



<u>Decision Ref:</u>	2021-0560
<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 sub-account ending **4181(02)** held by the Complainants with the Provider. The mortgage is secured on the Complainants' private dwelling house.

The loan offer dated **11 November 2008** provided for a loan in the amount of €50,000 on a 5-year fixed interest rate of 5.50% with a standard variable interest rate to apply thereafter.

The Complainants' Case

The Complainants submit that they applied for a top-up mortgage loan of €50,000 in **October 2008**. They submit that during the application process they received a call from a representative of the Provider's branch, who informed them that they "*had been approved for the €50,000 on condition that [they] fixed the top up for 5 years. The other alternative was that [they] only accept approval for €30,000 on what [their] understanding was a Tracker Rate.*" The Complainants submit that they opted for €50,000 at the 5-year fixed interest rate.

The Complainants maintain that it was their understanding that on the expiry of the fixed interest rate period, the sub-account ending **4181(02)** would switch to the tracker variable rate that applied to their principal mortgage loan account ending **4181(01)**.

The Complainants submit that they contacted the Provider by telephone on **11 November 2013** as the 5-year fixed interest rate on sub-account ending **4181(02)** was due to expire and it was confirmed to them that “all” of their mortgage was on the tracker variable interest rate. The Complainants state that sub-account ending **4181(02)** was instead placed on a standard variable interest rate at the end of the fixed interest rate period.

The Complainants submit that it is not clear from the **Letter of Loan Offer** dated **11 November 2008** that the “*variable interest rate*” refers to the “*standard variable rate*” and not the tracker variable rate. They submit that they understood from the information furnished to them by the Provider that the sub-account ending **4181(02)** would switch to a tracker variable rate at the end of the fixed interest rate period. During the application process in **2008**, they submit that the Provider offered them either a fixed rate or a tracker rate but did not refer to the standard variable rate. They further submit that the application form they completed in **2008** states “Tracker Mortgage Top up” on the first page and that the top-up conditions leaflet which was provided with their application also shows details and information in relation to tracker rates. The Complainants assert that the top-up loan application form was not dated by them but was dated by the Provider. The Complainants detail that the application form was submitted prior to the end of **September 2008** and therefore contend that they should “*have been afforded the Tracker Mortgage as applied for*”.

The Complainants submit that they should be able to trust that the information provided to them by the Provider was “*valid, up-to-date and truthful.*”

The Complainants are seeking the following:

- (1) That sub-account ending **4181(02)** is switched to the tracker variable interest rate for the remainder of the lifetime of the mortgage; and
- (2) Reimbursement of interest overpaid on the mortgage sub-account ending **4181(02)** since **November 2013**.

The Provider’s Case

The Provider submits that the Complainants held two separate mortgage loan sub-accounts which relate to the same mortgage however each mortgage sub-account was on a different interest rate product and governed by different terms and conditions.

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The Provider outlines that the Complainants drew down mortgage sub-account ending **4181(01)** in **February 2008** on a fixed interest rate of 4.99% with a tracker interest rate of ECB base rate + 1.15% margin to apply thereafter. The Provider notes that this mortgage loan sub-account is not subject of this complaint.

The Provider outlines that the Complainants submitted a mortgage loan application dated **14 October 2008** for a top-up loan in the sum of €50,000. The Provider details that the Complainants drew down mortgage sub-account ending **4181(02)** in **November 2008** on a fixed interest rate of 5.50% for a period of 5 years with a standard variable interest rate to apply thereafter, having signed and accepted the top-up loan offer on **12 November 2008**. The Provider submits that the Complainants *“could not have been offered a tracker interest rate when they applied for their top-up mortgage in October 2008”* as tracker interest rate products had been withdrawn from the end of **September 2008** and therefore not available as a product for selection. The Provider outlines that the loan offer letter dated **11 November 2008** did not contain any condition indicating that a tracker interest rate would be made available to the Complainants when the fixed interest rate period ended. The Provider refers to **General Condition 5** of the loan offer in that regard.

The Provider submits that it does not hold any record of a discussion with the Complainants in or around **October 2008** when, according to the Complainants, the Provider informed them that they *“had been approved for the €50,000 on condition that [they] fixed the top up for 5 years”*.

The Provider explains that the standard variable interest rate is *“a variable rate which can be increased or reduced by the Bank. By comparison, a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will rise and fall in line with movements in the ECB base rate”*.

