



<b><u>Decision Ref:</u></b>	2020-0417
<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
<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 that is the subject of this complaint was secured on the Complainants' Residential Investment Property (RIP).

The loan amount was €155,000 and the term was 15 years. The Letter of Approval which was signed on **28 January 2005** detailed that the Loan Type was a "*Residential Investment Loan 1 Year Fixed New Business Rate*".

##### **The Complainants' Case**

The Complainants submit that prior to the expiry of the initial fixed interest rate period in **February 2006**, they were issued a rate options form offering them a variable interest rate and 3 fixed interest rate options. They detail that a tracker interest rate was not made available to them. On **6 February 2006**, the Complainants completed the options form and opted to apply a further fixed interest rate of 3.75% for a period of one year.

In **December 2006**, the Complainants were issued a further rate options form which offered them 3 fixed rate options but no tracker interest rate option. They elected to apply a five year fixed rate of 4.85% to the mortgage account.

Prior to the expiry of the five year fixed interest rate period in **December 2011**, the Complainants were issued a further rate options form and opted to convert their mortgage account to an LTV variable rate at 6.70%.

The Complainants state that the Provider's Final Response Letter of **6 July 2018** outlined that *"during the period from [mid] 2006 to [mid] 2009 [the Provider] was offering Tracker Rates to existing customers on expiry of the Fixed Rate and Discounted Rate periods"*. In this regard, the Complainants submit that the one year fixed interest rate applied to their account on **10 February 2006** would have expired on **9 February 2007**, however they state that the Provider failed to offer them a tracker interest rate at that point in time.

The Complainants are seeking financial compensation for the Provider's failure to offer them the option of a tracker interest rate on their mortgage loan account in **February 2006**, **February 2007**, and **December 2011**.

### **The Provider's Case**

The Provider details that it issued a **Letter of Approval** to the Complainants on **16 November 2004** for a residential investment property in the amount of €155,000, repayable over a term of 15 years. It states that the rate of interest was fixed for the first year at 2.74%, after which the Provider or the Complainants could elect to apply a variable rate. The Provider submits that the Letter of Approval did not contain a contractual entitlement to a tracker rate on the expiry of the initial fixed rate period or at any point in time during the term of the loan. The Provider relies on **Special Condition A** of the Complainants' **Letter of Approval** and **General Condition 5** of the **General Mortgage Loan Approval Conditions**.

The Provider states that the loan was drawn down on **10 February 2005** at a rate of 2.74% which was fixed until **10 February 2006**.

The Provider submits that twenty days prior to the expiry of the fixed interest rate period, it issued a letter to the Complainants which reminded them that their fixed rate period was due to expire and stated that in the absence of the Complainants selecting one of the rate options offered to them in the letter, the Provider would apply the standard variable rate of 3.70% on the expiry of the fixed rate term on **10 February 2006**. It details that the other rate options were fixed interest rates for 1, 3, and 5 year terms. It states that the Complainants were not offered a tracker rate option because they had no contractual entitlement to be offered a tracker rate, and at that point in time the Provider *"had not yet commenced offering a tracker rate option to customers who did not have a tracker option included in their mortgage terms and conditions maturing from fixed or discounted rate terms."*

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The Provider details that the Complainants' mortgage loan account defaulted to the standard variable rate of 3.70% on expiry of the fixed term on **10 February 2006** in circumstances where the Complainants had not returned their signed options form. It states that subsequently the Complainants returned the signed options form dated **6 February 2006** in which they opted for a further 1 year fixed rate of 3.75% which was applied to the account on **20 February 2006**.

The Provider submits that on **29 November 2006**, during the course of the one year fixed interest rate term, the Complainants' Broker contacted the Provider in relation to fixed interest rates. The Provider details that its records indicate that the Broker informed its Business Retention department that the Complainants were reviewing the interest rate on their mortgage account and they were considering moving to a new lender because it had offered them a more attractive interest rate. They were seeking to switch to a three year fixed interest rate of 4.85% and did not wish to pay any breakage fee.

The Provider states that on **4 December 2006**, an **options form** was issued to the Complainants offering them 1, 3 and 5 year fixed interest rate options. On **8 December 2006**, the Complainants signed the form, selecting a five year fixed interest rate of 4.85%, which was applied to the account on **1 January 2007**.

