



<b><u>Decision Ref:</u></b>	2020-0339
<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 one of two mortgage loan accounts held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's principal private residence and was subsequently redeemed in **September 2014**.

The loan amount was €180,000 and the term of the loan was 20 years. The Mortgage Loan Offer Letter which was signed on **2 February 2004** detailed that the loan type was a "Repayment".

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

The Complainant was issued with a Mortgage Loan Offer Letter dated **16 October 2003** in respect of mortgage loan account ending **5664**. The particulars of the mortgage loan offer detail that the interest rate applicable was fixed at a rate of 3.850% for a two year period. The Complainant questions why he was not offered a tracker interest rate at the time the Mortgage Loan Offer Letter issued in **October 2003** when the Provider states in its final response letter that that tracker rates were available since **2001**.

In **April 2006**, prior to the expiry of the initial two year fixed rate period, the Complainant submits that the Provider issued a **Mortgage Form of Authorisation ("MFA")** to him which included the option of a tracker interest rate. The Complainant submits that in **April 2006** he filled out the MFA at the counter of the local branch of the Provider in the presence of one of the Provider's employees and *"ticked tracker box and signed it"*.

The Complainant states that he believes that *"he signed to switch to a tracker rate"* upon the expiry of the two year fixed rate period. The Complainant submits that the Provider's employee of the branch in question *"explained this was best option as it was linked to European central bank rates"*. The Complainant states that he handed the completed MFA to the Provider's employee who assured him that *"he would look after it"*. The Complainant asserts that he consequently believed that his mortgage loan account was subject to a tracker rate from that point onwards.

The Complainant explains that he obtained a second mortgage from the Provider in **2006** (mortgage loan account ending **3277**) which was on a tracker rate. In respect of this mortgage loan account, the Complainant states that he signed a *"form switching me on to a tracker mortgage"*. The Complainant notes that the *"year after taking out 2<sup>nd</sup> mortgage [E]uropean central bank rates rose"* and he *"was receiving regular rate rise letters from [the Provider] informing him of this"*.

In **2008**, the Complainant submits that he noticed that the interest rate *"on 2<sup>nd</sup> mortgage started going down"* but the interest rate on mortgage loan account ending **5664** *"were going up"*. The Complainant contends that this is when he first realised that mortgage loan account ending **5664** was on a variable rate and mortgage loan account ending **6277** was on a tracker rate. The Complainant submits that *"[t]here is no possible reason for me to switch one to a tracker and leave the other on a variable rate"*.

In response to the Provider's submission that a letter dated **29 May 2006** was issued to him detailing that mortgage loan account ending **5664** was on a variable rate, the Complainant asserts that he did not receive this document. The Complainant submits that the type of interest rate which applied to his mortgage loan account ending **5664** was not stated on any of the correspondence he received from the Provider between **June 2006** and **July 2008** informing him of rate changes. He submits that the interest rate increases were shown on the letters but they did not refer to the terms *"tracker"*, *"variable"* or *"fixed"*.

The Complainant submits that in **2010**, the Provider informed him that mortgage loan account ending **5664** *"never had an option to move on to a tracker one, then in May 2014 they admitted that a rate form MFA was sent out to me but unfortunately they never received it, that [is] the form I filled out in [Provider's branch] with [Provider's employee]"*.

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It was at that time that the Complainant states it came to light that the Provider had lost the MFA form that he signed at the Provider's branch in **April 2006**. The Complainant states that he is "*holding the Bank responsible for the loss of this document*".

In relation to the Provider's submissions that it is unable to find evidence of a meeting between the Complainant and the Provider's employee in relation to completing a MFA in **April 2006**, the Complainant contends that the Provider is "*hiding a lot of information*" with regards to his visit to the branch on that particular occasion. The Complainant explains that he was familiar with the Provider's employee through his years of engagement with the Provider's branch and he expresses an opinion with regard to the mental health and fitness of the staff member. The Complainant states that when it became apparent that different interest rates applied to each of his mortgage loan accounts, he approached the Provider's branch who said that "*they could not find the form they could not put me back on Tracker and they could not produce video evidence of me and [the Provider's employee] with this form at counter as video was only kept for six months*".

The Complainant is seeking for a tracker interest rate to be applied to his mortgage loan account ending **5664**.

