months |
| 4. Number of Repayment Instalments | 240                   |
| 5. Amount of Each Instalment       | (1) 240 @ €746.31"    |

The **Particulars of Offer of Mortgage Loan** on **page 2** of the Letter of Offer detail;

"	<b>Term (Months)</b>	<b>Loan Type</b>	<b>Interest Rate Description</b>	<b>Rate</b>	<b>Adjustment*</b>	<b>Net Rate</b>	<b>Amount of Each Instalment</b>
1	240	Annuity for the Term	PDH LTV Var <=50%	3.84%	0.0%	3.84%%	€746.31"

- *"The rate adjustment (if any) takes into account the particular circumstances of the customer's case"*

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

***"Special Conditions***

...

*Solicitors confirmation of irrevocable and unconditional contract for sale being in place for €150,000 re sale of existing primary dwelling house, prior to drawdown of the facility.*

*The existing Home Loan, account number(s) [ending] 9045 must be cleared in full on drawdown of the facility now offered. (If the existing loan is on a fixed rate of interest, a breakage cost may occur)"*

The **General Terms and Conditions** of the Letter of Offer detail;

**"3.6 LTV VARIABLE INTEREST RATE MORTGAGE LOAN**

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3.6.1 LTV variable rate is available only where the property is or is intended to be the principal residence of the Customer. The applicable rate band will depend on the loan-to-value ratio ("LTV") of the amount of the mortgage loan relative to the value of the property set out in the Particulars of Offer of Mortgage Loan. The interest rate applicable at any time, will vary according to the prevailing LTV variable rates set by the Bank from time to time, subject to these conditions.

..."

The Complainant's solicitor wrote to the Provider by letter dated **13 December 2012** as follows;

*"In relation to Special Condition 2 Part 2 "Solicitors confirmation of irrevocable and unconditional contract for sale being in place for €150,000 re sale of existing primary dwelling house, prior to drawdown of facility" this is not applicable to this case as the house is not for sale.*

*Our Client [Name] is buying out her husband's share in the property for the sum of €114,000 and she is remaining in the family home with the children.*

...

*We would therefore be obliged if you would confirm the deletion of this condition or provide us with a new loan offer immediately."*

The Provider wrote to the Complainant's solicitor by letter dated **19 December 2012** detailing as follows;

*"I refer to your correspondence of 13<sup>th</sup> December 2012 and confirm that the Bank has waived the contract for sale condition as [the Complainant] is buying out her husband's share in the property."*

I note that **Special Condition 2** was duly crossed out in the Letter of Offer dated **11 December 2012**.

The Complainant signed and accepted the **Acceptance and Consent** on **19 December 2012** in the presence of her solicitor, on the following terms;

*"I/We accept the conditions of this Offer and agree to mortgage the property to the Lenders as Security for the Mortgage Loan."*

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The Provider wrote to the Complainant's representative on **02 January 2013**, as follows;

*"Having received your Letter of Undertaking in this case, we are writing to inform you that the amount(s) listed below has been transferred to the account specified below.*

Amount	NSC	Account number
€13,663.56	[XXXXXX]	[XXXX]9045
€111,336.44	[redacted]	[redacted]"

It was at this time in **January 2013** that the failure that was subsequently identified in **August 2016** as part of the Examination occurred on the Complainant's mortgage loan account ending **9286** for the following reason:

*"When you requested to change the borrowers named on your mortgage account, we didn't offer you the option to keep a tracker interest rate. This was because we had withdrawn trackers in October 2008. While we agreed a different interest rate with you at the time, we now believe this approach was unfair to you."*

The Complainant did not have a contractual entitlement to the application of the tracker interest rate of ECB + 0.95%, which was previously held on mortgage account ending **9045** on the new mortgage loan that she was applying for. It is important for the Complainant to understand that there was no obligation on the Provider to offer the Complainant a tracker interest rate of ECB + 0.95% on the entire mortgage loan under mortgage account ending **9286**. That being said, the Provider subsequently identified a certain unfairness in not offering the Complainant the option to change the borrowers named on mortgage loan account ending **9045** and keep the tracker interest rate of ECB + 0.95% on the balance of that account that was moving over into mortgage account ending 9286 of €13,633.56. Again I restate that there was no entitlement to the tracker interest rate of ECB + 0.95% on the additional funds of circa €111,000 being sought at the time by the Complainant. The additional funds was new lending and the Provider was entitled to make an offer for those borrowings on its then available rates for new borrowings.

I note that when redressing the Complainant's mortgage loan account ending **9286** as part of the Examination, the Provider considered two options. These options are set out in the Provider's response to the appeal to the Independent Appeal Panel, as follows:

*"Option 1 – Separate out the €13,663.56 amount from the date of failure and have the Customer agree to loan documentation for two separate mortgages, one for €13,663.56 (impacted) and one for €111,336.44 (non-impacted). However, this approach would place a burden of effort on the Customer in terms of the legal*

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documentation required to turn one new mortgage account into two separate accounts.

**Option 2** (chosen Option) – Don't separate out the €13,663.56 amount given the inconvenience this would place on the Customer. While the Customer is entitled to only have the impacted portion of the loan continue on a tracker rate going forward (and noting that a weighted average rate is both technically challenging and does not work into the future, as variable within the loan change), the Bank exercised commercial discretion to go beyond the redress requirements and placed the full loan balance on a tracker rate going forward. The Bank chose Option 2 as this places the Customer in a better position going forward than she would have been in if the failure had not occurred, and removes any inconvenience for the Customer to separate out her loan between two accounts.

....

Accordingly, for the historical part of the impacted period, the Redress payment was calculated by using a blended rate on the full loan balance of €125,000. The blended rate was arrived at by combining the Tracker Rate on the balance originally from the account ending 9045 (€13,663.56) and the actual SVR rate on the balance of the impacted loan (ie. €111,336.44).

....

In summary, the Bank has applied a blended rate, ranging from 2.86% - 3.80% up to the rectification date (August 2016), and applied the Tracker Rate of ECB + 0.95% to the full loan balance thereafter for the remaining term of the loan until it matures in 2033."

It is most disappointing that the Provider did not set out these options to the Complainant or explain the reason that it took the approach that it did in applying redress to the Complainant's mortgage loan account. If the Provider had done so, perhaps it would have been more apparent to the Complainant that there was a significant benefit to her in the approach taken by the Provider, in that, the Complainant has been given the benefit of the application of the tracker interest rate of ECB + 0.95% applying to the new lending of circa €111,000 from **August 2016**, despite having no entitlement to this advantageous rate.

The evidence does not support the Complainant's submission that there has been an interest overcharge on her mortgage loan account of €11,259.21. The document that the Complainant has submitted to support this has been produced by a third party as if the Complainant had an entitlement to the application of a tracker interest rate of ECB + 0.95% on the full sum borrowed of €125,000 under mortgage loan account ending **9286**. The Complainant did not have this entitlement.

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Taking into account all of the evidence before me, I am of the view that redress and compensation that has been given by the Provider to date, being the application of the tracker interest rate of ECB + 0.95% to the entire mortgage loan account from **August 2016**, the redress of €802.72, the balance adjustment of €498.55 and compensation payment of €500 is more than reasonable to compensate the Complainant for a failure to apply the tracker interest rate of ECB + 0.95% to the €13,663.56 portion of the mortgage loan that was previously held under mortgage account ending **9045** from **January 2013**.

In these circumstances and for the reasons set out above, I do not uphold the complaint.

### **Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

26 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.**