The Provider notes that the top-up mortgage **brochure** referenced the term *“tracker variable rates”* however it explains that the purpose of the brochure was to provide general information to the Complainants in relation to availing of a top-up mortgage and it *“did not state that a tracker interest rate would be made available to the customers when the fixed interest rate period on their mortgage Top-Up loan ended, or at any other future date”*. The Provider states that the **Suitability Statement** referred to by the Complainants contains the term *“Tracker Variable Rate”* and that the document was *“completed after the initial discussions”* with the Complainants. The Provider notes that the Complainants did not complete the document to indicate their preferred interest rate at that time. The

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Provider submits that neither the application form nor the Suitability Statement constituted a legally binding offer of finance.

The Provider details that prior to the expiry of the fixed interest rate period, it wrote to the Complainants to notify them of the expiry of the fixed interest rate period and detailed the various fixed and variable interest rates that were available for selection by the Complainants. The Provider submits that it did not receive a response from the Complainants and therefore the interest rate rolled to a standard variable interest rate in **December 2013**.

The Provider submits that it has no record of the Complainants' telephone conversation with the Provider on **11 November 2013**. It states that its records show that it has a record of a call from **12 November 2013** and notes that the Complainants were not provided with any information in relation to the interest rate applicable to the top-up mortgage loan during that call.

The Provider submits that *"all interest rate products are subject to change and can be withdrawn"* by the Provider. It outlines that *"verbal or written confirmation guaranteeing the availability of a specific interest rate period (e.g a tracker interest rate) at a future date was not and could not have been provided"* to the Complainants by the Provider. The Provider is satisfied that the information made available to the Complainants in respect of their top-up mortgage loan was sufficiently clear and transparent as to what would transpire at the end of the fixed interest rate period. The Provider maintains that the Complainants could not have formed any reasonable expectation that their top-up mortgage loan would default to a tracker interest rate at the end of the fixed interest rate period.

The Complaint for Adjudication

The complaint for adjudication is that the Provider did not offer the Complainants a tracker variable interest rate for mortgage sub-account ending **4181(02)** on the expiry of the 5-year fixed interest rate period in **2013**.

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 29 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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation relating to mortgage loan sub-accounts ending **4181(01)** and **4181(02)**. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2008** and **2013**.

I note that the Provider issued a **Loan Offer Letter** dated **15 January 2008** for the Complainants' mortgage loan sub account ending **4181(01)** which detailed as follows:

<i>“Loan Type</i>	<i>Pro Fix 4.99% Until 311208 – ECB+1.15% Capital and Interest</i>
<i>Loan Amount</i>	<i>€300,000.00</i>
<i>Interest Rate</i>	<i>4.99%</i>
<i>Interest Type</i>	<i>Fixed</i>
<i>Term</i>	<i>29 years”</i>

The evidence shows that the Complainants signed the **Loan Acceptance** on **22 January 2008** and mortgage loan sub account ending **4181(01)** was drawn down in **February 2008**. It is clear to me that the **Loan Offer Letter** dated **15 January 2008** envisaged that a fixed interest rate of 4.99% would apply until **31 December 2008** and a tracker interest rate of ECB + 1.15% would apply thereafter. I note that mortgage loan sub account ending **4181(01)** does not form part of this complaint.

The Complainants completed an **Application Form** on **14 October 2008** seeking additional borrowings in the amount of €50,000. Under the heading “*Details of Loan Required*” of the Application Form, it detailed as follows:

<i>“Amount Required €50,000</i>	<i>Term 28 Years</i>	<i>Rate %</i>	<i>APR %</i>
<i>Type of New Loan</i>	<i>Variable</i>	<i>Fixed Rate ✓</i>	<i>Fixed Term 2 years @5.75%”</i>

The **Declaration** section of the **Application Form** stipulates the following:

“16. I/We agree that [the Provider] may refuse to proceed with this application without having to state any reasons for such refusal”.

The Complainants submit that they were informed by the Provider in **October 2008** that they had been approved for the €50,000 “*on condition that [they] fixed the top up for 5 years. The other alternative was that [they] only accept approval for €30,000 on what [their] understanding was a Tracker Rate*”. I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants during the application stage in relation to interest rate options. However, the Application Form submitted in evidence shows that the Complainants ticked the fixed rate option and indicated their preference for a 2-year fixed interest period at a rate of 5.75%. I note that there is no reference to a tracker interest rate on the application form.

The **Top- Up brochure** which accompanied the Application Form, detailed as follows under the heading “*Fixed or Tracker Variable Rate*”:

“At [the Provider] you can avail of fixed or tracker variable interest rates. This means you have the choice of whether to opt for the security of fixed repayments in order to plan your future outgoings, or variable repayments which may rise and fall in line with the European Central Bank base rate. Please ask your Loan Advisor for details”

The Provider has detailed that it withdrew its tracker interest rate products from the market at the end of **September 2008**. I accept that this was a business decision that the Provider was entitled to make at the time. I note that the information in the Top-Up brochure was detailed as being correct at time of print on “*13/06/2007*” therefore it

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seems likely that it was not updated to exclude tracker interest rates from the Provider's product offering.

