



<b><u>Decision Ref:</u></b>	2021-0410
<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 at point of sale
<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 is secured on the Complainants' private dwelling house.

The loan amount was €303,600 and the term of the loan was 30 years. The **Amended Loan Offer Letter** dated **24 July 2006** detailed that the interest rate applicable to the loan was a variable base rate of 4.00%.

**The Complainants' Case**

The Complainants submit that, at the time they were applying for their mortgage, they *"asked the branch manager about a tracker rate to which he replied that as it wasn't our first mortgage we were not entitled to a tracker."* The Complainants state that they *"never queried this"*. The Complainants submit that when they became aware of the issues surrounding tracker mortgages, they contacted the Provider's helpline and were told that *"there was nothing in place at that time to deny us a tracker rate relating to first time buyers."*

The Complainants disagree with the Provider's assertion that the mortgage loan documentation was clear and transparent as the **Home Loan Application Form** "*had not been updated to include tracker option.*"

The Complainants state that they do not "*expect there to be any paperwork suggesting we applied for a tracker as I have already explained we asked for it in a conversation with the Manager in his office and was told we did not qualify as we were not first time buyers.*" The Complainants note that they do not have "*physical evidence*" but that their hope is that "*[Redacted] would admit he wrongly advised customers*". The Complainants are of the view that there "*was ingenuity amongst members of [the Provider] selling mortgages at that time.*"

The Complainants are seeking the following:

- (a) a tracker interest rate be applied to their mortgage loan account; and
- (b) Compensation "*for being wrongly denied*" a tracker rate "*in the first place*".

#### **The Provider's Case**

The Provider submits that when the Complainants applied for the mortgage loan in **2005**, "*the full range of interest rate options available from [the Provider] included the Fixed, Variable and Tracker interest rates together with the Split Loan options.*" The Provider maintains that the full range of options "*was publicly advertised on [the Provider's] website and this information was also available in all of [the Provider's] branches.*" The Provider submits that, as is standard practice, "*the availability of these interest rates would have been explained to the Complainants during the mortgage application process.*"

The Provider states that the Complainants submitted a **Home Loan Application Form** on **10 October 2005** and that the interest rate options on the form were variable interest rates, fixed interest rates and split loan options. The Provider submits that the Provider's "*application form had not been updated since the introduction of Tracker interest rates in 2004, however, this did not mean customers could not apply for a Tracker interest rate.*" The Provider maintains the Complainants were not precluded from applying for a Tracker interest rate. The Provider is of the view that the Complainants were required to complete a separate **Application to Apply for a Tracker Mortgage Rate** form in order to apply for a tracker rate of interest. The Provider submits that they have "*no record of a request for a Tracker interest rate being received from the Complainants or of such a request being applied for.*" The Provider asserts that the Complainants selected a variable interest rate on the **Home Loan Application Form**.

The Provider states that “Due to a change in the property address number of the property being purchased” an **Amended Loan Offer Letter** issued on **24 July 2006**. The Provider asserts that the **Loan Offer Letter** that issued on **13 October 2005** had a “*typographical error*” as the wrong property number was delineated.

The Provider states that as the Complainants drew down the mortgage loan account on **14 August 2006**, “*the Complainants expressly accepted [the Provider’s] Amended Loan Offer and the associated terms and conditions.*” The Provider relies on **General Condition 3** in this regard.

The Provider asserts that there was “*no policy, at the time, by the Bank to steer customers away from Tracker interest rates.*” The Provider disagrees with the Complainants assertion that there was “*ingenuity*” amongst the Provider’s staff selling mortgages at the time. The Provider submits that the tracker interest rates were “*widely available*” for private dwelling house mortgage loans from **early 2004** until **late 2008**. The Provider asserts that “*There is no reason why [the Provider’s] staff would have adopted a position that Tracker interest rates were not available to the Complainants when applying for their PDH Mortgage Loan in October 2005.*” The Provider states that the Complainants “*could have applied for a Tracker interest rate at application stage or at any time during the period they were available from [the Provider].*” The Provider submits that the “*final decision as to which interest rate to opt for rested solely with the Complainants.*” The Provider maintains that the Complainants chose a specific interest rate and the Provider complied with their request.

The Provider states that their staff “*do not advise customers on the suitability of interest rates or which rate option to choose, rather Staff provide information on the interest rates available on request*”. The Provider states that they engaged with the staff member who dealt with the Complainants loan application and “*they have denied that in October 2005, a customer would have been informed that the Bank was no longer offering Tracker interest rates to second time buyers.*”

The Provider is of the view that the mortgage loan documentation “*was sufficiently clear and transparent as to the Complainants interest rate entitlements.*” The Provider states that the mortgage loan documentation did not provide the Complainants with an entitlement to a tracker interest rate. The Provider maintains that the Complainants’ mortgage loan account “*performed as it should have at all times*” and that, as per the **Amended Loan Offer**, “*there is no contractual right or entitlement to a Tracker interest rate on this Mortgage Loan Account.*”

### **The Complaint for Adjudication**

The conduct complained of is that the Provider failed to permit the Complainants the option of a tracker interest rate when they applied for their mortgage loan in **October 2005**.

### **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 14 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 details of certain interactions between the Complainants and the Provider in **2005** and **2006**.

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The Provider has provided an internal document dated **8 March 2004** which appears to have been circulated to staff members at this time and details as follows:

“ ...

*[The Provider] have launched a Home Loan Tracker Mortgage. This mortgage will be available to both New and Existing members of [the Provider]. It is available from [March 2004].*

...

