



<u>Decision Ref:</u>	2020-0481
<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 Application of interest rate
<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' principal private residence.

The loan amount was €320,000 and the term of the loan was 35 years. The particulars of the Letter of Approval dated **16 April 2007** detailed that the loan type was a "2 Year Fixed Rate Home Loan."

The Complainants' Case

The Complainants outline that a tracker interest rate of ECB + 2.25% has applied to their mortgage loan account since **15 May 2009**, on which date their two year fixed interest rate ended. The Complainants outline that at the same time a "work colleague had her tracker mortgage with [another named Provider] with a base rate of 1% + ECB rate."

The Complainants detail that they were "aggrieved to know that for the last number of years that the rate on [their] tracker mortgage was a full percent more than what [another named Provider] and [another named Provider] were charging their customers." The Complainants contend that the variance in margins seems quite excessive.

The Complainants submit that they feel the margin of 2.25% is “*relatively steep*” in comparison to the tracker interest rate being charged by other Providers. The Complainants outline that “[*it is hard to understand how a tracker rate can vary so greatly between financial institutions*”.

The Complainants detail that the difference in tracker rate margins resulted in them paying much higher repayments than if they were on a lower tracker rate margin offered by another Provider.

The Complainants outline that they read a newspaper article regarding tracker interest rates in **December 2017** and subsequently contacted the Provider querying why they were not offered a better tracker interest rate, when a lower tracker rate was being offered on the market in **2009** by other Providers. In addition, the Complainants question why they continue to pay an “*additional 1% + margin on [their] tracker interest rate*”.

The Complainants are seeking a “*return on the money paid against [their] mortgage of at least 1% per annum*”.

The Provider’s Case

The Provider outlines that the Complainants submitted their mortgage application through a broker, requesting an amount of €330,000 over a 35 year term on **23 March 2006**.

It submits that it issued the Complainants a **Letter of Approval** dated **16 April 2007** for a 2 year fixed rate home loan in the amount of €320,000 over a 35 year term on an initial fixed interest rate of 4.75%.

The Provider details that the Complainants signed a **Letter of Acceptance** in the presence of their Solicitor on **25 April 2007** and drew down their mortgage on **15 May 2007**.

The Provider outlines that the Complainants’ fixed interest rate period was due to expire on **15 May 2009**. It details that 20 days prior to the expiry of the fixed rate period, “*the Bank’s automated mortgage processing system issued a standard letter enclosing a list of the rate options available to the Complainants on expiry of the fixed rate.*” It submits that **the rate options letter** that issued to the Complainants included a tracker interest rate option and detailed that, in the absence of a selection by the Complainants, a tracker interest rate would be applied to the Complainants’ mortgage loan account.

The Provider submits that although the *“Complainant[s]’ mortgage terms and conditions did not provide that a tracker rate option would be offered to them either on expiry of the fixed rate period or at any stage during the mortgage term”*, from **30 June 2006** until **31 August 2009**, it had *“introduced a practice 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.”*

It submits that, as a result of this policy, a tracker rate option was included in its automated **rate options letter** that issued to the Complainants on the expiry of fixed rate periods from **30 June 2006** until **31 August 2009**.

The Provider outlines that interest rates are set subject to certain factors including *“the Bank’s operational costs and its current cost of funds, i.e. interest rates paid by the Bank on deposits, wholesale borrowing and other sources of funds”* as well as the Provider’s competitive position in the market place.

The Provider details that it increased its tracker rate margin on existing home loans to 2.25% from **20 December 2008** and when the Complainants fixed interest rate expired on **15 May 2009**, a tracker interest rate margin of 2.25% was the current rate available.

The Provider details that it has no record of receiving a signed **rate options form** from the Complainants therefore a tracker interest rate of ECB+ 2.25% was applied to the Complainants’ mortgage loan account on the expiry of the fixed interest rate period on **15 May 2009** as per the Provider’s policy at the time. It contends that the Complainants did not have a contractual entitlement to a tracker interest rate. The Provider relies on **Special Condition A** and **General Condition 5** of the **Letter of Approval** to support this.

