



<u>Decision Ref:</u>	2021-0396
<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 Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount is for €222,640 and the term of the loan is 35 years. The **Loan Offer** dated **19 August 2004** outlined the loan type as "*Repayment*" with the interest rate basis detailed a "*Variable Base Rate*".

The Complainants' Case

The Complainants submit that they drew down a mortgage loan with the Provider on **19 October 2004** on a variable interest rate of 3.25%.

The Complainants submit that the mortgage loan agreed between the parties detailed that the applicable interest rate was a "*Variable Base Rate*" upon drawing down the mortgage loan. The Complainants assert that the Provider "*no longer offer what they term a "Variable Base Rate"*" and "*Their only current day reference to variable rate, both in paper and digital marketing collateral, is a "Standard Variable"*".

The Complainants state that the term “base” within the context of financial products, “refers to the rate set by the Central Bank of that jurisdiction”. In this manner, the Complainants submit that it was their understanding that “The rate DID track the ECB BASE rate by exactly +1.25% for the duration of the loan from draw down month 3, until [the Complainants] entered into a Fixed Rate agreement.” The Complainants detail that the Provider, in its formal response of **13 January 2020**, “do not mention BASE when referring to our rate, even though it is expressed on ou[r] Loan Offer Letter”. The Complainants maintain that “No acceptable explanation has been provided to address this fundamental point.”

The Complainants note that they completed a Fixed Rate Mortgage Conversion Form on **10 May 2007** applying a 5-year fixed interest rate of 4.88%. Prior to the fixed rate period being applied, the Provider’s fixed rate increased to 4.99% and this is the fixed rate that was applied to the Complainants’ mortgage loan account. Upon expiry of the fixed interest rate period in **June 2012**, the Complainants state that the mortgage interest rate converted to the Provider’s variable rate of 4.33%. The Complainants assert however that it was their understanding that “the rate should have returned to [their] original “Variable Base Rate” which tracked the ECB Base rate exactly +1.25% in the 26 months after drawing down, and prior to moving to a fixed rate.”

The Complainants submit that given their mortgage loan drew down on a tracker interest rate, the mortgage loan should have defaulted to a tracker interest rate on expiry of the 5-year fixed interest rate period in **June 2012**. The Complainants submit that the mortgage loan statements issued by the Provider can be cross referenced to show a parallel with the ECB rate. The Complainants assert that this demonstrates a “direct correlation on the initial Variable rate”, indicating that they were on a tracker interest rate. The Complainants submit that the ECB base rate margin was 1.25% between **March 2004** and **December 2007**, prior to the application of the 5-year fixed interest rate period therefore a rate of ECB + 1.25% should have applied on expiry of the fixed rate period.

The Complainants state that the variable interest rate that applied to their mortgage loan account in **2012** “bore no relationship with the ECB Base rate of the day - post 2007.”

The Complainants are seeking the following:

- (a) Application of a tracker interest rate of ECB + 1.25% to their mortgage loan account;

- (b) A refund of the difference between the variable interest rate that applied to their mortgage loan account and the tracker interest rate that should have applied from **June 2012** to present;
- (c) The remaining balance of the mortgage loan recalculated to reflect a tracker interest being having been applied from **June 2012**; and
- (d) Compensation for emotional distress.

The Provider's Case

The Provider submits that there were three interest rates available for selection when the Complainants completed and signed a Home Loan Application Form on **13 August 2004** with the Provider, that is fixed, variable and tracker interest rates. The Provider states that the Complainants selected a variable interest rate.

The Provider details if the Complainants wanted to apply for a tracker interest rate, they were required to complete an **Application to Apply for A Tracker Mortgage Rate Form**, however they did not do so.

