



<u>Decision Ref:</u>	2021-0209
<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 is secured on the Complainants' private dwelling house.

The loan amount is €350,000 and the term of the loan is 25 years. The Letter of Approval dated **25 April 2005** provided that the mortgage loan account would be drawn down on a 1-year fixed interest rate, with a variable interest rate to apply thereafter.

The Complainants' Case

The Complainants states that they drew down mortgage loan account with the Provider in **April 2005** on a 1-year fixed rate of 2.74%.

At the end of the fixed rate interest rate period in **2006**, the Complainants submit that they opted for a further 3-year fixed interest rate of 4.85%. The Complainants state that *"[f]or our own reasons in June 2006, we preferred to fix our interest rate for three years and were not interested in any kind of variable rate (including a tracker rate) at that time"*.

They submit that it was agreed with the Provider that at the end of the 3-year fixed rate period, the Provider's tracker variable rate would be applied to the mortgage loan account. They further submit that in **2006** the Provider's prevailing tracker variable rate was ECB + 1%.

The Complainants submit that the Provider offered them a tracker interest rate of ECB + 2.25% when the 3-year fixed rate period expired in **June 2009**. They submit that they had understood that the tracker interest rate available at the end of the fixed interest rate period in **2009** would "*at the very least*", be similar to the prevailing tracker rate that was available in **2006**.

The Complainants further submit that the alternative rate options offered in **2009** were not attractive and they were "*faced with the Hobson's choice of choosing between a range of high fixed and variable rates including the recently adjusted tracker*". The Complainants outline that in **mid-2006** the tracker interest rate was ECB+1.10% and as late as **2008**, the tracker interest rate was ECB+1.68%. However, the Complainants state that in **2009** "*the Bank, for their own commercial reasons, increased their tracker rates substantially to a level closer to their other high variable and fixed rates*" and a tracker interest rate of ECB + 2.25% was offered to them. The Complainants state that they decided to choose the tracker interest rate of ECB+2.25% in **June 2009** "*despite our misgivings because the other options were even more unattractive*". The Complainants submits that "*the variable rate offered was slightly lower but we felt (rightly as it proved!) that the tracker rate would give us some sense of control*". Therefore, the Complainants are of the view that they "*should be entitled to a tracker rate over the ECB rate that approximated to one that was applied over the course of our 3-year fixed period*".

The Complainants acknowledge that "*there was no guarantee of a tracker mortgage in the Original Loan Contract*". However, they contend that "*the form of the mortgage was originally for only one year with a fixed interest rate of 2.74% for that first year*" and "*inevitably, the terms of the mortgage were bound to change on the completion of one year*". The Complainants state that given the mortgage was for 25 years "*it would be ridiculous to expect that the terms of the mortgage, the interest rates, and the nature of the interest rates would never change over the life of the mortgage*". The Complainants assert that it "*appears to be an over-strict interpretation of contractual entitlement and discriminatory that certain mortgage products should be available to some customers and not to others*". The Complainants state that the Provider "*cannot have it every way in that they can introduce an entitlement to a tracker because they feel that it is in their interests due to a "competitive mortgage market" and then believe that they have a right to withdraw it or alter it beyond recognition when it does not suit them.*"

The Complainants are seeking a refund of the interest they have overpaid since **2009** due to the application of the tracker rate of ECB + 2.25% instead of ECB + 1.00%. They have estimated this as approximately €31,250.00 (less tax relief).

The Provider's Case

The Provider submits that it issued a **Letter of Approval** to the Complainants on **25 April 2005** for a mortgage home loan in the amount of €350,000.00 repayable over a period of 25 years. It details that the interest rate applicable was an initial 1-year fixed interest rate of 2.74%. The Provider details that the loan offer was accepted by the Complainants on **13 June 2005** with the benefit of independent legal advice and they confirmed that their solicitor had fully explained the terms and conditions of the loan to them.

The Provider states that the **Letter of Approval** dated **25 April 2005** did not contain an entitlement to a tracker interest rate at the end of the initial fixed interest rate period or at any other time during the term of the loan. The Provider relies on **Special Condition A** and **General Condition 5** of the **General Mortgage Loan Approval Conditions** which set out the Complainants' contractual entitlements with respect to interest rates applied and the terms applicable on the expiry of the fixed rate period. The Provider notes that **General Condition 5.4** outlines that the Complainants would have the option of converting the loan to a variable rate at the end of each fixed rate period applied.

The Provider states that before the expiry of the 1-year fixed interest rate on **24 June 2006**, its mortgage processing system automatically issued an options letter and form to the Complainants outlining the maturity rate options available to them at that time. The Provider explains that in **June 2009**, the available options included a tracker rate option. The Provider further explains that this arose from a policy which existed from **mid-2006 to mid-2009** "*by which a tracker option was provided to customers who had no contractual entitlement to it*". The Provider states that when this policy was first being developed and before a tracker rate option was included automatically in options letters, certain customers received a note in their options letter inviting them to contact the Provider if they were interested in discussing tracker interest rate options.

