



<u>Decision Ref:</u>	2020-0310
<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 two mortgage loan accounts held by the Complainants with the Provider. The mortgage loans that are the subject of this complaint are secured on the Complainants' Principal Private Residence.

The loan amount on mortgage loan account ending **2986** was €115,000 and the term of the loan was 30 years. The particulars of the Letter of Approval dated **28 April 2004** detailed that the loan type was a "1 Year Fixed Rate Home Loan".

The loan amount on mortgage loan account ending **8342** was €15,000 and the term of the loan was 29 years. The particulars of the Letter of Approval dated **8 March 2005** detailed that the loan type was a "Further Advance 2 Year Fixed Rate".

The Complainants' Case

The Complainants submit that they have two mortgage loan accounts with the Provider; mortgage loan account ending **2986** and mortgage loan account ending **8342**.

1. Mortgage loan account ending 2986

With regard to mortgage loan account ending **2986** the Complainants submit that in **June 2004** the loan was issued for €115,000, as a 1 Year Fixed Rate Home Loan, at a rate of 2.54%. The Complainants submit when the fixed period expired in **2005** they chose a further three year fixed rate of 3.95%.

The Complainants state that when the three year fixed period expired in **2008**, they were offered a tracker rate of ECB + 0.95% by the Provider but they decided to choose a further five year fixed rate at 5.10%. The Complainants submit that when the five year fixed period expired in **2013**, they were not offered a tracker rate again by the Provider.

2. Mortgage loan account ending 8342

With regard to mortgage loan account ending **8342** the Complainants submit that in **March 2005** this loan was issued for €15,000 as a Further Advance 2 Year Fixed Rate loan at a rate of 3.55%. They submit when the fixed period expired in **2007**, the Complainants were offered a tracker rate of 4.55% by the Provider but they decided to choose a further five year fixed interest rate of 5.15%.

The Complainants submit that when the five year fixed period expired in **2012**, they were not offered a tracker rate again by the Provider.

The complaint is that the Provider did not advise the Complainants that by opting for fixed rates in **May 2007** and **June 2008** respectively, they would not be offered a tracker rate for either mortgage loan account when the fixed rate periods expired. The Complainants submit that it would have been a "*massive help to us if our mortgage repayments had been less*".

The Complainants are seeking confirmation if they were entitled to be offered a tracker rate in **2012** and **2013** upon expiry of the fixed rate periods on mortgage loan accounts ending **8342** and **2986** respectively, and whether they could have been paying less interest since these periods.

The Provider's Case

The Provider has outlined the interest rate history with respect to each mortgage loan account as follows:

1. Mortgage loan account ending 2986

The Provider states that it issued a **Letter of Approval** to the Complainants on **28 April 2004** for a 1 Year Fixed Rate Home Loan.

The Provider outlines that in **May 2005** the Provider wrote to the Complainants to outline the various interest rate options available to the Complainants on their mortgage loan, which included a variable rate and various fixed rates. The Provider details that it received a signed options form from the Complainants on **27 May 2005** wherein the Complainants opted for a 3 year fixed rate of 3.95%. This rate was applied to the loan on **01 June 2005**.

The Provider submits that in **May 2008**, it wrote to the Complainants to remind them of the expiry of the fixed interest rate period and to provide details of the rate options. The options given at that time were tracker variable, standard variable and a series of fixed rates. The Provider details that it received a signed options form from the Complainants on **27 May 2008** wherein the Complainants opted for a 5 year fixed interest rate of 5.10%. This rate was applied to the mortgage loan on **30 May 2008**.

The Provider outlines that in **April 2013**, it wrote to the Complainants to remind them of the expiry of the fixed interest rate period and to provide details of the rate options. The options given at that time were a variable rate and a series of fixed rates. The Provider details that it was outlined in the letter that in the event that the Provider did not receive a response from the Complainants indicating a preference for a rate then the mortgage would default to the variable rate of 4.34%.

The Provider outlines that on **30 May 2013** the mortgage loan was changed to a variable rate of 4.34%.

