



<b><u>Decision Ref:</u></b>	2020-0397
<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**

This complaint relates to a mortgage loan account that was previously held in the joint names of the First and Second Complainant. The mortgage loan was secured on the Complainants' private dwelling house.

The loan amount was €186,300 and the term of the loan was 30 years. The particulars of the Letter of Approval dated **14 March 2005** detailed the loan type as "*1 Year Fixed Rate Home Loan*".

The Second Complainant was removed from the mortgage loan account in **2013**. Since then the First Complainant has continued to occupy the property, on which the mortgage is secured as his private dwelling house.

**The Complainants' Case**

The Complainants submit that they were on a tracker interest rate and that the Provider "*asked*" them to choose a 3 year fixed interest rate in **2006** when the mortgage loan account was on a tracker rate. They assert "*I made it very clear that I did not want to come off tracker at the time as fixed rate was higher but was [assured]... it was a good move and I'd be put back on tracker at the end of the 3 year period*".

The Complainants details that the conduct complained of occurred on **31 August 2009**. They further details that at the end of the 3 year fixed rate period this did not happen and the First Complainant feels he *“was wrongly advised and taken advantage of.”*

The Complainants are seeking the following from the Provider;

- (a) To restore a tracker interest rate to the mortgage loan account, and
- (b) Reimbursement for interest over paid since **2009**.

### **The Provider’s Case**

The Provider submits that the Complainants were not offered a tracker interest rate when the fixed rate interest period expired in **2009** because they did not have a contractual entitlement to be offered a tracker interest rate on the expiry of the fixed rate period.

The Provider states that it issued a **Letter of Approval** to the Complainants on **14 March 2005** for the loan amount of €186,300.00 repayable over 30 years. It details the initial rate of interest as per the Letter of Approval was fixed at 2.74% for 1 year after which the rate applicable would be variable rate. The Provider details that the **Letter of Approval** was signed and accepted by the Complainants, with the benefit of legal advice, on **23 March 2005**. The Provider outlines that the loan drew down on **17 November 2005** on a 1 year fixed interest rate of 2.55% pursuant to **General Mortgage Loan Condition 5.2**.

The Provider submits that prior to the expiry of the fixed rate period, it issued the Complainants with a **rate options letter and form** in **October 2006**, which listed the interest rates that were available to the Complainants to the Complainant on the expiry of the rate period in **November 2006**, and this included the option of a tracker variable rate of 4.50% (ECB + 1.25%), the Provider’s standard variable rate and a *“... series of fixed interest rate options from 1 to 10 years”*.

The Provider states that as it did not receive the Complainants’ signed rate options form prior to the expiry of the fixed rate period, on *“... Friday 17 November 2006 the account defaulted to the tracker interest of 4.50% (ECB +1.25%).”* The Provider further details that *“... the next working day, Monday 20 November 2006, the Complainant[s’] signed options form dated 16 November was received by the Bank.”* The Provider outlines the Complainants opted for the 3-year fixed rate mortgage rate of 4.85% and the mortgage loan account was amended to the Complainants’ preferred rate of the 3-year fixed mortgage rate of 4.85% on **20 November 2006**.

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The Provider *“does not accept that its staff informed the Complainant[s] in November 2006 that a tracker interest rate would be available three year after to the Complainant[s], a customer who had no contractual entitlement to be offered a tracker rate of interest at any time during the lifetime of [the] loan.”* The Provider states that it was not in a position in **2006** to provide information to the Complainants regarding future rate options which would be available on expiry of any of the fixed rate periods offered to the Complainants in **2006** and, in particular, could not say whether a rate available in **2006** would be available in **2009**. It states that the Provider may from time to time introduce or withdraw products or interest rates it offers and is not in a position to know in advance the interest rates or products it would be offering on future dates, and further, it could not say for how long it would continue to offer an expiry rate option of a tracker rate to customers who had no contractual entitlement to such an option.

The Provider states that the Complainants *“had a choice of nine interest options. By choosing one of the nine options, [they were] forgoing the other eight options. A tracker rate was one of the options which [they] decided to forgo.”*

The Provider submits that the Letter of Approval and accompanying contractual terms did not contain an entitlement to a tracker interest rate 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 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 outlines that the Complainants’ second fixed rate period was due to expire on **20 November 2009**. The Provider outlines that on **30 October 2009**, it issued a rate options letter which *“...contained a list of the then current available interest rates”* and this did not contain the option of a tracker interest rate.

