



<u>Decision Ref:</u>	2020-0023
<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

Background

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

The Letter of Approval detailed that the loan amount was €133,500 and the term was 20 years. The Letter of Approval which was signed on **19 July 2006** outlined the loan type as "*1 Year Fixed Rate Home Loan*". The Complainants drew down €128,500 on 28 July 2006.

The Complainants' Case

The Complainants' submit that the mortgage loan account automatically defaulted to a tracker variable rate at the end of their initial one-year fixed rate period on **28 July 2007**. The Complainants signed an options form selecting a four-year fixed interest rate period in July 2007. The options form is dated **23 July 2007** and was received by the Provider on **31 July 2007**.

The Complainants outline that when they "*changed*" from a tracker interest rate to a fixed interest rate that they were not advised by the Provider to seek "*legal or financial advice*".

The Complainants submit that the Provider also failed to “clarify” that their mortgage loan would not go back to a tracker interest rate when the fixed interest rate period expired.

When the 4 year fixed interest rate period expired in **July 2011**, the Complainants submit that they were not offered the option of applying a tracker interest rate to the mortgage loan account.

The Complainants are seeking to have the tracker interest rate reinstated to their mortgage loan account, from July 2011 when the 4 year fixed rate period expired.

The Provider’s Case

The Provider submits that the Complainants’ mortgage loan was drawn down on **28 July 2006**, in the amount of €128,500 at a 1 year fixed rate of 3.95%.

The Provider details that the Complainants signed their Acceptance of Loan Offer with the benefit of legal advice on **19 July 2006** and had confirmed that their solicitor had explained the terms and conditions of the loan to them.

The Provider states that the Loan Offer did not contain a contractual entitlement to a tracker rate at the end of the initial fixed rate period, or at any subsequent time during the term of the loan. The Provider relies on **Special Condition A** of the Complainant’s **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** to support this.

The Provider submits that from **mid-2006**, it offered a tracker interest rate as one of the options listed in the options letters issued to existing mortgage customers of the Provider on the expiry of fixed rate periods, including customers who did not have a contractual entitlement to such an option. The Provider outlines that from **mid-2006** until **mid-2009**, the options letters stated that, in the absence of a customer selection, the tracker interest rate was the default rate which would be applied to the mortgage.

Prior to the expiry date of the Complainants’ initial one-year fixed rate period on **26 July 2007**, the Provider issued an options letter and form to the Complainants, with a list of the then current available interest rates. The Provider states that as it had not received the Complainants’ completed rate options form by **27 July 2007**, the interest rate on the mortgage loan account defaulted to a tracker rate of 4.80% (ECB + 0.80%) in line with the Provider’s policy during that period. The Provider submits that the Complainants’ signed rate options form, dated **23 July 2007**, was received by the Provider on **31 July 2007**, and the Provider changed the interest rate from a tracker interest rate to the fixed interest rate selected by the Complainants on that date.

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The Provider outlines that it did not inform the Complainants in **2007** that by opting for the 4-year fixed rate, they would not be able to avail of the tracker interest rate at the end of the 4-year fixed rate period, as it was not in a position to provide such information to the Complainants in July 2007. The Provider submits that it may from time to time introduce or withdraw products or interest rates and it would not be in a position to know in advance what interest rates or products it would be offering at a later stage. The Provider details that it provided sufficient information to the Complainants in respect of their rate options in July 2007 and that the decision as to which product to choose is for each individual customer to make.

The Provider outlines that the 4-year fixed interest rate period chosen by the Complainants was due to expire on **28 July 2011** and the Provider issued an options letter to the Complainants on **8 July 2011**, containing fixed and variable rates.

The Provider submits that, it ceased offering tracker rates to customers maturing from fixed rates and discount rates as of **mid-2009** unless the customer had a contractual entitlement to a tracker rate. It submits that as the Complainants did not have a contractual entitlement to a tracker rate at any point during the term of their loan, the Provider did not offer a tracker rate as an option on the interest rate options form in **July 2011**.

The Complaints for Adjudication

The complaints for adjudication are that the Provider failed to inform the Complainants in **July 2007** when they opted for a fixed interest rate that they would not be able to “revert” to a tracker interest rate when the fixed period expired, the Provider failed to advise the Complainants to seek legal or financial advice when they switched rates in **July 2007** and the Provider failed to offer the Complainants a tracker interest rate in **July 2011** when the fixed interest rate period expired.

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.

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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 **3 January 2020**, 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.

The issues to be determined are whether the Provider failed to inform the Complainants in **July 2007** when they opted for a fixed interest rate that they would not be able to “revert” to a tracker interest rate when the fixed period expired, failed to advise the Complainants to seek legal or financial advice when they switched rates in **July 2007** and failed to offer the Complainants a tracker interest rate in **July 2011** when the fixed interest rate period expired. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainants’ mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between 2006 and 2011.