The Provider states that a **Loan Offer Letter** issued on **19 August 2004** offering "*Variable Base Rate*" of 3.25%. The Provider submits that the term "*Variable Base Rate*" did not equate to a tracker interest rate. The Provider explains that variable interest rates and tracker interest rates were two separate interest rate products, which operated in a different manner. The Provider details that whilst the term "*variable rate*" is not "*expressly defined*" in the Complainants' mortgage loan documentation, "*the Mortgage Loan documentation, and indeed all further correspondence with the Complainants, made it clear that the interest rate which applied to their Mortgage Loan Account was a Variable one that was adjusted by the lender from time to time, rather than a Tracker interest rate.*"

The Provider details that neither the Loan Offer Letter nor the General Conditions attached to the loan offer conferred a "*right or entitlement*" to a tracker interest rate on the part of the Complainants. The Provider submits that the terms and condition of the loan offer "*included no express or other commitment that the interest rate applicable to the Complainants' Mortgage Loan Account would track the European Central Bank ('ECB') rate (or indeed any other reference rate) and did not specify any particular 'margin' above any such 'reference rate'. Rather, the Loan Offer Letter clearly referred to a 'Variable' interest rate only.*"

The Provider details that *“Before the contract was accepted, there was no additional representation or written statement made to the Complainants which could have supported any expectation that the Variable interest rate would ‘track’ or ‘follow’ the ECB rate.”* The Provider states that the mortgage loan account was drawn down on **19 October 2004** with an applicable variable interest rate of 3.25%.

The Provider states that in drawing down the mortgage loan the Complainants demonstrated their acceptance of the terms and conditions as per **Condition 3** of the General Conditions attaching to the loan offer.

The Provider submits that the Complainants completed a **Fixed Rate Mortgage Conversion Form** dated **10 May 2007**, where they elected to apply a 5-year fixed rate of 4.88% to their mortgage loan account. The Provider details that the Loan Offer Letter detailed at **Condition 9** that the mortgage loan would convert to a variable rate at the expiration of a fixed rate period. The Provider details that the applicable fixed rate had changed to 4.99% on the expiry of the fixed interest rate period and this rate applied to the Complainants’ mortgage loan account on **30 June 2007**.

The Provider notes further that the words ‘track’, ‘tracker’ or ‘tracks’ are not found anywhere in the Complainants’ mortgage loan documentation, except in a reference in the Complainants **Fixed Rate Mortgage Conversion Form** signed by the Complainants on **10 May 2007**, which was in reference to an early redemption charge. The Provider explains however that this reference *“strictly relates”* to an early redemption charge being payable where the fixed interest rate has not expired and has been converted to a *“a variable rate/tracker rate”*. The Provider states therefore that this term could only have applied if the Complainants had *“expressly requested to break out of a Fixed interest rate period and requested at that point in time – and was permitted by the Bank – to convert from the relevant Fixed interest rate to a Tracker interest rate at that time (which did not happen at any point)”*. The Provider states that it is satisfied that the Fixed Rate Mortgage Conversion Form therefore *“clearly distinguishes between a ‘Variable’ interest rate and a ‘Tracker’ interest rate in this regard”*. For this reason, the Provider states that *“the Complainants could not reasonably have understood the reference in the Fixed Rate Conversion Form to the loan converting to an “applicable variable rate then prevailing” to have meant, in any sense, that their loan would convert to a Tracker interest rate of any kind.”*

Prior to expiration of the 5-year fixed interest rate period, the Provider submits that a letter issued to the Complainants on **5 June 2012** which confirmed that the current variable rate would be applied to the mortgage loan account at the end of the fixed rate period unless the Complainants’ chose an alternative rate available at that time.

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The Provider details that a variable rate of 4.33%, a 3- year fixed rate of 4.90% and a 5-year fixed rate of 5.40% were available for selection by the Complainants following the expiration of the fixed rate period in **June 2012**. The Provider states that the Complainants were not offered a tracker interest rate on expiration of the fixed rate period as they *“had no contractual right or entitlement to a Tracker interest rate or to be offered a Tracker interest rate.”*

In response to the Complainants’ assertion that the Provider’s tracker interest rate and variable rate were in *“direct correlation”* between **January 2004** and **December 2007** the Provider submits as follows:

“For a period of time (2005 to April 2008) the Bank did adjust the Variable interest rate when the ECB rate moved. Even though the rates reflected similar movements for periods, the Variable interest rate and the ECB rate are not linked and they moved independently during other periods. The Bank has the discretion to change the Variable interest rate while the changes in the ECB rate are not linked and they moved independently during other periods. The Bank has the discretion to change the Variable interest rate while the changes in the ECB rate are driven by the European Central Bank.”