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

The Provider notes at the outset that while tracker rates may have been available in **2003**, it was under no obligation to offer a tracker rate or any particular rate to the Complainant or any prospective customer. The Provider asserts that "*[t]here was no failure by the Provider in not offering such a rate*".

The Provider submits that the Mortgage Loan Offer Letter dated **16 October 2003**, which was signed by the Complainant on **2 February 2004**, provides for a fixed rate for a period of 24 months, followed by a variable rate of interest for the balance of the term of the mortgage as described in **General Condition 6** of the mortgage loan documentation. The Provider explains that the variable rate as described in **General Condition 6** of the Mortgage Loan Offer was a variable rate which "*the Provider had the power to vary it in its discretion*." The Provider contends that the Complainant did not enter into an agreement with the Provider "*whereby his mortgage would automatically default ('roll-over') to a tracker interest rate once the fixed rate period had ended*". The Provider explains that it was under no obligation to offer the Complainant a tracker interest rate on expiration of the initial fixed rate period in **May 2006**.

The Provider states that prior to expiration of the two year fixed rate period, the Provider sent the Complainant a letter dated **28 April 2006** enclosing a MFA offering the

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Complainant a choice from available interest rates to include the Provider's "*Homeloan Variable Rate, Tracker Variable Rate of ECB + 1.25% and fixed rate options over various terms*".

The Provider asserts that it issued the MFA in accordance with **General Condition 7(b)** of the Mortgage Loan Offer Letter. The Provider states that it was satisfied and willing to offer a tracker interest rate option to the Complainant at the end of the initial fixed interest rate period but did not offer a tracker interest rate option "*because it believed it had an obligation to do so*". The Provider asserts that there is "*no provision in the [Mortgage Loan Offer Letter] for account 5664 for a tracker rate of interest whatsoever; and there can be no reason for reading a promise of a tracker rate at the end of the initial fixed rate period into General Condition 7 (b)*".

The Provider explains that the MFA was generated automatically by the Provider and posted to a customer's address with an accompanying explanatory letter. The Provider notes that the accompanying letter "*would have provided instructions to the customer to complete this form and return it by post*" to the Provider's freepost address. The Provider states that it has no record of receiving a completed MFA from the Complainant, and no returned form is on file in the Provider's branch or anywhere else. The Provider explains that its process of such items means that upon receipt the MFA "*would have been forwarded to the mortgage administration team to be actioned as necessary. All incoming post would have been scanned thereby creating a permanent record on the mortgage account*". However the Provider contends that it has no record of receiving a MFA and the Complainant has not "*produced any evidence to support his claim that he submitted a MFA choosing a tracker rate to the Provider in [2006]; or that he did so and that the Provider or an employee of the Provider lost it*".

Moreover, the Provider outlines that there are "*a number of conflicting statements*" regarding the Complainant's description of events surrounding the MFA. The Provider refers to a letter from the Complainant dated **26 August 2010** wherein the Complainant states that he signed "*a document*" with one of the Provider's employees and "*believed [he] signed to switch to a tracker rate*". The Provider points out the "*uncertainty*" of the Complainant's statement which is at "*variance*" with the Complainant's more recent assertions. In this regard the Provider refers to claims made by the Complainant in an email to the office of the Financial Services Ombudsman dated **8 October 2017** wherein he states that it was a member of banking staff who completed the MFA for him by ticking the option for a tracker interest rate. The Provider contends that the Complainant here is asserting that "*he was undecided as to the desired rate. So uncertain, in fact, that he returned an uncompleted form to a member of staff*". The Provider notes that by contrast in previous statements, the Complainant then "*insisted that he, at all times, wanted tracker interest rates to apply to all of his mortgage loans*".

