



<u>Decision Ref:</u>	2021-0363
<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**

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The loan amount was €140,000.00 and the term of the loan was 25 years. The **Offer of Advance** dated **3 September 2003** provided for a discounted variable home loan rate of 2.950%.

The Complainant's Case

The Complainant submits that she took out a tracker mortgage with the Provider in **2004**.

The Complainant states that she availed of "*the special introductory offer of a cheaper fixed rate*" in 2004 and subsequently availed of "*other fixed rate offers*" until **2009**.

The Complainant submits when the fixed interest rate term expired on her mortgage loan account in **2009**, the Provider withdrew the tracker rate option. The Complainant explains that her mortgage loan account has been subject to a standard variable rate of interest ever since.

The Complainant is seeking the following:

- (a) Reinstatement of the tracker rate to her mortgage loan account; and
- (b) A refund of the overcharge in interest since **March 2009** to be credited to the mortgage balance.

The Provider's Case

The Provider submits that the Complainant's mortgage loan account drew down on a discounted variable home loan rate of 2.95% as provided for in the **Offer of Advance** dated **3 September 2003**. The Provider notes that the Complainant signed and accepted the **Offer of Advance** on **10 September 2003**.

The Provider states that the **Special Conditions** attached to the **Offer of Advance** details that the Provider's discounted variable home loan rate was to apply until **30 June 2004** and the Provider's variable home loan Rate would apply thereafter. The Provider explains that **General Condition 2** of the **Offer of Advance** described the nature of the Provider's variable home Loan rate as one that could be amended at any time. The Provider asserts that **General Condition 2** does not state that the Provider's variable home loan rate "*is linked to the European Central Bank (ECB) base rate*". The Provider further explains that there was no reference to a tracker interest rate in the Offer of Advance, nor did it contain "*any condition specifying that a tracker interest rate would be made available to the Complainant at any future date*".

The Provider submits that in **July 2004**, the Complainant chose to move his mortgage loan to a fixed interest rate of 4.20% until **31 March 2007**, by completing and signing a **Fixed Rate Transfer Authority Form** on **25 June 2004**. The Provider states that there was no reference to a tracker interest rate in the **Fixed Rate Transfer Authority Form**.

In **March 2007**, prior to expiry of the fixed interest rate period, the Provider submits that it issued a Product Expiry Letter confirming the expiry of the fixed interest rate period and outlining the alternative interest rates (both fixed and variable) available to the Complainant. The Provider states that this letter also enclosed a **Fixed Rate Transfer Authority Form** which the Complainant completed and signed on **20 March 2007**. The Provider explains that the Complainant chose to avail of a further fixed interest rate of 5.00% to apply to the mortgage loan account until **31 March 2009**. The Provider submits that the **Fixed Rate Transfer Authority Form** contained all relevant information including what would transpire at the end of the fixed interest rate period "*i.e that the Bank may offer another fixed interest rate(s) or alternative available products and the loan could default to the [Provider's] Variable Home Loan Rate*".

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The Provider submits that in **March 2009** prior to the expiry fixed interest rate period, it wrote to the Complainant advising of the expiry date and confirmed that the mortgage loan account would automatically roll to the Provider's standard variable interest rate. The Provider states that the letter also invited the Complainant to discuss fixed interest rate options. The Provider submits that in circumstances where it did not receive a response from the Complainant, the mortgage loan account switched to the Provider's standard variable rate on **1 April 2009**. The Provider submits that it wrote to the Complainant on **22 April 2009** confirming that the rate had transferred to the Provider's standard variable rate. The Provider explains that the Complainant was not offered a tracker interest rate on the expiry of the fixed interest rate period in **March 2009** as tracker interest rates had been withdrawn by the Provider in **2008**. The Provider submits that it offered tracker interest rate products from **2001 to 2008**.

The Provider asserts that the Complainant had no contractual entitlement to a tracker interest rate on her mortgage loan account. The Provider submits that the **Fixed Rate Transfer Authority Forms** made no reference to a tracker interest rate and such a reference would have been necessary for a tracker interest rate to apply.

The Provider contends that throughout the Complainant's mortgage journey she was provided with all of the necessary information and documentation to make informed decisions regarding interest rate choices.

