



<u>Decision Ref:</u>	2021-0468
<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 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 €160,000.00 and the term of the loan was 38 years. The **Loan Offer Letter** dated **27 April 2005** provided for a 2-year discounted variable rate of 3.13%.

The Complainant's Case

The Complainant states that she holds mortgage loan sub-account ending **785(01)** and mortgage loan sub-account ending **785(02)** with the Provider.

The Complainant notes that mortgage loan sub-account ending **785(01)** was drawn down in **May 2005** on a 2- year discounted standard variable rate after which the mortgage loan sub-account defaulted to the normal standard variable rate. The Complainant notes that mortgage loan sub-account ending **785(02)** was drawn down in **February 2006** on a standard variable rate.

The Complainant submits that she contacted the Provider in **November 2017** regarding her mortgage account “*going from Tracker to variable rate*” and she requested that the Provider examine her account.

The Complainant details that following a response from the Provider stating she “*was never entitled to a Tracker interest rate*” she then made a subject access request to obtain a copy of all her documentation from the Provider.

The Complainant contends that “*not all the data and mortgage documentation throughout [her] mortgage journey was supplied*” as she held a copy of a letter “*stating clearly*” that she was “*on a Tracker Mortgage Product.*” The Complainant refers to a letter signed by her on **24 January 2008** wherein she submits that she requested a tracker interest rate to apply to mortgage sub-account ending **785(01)**

The Complainant refutes the Provider’s assertion that she should have been aware that she was not on a tracker interest rate as she had received mortgage statements and her repayments did not significantly decrease. In this regard, the Complainant submits that “*the onus is on the [Provider] to carefully ensure that the interest rate that they apply is the correct interest rate*” and that she “*trusted that the [Provider] had the interest rate right*”.

The Complainant is seeking:

- (a) A tracker interest rate is applied to her mortgage loan account; and
- (b) Compensation and redress.

The Provider’s Case

The Provider submits that the Complainant’s mortgage sub-account ending **785(01)** drew down on **18 May 2005**. The Provider details that the Complainant’s **Loan Offer Letter** provided for a loan in the amount of €160,000 over a term of 38 years, based on an initial interest rate of 3.13%, which reflected a discount of 0.40% on the Provider’s standard variable rate applicable for the first two years. The Provider submits that the Complainant signed and accepted the loan offer on **04 May 2005**.

The Provider details that on the expiry of the 2-year discounted interest rate period in **May 2007**, the Complainant’s mortgage loan defaulted to the Provider’s standard variable rate. The Provider submits that the mortgage sub-account ending **785(01)** has remained on the Provider’s standard variable since **May 2007**.

The Provider asserts that *“There was no agreement for or reference to a tracker interest rate in the customer's loan agreement. Nor was there any reference to an interest rate linked to the ECB base rate, which would have been necessary for a tracker interest rate to apply.”*

In reference to the Complainant's copy letter which she provided in evidence that is signed by her on **24 January 2008** requesting a tracker interest rate, the Provider maintains that it *“has no record of having received the signed letter from the customer at that time, no record of having acknowledged receipt of this letter or notification that her mortgage sub-account was to be moved to a tracker interest rate”*. The Provider contends that *“This is the first time the Bank has been made aware of the letter and there is no record of the customer contacting the Bank regarding a request to change to a tracker interest rate prior to the complaint.”*

The Provider details that *“It is important to point out that the copy letter in question did not advise the customer that her mortgage sub-account was to be moved to a tracker interest rate.”* The Provider submits that rather, *“It was a signed letter from the customer in January 2008 requesting that her mortgage sub-account [ending **785(01)**], be placed on to a tracker interest rate.”* The Provider therefore asserts that *“such a request to have the interest rate on her mortgage sub-account changed to a tracker interest rate could not have been actioned by the Bank, given that the Bank has no record of ever having received the letter at that time.”*

The Provider contends that its records indicate that on **07 February 2008**, it wrote to the Complainant in response to an enquiry which detailed as follows:

*“Further to your recent request please find below repayment quotes for our available Fixed rates... Should you have any specific queries in relation to re-fixing your mortgage or the availability of **tracker variable rate options** [Provider's emphasis] please contact us”.*

The Provider further contends that notes recorded on its mortgage system confirm that on **07 February 2008**, it issued a **Fixed Rate Authority Form** to the Complainant but there was no subsequent development with respect to this document. The Provider states that it *“has no record of the customer having pursued any of the fixed rate options, which were available at that time.”*

The Provider submits that tracker interest rates were available to new and existing customers from **early-2004** to **late-2008** when they were withdrawn from the market by the Provider.

