



<u>Decision Ref:</u>	2021-0413
<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 is secured on the Complainants' principal private residence.

The loan amount was €240,000 and the term of the loan was for 35 years. The particulars of the Amended Loan Offer dated **15 March 2004** provided for a 1-year discounted fixed interest rate of 2.65%, with the Provider's "Variable Base" to apply thereafter. The mortgage loan account was drawn down in **June 2004**.

The Complainants' Case

The Complainants note that they applied for a mortgage loan with the Provider in **2003**. The Complainants submit that during their first meeting with the Provider they "expressed an interest in obtaining a Tracker Mortgage" but were informed that "this product was not on offer by [the Provider] at that time."

The Complainants state that in **June 2004** they "restructured [their] mortgage from a variable rate @ 3.35% to a fixed rate mortgage of 2.65% with the staff" at the Provider's branch. The Complainants submit that the Provider issued an Amended Loan Offer to the dated **15 March 2004** which provided for a loan amount of €240,000 over a period of 35 years on an initial 1-year fixed interest rate of 2.65%.

The Complainants note that the fixed interest rate period expired on **30 June 2005** and their mortgage loan account switched to the Provider's variable rate. The Complainants submit that they never received any indication from the Provider that there were other interest rates available and contend that they "*never knew that [their] mortgage provider done tracker mortgages.*"

The Complainants detail that the Provider informed them "*that it is standard practice to inform all customers of all of their interest rate options at time of application and on request*" however, the Complainants state that they have "*continuously asked the [Provider] for a copy of this document*" which they never received. The Complainants submit that the Provider has "*no record of it being sent*" but can confirm that a tracker rate of interest was available as an option to them on the expiry of the fixed interest rate period.

The Complainants submit that they contacted the Provider in **2017** and were informed that they should have received a letter from the Provider outlining the mortgage options that were then currently available in **June 2005**. The Complainants submit that they never received such documentation. The Complainants maintain that "*It is impossible for anybody to make a decision involving [their] mortgage options when they do not get the relevant information in front of them*". The Complainants further contend that the Provider "*failed [the Complainants] as customers by omission of information and transparency*" by failing to inform them of all interest rates available to them.

The Complainants detail that they were existing customers "*since 1998 and there was nothing on [their] account that prohibited [them] from accessing a tracker interest rate*" and they "*had the criteria to access all interest rates offered by the Provider*". As a result, the Complainants assert that they had a "*pre-contractual right and entitlement*" to be "*offered all rates and not selected rates on official documentation*". The Complainants submit that the "*fact [they] fixed [their] mortgage and [were] only provided with selected rates chosen by the bank for [the Complainants] to choose proves that [they were] denied a tracker interest rate on this document...*"

The Complainants are seeking the following:

- (a) That a tracker interest rate is applied to their mortgage loan account; and
- (b) The Provider refunds all overpaid interest on their mortgage loan account, backdating to **June 2005**.

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The Provider's Case

The Provider submits that it was approached by the Complainants in **July 2003** to apply for a private dwelling home (PDH) mortgage loan. The Provider states that the Complainants completed and signed a **Loan Approval Certificate Application** form on **22 July 2003**. The Provider details that a **Home Loan Application** form was subsequently completed and signed by the Complainants on **7 August 2003**.

The Provider states that there were two types of interest rates available for selection when the Complainants applied for their mortgage loan, that is *"the Bank's Variable and Fixed interest rates."* The Provider details that *"These interest rates were publicly advertised and available and both options appeared for selection on the 'Home Loan Application Form'".* The Provider states it was not offering tracker interest rates as an option at the time of the Complainants application in **2003**

The Provider submits that it issued the Complainants a **Loan Offer Letter** dated **13 August 2003**, offering them a mortgage loan of €220,000 with a discounted variable base rate of 2.75% for the first six months of the term of the loan. The Provider states that the Complainants subsequently sent the Provider a signed letter requesting that the term of the mortgage loan be increased from 30 years to 35 years and also requested a 1-year fixed interest rate to be applied to the mortgage loan.

The Provider details that it issued an **Amended Loan Offer Letter** to the Complainants on **3 February 2004**. The Provider submits that this Amended Loan Offer Letter was for an amount of €220,000 with a 1-year fixed interest rate of 2.75%, with the Provider's variable base rate to apply thereafter.

The Provider states that it subsequently received a request from the Complainants to increase the loan amount from €220,000 to €240,000. The Provider details that a further **Amended Loan Offer Letter** issued on **15 March 2004** for a loan in the amount of €240,000 for a term of 35 years with a 1-year fixed interest rate of 2.65% *"which would then convert to the Bank's Variable Base Rate upon expiry of the one year Fixed interest rate period."*

The Provider states that the **Amended Loan Offer Letter** dated **15 March 2004** detailed that the fixed interest rate may change before the drawdown of the mortgage loan. The Provider submits that the applicable interest rate had changed and the fixed interest rate available at the cheque issue stage was a fixed interest rate of 3.15%. The Provider details that the Complainants *"chose to accept this Second Amended Loan Offer dated 15 March 2004 subject to the terms and conditions referred to"*.

