



<u>Decision Ref:</u>	2022-0288
<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

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €250,000.00 and the term of the loan was 30 years. The Loan Offer dated **30 September 2005** provided for a 5-year fixed interest rate of 3.75%.

The Complainants' Case

The Complainants submit that they were only given *"the option of a fixed or variable rate"* when they applied for their mortgage loan in **September 2005**, even though the Provider *"still had tracker mortgages available."* The Complainants state that the Provider *"never offered a tracker mortgage"* interest rate option to them.

The Complainants detail that they would *"of course"* have chosen to apply a tracker interest rate on their mortgage loan if it had been offered to them by the Provider. The Complainants further detail that if a tracker interest rate had been applied to their mortgage loan, the monthly repayments would have been €850.00 per month *"as opposed to €1,250 per month"* on the fixed interest rate.

The Complainants submit that they “*had to pay the higher interest rates*” because the Provider did not offer them a tracker interest rate. The Complainants state that they feel that the Provider “*kept*” tracker rate mortgage products from them.

In response to the Provider’s submission that “*the tracker product was available to [them] but only if [they] asked for it*”, the Complainants submit they have spoken to a number of people who are on tracker interest rates and have been told that tracker interest rates were given as an “*option by their provider as they were available.*”

The Complainants are seeking a refund of overpaid interest in the amount of €67,200.00 which they state represents the difference between the amount of interest that they paid on a fixed interest rate and the amount of interest that they would have paid if they were on a tracker interest rate.

The Provider’s Case

The Provider submits that the Complainants completed and signed a home loan application form on **15 September 2005** which contained variable, fixed, and split mortgage interest rate options.

The Provider submits that the home loan application form in use at the time of the Complainants’ mortgage loan application “*had not been updated to reflect the introduction of Tracker interest rates*”. The Provider states that the interest rates on offer “*would have been explained to the Complainants during the mortgage application process as part of the Bank’s standard practice*”. The Provider states however that it “*is not the practice or policy of the Bank to offer advice to customers on interest rates, including for example the appropriateness of any particular interest rate type for any particular customer*”.

The Provider outlines that the Complainants did not indicate their preference for a particular interest rate on the home loan application form which they signed on **15 September 2005**. However, the Provider explains that the Complainants “*did demonstrate their preference for a Fixed rate by completing and signing the Fixed Rate Mortgage Declaration form on 22 September 2005*”. In this regard, the Provider states that the Complainants chose to apply for a 5-year fixed interest rate of 3.75%.

The Provider submits that a Loan Offer was issued to the Complainants on **30 September 2005** for a loan amount of €250,000.00 repayable over a term of 30 years on a 5-year fixed interest rate of 3.75%. The Provider states that the Complainants accepted and signed the

/Cont’d...

terms and conditions of the Loan Offer and mortgage loan account ending **9773** was drawn down on **22 December 2005** on a 5-year fixed interest rate of 4.20%.

The Provider explains that the fixed interest rate had increased after the loan offer issued and before the Complainants had signed their acceptance of the loan offer.

The Provider details that upon the expiry of the 5-year fixed interest rate period on **31 December 2010**, mortgage loan account ending **9773** converted to the *"variable base interest rate"*.

The Provider explains that it introduced tracker interest rates as part of its mortgage product offering in **early 2004**. The Provider notes that tracker mortgages were widely available to new and existing home loan customers until **late 2008**, when the Provider withdrew its tracker interest rates from the market. The Provider submits that if the Complainants wished to apply for a tracker interest rate when they first approached the Provider in **2005**, they *"could have applied for a Tracker interest rate by completing a separate 'Application To Apply For A Tracker Mortgage Rate' form and this would have been explained to the Complainants"*. The Provider also submits that the Complainants *"could have applied for a Tracker interest rate ...at any time thereafter until [late] 2008"*. The Provider asserts that it *"has no record of the Complainants having requested a Tracker rate or having made any application for a Tracker interest rate to be applied to their Mortgage Loan Account ending 9773."*

The Provider details that when the Complainants applied for their mortgage, the *"full range of interest rate options were publicly advertised on the Bank's website and in all of the Bank's Branches and was available, upon request, from the Bank's staff"*. The Provider submits that *"the decision as to which rate to opt for rested solely with the Complainants and they applied for the 5-year Fixed Rate, by completing and signing the Fixed Rate Declaration."*

The Provider states that it is *"satisfied that the documentation relating to the Complainants' Mortgage Home Loan Account ending 9773 was sufficiently clear and transparent as to their interest rate entitlements."* The Provider further submits that the Complainants' mortgage loan documentation did not provide them with any contractual entitlement to a tracker interest rate on their mortgage loan account on drawdown or at any time during the term of the mortgage loan.

