



<b><u>Decision Ref:</u></b>	2020-0337
<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 throughout the life of the mortgage
<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 held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainant's private dwelling house.

The loan amount was €197,500.00 and the term of the loan was 35 years. The particulars of the mortgage loan offer signed by the Complainant on **19 May 2006** detailed that the interest rate applicable was "2 Year Fixed Rate Home Loan" at 4.75%. The mortgage loan was drawn down on **14 May 2007**. The interest rate applicable to the Complainant's mortgage loan since **May 2009** is ECB base rate + 2.25%.

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

The Complainant outlines that he "took out" the mortgage loan account on **14 May 2007** and applied a fixed interest rate for two years, with the option of "going back onto the tracker rate which was ECB +1.25% margin". The Complainant contends that he was offered particular interest rates in **2007** and was never informed by the Provider that the margin above the ECB rate would change.

The Complainant details that that he received a letter from the Provider dated **24 April 2009**, offering him a tracker interest rate of ECB + 2.25%. The Complainant submits that the tracker interest rate was not the lowest interest rate offered in this letter and contends that this “...was a deliberate attempt by the bank to entice [the Complainant] away from the tracker option”.

The Complainant details that he contacted the Provider by telephone in **2009** to complain about the high tracker interest rate margin offered and submits he was informed by the Provider that this was the only tracker option.

The Complainant is seeking that his mortgage loan account is placed on a tracker interest rate of ECB = 1.25%, in addition to a refund of the “...overpayment of interest since 2009 = 10000EURO Redress for the overpayment account to central bank rules”.

### **The Provider’s Case**

The Provider outlines that on **26 April 2006**, it issued a Mortgage Quotation to the Complainant outlining the details of a two year fixed rate home loan or a tracker mortgage. The Provider details that the Mortgage Quotation included the costs associated with the available products based on the amount that the Complainant sought to borrow. The Provider submits that the Mortgage Quotation did not provide details of or offer any contractual entitlements in respect of “a product to which the quoted fixed rate would expire”.

The Provider submits that in **April 2006**, it was offering fixed rate products which matured onto its standard variable rate, and was not offering fixed rate products which matured onto its tracker interest rate. The Provider outlines that when it introduced such a fixed rate product in late 2006, it did not specify a particular rate which would apply at the end of the fixed rate period and contends that there was no basis on which the Complainant could have expected that there was a tracker rate available to him on the expiry of the fixed rate period of “...a rate of ECB+1.25% or otherwise”.

The Provider submits that it issued a Letter of Approval to the Complainant on **16 May 2006** in the amount of €197,500.00 over a term of 35 years. The Provider details that the loan was a 2 year fixed rate home loan and submits that this was accepted by the Complainant on **19 May 2006**, and with his signature, he acknowledged that this solicitor had explained the terms and conditions of the loan offer to him.

The Provider goes on to outline that the Complainant subsequently requested an amendment to the Provider’s offer and an amended Letter of Approval issued on **15 June 2006**. The Provider details that a diary note from its internal system dated **12 July 2006**

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indicates that the Complainant's solicitor re-dated the undertakings. The Provider outlines that the proceeds of the loan issued on **14 May 2007** on an initial 2 year fixed rate of 4.75%.

The Provider details that the Letter of Approval outlined that at the end of each fixed interest rate period, the Provider or the Complainant could apply the variable interest rate to the mortgage loan. The Provider relies on **Special Condition A** and **General Mortgage Loan Approval Condition 5** of the Letter of Approval in support of this. The Provider states that the Complainant's Letter of Approval contained no contractual entitlement that a tracker interest rate would be offered to him either on expiry of the fixed rate period or at any stage during the mortgage term.

The Provider submits that it sets interest rates at its absolute discretion and such decisions are commercial in nature. It states that the calculation of the margin above ECB rate was based on a commercial decision made by the Provider and was made taking into account a number of factors including wholesale lending and borrowing rates, interest rates paid on deposits, and the Provider's competitive position. The Provider outlines that in **June 2006**, it was offering home loan customers a tracker interest rate of ECB + 1.25% applicable from the date of drawdown for loan amounts of €100,000 to €250,000. The Provider details that in **December 2008**, the relevant home loan tracker rate was changed to ECB + 2.25%.