The Provider asserts that the Complainants’ mortgage loan account *“was never on a Tracker interest rate and there was no contractual entitlement to a Tracker interest rate”* and the mortgage loan account *“operated at all times in line with the terms of the original Loan Offer Letter dated 19 August 2004.”*

The Complaint for Adjudication

The complaint for adjudication is the Provider incorrectly failed to apply a tracker interest rate to the Complainants’ mortgage loan account at the end of the fixed interest rate period in **June 2012**.

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.

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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 8 October 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 consider the details of certain interactions between the Provider and the Complainants between **May 2008** and **June 2012**.

A **Home Loan Application Form** was completed by the Complainants on **13 August 2004**. The application form detailed that the Complainants were seeking a loan in the amount of €222,640 over a term of 35 years. I note that 'Variable', 'Fixed' or 'Split' were the interest rate options available for selection by the Complainants in the application form. The Complainants selected the 'Variable' option.

A **Home Loan Summary Sheet** dated **18 August 2004** subsequently issued to the Complainants which details as follows:

"Loan Details:

<i>Loan Type:</i>	<i>Annuity</i>
<i>Purpose of Loan:</i>	<i>P.D.H Owner Occupation</i>
...	
<i>Rate type:</i>	<i>Variable</i>
<i>Interest Rate:</i>	<i>3.25% Base Rate</i>

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...

Loan Amount: €222,640.00

[...]

Conditions:

Your existing mortgage No [mortgage account number] and [mortgage account number] with [third party Provider] being paid off prior to or on execution of the mortgage deed..

...

Applicant Comments:

Already approved see [application number] but property deal fell through. Now buying another property in [location]. HAVE NEW HOUSE INS, LIFE INS, APPLICATION FORM CERTS INCOME AND ALL OTHER DOCUMENTATION ON PREVIOUS FILE WHICH HAS BEEN SCANNED”

The Provider subsequently issued a **Loan Offer** dated **19 August 2004** to the Complainants which details as follows:

“Dear [Complainants],

I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €222,640.00 towards the purchase of the above property at a cost of €242,000.00 subject to the following terms and the attached General Conditions. [The Provider] will pay an indemnity bond of €527.66 directly to the indemnity insurance company on your behalf when the loan cheque is issued, at no cost to you.

Type of Loan:	Repayment
Total Amount of Loan:	€222,640.00
Cheque Issue Amount:	€222,640.00
Monthly Repayment:	€888.19
Interest Rate (Variable):	3.25%
Interest Rate Basis:	Variable Base Rate
Repayment Period (Years):	35 Approx.

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*With your assistance, we look forward to completing the formalities of this loan as quickly as possible. We trust that everything will run smoothly and that you will very soon be moving into your new home. **There are a few special conditions – set out below – that must be met before the loan can be completed. If these conditions are not fulfilled, we can unfortunately not issue your loan cheque.***

To avoid delays, please read the conditions very carefully, discuss with your solicitor and ensure everything required is done in good time.

[...]

Conditions :

- *Your existing mortgage No [mortgage account number] and [mortgage account number] with [third party Provider] being paid off prior to or on execution of the mortgage deed.*
- *Subject to your personal loan Account No [account number] with [third party Provider] being redeemed prior to or on completion of the mortgage deed.*
- *Freehold/Leasehold details proving satisfactory to your Solicitor prior to cheque issue.”*

Condition 3 of the **General Conditions for [Provider’s] Home Loans** states as follows:

*“3. **Acceptance of terms and conditions:** By taking the loan from [the Provider], the borrower accepts all the terms and conditions set out in the application form, offer letter, these general conditions and the mortgage”.*

Condition 9 of the **General Conditions for [Provider’s] Home Loans** states as follows:

***9. Fixed Rate Loans:** When the fixed rate period ends the interest rate will convert to a variable rate, and if [the Provider] is then offering a Fixed Home Loan rate for a defined period the borrower may opt to convert to a fixed rate for that period and defer conversion to a variable rate. In either case, any margin specified in the loan offer letter will be applied to the interest on the loan.*

If the loan is repaid in whole or in part before the end of the fixed rate period, then an additional interest charge on the principal sum repaid will be made at the end of the month in which the repayment takes place, as follows;

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- *For 1 or 2 years fixed: three months interest*
- *For 3, 4 or 5 years fixed: six months interest*
- *For any term in excess of 5 years fixed: twelve months interest*

The charge will not be applied if another main residence is being purchased by the borrower and the existing fixed rate loan balance is transferred to it with the agreement of [the Provider].”

