



<u>Decision Ref:</u>	2020-0061
<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 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 one of the mortgage loan accounts 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 particulars of the loan offer letter dated **26 September 2005** detail that the loan amount is €201,500 and the term of the loan is 25 years. The interest rate applicable was 3.79% fixed until **31 July 2010**.

The Complainants' Case

The Complainants submit that they applied to “switch” their mortgage loan to the Provider in **August 2005**. They submit that the Provider approved their application and issued an initial loan offer letter to them which provided for a tracker variable rate (ECB + circa 1%), in **August 2005**.

The Complainants state that following receipt of the initial loan offer letter, “...we had further discussions with the Bank, following which we decided to opt to fix the rate for 5 years”. They state that the reason for this was “to provide certainty of rate for the duration

of the fixed rate period". The Complainants submit that following their discussions with the Provider, it was their "very clear understanding" that on the expiry of the five year fixed interest rate period, the mortgage account would switch to the tracker interest rate "as quoted in the previous facility letter". They submit "[we] did specifically ask the question prior to accepting the fixed rate offer whether we would be reverting to the tracker rate on fixed rate expiry. The reason [we] recall that [we] asked this is because we had initially received the [Provider's] offer letter, quoting a tracker variable rate and [we] wanted to ensure that we would still be able to secure this rate on expiry. I can confirm that the branch confirmed to me at the time that this was the case."

The Provider subsequently issued a second loan offer letter dated **26 September 2005** which provided for a five year fixed interest rate of 3.79%. This loan offer letter was accepted by the Complainants on **26 September 2005** and the mortgage account ending **(01)** was drawn down in **October 2005**.

The Complainants submit that subsequently they sought and secured a top up loan from the Provider and their mortgage sub-account ending **(02)** was drawn down on a tracker rate of ECB + 0.85% in **December 2005**.

The Complainants submit that prior to the expiry of the fixed interest rate period, a letter and interest rate options form issued to them on **14 July 2010** which did not include the option of a tracker interest rate. They state that the Provider subsequently wrote to them on **25 August 2010** detailing that as the Complainants had not responded to its correspondence of **14 July 2010** the mortgage account had been transferred to the Provider's standard variable rate. The Complainants submit that they subsequently telephoned the Provider to query the position "*...some weeks after the fixed rate loan expired ... it was then that we became aware that the bank was not offering us a tracker rate option*".

The Complainants further submit that they contacted the Provider again "*...some months after the expiry of the fixed rate and after it has been switched (incorrectly under the terms of the governing offer letter) to the [Provider] Standard Variable rate. Following this discussion it was agreed that the rate would be amended to the [Provider] staff rate of 3%*". They submit that while the switch to the staff rate "*represented some improvement, our view remained that the bank had still not honoured what we understood was a clear commitment to default the loan to tracker rate*".

The Complainants submit that the loan offer letter dated **25 September 2005**, states that on expiry of the fixed rate the loan would switch to the Provider's variable rate. They submit, "*...what the offer letter clearly does not stipulate is that the rate applicable on expiry would be the [Provider] Standard Variable Rate*". They state that the loan offer letter does not

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detail whether the variable rate referred to “*was to be Standard Variable Rate, Discount Variable Rate, Tracker Rate etc. – all of which were variable rate offerings of the [Provider] back in Sept 2005*”. They assert that the loan offer letter is “*unspecific and flawed in its wording*”.

The Complainants are seeking the following;

- (a) The tracker interest rate to be “*reinstated*” on mortgage account ending **(01)** and backdated to the date of expiry of the five year fixed rate in **2010**; and
- (b) A refund of overpayment of interest on the mortgage account ending **(01)** from the date of expiry of the fixed rate in **2010** to date.

The Provider’s Case

The Provider submits that the Complainants could not have been offered a tracker interest rate when the fixed interest rate period expired in **August 2010** as tracker products had been withdrawn from the market by the Provider in **mid-2008** and were not available as a product from selection from that date onwards. It further states that the Provider never offered a tracker interest rate as a default rate upon the expiry of a fixed interest rate.

