



<b><u>Decision Ref:</u></b>	2020-0157
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage Failure to offer a tracker rate at point of sale
<b><u>Outcome:</u></b>	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 is secured on the Complainants' principal private residence.

The loan amount was €263,500.00 and the term was 30 years. The **Letter of Approval** which was signed on **26 February 2008** outlined the Loan Type as *"Disc Tracker (LTV>80%<95%/<500K) Home Loan"*.

**The Complainants' Case**

The Complainants submit that they took out their mortgage loan account with the Provider in **March 2008** on an initial 12-month discounted LTV tracker interest rate of 4.85% (ECB + 0.85%).

The Complainants detail that at the end of the discounted period in **March 2009** they received a rate options letter from the Provider. The Complainants *"didn't understand"* why they received an options letter, as their understanding was that the *"discounted LTV tracker rate of ECB + 0.85% would revert to the undiscounted rate after the 12 months discount"*. They outline that *"There is no mention in our Mortgage agreement of any options letter to*

*be completed when the discount ended. Why an options letter was sent out at all is confusing in its self”.*

The Complainants’ mortgage loan account was subsequently switched to the tracker interest rate of 4.25% (ECB + 2.25%) at the end of the discounted period in **2009**. The Complainants assert that this is a *“huge increase”* from the margin of ECB + 0.85% that had previously applied. They detail that they asked the Provider *“where they got”* the tracker interest rate margin of ECB + 2.25% and were informed only that *“a number of factors were taken into consideration”*.

The Complainants submit that they were *“sold a product without being advised on what the rate would be after the discounted rate was up.”* They say that the **Special Conditions** of the loan offer refers to the rate that would apply on the expiry of the discounted period as *“the then current [Provider] tracker rate”*. They submit that the wording used *“is misleading as the word **then** is past tense.”*

The Complainants submit *“As a customer we feel our bank did not act in our best interest. Why offer a discount to customers if they are going to pay more in the long run”*.

The conduct complained of is that the Provider applied a higher tracker margin of ECB + 2.25% to the Complainants’ mortgage loan account in **March 2009** upon expiration of the discounted tracker rate period.

The Complainants are seeking the following;

- a) *“Put back on tracker rate at the time the mortgage was taken out (before discount)”*
- b) *“To be fully compensated for over payments”*
- c) *“Compensation for the length of time this has gone on and the stress [the Complainants] and [their family] have been put under because of this”*.

### **The Provider’s Case**

The Provider submits that on **8 February 2008** the Complainants submitted a mortgage loan application form to the Provider through its Branch for a loan amount of €285,000. The value of the Complainants’ property was €300,000. The Provider states that the mortgage loan proceeds were required to redeem a mortgage loan held on the property with another financial service provider.

The Provider states that the Complainants have provided no details in respect of their allegation that the mortgage was mis-sold to them, which the Provider strongly rejects. It states that its personnel engaged in mortgage lending were experienced in dealing with customers who were applying for a mortgage loan and would discuss with applicants the

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various loan types available. It states that the lending products then available for selection on **8 February 2008** were as follows;

- 1 Year Discounted Tracker Rate LTV 80%-95% 4.85%
- Standard Variable Rate 5.35%
- 1 Year Fixed Rate 4.99%
- 2 Year Fixed Rate 5.25%
- 3 Year Fixed Rate 5.30%

The Provider submits that the Complainants opted for an introductory discounted tracker interest rate applicable for the first 12 months at the rate of ECB + 0.85%, to be followed by a tracker rate of interest which would be set on expiry of the first twelve months.

The Provider details that a **Letter of Approval** was issued to the Complainants on **22 February 2008** for the sum of €263,500.00 over a 30 year term. It states that the Letter of Approval provided for the 12 month discounted tracker interest rate of ECB + 0.85% which the Complainants had chosen. It details that on **26 February 2008** the Complainants accepted the loan offer on the terms and conditions set out in the Letter of Approval and the Provider's **Mortgage Conditions** and in doing so confirmed that their solicitor had fully explained the said terms and conditions to them. The mortgage loan proceeds were issued on **13 March 2008**.