2. Mortgage loan account ending 8342

With respect of mortgage loan account ending **8342**, the Provider states that it issued a **Letter of Approval** to the Complainants on **8 March 2005** for further advance commencing on a 2 Year Fixed Rate Home Loan.

The Provider states the Complainants' fixed rate period was due to expire on **18 May 2007**. The Provider details that the interest rate options available at the time were a tracker interest rate, a standard variable rate and a series of fixed rates. The Provider states that it received the signed options form from the Complainants on **11 May 2007** wherein they opted for a 5 year fixed rate of 5.15%. The Provider details that it applied that rate to the mortgage loan on **18 May 2007**.

/Cont'd...

The Provider submits that on the expiry of that interest rate period, it again outlined the interest rate options to the Complainants which were standard variable and fixed rate options. The Provider outlines that it received a signed options form from the Complainants on **15 May 2012** wherein the Complainants opted for a 2 year fixed rate of 7.25%. The Provider details that it applied that rate to the mortgage loan on **18 May 2012**.

The Provider submits that the respective Letters of Approval and accompanying contractual terms did not contain an entitlement to a tracker mortgage at the end of the fixed rate period or at any time during the term of the loan. It states that the conditions of the mortgage loans detailed that the interest would be a fixed rate with either party having the option to apply a variable rate on expiry of the fixed rate period. The Provider relies on **Special Condition A** of the Complainants' **Letters of Approval** and **General Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this. It submits that the term "*variable rate*" is defined in the **General Mortgage Loan Approval Conditions**.

The Provider details that the rationale for offering tracker interest rates to the Complainants on the expiry of the fixed interest rate periods in 2007 and 2008 was based on a policy or practice that existed in the Provider during a period in 2006 – 2009 and does not derive from any contractual entitlement.

The Provider submits that in **mid-2006** it introduced a policy of offering tracker interest rates as one of the options in the options letters to existing customers maturing from a fixed rate period, irrespective of whether or not the customer had a contractual entitlement to be offered a tracker interest rate. It states that it continued this policy until **mid-2009**, and after that date customers who did not have a contractual entitlement to be offered a tracker interest rate at maturity did not receive such an offer.

The Provider submits that it did not inform the Complainants that by opting for fixed rates in **2007**, with respect of account ending **8342**, and **2008**, in respect of account ending **2986**, that they would not be able to avail of a tracker rate at the end of those fixed rates. The Provider outlines that it was not and could not have been aware at those times that it would be ending the option in the future. The Provider details that it was not in a position to inform the Complainants in advance of a fixed interest rate, what rates they would be offered at the date of expiry of that fixed rate. However it outlines that the Complainants' mortgage loan contracts did inform them that they were entitled to a variable rate at the end of any fixed rate period which applied to their two mortgage loan accounts.

/Cont'd...

The Provider submits that the reason it did not offer the Complainants a tracker interest rate on the expiry of the fixed interest rate periods in **2012** and **2013** was because the Complainants did not have an entitlement, in respect of either loan to be offered a tracker rate.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to advise the Complainants that by opting for fixed interest rates in **May 2008** (mortgage loan account ending **2986**) and **May 2007** (mortgage loan account ending **8342**) they would not be offered a tracker rate on the expiry of those fixed interest rate periods.

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 **26 August 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.

/Cont'd...

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 the relevant provisions of the Complainants' loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2005** and **2013**.

Mortgage loan account ending 2986

The **Letter of Approval** for mortgage loan account ending **2986** dated **28 April 2004** details as follows;

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

<i>Purchase Price / Estimated Value:</i>	<i>EUR 210,000.00</i>
<i>Loan Amount:</i>	<i>EUR 115,000.00</i>
<i>Interest Rate:</i>	<i>2.54%</i>
<i>Term:</i>	<i>30 year(s)"</i>

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** outline;

"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.

...

/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 April 2004**. 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.

...

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

On the expiry of the initial one year fixed interest rate period, the Complainants were issued with a rate options form which included a variable rate option and various fixed rate options. The Complainants signed the rate options form on **25 May 2005** and elected to apply the 3 year fixed interest rate of 3.95% to the mortgage loan.