The Provider outlines that during the period between **mid-2006** and **mid-2009**, customers who had no contractual entitlement to a tracker rate were automatically issued with a tracker rate option in the options provided to them on the maturity of a fixed rate period. It details that the Complainants were not offered a tracker interest rate in **December 2006** as their one year fixed rate had not reached maturity. It states that in **December 2006** the Complainants effectively "*chose to extend their existing fixed rate period from 1 year to 5 years.*"

The Provider submits that a rate options letter was issued to the Complainants on **9 December 2011** reminding them that the fixed rate term was due to expire on their mortgage loan on **1 January 2012**. It states that the Complainants were offered an LTV variable rate of 6.70% and fixed rates for 2 and 5 year terms. The Complainants completed the options form on **19 December 2011** selecting the LTV variable rate of 6.70%.

The Provider submits that the Complainants were not offered a tracker interest rate in **December 2011** as they did not have a contractual entitlement to be offered a tracker rate. Furthermore, the Provider details that it had stopped offering tracker rates to customers at that point in time, with the exception of those who had an entitlement to be offered a tracker mortgage interest rate included in their mortgage terms and conditions.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate on their mortgage loan account at the following points in time;

**February 2006,  
December 2006, and;  
December 2011**

### **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 **7 October 2020** outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants' representative made a submission by letter dated **22 October 2020**.

A copy of the Complainant's representative's submission was exchanged with the Provider. Following the consideration of the additional submission and all of the submissions and evidence on the file, my final determination is set out below.

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Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this Office, by letter, which outlined as follows;

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third party Broker engaged by the Complainants, does not form part of this investigation and Decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants’ loan documentation. It is also necessary to set out the interactions between the Complainants and the Provider between **February 2006** and **December 2011**.

The **Letter of Approval** dated **16 November 2004** details as follows;

<i>“Loan Type:</i>	<i>Residential Investment Loan 1 Year Fixed New Business Rate</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 250,000.00</i>
<i>Loan Amount:</i>	<i>EUR 155,000.00</i>
<i>Interest Rate:</i>	<i>2.74%</i>
<i>Term:</i>	<i>15 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.”*

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

***“CONDITIONS RELATING TO FIXED RATE LOANS***

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*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.*

...

*5.4 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 a 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 **28 January 2005**. 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'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 2.74% and thereafter the option of a variable rate. The variable rate in this case 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 and they understood the Loan Offer.

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The Provider has submitted that approximately twenty days prior to the expiry of the fixed rate period in **February 2006** it automatically issued a **letter** and **rate options form** to the Complainants. I have not been provided in evidence with a copy of the letter that accompanied the rate options form, but it does not appear to be in dispute between the parties that a letter was received.

The **rate options form** detailed as follows;

“...		*MONTHLY REPAYMENT*
		EUR
Variable Rate	- Currently; 3.70%	1119.21
1 year fixed rate	- Currently; 3.75%	1122.83
3 year fixed rate	- Currently; 4.15%	1152.00
5 year fixed rate	- Currently; 4.29%	1162.32”

The **mortgage loan statements** show that the mortgage loan account defaulted to the variable rate of 3.70% on **10 February 2006**. I note that the Complainants completed and signed the options form dated **6 February 2006** and elected to apply the one year fixed interest rate of 3.75% to the account. The **mortgage loan statements** show that the rate of 3.75% was applied on **20 February 2006**.

Having considered the evidence before me, including the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period in **February 2006**.

The Provider has summarised its policy in relation to tracker interest rates 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 although their loan contract did not specify an entitlement to be offered a tracker rate at maturity...”*

*While the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008, it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts 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 loans where customers had a contractual right to a tracker rate.”*

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The Provider did not introduce its policy of offering tracker rates to existing customers maturing from a fixed interest rate period who did not have a contractual entitlement to be offered a tracker rate until **mid-2006**. This was after the Complainants' fixed interest rate period had expired in **February 2006**. Therefore there was no obligation on the Provider, contractual or otherwise, to offer the Complainants a tracker rate of interest on the expiry of the fixed interest rate period in **February 2006**, or at any other time.

In the interests of completeness, I should point out that even if the Provider's policy of offering tracker mortgage interest rates to existing customers had been in place in **February 2006**, this would not have imposed a contractual or other obligation on the Provider to offer a tracker interest rate to the Complainants.