The Provider does not accept that the tracker interest rate of ECB+ 2.25% that was applied to the Complainants’ mortgage loan account was *“excessive”* compared to the margin above ECB offered by other Providers or otherwise. It contends that the Complainants have not provided any contrary evidence to support that submission and it outlines that it *“is not in a position to comment on specific interest rates offered by other institutions in May 2009.”*

The Provider does not accept the Complainants’ submission that they have overpaid interest of at least 1% per year since **May 2009**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly applied a high tracker interest rate of ECB + 2.25% to the Complainants' mortgage loan account on the expiry of the fixed rate period in **May 2009**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 27 November 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.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished do 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 are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party broker. As this complaint is made against the respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this office, by letter dated **1 July 2020**, which outlined as follows;

“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”

Therefore, the conduct of the third party broker engaged by the Complainants does not form part of this investigation and decision for the reasons set out above.

The issue to be determined is whether the Provider incorrectly applied a high tracker interest rate of ECB + 2.25% to the Complainants’ mortgage loan account on the expiry of the fixed rate period in **May 2009**. In order to determine this, 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 Complainant and the Provider between **March 2006** and **May 2009**.

The Provider has submitted into evidence an undated letter from the Complainants’ broker detailing the following;

“The above clients are looking to borrow €330,000 to purchase a new home for €330,000 (100%).

...

Please advise of approval in principle but should you have any queries please do not hesitate to contact me on [redacted]”

The Provider has also submitted a **mortgage application form** which contains the Complainants’ details. However, no information has been filled in under the headings *“Mortgage Type, Rate and Term Details”* and *“Funding Details/ Mortgage Required”*.

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The Complainants signed a document titled “APPLICATION FOR CREDIT”, on **23 March 2006** which details as follows;

2. Details of mortgage required			
Purchase price/ value of property	€ 330,000	Amount of Loan Required	€ 330,000
Loan Type	Annuity	Repayment Term Required	35
3. Valuation			

I note from the evidence that the Provider appears to have issued three **Letters of Approval** to the Complainants. The first two Letters of Approval that issued, as detailed below, do not appear to have been signed or accepted by the Complainants.

The **Letter of Approval** dated **20 March 2007** details as follows;

“Loan Type:	2 Year Fixed Rate Home Loan
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Purchase Price / Estimated Value:	EUR 330,000.00
Loan Amount:	EUR 329,000.00
Interest Rate:	4.75%
Term:	35 year(s)”

The Letter of Approval dated **29 March 2007** details as follows;

“Loan Type:	2 Year Fixed Rate Home Loan
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Purchase Price / Estimated Value:	EUR 330,000.00
Loan Amount:	EUR 320,000.00
Interest Rate:	4.75%
Term:	35 year(s)”

I note that each of these Letters of Approval offered the same interest rate as provided for in the third **Letter of Approval** dated **16 April 2007**, which was signed and accepted by the Complainants.

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The **Letter of Approval** dated **16 April 2007** details as follows;

<i>"Loan Type:</i>	<i>2 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 330,000.00</i>
<i>Loan Amount:</i>	<i>EUR 320,000.00</i>
<i>Interest Rate:</i>	<i>4.75%</i>
<i>Term:</i>	<i>35 year(s)"</i>

The **Special Conditions** attaching to the Letter of Approval dated **16 April 2007** detail as follows;

"Special Conditions

- A. *GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE."*

General Condition 5 of the **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval dated **16 April 2007** details as follows;

"CONDITIONS RELATING TO FIXED RATE LOANS

5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.

5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.

...

5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."

The **General Mortgage Loan Approval Conditions** also outline;

"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."