**Who can apply?**

*Our Tracker of ECB + 1.25% is open to all our mortgage [customers].*

**How can they apply?**

*For New [Customer], they should complete a Tracker application form along with their Homeloan application...*

*For Existing [Customer], they need to complete a Tracker application form and this must be sent to the Loans Team and they will convert it.*

*Tracker forms will be in offices early next week....”*

The Complainants completed a **Home Loan Application Form** which was signed and dated by the Complainants on **10 October 2005** and details as follows:

**“LOAN TYPE (please tick one)**      Repayment/Annuity ✓      Endowment  
Pension

**INTEREST RATE**      \*Variable ✓ or      \*\*Fixed      or Split

*\* Variable interest rates increase and decrease with changes in market rates.*

*\*\* If choosing a fixed rate, please complete the section below which outlines terms of conditions associated with fixed rate loans.”*

The **Home Loan Application Form** shows that the Complainants chose a variable interest rate. It appears from the Complainants’ submissions that they are of the view that they were advised that tracker interest rates were not available for selection. While I note that tracker interest rates were not included as an option on the application form, tracker interest rates were available to new customers like the Complainants in **2005**. If the

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Complainants wished to apply for a tracker interest rate, a separate tracker application form had to be completed along with the home loan application form.

I have not been provided with any evidence to suggest that the Complainants completed a tracker application form.

The Provider initially issued the Complainants with a **Loan Offer** dated **13 October 2005** offering a loan in the amount of €303,600 repayable over a term of 30 years on a variable base rate of 3.25%. I note however that this loan offer was not accepted by the Complainants.

The Provider subsequently issued an **Amended Loan Offer Letter** dated **24 July 2006** to the Complainants, which details as follows:

<i>"Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan:</i>	<i>€303,600.00</i>
<i>Cheque Issue Amount:</i>	<i>€303,600.00</i>
<i>Monthly Repayment:</i>	<i>€1,449.43</i>
<i>Interest Rate (Variable)</i>	<i>4.00%</i>
<i>Interest Rate Basis:</i>	<i>Variable</i>
<i>Repayment Period (Years):</i>	<i>30 Approx.</i>
<i>..."</i>	

**Condition 2.2** of the Provider's Mortgage Conditions states as follows:

*"The interest rate on the Loan may be increased or reduced by [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."*

I have not been provided with the Complainants' signed acceptance of the **Amended Loan Offer**. Nonetheless it does not appear to be disputed between the parties that the Complainants accepted this loan offer on the terms and conditions set out in the **Amended Loan Offer** and drew down the loan.

**General Condition 3** of the **General Conditions** attached to the **Amended Loan Offer Letter** provides 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."*

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The Provider issued an **Issue of Loan Cheque letter** dated **31 July 2006** to the Complainants which details as follows:

**"Issue of Loan Cheque**

...

*I am pleased to inform you that your loan cheque has been forwarded to your solicitors [Redacted]. I understand that an appointment has been made with your solicitors to complete the transaction.*

...

<i>Term of Loan:</i>	<i>30 years Approx.</i>
<i>Rate of Interest:</i>	<i>4.00% Base Rate (APR 4.1%)</i>
<i>Daily Interest:</i>	<i>€33.27</i>

...

*THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY [PROVIDER] FROM TIME TO TIME (Does not apply while the loan is at a fixed rate)"*

The evidence suggests therefore that the Complainants had the benefit of legal advice when drawing down the mortgage loan.

The Annual Loan Statements submitted in evidence show that the mortgage loan on was drawn down on **14 August 2006** on a variable interest rate of 4.00%, in accordance with the terms of the **Amended Loan Offer Letter**.

It is clear to me that the **Amended Loan Offer** dated **24 July 2006** envisaged that a variable interest rate would apply to the Complainants' mortgage loan account. The variable interest rate in the Complainants' mortgage loan documentation made no reference to varying in accordance with variations in the ECB refinancing rate.

The Complainants completed and signed a **Fixed Rate Mortgage Conversion Form** on **17 October 2006** and details as follows:

*"I/We wish to apply to convert the balance of my/our loan account to a fixed rate for the next  year(s).*

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*I/We understand that when this period has expired the loan will revert to the applicable variable rate then prevailing.*

*...”*

I note that the Provider subsequently sent the Complainants a **Confirmation of Conversion to Fixed Rate letter** on **20 October 2006** which confirmed that their mortgage loan account had been converted to a fixed rate of 4.75% for three years.

The Complainants contend that the Provider did not offer them tracker interest rate options in **October 2005**. It is important to note that although tracker interest rates were on offer generally by the Provider as part of its suite of products from **early-2004**, there was no obligation on the Provider to furnish the Complainants with information on its tracker interest rate offering at that time. If the Complainants wanted independent advice about rates available in the market or the market generally, the Complainants could only get that advice from an independent third-party advisor.

Even in circumstances where the Complainants contacted the Provider to request that a tracker interest rate be applied to their mortgage loan account, it was within the Provider’s commercial discretion as to whether it wished to accede to that request. The Complainants applied for a variable interest rate and the Provider subsequently offered a variable interest rate loan which the Complainants ultimately drew down with the Provider. If it was the case that the Complainants were of the view that a variable interest rate loan was not suitable for them, then the Complainants could have decided not to accept the loan offer and ultimately draw down the loan and instead, they could have sought an alternative rate with the Provider or with another mortgage provider. However, the Complainants 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.**



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**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

8 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.**