I accept however that the Top-Up brochure does not form any legally binding agreement between the parties and its sole purpose is to provide information to the customers.

The Provider subsequently issued a **Top-Up Loan Offer** dated **11 November 2008** to the Complainants in respect of mortgage loan sub-account ending **4181 (02)** which details as follows:

"[The Provider] is pleased to advise that your recent application for a TOP-UP Loan has been approved at a fixed interest rate of 5.5% and now offers loan facilities on the following Terms and Conditions.

Important Information as at 11 November 2008

1. Amount of credit advanced	€50,000.00
2. Period of Agreement	28 years
3. Number of Repayment Instalments	336
4. Amount of Each Instalment until 30/11/2013	€292.35
Amount of Each Instalment until 11/11/2036	€294.49"

The reverse side of the **Top-Up Loan Offer** detailed as follows:

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

The relevant sections of the **General Conditions – Fixed/Variable Interest Rate Loan** attached to the To-Up Letter details as follows:

"5. Interest – Fixed Rate Loan

The rate of interest applicable to this loan will be fixed at a rate and for the period as specified in the loan offer. The applicant(s) on the expiry of the fixed term may by prior notice in writing to the company opt to choose a further fixed rate of interest for a certain period if such an option is made available by the Company. Where such an option is not available or if available, the applicant(s) fail to exercise the option, the interest rate applicable will be the rate of interest which may be increased or reduced by the Company from time to time and at any time (the variable interest rate) and in this respect the decision of the Company will be final and conclusively binding on the applicants(s).

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6. Interest Variation/Variable Rate Loan

The rate of interest may be varied by us during the currency of the loan by reference to prevailing market rates or commercial criteria. Notice of changes will be advised in our Branches or in the National Press or by Notice to you. Changes in the rate of interest before this Agreement becomes effective will not affect the Rate of Interest payable until Notice of change is given to you. We may vary the Amount of Each Instalment or the number of Repayment Instalments to take into account variations in the Rate of Interest and any interest variations resulting from the date of draw down."

The Complainants signed and accepted the terms of the **Top- Up Loan Offer** noting as follows:

"I/We have read and understand the terms and conditions set out above and overleaf, and HEREBY ACCEPT the loan offered on those terms and conditions and agree to be bound by them".

It is clear to me that the **Top- Up Loan Offer** envisaged that a fixed interest rate of 5.5% would apply to the mortgage loan until **30 November 2013**, and thereafter a further fixed interest rate may apply or the Provider's variable interest rate if a fixed interest rate is not available, or in the absence of selection of a fixed interest rate by the Complainants. The nature of the variable interest rate applicable to the loan is described in **General Condition 5** of the **Top- Up Loan Offer**. The variable interest rate was one that could be adjusted by the Provider at any time as opposed to a tracker variable interest rate which fluctuates in line with the European Central Bank (ECB) refinancing rate.

The Complainants submit that they contacted the Provider on **11 November 2013** and were informed that "all" of their mortgage was on the tracker variable rate. The Provider has stated that it has no record of a telephone call from that date but has provided details of a telephone call which took place on **12 November 2013**, as follows:

"[Second Complainant] called made bibit (sic) of 880.00 explained that she wanted to set up DD however made slightly higher payments to chip away at arrears(sic)"

Upon expiry of the 5-year fixed interest rate period, the Provider issued correspondence to the Complainants on **05 December 2013** which stated as follows:

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“THE FIXED RATE PERIOD ON YOUR MORTGAGE IS ABOUT TO END

Dear Customer(s)

The fixed rate period on your mortgage is coming to an end on **30/11/2013**, so now it’s time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate (APR 4.6%)**. Your monthly repayment on this rate is included in the table overleaf.

Alternatively you might choose a new variable or fixed rate. To help you make an informed decision the table below outlines the advantages and disadvantages of the default Standard Variable Rate compared to other variable and fixed rate mortgages.