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The Provider submits that the Complainant's assertion that a member of its staff completed the MFA for him, selected a tracker interest rate on his behalf, and intimated that this rate was *"the best option"* would be *"highly unusual and contrary to policy"*. The Provider submits that interest rate options in a MFA are presented in a *"neutral manner"* in order to *"empower"* the customer to select a rate that best suits their needs. In this manner, the Provider submits that it would be *"contrary to policy"* for a member of staff to *"accept responsibility for such a decision on behalf of a customer."*

In circumstances where the Provider did not receive a MFA from the Complainant opting for a particular interest rate, the Complainant's mortgage loan account switched to the Provider's standard home loan variable interest rate on **29 May 2006** as per **General Condition 7(b)** and **General Condition 6** of the **Mortgage Loan Offer Letter**. The Provider submits that an automated system generated letter issued to the Complainant on **29 May 2006** outlining that the Complainant's mortgage loan account ending **5664** had rolled to the Provider's standard home loan variable interest rate. After this time, the Provider explains that the rate changed several times and the Complainant was issued letters with respect to these rate changes. The Provider accepts that this correspondence did not identify whether the interest rate was a tracker interest rate or not.

The Provider submits that the variances within the Complainant's own statements demonstrate that the Complainant *"may have an imperfect recollection of events in 2006."* The Provider is of the view that the Complainant *"may have confused dates"* with respect to submitting a MFA in relation to mortgage loan account ending **5664** and speaking with the Provider in relation to a second equity release mortgage under mortgage loan account ending **3277**. The Provider explains that its records show that a member of staff referred to speaking with the Complainant regarding a second mortgage on **23 March 2006** and an offer for an equity release mortgage on the Complainant's property was made on **27 March 2006**. The Provider notes that both of these events precede the issue of the MFA which was on **28 April 2006**. The Provider states that there are *"no records of any discussions or meetings with the Complainant on the system for the period of April to May 2006 with the member of staff he had previously dealt with or anyone else"*.

The Provider explains that the mortgage application for the second mortgage lapsed on **20 May 2006** and was reactivated at the Complainant's request and a new offer was sanctioned in **October 2006**.

The Provider submits that it ceased offering tracker interest rates on in **late 2008** therefore it could not offer the Complainant a tracker interest rate after this date.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to apply a tracker interest rate to the Complainant's mortgage loan account ending **5664** in **May 2006**, which the Complainant submits he selected on a MFA dated **28 April 2006**.

### **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 determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation and to consider the interactions between the Provider with the Complainant in the period prior to and following the expiry of the fixed interest rate period in **May 2006**.

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The Provider issued a **Mortgage Loan Offer Letter** to the Complainant dated **16 October 2003**, which provided for an advance of €180,000 over a term of 20 years.

**Part 1 – The Statutory Loan Details** of the Mortgage Loan Offer Letter, sets out the following;

<i>“3. Number of Repayment Instalments</i>	<i>Instalment Type</i>	<i>4. Amount of each Instalment</i>
<i>24</i>	<i>Fixed at 3.850%</i>	<i>€1,075.43</i>
<i>216</i>	<i>Variable at 3.600%</i>	<i>€1,054.21”</i>

The Mortgage Loan Offer Letter outlines that the loan type is *“Repayment”* and the interest rate is *“3.850% Fixed”*.

**General Condition 4 of Part 5 – The General Conditions** attaching to the Mortgage Loan Offer Letter details as follows;

**“4. Repayment**

- (a) *Unless otherwise stated herein or agreed by the Lender in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable and for an endowment loan shall comprise of interest, and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.*
- (b) *In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*
- (c) *If so agreed in writing by the Lender, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Lender at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during that year for that Loan.*

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- (d) *The Lender may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amount payable in respect of the Loan."*

**General Condition 6 of Part 5 – The General Conditions** details as follows in relation to variable interest rates;

**"6. Variable Interest Rates**

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards.*

*If at any time a variable rate of interest applies, repayments in excess of these agreed may be made at any time during the term of the Loan without penalty.*

- (b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest and the date from which the varied interest rate will be charged.*

- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

**General Condition 7 of Part 5 – The General Conditions** details as follows in relation to fixed interest rates;

**"7. Fixed Interest Rates**

- (a) *The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate*



available for the fixed period selected by the Borrower at the date of draw down.