The Provider submits that an options form issued to the Complainants in **June 2006** at a time "*which preceded the introduction of options letters which included a tracker option*". The Provider states that therefore the Complainants options form instead "*invited [the Complainants] to contact the Bank if they were interested in discussing a tracker rate*". The Provider explains that at the time the Complainants' mortgage loan account was due to mature from the 1-year fixed interest rate, the tracker interest rate on offer by the Provider was 3.60% (ECB +1.10%).

The Provider states that the Complainants did not contact the Provider to discuss the option of a tracker rate and instead completed the options form on **16 June 2006** opting for a 3-year fixed interest rate of 4.85%.

The Provider explains that a fixed interest rate of 4.85% was applied to the Complainants' mortgage loan account on **23 June 2006** and this rate applied until **23 June 2009**.

In **late 2008**, the Provider details that it changed the margin over the ECB rate to 2.25% for its tracker rate applicable to home loans. The Provider states that each the various changes to the Provider's interest rates were not communicated to the Complainants directly when such changes occurred but they were available to the Complainants from a number of different sources including the Provider's website, branches and by contacting the Provider's customer call centre. The Provider notes however that the Complainants received direct communications regarding interest rate offerings in advance of each expiry applying to their own mortgage loan account.

The Provider submits that prior to the expiry of the 3-year fixed rate, an options letter and form issued to the Complainants outlining the interest rates available at that time. The Provider states that the rate options included a tracker variable rate of 3.50% (ECB + 2.25%), a LTV variable interest rate and fixed interest rates for 2, 5, 7 and 10 year periods. The Provider states that the tracker rate of interest featured on the options form was "*the current tracker rate available to home loan customers in [mid] 2009*". The Provider notes that the Complainants completed the options form dated **22 June 2009** confirming their preference for a tracker interest rate option of 3.50% (ECB + 2.25%). The Provider explains that when the options form issued to the Complainants on or around **3 June 2009**, the tracker interest rate available on home loans was 3.50% (ECB + 2.25%) and this had been set by the Provider in **late 2009** when the ECB refinancing rate was 1.25%. The Provider explains that this rate subsequently changed to 3.25% in **mid-2009** in accordance with ECB rate changes. The Provider therefore states that a tracker rate of 3.25% (ECB + 2.25%) was applied to the Complainants' mortgage loan account on **23 June 2009**.

The Provider explains that the calculation of the tracker rate margin changed over time and was based on a commercial decision of the Provider based on market conditions and taking into account a number of factors such as "*[w]holesale lending and borrowing rates*", "*[i]nterest rates paid on deposits*" and the Provider's "*competitive position*". The Provider states that it is satisfied that the rates offered to the Complainants were correct in **June 2006** and **June 2009**.

The Complaint for Adjudication

The conduct complained of is that the Complainants were offered a tracker rate of interest of ECB + 2.25% in **June 2009** which was *“a significant increase on the tracker rate offered”* by the Provider in **June 2006**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 31 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.

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 set out details of certain interactions between the Provider and the Complainants between **2005 and 2009**.

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The **Letter of Approval** dated **25 April 2005** in respect of mortgage loan account ending **6140** details as follows;

<i>"Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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Purchase Price / Estimated Value: EUR 485,000.00

Loan Amount: EUR 350,000.00

Interest Rate: 2.74%

Term: 25 year(s)"

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 COMPLETION OF THE MORTGAGE."

General Condition 1.10 of the **General Mortgage Loan Approval Conditions**, states as follows;

"Whenever the Directors of [the Provider] in their absolute discretion consider it desirable the interest rate payable under this advance may be varied."

General Condition 5 of the **General Mortgage Loan Approval Conditions**, states 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".

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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 **13 June 2005** 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’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** dated **25 April 2005** envisaged a 1-year fixed interest rate of 2.74% and thereafter the option of 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.

The **Letter of Approval** did not contain a contractual entitlement to a tracker interest rate or an expectation that a tracker interest rate would apply at any time during the term of the mortgage loan. I am of the view that in order for the Complainants to have a contractual right to a tracker interest rate that right would need to be specifically provided for in the Complainants’ mortgage loan documentation. However, no such right was set out in writing in the **Letter of Approval** dated **25 April 2005**, which was accepted by the Complainants on **13 June 2005**.

Prior to the expiry of the 1-year fixed interest rate, the Provider submits that it automatically issued an **options letter** and **rate options form** to the Complainants in **June 2006** containing the currently available rate options.