The Provider details that *“At that time, the practice in [the Provider] was that the range of interest rate options that were available to customers, subject to credit criteria, eligibility and terms & conditions, were outlined to customers.”* The Provider further details that it *“provided information, when requested, in relation to the various interest rate options that may have been available at that time.”*

The Provider states that the Complainant’s **Loan Offer Letter** *“clearly confirmed”* that the Complainant’s mortgage loan was to draw down on a discounted variable interest rate and it *“did not contain any reference to a tracker interest rate nor did this document state that a tracker interest rate would be made available to the customer when the initial discounted rate period ended, or at any future date.”* The Provider asserts that *“Such a reference would have been necessary for a tracker interest rate to apply.”*

The Provider states that it is *“satisfied that the customer’s mortgage loan documentation was sufficiently clear and transparent as to the customer’s entitlement in respect to a tracker interest rate (i.e. there was no such contractual or other entitlement to a tracker interest rate).”*

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to apply a tracker interest rate to the Complainant’s mortgage sub-account ending **785(01)** following a request which she submits was made by her on **24 January 2008**.

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 **1 November 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.

Following the issue of my Preliminary Decision, the Provider made an observation under cover of e-mail to this office dated **4 November 2021** in relation to a typographical error on page 5 of my Preliminary Decision wherein I stated that in order to determine this complaint, it is *“necessary to consider certain interactions between the Complainant and the Provider between 2003 and 2008”*. I note that the reference to *“2003”* was in fact a typographical error as there were no interactions between the Complainant and the Provider in **2003** regarding this matter. This typographical error was subsequently brought to the attention of the Complainant by way of e-mail dated **4 November 2021**.

In the absence of further submissions from the parties, within the period permitted, my final determination is set out below.

Before dealing with the substance of the complaint, I note that the mortgage loan application appears to have been submitted to the Provider by a third-party broker on behalf of the Complainant. As this complaint is made against the respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision.

Therefore, the conduct of the third-party broker engaged by the Complainant does not form part of this investigation and this Decision.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant’s mortgage loan documentation with respect to mortgage loan account ending **785(01)**. It is also necessary to consider certain interactions between the Complainant and the Provider in **2008**.

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The Provider issued a **Loan Offer Letter** dated **27 April 2005** to the Complainant which detailed as follows:

“Purpose of Loan:

REFINANCE € 160,000.00

Repayment Details

Loan Account

Customer/Loan Account Number

[account ending 3465]

Loan Type:

STANDARD ANNUITY

Loan Amount:

€160,000.00

Interest Rate:

3.13%

Interest Type:

2 YEAR DISCOUNT VARIABLE

Term:

38 YRS

Monthly Loan Repayment

€600.37 for the following 24 months

*€636.21 for the following 432 months**

[...]

** Based on a calculation using the current [Provider’s] variable rate*

[...]

IMPORTANT INFORMATION AS AT 27/04/05

- | | |
|---|----------------------|
| <i>1. Amount of credit advanced</i> | <i>: €160,000.00</i> |
| <i>2. Period of agreement</i> | <i>: 38 YRS</i> |
| <i>3. Number of repayment instalments</i> | <i>: 456</i> |
| <i>4. Amount of each instalment for the first 24 months</i> | <i>: €600.37</i> |
| <i>Amount of each instalment for the following 432 months</i> | <i>: €636.21”</i> |

The **Loan Offer Letter** dated **27 April 2005** also detailed as follows:

“WARNING...

THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME”

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Condition (3) of the **Specific Loan Offer Conditions** attaching to the Loan Offer Letter under the heading **“What requires no further action”** reads as follows:

“...

The 2yr discount rate quoted is 0.4% less than the prevailing variable interest rate and is subject to variation in accordance with mortgage terms. The interest rate will revert to the appropriate variable interest rate 24 months after issue of the loan cheque. If the account falls more than two repayments in arrears during the discount period, the interest rate will automatically revert to the full variable interest rate and the discount rate will not be available to the Borrower thereafter.”

Condition 14 of the **Standard Mortgage General Terms and Conditions** attaching to the **Loan Offer Letter** reads as follows:

“Interest Rate

(a) *Subject to subsection (b), all loans are subject to the prevailing interest rate at the date the loan is drawn down. Subsequently, the interest rate may vary in accordance with the terms and conditions of the Loan Offer.*

(b) *In the case of a fixed interest rate Mortgage, the following conditions will apply:-*

(i) *The rate of interest applicable to the loan will be fixed at the rate and for the period specified in the Loan Offer;*

(ii) *The Borrower on expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed rate of interest for a certain period if such an option is made available by [the Provider] and on terms and conditions as may be specified by [the Provider].*

Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower.”

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The Complainant signed the **Loan Acceptance** on **4 May 2005** on the following terms:

“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

I/We fully understand and accept the specific nature of this Standard Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Standard Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.”

It is clear that the **Loan Offer Letter** dated **27 April 2005** envisaged that a discounted variable rate, which equated to the Provider’s standard variable rate less 0.40%, would apply to the Complainant’s mortgage loan account for the first two years of the term of the loan with the full variable interest rate to apply thereafter.

