



<u>Decision Ref:</u>	2020-0407
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house. It appears that the Complainants moved out of the property in **2014** and commenced renting the property.

The loan amount was €310,000 and the term of the loan is 35 years. The **Letter of Approval** dated **02 February 2007** detailed the loan type as "5 Year Fixed Rate Home Loan". Following the expiry of the fixed interest rate period in **February 2012** a tracker interest rate of 4.25% (ECB + 3.25%) was applied to the mortgage loan.

The Complainants' Case

The Complainants submit that they drew down the mortgage loan account on **27 February 2007** subject to a five year fixed rate of 5.15%. The Complainants outline that the mortgage agreement sets out that there is a default tracker interest rate to apply to the mortgage loan account on the expiry of the fixed interest rate in **2012**.

The Complainants detail that on the expiry of the fixed interest rate in **February 2012**, the Provider offered the Complainants a number of different interest rates to include the following;

"1) tracker rate currently 4.25% 2) LTV variable rate currently 5.19% 3) 2 Yr fixed term currently 7.25% 4) 5 Yr fixed term currently 8.75%."

The Complainants detail that the tracker rate on offer was very high, but they had no option but to select it in circumstances where the fixed and variable rates offered were *"exorbitant"*. A tracker interest rate of ECB + 3.25% was applied to the mortgage loan from **February 2012**. The Complainants submit that they complained to the Provider twice to determine if the Provider was correct in issuing such a high tracker interest rate.

The Complainants outline that the tracker interest rate offered was too high and as a result they *"feel discriminated in comparison to other customers."*

The Complainants submit that they had to move out of the mortgaged property in **2014** due to *"personal circumstances"*. They state that they have had to rent out the house and in doing so, *"[they] had to forego the mortgage interest relief"*. As a result, they submit that they have to contend with a monthly shortfall of €450 on their mortgage payments. They further outline that they are not in a position to sell their house as *"the negative equity is considerable"*.

The Complainants detail that they have overpaid to the *"tune of €320 per month"* since **February 2020**, which they equated to be €19,200 at the time of their complaint and this amount is *"increasing with every passing month"*.

The Complainants are seeking the following;

- To be offered a fair tracker interest rate, which they suggested to be ECB + 1%; and
- A refund for the overcharging caused by the unfair tracker interest rate.

The Provider's Case

The Provider submits that on **27 February 2007**, the Complainants' mortgage loan account was drawn down on a 5 year Fixed Rate Home Loan interest rate of 5.15%. It details that the fixed interest rate period was due to expire on **27 February 2012**.

The Provider outlines that it issued an options letter and form to the Complainants prior to the expiry of the fixed interest rate in **February 2012** outlining the available interest rate options at the time, which were, a tracker interest rate of 4.25% (ECB + 3.25%), LTV

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variable rate of 5.19%, 2 year fixed rate of 7.25% and a 5 year fixed rate of 8.75%. The Provider details that the options letter detailed that in the event that the Provider did not receive a written instruction from the Complainants in relation to their preferred interest rate on or before **27 February 2012**, then the interest rate that would be applied on the mortgage loan account from that date would be the tracker rate.

The Provider submits that on **10 February 2012**, the Provider received the signed instruction form confirming the selection of the tracker interest rate of 4.25% (ECB + 3.25%) and the tracker interest rate was applied to the mortgage loan from **27 February 2012**.

The Provider outlines that it does not accept that it has treated the Complainants unfairly in comparison to other customers or at all. The Provider outlines that in applying the tracker interest rate of ECB + 3.25% to the Complainants' mortgage loan that it has complied with the Complainants' mortgage loan contract and in particular **Special Condition A**. The Provider submits that the Complainants' Loan Offer did not contain a contractual entitlement to a specific margin over the ECB rate at any point during the term of the loan. It details that **Special Condition A** outlined that, on the expiry of the fixed interest rate period, the Complainants would be able to avail of the then current tracker rate applicable to the loan balance outstanding at that time, and in the absence of an instruction to apply another rate, then the interest rate would be that tracker rate. The Provider submits that, at the time of expiry of the fixed rate period on the Complainants' mortgage loan in **February 2012**, the current tracker rate offered was ECB + 3.25%.

The Provider submits that it does not accept that the other rate options offered in **February 2012** were exorbitant. The Provider details that it is entitled to exercise its discretion in setting the interest rates offered based on factors, such as, cost of funds, cost of credit risk and the Provider's competitive position. The Provider indicates that it is *"lawfully entitled to have regard to these factors when setting interest rates or margins."*

The Provider submits that it is unable to establish a monthly shortfall in tax relief at source and has provided an outline of TRS applied from **August 2015 – October 2015**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider has applied an unfairly high tracker interest rate of ECB + 3.25 to the Complainants' mortgage loan account since **February 2012**.

Decision

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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 **19 October 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **February 2012**.

A **Loan Application** was completed and signed by the Complainants on **25 January 2007**. In the mortgage details section of the Loan Application the "*home loan*" option was selected. The other options were "*tracker home loan*" and "*interest only home loan*". In the "rate type" section the Complainants selected "fixed". The other options were tracker, variable, discount, split and other. The words "*5 years*" are included in handwritten text.