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It is disappointing that a copy of the rate options letter and form that purportedly issued to the Complainants has not been furnished in evidence to this office. The Provider states that in circumstances where *“these letters were system generated the Bank is not in a position to provide a copy of same.”*

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain records, there was no breach of the **Consumer Protection Code 2006**.

The Provider has submitted a copy of its **Lending Interest Rates** in evidence effective from the start of business on **22 May 2006**, which details as follows;

<i>“Repayment Home Loans</i>	<i>RATE</i>
<i>Variable rate</i>	<i>3.85%</i>
<i>1 Year fixed rate Mortgage currently</i>	<i>4.35%</i>
<i>2 Year fixed rate Mortgage currently</i>	<i>4.65%</i>
<i>3 Year fixed rate Mortgage currently</i>	<i>4.85%</i>
<i>5 Year fixed rate Mortgage currently</i>	<i>4.99%</i>
<i>7 Year fixed rate Mortgage currently</i>	<i>5.15%</i>
<i>10 Year fixed rate Mortgage currently</i>	<i>5.25%</i>

.....

<i>Tracker Mortgage (Home Loan and Residential Investment Property)</i>	
<i>Loan Amount of €0 - €99,999</i>	<i>3.85%</i>
<i>Loan Amount of €100,000 - €249,999</i>	<i>3.75%</i>
<i>Loan Amount of €250,000 - €749,999</i>	<i>3.60%</i>
<i>Loan Amount of €750,000 or more</i>	<i>3.40%”</i>

The Provider has submitted in evidence a copy of a **template letter** that issued to customers in **late June 2006** offering a tracker variable rate of ECB+1.25%. However, the Provider submits that this does not reflect the options form that issued to the Complainants in or around 20 days prior to expiry of the fixed rate period on **24 June 2006**. Therefore, I do not propose to consider this options form in any detail. The Provider explains that the options form that issued to the Complainants did not include a list of tracker interest rate but instead invited the Complainants to contact the Provider if they wished to discuss ECB tracker mortgage rate options. I note that, in accordance with the **Lending Interest Rates** outlined above, the tracker interest rate offered at the time which was applicable to the Complainants’ mortgage loan given the loan amount was 3.60% (ECB+1.10%).

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Prior to the expiry of the 1-year fixed interest rate period, the Provider issued correspondence to the Complainants dated **7 June 2006** on foot of a query from the Complainants, which details as follows;

“Thank you for calling the Mortgage Servicing Team to enquire about our fixed rate options.

As requested I am enclosing a current fixed rate options form. Please return the completed form signed by all parties named on the mortgage in the freepost envelope provided.

...”

The Provider’s correspondence enclosed a **rate options form** detailing the following fixed interest rate options;

“Please tick the option you want

....

<i>Current Rate</i>	<i>2.74%</i>
<i>1 Year fixed rate Mortgage currently</i>	<i>4.35%</i>
<i>2 Year fixed rate Mortgage currently</i>	<i>4.65%</i>
<i>3 Year fixed rate Mortgage currently</i>	<i>4.85%</i>
<i>5 Year fixed rate Mortgage currently</i>	<i>4.99%</i>
<i>7 Year fixed rate Mortgage currently</i>	<i>5.15%</i>
<i>10 Year fixed rate Mortgage currently</i>	<i>5.25%</i>

...

- If you choose a fixed rate, the standard fixed rate conditions will apply.”*

The Complainants completed and signed the **options form** on **16 June 2006** and selected a 3-year fixed interest rate of 4.85%. The signed options form was stamped as received by the Provider on **20 June 2006**.

I acknowledge that a tracker interest rate of 3.60% (ECB+1.10%) was available for selection by the Complainants on the expiry of the 1-year fixed interest rate as the Provider, at its own commercial discretion, introduced a policy in **mid-2006** offering tracker rates of interest to its existing customers who were maturing from a fixed rate of interest even where their loan contract did not specify an entitlement to be offered a tracker interest rate at maturity. The Complainants did not seek a tracker interest rate from the Provider in **June 2006** and ultimately chose to apply a 3-year fixed interest rate to their mortgage loan account until **June 2009**.

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Prior to the expiry of the 3-year fixed rate in **June 2009**, the Provider issued an **options letter and form** to the Complainants outlining the interest rates available at that time. The **rate options form** detailed the following interest rate options;

“Current options available:

You may only select one option.