The **Loan Offer Letter** made no reference to the nature of the Provider’s variable home loan rate being connected to the European Central Bank (ECB) base rate. Rather, it was a variable interest rate which could be adjusted by the Provider. The Complainant accepted the **Loan Offer Letter** by signing the **Loan Acceptance**, having confirmed that the **Loan Offer Letter** had been explained to her by her solicitor and that she understood the contents of the **Loan Offer Letter** and the terms and conditions attaching to it. If the Complainant was not happy with the terms of the **Loan Offer Letter**, including the terms with respect to the applicable interest rate, the Complainant could have decided not to accept the offer made by the Provider.

The mortgage loan statements provided in evidence indicate that the mortgage loan account was drawn down on **16 May 2005**.

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The Complainant has provided a document in evidence which she submits states “clearly” that she was “on a Tracker Mortgage Product”. This document is a rate options form that was signed by the Complainant on **24 January 2008** and which details as follows:

“I/We refer to previous correspondence and confirm the following points:

I/We wish to transfer the above Loan Account to a Tracker Mortgage Product.

I/We wish to transfer our existing mortgage to the following Tracker Mortgage Loan to Value Band. (Please see below). I/We understand that the LTV band selected is based on the current loan balance (to be transferred to the Tracker Mortgage) expressed as a percentage of the current market value of the property (per a recent valuation report).

Loan to Value (% of property value against amount to be borrowed)	% Margin above ECB rate for the life of the Tracker Mortgage	
<i>Less than or equal to 50% > €500,000</i>	0.70%	()
<i>Less than or equal to 50% < €500,000</i>	0.95%	()
<i>Greater than 50% and less than or equal to 80%</i>	0.95%	(x)
<i>Greater than 80% and less than or equal to 100%</i>	1.15%	()

I note that the Complainant ticked the box which detailed “Greater than 50% and less than or equal to 80%” (ECB +0.95%) and signed the rate options form on **24 January 2008**. The Complainant is of the view that this document proves that she was “on a Tracker Mortgage Product”. The Provider however submits that it has no record of receiving this request from the Complainant.

The Provider issued a **Letter of Authority** dated **7 February 2008** to the Complainant detailing the then available fixed rates as follows:

“Dear Sir/Madam,

Further to your recent request please find below repayment quotes for our available fixed rates:

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Rate Options	Rate %	Loan Repayment per Month Including Any Insurances	TRS	Total Repayment per month
<i>2 Year Fixed</i>	<i>5.29%</i>	<i>€809.18</i>	<i>€45.67</i>	<i>€763.51</i>
<i>3 Year Fixed</i>	<i>5.39%</i>	<i>€819.29</i>	<i>€45.67</i>	<i>€773.62</i>
<i>5 Year Fixed</i>	<i>5.53%</i>	<i>€833.52</i>	<i>€45.67</i>	<i>€787.85</i>

This information quoted above relates to your mortgage.

If you decide that a fixed rate is the best for you, simply complete the enclosed Letter of Authority and return it to us within seven days. We will then transfer your existing Mortgage to the option chosen. Should you have any specific queries in relation to re-fixing your mortgage, or the availability of tracker variable rate options, please contact us at [telephone].

Please note the repayments quoted are approximate, and may vary. All repayments are subject to the terms and conditions of your loan.

Also note a change in interest rate may alter the monthly TRS credit on your account. This change will not be known to the Company until next month and if applicable a letter will be issued to you confirming your new TRS details.

Fixed Rate Mortgage

WARNING: You may have to pay charges if you pay off a fixed rate loan early."

From the content of the correspondence of **7 February 2008**, it appears that this was issued by the Provider to the Complainant in response to a "recent request". There is no evidence to suggest that this Letter of Authority was signed and returned to the Provider therefore a standard variable rate of interest continued to apply to the mortgage loan account.

While I have no reason to doubt the Complainant's account of her actions in relation to her mortgage loan account, the document signed on **24 January 2008** does not equate to confirmation that the Complainant's mortgage loan account was on a tracker rate of interest. This document simply indicates that the Complainant requested that the Provider apply a tracker interest rate to her mortgage loan account in **January 2008**. It would have been completely within the Provider's discretion whether it wished to accede to the Complainant's request in circumstances where the Complainant had no contractual or other entitlement to avail of a tracker interest rate.

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In order for the Complainant to have a contractual right to a tracker interest rate on her mortgage loan account, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the Complainant. However, no such right was set out in writing in the **Loan Offer** dated **27 April 2005**, which was signed and accepted by the Complainant on **4 May 2005**.

That said, if the Provider had received this request from the Complainant, I see no reason why the Provider would not have processed the request if the Complainant was eligible for a tracker interest rate or at the very least acknowledged this request. However, it appears to me that no form of acknowledgement issued to the Complainant from the Provider in respect of this request.

I note that tracker interest rates were on offer generally by the Provider to new and existing customers from **early 2004** to **late 2008**. If the Complainant felt that she had requested a tracker interest rate, but this was not implemented by the Provider, the Complainant could have contacted the Provider to ensure that the preferred interest rate was being applied to her mortgage loan account. However, the evidence shows that the Complainant did not contact the Provider until **November 2017** in relation to a request for a tracker interest rate.

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 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

1 December 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.