The Provider issued a further rate options form to the Complainants on the expiry of the fixed interest rate period in or around **May 2005**. I have not been provided in evidence with a copy of the letter that accompanied the rate options form, but it does not appear to be in dispute between the parties that the purpose of the rate options form was to offer the Complainants interest rates for their mortgage loan at the time.

/Cont'd...

The **rate options form** with respect to mortgage loan account **2986** outlines as follows;

“Current options available:

You may only select one option.

...

			Monthly Repayment EUR
-	Tracker variable rate (ECB + maximum 0.9500%)*	- Currently: 4.95%	658.99
-	Standard variable rate	- Currently: 5.69%	706.23
-	2 year fixed rate	- Currently; 5.30%	681.12
-	3 year fixed rate	- Currently; 5.25%	677.93
-	4 year fixed rate	- Currently; 5.25%	677.93
-	5 year fixed rate	- Currently; 5.10%	668.43
-	7 year fixed rate	- Currently; 5.25%	677.93
-	10 year fixed rate	- Currently; 5.25%	677.93

...

- *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 0.9500% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.”*

The reverse side of the rate options form under the heading **“Fixed Rate Loans”** contained text which relates to repaying the loan in full or in part during a fixed interest rate period.

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

/Cont’d...

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 completed and signed the rate options form on **26 May 2008** and selected the 5 year fixed interest rate of 5.10%. The options form was stamped received by the Provider on **28 May 2008**.

The Provider issued a **letter and rate options form** dated **30 April 2013** to the Complainants with respect to mortgage loan account ending **2986** prior to the expiry of the fixed interest rate period. The Provider's letter detailed as follows;

"If we do not receive a written instruction from you in relation to the above on or before the 30 May 2013, the interest rate on your mortgage will be the LTV Variable Rate"

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

"...

Please tick the option you want below. You may only pick one option and everyone signed up to the mortgage must sign.

...

Option	Monthly Repayment
LTV Variable Rate ** CURRENTLY	4.34% 663.70
2 Year Fixed Rate CURRENTLY	7.25% 828.27
5 Year Fixed Rate CURRENTLY	8.75% 920.79"

I note from the evidence submitted that the Complainants did not return the completed options form and the LTV variable rate of 4.34% was applied to the mortgage loan on **30 May 2013**.

Mortgage loan account ending 8342

The **Letter of Approval** for mortgage loan account ending **8342** dated **8 March 2005** details as follows;

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

<i>Purchase Price / Estimated Value:</i>	<i>EUR 210,000.00</i>
<i>Loan Amount:</i>	<i>EUR 15,000.00</i>
<i>Interest Rate:</i>	<i>3.55%</i>
<i>Term:</i>	<i>29 year(s)”</i>

The **Special Conditions** to the Letter of Approval contained the same Special Condition A and General Conditions, as quote above, with respect to mortgage account ending **2986**.

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **18 March 2005** on the same terms, as quote above, with respect to mortgage account ending **2986**.

The Provider issued a further rate options form to the Complainants on the expiry of the fixed interest rate period in or around **May 2007**. I have not been provided in evidence with a copy of the letter that accompanied the rate options form, but it does not appear to be in dispute between the parties that the purpose of the rate options form was to offer the Complainants interest rates for their mortgage loan at the time. The **rate options form** outlined as follows;

*“Current options available:
You may only select one option.
...*

			<i>Monthly Repayment EUR</i>
-	<i>Tracker variable rate</i>	<i>- Currently: 4.55%</i>	<i>177.13</i>
	<i>(ECB + maximum 0.8000%)*</i>		
-	<i>Standard variable rate</i>	<i>- Currently: 5.10%</i>	<i>181.83</i>

/Cont'd...

- 1 year fixed rate	- Currently;	4.99%	180.88
- 2 year fixed rate	- Currently;	5.15%	182.26
- 3 year fixed rate	- Currently;	5.10%	181.83
- 4 year fixed rate	- Currently;	5.15%	182.26
- 5 year fixed rate	- Currently;	5.15%	182.26
- 7 year fixed rate	- Currently;	5.15%	182.26
- 10 year fixed rate	- Currently;	5.15%	182.26

...