The Provider submits that it received a mortgage application form signed by the Complainants on **3 August 2005**. It states that it issued the Complainants with a loan offer letter dated **25 August 2005** which provided for a mortgage in the amount of €201,500 over a term of 25 years based on a tracker interest rate of ECB base rate + 0.85%. The Provider submits that if the Complainants wished to accept this offer they were required to sign and return the document within 21 days of the date outlined therein, however they chose not to accept the loan offer.

The Provider submits that its records show that on **19 September 2005** the Complainants contacted the Provider and made a request to amend the conditions outlined in the initial loan offer letter issued on **25 August 2005**. It states that the Complainants requested that their mortgage be drawn down in six stages instead of the previously agreed three stages, and also requested that the interest rate be amended to a 5 year fixed rate of 3.79%.

The Provider states that subsequently, on **26 September 2005** it issued a further loan offer letter which provided for a mortgage in the amount of €201,500 over a term of 25 years, however the mortgage was to draw down on an interest rate of 3.79% fixed until **31 July 2010** and not the previously offered tracker rate. It details that this loan offer contained the wording “*This offer supersedes the offer issued on 25/08/05.*” The Provider submits that this loan offer was accepted and signed by the Complainants on **26 September 2005** and their acceptance was witnessed by their solicitor.

The Provider submits that there is no reference to a tracker interest rate in the Complainants' loan offer letter dated **26 September 2005** and such a reference would have been necessary for a tracker interest rate to apply to the mortgage. It states that the loan offer letter clearly confirmed that the Complainants' mortgage was to draw down on a fixed rate of interest and does not contain any condition specifying that a tracker interest rate would be made available to the Complainants when the initial fixed interest rate period ended or at any future date. The Provider relies on the **Special Conditions** and **General Condition 2** of the Complainants' loan offer letter in support of this.

The Provider submits that in line with this, on **14 July 2010**, prior to the expiry of the fixed interest rate period, it wrote to the Complainants advising them of the upcoming end of the fixed interest rate period and stated that *"Any borrowings you have on this fixed rate will automatically roll to the Standard Variable Rate (APR 3.9%) of 3.85%"*. It states that the letter also outlined the alternative interest rate products available to the Complainants at that time. The Provider details that as it had withdrawn tracker interest rate products in **mid-2008**, this product type was not included in the letter. The Provider submits that the Complainants did not select an alternative rate product as outlined in the Provider's letter and so the mortgage rolled to the Variable Home Loan Rate which is the Provider's Standard Variable Rate.

The Provider acknowledges that the loan offer letter does not contain the term *"Standard Variable Rate"* as referred to in its letter of **14 July 2010**. It states that the Provider's *"Variable Home Loan Rate"* and the Provider's *"Standard Variable Rate"* are the same, that is, a rate which can be amended at any time. It states that by comparison a tracker interest rate is linked to the European Central Bank (ECB) rate and so will only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider. It states that there is no reference to a tracker interest rate in the Complainants' loan offer letter dated **26 September 2005**.

The Provider submits that its staff were not authorised to provide advice or recommendations as to which interest rate option to select. It details that its staff were trained to provide information in relation to the various rate options that were available when such information was requested. It states that all interest rates were subject to change and could on occasion be withdrawn by the Provider and therefore confirmation (either verbally or written) guaranteeing the availability of a specific interest rate product, for example a tracker interest rate at a future date, was not and could not have been provided to the Complainants by the Provider when the Complainants drew down the mortgage in **2005**. The Provider submits that the decision in relation to which interest rate option to select rests with the customers based on their own requirements.

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The Provider states that it is satisfied that the information made available to the Complainants was sufficiently clear and transparent with respect to the consequences of drawing down their mortgage loan account ending **(01)** on a fixed interest rate in **2005**. It states that it does not consider that the Complainants could have formed any reasonable expectation of defaulting to a tracker interest rate at the end of the initial fixed rate period that the mortgage drew down on. The Provider submits that it believes *“it would be reasonable to expect that if any customer had any concerns about any documentation they were proposing to sign in respect of their mortgage that an attempt at clarification would have been sought beforehand.”*

The Provider submits that the Complainants drew down a top-up mortgage in **December 2005** and in this regard the Complainants were issued with a loan offer letter dated **29 November 2005** which described the applicable interest rate as follows; *“the rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 0.85%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged.”*

The Provider states that the Complainants’ top-up mortgage has remained on the tracker interest rate since drawdown. It states that from **December 2005** onwards, the Complainants had one mortgage secured by one mortgaged property, split into two separate mortgage sub-accounts which were issued to the Complainants on different terms and conditions.