The Provider submits that the Letter of Approval did not contain the promise of any specific margin over the ECB rate on the expiry of the discounted period. It states that **Special Condition 9** of the **Mortgage Special Conditions** is the relevant provision which outlines the interest rate option that would be applicable on the expiry of the discounted period in **March 2009**. It states that at that time and from **20 December 2008**, the tracker interest rate of ECB + 2.25% was the current home loan tracker mortgage rate of the Provider.

The Provider submits that prior to the expiry of a fixed or discount period applying to a mortgage loan account, a letter referred to as an "*options letter*" issues to the customer to remind the customer of the date on which the current interest rate will end and to provide details of interest rate options from which the borrower can select a rate to be applied when the current rate, which are listed in a form attached to the letter. It states that the form must be ticked, signed and returned by the customer in order to select one of the options and the form explains which one of the rates will be applied if this is not done, i.e. the default rate.

The Provider details that in the absence of a signed instruction, the Complainants' mortgage would have defaulted to the tracker interest rate of 4.25% (ECB + 2.25%) on **13 March 2009**, however the Complainants, did in fact, sign and return the options form dated **28 February**

**2009** to the Provider indicating their preference for the tracker rate of 4.25%, which was applied to the account on **13 March 2009** accordingly.

The Provider submits that it calculated its tracker rate offerings on the basis of a margin set by the Provider, in addition to the ECB rate. It states that interest rates set by the Provider take into account a number of factors including wholesale lending and borrowing rates, interest rates paid on deposits and the Provider's competitive position. It states that these factors were taken into account when setting the rate of ECB + 2.25%. It details that the factors relevant to the Complainants' loan were the type and value of the loan as it was a home loan with a loan to value ratio greater than 80% and therefore it asserts that the appropriate tracker rate in respect of such a loan at that time was ECB + 2.25%.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider applied a higher tracker margin of ECB + 2.25% to the Complainants' mortgage loan account in **March 2009** upon expiration of the discounted tracker rate period.

### **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 **06 April 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

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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 issue to be determined is whether the Provider acted incorrectly by applying a "higher" tracker margin of ECB + 2.25% to the Complainants' mortgage loan account in **March 2009**, upon expiration of the discounted tracker rate period. In order to determine this complaint, it is necessary to review and set out certain interactions between the Complainants and the Provider and to set out relevant provisions of the Complainants' loan documentation.

I note from the evidence that a **Mortgage Quotation** was furnished to the Complainants by the Provider on **8 February 2008**, which detailed as follows;

*"Your mortgage quotation*

<i>Product</i>	<i>Amount</i>	<i>Term</i>	<i>Rate</i>	<i>Annual</i>	<i>Monthly</i>
		<i>(Years)</i>	<i>(%)</i>	<i>percentage</i>	<i>repayment</i>
			<i>rate</i>	<i>before tax</i>	
			<i>(APR)</i>	<i>relief</i>	
			<i>(%)</i>		
<i>1 Year Fixed Rate</i>	<i>€285,000</i>	<i>25</i>	<i>4.99</i>	<i>5.40</i>	
<i>€1,664.42</i>					
<i>New Business</i>					
<i>Home Loan</i>					
<i>2 Year Fixed</i>	<i>€285,000</i>	<i>25</i>	<i>5.25</i>	<i>5.40</i>	<i>€1,707.86</i>
<i>New Business</i>					
<i>Home Loan</i>					
<i>3 Year Fixed</i>	<i>€285,000</i>	<i>25</i>	<i>5.30</i>	<i>5.40</i>	<i>€1,716.27</i>
<i>New Business</i>					
<i>Home Loan</i>					
<i>Standard</i>	<i>€285,000</i>	<i>25</i>	<i>5.35</i>	<i>5.50</i>	
<i>€1,724.71</i>					
<i>Variable Rate</i>					
<i>Home Loan</i>					

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Disc Tracker LTV      €285,000                      25      4.85      5.30  
€1,641.27  
>80%<95%/<€500K  
Homeloan

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Disc Tracker LTV>80%  
<95%/<500K  
Homeloan

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...