- *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 0.8000% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.**

The reverse side of the rate options form contained the same text as the rate options form that issued with respect to mortgage account ending **2986** in **May 2005**. That text is extracted above.

The Complainants completed and signed the rate options form on **08 May 2007** and selected the 5 year fixed interest rate of 5.15%. The options form was stamped received by the Provider on **11 May 2008**.

The Provider issued a **letter and rate options form** dated **27 April 2012** to the Complainants with respect to mortgage loan account ending **8342** prior to the expiry of the fixed interest rate period. The Provider’s letter detailed as follows;

“If we do not receive a written instruction from you in relation to the above on or before the 18 May 2012, the interest rate on your mortgage will be the LTV Variable Rate”

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

“...

Please tick the option you want below. You may only pick one option and everyone signed up to the mortgage must sign.

/Cont’d...

...

Option		Monthly Repayment	
LTV Variable Rate **	CURRENTLY	5.19%	183.80
2 Year Fixed Rate	CURRENTLY	7.25%	199.95
5 Year Fixed Rate	CURRENTLY	8.75%	212.54"

I note from the evidence submitted that the Complainants opted to apply a two year fixed rate of 7.25% and this was applied to their loan on **18 May 2012**.

Analysis

It is clear to me that the Letter of Approval for mortgage loan account ending **2986** envisaged a one year fixed rate of 2.54% and thereafter the option of a variable rate. The Letter of Approval for mortgage loan account ending **8342** envisaged a two year fixed rate of 3.55% and thereafter the option of a variable rate. The variable rate in respect of both of the mortgage loan accounts 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 both of the **Letters of Approval** having confirmed that they had been explained to them by their solicitor.

The Provider has summarised its policy in relation to tracker rates at the time 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

/Cont'd...

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."

Having considered the evidence before me, including the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate periods which occurred in **May 2007** and **May 2008** with respect to each mortgage loan. It appears that the Provider, in line with its own policy at the time, offered the Complainants a tracker interest rate with respect of each mortgage loan account, even though it had no obligation to do so.

The reverse side of the options forms which the Complainants signed on **26 May 2008** (with respect to mortgage loan account ending **2986**) and on **08 May 2007** (with respect to mortgage loan account ending **8342**), contained detail about the tracker interest rate offering, 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, the percentage of 0.95% (with respect to mortgage loan account ending **2986**) or 0.80% (with respect to mortgage loan account ending **8342**) would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank.

The rate options were clearly outlined to be "*current options available*". In my view it was clear that these were the options that were available at the time in **May 2007** and **May 2008**.

However the Complainants did not opt to accept the tracker interest rate options and instead signed the options forms and elected to apply the 5 year fixed interest rate to each mortgage loan account.

At the end of the 5 year fixed interest rate periods in **May 2013** (with respect to mortgage loan account ending **2986**) and **May 2012** (with respect to mortgage loan account ending **8342**) the Complainants were not offered a tracker interest rate option. The reason for this is that the Complainants did not have a contractual or other entitlement to be offered a tracker interest rate on either mortgage loan account at the end of the fixed interest rate periods in **May 2013** and **May 2012**.

/Cont'd...

As detailed above, the Provider was not contractually obliged to offer the Complainants the option of a tracker interest rate on the mortgage loan at any time. It did so in **May 2007** and **May 2008** as a matter of policy despite not being obliged to do so. The Complainants did not accept those offers.

Having considered the evidence in this matter, the Complainants did not have a contractual or other entitlement to a tracker interest rate on either of their mortgage loan accounts (ending **2986** and **8342**). The Provider offered the Complainants the option of a tracker interest rate of ECB + 0.95% with respect to mortgage loan account ending **2986** in **May 2008** and the option of a tracker interest rate of ECB + 0.80% with respect to mortgage loan account ending **8342** in **May 2007**. These were clearly outlined to be "*current options available*". The Complainants elected to choose the 5 year fixed interest rate options on both mortgage loans. Tracker interest rates were no longer available as a matter of policy when the further fixed interest rate periods expired in **May 2012** and **May 2013**.

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

22 September 2020

/Cont'd...

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.