The Provider details that from **30 June 2006** until **31 August 2009**, as a matter of policy, it included a tracker interest rate as one of the rate options issued to certain existing mortgage customers of the Provider on the expiry of a fixed rate period and this included certain customers who did not have any contractual entitlement to a tracker interest rate.

The Provider submits that the Complainant's fixed rate term was due to expire on **14 May 2009** and prior to this the Provider issued an options letter to the Complainant enclosing a list of the rate options available. It states that this list included fixed rates for 2, 5, 7 and 10 year terms, a standard variable rate of 3.65%, and a tracker variable rate of 3.75% (ECB + 2.25%). The Provider details that the calculation of the tracker interest rate of ECB + 2.25% was based on a commercial decision made by the Provider resulting from market conditions which took in a number of factors.

The Provider outlines that the letter informed the Complainant to consider the options carefully before choosing an interest rate and also stated that if the Complainant chose a fixed interest rate, a further list of options would be sent to him, and this further list may or may not include the tracker rate option. The Provider submits that it does not accept the Complainant's submission that there was a "*deliberate attempt*" to deter him from selecting a tracker interest rate in May 2009.

The Provider submits that on receipt of the signed rate options form on **14 May 2009**, the mortgage was amended to a tracker rate of 3.75% (ECB + 2.25%) and has remained on this interest rate.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainant a tracker rate of ECB + 1.25% for his mortgage loan account the expiry of the fixed rate period in **May 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.

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 15 September 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, I set out below my final determination.

In order to adjudicate on this complaint, it is necessary to review and set out the relevant provisions of the Complainant's loan documentation. It is also relevant to set out the

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interactions between the Provider and the Complainants between **April 2006** and **May 2009**.

The Complainant has submitted in evidence a document entitled "**Mortgage Quotation**" dated **26 April 2006** which details as follows:

Date: 26.04.2006

[REDACTED]

### Mortgage Quotation

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**3.70% 2 Year Fixed Rate Home Loan**

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Property price/value	EUR 197,500.00		
Loan amount	EUR 197,500.00		
Gross monthly payment	EUR 909.05		
Less tax relief	(EUR 66.67)		
Net monthly amount	EUR 842.39		
Term (years)	30		
Interest rate %	3.70		
Typical APR %	4.00		
Tax	Single First Time Buyer		
		<b>Additional costs</b>	
		Stamp duty	EUR 0.00
		Solicitor fee	EUR 2,389.75
		Valuation fee	EUR 130.00

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**3.65% Tracker Mortgage (ECB + max 1.25%) - Home Loan**

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Property price/value	EUR 197,500.00		
Loan amount	EUR 197,500.00		
Gross monthly payment	EUR 903.48		
Less tax relief	(EUR 66.67)		
Net monthly amount	EUR 836.81		
Term (years)	30		
Interest rate %	3.65		
Typical APR %	3.80		
Tax	Single First Time Buyer		
		<b>Additional costs</b>	
		Stamp duty	EUR 0.00
		Solicitor fee	EUR 2,389.75
		Valuation fee	EUR 130.00

The Complainant has indicated in his submissions that he took out the mortgage loan account on **14 May 2007** and applied a fixed interest rate for two years, with the option of "*going back onto the tracker rate which was ECB +1.25% margin*". It appears that the Complainant is relying on the Mortgage Quotation document, however this document provides a quotation of two separate and distinct products on offer at that time from the Provider – the **2 Year Fixed Rate Home Loan** and also, but separately, the **Tracker Mortgage (ECB + max 1.25%) – Home Loan**. The Mortgage Quotation document does not indicate that should the Complainant choose the 2 Year Fixed Rate Home Loan product, he would be entitled to the option of a tracker interest rate of ECB + 1.25% on the expiry of the fixed rate period. Furthermore, the Mortgage Quotation document is as indicated in the title, only a quotation, and is not a legally binding offer or agreement.