*If applicable new business discount tracker rates:*

*The New Business Tracker Rate is a discounted tracker rate applicable for a period of 12 months from the date of loan issue. At the end of that period, the interest rate will not be more than a certain percentage over the European Central Bank Refinancing Rate as may be varied from time to time.*

*This example is not legally binding and does not mean that we will accept any proposal on similar terms.*

..."

I have considered the **Application for Credit** signed by the Complainants on **8 February 2008**. I note that in the "Mortgage Details" section, in response to the question "loan amount" the Complainants have written €285,000. In response to the question "rate type" the Complainants have not selected any of the options. The options available were tracker, fixed, variable, discount, split or other.

I note that the Provider wrote to the Complainants by letter dated **22 February 2008**, detailing as follows;

*"The following outlines our proposal based on the information you have given us regarding your personal circumstances, financial needs and plans. The loan preferences and options you have chosen are also listed, as at February 22<sup>nd</sup>, 2008.*

**Proposal**

We propose the following:

*Tracker – A variable interest rate that is linked to ECB rates.*

**Mortgage details agreed**

*You have selected a loan type from a range which we are prepared to offer you based on your needs and circumstances. You have chosen a repayment term and flexible options (where relevant) to achieve a repayment amount best suited to your needs and preferences. Details are as follows;*

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- Amount of loan required €263,500.00
- Property price/value €325,000.00/€325,000.00
- Loan Purpose Refinance/Restructure
- Loan Type Disc Tracker (LTV>80%<95%/<500K)  
Homeloan
- Repayment term required 30 Years
- Flexible repayment option None

...

Please review the information in this letter and ensure the mortgage features and details best suit your requirements and wishes, given the advice from [the Provider] staff and the information you provided. You should take the necessary time to consider and query any information provided to you in relation to your loan application.

..."

The **Letter of Approval** dated **22 February 2008** details as follows;

"Loan Type:	Disc Tracker (LTV >80%<95%/500K) Homeloan
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Purchase Price / Estimated Value:	€325,000.00
Loan Amount:	€263,500.00
Interest Rate:	4.85%
Term:	30 year(s)"

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

"4. The interest rate and mortgage repayment indicated in the letter of approval are based on the ECB rate applicable at the date of the letter of approval and takes into account the discount period referred to above. The ECB rate may change on or before drawdown.

5. If, for whatever reason, an event occurs which fundamentally affects the use of the ECB rate as a reference rate for this loan, [the Provider], in its sole discretion, shall be entitled to use such other reference rate or other method or basis of calculation as it deems fair and reasonable and not withstanding the use of such other reference rate or method or basis of calculation, the rate so calculated by [the Provider] shall be and apply as the reference rate applicable to this loan in place of the ECB rate.

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9. The interest rate applicable to this tracker loan may be varied by [the Provider] provided it will not exceed 0.85% over the European Central Bank (the "ECB") refinancing rate (the "ECB rate") for the first 12 Months (the discount period) from the date of loan issue. The ECB rate may be varied from time to time by the ECB. In the event of any variation of the ECB rate during the discount period, the interest rate will not be more than 0.85% over the ECB rate as varied by the ECB. [The Provider] reserves the right to alter the said percentage over the ECB rate at any time prior to drawdown. On expiry of the discount period, the interest rate will be the then current [the Provider] tracker mortgage rate (comprising of a certain percentage over the ECB rate) appropriate to the loan as may be varied in accordance with variations to the ECB rate. In the event of any variation of the ECB rate the revised interest rate will apply not later than 1 calendar month from the effective date provided by the ECB'."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by their solicitor on **26 February 2008**. The **Acceptance of Loan Offer** states as follows;

"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 conditions
- iii. The [Provider] 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."

