



<b><u>Decision Ref:</u></b>	2021-0170
<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 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 €210,000 and the term of the loan was 25 years. The particulars of the Letter of Approval dated **12 September 2006** detailed that the loan type was a "3 Year Fixed Rate Home Loan."

The mortgage loan account was redeemed by the Complainants on **21 January 2010**.

**The Complainants' Case**

In **October 2006**, the Complainants drew down their mortgage loan account on a 3-year fixed interest rate of 4.79%.

The Complainants submit that prior to the expiry of the fixed rate period in **September 2009**, they received a list of interest rate options from the Provider which included a tracker rate of 4.25% (ECB + 3.25%). The Complainants elected to move their mortgage account to a LTV variable rate of 3.55% by signing the rate options form on **30 September 2009**.

The Complainants submit that they were not offered a “true” tracker rate on the expiry of their initial 3-year fixed rate in **September 2009**, which “forced” them to take an LTV rate at that time and eventually caused them to move to another Provider. The Provider offered a tracker variable rate of 4.25% which was 3.25% above the ECB rate of 1.00%. The Complainants state that the tracker rate offered by the Provider was “not indicative of the market rates” in **September 2009**.

The Complainants further submit that “Despite what [the Provider] state that they were not obligated to offer a tracker rate it specifically details this as part of the loan offer European Standardised Information Sheet which is included in their own documentation”.

The Complainants redeemed their mortgage loan account with the Provider in **January 2010**.

The Complainants are seeking;

- (a) That the Provider “take [their] mortgage back on a tracker rate”; and
- (b) A refund of “the difference of what is owed to [them]”.

### **The Provider’s Case**

The Provider submits that it issued the Complainants a **Letter of Approval** dated **12 September 2006** for a 3-year fixed rate home loan in the amount of €210,000 over a 25 year term on an initial fixed interest rate of 4.79% with a variable rate to apply thereafter. The Provider refers to **Special Condition A** and **General Mortgage Loan Approval Condition 5.4** in support of this.

The Provider details that the Complainants drew down their mortgage loan on **12 October 2006**.

The Provider outlines that prior to the expiry of the Complainants’ fixed interest rate period on **12 October 2009**, it issued a letter enclosing a **rate options form** to the Complainants, in which the following interest rates were offered to the Complainants:

<i>“Tracker Variable rate</i>	<i>4.25%</i>
<i>LTV Variable rate</i>	<i>3.55%</i>
<i>2 Year Fixed Rate</i>	<i>5.25%</i>
<i>5 Year Fixed Rate</i>	<i>5.75%</i>
<i>7 Year Fixed Rate</i>	<i>6.10%</i>

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10 Year Fixed Rate

6.10%”

The Provider states that the Complainants completed and signed the rate options form dated **30 September 2009** selecting the LTV variable rate of 3.55%.

The Provider submits that **the rate options letter** that issued to the Complainants included a tracker interest rate option which the *“Complainants did not have a contractual entitlement to”*. The Provider states that the offer of a tracker interest rate was entirely at the Provider’s discretion and was *“based on a policy of the Bank since 2006 of offering a tracker rate option to certain existing customers who did not have a tracker entitlement.”* The Provider further states that as the Complainants *“did not have a contractual entitlement to a tracker rate, this meant that they did not have an entitlement to a particular tracker margin.”*

The Provider submits that the tracker interest rate of ECB + 3.25% offered to the Complainants in **September 2009** was *“fair and reasonable”* and *“computed on the basis of factors relevant to the period during which the Complainant’s fixed rate period expired”*. It does not accept the Complainants’ submission that the tracker interest rate offered was not indicative of the market rates in **September 2009** and states that this was the current tracker rate of the Provider at the time of the expiry of the fixed rate period. It details that the tracker rate and margin of ECB + 3.25% that was applicable during the period when the Complainants’ fixed interest rate was due to expire in **September 2009**, was based on a number of factors as follows;

- “(i) the bank’s cost of funds which is influenced by wholesale borrowing rates and deposit interest rates;*
- (ii) the cost of credit risk associated with lending, the operational costs (costs of originating and servicing the product on an ongoing basis), the cost of capital (the economic cost of capital which must be held against the risk being taken on, in line with prudential regulations i.e. risk weighted assets), and;*
- (iii) the bank’s competitive position”*

The Provider submits that it is lawfully entitled to have regard to these factors when setting interest rates or margins.

The Provider further submits that there was a *“significant level of turmoil in the Irish and international financial markets over the course of 2008 and 2009, giving rise to serious funding difficulties for all banks ... Deteriorating economic conditions and in particular, the rapid rise of unemployment rates in Ireland led to rising levels of loan arrears and in turn, increased impairment provisioning which increased the cost of risk”*.

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The Provider states that the Complainants *“did not at any time have an entitlement to have a tracker rate applied to their account at any time during the twenty five year lifetime of their loan”*.

