



<u>Decision Ref:</u>	2021-0490
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan was secured on the Complainant's principal private residence.

The loan amount was €250,000 and the term of the loan was 10 years. The particulars of the Mortgage Loan Offer Letter dated **09 March 2006** provided for a 36-month fixed interest rate of 4.250%, with the Provider's variable interest rate to apply thereafter. The Mortgage Loan Offer Letter also detailed that the repayments for the first 24 months would be on an interest only basis. The mortgage loan account was drawn down in **August 2006**.

The mortgage loan was redeemed by the Complainant in **February 2012**.

The Complainant's Case

The Complainant submits that she was never "*informed of the option of a Tracker Mortgage*" during her mortgage loan application with the Provider in **2006**. The Complainant asserts that as a result of not being offered a tracker interest rate, she "*missed out on a cheaper mortgage*".

The Complainant details that because of her age at the date of taking out the mortgage she was required to *“double [her] overtime and sacrifice a lot in order to meet those repayments and clear the mortgage before [her] retirement.”*

The Complainant states that had she been able to avail of a tracker mortgage she *“would have not been under such financial pressure.”* The Complainant further submits that the Provider *“appeared very happy and without protest or penalty to accept lump sum payments during the throes of the recession”*.

The Complainant submits that her mortgage loan application coincided with the introduction of the **Consumer Protection Code 2006** (CPC 2006). The Complainant submits that the *“Code requires all Financial provider[s] to fully disclose all products on offer”* and as a result she could not make an informed decision in **2006** when she applied for her mortgage. The Complainant further asserts, in respect of the Provider’s submission that the CPC 2006 was not fully effective until **July 2007**, that *“CPC 2006 would have been drawn up prior to its publication to Institutions in July 2006 and before drawdown of my Mortgage 3rd August 2006”*.

The Complainant is seeking the following:

- (a) A refund of the difference between the interest rate she was charged on her mortgage loan account and the interest that she would have been charged if she was on a tracker rate of interest; and
- (b) Compensation.

The Provider’s Case

The Provider submits that the Complainant engaged the services of a third-party broker during her mortgage application to the Provider. The Provider details that in its view *“it is for the Mortgage Broker in the first instance to discuss the financial needs of its client and the interest rate options which dictate the level of repayments required”*.

The Provider states that on **8 February 2006** the Complainant’s third-party broker requested a two-year interest only period *“at which point, the Complainant would part redeem the mortgage loan with the proceeds of the sale or buy out the Family Home.”*

The Provider states that in **March 2006**, at the time of the Complainant’s application, *“a tracker rate would have been an option available to the Complainant”*. The Provider states that tracker interest rates were introduced as a product in **mid-2001** and were available to customers until **late-2008**.

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The Provider submits that the third-party broker representing the Complainant requested a fixed interest rate at 4.09% and it subsequently issued *“the Offer Letter in line with the interest rate which was requested by the Mortgage Broker.”*

The Provider details that it issued a Mortgage Loan Offer Letter to the Complainant dated **3 March 2006**, which was accepted and signed by the Complainant on **22 May 2006**. The Provider submits that the Complainant drew down the mortgage loan on **3 August 2006**, for a loan amount of €250,000 over a term of 10 years.

The Provider details that the initial applicable interest rate was a three-year fixed rate of 4.25%, following which the Provider’s standard variable interest rate would apply. The Provider submits that repayments for the first two years of the loan were on an interest only basis.

The Provider submits that **General Condition 7(b)** of the Mortgage Loan Offer Letter sets out that the interest rate applicable at the end of any fixed rate period, was *“a variable interest rate”*. The Provider details that **General Condition 6(a)** of the Mortgage Loan Offer Letter sets out that the variable rate *“will vary at the [Provider’s] discretion upwards or downwards...”* The Provider asserts that **General Condition 7(b)** and **General Condition 6(a)** of the Mortgage Loan Offer Letter are *“clear, concise and comprehensible”*.

The Provider states that *“It was at all times open between August 2006 (when the mortgage loan account was drawn down) and 10 October 2008 for the Complainant to approach the Provider with a request to move the mortgage loan account to a tracker rate of interest”* but the Complainant *“did not take up such an opportunity.”*

In response to the Complainant’s submission that the Provider failed to comply with its obligations under the **Consumer Protection Code 2006** (CPC 2006), the Provider submits that the CPC 2006 was not fully in effect until **1 July 2007** therefore *“it would be unfair to suggest that the Provider failed to comply with CPC 2006 when it was not applicable at the time the conduct complained of occurred.”* Additionally, the Provider states that the Complainant’s mortgage loan application was submitted on behalf of the Complainant through a third-party broker, and it is the Provider’s *“view that the primary source of advice on what products are available to the Complainant usually rests with the Mortgage Broker, whose role is to present product options for their client’s consideration based on an assessment of their financial circumstances.”*

In regard to the Complainant's submission that she "*missed out on a cheaper mortgage*" and as a result of her age she was required "*to double [her] overtime and sacrifice a lot in order to meet those repayments*", the Provider asserts that "*there is no contemporaneous evidence to support her assertion of financial difficulty*". The Provider submits that there are no indications in the Complainant's correspondence which "*indicate that she was in financial difficulty of any sort.*"

The Provider details that the Complainant redeemed the mortgage loan on **13 February 2012**, "*3.5 years earlier than set out in the Offer Letter*".