The Complaint for Adjudication

The complaint is that the Provider incorrectly failed to advise and/or offer the Complainants the option of a tracker interest rate when they applied for their mortgage loan in **September 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 do 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 are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **14 July 2022** outlining the preliminary determination of this Office 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 the Preliminary Decision, the Complainants made a further submission, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

Having considered the Complainants' additional submission and all of the submissions and evidence furnished to this Office by the parties, I set out below my final determination.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to

/Cont'd...

consider details of certain interactions between the Complainants and the Provider in **2005**.

The Complainants completed and signed a **Home Loan Application Form** on **15 September 2005**. **Section E** of the **Home Loan Application Form** is titled "*Loan Details*" under which the "*Loan Type*" is detailed as follows:

"LOAN TYPE (please tick one)	<i>Repayment/Annuity</i> ✓	<i>Endowment</i>	<i>Pension</i>
INTEREST RATE	* <i>Variable</i>	or	** <i>Fixed</i> or <i>Split</i>

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

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

The Complainants did not select which interest rate type they wanted to seek for their mortgage. However, the Complainants subsequently completed and signed an **Application for a Fixed Rate Mortgage** on **22 September 2005** which detailed as follows:

"I/We wish to apply for a fixed rate of 3.75% for the first 5 year(s) of my/our mortgage.

I/We understand that when this fixed rate period has expired the loan will convert to the applicable variable rate then prevailing. The variable interest rate basis will be specified in the loan offer letter issued by [Provider] (If the loan is approved)."

The evidence shows that tracker interest rates were introduced by the Provider in **mid-2004** and were available for selection by customers subject to certain eligibility and lending criteria until they were withdrawn by the Provider in **late 2008**. This was information that was publicly available in the Provider's branches and on its website therefore I do not accept the Complainants' comments that the Provider was "*hiding the fact that the rate was available*". The Provider has submitted the below table in evidence which details the range of tracker interest rates that were on offer to existing customers between **March 2005** and **September 2005**, during which time the Complainants applied for their mortgage loan. These tracker interest rate options were subject to certain eligibility and lending criteria.

/Cont'd...

Tracker Interest Rate Offerings to New Customers									
Effective Date		Loan Amount	>=450k						
01/03/2005	ECB: 2.00%	Loan Amount	Standard Tracker	>=€250k	>=€300k	>=€375k			
		LTV %	<=100%	<=75%	<=75%	<=75%			
		Margin	1.25%	1.10%	1.05%	0.99%			
		Rate	3.25%	3.10%	3.05%	2.99%			
05/05/2005	ECB: 2.00%	Loan Amount	Standard Tracker	>=€250k	>=€300k	>=300k	>=€375k	>=750k	
		LTV %	<=100%	<=75%	<=75%	>75%	<=75%	<=75%	
		Margin	1.25%	1.10%	1.05%	1.15%	0.99%	0.85%	
		Rate	3.25%	3.10%	3.05%	3.15%	2.99%	2.85%	
09/06/2005	ECB: 2.00%	Loan Amount	Standard Tracker	>=€250k	>=€300k	>=300k	>=€375k	>=750k	>=1.25m
		LTV %	<=100%	<=75%	>75%	<=75%	<=75%	<=75%	<=75%
		Margin	1.25%	1.10%	1.15%	1.05%	0.99%	0.85%	0.80%
		Rate	3.25%	3.10%	3.15%	3.05%	2.99%	2.85%	2.80%
23/08/2005	ECB: 2.00%	Loan Amount	Standard Tracker	>=250k <300k	>=300k <375k	>=300k no max	>=375k <750k	>=750k <1.25m	>=1.25m
		LTV %	<=100%	<=75%	<=75%	>75%<=92%	<=75%	<=75%	<=75%
		Margin	1.25%	1.10%	1.05%	1.15%	0.99%	0.85%	0.80%
		Rate	3.25%	3.10%	3.05%	3.15%	2.99%	2.85%	2.80%
07/09/2005	ECB: 2.00%	Loan Amount	Standard Tracker	>=250k <300k	>=300k <375k	>=250 no max	>=375k <750k	>=750k <1.25m	>=1.25m
		LTV %	<=100%	<=80%	<=80%	>80% <=92%	<=80%	<=80%	<=80%
		Margin	1.25%	1.10%	1.05%	1.15%	0.99%	0.85%	0.80%
		Rate	3.25%	3.10%	3.05%	3.15%	2.99%	2.85%	2.80%

It was therefore open to the Complainants to explore the option of applying a tracker interest rate to their mortgage loan account in **2005** when they applied for their mortgage loan. However, I have not been provided with any evidence to suggest that the Complainants made enquiries about the Provider’s tracker interest rate offerings at the time. Further, there is no evidence to suggest that the Complainants completed an “Application to Apply for A Tracker Mortgage Rate form” which appears to have been required if the Complainants wished to apply for a tracker interest rate. Even if the Complainants did specifically apply for a tracker interest rate in **2005**, it was entirely within the Provider’s commercial discretion as to whether it wished to accede to the Complainants’ request and offer the Complainants a mortgage loan on a tracker interest rate.