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The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **25 April 2007**. 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] 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 dated **16 April 2007** envisaged a two year fixed interest rate and thereafter the option of a further fixed interest rate or a variable interest 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. 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 **2009** that right would need to be specifically outlined in the mortgage loan documentation. However no such right was contained in the **Letter of Approval** dated **16 April 2007** which was signed by the Complainants on **26 April 2007**. The Complainants accepted the Letter of Approval on **26 April 2007**, having confirmed that the terms and conditions of the Loan Offer had been explained to them by their solicitor. It appears that the mortgage loan account was drawn down on **15 May 2007**.

The Provider has submitted that approximately twenty days prior to the expiry of the fixed rate period, it automatically issued a **rate options letter** and **rate options form** to the Complainants in or around **April 2009** detailing the available interest rate options at that time, including a tracker interest rate option. The Provider has provided a copy of a template rate options letter issued to the Complainants at this time. The Provider has not given any explanation to this office as to why it does not hold a copy of the actual letter that issued to the Complainants.

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I am disappointed to note that a copy of the **rate options letter** and **rate options form** that purportedly issued to the Complainants in **April 2009** has not been furnished in evidence to this office by the Provider. Furthermore, it is disappointing that the Provider has failed to offer a satisfactory explanation to this office as to why it does not hold a copy of this documentation in its records, save that the Provider "*has no record of receiving a signed options form from the Complainants*".

Provision 49 of the **Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows;

"A regulated entity must maintain up-to-date consumer records containing at least the following:

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."

The Complainants' mortgage loan was incepted for a term of 35 years commencing from **May 2007** and the **rate options letter** and **rate options form** purportedly issued in **April 2009**. It is understood that the mortgage account remains presently active with the Provider. As such, it appears to me that the Provider is obliged to retain that documentation on file for 6 years from the date the relationship with the mortgage holder ends. However it is unclear to this office, in the absence of a proper explanation, why this documentation has not been retained by the Provider. For the avoidance of any doubt, the fact that the letter was issued automatically from the Provider's automated system does not explain why it was not retained in accordance with the **Consumer Protection Code 2006**.

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However, the Complainants have furnished this office with a copy of the **rate options letter** issued to them on **24 April 2009**, which details as follows;

"I am writing to remind you that the current rate option on your mortgage account will end on 15 May 2009.

Please find attached the current options available to you.

We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.

If we do not receive a written instruction from you in relation to the above on or before the 15 May 2009, the interest rate on your mortgage will be the tracker variable rate.

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

The **rate options form** enclosed with the **rate options letter** details as follows;

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

...

		Monthly Repayment EUR
--- Tracker variable rate (ECB + maximum 2.250%)*	- Currently: 3.75%	1377.39
--- LTV variable rate**	- Currently: 3.65%	1359.25
--- 2 year fixed rate	- Currently: 5.25%	1663.60
--- 5 year fixed rate	- Currently: 5.75%	1764.53
--- 7 year fixed rate	- Currently: 6.10%	1836.69
--- 10 year fixed rate	- Currently: 6.10%	1836.69

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

This office has not been provided with a copy of the reverse side of the rate options letter.

The Provider detailed that it did not receive any communication from the Complainants opting for any of the interest rate options offered in the rate options form.

The Complainants have submitted a letter from the Provider to the Complainants dated **15 May 2009** into evidence which details as follows;

“I wish to advise that in accordance with the terms of your loan, the rate of interest has been amended to a tracker rate currently 3.500% (ECB + max 2.250%).

Confirmation of your revised monthly payment calculated at the new interest rate will be forwarded to you shortly”

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 THE 30TH APRIL 2009”*. This document outlines as follows;

“Home Loan Rates for Existing Business

....

	<i>RATE</i>	<i>APR</i>
<i>LTV Tracker Maturity Rate for existing Home Loans Maturing where applicable</i>		
<i>Tracker Rate LTV < 80%</i>	<i>3.50%</i>	<i>4.6%</i>
<i>Tracker Rate LTV > 80%</i>	<i>3.50%</i>	<i>3.5%”</i>

On reviewing the Complainants’ mortgage loan statements, I note that the tracker interest rate that the Provider had available as of **30 April 2009** of 3.50% (ECB + 2.25%) was the same tracker interest rate that was applied to the Complainants’ mortgage loan account as the default rate on **15 May 2009**. As such, the rate applied to the Complainants’ mortgage loan account at the time of expiry of the fixed interest rate period, was the then current home loan tracker interest rate offered by the Provider.