The Complaint for Adjudication

The complaint for adjudication is that Provider failed to inform the Complainant of the availability of tracker interest rates in **March 2006**.

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 16 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.

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

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Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant to the Provider through a third-party broker. 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 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. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2009** on the expiration of the initial fixed interest rate period.

The Provider has submitted **Application Screenshots** in evidence dated **31 January 2006** which show that a fixed interest rate of 4.09% appears to have been the preferred interest rate on the part of the Complainant at the application stage of her mortgage loan. On foot of the Complainant's mortgage loan application, the Provider issued a letter to the Complainant's third-party broker dated **9 March 2006** detailing as follows:

"Dear Sir/Madam,

*I am delighted to confirm that the mortgage application, number [ending **8573**], on behalf of [Complainant], for the property at [address] has been approved. I enclose a copy of the Offer Letter for your records.*

I also enclose a copy of the letter, which we have issued to your client with instructions on how to proceed with the loan.

Should you have any queries please contact our Broker Contact Centre at [number]."

The Provider also issued a letter to the Complainant dated **9 March 2006**, detailing as follows:

"Dear [Complainant],

I am pleased to advise you that the [Provider] has approved you for a loan on the terms and conditions contained in the enclosed Offer Letter ("the Loan"). Your application was introduced by [named third-party broker].

What Should be Done Now?

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1. Offer Letter (in duplicate) – This is an important document which is the legal basis of the Loan. This also sets out the security which the [Provider] requires. You are strongly recommended to seek independent legal advice before signing it. **Please return NOW one copy of the Offer Letter, duly signed by all borrowers.** You should keep the other copy for your records.

[...]

How to Get your Cheque?

Loan cheques are issued through your solicitors. Before we can issue the loan cheque the following matters must be attended to:

1. Your solicitors must comply with our **legal requirements**. We have today written separately to your solicitors, sending them our Standard Pack and a note of our requirements. Please contact your solicitors and make an appointment to see them if necessary.
2. We will need the **original** life assurance/mortgage protection or endowment policy.
3. We will also need the **original** buildings/ property insurance policy and Letter of Indemnity from your insurance company, containing policy details. Cover must be effected in the joint names of you and the [Provider].
4. You must comply with any requirements set out in the **Special Conditions** in the Offer Letter.

Should I, or any of my colleagues, be able to assist you, do not hesitate to call us on [number], remembering to have your application number (at the top of this letter) to hand.”

The above letter enclosed a **Mortgage Loan Offer Letter** dated **9 March 2006**. **Part 1 – The Statutory Loan Details** of the **Mortgage Loan Offer Letter** dated **9 March 2006** sets out the following:

“1. Amount of credit advanced:	€250,000
2. Period of Agreement:	10 Years
3. Number of Repayment Instalment	4. Amount of each
<u>Instalments</u> <u>Type</u>	<u>Instalments</u>
24 Fixed at 4.250% until 3 April 2009	€885.42
12 Fixed at 4.250% until 3 April 2009	€3,076.48

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84 Variable at 3.750% €3,025.11 ...”

Part 2 –The Additional Details of the Mortgage Loan Offer Letter details as follows:

“11. *Type of Loan:* Interest Only
12. *Interest Rate:* 4.250% Fixed”

The notice at the end of the page containing **Part 2 –The Additional Details** outlines as follows:

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it.

This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

General Condition 6 of Part 3 – The General and Special Conditions details as follows:

“6. Variable Interest Rates

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the [Provider’s] discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) *The [Provider] shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month’s money at the Euro Inter Bank Offered Rate (EURIBOR).”*

General Condition 7 of Part 3 – The General and Special Conditions details as follows:

“7. Fixed Interest Rates

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(a) *The [Provider] may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter.*

The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the [Provider's] fixed rate available for the fixed period selected by the Borrower at the date of draw down.

(b) *The [Provider] shall have sole discretion to provide any further or subsequent fixed rate period. If the [Provider] does not provide such a further or subsequent fixed rate period or if the [Provider] offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate."*

General Condition 11 of Part 3 – The General and Special Conditions details as follows:

" ...

(a) *The following special conditions apply to the loan:*

...

(vii) *For the first 2 years of the term of the loan, repayment of this loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end of the 2 year period, repayments shall comprise of principal and interest and any other amounts payable in writing. The amount of such revised repayment instalments shall be as advised to the Borrower by the Lender in writing. The Lender may at any time during the initial 2 year period and at its absolute discretion (or at the request of the borrower), convert the Loan to an annuity or repayment loan whereupon the Borrower shall be obliged to make such revised repayment instalments compromising both of the principal and interest and any other moneys payable as the Lender shall advise the Borrower in writing."*

The **Acceptance and Consent** section of the **Mortgage Loan Offer Letter** was accepted and signed by the Complainant on **22 May 2006** on the following terms:

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“I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions.”