- (b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrowers a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*
- (c) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in accordance with the following formula:; (Amount x (R-R1) x Time) divided by 36500 and for the purposes of this formula, the variables are defined as follows: "Amount" means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal the full amount of the early repayment or conversion. "R1" means the interest rate available to the Lender for funds placed in the money market on the date of early repayment or conversion to the end of the relevant fixed rate period.*
- (d) *At the Borrower's request, the Lender may, at its absolute discretion agree to add any sum payable in accordance with clause 7(c) to the principal amount from time to time owing and this may be accommodated at the discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) and adjustment in the term of the Loan AND it shall be a condition of any Policy as appropriate) in respect of this additional amount."*

The **Consumer Credit Act Notices** contained in the **Mortgage Loan Offer** dated **16 October 2003** detail as follows;

*"If your mortgage is at any time at a variable rate, please note:  
THE PAYMENT RATES ON THE HOUSING LOAN MAY BE ADJUSTED BY THE LENDER  
FROM TIME TO TIME"*

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I note that the Complainant signed the **“Borrower’s Acceptance and Consents”** section of the **Mortgage Loan Offer** on **2 February 2004** on the following terms;

*“I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions.”*

The Complainant takes issue with the fact that the Provider did not offer him a tracker interest rate when he applied for mortgage loan account ending **5664**. In this regard, it is important for the Complainant to be aware that despite tracker interest rates being available from the Provider at the time, the Provider was under no obligation to offer him any mortgage or any particular type of mortgage in **2006**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainant borrowing at the time and secondly, how that offer would be structured.

It is clear to me that the **Mortgage Loan Offer Letter** provided for a fixed interest rate of 3.85% for a period of 24 months/2 years in respect of mortgage loan account ending **5664** and thereafter the mortgage loan account would move to a variable interest rate.

The variable rate in this case made no reference to varying in accordance with variations in the European Central Bank refinancing rate, rather it was a variable rate which would *“vary at the Lender’s discretion upwards or downwards”* as set out in **General Condition 6 (a)**. I note that there is no mention in the Mortgage Loan Offer Letter that the Complainant’s mortgage loan account would automatically move to, or that the Complainant would be offered a tracker interest rate on the expiry of the two year fixed interest rate period. The Complainant accepted the contents of the Mortgage Loan Offer Letter, having confirmed that he fully read and had understood the terms and conditions contained therein. The Mortgage Loan Offer Letter included the following notice to the Complainant;

*“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it.”*

If it was the case that the Complainant was not satisfied with the details of the Provider’s loan offer, the Complainant was under no obligation to accept it. However, the Complainant accepted the terms and conditions of the Mortgage Loan Offer Letter on **2 February 2004** and mortgage loan account ending **5664** was subsequently drawn down on a fixed interest rate in **May 2004**.

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Prior to the end of the initial two year fixed rate period, the evidence indicates that the Provider issued a letter to the Complainant enclosing a MFA on **28 April 2006** which outlined the interest rates then available to the Complainant. The Provider has not furnished this office with a copy of the letter or the MFA that issued to the Complainant at this time. It is most disappointing that the Provider has failed to retain a copy of this letter and the MFA in its records. It appears that such correspondence was generated automatically by the Provider at the time and posted to the Complainant's address however the Provider did not retain copies on its system. In circumstances where the Complainant accepts that he received a MFA in **April 2006** by post from the Provider and the Provider's internal system shows that a "**Product Review Notice**" document issued on **28 April 2006**, I accept that the Provider did issue a MFA on this date and I have no reason to doubt that the Complainant received this document.

The Provider submits that the MFA offered the following choice of rates: home loan variable rate, tracker variable rate ECB + 1.25% and fixed rate options over various terms. It appears that in accordance with **General Condition 7 (b)** of the Mortgage Loan Offer Letter the Provider exercised its discretion to offer the Complainant further fixed rate options.

It appears that the Provider also chose to offer the Complainant a tracker variable rate option, which I accept that the Provider was not contractually obliged to do, given the terms of the Mortgage Loan Offer Letter, but rather, at its discretion, chose to offer this particular interest rate at the time.

The Complainant contends that he visited the Provider's local branch in **May 2006** with a copy of the MFA and on the advice of an employee of the Provider, who has since passed away, he submits that he chose a tracker interest rate and gave the signed MFA to the Provider's employee who the Complainant states said "*he would look after it*". However, the Provider asserts that it has no record of receiving a completed MFA from the Complainant in **May 2006** and no return form is recorded on its internal system or on file at the Provider's local branch or anywhere else. The Provider further states that it has no evidence to reflect that the Complainant visited the branch on this occasion or any notes indicating that this exchange occurred with one of its employees. In the circumstances the Complainant's mortgage loan account switched to the Provider's variable interest rate in line with **General Condition 7 (b)** of the Mortgage Loan Offer Letter.