The Complaint for Adjudication

The complaint for adjudication is that the Complainants were not offered a tracker variable rate for their mortgage loan account ending **(01)** at the end of the five year fixed interest rate period in **August 2010** and were instead placed on the Provider’s standard variable rate.

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 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 **21 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.

In order to ascertain if the Provider should have offered the Complainants a tracker interest rate on their mortgage account ending **(01)** at the end of the initial five year fixed interest rate period in **August 2010**, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also relevant to set out the interactions with the Complainants between **August 2005** and **September 2005** when they applied for the mortgage with the Provider.

I have considered the **Mortgage Application Form** that was signed by the Complainants on **3 August 2005**. I note that there is no reference to interest rate options within the application form.

The initial **Offer of Advance** dated **25 August 2005** details as follows;

*“Amount of Credit Advanced: 201,500.00 Eur
Period of agreement: 25 years 0 months
...
Interest Rate : 2.8500 %”*

The **Special Conditions** detail as follows;

“The rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 0.85%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged.”

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I note that this Offer of Advance was not signed or accepted by the Complainants. I understand that following receipt of the initial Offer of Advance there were discussions between the Complainants and the Provider which related to the possibility of amending the interest rate applicable to the mortgage. I note that the Provider has indicated that it "holds no records or minutes related to meetings or discussion which may have taken place with the customers in 2005". It is disappointing that the Provider does not hold detailed records of the discussions or meetings with the Complainants, however it is nevertheless accepted between the parties that following receipt of the initial Offer of Advance the Complainants subsequently requested a five year fixed interest rate of 3.79% for the loan. A copy of the Provider's internal note dated **19 September 2005** has been furnished in evidence, which details as follows;

"[The First Complainant] has it agreed that he may draw the mortgage in three stage payments, at his request, and provide a certificate of compliance on completion. He has requested this be amended to up to 6 payments – part of the work will be done in Oct/Nov but the builders for the major renovation work cannot start until after Christmas – therefore [the First Complainant] will need to pay the first builders in a few stages and the second lot of builders in another couple of stages. He does not want to draw down funds that are not yet required and pay the interest.

House Mortgages – Please note that [the First Complainant] would like to amend the rate to a 5 year fixed rate of 3.79%."

The subsequent **Offer of Advance** that was signed by the Complainants on **26 September 2005** details as follows;

*"Amount of Credit Advanced: 201,500.00 Eur
Period of agreement: 25 years 0 months*

*...
Interest Rate : 3.7900 %*

*...
WARNING*

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

This offer supersedes the offer issued on the 25/08/05"

I note that the **Special Conditions** detail as follows;

“The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 3.7900 % per annum and this rate will apply until 31 July 2010. At the end of the fixed rate period the loan will automatically revert to the [Provider] Variable Home Loan Rate and [the Provider] may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide. In the event of the Applicant electing to accept such an offer (if any), he/she must do so in writing, and the agreement must be signed by all parties to the mortgage advance. If no such offer is made by [the Provider] or if an offer is made by [the Provider] and not accepted by the Applicant(s) the [Provider] Variable Home Loan Rate shall apply from 1 August 2010 and thereafter but otherwise in accordance with General Condition 2 of the Bank’s General Conditions Relating to Advances by [the Provider] House Mortgages Section enclosed herewith, which varies the Interest Rate, and the mortgage conditions incorporated in the mortgage, and the said General Conditions relating to the Advances shall be construed accordingly.”

General Condition 2 of the **General Conditions relating to Home Loan Advances** details as follows;

*“Interest is calculated on the balance outstanding on the home loan at the close of business each day from the date of negotiation of the home loan cheque until the home loan is repaid. Interest so calculated is charged on the last day of the calend[a]r month in which negotiation of the home loan cheque takes place and on the last day of each calend[a]r month thereafter until the home loan is repaid. Interest charged to the home loan is included in the outstanding balance on which interest is calculated. The outstanding balance on which interest is calculated will include any overdue repayments and other sums outstanding. Overdue repayments and other sums outstanding will be included in the outstanding balance from the date on which they are debited to the home loan account until the date on which they are discharged. If redemption of the home loan takes place mid month the amount required to redeem the loan will include interest from the first day of the month in which redemption takes place to the date of redemption. **The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [the Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper.** Interest is calculated on a compound basis.*