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being "effective from the start of business on the 4<sup>th</sup> February 2008".

This document outlines as follows;

**"Rates applicable to new Home Loans**

**1 Year Discounted Tracker LTV <80%**

loan <€500k	4.75%	5.0%
loan €500k +	4.70%	5.0%

**1 Year Discounted Tracker LTV 80% - 95%**

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<i>loan &lt;€500k</i>	4.85%	5.3%
<i>loan €500k - €1M</i>	4.85%	5.1%
<i>loan €1M +</i>	4.70%	5.0%
<i>Tracker Rate LTV &lt;60% loan &gt;€200k</i>	4.75%	4.9%
<i>Tracker Rate LTV 95% + loan &lt;€500k</i>	5.30%	5.4%
<i>Tracker Rate LTV 95% + loan €500k +</i>	5.10%	5.2%
<i>1 Year Fixed Rate</i>	4.99%	5.4%
<i>2 Year Fixed Rate</i>	5.25%	5.4%
<i>3 Year Fixed Rate</i>	5.30%	5.4%
<i>Developer Mortgage 2 year Capped Tracker</i>	4.49%	4.8%
<i>..."</i>		

The Complainants have submitted that they believe that they were sold “a 1 year tracker rate and not a discounted rate”. It is clear from the **Lending Interest Rates** document that the Provider had a suite of tracker interest rate types available. If the Complainants did not want to pursue the option of the mortgage loan on the “*Disc Tracker (LTV >80% <95%/500K) Homeloan*” as they were unhappy with the rate applicable, they could have declined to accept the **Letter of Approval** and engaged with the Provider with respect to the other interest rate options available at the time. There was no obligation on the Provider, contractual or otherwise, to give the Complainants the option of any particular tracker interest rate type on their mortgage loan when they were proceeding with their application in **February 2008**.

I note that the Provider submits that it wrote to the Complainants prior to the expiry of the discounted period in **March 2009** to remind them that the discounted period was coming to an end and to provide details of the rate options available to them. However I note that a copy of this letter has not been furnished in evidence, nor has the Provider provided any explanation as to why this letter has not been furnished.

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines 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 **30 years** commencing in **February 2008** and the letter purportedly issued in **February 2009**. 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. It is unclear to me, in the absence of any explanation, why this documentation has not been furnished by the Provider. This is most disappointing.

Nonetheless, I note that it is not in dispute between the parties than an options letter was issued by the Provider to the Complainants prior to the expiry of the discount period which provided for a tracker interest rate option of 4.25% (ECB + 2.25%).

The **rate options form** enclosed with the options letter that was signed by the Complainants, has been furnished in evidence, and details as follows;

*“Current options available:  
You may only select one option.  
Account Number: [XXXXXXXXXX]1762*

			Monthly repayment	
<i>Tracker variable rate (ECB + maximum 2.2500%)*</i>	<i>- Currently:</i>	<i>4.25%</i>	<i>1464.74</i>	<i>...</i>
<i>LTV variable rate**</i>	<i>- Currently:</i>	<i>4.05%</i>	<i>1434.76</i>	<i>...</i>
<i>2 year fixed rate</i>	<i>- Currently:</i>	<i>5.25%</i>	<i>1619.90</i>	<i>...</i>
<i>5 year fixed rate</i>	<i>- Currently:</i>	<i>5.75%</i>	<i>1700.63</i>	<i>...</i>
<i>7 year fixed rate</i>	<i>- Currently:</i>	<i>6.10%</i>	<i>1758.33</i>	<i>...</i>
<i>10 year fixed rate</i>	<i>- Currently:</i>	<i>6.10%</i>	<i>1758.33</i>	<i>...</i>

...  
- *Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).*

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- *\*The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.2500% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans.*
  
- *In calculating your loan to value ratio we use your current loan balance and the most recent valuation on file for this mortgage."*

The reverse of the **rate options form** under the heading "**TRACKER MORTGAGE LOANS**" detailed as follows;

- "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.*
  
- 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 selected the tracker interest rate option of 4.25% (ECB + 2.25%) and signed the **options form** on **28 February 2009**. The options form was stamped received by the Provider on **03 March 2009**.