The Letter of Approval dated **13 July 2006** details as follows;

“Loan Type:	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 320,000.00</i>
<i>Loan Amount:</i>	<i>EUR 133,500.00</i>
<i>Interest Rate:</i>	<i>3.95%</i>
<i>Term:</i>	<i>20 year(s)</i>

The **Special Conditions** to the Letter of Approval detail as follows;

“Special Conditions

- A. *GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 “CONDITIONS RELATING TO FIXED RATE LOANS” APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE.”*

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General Condition 5 of the **General Mortgage Loan Approval Conditions** outline;

- “5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- 5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:*
- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*
 - (b) A sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.*
- 5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to variable rate loan agreement which will carry no such redemption fee.”*

The **General Mortgage Loan Approval Conditions** also outline;

IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **19 July 2005**. The Acceptance of Loan Offer states as follows:

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- “1. I/we the undersigned accept the within offer on the terms and conditions set out in*
- i. Letter of Approval*
 - ii. the General Mortgage Loan Approval Condition*
 - iii. [the Provider’s] Mortgage Conditions.*
- copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*
- ...
- 4. My/our Solicitor has fully explained the said terms and conditions to me/us.”*

It is clear to me that the Letter of Approval envisaged a one-year fixed rate of 3.95% and thereafter the option of a variable rate. The variable rate, in the Complainants’ mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to them by their solicitor.

The Provider states that it issued a letter and rate options form to the Complainants prior to the expiry of the one-year fixed rate period in **July 2007**. The Provider has only submitted a copy of a *“template options letter as sent to the Complainants in or around July 2007 with the options form”*.

It is disappointing that the Provider has failed to furnish a copy of the options letter that issued to the Complainants. Furthermore it is disappointing that the Provider has failed to offer any explanation to this office as to why it does not hold a copy of this documentation in its records.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from 01 July 2007) and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

- “A regulated entity must maintain up-to-date consumer records containing at least the following*
- a) a copy of all documents required for consumer identification and profile;*
 - b) the consumer’s contact details;*
 - c) all information and documents prepared in compliance with this Code;*
 - d) details of products and services provided to the consumer;*
 - e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
 - f) all documents or applications completed or signed by the consumer;*

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- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

The Complainants’ mortgage loan was incepted for a term of **20 years** commencing from **July 2006** and the options letter purportedly issued in **July 2007**. There is no indication that the mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to this office, in the absence of any explanation, why this documentation has not been held by the Provider.

In any event, it is not in dispute between the parties that an options letter issued to the Complainants in or around **July 2007**, in the same form as the template letter provided in evidence to this office.

The template letter which has been supplied in evidence details as follows;

*“I am writing to remind you that the current rate option on your mortgage account will end on **DATE**.*

Please find attached the current options available to you, including our competitive tracker variable rate. In calculating the new tracker rate we use the original loan amount to calculate your balance band and we use your current balance and the original valuation of your home to calculate the loan to value.

*If we do not receive a written instruction from you in relation to the above on or before the **DATE**, we will automatically default your loan to the tracker variable rate.*

We value your business highly at [the Provider] so if you have any questions regarding your options. Please contact our dedicated mortgage team on [Contact Number]. They will be happy to help you.”

The **options form** outlined as follows;

“Current options available

You may only select one option.

Account number: XXXXXXXXX

		<i>Monthly Repayment EUR</i>
<i>Tracker variable rate</i>	<i>- Currently 4.80%</i>	<i>910.73</i>
<i>(ECB + maximum 0.8000%)*</i>		
<i>Standard variable rate</i>	<i>- Currently 5.35%</i>	<i>948.31</i>
<i>1 year fixed rate</i>	<i>- Currently 5.35%</i>	<i>948.31</i>
<i>2 year fixed rate</i>	<i>- Currently 5.55%</i>	<i>962.20</i>
<i>3 year fixed rate</i>	<i>- Currently 5.60%</i>	<i>965.69</i>
<i>4 year fixed rate</i>	<i>- Currently 5.50%</i>	<i>958.72</i>
<i>5 year fixed rate</i>	<i>- Currently 5.60%</i>	<i>965.69</i>
<i>7 year fixed rate</i>	<i>- Currently 5.60%</i>	<i>965.69</i>
<i>10 year fixed rate</i>	<i>- Currently 5.60%</i>	<i>965.69</i>

....

- Please note if you chose a fixed rate, the standard fixed-rate conditions will apply (see over the page)*
- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 0.8000% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.”*

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading **“Fixed Rate Loans”**. Under the heading **“Tracker Mortgage Loans”** the reverse of the rate options form contained the following;

“1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

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3. *If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.*

4. *If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate."*

The Complainants signed the options form on **23 July 2007** electing to apply the 4 year fixed interest rate of 5.50%. The Provider did not receive the completed options form until **31 July 2007**, and as such the Complainants' mortgage loan defaulted to the tracker variable rate of ECB + 0.80% (4.80%) on **28 July 2007**. When the Provider received the completed options form on **31 July 2007**, the four year fixed interest rate requested by the Complainants' was applied on that date.

The Provider wrote to the Complainants on **01 August 2008** detailing as follows;

"I acknowledge receipt of your acceptance of [the Provider's] loan offer and confirm that the rate of interest applicable to your loan account has been switched from a tracker rate to a fixed rate for 4 year(s) at 5.500%."