The Complainant accepted the **Mortgage Loan Offer**, having confirmed that she had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer Letter** dated **9 March 2006**.

The **Mortgage Loan Account Statements** submitted in evidence show that the Complainant’s mortgage loan account was subsequently drawn down on **4 August 2006**.

It is clear to me that the **Mortgage Loan Offer Letter** envisaged a fixed interest rate of 4.25% to apply for the first three years of the term of the loan and a standard variable rate of interest to apply thereafter.

The variable rate, in the Complainant’s mortgage loan documentation, made no reference to varying in accordance with variations in the European Central Bank refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The **Mortgage Loan Offer Letter** also indicated that a two-year interest only repayment period would be applied to the mortgage loan account from the date of drawdown.

Prior to expiration of the fixed rate period in **April 2009**, the Provider issued correspondence to the Complainant dated **4 March 2009** detailing as follows:

“Dear [Complainant],

I am writing to let you know that your current rate of 4.250% will expire on 3/04/2009. We have a number of attractive mortgage products and I am pleased to offer you the following range of options:-

Description	Rate	Projected Repayments	
		Standard Repayment	Repayment with Agreed Overpay
<i>Existing Variable LTV Rate PDH</i>	<i>3.700%</i>	<i>€2,015.48</i>	<i>€2,015.48</i>
<i>Fixed to 19 April 2011 (PDH)</i>	<i>3.990%</i>	<i>€2,029.19</i>	<i>€2,029.19</i>
<i>Fixed to 19/04/2012 (PDH)</i>	<i>4.190%</i>	<i>€2,038.67</i>	<i>€2,038.67</i>

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*To avail of your selected option, please tick the relevant rate on the enclosed Mortgage Form of Authorisation. Please **sign and date this form** and return it to us at [address] before 3/04/2009. Unfortunately, we cannot hold the above choice of rates open after this date.*

[...]

If I do not hear from you by 3/04/2009, your homeloan will, in accordance with your loan offer, automatically move to the variable rate of 3.700%”

It appears from the evidence submitted that the Complainant did not return the completed **Mortgage Form of Authorisation** and a standard variable rate of 3.20% was applied to the Complainant’s mortgage loan account on **3 April 2009**. I am of the view that this switch to the Provider’s standard variable rate was in line with **General Condition 7 of Part 3 – The General and Special Conditions** attaching to the **Mortgage Loan Offer** dated **9 March 2006** which stipulates that the mortgage loan would convert to the Provider’s variable interest rate at the end of a fixed rate period.

The variable rate was one which could be adjusted by the Provider, rather than a tracker variable rate which would tracker the ECB rate. I also note that the **Mortgage Form of Authorisation** was issued to the Complainant after the Provider withdrew tracker interest rates from its suite of mortgage products. Therefore, the Provider was under no obligation, contractual or otherwise, to offer a tracker interest to the Complainant at the end of the fixed interest rate period.

It is important to highlight that although tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainant applied for the mortgage loan in **2006**, there was no obligation on the Provider to offer a tracker interest rate to the Complainant at that time or indeed at any time during the term of the loan. It was open to the Complainant to approach to Provider at any stage from drawdown of the loan up until **late 2008**, when the Provider withdrew tracker interest rates, to apply to switch the interest rate on her mortgage loan to a tracker interest rate. However, I have not been provided with any evidence to suggest that the Complainant took any steps to change the interest rate applicable to her loan to a tracker interest rate during this time.

The Complainant submits that the Provider was obliged to “*fully disclose all products on offer*” pursuant to the **Consumer Protection Code 2006** (“CPC 2006”) and she was never “*informed of the option of a Tracker Mortgage*”. The Complainant appears to be of the view that she was therefore unable to make an informed decision in **2006** when she applied for her mortgage.

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I do not consider the Provider to have failed to adhere to its obligations under the **CPC 2006** in its dealings with the Complainant at the application stage, in circumstances where the **CPC 2006** only became fully effective from **01 July 2007**, after the Complainant drew down her mortgage loan in **May 2006**. Moreover, the evidence is that the Provider did not have any direct communication with the Complainant at the application stage and all communications were with the Complainant's third-party broker with respect to the mortgage loan up until the Provider issued a Mortgage Loan Offer Letter. In circumstances where the Complainant was engaging with a third-party broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainant during the application stage to advise on or provide information about interest rates available on the market.

The **Application Screenshots** show that a fixed interest rate was the preferred interest rate on the part of the Complainant having engaged with her broker and the Provider subsequently issued a Mortgage Loan Offer Letter offering a fixed interest rate.

If the Complainant was not satisfied with the nature of the interest rate offered to her by the Provider in the **Mortgage Loan Offer Letter** dated **9 March 2006**, the Complainant could have discussed this with her broker, financial adviser or the Provider.

Alternatively, the Complainant could have decided not to accept the offer made by the Provider and explore other interest rate options available to her. However, the Complainant did not do so. Rather, the Complainant signed and accepted the terms of the **Mortgage Loan Offer Letter** on **22 May 2006** confirming that she understood the terms and conditions of the **Mortgage Loan Offer** dated **9 March 2006**.

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

8 December 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.