Mortgage Type	Advantages	Disadvantages
Fixed Rate	<ul style="list-style-type: none"> ▪ Your monthly repayments will not change for the set fixed period which makes budgeting easier. ▪ Even if there is an increase in the ECB base rate your monthly repayments will not change. 	<ul style="list-style-type: none"> ▪ You will not benefit if there is a reduction in the ECB base rate. ▪ If you redeem a fixed rate mortgage prior to the end of the agreed term, a Fixed Rate Breakage Fee will be applied. ▪ There is a limit on the amount of overpayments/lump sum payments you can make without incurring a Fixed Rate Breakage Fee.
Standard Variable Rate	<ul style="list-style-type: none"> ▪ Your rate may decrease if general market rates decrease. ▪ There is no early repayment charge if you pay your mortgage off early. ▪ You can make unlimited regular overpayments or lump sum repayments without incurring any early repayment charge. ▪ By making overpayments or lump sum repayments you will save interest on your mortgage as well as reducing its term. 	<ul style="list-style-type: none"> ▪ As your rate is not linked to the ECB base rate, your rate can increase at any time even if there is no change in the ECB base rate. ▪ If the ECB base rate decreases your rate may not decrease.
Other Variable Rate (Disc Variable/Flexible Variable)	<ul style="list-style-type: none"> ▪ Your rate may decrease if general market rates decrease. ▪ There is no early repayment charge if you pay your mortgage off early. ▪ You can make unlimited regular overpayments or lump sum repayments without incurring any early repayment charge. ▪ By making overpayments or lump sum repayments you will save interest on your mortgage as well as reducing its term. 	<ul style="list-style-type: none"> ▪ As your rate is not linked to the ECB base rate, your rate can increase at any time even if there is no change in the ECB base rate. ▪ If the ECB base rate decreases your rate may not decrease.

”

I note that the above letter states that the fixed interest rate period was due to expire on **30 November 2013**, however the mortgage loan account statements submitted in evidence indicate that the 5-year fixed interest period expired at the end of **December 2013**. Nevertheless, this letter informed the Complainants that their mortgage loan account would default to a standard variable rate of interest unless the Complainants chose a further fixed interest rate or a new variable rate. The “Standard Variable Rate” was clearly described as a rate that is not linked to the ECB base rate and is a rate that may decrease if general market rates decrease. The letter dated **05 December 2013** enclosed a **Rate Change Letter of Authority** which detailed the range of interest rate options available

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to the Complainants to choose from. The interest rate options included a 2 -year, 3-year and 5-year fixed interest rate, various discounted variable interest rates, a flexible variable rate or a “*Standard Variable Rate Default Option (APR 4.6%)*” of 4.50%.

The standard variable rate default option was the interest referred to in the letter dated **05 December 2013**, as outlined above.

It does not appear from the evidence that the Complainants signed and returned the **Rate Change Letter of Authority** selecting an interest rate option. In the absence of an interest rate selection by the Complainants, the mortgage loan account ending **4181(02)** switched to a standard variable rate in **December 2013**.

Having considered the loan documentation in its entirety, it is clear to me that that there was no contractual entitlement to a tracker interest rate in the mortgage loan agreement in relation to mortgage loan sub-account ending **4181(02)**.

The fact that the Provider offered the Complainants a tracker interest rate for mortgage loan account ending **4181(01)** in **January 2008** did not create an obligation (contractual or otherwise) on the Provider to offer or provide a tracker interest rate to the Complainants on mortgage loan account ending **4181(02)** in **November 2008**. It is important to note that each mortgage loan held by the Complainants with the Provider is governed by the terms and conditions applicable to that particular mortgage loan. The fact that both of the Complainants’ mortgage loans were secured on the same property did not entitle the Complainants to the same interest rates on both mortgage loan accounts.

Moreover, it is clear from the **Top-Up Application Form** completed by the Complainants that they chose to apply for a fixed interest rate and the Provider subsequently offered the Complainants a fixed interest rate in **Top-Up Loan Offer**, the terms of which the Complainants accepted. The terms and conditions of the **Top-Up Loan Offer** clearly detailed that the mortgage loan would commence on a 5-year fixed interest rate with a further fixed interest rate or variable interest rate to apply thereafter. I am of the view that the mortgage loan agreement for the top-up loan amount did not contain any provision that could have led the Complainants to reasonably believe that a tracker interest rate would be applied to mortgage loan account ending **4181(02)** on the expiry of the fixed interest rate period, or indeed at any point in the lifetime of the loan. I am satisfied that the interest rate options offered to the Complainants in the **Rate Change Letter of Authority** that issued in **December 2013**, on the expiry of the fixed interest rate period, were in line with the terms and conditions of the **Top-Up Loan Offer**.

It is important for the Complainants to be aware that the Provider was under no obligation to offer them a top-up mortgage loan in **2008**. It was a matter for the Provider to decide

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firstly, if it was willing to offer the Complainants any additional borrowings at the time and secondly, how that offer would be structured.

The evidence shows that the choice to take out both mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants. If the Complainants were not satisfied with the terms of the **Top-Up Loan Offer** to include the applicable interest rate and what would transpire at the end of the fixed interest rate period, the Complainants could have decided not to accept the Provider's loan offer. However, the Complainants accepted the Provider's offer by agreeing to the terms of the **Top-Up Loan Offer on 12 November 2008**.

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.



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

22 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

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(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