Drawdown date of your mortgage will be the date on which your mortgage cheque is negotiated. If drawdown date is before the date on which direct debits are raised in any given month the first repayment will be on the 1st of the month following the month in which drawdown takes place and will be interest only on the amount

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drawdown from the date of drawdown until month end. This repayment will be in addition to the number of repayment instalments shown on the schedule of important information. If drawdown date is after the date on which direct debits are raised in any given month interest will be charged on the last day of the month on the amount drawn down from the date of drawdown until month end. This interest will be added to your first normal repayment on the 1st of the month following the month which follows the month in which drawdown takes place. In this case the total number of repayments will be as shown under the number of repayment instalments in the schedule of important information.

APR calculation assumes that drawdown of the loan will take place on the 15th of the month following the month in which the Offer of Advance issues" [my emphasis]

The Complainants signed an **Acceptance and Authority** on **26 September 2005** on the following terms;

"I/We the undersigned accept the Offer of Advance on the terms and conditions set out above and overleaf and in the Bank's standard form of mortgage."

The Complainants' signatures were witnessed by their solicitor on the basis that "*the nature and contents hereof*" had been explained to the Complainants.

It appears to me that the **Offer of Advance** envisaged that a fixed interest rate of 3.79% would apply to the loan until **31 July 2010** and at the end of the fixed interest rate period, the Provider "*may*" offer a further fixed interest rate period or "*alternative available products*" and that if no such offer was made or if an offer was made and it was not accepted, then the Home Loan Rate would apply. This was set out in the **Special Condition** to the mortgage loan and also **General Condition 2** of the **General Conditions relating to Home Loan Advances**.

I note that **General Condition 2**, as quoted above, is somewhat lengthy and deals with a number of other matters related to the mortgage loan aside from the nature of the Home Loan Interest Rate which was applicable to the mortgage loan. The section that I have emphasised above in **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Home Loan Interest Rate** to be one which may be adjusted by the Provider at any time. There is no mention in the **Offer of Advance** about the application of a tracker interest rate to the Complainant's mortgage loan, as was contained in the previous **Offer of Advance** dated **25 August 2005**

On the basis of the information provided by the Complainants, it seems clear to me that it ultimately was not their intention to draw down the mortgage loan under the Offer of Advance dated **25 August 2005**. Rather the Complainants decided that for “*certainty*” that they wanted a mortgage loan on a fixed interest rate and that is what they were subsequently offered by the Provider. However the Complainants have submitted that “*It was ... always our very clear understanding from discussions had with the bank at that time regarding the fixed rate, that on expiry of the fixed rate, mortgage 1 would revert to variable tracker rate as quoted in the previous facility letter*”. Again I note that there is no documentary evidence of the discussions that took place in **2005** where it is purported that the “*understanding*” on the part of the Complainants was formed that the rate “*would revert to tracker variable rate.*” In any event, regardless of any discussion that may have taken place between the parties at that time, or any “*confirmation*” said to have been given by the Provider, there is no evidence of such an assertion. In order for the Complainants to have a contractual right to a tracker interest rate on their mortgage loan at the end of the fixed interest rate period, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However no such right was set out in writing in the **Offer of Advance** dated **26 September 2005**, which was signed by the Complainants on **26 September 2005**. Of further note, the **Offer of Advance** dated **26 September 2005**, was specifically outlined to have “*superseded*” the previous initial **Offer of Advance** that had issued. I also note that the First Complainant, by his own submission “*worked in financial services for c. 31 years*” with a third party Provider and also with the Provider who is the respondent to this complaint. In these circumstances, the First Complainant should have been fully aware that the terms of a mortgage loan are governed by the terms contained in the **Offer of Advance** which is signed by the parties, and not by reference to a previous offer, which was rejected by the Complainants and then superseded.

