



<u>Decision Ref:</u>	2022-0297
<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' principal private residence.

The loan amount was €50,000.00 and the term of the loan was 20 years. The **Loan Offer** dated **28 May 2008** detailed that the loan type was a standard variable interest rate of 5.33%.

The Complainants' Case

The Complainants outline that they drew down mortgage loan account ending **1080** in **December 2003** on a standard variable interest rate. The Complainants submit that in **2006** they applied for a top-up loan to extend and renovate their house. The Complainants further submit that in **2007** they asked a staff member of the Provider for a *"tracker rate to be applied to both these mortgages (the mortgage we took in 2003 and the top-up we took in 2007)"*. The Complainants state that the Provider *"agreed"* to apply a tracker interest rate to both mortgage loan accounts ending **1080** and **4659**.

The Complainants submit that in **May 2008** they applied for a further top-up mortgage loan with the Provider (mortgage loan account ending 8964). The Complainants outline that the purpose of the top-up loan was to refinance a short-term debt and for home improvements.

The Complainants outline that the Provider *“claimed that all rates were available to us and that we had chosen the variable rate.”* The Complainants state that *“this was clearly not the case as a tracker rate was not offered on the loan application form.”* The Complainants contend that during the application process for the top-up mortgage, the *“only options”* available were fixed and variable interest rate options. The Complainants assert that the Provider did not offer a suite of interest rates, *“despite [the Provider] offering trackers in May 2008.”*

The Complainants refute that the Provider *“never offered Top[-up] Loans at a Tracker rate”* as they held another top-up mortgage loan on a tracker interest rate.

The Complainants contend that they had an entitlement to information on all mortgage products, and that the Provider was obliged to provide them with the necessary information to make an informed decision on the product which best met their needs.

The Complainants are seeking the following:

- (a) A tracker interest rate to be applied to mortgage loan account ending **8964**; and
- (b) A refund of any overpaid interest on mortgage loan account ending **8964** since the drawdown of the mortgage loan in **2008** to present.

The Provider’s Case

The Provider details that the Complainants applied for a top-up mortgage loan in the amount of €50,000.00 in **May 2008**. The Provider submits that the Complainants signed an Application Form on **27 May 2008** which contained variable and fixed interest rate options. The Provider submits that the Complainants selected a variable interest rate option.

The Provider submits that it issued a Loan Offer to the Complainants on **27 May 2008** for a loan amount of €50,000.00 repayable over a term of 20 years, with a standard variable interest rate of 5.33% applying to the mortgage loan account. The Provider notes that the Loan Offer was signed by the Complainants and witnessed by their solicitor on **06 August 2008**.

The Provider submits that it sent correspondence to the Complainants on **05 August 2008**, confirming the first tranche of the mortgage loan had been issued. The Provider states that the interest rate detailed in this letter was a standard variable interest rate of 5.88%. The Provider outlines that the remaining balance of the mortgage loan was drawn down on **02 February 2009**.

The Provider states that the mortgage loan product that was selected by the Complainants was *“only offered on either the Bank’s Variable interest rate or a Fixed interest rate”* at the application stage. The Provider asserts that *“there was no obligation on the Bank to specifically offer Tracker interest rates on Top Up Loans.”* The Provider outlines that *“if a customer requested a Tracker interest rate, the bank would assess this request on a case by case basis and if granted, it was at the Bank’s commercial discretion.”* The Provider explains that *“the approval of a Tracker interest rate on Top Ups would have been the exception rather than the norm.”*

The Provider submits that the mortgage loan documentation in relation to mortgage loan account ending **8964** did not contain a contractual entitlement to a tracker interest rate at any time during the term of the mortgage loan. The Provider submits that its obligation to the Complainants was to honour the terms set out in the mortgage loan documentation, which the Provider maintains that it did and continues to do. In addition, the Provider submits that *“the Bank’s staff provide information regarding all rates that are available to customers, both at application stage and separately during the lifetime of Loans as requested.”*

The Provider submits that the option to apply for a tracker interest rate was available to the Complainants from when they applied for the mortgage loan, until tracker interest rates were withdrawn by the Provider in **late 2008**. The Provider maintains that there is no evidence on its file that demonstrates that the Complainants applied for or enquired about tracker interest rates at any time before receiving the Complainants’ complaint in **2017**, at which stage tracker interest rates had been withdrawn.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on their mortgage loan when the Complainants applied for and subsequently drew down the mortgage loan under mortgage loan account ending **8964** in **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 Complainants were given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **05 August 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.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this Office is set out below.

In order to determine this complaint, it is necessary to set out and consider the Complainants’ mortgage loan documentation in relation to mortgage loan account ending **8964**. It is also necessary to consider certain interactions between the Provider and the Complainants in **2008**.

The Complainants completed a **[name of product] Loan Application Form**, which was signed by the Complainants on **27 May 2008**. The section titled “*Loan*” of the **[name of product] Loan Application Form** detailed as follows:

“Loan

Total Loan Amount €50,000

Term of Loan 20 years

Interest Type: Variable Rate

 X

Fixed Rate

Years

“

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The **[name of product] Loan Application Form** shows that a variable interest rate was chosen. It is clear that the Complainants could have chosen a variable interest rate or a fixed interest rate on the Application Form.

