



<u>Decision Ref:</u>	2021-0319
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<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 Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The loan amount was €302,500 and the term of the loan was 35 years. The Amended Loan Offer signed by the Complainant on **13 March 2008** detailed that the interest rate applicable to the loan was a 5-year fixed interest rate of 5.10% with a variable interest rate to apply thereafter.

The Complainant's Case

The Complainant submits that she *"enquired about a mortgage with [the Provider] because [her] husband seemed to have lower repayments than [she] did with [another Provider]."*

The Complainant contends that the branch manager of the Provider *"agreed and said he could do better."* The Complainant details that the branch manager *"took [her] off a Tracker mortgage with [another Provider] and put [her] on a 5 year fixed with [the Provider]."*

The Complainant states that “[s]uddenly [her] repayments were higher and the initial loan amount had to be increased” and that she “only knew of this when [she] got the paperwork.” The Complainant asserts that “[n]ever was it explained to [her] the benefits of a Tracker v’s a Fixed.”

The Complainant details that her husband was on a tracker interest rate with the Provider at the same time and therefore questions “why did [she] get a 5 [year] Fixed?”.

The Complainant maintains that the branch manager never informed her of “all interest rate options at the time of the application” and asserts that the branch manager offered her a “Fixed Rate option only”.

The Complainant submits that she was “never offered [a Provider] Tracker Rate despite [the Provider] offering Tracker Rate mortgages until [late] 2008”.

In relation to Section E of the Complainant’s Home Loan Application Form, the Complainant states that she “would like an explanation as to why the ‘Tracker’ option is ticked and crossed out and the ‘Fixed’ option selected.”

The Complainant contends that “It is quite clear that [her] loan sum would be significantly less” had she been placed on a tracker rate mortgage with the Provider.

The Complainant is seeking:

- a) A tracker interest rate to apply to her mortgage loan account; and
- b) A refund of overpaid interest from **March 2008** to date.

The Provider’s Case

The Provider details that the Complainant first approached the Provider to apply for a mortgage on **01 February 2008**. The Provider details that “[t]he Complainant completed and signed a ‘Home Loan Application Form’ on 01 February 2008, which included the various rate options available for her to apply for, including a Tracker Interest Rate”. The Provider contends that the Complainant chose to apply for a fixed interest rate when completing her application form.

The Provider maintains that its underwriters “assessed and approved the requested loan amount, based on the details provided in the mortgage loan application based on the request for an initial five year Fixed interest rate.”

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The Provider details that its records *“show that a discussion took place between the Branch Manager and the Complainant regarding splitting the mortgage loan on a 50% Tracker interest rate and 50% Fixed interest rate basis.”* The Provider asserts that its records also evidence that *“the Complainant communicated that she was satisfied to accept the full loan amount on a five year Fixed interest rate, because following a rate drop, she believed that this accepted rate was good value.”*

The Provider states that a Loan Offer was issued to the Complainant on **11 February 2008** which provided for loan in the amount of €297,000 with the first five years on a fixed interest rate of 5.11% and a variable base interest rate to apply thereafter. The Provider states that the repayment period for this loan was 35 years. The Provider details that the Complainant signed and accepted the terms of the Loan Offer on **12 February 2008**.

The Provider explains however that *“due to an increase in the total amount of funding required, an Amended Letter of Offer was required.”* The Provider details that the Amended Letter of Loan Offer was issued to the Complainant on **05 March 2008** for a loan in the amount of €302,500 with the first five years on a fixed interest rate of 5.10% and a variable base rate to apply thereafter. The Provider states that the repayment period for this loan was 35 years. The Provider details that the Complainant signed and accepted the Amended Loan Offer on **13 March 2008**.

The Provider details that it is *“satisfied that the Complainant was sufficiently advised that she should seek the advices of her solicitor prior to executing the Mortgage Loan agreement”*. The Provider contends that *“it is also worth noting that there was no regulatory requirement on the Bank to advise the Complainant to seek independent legal advice”*.

The Provider further contends that *“[i]t is not the practice or policy of the Bank to offer advice to customers on interest rates.”* The Provider asserts that all of its rates *“were publicly advertised and available to consult in”* all of its branches. The Provider states that *“[w]ilst the full range of interest rate options including Fixed, Variable and Tracker rates were widely available and publicly advertised, at the time of application, ultimately the decision as to which rate to opt for rested solely with the Complainant.”* The Provider asserts that the Complainant *“applied for and accepted the offer of a fixed rate mortgage loan for a specified period, as detailed in her Mortgage Loan Documentation.”*

The Provider submits that it introduced tracker interest rates on **early 2004**, and they were widely available to new and existing customers until **late 2008**, when they were withdrawn from the market by the Provider.

The Provider further submits that the Complainant *“could have applied for a Tracker Interest Rate at application stage or at any time during this period”*.