It appears from the Provider's internal record dated **29 November 2006** that the Complainants' Broker contacted the Provider on that date in relation to the interest rate on the Complainants' mortgage loan account.

The Provider's internal record details as follows;

<i>"Date</i>	<i>...</i>	<i>Channel</i>	<i>...</i>	<i>Reason for not using [Provider]?</i>	<i>Reason for new lender choice</i>	<i>...</i>	<i>Switch to Tracker</i>	<i>Notes</i>
<i>29-Nov-06</i>	<i>...</i>	<i>Broker</i>	<i>...</i>	<i>Interest Rate</i>	<i>Interest Rate</i>	<i>...</i>	<i>FALSE</i>	<i>Customer wants a 3 year fixed rate of 4.65%. fee to be waived"</i>

The Provider's internal email of the same date details as follows;

*"Can [we send] out a fixed rate options form  
No €100 fee as customer is on a fixed rate"*

The Provider issued a **rate options letter** to the Complainants on **4 December 2006** which detailed as follows;

*"You recently contacted us about the mortgage account shown above.*

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*I am attaching a list of our current fixed rate options. Please tick the rate you would like and return it, signed to: [The Provider]"*

The enclosed **rate options form** detailed as follows;

<i>"Approximate repayment</i>		<i>eur €</i>
<i>Current Rate</i>	<i>3.75%</i>	<i>€ 1,122.47</i>
<i>1 Year fixed rate Mortgage currently</i>	<i>4.75%</i>	<i>€ 1,192.12</i>
<i>3 Year fixed rate Mortgage currently</i>	<i>4.85%</i>	<i>€ 1,199.23</i>
<i>5 Year fixed rate Mortgage currently</i>	<i>4.85%</i>	<i>€ 1,199.23</i>

...

- *If you choose a fixed rate, the standard fixed rate conditions will apply."*

The reverse side of the **options form** outlined as follows with respect to fixed interest rate loans;

#### ***"Fixed Rate Loans***

*Wherever 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 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."*

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The Complainants completed and signed the options form on **8 December 2006** and elected to apply the five year fixed interest rate of 4.85% to the mortgage loan account.

I note that the Provider wrote to the Complainants by letter dated **13 December 2006** which detailed as follows;

*"I refer to your request to amend the rate on the above account. I would like to confirm that I have no record of payment of the administration fee of €100.00 for conversion of the account from a variable to a Fixed rate loan.*

*If you would like to proceed with the conversion, I would be grateful if you could arrange to send me a cheque for €100.00 and I will arrange to advise you of your revised repayment at the new fixed rate.*

*..."*

The Complainants wrote to the Provider on **18 December 2006** as follows;

*"Original conversation with [Name Redacted] indicated no fees or penalties in taking up a new 5 year option at a rate of 4.85% fixed.*

*Position explained to [Name Redacted] as per telephone conversation on 18/12/2006."*

The Provider wrote to the Complainants by letter dated **2 January 2007**, as follows;

*"We have now amended your mortgage as follows:*

*Product Type: Residential Investment Loan 5 Year Fixed Rate*

*...*

*Interest rate: 4.85%"*

In the post Preliminary Decision submission dated **22 October 2020**, the Complainants' representative submitted as follows;

*"I have been instructed by [the Complainants] to again reiterate the point that in the letter dated 4<sup>th</sup> December 2006 – [Provider's representative] to [the Complainants] which refers to a number of interest rate options that this letter and the attached interest rate options did not give [the Complainants] the option of a tracker interest rate even though the tracker interest rate options were on offer to [the Provider's] customers during the period [mid] 2006 to [mid] 2009. My client again makes the point that the option of availing of a tracker interest rate should*

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*have been made available to [the Complainants] in the letter dated 4<sup>th</sup> December 2006.”*

The evidence is clear that in **November 2006** the Complainants, through their Broker, requested a fixed interest rate and the Provider made that interest rate option available to the Complainants. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate when their Broker contacted the Provider in **November 2006**. The Complainants’ mortgage loan documentation does not provide for an entitlement to any particular interest rate type when a break in a fix interest rate period was effected by the Complainants in **December 2006**. The Complainants’ representative has not offered any rationale as to why the tracker interest rate option “*should*” have been made available to the Complainants with respect to their mortgage loan in December 2006. The evidence shows that the Complainants, through their Broker, requested fixed interest rate options. The Provider issued the Complainants fixed interest rate options. There was no obligation on the Provider to offer the Complainants a tracker interest rate, just because it was an available rate option in the Provider’s suite of products.