The Provider submits that a letter detailing that the Complainant's mortgage loan account had switched to a variable interest rate issued to the Complainant on **29 May 2006**. The Complainant contends that he received no such letter. Again, the Provider has not furnished a copy of this letter that issued to the Complainant at this time which is disappointing.

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The Provider notes again that this letter *“is system generated to issue to the account holder and the record of issuing is retained on the Provider’s mortgage account management system”*. I have been furnished with an extract from the Provider’s internal system which shows that a **“Product Rollover”** document issued on **29 May 2006** which is understood to be the letter outlining that the Complainant’s mortgage loan account had rolled over to the Provider’s standard variable rate. The Provider’s internal notes titled **“Work with Repayment Change History”** show that an interest rate of 3.99% applied to the Complainant’s mortgage loan account ending **5664** as of **29 May 2006**.

At this juncture, I am of the view that it is also important to consider the background to the Complainant’s second mortgage loan account ending **3277** which was applied for in or around **March 2006** before the issuing of the MFA in relation to the Complainant’s original mortgage loan account (account ending **5644**). To be clear, this mortgage loan account is not the subject of this complaint. It appears from the Provider’s internal notes that in **March 2006** a discussion took place between the mortgage adviser of the Provider’s branch, being the same employee who the Complainant says he gave the MFA to in respect of mortgage loan account ending **5664** in **May 2006**, about taking out a second mortgage to purchase a property abroad whereby the loan would be secured on the Complainant’s principal private residence.

The Provider’s internal notes in respect of the Complainant’s application for mortgage loan account ending **3277** show that the Provider sanctioned a second loan offer in the amount of €60,000 on **27 March 2006**. These events precede the issue of the MFA dated **28 April 2006**. The Complainant’s application for the second mortgage lapsed on **20 May 2006**. This was reactivated at the Complainant’s request and a Mortgage Loan Offer Letter issued on **4 October 2006** in respect of mortgage loan account ending **3277**. The second mortgage loan account was drawn down on a 2 year fixed interest rate of 4.490% on **1 December 2006**.

**Part 4-The Special Conditions (a) (ii)** of the Mortgage Loan Offer Letter dated **4 October 2006** details that;

*“...At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period of if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7(b) of the Offer Letter, the interest rate applicable to the Loan will be a variable interest rate.*

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*The variable interest rate may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Rate ("Repo Rate") for the term of the Loan [...]"*

The Provider has furnished this office with a MFA that issued to the Complainant in respect of mortgage loan account ending **3277** at the end of the initial 2 year fixed rate period. The MFA offered the Complainant a 2 year fixed rate of 4.750%, a 3 year fixed rate of 5.290%, a home loan variable rate of 5.35% and a tracker variable rate of ECB + 1.25%. I am of the view that the interest rates offered by the Provider in the MFA are in line with **Special Condition (a) (ii)** as outlined above. The Complainant selected a tracker variable rate of ECB + 1.25% in **November 2008** and this rate was applied to the mortgage loan account ending **3277**. It is notable that the Provider has been able to furnish a copy of this MFA in evidence but has no record of receiving the MFA in **May 2006** in relation to the Complainant's first mortgage loan account.

I will now consider the issues raised by the Complainant in relation to the MFA dated **28 April 2006** in respect of mortgage account ending **5664** and his selection of a tracker interest rate at that time. The Complainant first raised this issue with the Provider in a letter dated **16 August 2010** where the Complainant submits;

*"I believe that I signed a document in [the Provider's] branch with [Provider's employee] putting me on a Tracker mortgage after my Fixed Term ended.*

*If you look at my second mortgage with [the Provider] [ending 3277] you will see that I signed the form switching me on to a tracker mortgage.*

*There is no possible reason for me to switch one to a tracker and leave the other on a variable rate.*

*I believe [the Provider] lost the form I signed in the Branch office."*

The Complainant chose to apply a tracker interest rate to mortgage loan account ending **3277** in **November 2008** by selecting that rate in the MFA that issued at that time whereas the MFA outlining the interest rates available for selection in respect of mortgage loan account ending **5664** issued in **May 2006**, over two years prior during which time interest rates were fluctuating. It is important to highlight that there was no overlap wherein the Complainant signed for a tracker interest rate with respect to both mortgages at the same time. Further, I accept that it is not unusual for a borrower with more than one mortgage loan account to have different interest rates applied to each account.