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The Provider issued a **Letter of Approval** dated **16 May 2006** to the Complainant, which details as follows;

<i>"Loan Type:</i>	<i>2 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value :</i>	<i>€197,500.00</i>
<i>Loan Amount:</i>	<i>€197,500.00</i>
<i>Interest Rate:</i>	<i>4.25%</i>
<i>Term:</i>	<i>35 year(s)</i>
<i>Monthly Instalment:</i>	<i>EUR 904.34"</i>

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

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

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*(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 as it 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 loan."*

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **19 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."*

The General Conditions also provide:

**"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 Provider indicates that the Complainant subsequently requested an amendment to the Provider's offer and an amended Letter of Approval issued on **15 June 2006**. The Provider issued a second **Letter of Approval** dated **15 June 2006** to the Complainant, which details as follows;

"Loan Type:	2 Year Fixed Rate Home Loan
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Purchase Price / Estimated Value :	€197,500.00
Loan Amount:	€197,500.00
Interest Rate:	4.39%
Term:	35 year(s)
Monthly Instalment:	EUR 921.27"

**Special Condition A, General Condition 5** and the above referenced unnumbered **General Condition** are identical to those provided with the original Letter of Offer dated **16 May 2006**.

The Complainant does not appear to have signed and accepted the **Letter of Offer** dated **15 June 2006**. The Provider detailed in its submissions to this office that a "...diary note from the Bank's system dated 12 July 2006 confirmed the Complainant's Solicitor had re-dated the undertakings". The Provider has submitted into evidence a print out from its internal system in respect of the mortgage loan account, which details as follows:

"...

Communication	12/07/2006 15:51:52 REDACTED LEGALS IN STORAGE BOX 13
Event	12/07/2006 15:36:09 UNDERTAKING APPROVED SENT
....	
Event	15/06/2006 12:34:00 AMENDED APPROVAL LETTER SENT"

It does not appear that the Provider holds a copy of the Letter of Approval dated **15 June 2006**, which has been signed and accepted by the Complainant. It is disappointing that a copy of the signed **Loan Offer Letter** dated **15 June 2006** that issued to the Complainant has not been furnished in evidence to this office, nor has the Provider provided any explanation as to why this signed letter has not been furnished. However in any event it does not appear to be in dispute between the parties that the **Loan Offer Letter** dated **15 June 2006**, was accepted by the Complainant.

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It appears that the Complainant's mortgage loan was drawn down on **14 May 2007** on an interest rate of 4.75%. The variation in the interest rate from that outlined in the Letter of Offer is permitted under **General Condition 5.2**. It is clear to me that the Letter of Approval envisaged a two year fixed interest rate and thereafter the option of a variable rate. The variable rate, in the Complainant's mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

Contrary to the Complainant's submission, there was no guarantee in the Special Conditions or any other conditions applicable to the Complainant's mortgage loan that a specific tracker mortgage margin would be made available to the Complainant at the end of the fixed period, nor that any tracker interest rate would be made available to him. It is important for the Complainant to be aware that the Complainant's mortgage loan is governed by the terms and conditions of his mortgage loan documentation.

In these circumstances the terms and conditions of the loan were clear, and there was no entitlement to a tracker interest rate.

If the Complainant was not happy with the terms of the **Letter of Approval** dated **15 June 2006**, the Complainant could have decided not to accept the offer made by the Provider. However it appears he accepted the offer and drew-down the loan.

The Provider has submitted that prior to the expiry of the fixed rate period it automatically issued a **rate options letter** and **rate instruction form** to the Complainant in **April 2009** containing the currently available rate options, including the tracker interest rate of 3.755% (ECB + 2.25%).