The Provider explains that *“[a]t the time the Complainant made her Mortgage Loan Application, in 2008, Tracker interest rates were widely available as an option for selection and the Bank had not made any decision at that time regarding the withdrawal of the Tracker product”*. The Provider also submits that it did not inform the Complainant at any point in **2008** that by opting for a 5-year fixed interest rate period, she would not be able to avail of a tracker rate at the end of the fixed rate period.

The Provider asserts that the Complainant *“had no contractual entitlement to a Tracker interest rate at the expiry of the Fixed rate period, or otherwise”*. The Provider further asserts that the Complainant was therefore *“not giving up any entitlement, or otherwise foregoing the opportunity to convert to a Tracker rate, by entering into the relevant Fixed rate period”*. The Provider details that it *“clearly set out in the loan documentation that upon the expiry of the Fixed rate term, the Complainant’s account would convert to the Bank’s variable rate.”*

The Provider states that it is satisfied that the documentation relating to the Complainant’s mortgage loan *“was sufficiently clear and transparent”* and did not provide the Complainant with a contractual entitlement to a tracker interest rate on her mortgage loan at drawdown or on the expiry of the 5-year fixed interest rate period.

The Provider highlights that *“[t]here is no reference whatsoever to the ECB rate in any of the Complainant’s mortgage loan documentation in the context of an applicable interest rate to the loan”*.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- a) The Provider incorrectly failed to offer the Complainant a tracker interest rate on her mortgage loan account ending **9249** from inception in **2008**; and
- b) The Provider failed to advise the Complainant of the *“benefits of a tracker v’s a fixed”* interest rate when she applied for mortgage loan account ending **9249**.

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 Complainant was 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 23 August 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 Complainant's mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider in **2008**.

The Complainant applied for a mortgage loan with the Provider in **February 2008**. A copy of the Home Loan Application form that was signed by the Complainant on **01 February 2008** has been submitted in evidence by the Provider.

The "*Loan Details*" section of the Home Loan Application form states as follows:

<i>"Amount</i>	
<i>Loan Required</i>	€297,000

/Cont'd...

Term of Loan 35 years
....
Loan Type *Repayment/Annuity*
Interest Rate ****Fixed*
 ****If choosing a fixed rate, please complete the Fixed Rate section enclosed which outlines terms of conditions associated with fixed rate loans"*

I note that the option of "Tracker" under the "Interest Rate" section appears also to have been but is scribbled out. In this regard, the Home Loan Application form states "if choosing tracker, please complete the tracker form enclosed".

Having selected the fixed interest rate option in the Home Loan Application form, the Complainant completed and signed an **Application for a Fixed Rate Mortgage on 8 February 2008** which details as follows:

"I/We wish to apply for a fixed rate of 5.11 for the first 5 year(s) of my/our mortgage.

I/We understand that when this fixed rate period has expired the loan will convert to the applicable variable rate then prevailing. The variable interest rate basis will be specified in the loan offer letter issued by [Provider] (If the loan is approved).

....

I/We confirm that we understand the workings of the Fixed Rate and wish to proceed with this application".

I have not been provided with any evidence to suggest that the Complainant completed a "tracker form" which appears to have been required if the Complainant wished to explore the option of applying for a tracker interest rate. It appears to me that the Complainant decided not to apply for a tracker interest rate and instead pursued the option of applying for a 5- year fixed interest rate.

The Provider has submitted a copy of its internal notes titled "Loan Application Comments Enquiry" into evidence which show that a discussion took place between the branch manager and the Provider regarding splitting the Complainant's mortgage loan with 50% on a tracker interest rate and 50% on a fixed interest rate.

The Provider's internal notes detail as follows:

"Clarification Request

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...this case is extremely tight at 11% out going 3 points up and 50% NDI we would need a 5 yr fixed please confirm thanks

Clarification Response

...would you agree to a split loan of 50% five yr fixed and 50% tracker to get this case?...

Clarification Response

...I have just spoken to customer and following the drop in 5 year fixed rates from tomorrow to 5.11% she is actually happy to go with the 5 year fixed as she sees it as good value. Please approve."

The Provider subsequently issued a **Loan Offer** dated **11 February 2008** to the Complainant which detailed as follows:

"...

Total Amount of loan: €297,000

...

Interest Rate (Yrs 1-5): 5.11% (See Important Note)

After 5 years: Variable Base (currently 05.25%)

Repayment Period (Years): 35 Approx.

Important Note On Fixed Rate:

The fixed rate shown is the current rate. If there is an interest rate change before the main loan cheque is issued, the rate will be altered to the fixed rate on offer at the date of cheque issue, and this is the rate that will apply to the loan account. If no fixed rate is available at that time, the variable rate will apply."

The "Conditions" section of the Loan Offer details as follows:

"...

The loan amount is offered on the basis that the full loan is fixed for a period of at least 5 years from the date of Cheque Issue".