The Complainants take issue with the application of the tracker interest rate of ECB + 2.25% to their mortgage loan on the expiry of the 12 month discount period. The Complainants outline that the discounted rate sold to them was "*misleading*" and they "*were not advised correctly*" by the Provider.

I do not accept the Complainants' submissions in this respect. **Special Condition 9** set out that rate applicable to the mortgage loan for the first 12 months, which is referred to as the discounted period, would be no more than 0.85% over the ECB rate. This condition also

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provides that the “then current [Provider] tracker mortgage rate ... appropriate to the loan as may be varied in accordance with variations to the ECB rate” will apply at the end of the discount period.

There was no guarantee in the Special Conditions or any other conditions applicable to the Complainants’ mortgage loan that a specific tracker mortgage margin would be made available to the Complainants at the end of the discount period. **Special Condition 9** set out that the rate of ECB + 0.85% would apply for the discounted period. There was no obligation on the Provider to set out the basis on which the discount rate was arrived at. It is important for the Complainants to be aware that the Complainants’ mortgage loan is governed by the terms and conditions of their mortgage loan documentation. In these circumstances the terms and conditions of the loan were clear. There is no evidence that the Complainants were “mislead” by the Provider when the mortgage loan was sold to them.

If the Complainants were not happy with the terms of the **Letter of Approval**, including the type of interest rate or the fact that the mortgage loan contract did not stipulate a specific tracker mortgage rate margin that would be applied at the end of the discount period, the Complainants could have decided not to accept the offer made by the Provider. Instead the Complainants accepted the Provider’s offer by signing the **Acceptance of Loan Offer** on **26 February 2008**, and in doing so, confirmed that their solicitor had fully explained the terms and conditions of the mortgage loan to them.

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being “effective from the start of business on the 13<sup>th</sup> February 2009”.

This document outlines as follows;

**“Home Loans Rates for Existing Business**

...	<b>Rate</b>	<b>APR</b>
Tracker Rate LTV <80%	4.25%	4.3%
Tracker Rate LTV >80%	4.25%	4.3%

The evidence shows that the tracker interest rate that the Provider had available in **February 2009** of 4.25% (ECB + 2.25%) was the same tracker interest rate that was offered to the Complainants for their mortgage loan. In these circumstances it appears to me that the Complainants were offered the option of the “then current [Provider] tracker mortgage rate ... appropriate to the loan” at the time of expiry of the discount period, in accordance with **Special Condition 9**. It was within the Provider’s commercial discretion to set this rate. The Provider was under no obligation to notify the Complainants when they applied for the mortgage loan in **February 2008** of the tracker mortgage rate which would be applicable on

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the expiry of the discount period in **March 2009**. The evidence shows that the rate had not been set by the Provider at that time. Therefore it could not have informed the Complainants of the rate that would apply in **March 2009**.

Having considered the Complainants' mortgage loan documentation, I find the Complainants had a contractual entitlement to "*then current [Provider] tracker mortgage rate ... appropriate to the loan*". The Provider offered the Complainants a tracker interest rate of ECB + 2.25% in **February 2009** and the Complainants signed the options form on **28 February 2009** to indicate that this was their preference. The Provider, in line with **Special Condition 9**, applied the tracker mortgage rate of 4.25% (ECB + 2.25%). This was the tracker mortgage rate applicable at the time. I accept that this was clearly outlined in the Complainants' Letter of Approval.

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

### **Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

30 April 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

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