On the basis of the above it appears that the tracker rate of 4.80% (ECB + 0.8%) was applied to the Complainants' mortgage loan account from **28 July 2007** to **31 July 2007**.

The Provider has summarised its policy on its tracker interest rate offering as follows;

"...[in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest and whose contract did not specify an entitlement to be offered a tracker rate at maturity. From that date, until [mid] 2009, the Bank's rate options letter sent automatically to such customers prior to expiry of a fixed rate period included a tracker variable rate. This initiative was taken against the backdrop of the competitive mortgage market at that time. Between [...] 2006 and [...] 2006 while the options listed in the options letter included the offer of a tracker interest rate, the letter stated that, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, options letters stated that, in the absence of a customer selection, the listed tracker variable rate was the rate which would be applied to the mortgage as the default.

While the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008, the Bank continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts

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did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.

After [mid] 2009, the Bank continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to same."

Having considered the mortgage loan documentation, it is my view that that the Complainants did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from **July 2006 to July 2007**. It appears that the Provider, in line with its own policy at the time, offered the Complainants a tracker interest rate and applied the tracker interest rate of 4.80% (ECB + 0.8%) as the default rate on **31 July 2007**.

The Complainants submit that the Provider failed to "*clarify*" with them that their mortgage loan would not go back to a tracker interest rate when the four year fixed interest rate period expired and that the Provider failed to advise them to seek legal or financial advice when they switched interest rates in July 2007.

In the circumstances of this complaint I do not accept that there was an information failing on the part of the Provider in July 2007. The Complainants were informed in the letter that accompanied the options form that the mortgage loan would default to the tracker variable rate, if the Complainants did not select an alternative rate. The Complainants however did select an alternative, the 4 year fixed interest rate option. The mortgage loan only defaulted to the tracker interest rate because the fixed interest rate instruction signed on **23 July 2007**, had not yet been received by Provider. The Complainants' instruction to apply the fixed interest rate was actioned by the Provider on receipt of the form on **31 July 2007**.

The reverse side of the options form which the Complainants signed on **23 July 2007**, contained detail about the tracker interest rate offering, such that the Complainants could have made an informed decision as to which interest rate to choose at the time. The Provider had set out in a clear and comprehensible manner that the interest rate applicable to a tracker mortgage loan is made up of "*the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate*". As such, the Complainants ought to have been aware that, in circumstances where they opted for the tracker interest rate, the percentage of 0.8% would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank. There was no obligation on the Provider to advise the Complainants that they should seek independent advice with respect to the rate options made available to them by the Provider at the time. I further note that the Provider had indicated in the letter that enclosed the options form that they could contact the Provider if they had any questions regarding the options. The

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Complainants did not contact the Provider to ask any questions about their options at the time.

The Complainants of their own volition decided not to choose the option at a tracker interest rate of ECB + 0.8% (4.80%) at the time and instead selected the higher four year fixed interest rate offered (5.50%). The rate options form clearly outlined that the options outlined were the “*current options available*” and that if the Complainants chose a “*fixed rate, the standard fixed-rate conditions will apply*”. The variable rate, in the Complainants’ mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

The Provider wrote to the Complainants on **08 July 2011**, to remind them that the four year fixed interest rate was due to end on 31 July 2011. The letter also appended a rate options form detailing the rate options available to the Complainants. The interest rate options offered were a LTV Variable Rate, a two year fixed interest rate and a five year fixed interest rate.

Having considered the mortgage loan documentation, it is my view that that the Complainants did not have a contractual or other entitlement to a tracker interest rate at the end of any fixed rate period, including the end of the fixed rate periods which ended in **July 2007** and **July 2011**. The fact that the Provider had previously offered the Complainants a tracker interest rate on their mortgage loan in **July 2007**, which the Complainants opted not to accept, did not oblige the Provider to offer a tracker interest rate at a later point in time. The fact that the Provider applied the tracker interest rate as the default rate on 28 July 2007, in circumstances where the Complainants’ signed fixed rate instruction (**23 July 2007**) had not yet been received by the Provider (**31 July 2007**), also did not oblige the Provider to offer a tracker interest rate at a later point in time. The offer of the tracker interest rate and the application as the default rate between **28** and **31 July 2007**, was in accordance with the Provider’s policy at the time. By **July 2011**, the Provider was no longer offering tracker interest rates at the end of fixed interest rate periods, and the Complainants did not have a contractual entitlement to be offered a tracker interest rate.

The Complainants did not return the July 2011 rate options form and the loan defaulted to a variable rate of 5.80 % on **29 July 2011**.

Having considered all of the evidence including the Complainants’ mortgage loan documentation, I find the Complainants did not have any contractual or other entitlement to a tracker interest rate on their mortgage loan. The Provider as a matter of policy offered the Complainants a tracker interest rate of ECB + 0.8% in July 2007, however the

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Complainants elected not to accept it and instead opted to apply a fixed interest rate to the mortgage loan at the time.

For the reasons outlined above, I do not propose to uphold this complaint.

Conclusion

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

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**

27 January 2020

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.