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The Provider applied the tracker interest rate option of ECB + 2.25% to the Complainants' mortgage loan account in accordance with its own policy at the time. The Provider has summarised its policy as follows;

"... on 30 June 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period.

Between 30 June 2006 and 08 September 2006 while the options letter included the offer of a tracker interest rate, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From 08 September 2006 until 31 August 2009, in the absence of a customer selection the tracker interest rate was applied to the mortgage as the default interest rate."

The evidence shows that the tracker interest rate that the Provider had available for home loans for existing business in **May 2009** was 3.50% and that was the tracker interest rate that was offered to the Complainants in respect of their mortgage loan account. It was within the Provider's commercial discretion to set this rate. The Complainants were notified of this rate on **24 April 2009** in advance of the expiry of the fixed interest rate period.

Having considered the mortgage loan documentation, it is clear that the Complainants did not have a contractual entitlement to a particular tracker interest rate at the end of the fixed interest rate period in **May 2009**.

It is important for the Complainants to understand that the Provider has commercial discretion in setting its interest rates. The Provider has submitted that it takes into account a number of factors in setting its interest rates including its "*competitive position in the marketplace*". The Provider is not obliged to offer the Complainants a lower tracker interest rate margin based on interest rate margins being offered by other providers.

The tracker rate margin set by the Provider is solely within the Provider's commercial discretion. If the Complainants did not deem the tracker interest rate margin suitable, they did not have to continue to apply this interest rate to their mortgage loan account.

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It is also important for the Complainants to understand that their mortgage loan is governed by the terms and conditions attaching to the Letter of Approval that they accepted in the presence of their solicitor. In this instance, I accept that the terms and conditions were clear as to what would occur at the end of the fixed interest rate period in **May 2009** that is that a further fixed interest rate or a variable interest rate would apply, and there was no reference to a specific tracker margin applying.

If the Complainants were not happy with the terms of the Letter of Approval, including the type of interest rate applied to their loan account or the fact that the loan agreement did not stipulate that a specific tracker mortgage rate margin would be applied at the end of the fixed rate period, the Complainants could have decided not to accept the offer made by the Provider.

Instead, the Complainants accepted the Provider's offer by signing the Acceptance of Loan Offer on **25 April 2007**, and in doing so, confirmed that their solicitor had fully explained the terms and conditions of the mortgage loan to them.

As set out above, having considered the Complainants' mortgage loan documentation, I accept that there was no contractual obligation on the Provider under **Special Condition A** of the **Letter of Approval** or **General Condition 5** of the **General Mortgage Loan Approval Conditions** to apply a certain tracker rate margin to the Complainants' mortgage loan account at the end of the fixed interest rate period or at any other stage during the life of the mortgage. There was no contractual entitlement to a guaranteed interest rate of a certain percentage over the ECB rate. It is clear from the Provider's lending rate sheets applicable in **April** and **May 2009** that the Provider's current home loan tracker rate at the time was ECB + 2.25% and that was the rate that was correctly applied to the Complainants' mortgage loan account as of **15 May 2009**.

I do not accept that the Provider, in setting its interest rates, was obliged to apply a lower tracker rate margin to the Complainants' mortgage loan account in **May 2009** by virtue of the fact that other providers were offering a lower tracker rate margin at that time. The Complainants had no entitlement to a tracker mortgage rate of interest. They appear to me to have been fortunate to secure a tracker interest rate of ECB+2.25% when their mortgage loan account defaulted to that rate in **May 2009**. The fact that a work colleague has a more advantageous tracker rate of interest from another provider is of absolutely no relevance to the Complainants' contract with the Provider.

For the reasons set out 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

21 December 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.