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The Provider states that the mortgage loan was drawn down on **29 June 2004** and in completing the draw down *“the Complainants demonstrated their acceptance of the Terms and Conditions associated with Mortgage Loan Account ending 8402.”*

Prior to expiry of the fixed rate period, the Provider submits that it issued an *“end of Fixed interest rate period conversion letter (the Conversion Letter) to the Complainants.”* The Provider details that while it is unable to locate a copy of the conversion letter that was issued on or around **10 June 2005**, its internal system indicates that correspondence was issued which *“detailed certain fixed interest rates available at the time should the customer have wished to apply for a further fixed interest rate period on their Mortgage Loan Account.”* The Provider submits that *“on foot or receiving this Conversion Letter”* the Complainants called the Provider on **17 June 2005** to query the amount quoted on the conversion letter.

The Provider states that there *“was no contractual obligation on the Bank to offer the Complainants a Tracker interest rate on the expiry of the Fixed interest rate period”* but the Complainants *“could have applied for a Tracker interest rate in June 2005 or indeed at any time within which the Bank had a tracker interest rate product available”*.

The Provider submits that given *“the Complainants did not request an alternative interest rate”*, the Provider’s variable base rate was applied to the Complainants’ mortgage on the expiration of the fixed interest rate period. The Provider states that *“There is no record of a request for a Tracker interest rate having been made by the Complainants”* prior to the withdrawal of tracker interest rates in **late 2008**.

The Provider details that *“Tracker interest rates were widely advertised and available from [early-2004] to [late-2008]. If the Complainants wished to avail of a Tracker interest rate a separate ‘Application For A Tracker Mortgage Rate’ was required to be completed”*. The Provider states that it has *“no record or documentation on file to show that the Complainants ever requested or were denied a Tracker interest rate during the period when they were available.”* The Provider asserts that there *“was no contractual obligation”* on the Provider to specifically offer the Complainants a tracker interest rate.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on that expiry of the fixed interest rate period in **June 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 18 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 Complainants and the Provider in **2005**.

The Complainants completed a **Loan Approval Certificate Application Form** on **22 July 2003**. The **Loan Approval Certificate Application Form** detailed that the Complainants had an existing mortgage with the Provider, and they were seeking additional borrowings in the amount of €220,000 with a repayment term of 30 years.

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A **Mortgage Loan Application Form** was subsequently completed by the Complainants on **07 August 2003**. The Complainants selected a “*Variable*” interest rate in the **Mortgage Loan Application Form**. The application form also details that “*Variable interest rates increase and decrease with changes in market rates.*”

The Provider issued a **Loan Offer** to the Complainants dated **13 August 2003**. The Loan Offer details as follows:

<i>“Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan:</i>	<i>€220,000.00</i>
<i>Cheque Issue Amount:</i>	<i>€220,000.00</i>
<i>Monthly Repayment:</i>	<i>€898.13</i>
<i>Interest Rate (Discount 6:</i>	<i>2.75% (See Important Note)</i>
<i>After 6 months:</i>	<i>Variable Base Rate</i>
<i>Repayment Period (Years):</i>	<i>30 Approx.</i>

Important Note On Variable Discount Rate:

The discount rate shown is the current discount rate. In the event of an interest rate change prior to the completion of this loan (i.e. advance of funds via your homeloan cheque), the rate will be altered to the variable discount rate on offer on the date of completion. If no discount variable rate is available at that time, the prevailing variable rate will apply.”

The Provider received a handwritten note from the Complainants on **02 February 2004** which details as follows:

“Please can we change term from 30 years to 35 and fixed for 1 yr 2.85%”

An **Amended Loan Offer** dated **03 February 2004** was subsequently issued to the Complainants detailing as follows:

<i>“Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan</i>	<i>€220,000.00</i>
<i>Cheque Issue Amount:</i>	<i>€220,000.00</i>
<i>Monthly Repayment: (Fixed for Year 1)</i>	<i>€816.28</i>
<i>Interest Rate (Fixed for Year 1):</i>	<i>2.75% (See Important Note)</i>
<i>After 1 year:</i>	<i>Variable Base (Currently 03.35%)</i>
<i>Repayment Period (Years):</i>	<i>35 Approx.</i>

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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 Complainants sent a handwritten letter to the Provider dated **10 March 2004** wherein they requested as follows:

"Dear Sirs,

We wish to increase our loan approval of €220,000 to €240,00[0] over 35 years."

A second **Amended Loan Offer** issued to the Complainants dated **15 March 2004** detailing as follows:

<i>"Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan</i>	<i>€240,000.00</i>
<i>Cheque Issue Amount:</i>	<i>€240,000.00</i>
<i>Monthly Repayment: (Fixed for Year 1)</i>	<i>€877.41</i>
<i>Interest Rate (Fixed for Year 1):</i>	<i>2.65% (See Important Note)</i>
<i>After 1 year:</i>	<i>Variable Base (Currently 03.35%)</i>
<i>Repayment Period (Years):</i>	<i>35 Approx.</i>

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 **Special Conditions** attached to the **Amended Loan Offer** detail as follows:

"Your existing mortgage account number [ending 7865] being paid off prior to or on execution of the mortgage deed."