The rate options letter dated **24 April 2009** details as follows;

*"I am writing to remind you that the current rate option on your mortgage account will end on 14 May 2009.*

*Please find attached the current options available to you.*

*We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option.*

*Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.*

*If we do not receive a written instruction from you in relation to the above on or before the 14 May 2009, the interest rate on your mortgage will be the tracker variable rate.*

*We value your business highly at [the Provider] so if you have any questions regarding these options, please contact our dedicated mortgage team on [PHONE NUMBER]. They will be happy to help you."*

The **rate options form** that was signed by the Complainant, has been furnished in evidence, and details as follows;

*"Current options available:*

*You may only select one option.*

*Account Number:XXXXXXXXX3714*

			<i>Monthly Repayment</i>	
			<i>EUR</i>	<i>...</i>
<i>--- Tracker variable rate</i>	<i>- Currently</i>	<i>3.75%</i>	<i>937.35</i>	<i>...</i>
<i>(ECB + maximum 2.2500%)*</i>				
<i>--- LTV variable rate **</i>	<i>- Currently</i>	<i>3.65%</i>	<i>926.14</i>	<i>...</i>
<i>--- 2 year fixed rate</i>	<i>- Currently</i>	<i>5.25%</i>	<i>1114.26</i>	<i>...</i>
<i>--- 5 year fixed rate</i>	<i>- Currently</i>	<i>5.75%</i>	<i>1176.64</i>	<i>...</i>
<i>--- 7 year fixed rate</i>	<i>- Currently</i>	<i>6.10%</i>	<i>1221.24</i>	<i>...</i>
<i>--- 10 year fixed rate</i>	<i>- Currently</i>	<i>6.10%</i>	<i>1221.24</i>	<i>...</i>

*...*

*\*The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.2500% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans."*

It appears that the Complainant placed a call to the Provider in or around **May 2009**. The Provider did not furnish in evidence a recording of the telephone call between the Provider and the Complainants purported to have taken place in or around **May 2009**.

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The Provider has stated that that due to IT restrictions and the passage of time the Provider was not in a position to retrieve telephone call recordings. It does not appear to be in dispute that the call was in relation to the available interest rate options.

The options form was clear that in circumstances where the Complainant opted for the tracker interest rate or did not select another rate then a tracker interest rate would be applied to the loan. That tracker rate was stated to be at a percentage of 2.25% above ECB which would not be exceeded during the term of the loan and the ECB rate would fluctuate as set by the European Central Bank.

The reserve side of the options form which the Complainant signed on **12 May 2009** appears to have contained detail about the tracker interest rate offer. This has not been furnished in evidence to this office, however, I am of the view that in circumstances where the complaint relates to the interest rate offered, which the evidence shows was 2.25%, I do not believe the reverse side of the form is material to this complaint.

The Complainant signed the options form on **12 May 2009** and selected the tracker variable rate option of 3.75% (ECB + 2.25%).

The Complainant takes issue with the application of the tracker interest rate of ECB + 2.25% to his mortgage loan on the expiry of the two year fixed interest rate period. He outlines that on the expiry of the two year fixed rate period, he was entitled to be offered a tracker interest rate of ECB +1.25%. I have been provided with no evidence to support this assertion. As outlined above, the Complainant did not have a contractual entitlement to a tracker interest rate on his mortgage loan.

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

*“From [mid] 2006, the Bank had a policy of offering an option of 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 may not contain 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 rate options listed in an automated options letter issued to a customer during the month prior to the date of maturity of a fixed rate period. The Bank also provided in options letters issued from [late 2006] that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest.*

*When the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008, it included in its options letters a warning that a tracker rate of interest may not be available at the expiry of any fixed rate period selected. The Bank 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.”*

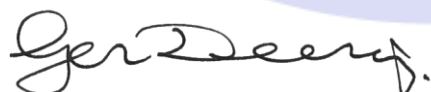
Having considered the evidence before me, including the mortgage loan documentation, it is clear to me that the Complainant did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period. It appears that the Provider, in line with its own policy at the time, offered the Complainants a tracker interest rate of ECB + 2.25% in **April 2009**, even though it had no obligation to do so. The Complainant did not have an entitlement to a tracker interest rate of ECB + 1.25% or any particular rate on his mortgage loan at any time. The Complainant was given the option to apply for a mortgage loan on a tracker interest rate of ECB + 1.25% when the mortgage loan was applied for in **April 2006**. He did not accept this offer. The Complainant proceeded with an application for a mortgage loan on a 2 year fixed interest rate and that was what the Complainant was offered by the Provider. A tracker interest rate of ECB + 2.25% continued to apply to his mortgage.

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

### **Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

6 October 2020

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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.**