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It was entirely possible for the Complainant to have a tracker interest rate on mortgage loan account ending **3277** and a non-tracker variable rate applied to mortgage loan account ending **5664** which was in fact the case. In fact prior to this in **December 2006**, when the second mortgage loan account ending **3277** was drawn down it was on a fixed interest rate while mortgage loan account ending **5664** was on the Provider's standard variable rate, therefore two different interest rates applied to each of the Complainant's mortgage loan accounts.

In a letter dated **26 August 2010** to the Provider, the Complainant states as follows;

*"[...] When I signed a document with [name of employee of the Provider] when my 2 year fixed term was up in [Provider's branch], your office on [Provider's branch] must have a copy of this. I believed I signed to switch to a tracker rate. [...]"*

The Provider responded by way of letter dated **27 September 2010** noting as follows;

*"[...] [Location] branch have noted that there is no copy of the Mortgage Form of Authorisation (MFA) on file at the branch. We also have no record of receiving this MFA. [...]"*

The Complainant responded by way of letter dated **28 September 2010** noting as follows;

*"[...] I note that no Mortgage Form Authorisation (M.F.A) was found that seems to imply that [Provider] don't make mistakes or misplace documents.*

*....*

*At the time I took out this mortgage I was advised by your rep to take the new business discounted mortgage fixed rate and when the fixed term was up to revert to the tracker rate- I still believe I signed the M.F.A document in [Provider's branch]"*

By way of letter dated **24 January 2011**, the Complainant requested that the Provider switch the *"remaining variable rate mortgage [account ending 5664] to a tracker rate"*. The Provider replied by way of letter dated **26 January 2011** noting that *"[w]e are unable to offer you a tracker rate on this loan, as of [late] 2008 we not (sic.) longer offer tracker products for new or existing business."*

In a letter dated **2 December 2013**, the Complainant details as follows;

*"[...] I know I did fill out a tracker form (M.F.A) with [name of employee of Provider] at the counter in [Provider's branch] and I ticked tracker box and signed it in front of*

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*him. He took the letter from me and said he would look after it. I am holding the bank responsible for the loss of this document”.*

The Complainant submitted a standard financial statement (SFS) on **3 April 2014** to the Provider and wrote a letter accompanying this SFS in which he refers to his meeting with the Provider’s employee in **2006** as follows;

*“In April of 2006 I received a letter in the post from [the Provider]. It was a “Mortgage Form of Authorisation” I never seen a letter like this. I brought it down to [Provider’s employee] and he explained the letter to me. He advised going with the “Tracker Option”. He got me to check the box and sign it and he would take it from there.*

*...*

*If my tracker form was lost in [Provider’s branch] it was not my fault.”*

In an e-mail to this office dated **8 October 2017**, the Complainant states that *“MFA tracker form filled out by me with [name of Provider’s employee] in [Provider’s branch] in **April/May 2006** [name of Provider’s employee] checked tracker box and explained this was best option as it was linked to European central bank rates, [i] signed that form at counter and handed it back to [name of Provider’s employee] for submission”*. This is slightly at odds with what the Complainant states previously wherein he indicated that he ticked tracker box whereas the Complainant’s most recent comments would suggest that it was the Provider’s employee, who is now deceased, who *“checked”* the tracker box.

The Provider maintains that it holds no record of any interaction between the Complainant and this employee or indeed any other employee of the Provider for the period of **April to May 2006**. I note that the Provider’s internal notes for this period only refer to the issuing of a **“Product Review Notice”** on **28 April 2006** and a **“Product Rollover”** letter on **29 May 2006**.

It does not appear that the Provider responded to the Complainant’s letter of **2 December 2013** which is disappointing and the Provider notes in a letter to the Complainant dated **23 April 2014** that it did not receive the Complainant’s complaint letter of **2 December 2013**.