The Provider submits that the reason it did not offer the Complainants a tracker interest rate on the expiry of the fixed interest rate period in **2009** was because the Complainants did not have a contractual entitlement to be offered a tracker interest rate and “... *the Bank had ceased offering tracker rates to customers upon expiry of a fixed rate term in August 2009, other than customers who had a contractual entitlement to be offered a tracker rate...*”. It states that the rate options letter explained that in the absence of a completed form being returned to it that the default rate which would be applied was the Provider’s LTV variable rate. The Provider submits that on **20 November 2009**, the Complainants’ mortgage loan account defaulted to the Provider’s LTV variable rate of 3.65% in the absence of an instruction from the Complainants.

The Provider outlines that **General Condition 5.4** of the Complainants’ Letter of Approval provided that the Provider and the Complainants each had an entitlement to change the rate of interest to a variable rate of interest on expiry of any fixed rate period applied to the loan. It details “*The loan had two fixed rate periods, the first from 17 November 2005 to 17 November 2006 and the second from 20 November 2006 to 20 November 2009. The Banks chosen or default variable rate for the expiry of the first of these fixed periods was a tracker variable rate of 4.50%*”. It further details that it informed the Complainants 20 days prior to the expiry of the fixed rate period in **November 2006** and gave the Complainants a number of rate options from which they could choose. The Provider submits “*the Complainant[s] chose another rate, a fixed rate for three years, and the Bank applied that to the account*”. It outlines “*the Banks chosen or default variable rate for the expiry of the second fixed rate period was a LTV variable rate of 3.65%*” and the Provider “*applied this rate in absence of selection by the Complainant[s]*.”

The Provider submits that the Second Complainant was removed from the mortgage loan account in **March 2013**.

The Provider states that it is satisfied that the interest rates applied to the mortgage loan account were correct.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants the option of a tracker interest rate upon the expiry of the fixed interest rate period in **November 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 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 12 October 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 Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2006** and in **2009**.

The **Letter of Approval** dated **14 March 2005** details as follows;

<i>"Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>€202,500.00</i>
<i>Loan Amount:</i>	<i>€186,300.00</i>
<i>Interest Rate:</i>	<i>2.74%</i>

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Term: 30 year(s)"

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

*"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 in the Letter of Approval and thereafter will not be changed at intervals of less than one year.*
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- 5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:*
- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*
- (b) A sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.*
- 5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."*

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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 **23 March 2005**. The Acceptance of Loan Offer states as follows:

*“1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval 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.”*

It is clear to me that the Letter of Approval envisaged a 1 year fixed interest rate of 2.74% and thereafter the option of a variable rate. The variable rate in this case 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 the **Letter of Approval** having confirmed that it had been explained to them by their solicitor on **23 March 2005**.

The mortgage loan was drawn down on **17 November 2005** on a fixed interest rate of 2.55%. **General Condition 5.2** allows for such a variation in the interest rate prior to completion.

The Provider has submitted that it issued a **letter** and **options form** to the Complainants approximately 20 days prior to the expiry of the 1 year fixed interest rate period in **November 2006**. The Provider submits that the letter and form reminded the Complainants of the expiry date, provided a list of interest rate options and outlined that in the absence of a selection the default rate would be the tracker interest rate option.

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I am disappointed to note that 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 a letter issued with the rate options form at that time.

The **rate options form** signed by the Complainants on **16 November 2006**, has been furnished in evidence, and details as follows;

*“Current options available:*

*You may only select one option.*

*Account Number:XXXXXXXXX2469*

*\*Monthly  
Repayment \*  
EUR ...*

<i>--- Tracker variable rate (ECB + maximum 1.2500%)*</i>	<i>- Currently 4.50%</i>	<i>1042.33</i>	<i>...</i>
<i>--- Standard variable rate **</i>	<i>- Currently 4.60%</i>	<i>1053.12</i>	<i>...</i>
<i>--- 1 year fixed rate</i>	<i>- Currently 4.75%</i>	<i>1069.42</i>	<i>...</i>
<i>--- 2 year fixed rate</i>	<i>- Currently 4.85%</i>	<i>1080.37</i>	<i>...</i>
<i>--- 3 year fixed rate</i>	<i>- Currently 4.85%</i>	<i>1080.37</i>	<i>...</i>
<i>--- 4 year fixed rate</i>	<i>- Currently 4.89%</i>	<i>1084.76</i>	<i>...</i>
<i>--- 5 year fixed rate</i>	<i>- Currently 4.99%</i>	<i>1095.79</i>	<i>...</i>
<i>--- 7 year fixed rate</i>	<i>- Currently 5.15%</i>	<i>1113.57</i>	<i>...</i>
<i>--- 10 year fixed rate</i>	<i>- Currently 5.25%</i>	<i>1124.75</i>	<i>...</i>

*...*

- 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 1.2500% 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.*

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*The amount of the percentage over the ECB Rate will depend on the 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 **16 November 2006** and selected the 3 year fixed interest rate of 4.85%. The Provider upon receipt of the **rate options form** applied the requested interest rate to the mortgage loan account on **20 November 2006**.