The **General Conditions for [the Provider's] Home Loans** attached to the Amended Loan Offer dated **15 March 2004** detail as follows:

"...

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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.*

...

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 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 offer letter will be applied to the interest rate 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:

- ▶ *For 1 or 2 years fixed: three months interest*
- ▶ *For 3 or more years fixed: six 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]."

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.

The Complainants' solicitor completed a **cheque requisition form** on **25 June 2004** requesting to have the home loan drawn down.

An **Issue of Loan Cheque** letter issued to the Complainants dated **29 June 2004** detailing as follows:

"Dear [Complainants],

I refer to our letter of the 03/02/04. I am pleased to inform you that your loan cheque has been forwarded to your solicitors [solicitors name]. I understand that an appointment has been made with your solicitor to complete the transaction.

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

<i>Total</i>	<u>€240,000.00</u>
<i>Net Loan Cheque</i>	<u>€240,000.00</u>

<i>Term of Loan:</i>	<i>35 Years Approx.</i>
<i>Rate of Interest:</i>	<i>3.15% Base Rate Fixed for Year 1</i>
<i>After 1 year rate Interest will be:</i>	<i>Variable Base Rate (currently 03.25%) (APR 3.3%)</i>
<i>Daily Interest:</i>	<i>€20.71</i>

[...]

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

The Annual Loan Statements provided in evidence show that the mortgage loan was drawn down on **29 June 2004** on a fixed interest rate of 3.15%.

It is clear to me that the **Amended Loan Offer** dated **15 March 2004** envisaged that a 1-year fixed interest rate would apply to the Complainants' 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.

The initial fixed interest rate period expired on the Complainants mortgage loan account on **30 June 2005**. The Provider submits that it issued a Fixed Rate Options Letter to the Complainants on **10 June 2005**, prior to expiry of the initial fixed rate period, however a copy of this correspondence has not been provided in evidence.

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 a copy of the correspondence which purportedly issued in **June 2005** relating to the expiration of the fixed rate period, there was no breach of the **Consumer Protection Code 2006**.

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The Provider has however submitted an **internal system note** detailing that a “*Fixed Rate Expiry Letter*” was sent to the Complainants on **10 June 2005**. The Provider has also submitted an internal system note detailing the interest rates available in respect of the Complainants’ mortgage loan account on **10 June 2005** when the letter issued. The internal system note details the following interest rate options available at that time:

<i>“Option</i>	<i>Rate %</i>	<i>Mthly Repymt EUR</i>	<i>Insur Prem EUR</i>	<i>Total Repymt EUR</i>
<i>Current</i>	<i>3.150</i>	<i>943.85</i>	<i>79.68</i>	<i>1,023.53</i>
<i>1 YR FIXED</i>	<i>3.450</i>	<i>984.10</i>	<i>79.68</i>	<i>1,063.78</i>
<i>2 YR FIXED</i>	<i>3.500</i>	<i>990.88</i>	<i>79.68</i>	<i>1,070.56</i>
<i>3 YR FIXED</i>	<i>3.550</i>	<i>997.68</i>	<i>79.68</i>	<i>1,077.36</i>
<i>4 YR FIXED</i>	<i>3.750</i>	<i>1,025.14</i>	<i>79.68</i>	<i>1,104.82”</i>

The Provider’s internal system note dated **17 June 2005** details that detailing that the Complainants contacted the Provider by telephone on **17 June 2005** in response to the letter that issued on **10 June 2005**. The internal note details as follows:

“advised cust that repay quoted in conversion ltr is exc trs. advised of rate at present and conf’d life ins paid...”

The Complainants contend that the Provider did not offer them tracker interest rate options in **June 2005**. The Complainants appear to submit that, particularly, they had “*the same right to access a tracker rate of interest as somebody who had a contractual right to access*”. The Complainants’ mortgage loan is governed by terms and conditions of the **Amended Loan Offer** dated **15 March 2004**, none of which contain a contractual entitlement on the part of the Complainants to a tracker interest rate. The fact that other customers of the Provider, or indeed other customers of any third party providers, had tracker interest rates applied to their mortgage loans has no relevance whatsoever to the Complainants’ mortgage and did not in any way create an obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan.

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 provide the Complainants with information on its tracker interest rate offering at that time. The Complainants were offered further fixed interest rate options on the expiry of the initial fixed interest rate period, in line with the terms and condition of their mortgage loan.

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However, the Complainants did not opt for a further fixed interest rate period therefore a variable interest rate was applied to their mortgage loan account on the expiry of the fixed interest rate period. I note from the mortgage loan account statements submitted in evidence that the Complainants' mortgage loan account converted to a variable interest rate of 3.25% on **30 June 2005**, in accordance with **General Condition 9** of their mortgage loan documentation.

While the Complainants could have explored potential interest rate options with the Provider, the Complainants did not have a contractual or any other entitlement to a tracker interest rate on their mortgage loan account on the expiry of the fixed interest rate period or indeed at any time during the term of the loan. Accordingly, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the mortgage account in **June 2005**. Consequently, even if 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.

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

10 November 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.