The Complainants, in their post Preliminary Decision submission dated **29 July 2022**, submit that “it was not financially viable for [the Provider] to offer tracker rates to their customers. So they did not make it clear that they were available to [them]”. There is no evidence to support the Complainants’ submission in this respect.

The Provider subsequently issued a **Loan Offer** dated **30 September 2005** to the Complainants which details as follows:

“I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €250,000.00 towards the purchase of the above property at a cost of €348,500.00 subject to the following terms and the attached General Conditions.

Type of loan:
 Total Amount of loan: €250,000.00
 ...
 Interest Rate (Yrs 1-5): 3.75% (See Important Note)
 After 5 years: Variable Base (currently 03.25%)
 Repayment Period (Years): 30 Approx.

/Cont’d...

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. (See General Conditions – 9)”

General Condition 3 of the Provider’s **General Conditions for Home Loans** details as follows:

*“**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.”*

General Condition 9 of the Provider’s **General Conditions for Home Loans** details as follows:

*“**Fixed Rate Loans:** When the fixed rate period ends, the interest will convert to a variable interest rate and if [the Provider] is then offering a Fixed Home Loan rate for a defined period the borrower may opt to convert to a fixed rate for that period, and defer conversion to a variable rate...”*

I have not been provided with the Complainants’ signed acceptance of the **Loan Offer** dated **30 September 2005**, however, it does not appear to be in dispute between the parties that the Loan Offer was accepted and signed by the Complainants. The evidence shows that the Complainants drew down the mortgage loan on **22 December 2005** on a fixed interest rate of 4.2%

The **Loan Offer** dated **30 September 2005** envisaged that a 5-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 Complainants’ mortgage loan documentation made no reference to varying in accordance with variations in the European Central Bank main refinancing rate. The evidence shows that a 5-year fixed interest rate of 4.2% applied to the Complainants’ mortgage loan account until **December 2010**. By way of letter from the Provider dated **07 December 2010**, the Complainants were given the option to convert their mortgage loan to a variable interest rate of 3.83% in line with **General Condition 9** and they were also given the option to contact the Provider to apply for a further fixed interest rate. The mortgage loan account statements submitted in evidence show that the applicable interest rate changed from a fixed interest rate of 4.2% to a variable interest rate of 3.83% on **31 December 2010**.

/Cont’d...

The Complainants submit that the Provider did not offer them the option of and/or advise them on tracker interest rate options when they applied for their mortgage loan in **2005**. The Complainants, in their post Preliminary Decision submission dated **29 July 2022**, state that *“There was no mention of a tracker rate”* and that they would have *“taken the rate if [they] were told about it”*. In this regard, while I appreciate that tracker interest rates were on offer generally by the Provider as part of its suite of mortgage products in **September 2005** when the Complainants applied for their mortgage loan, there was no contractual or regulatory obligation on the Provider to provide the Complainants with information on tracker interest rates at that time. Equally, there was no contractual or other obligation on the Provider to inform the Complainants as to the availability of a tracker interest rate or offer the Complainants a tracker interest rate on their mortgage loan.

It was entirely a matter for the Complainants to decide which interest rate best suited their needs and circumstances. If the Complainants wanted to seek a tracker interest rate, they could have discussed the tracker interest rate offering with the Provider. Further, if the Complainants wanted independent advice about interest rates available in the market in **2005**, in particular tracker interest rates, it was a matter for the Complainants to obtain that advice from an independent third-party advisor. The Provider was under no obligation to offer the Complainants advice with respect to interest rates.

The evidence shows that the Complainants applied for a fixed interest rate and the Provider issued a **Loan Offer** to the Complainants offering a 5-year fixed interest rate on foot of their request. The Complainants accepted the terms of the **Loan Offer** by drawing down the mortgage loan in **December 2005**. If the Complainants were not satisfied with the terms and conditions of the **Loan Offer** dated **30 September 2005** to include the applicable interest rate, the Complainants could have sought an alternative interest rate from the Provider before drawing down the loan or indeed with another mortgage provider. However, they did not do so.

For the reasons set out in this Decision, I do not uphold the complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

/Cont'd...



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

26 August 2022

PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.