The Provider has summarised its policy with respect to tracker interest rate offerings as follows;

*“...[in mid] 2006, the [Provider] 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 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 [Provider] commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008 (it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.*

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

No documentary evidence has been provided to show that the mortgage loan account defaulted to the tracker interest rate of 4.50% (ECB + 1.25%) on **Friday 17 November 2006**, however it does not appear to be in dispute between the parties that this is what occurred. By this time, the Complainants had already completed and signed the rate options form on **16 November 2006** electing for the 3 year fixed interest rate of 4.85% to apply to the mortgage loan. The Provider then implemented the Complainant's instructions and applied the fixed interest rate on **Monday 20 November 2006**. The Provider was implementing the Complainants' instructions by applying the fixed interest rate to the mortgage loan.

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 period in **November 2006**. It appears that the Provider, in line with its own policy at the time, offered the Complainants a tracker interest rate option of 4.5% (ECB + 1.25%) in **October 2006**, even though it had no obligation to do so.

It also clear that the Complainants did not accept this offer.

The reverse side of the options forms which the Complainants signed on **16 November 2006** 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 1.25% 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 **November 2006**. However, the Complainants did not opt to accept the tracker interest rate option and instead signed the options form and elected to apply the 3 year fixed interest rate to the mortgage loan account.

The Complainants have submitted that the Provider "*asked*" them to apply a 3 year fixed interest rate to the mortgage loan account in **2006** when the mortgage loan account was on a tracker rate. For the avoidance of doubt, the Complainants' mortgage account was on

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a tracker interest rate for 1 working day from **Friday 17 November 2006** to **Monday 20 November 2006**, as the Provider had not received and processed the rate options form before the 1 year fixed rate period expired.

Having received the completed rate options form which was signed by the Complainants on **16 November 2006**, the day before the fixed rate period expired the Provider processed the Complainants' instruction and applied the fixed interest rate on **Monday 20 November 2006**. I have not been furnished with any evidence to show that the Provider "asked" the Complainants to apply a 3 year fixed interest rate in **2006**. As set out above, the reverse side of the options form which the Complainants signed on **16 November 2006** contained detail about the tracker interest rate offer, such that the Complainants could have made an informed decision as to which interest rate to choose at the time. The Complainants opted to choose a 3 year fixed interest rate of 4.85% in November 2006, rather than any of the other options thereby rejecting the offer of a tracker rate.

The Provider issued a **letter and rate options form** dated **30 October 2009** to the Complainants 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 20 Nov 2009, the interest rate on your mortgage will be the LTV Variable Rate\*\*"*

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

*"Current options available:  
You may only select one option.  
Account number: [XXX]*

		<i>Monthly Repayment EUR</i>
- <i>LTV Variable Rate**</i>	- <i>Currently 3.6500%</i>	<i>871.63</i>
- <i>2 Year Fixed Rate</i>	- <i>Currently 5.2500%</i>	<i>1030.08</i>
- <i>5 Year Fixed Rate</i>	- <i>Currently 5.7500%</i>	<i>1082.39</i>
- <i>7 Year Fixed Rate</i>	- <i>Currently 6.1000%</i>	<i>1119.75</i>
- <i>10 Year Fixed Rate</i>	- <i>Currently 6.1000%</i>	<i>1119.75</i>

....

- *Please note, if you chose a fixed rate, the standard fixed-rate conditions will apply (see over the page).*

- *\*\*In calculating your loan to value ("LTV") ratio, we use the current loan balance and the most recent valuation on file for this mortgage."*

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I note from the evidence submitted that the Complainants did not return the completed options form and the LTV variable rate was applied to the mortgage loan on **30 November 2009**. This was in accordance with General Condition 5.4 of the Complainants' mortgage loan documentation.

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 offer the Complainants a tracker interest rate of ECB + 1.25% in **November 2006** as a matter of policy despite not being obliged to do so. The Complainants did not accept that offer. Rather they issued an instruction for the three year fixed interest rate to be applied to the mortgage loan on **Thursday 16 November 2006**. A tracker interest rate of ECB + 1.25% was applied to the mortgage loan on **Friday 17 November 2006**, while the fixed rate instruction was being processed. On **Monday 20 November 2006** the Provider applied the fixed interest rate, in accordance with the Complainants' instructions. On the expiry of the 3 year fixed interest rate period in **November 2009** 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 their mortgage loan account at the end of the fixed interest rate period in **November 2009**.

For the reasons outlined in this Decision, 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**

3 November 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—**

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**(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.**