The Provider submits that the Complainants’ mortgage loan remained on the LTV variable rate until it was redeemed on **21 January 2010**.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer a *“true”* tracker interest rate when it offered the Complainants a tracker interest of 4.25% (ECB + 3.25%) on the expiry of the fixed rate period in **September 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 7 May 2021, 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 of this office.

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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 **7 March 2019**, 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.

In order to determine the 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 or around **September 2009**.

The **mortgage loan application** provided in evidence was signed by the Complainants on **22 August 2006**.

The ‘**case summary**’ section of the mortgage loan application detailed as follows:

*“Remortgage to clear existing [third party Provider] mortgage, credit union loan + remainder for home improvements (€30K approx)  
Car loan with [third party Provider] to remain  
Clients are redecorating internally – no construction work needed  
Current mortgage is [third party Provider] current A\C mortgage (€140K) + Top up (€20K)”*

Under the ‘**mortgage details**’ section the loan amount was detailed as €210,000 and the loan term was detailed as 25 years. In response to the question ‘**type of loan**’, the ‘home loan’ option was ticked. The other options included tracker home loan, interest only home loan or other. In response to the question ‘**interest rate**’ the option ‘**fixed**’ is ticked. The other options included tracker, variable, discount, split or other.

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I note that a **Letter of Approval** dated **07 September 2006** issued to the Complainants which detailed:

<i>"Loan Type:</i>	<i>3 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 270,000.00</i>
<i>Loan Amount:</i>	<i>EUR 210,000.00</i>
<i>Interest Rate:</i>	<i>4.79%</i>
<i>Term:</i>	<i>25 year(s)"</i>

It does not appear from the evidence before me that the Letter of Approval dated **07 September 2006** was signed or accepted by the Complainants.

An **Amended Letter of Approval** dated **12 September 2006** details as follows;

<i>"Loan Type:</i>	<i>3 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 270,000.00</i>
<i>Loan Amount:</i>	<i>EUR 210,000.00</i>
<i>Interest Rate:</i>	<i>4.79%</i>
<i>Term:</i>	<i>25 year(s)"</i>

The **Special Conditions** attaching to the Letter of Approval dated **12 September 2006** 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 **12 September 2006** detail 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.*

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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."*

**Page 1** of the **European Standardised Information Sheet** attaching to the Letter of Approval details as follows:

*"This document does not constitute a legally binding offer.*

*The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.*

*The provision of this information does not oblige the lender to grant credit.*

...

**Nominal Rate**      *The interest rate is 4.79 percent.*

*This rate is fixed for 3 year(s).*

*At the end of the fixed rate period you may exercise an option to contract for another fixed rate period (if available) or to move to the Standard Variable Rate or to a Tracker Mortgage Rate.*

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*If a Tracker Mortgage Rate is chosen the loan will become a Tracker Mortgage Loan and the rate applicable will be the rate appropriate to the balance outstanding on the loan at the time of expiry of the fixed rate period and as may be varied in accordance with variations to the ECB Rate. THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (applies if a Standard Variable Rate or Tracker Rate is chosen).*

*The lock-in period for this product is the fixed rate term.*

*However this can be broken subject to payment of a redemption fee as described in the section Early Payment below.”*

The **Acceptance of Loan Offer** was signed by the Complainants on **13 September 2006** on the following terms:

*“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 **12 September 2006** envisaged a three year fixed interest rate and thereafter 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 tracker interest rate, or indeed to a specific tracker interest rate margin, on their mortgage loan at the end of the fixed interest rate period in **September 2009** that right would need to be specifically outlined in the mortgage loan documentation.

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However, no such right was contained in the **Letter of Approval** dated **12 September 2006**. The Complainants accepted the Letter of Approval on **13 September 2006**, having confirmed that the terms and conditions of the Loan Offer had been explained to them by their solicitor.

The Complainants have submitted that they are entitled to rely on the rates used in the **European Standardised Information Sheet** which provided that the rate was fixed for 3 years and would roll over to a fixed rate, a standard variable rate or a tracker rate at the end of that period.

Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider must provide certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet. The purpose of a European Standardised Information Sheet is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider, by comparing the credit available from the Provider to what is available in the market.

Having considered the content of this documentation, I note that it is specifically detailed on **page 1** of the European Standardised Information Sheet that the document is not a legally binding offer.

I am of the view that the Complainants do not have a contractual entitlement to a tracker interest rate on the basis of the information contained in the European Standardised Information Sheet. The information contained in the Illustrative Amortisation Table was for illustrative purposes only and was prepared on the basis of the rates applicable at the time the mortgage loan issued in **September 2006**.

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 **October 2009**. The Provider submits that the letter and form reminded the Complainants of the expiry date and provided a list of interest rate options.

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 **30 September 2009** provided in evidence details as follows:

*“Current options available:*

/Cont’d...

You may only select one option.

...