The relevant sections of the Provider’s **Mortgage Conditions** detail as follows:

“2. How interest on the Loan is calculated and charged

2.1 The basis on which the interest rate on the Loan is calculated is stated in the Offer Letter.

2.2 The interest rate on the Loan may be increased or reduced by [the Provider] from time to time, however no change in the interest rate will be applied to the Loan during any period when the interest rate is a fixed rate.

2.3 Notice of change in the interest rate on the Loan will be given by way of a notice in writing sent to the Borrower, or by

(a) a notice exhibited at the chief office of [the Provider], and

(b) a notice in at least two national daily newspapers

2.4 Where specified in the Offer Letter and where the Borrower has agreed in the form specified by the Central Bank, the interest rate may include one or more tiered interest rates. In these circumstances, references to “interest rate” in these conditions will, where appropriate, be applicable also to the tiered rate(s).

2.5 Where the interest rate is based in part on the fact that the Property is for use and occupation of the Borrower and the Borrower’s family, and subsequently [the Provider] consents to the letting of some or all of the Property, a condition of this consent may be that the interest rate on the Loan be increased.

2.6 For the purposes of calculating interest, percentages will not be taken beyond six places of decimals.

2.7 Interest will continue to be charged under these conditions after (as well as before) any judgement which [the Provider] obtains against the Borrower for the recovery of all or any part of the Total Debt.”

An **Issue of Loan Cheque** letter was issued to the Complainants dated **1 September 2004**, which details as follows:

“Dear [Complainants],

I refer to our letter of the 19/08/04. I am pleased to inform you that your loan cheque has been forwarded to your solicitors [named solicitor]. I understand that an appointment has been made with your solicitor to complete the transaction.

The amount of the cheque will be made up as follows:

Total	<u>€222,640.00</u>
Net Loan Cheque	<u>€222,640.00</u>

<i>Term of Loan:</i>	<i>35 years Approx.</i>
<i>Rate of Interest:</i>	<i>3.25% Base Rate (APR 3.3%)</i>
<i>Daily Interest:</i>	<i>€19.82</i>

[...]

THE PAYMENT RATES ON THIS HOUSING LAN MAY BE ADJUSTED BY [the Provider] FROM TIME TO TIME. (Does not apply while the loan is at a fixed rate)”

I have not been provided with the Acceptance Form signed by the Complainants however it does not appear to be disputed between the parties that the Complainants accepted the particulars and terms and conditions of the **Loan Offer** dated **19 August 2004**. Mortgage loan account ending **1086** was subsequently drawn down on **19 October 2004**. By drawing down the loan, the Complainants accepted all the terms and conditions set out in the application form, the **Loan Offer** dated **19 August 2004** and the general terms and conditions.

It is clear to me that the loan offer envisaged that a variable interest rate of 3.25% would apply to the Complainants’ mortgage loan account. The Complainants appear to submit that they were of the understanding that a tracker variable interest rate of ECB +1.25% applied to their mortgage loan account from inception of the loan.

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However, I note that the loan offer clearly sets out the nature of the variable interest rate applicable to the Complainants' mortgage loan to be one which may be increased or reduced by the Provider from time to time. The "variable base" interest rate in the Complainants' mortgage loan documentation made no reference to varying in accordance with variations in the ECB refinancing rate.

I note that the Complainants completed a **Fixed Rate Mortgage Conversion Form** on **10 May 2007** which details as follows:

"Declaration

I/We wish to apply to convert the balance of my/our loan account to a fixed rate of 4.88 for the next 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.***

Important

I/We understand that in event of there being a change in interest rates before [the Provider] have converted our loan rate, [the Provider] will apply the fixed rate currently available. If there is no other fixed rate available, the appropriate variable rate may apply.

Unfortunately, [the Provider] cannot inform customers individually if changes in interest rates prior to converting their loan rate.