The Provider issued a **Loan Offer** to the Complainants dated **28 May 2008**, which detailed as follows:

"I am pleased to inform you that [the Provider] [name of product] Loan of €50,000.00 has been approved for you on the following terms:

<i>Loan Amount</i>	<i>€50,000.00</i>
<i>Loan Term</i>	<i>20 years</i>
<i>Interest Rate (Variable)</i>	<i>5.33%"</i>

The **Loan Terms and Conditions** section of the **Loan Offer** details as follows:

"[...]

Interest Rate

The rate of interest applicable to the loan will be the rate prevailing on the date the loan is issued. The rate of interest quoted on this loan offer is the relevant rate prevailing at today's date, and may change before the loan is issued. [Provider] reserves the absolute right to increase or decrease the rate of interest at its discretion...

[...]

Original Home Loan

Home Loan Terms and Conditions apply to this loan."

General Condition 3 of the **General Conditions for [the Provider] Home Loans** provided 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."*

The Complainants signed the **Acceptance** section of the **Loan Offer** on **06 June 2008** on the following terms:

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"I/We, the undersigned, accept the offer of advance made to me/us by [The Bank] on the terms and conditions set out in this offer letter and the existing terms and conditions applicable to my home loan."

The Provider issued a letter to the Complainants dated **05 August 2008** which states as follows:

"I am pleased to inform you that your first drawdown of €25,000 from your [name of product] Loan has been issued.

...

Your [name of product] Loan is as follows:

<i>Total Loan Amount</i>	<i>€50,000.00</i>
<i>Remainder to Drawdown</i>	<i>€25,000.00</i>
<i>Loan Term</i>	<i>20 years</i>
<i>Interest Rate (Variable)</i>	<i>5.88%</i>

It is clear that the **Loan Offer** dated **28 May 2008** envisaged that a variable interest rate would apply to the Complainants' mortgage loan account. The variable 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. Rather, the Provider could increase the applicable variable interest rate at its discretion. There is no evidence to suggest that the Complainants approached the Provider prior to the drawdown of the mortgage loan to seek to amend the applicable variable interest rate on the mortgage loan. The **mortgage loan statements** provided in evidence indicate that the loan was drawn down in two stages on **05 August 2008** on an interest rate of 5.88% and on **02 February 2009** on an interest rate of 3.63%.

The Complainants are of the view that the Provider failed to offer them a tracker interest rate when they applied for their top-up mortgage loan in **May 2008**. The Provider explains that it did not offer tracker interest rates in relation to the mortgage loan product that the Complainants applied for in **May 2008**. The Provider submits that customers availing of this particular product were offered fixed and variable interest rate options. While the Complainants may have requested that a tracker interest rate be applied to other mortgage loans held with the Provider and the Provider acceded to these requests, it is important to note that each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that the Complainants may have requested and applied a tracker interest rate on another mortgage loan account held with the Provider, has no bearing on the Complainants' interest rate entitlements in relation to

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mortgage loan account ending **8964** or the Provider's obligations to offer them a tracker interest rate.

It appears that tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainants applied for their mortgage loan in **2008**, however, the Provider made a business decision to not offer tracker interest rates in respect of top-up mortgage loans being incepted at that time. In this regard, this Office accepts that the Provider operates as a business and is entitled to set interest rate options for products at its absolute discretion. Therefore, the Provider was under no obligation to provide the Complainants with information on the tracker interest rate offering or offer a tracker interest rate to the Complainants during the mortgage loan application process or upon the drawdown of the mortgage loan.

While it was open to the Complainants to explore the tracker interest rate offering with the Provider, it would have been a matter of commercial discretion on the part of the Provider whether to accede to any such request to apply a tracker interest rate to the top-up mortgage loan product. There is no evidence or documentation to suggest that the Complainants approached the Provider requesting the option of a tracker interest rate at the time of their mortgage loan application in **May 2008** or at the drawdown of the mortgage loan in **August 2008**.

Having considered the Complainants' mortgage loan documentation, it is clear to me that the Complainants applied for a variable interest rate mortgage loan in **May 2008** having completed the **[name of product] Loan Application Form**. The Provider subsequently offered them a variable interest rate by way of **Loan Offer** dated **28 May 2008** which was accepted and signed by the Complainants on **06 June 2008**. The choice as to which interest rate to apply for, rested solely with the Complainants. If it was the case that, upon considering the particulars of the **Loan Offer** dated **28 May 2008**, the Complainants were of the view that a variable interest rate loan was not suitable to them, then the Complainants could have decided not to sign the **Acceptance** and draw down the loan in **August 2008**. Instead, they could have sought an alternative interest rate with the Provider or with another mortgage provider. However, they did not do so.

For the reasons outlined above, 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.

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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.



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

31 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

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