In its **Final Response Letter** to the Complainant dated **19 May 2014**, the Provider notes the following;

*“In February 2004 you accepted the [Provider’s] Loan Offer Letter dated 16 October 2003, which outlined that an amount of €180,000.00 would be issued at an interest rate of 3.85% (based on interest rates applicable at that point in time) fixed until 29 May 2006 reverting to a variable rate of interest. There is no provision anywhere in*

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*your Mortgage agreement (Letter of Offer) for a tracker rate of interest. General Condition 6(a) of your Mortgage Loan Offer Letter applies to the variable rate of interest (of 3.60%) provided for in the offer letter.*

....

*A rate form was issued to you on the 28/04/2006 offering you the rates available at that time, including a Tracker rate. You stated that you completed this rate form and selected the Tracker rate in the [Provider's branch]. Unfortunately this signed form was never received by us. Because of this you would not have received any confirmation letter in relation to the Tracker rate. A letter issued 29/05/2006 confirming that the mortgage account had rolled to the Standard Homeloan Variable rate.*

*After this time, the rate changed several times and you were issued letters confirming these rate changes on 22/06/2006, 15/08/2006, 17/10/2006, 19/12/2006, 21/03/2007, 14/06/2007 and 09/07/2008. These letters would have confirmed that your mortgage loan account was on a Standard Homeloan Variable rate.*

....

*As you had not received any confirmation that you had changed to a Tracker rate, and as we had sent letters to advise you that your mortgage was on a Standard Homeloan Variable rate, unfortunately we cannot offer you the historic Tracker rate."*

The Complainant responded by way of letter to the Provider dated **26 May 2014** as follows;

*"[...] you say in 2006 a rate form was issued to me including a tracker rate? This is the form I signed at the Bank counter with [name of Provider's employer] and you (the Bank) lost it.*

*You then go on to say that I was sent out a letter on 29/5/2006 confirming I was on a variable rate I did not receive this document. I have all other document relating to both mortgages I had- please forward me a copy of that document.*

*You then go on to state I had 7 rate changes and it would be noted on the document I was on the variable rate- I have all these documents and it does not state what mortgage type I am on – only rate increases?*

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*As I stated- I had 2 mortgages with [Provider]. I believed both were on tracker rates when the E.C.B started to increase rates both my mortgages went up together so no alarm bells went off from 2006 to 2009 both mortgages went up. But then in late 2009 E.C.B started to cut rates and only one of my mortgages started to come down while the other went up- this was when alarm bells went off and I contacted the Bank [...]”.*

The Complainant states that he received the interest rate change notification letters issued by the Provider on the dates outlined above however he notes that these letters only state the change in interest and did not make it clear that his mortgage loan account was on a standard home loan variable rate. Again, the Provider is unable to produce copies of these system generated letters which is disappointing however the Provider accepts that such letters did not specify the type of interest rate applicable to the mortgage loan account as the standard home loan variable rate. The Provider explains that that this correspondence detailed the impact of any change to the interest rate without identifying whether the rate was a tracker variable rate or not. The Provider’s internal notes outline that interest rate change notification letters were issued on the above dates. While I have not had sight of this correspondence, I acknowledge that the content of these interest rate change notification letters may have been confusing if it was the case that the Complainant was of the understanding that he had opted for a tracker interest rate in **May 2006** but this was not applied and the rate change notification letters did not specify that the interest rate actually applied was a non-tracker variable rate.

It is to be noted that while the Complainant accepts that he received the MFA dated **28 April 2006** (a system generated document), he did not receive a letter dated **29 May 2006** (another system generated document), sent a month later to the same correspondence address yet received several subsequent interest rate change notification letters (again system generated) from **July 2006** onwards and the Mortgage Loan Offer Letter dated **4 October 2006**. On the basis of the Provider’s internal notes, I accept that the Provider issued a letter dated **29 May 2006** to the Complainant with respect to the roll-over on the interest rate on mortgage loan account ending **5664**.

The Complainant has been unable to produce any evidence that he received confirmation of the switch to a tracker interest rate in **May 2006**.