The **Letter of Approval** dated **02 February 2007** that issued to the Complainants details as follows;

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<i>Loan Type:</i>	<i>5 Year Fixed Rate Home Loan</i>
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<i>“Purchase Price/Estimated Value:</i>	<i>EUR310,000.00</i>
<i>Loan Amount</i>	<i>EUR310,000.00</i>
<i>Interest Rate:</i>	<i>5.15%</i>
<i>Term:</i>	<i>35 year(s)”</i>

The reverse side of each page of the Letter of Approval contains the following under the heading **Housing Loans under Consumer Credit Act 1995, Tracker Mortgage Loans;**

“1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the 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 **Special Conditions** attached to the Letter of Approval detail as follows;

*“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 issue of the loan. On expiry of the fixed rate period, and where the applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan will be the **tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period.** In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as may be varied in accordance with variations to the European Central Bank refinancing rate.”[my emphasis]*

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The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by their solicitor on **21 February 2007**. The Acceptance of Loan Offer states as follows;

“ 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] Mortgage Conditions

...

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

The mortgage loan was drawn down on **27 February 2007** on the fixed interest rate of 5.15%.

It is clear to me that the **Letter of Approval** envisaged a five year fixed interest rate and thereafter the option of a *“tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period”*. It is important for the Complainants to understand that in order for them to have a contractual right to a specific tracker interest rate margin on their mortgage loan at the end of the fixed interest rate period in **2012**; that right would need to have been specifically outlined in the mortgage loan documentation that was signed by the parties. However no such right was contained in the **Letter of Approval** dated **02 February 2007** which was signed by the Complainants on **21 February 2007**. The Complainants accepted the Letter of Approval on **21 February 2007**, having confirmed that the terms and conditions attaching to the Letter of Approval had been explained to them by their solicitor.

The Provider wrote to the Complainants by letter dated **07 February 2012**, which details as follows;

“I am writing to remind you that the current rate option on your mortgage account will end on 27 Feb 2012. Please find attached the current options available to you. We recommend that you consider your options carefully before making your selection. If you chose 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. 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 received a written instruction from you in relation to the above on or before the 27 Feb 2012, the interest rate will be the Tracker Variable Rate.”*

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

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“ ...

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

Account number: [ending] 7895

		Monthly Repayment ~ (EUR)
--- Tracker variable rate*	CURRENTLY 4.25%	1,470.73
--- LTV Variable Rate**	CURRENTLY 5.19%	1,640.16
--- 2 Year Fixed Rate	CURRENTLY 7.25%	2,040.69
--- 5 Year Fixed Rate	CURRENTLY 8.75%	2,353.85

....

**The interest rate that applies to this Tracker Mortgage Loan will never be more than the European Central Bank Refinancing Rate (the “ECB Rate”) plus a margin of 3.25%.*

See over the page for more details on Tracker Mortgage Loans.

The reverse side of the options form contained the same text under the heading **Housing Loans under Consumer Credit Act 1995, Tracker Mortgage Loans** as was contained on the reverse side of the Letter of Approval, as quoted above.

The Complainants signed the rate options form on **10 February 2012** and selected the tracker interest rate of 4.25%.

The Provider wrote to the Complainants by letter dated **27 February 2012**, detailing as follows;

“I wish to advise you that in accordance with the terms of your loan, the rate of interest has been amended to a Tracker Variable Rate currently 4.250%.”

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being “effective from the start of business on 23rd January 2012”. This document outlines as follows;

“Home Loan Rates for Existing Business

....

RATE APR

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***LTV Tracker Maturity Rate for existing
Home Loans Maturing where applicable***

<i>Tracker Rate LTV < 80%</i>	4.25%	4.3%
<i>Tracker Rate LTV > 80%</i>	4.25%	4.3%

The evidence shows that the tracker interest rate that the Provider had available for home loans for existing business in **February 2012** was 4.25% and that was the tracker interest rate that was offered to the Complainants in respect of their mortgage loan. In these circumstances, I accept that the Complainants were offered the option of the “*tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*”, in accordance with **Special Condition A** of their mortgage loan contract. It was within the Provider’s commercial discretion to set this rate. The Complainants were notified of this rate on **07 February 2012** in advance of the expiry of the fixed interest rate period.

I do not accept, based on the evidence available, that the Complainants had a contractual or other entitlement to a tracker interest rate of ECB + 1.00% on the expiry of the fixed interest rate period in **February 2012**, or indeed at any other stage during the term of the mortgage. Whilst it may be the case that the Complainants would like a lower tracker interest rate, the evidence does not support their assertion that they are entitled to this rate. There is also no evidence that the Complainants were discriminated against in comparison to other customers, as they have suggested.

The Complainants had a right to the “*tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*”, on the expiry of the fixed interest rate period in **February 2012**. The Provider offered the Complainants the rate of ECB + 3.25% (4.25%) and the Complainants signed the rate options form on **10 February 2012** selecting this option. I understand that this tracker interest rate continues to apply to the Complainants’ mortgage loan.

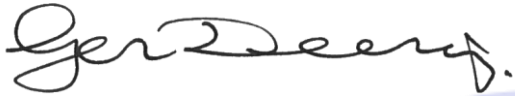
For the reasons outlined in this Decision, I do not uphold this complaint.

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.

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Ger Deering.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

13 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—

(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.