The Complainant signed and accepted this Loan Offer on **12 February 2008**.

The Provider has also submitted a copy of the **Suitability Statement** in evidence which issued to the Complainant on **11 February 2008** and details as follows:

"Dear [Complainant]

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Thank you for choosing [Provider] for your Home Loan. This letter outlines the principal features of the mortgage that you have chosen and the reasons why this mortgage is deemed suitable for you.

The loan has been individually assessed for affordability and the repayments have been deemed to be sustainable based on the information you have provided and you believe that you will be able to meet these requirements based on your circumstances.

....

Interest Rate Type

Fixed Rate

You have opted to fix your interest rate for the first 05 years, as you require your repayments to be protected against interest rate variations for this period. At the expiry of the fixed rate term your loan will revert to the Standard Variable Rate which will mean that your repayments will be subject to fluctuation in line with interest rate variations, unless you choose to fix your interest rate for an additional period at the prevailing fixed interest rates."

The Provider submits that "due to an increase in the total amount of funding required, an Amended Letter of Offer was required". It appears that it was therefore necessary for the Provider to issue an **Amended Loan Offer** dated **05 March 2008** to the Complainant for an increased loan amount. The **Amended Loan Offer** dated **05 March 2008** detailed as follows:

"" ...

Total Amount of loan: €302,500.00

...

Interest Rate (Yrs 1-5): 5.10% (See Important Note)

After 5 years: Variable Base (currently 05.25%)

Repayment Period (Years): 35 Approx.

Important Note On Fixed Rate:

The fixed rate shown is the current rate. If there is an interest rate change before the main loan cheque is issued, the rate will be altered to the fixed rate on offer at the date of cheque issue, and this is the rate that will apply to the loan account. If no fixed rate is available at that time, the variable rate will apply."

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The "Conditions" section of the Amended Loan Offer details as follows:

"Subject to this Offer Letter, dated 05/03/2008 12:54, being signed by the borrower(s) in the Acceptance Form and the full signed Offer Letter being returned to Provider.

The loan amount is offered on the basis that the full loan is fixed for a period of at least 5 years from the date of Cheque Issue

...

Your existing mortgage with [another provider] being paid off prior to or on execution of the mortgage deed."

The **Acceptance of Loan Offer** was signed by the Complainant on **13 March 2008** on the following terms:

"1. I/We, the undersigned, accept the offer of an advance made to me/us by [the Provider] on the terms and conditions set out in:

- i. this Offer Letter in replacement of all previous offer letters;*
- ii. the General Conditions for [the Provider's] Home Loans;*
- iii. [the Provider's] Mortgage Conditions;*
- iv. [the Provider's] standard Form of Home Loan Mortgage; and*
- v. the Rules of [the Provider].*

copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor."

General Condition 9 of the Provider's **General Conditions for Home Loans** details as follows:

"Fixed Rate Loans: Where a member applies for a fixed rate, it will be for a set period of time. When the fixed rate period ends, the loan will convert to a variable interest rate. If [the Provider] is then offering a Fixed Home Loan rate for a variety of defined periods, the borrower may opt to convert to a fixed rate again at that point, and defer conversion to a variable rate."

The Complainant's mortgage loan account was drawn down on **20 March 2008**.

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It is clear to me that the **Letter of Approval** envisaged that a 5-year fixed interest rate of 5.10% would apply to the Complainant's mortgage loan account with a "variable base" interest rate to apply thereafter. The "variable base" interest rate in the Complainant's mortgage loan documentation made no reference to varying in accordance with variations in the ECB refinancing rate.

It is important for the Complainant to be aware that although tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainant applied for her mortgage loan in **February 2008**, there was no obligation on the Provider to provide the Complainant with information on the tracker interest rate offering at that time. I note that the **Mortgage Application Form** outlined the types of interest rate options available generally on mortgage loans, including the tracker rate.

If the Complainant wished to seek a tracker interest rate on the mortgage loan at the time, the Complainant could have explored this option with the Provider. However, the Complainant decided to opt for a 5-year fixed interest rate.

The Complainant applied for a mortgage loan with a fixed interest rate and the Provider subsequently offered the Complainant a fixed interest rate. The Complainant accepted the terms of the loan offer having acknowledged that she took advice from her solicitor in relation to the mortgage loan documentation. It appears that a tracker interest rate option was discussed during the mortgage loan application process however the loan application documentation and the Provider's internal notes indicate that the Complainant decided to proceed with a 5-year fixed interest rate than a tracker rate of interest. If it was the case that the Complainant was of the view that a fixed interest rate loan was not suitable for her, then the Complainant could have decided not to sign the Loan Acceptance or the Letter of Approval or ultimately draw down the loan and instead, she could have sought an alternative rate with the Provider or with another mortgage provider. However, the Complainant did not do so.

For the reasons set out in this Decision, I do not uphold the 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

15 September 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.