It is also interesting to note that the Complainant accepts that he noticed that the interest rates on both his mortgage accounts were increasing from **2006** to **2009** but “*no alarm bells went off*” as he believed both of his mortgage loan accounts were on a tracker interest rate and recognised that the “*E.C.B started to increase rates*”. In an e-mail to this office dated **8 October 2017**, the Complainant states as follows;

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*"[...] in 2006 [I] obtained a 2<sup>nd</sup> mortgage from [Provider] this was on a tracker...*

*that year after taking out 2nd mortgage European central bank rates rose, [I] was receiving regular rate rise letters from [Provider] informing me of this. [T]hen in 2008 [I] noticed that the interest rate on 2nd mortgage started going down, but the interest rates on my main mortgage were going up, this is when [i] first realised that 1 st mortgage was on variable rate and 2 nd one was on a tracker, this was when [I] realised that my MFA form had not been put into banking system".*

I note from the Provider's internal notes that the variable interest rate applicable to the Complainant's mortgage loan account ending **5664** continued to increase from 3.99% on **29 May 2006** to 5.790% on **9 July 2008** however from **3 November 2008** the variable interest rate decreased from 5.29% to 3.04% on **19 March 2009** which appears to be at odds with the Complainant's comments above. I have not been provided with any evidence in respect of interest rate changes for mortgage loan account ending **3277** so I cannot comment on the Complainant's comments as regards his second mortgage loan account. However, it is clear that a tracker variable rate of ECB + 1.25% only applied to this account from **November/December 2008** which again is at odds with the Complainant's comments above.

In light of my analysis in relation to the Complainant's second mortgage loan account, I find it surprising that the Complainant was of the view that both of his mortgage loan accounts ending **5664** and **3277** were on a tracker interest rate during **2006 to 2009** when clearly a tracker interest rate was not applied to mortgage loan account ending **3277** until **November/ December 2008** on foot of the MFA that he signed on **18 November 2008** and it transpires that mortgage loan account ending **5664** had rolled over to a standard variable rate from **May 2006**.

Having considered the Complainant's mortgage loan documentation, in addition to the evidence submitted by both parties, I find that the Complainant did not have any contractual or other entitlement to a tracker interest rate on his mortgage loan account ending **5664** at the end of the initial two year fixed interest rate period. The Provider offered the Complainant a tracker interest rate option of ECB + 1.25% in **April 2006** along with fixed rate options over various terms and the Provider's home loan variable rate by issuing a MFA. In circumstances where there is no evidence to confirm that the Provider did receive a completed MFA from the Complainant, despite the Complainant's assertions that he completed the MFA in the presence of the Provider's employee in his local branch, the Complainant's mortgage loan account switched to the Provider's non-tracker variable rate in accordance with the terms of the Mortgage Loan Offer Letter.

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Neither the Complainant nor the Provider have furnished me with documentary evidence to indicate that the Complainant signed a MFA in the Provider's branch in or around **May 2006**. I acknowledge that the Complainant has provided an account of his own recollection of events in relation to his signing of the MFA however these assertions, which at times varied and conflicted, owing no doubt to the passage of time, have not been substantiated in any way by the evidence. I understand that the employee of the Provider in question who the Complainant says he handed the signed MFA to, has sadly since passed away.

In making my decision I note that the Provider's internal notes show that a MFA issued on **28 April 2006** and a product rollover letter issued on **29 May 2006**. If indeed a MFA was received and processed by the Provider and a tracker interest rate was applied to mortgage loan account ending **5664**, I am of the view that the Provider would have issued a letter or some form of notification to the Complainant to confirm that this was the case. I have also considered the fact that there are no records of any discussions between the Provider and the Complainant in **April 2006 and/ or May 2006** concerning mortgage loan account ending **5664** despite the Complainant's contention that he attended the Provider's branch in **May 2006**, however the Provider has produced notes from **March 2006 to May 2006** in relation to the Complainant's application for a second mortgage loan account ending **3277**.

The Complainant's submissions are confusing, in that, he was of the view that mortgage loan account ending **3277** was on a tracker rate since inception in **December 2006** and meanwhile he also believed that mortgage loan account ending **5664** was on a tracker rate since **May 2006**, neither of which were the case. It is notable that despite this confusion and the Complainant's assertion that he noticed a divergence in interest rates applicable to both of his mortgage accounts in **2008**, the Complainant did not query the interest rate until **2010** when he first contacted the Provider with this complaint.

In the absence of any documentary evidence from the Complainant confirming that he opted to apply a tracker interest rate to mortgage loan account ending **5664** in **May 2006** and that the Provider was obliged to process the instruction, once it was submitted, I do not uphold this complaint.

For the reasons outlined 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.

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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

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.