Account Number: [XXXXXXXXXX]

			<i>*Monthly repayment*</i>
			<i>EUR</i>
<i>Tracker Variable Rate*</i>	<i>– Currently:</i>	<i>3.5000%</i>	<i>...</i>
<i>LTV Variable Rate **</i>	<i>– Currently:</i>	<i>3.3000%</i>	<i>...</i>
<i>2 Year fixed rate Mortgage</i>	<i>– Currently:</i>	<i>5.2500%</i>	<i>...</i>
<i>5 Year fixed rate Mortgage</i>	<i>– Currently:</i>	<i>5.7500%</i>	<i>...</i>
<i>7 Year fixed rate Mortgage</i>	<i>– Currently:</i>	<i>6.1000%</i>	<i>...</i>
<i>10 Year fixed rate Mortgage</i>	<i>– Currently:</i>	<i>6.1000%</i>	<i>...</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 2.2500% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.”*

The Provider has submitted a copy of its **Lending Interest Rates** document in evidence effective from the start of business on **30 April 2009**, which details as follows;

“Home Loans Rates for Existing Business

<i>LTV Variable/LTV Tracker Maturity Rates Applicable to Existing Home Loans since 30/04/09</i>	<i>RATE</i>	<i>APR</i>
<i>Variable Rate LTV < 80%</i>	<i>3.30%</i>	<i>3.4%</i>
<i>Variable Rate LTV > 80%</i>	<i>3.40%</i>	<i>3.5%</i>
<i>Tracker Rate LTV < 80%</i>	<i>3.50%</i>	<i>3.6%</i>
<i>Tracker Rate LTV > 80%</i>	<i>3.50%</i>	<i>3.6%”</i>

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The Provider has also submitted a copy of its **Lending Interest Rates** document in evidence effective from the start of business on **5 June 2009**, which details as follows;

“Home Loans Rates for Existing Business

<i>LTV Variable/LTV Tracker Maturity Rates Applicable to Existing Home Loans since 05/06/09</i>	<i>RATE</i>	<i>APR</i>
<i>Variable Rate LTV < 80%</i>	3.05%	3.1%
<i>Variable Rate LTV > 80%</i>	3.15%	3.2%
<i>Tracker Rate LTV < 80%</i>	3.25%	3.3%
<i>Tracker Rate LTV > 80%</i>	4.15%	4.2%

The Complainants completed and signed the **options form** on **21 June 2009** and selected the tracker variable interest rate of 3.50% (ECB + 2.25%). However, the Lending Interest Rate documents outlined above show that as of **5 June 2009** the *“Tracker Rate LTV < 80%”* had decreased to 3.25% (ECB + 2.25%). Therefore, a tracker interest rate of 3.25% (ECB + 2.25%) was applied to the Complainants’ mortgage loan account on **23 June 2009**. I am satisfied that the correct tracker interest rate was offered and applied to the Complainants’ mortgage loan account in **June 2009**.

Having considered the Complainants’ mortgage loan documentation, I am of the view that there was no contractual entitlement to a tracker interest rate when the 1-year fixed interest rate period expired in **June 2006** or when the 3-year fixed interest rate period expired in **June 2009** or indeed at any other time during the term of the loan. It is important for the Complainants to understand that their mortgage loan is governed by the **Letter of Approval** and the terms and conditions attaching to same, none of which contain a contractual entitlement to a tracker interest rate. If the Complainants wished to pursue the option of applying a tracker interest rate of 3.60% (ECB+1.10%) on their mortgage loan account in **June 2006**, the Complainants could have contacted the Provider to request that such a rate be applied, however the Complainants chose to avail of a 3-year fixed interest rate of 4.85%. Prior to the expiry of the 3-year fixed interest rate, the Complainants were offered a tracker rate of interest of 3.50% (ECB + 2.25%) in **June 2009** and accepted this rate. The tracker interest rate decreased to 3.25% (ECB + 2.25%) as of **5 June 2009** therefore that was the rate that applied to the Complainants’ mortgage loan account on **23 June 2009**.

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If the Complainants did not want a tracker interest rate of ECB+2.25% to apply, they could have selected the LTV variable rate or opt for one of the fixed interest rates offered to them at the time.

The Complainants appear to be of the view that because a tracker interest rate of 3.60% (ECB + 1.10%) was available to them in **June 2006**, they should have been offered a similar tracker interest rate in **June 2009**. It is important for the Complainants to understand that they did not enter into an agreement with the Provider in **June 2006** which would have given them an entitlement to a tracker interest rate. Neither did they enter an agreement with the Provider that entitled them to a specific tracker interest rate in the future. The evidence does not support the Complainants' assertion that interest rate options offered to the Complainants in **June 2009** were in any way "discriminatory" and I do not consider it reasonable on the part of the Complainants to have expected to be offered a tracker interest rate of ECB + 1.10%, which was available in **2006**, some three years later.

I accept that the Provider was free to exercise its commercial discretion in determining the tracker interest rate margins in **June 2009** having regard to a range of different factors to include market conditions. It was within the Provider's commercial discretion to set the tracker interest rate margin at 2.25%.

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**

22 June 2021

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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.