I/We understand that an early redemption charge is payable in the following cases where the fixed rate period has not expired:

- 1. If a capital payment or full repayment is made the loan.*
- 2. If the loan is converted to a variable rate/tracker rate.*
- 3. If the loan is converted to another fixed rate.*

[...]

This document forms part of the existing documentation governing this loan, the conditions of which are outlined in the mortgage deed, the loan offer and cheque issue letters."

The **Annual Loan Statements** submitted in evidence show that a fixed interest rate of 4.99% was applied to the mortgage loan account on **30 June 2007**.

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The **Fixed Rate Mortgage Conversion Form** signed by the Complainants on **10 May 2007** outlines that on the expiry of the fixed interest rate period, the mortgage loan will convert to a variable interest rate.

Prior to the expiry of the 5-year fixed interest rate, the Provider issued correspondence to the Complainants on **5 June 2012** which details as follows:

“Dear [Complainants],

At the end of this month the fixed rate term of your loan will expire. Your repayment will revert back automatically to the current variable rate, you are not required to do anything. The table below illustrates your repayment details. Please note that these figures are based on the applicable variable rate which is subject to change. The repayment amount detailed below is not inclusive of Tax Relief at Source.

<i>Option</i>	<i>Interest Rate</i>	<i>Monthly Repayment</i>	<i>Monthly Insurance Premium</i>	<i>Total Monthly Repayment</i>
<i>Variable</i>	<i>4.330</i>	<i>726.89</i>	<i>32.64</i>	<i>759.53</i>

If you have any questions please phone a member of our team on [telephone number], email [email address], or visit your local [Provider’s] office.”

The reverse side of the letter dated **30 June 2012** details as follows:

“Variable Rate Loans

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

[...]

Fixed Rate Loans

An early redemption charge is payable in the following cases where the fixed rate period has not expired.

If the capital payment or full repayment is made to the loan

If the loan is converted to a variable rate/tracker rate

If the loan is converted to another fixed rate”

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The **Annual Loan Statements** submitted in evidence show that the Complainants' mortgage loan account switched to a rate of 4.330% on **30 June 2012** when the fixed interest rate period ended.

I note that the Complainants submit that the Provider's standard variable rate and the Provider's tracker interest rate changed in line with each other and are therefore of the view that the variable base rate somehow tracked the ECB rate. The Complainants appear to be of the view that a tracker interest of ECB + 1.25% applied to their mortgage loan account before they entered the 5-year fixed interest rate period. For this reason they also seem to be of the view that they were entitled to the "same" tracker rate in **June 2012** at the end of the fixed rate period. This is incorrect. The Complainants' mortgage loan account was never on a tracker rate of interest. It is clear from the Complainants' mortgage loan documentation that the mortgage loan account drew down on a variable interest rate, which is a different mortgage product from a tracker interest rate. The Complainants subsequently chose to apply a 5-year fixed interest rate at the end of which the Provider's standard variable interest rate was correctly applied. There is no reference to the nature of the variable rate as being one that varied in accordance with variations in the ECB refinancing rate.

The Provider explains that from **2005 to 2008**, it adjusted the variable base interest rate when the ECB rate moved however even though both rates reflected similar movements for a period of time, the Provider's variable interest rate and the tracker interest rate are not linked and "*they moved independently during other periods.*" The Provider has commercial discretion to set its own variable interest rates and the fact that this rate happened to move in line with the ECB tracker interest rate for a certain period of time does not mean that the Provider's variable base rate equates to a tracker interest rate. The Provider's variable interest rate and the tracker interest rate were two separate and distinct mortgage products on offer by the Provider.

In order for the Complainants to have a contractual right to a tracker interest rate in respect of their mortgage loan account, that right would need to have been specifically outlined in the mortgage loan documentation. However, no such right was set out in writing in the **Loan Offer** dated **19 August 2004**. Consequently, I do not see how the Complainants could have reasonably been of the understanding that a tracker interest rate applied to their mortgage loan account, let alone a specific tracker interest rate of ECB+1.25%, as submitted by the Complainants.

Having considered the evidence and submissions before me, it is clear that the Provider was under no obligation to offer a tracker interest rate to the Complainants in **June 2012**. This is because the Complainants did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed interest rate period, or at any other time.

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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**

2 November 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.**