The Complainants further submitted that they should have been offered a tracker interest rate at the time the fixed interest rate period would have expired in **February 2007** if they had not broken from it.

In the post Preliminary Decision submission dated **22 October 2020**, the Complainants’ representative submits as follows;

*“... [the Provider] outlines that during the period between mid 2006 and mid 2009 customers who had no contractual entitlement to a tracker rate were automatically issued with a tracker rate option in the options provided to them on the maturity of a fixed rate period. For some reason this did not happen in the case of the [Complainants].”*

Had the Complainants’ mortgage loan reached the maturity of the one year fixed interest rate period in **February 2007** it appears that the Provider may have then offered the Complainants a tracker interest rate, as it was its policy to do so at that time. However in the context of the Complainants’ mortgage loan, this is not relevant. The fact remains that the Complainants contacted the Provider and requested the application of a 5 year fixed interest rate of 4.85% to the mortgage loan. The Provider complied with the Complainants’ request and applied the interest rate sought. For the avoidance of doubt, the reason that the Complainants were not “*automatically issued with a tracker rate option*” on the maturity of the fixed rate period was because they opted to break from the 1 year fixed interest rate prior to its maturity date in **February 2007** in order to apply a 5 year fixed rate

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to the mortgage loan account. Consequently in **February 2007** a 5 year fixed rate was in place on the mortgage loan account, in accordance with the Complainants' request.

The Complainants did not request that the Provider apply a tracker interest rate to their mortgage loan at any point in time either before or after they drew down the mortgage. There was no obligation on the Provider to contact the Complainants at any stage to offer a tracker interest rate to the Complainants on their mortgage loan. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainants on their mortgage loan account.

Nonetheless, if the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainants could have contacted the Provider at the time. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider's rights and commercial discretion whether to accede to that request, if it was made.

The Provider wrote to the Complainants by letter dated **9 December 2011** and detailed as follows;

*"I am writing to remind you that the current rate option on your mortgage will end on 01 Jan 2012.*

*Please find attached the current options available to you.*

...

*If we do not receive a written instruction from you in relation to the above on or before the 01 Jan 2012, the interest rate on your mortgage will be the LTV variable rate"*

The **rate options form** enclosed with the letter set as follows;

*"Current Rate and repayment ~ 4.85% €1,198.73*

...

<i>Option</i>	<i>Monthly Repayment ~ (EUR)</i>	<i>...</i>
<i>LTV Variable Rate **</i>	<i>Currently 6.70%</i>	<i>...</i>
<i>2 Year Fixed Rate</i>	<i>Currently 7.35%</i>	<i>...</i>
<i>5 Year Fixed Rate</i>	<i>Currently 8.85%</i>	<i>..."</i>

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...

- *If you choose a fixed rate, the standard fixed rate conditions will apply – see overleaf*

...

*\*\*In calculating your loan to value (“LTV”) ratio, we use the current loan balance and the most recent valuation on file for this mortgage.”*

The Complainants completed and signed the options form on **19 December 2011** selecting the LTV variable rate of 6.70%.

The Provider wrote to the Complainants by letter dated **30 December 2011** and detailed as follows;

*“I wish to advise you that in accordance with the terms of your loan, the rate of interest has been amended to a LTV variable rate currently 5.990%”*

At the time the Complainants’ fixed interest rate period expired in **January 2012** the Provider had withdrawn its tracker interest rate offering to customers other than those who had a contractual entitlement to a tracker interest rate. The Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account on the expiry of the fixed interest rate **January 2012** or at any other point in time.

The Complainants applied for and were offered a mortgage loan on a one year fixed interest rate with the Provider in **January 2005**. The Complainants then opted to apply a one year fixed interest rate to the mortgage account in **February 2006**.

They then sought to break the fixed interest rate in **November 2006** in favour of a new fixed interest rate option. The Provider acted on the Complainants’ instructions in applying the fixed interest rates to the Complainants’ mortgage loan in **February 2006** and **December 2006**.

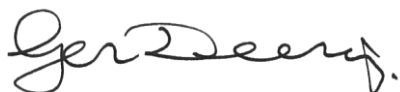
For the reasons set out in this Decision, I do not uphold this complaint.

### **Conclusion**

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

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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.



**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

18 November 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.