The Complainants also submit that the **Offer of Advance** dated **26 September 2005** is “*pointedly unspecific and flawed*” as it is unclear which variable rate the “*Variable Home Loan Rate*” is referring to. The Complainants submits that the Provider had a suite of variable rates, including the standard variable, the discounted variable and the tracker variable rate. As outlined above, **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Home Loan Interest Rate** to be one which may be adjusted by the Provider at any time. I note that in contrast, the initial **Offer of Advance** issued to the Complainants on **25 August 2005** outlined the interest rate product to be the “[*Provider*] *Flexible Mortgage*” which “*tracks the ECB rate with a margin which is fixed for the life of the Home Loan term*”. The margin was then stated to be 0.85%. I do not accept the Complainants’ submission that there was ambiguity or a lack of clarity about the nature of the “*Variable Home Loan Rate*”. There was no real basis for the Complainants to reasonably expect that the term “*Variable Home Loan Rate*” to relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate

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and the tracker interest rate product was titled to be the “[Provider] Flexible Mortgage” in the initial **Offer of Advance**, which was rejected by the Complainants.

If the Complainants were of the view that the **Offer of Advance** dated **26 September 2005**, was ambiguous as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider and sought that an amendment be made to the Special Conditions of the Offer of Advance to the effect that the loan would default the “[Provider] Flexible Mortgage” which “tracks the ECB rate with a margin which is fixed for the life of the Home Loan term”. Instead the Complainants signed the **Acceptance and Authority** on **26 September 2005** in the presence of their solicitor and confirmed that they accepted the Offer of Advance on the terms and conditions set out therein.

The Provider issued a letter to the Complainants dated **14 July 2010**, advising them that the fixed rate period was coming to an end. This letter detailed that if no response was received the interest rate would roll to the Provider’s “Standard Variable Rate”. I understand that the Standard Variable Rate is the same as the “Variable Home Loan Rate”. The Provider should have used the same terminology as contained in the Complainants’ mortgage loan documentation when referring to rate choices and options in subsequent correspondence with the Complainants. This ensures that there can be no confusion as to interest rate options (contractual or otherwise) being offered by the Provider. I note that the letter of **14 July 2010** also detailed a number of Residential Fixed rate options, a Discounted Variable rate option and Flexible Variable Rate options.

I note that the Provider wrote to the Complainants on **25 August 2015** detailing as follows;

“We wrote to you recently to advise that the product on one or more of your mortgage accounts was expiring. As we have not received any response from you, any accounts on an expiring product have been transferred to our Standard Variable Rate, currently 3.85%.”

I note that tracker mortgages had been withdrawn from the market by the Provider from **mid-2008** and therefore the Complainants could not have been offered a tracker interest rate when the fixed rate expired in **August 2010**. Furthermore, for the avoidance of doubt I am of the view that the Complainants had no contractual entitlement to a tracker interest rate to be applied to the mortgage loan account when the fixed interest rate period concluded in **August 2010**.

The Complainants have submitted that they engaged with the Provider “*some weeks*” after the mortgage account defaulted to the standard variable rate to ask why they had not been offered the tracker variable rate. I note that no documentary evidence of any engagements between the Provider and the Complainants at this time has been submitted in evidence. In any event, the fact that the Complainants may have engaged with the Provider at that time with respect to the interest rate on their mortgage loan did not obligate the Provider to offer the Complainants a tracker interest rate on their mortgage loan at the time. The Complainants have submitted that they ultimately accepted another product offering from the Provider to apply a staff rate of 3% to the mortgage loan account, albeit, “*solely as it represented some improvement on the penal standard variable rate then being applied*”. The decision to apply the staff rate to the mortgage loan was the Complainants’ decision to make. Alternatively, the mortgage loan could have remained on the “*Variable Home Loan Rate*”.

The Complainants have also submitted that the **Offer of Advance** dated **29 November 2005** that was issued in respect of their top-up mortgage loan account ending **(02)** “*quoted a variable rate of ECB plus margin of 0.85%*”. The Complainants’ two mortgage loan accounts were drawn down at two different points in time (**October 2005** and **December 2005**), they commenced on different interest rates (fixed rate and tracker rate) and were subject to different terms and conditions. The fact that the Provider offered the Complainants a tracker rate for mortgage loan account ending **(02)** and the Complainants accepted that offer on that mortgage loan account, did not create any obligation on the Provider to offer the same rate on the Complainants’ separate mortgage loan account ending **(01)** when the fixed interest rate period expired in **August 2010**.

For the reasons set out above, I do not propose to uphold the 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**

12 February 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.