		Monthly Repayment EUR
--- Tracker variable rate*	- Currently: 4.2500%	1146.63
--- LTV variable rate**	- Currently: 3.5500%	1072.71
--- 2 year fixed rate	- Currently: 5.2500%	1256.90
--- 5 year fixed rate	- Currently: 5.7500%	1314.04
--- 7 year fixed rate	- Currently: 6.1000%	1354.80
--- 10 year fixed rate	- Currently: 6.1000%	1354.80

...

- \* The interest rate that applies to this Tracker Mortgage Loan will never be more than 3.2500% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.
- \*\* In calculating your loan to value (“LTV”) ratio, we use the current loan balance and the most recent valuation on file for this mortgage.”

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading “**Fixed Rate Loans**”. 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. 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.”

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The Complainants did not opt to accept the tracker interest rate option and instead signed the **rate options form** on **30 September 2009** electing to apply the LTV variable rate of 3.55%.

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

*“... on [imd] 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. In the absence of a customer selection, the variable rate was applied to the mortgage. The Bank also provided in options letters issued from [late] 2006 that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest on maturity of the fixed rate period.”*

Having considered the evidence before me, including the mortgage loan documentation, it is my view that that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period in **October 2009**. It appears that the Provider, in line with its own policy at the time, offered the Complainants a tracker interest rate which the Complainants did not select. The Complainants elected to apply the LTV variable rate to the loan and this instruction to apply the variable interest rate was actioned by the Provider on receipt of the options form signed by the Complainants on **30 September 2009**.

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted being “effective from the start of business on the 31st August 2009”. This document outlines as follows;

***“Home Loan Rates for Existing Business***

....

***RATE***

***APR***

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

...

/Cont’d...

<i>Tracker Rate LTV &lt; 80%</i>	4.25%	4.3%
<i>Tracker Rate LTV &gt; 80%</i>	4.25%	4.3%

The Complainants submit that the tracker interest rate of ECB + 3.25% they were offered in **September 2009** was “*not indicative of market rates*” at the time. The evidence does not support the Complainants’ submission in this respect. The evidence shows that the tracker interest rate that the Provider had available for home loans for existing business in **September 2009** was 4.25% (ECB + 3.25%) and that was the tracker interest rate that was offered to the Complainants for their mortgage loan. It was within the Provider’s commercial discretion to set this rate.

The reverse side of the options form which the Complainants signed on **30 September 2009**, contained detail about the tracker interest rate offering, such that the Complainant 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*”. As such, the Complainant ought to have been aware that, in circumstances where she opted for the tracker interest rate, the percentage of 3.25% would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank.

The Complainants of their own volition decided not to choose the option of a tracker interest rate of ECB + 3.25% (4.25%) at the time and instead selected the LTV variable interest rate offered of 3.55%. The rate options form clearly outlined that the options set out were the “*current options available*”. The variable rate, in the Complainant’s mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

The **mortgage statement** provided in evidence shows that the LTV variable rate of 3.55% was applied to the mortgage loan account on **12 October 2009**.

A **mortgage redemption figures report** document dated **25 September 2009** has been provided in evidence which details as follows;

“Type of Figures Required: Redemption Figures  
*Reason for Request: Refinancing with other institution*  
*Any particular reason why customer is not remaining with IP? Rates too high”*

The Provider wrote to the Complainants dated **29 September 2009** as follows:

*“Thank you for your recent request for the amount you need to pay to clear your mortgage. Here are the details.*

<i>Loan Number</i>	<i>Amount €</i>	<i>Daily Accrual</i>	<i>Inclusive of fixed rate exit fee €</i>
<i>[ending 4494]</i>	<i>198,234.85</i>	<i>25.89</i>	<i>195.70</i>

***Please note that the figures quoted are in accordance with the request received by [the Provider]. Please do not include vacate or accountable trust receipt fee in the amount you pay to clear the above mortgages.***

*...”*

Further letters issued from the Provider to the Complainants on **16 October 2009**, **18 December 2009** and **18 January 2010** outlining the amount the Complainants needed to pay to clear their mortgage.

The Complainants’ solicitors wrote to the Provider dated **20 January 2010** enclosing a cheque for €195,947.35 to redeem the mortgage loan account.

The Provider wrote to the Complainants’ solicitor dated **21 January 2010** detailing that the sum of €195,947.35 had been lodged to the mortgage loan account.

It is clear that the Complainants’ mortgage loan documentation did not provide for a tracker interest rate entitlement at the end of the fixed interest rate period. **General Condition 5.4** in the **General Mortgage Loan Approval Conditions** provided that either party would have the “*option*” of converting the loan to a variable rate loan following a fixed rate period. Accordingly, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at the end of the fixed interest rate period in **October 2009** or at any other time. The Provider did offer the Complainants a tracker interest rate of ECB + 3.25% in **October 2009** as a matter of policy despite not being obliged to do so. The Complainants did not accept that offer.

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

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**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**

31 May 2021

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.**