The Provider submits that all interest rate products are subject to change and can be withdrawn by it at any time therefore verbal or written confirmation guaranteeing the availability of a specific interest rate product at a future date, was not, and could not have been provided. The Provider states that the decision as to what interest rate to select rested with the Complainant based on what suited her individual circumstances.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant a tracker interest rate on the expiry of the fixed interest rate period in **March 2009**.

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.

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The Complainant was 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 16 September 2021, 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The issue to be determined is whether the Provider incorrectly failed to offer the Complainant a tracker interest rate on the expiry of the fixed interest rate period on his mortgage loan account in **March 2009**.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation with respect to mortgage loan account ending **8234**. It is also relevant to set out details of certain interactions between the Complainant and the Provider between **2003** and **2009**.

The Provider issued an **Offer of Advance** dated **3 September 2003** to the Complainant which detailed as follows:

“ **IMPORTANT INFORMATION**

1. *Amount of Credit Advance: €140,000.00 Eur*
2. *Period of agreement: 25 years 0 months*

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3. *Number of repayment instalments: 300*
4. *Amount of each instalment per month: 660.26 Eur*

....

Interest Rate: 2.9500%”

The **Offer of Advance** dated **3 September 2003** also detailed as follows:

“WARNING...

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

The **Special Conditions** attaching to the **Offer of Advance** detail as follows:

“The interest rate as quoted represents a reduction of 0.55% on the present [Provider’s] Variable Home Loan Rate. The [Provider’s] Variable Home Loan Rate less 0.55% will apply from initial date of drawdown of your mortgage until 30 June 2004 after which time your interest rate will revert to the then [Provider’s] Variable Home Loan Rate.”

Condition 2 of the **General Conditions** attached to the **Offer of Advance** 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 calendar month in which negotiation of the home loan cheque takes place and on the last day of each calendar 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.

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The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [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. [My emphasis]

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 drawn down 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 date of drawdown until month end.

This interest will be added to your first normal repayments on the 1st 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 repayments instalments in the schedule of important information.

APR calculations 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."

The **Acceptance and Authority** was signed by the Complainant on **10 October 2003** on the following terms:

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

The Complainant's signature was witnessed by her solicitor on the basis that "*the nature and contents hereof*" had been explained to the Complainant.

In the interest of clarity, I note that the Provider submits that the Complainant signed the **Acceptance and Authority** on **10 September 2003** however the **Acceptance and Authority** submitted in evidence indicates that it was signed by the Complainant on **10 October 2003**.

The mortgage loan account was drawn down on **09 January 2004**.

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It is clear to me that the **Offer of Advance** envisaged that a discounted variable interest rate of 2.950% would apply to the Complainant's mortgage loan account until **30 June 2004** and thereafter switch to the Provider's variable home loan rate.

The Complainant appears to be of the view that she took out a tracker interest rate mortgage with the Provider in **2004**. However, the **Offer of Advance** made no reference to the Provider's variable home loan rate being connected to the European Central Bank (ECB) base rate, rather it was a variable interest rate which could be adjusted by the Provider. The Complainant signed and accepted the **Offer of Advance**, having confirmed that she had read the terms and conditions on **10 October 2003**, which were explained to her by her solicitor. It is important for the Complainant to understand that the terms of a mortgage loan are governed by the terms contained in the **Offer of Advance** which is signed by the parties.

In order for the Complainant to have a contractual right to a tracker interest rate on the mortgage loan account at draw down or indeed at the end of the discounted variable home loan interest 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 **3 September 2003**, which was signed and accepted by the Complainant on **10 October 2003**.

Prior to the expiry of the discounted variable interest period in **June 2004**, the Provider issued a **letter** to the Complainant together with a **Flexible Transfer Form** and a **Fixed Rate Mortgages Form**. The Provider submits that it has been unable to submit a copy of the letter that was sent to the Complainant in evidence, despite extensive searches. It is most disappointing that a copy of this letter was not retained by the Provider.

The Provider has however submitted a template copy of the letter that issued to customers moving off a discounted variable interest rate in **2004**, in evidence. The template letter outlines that the discounted variable interest rate period is coming to an end and that the rate will change to the Provider's standard variable rate. The letter also noted as follows:

"You may wish to avail of our Flexible Mortgage, or one of the Fixed Rate Mortgages which we currently offer. Information on these, and how to transfer your mortgage to one of these products, is enclosed. If we do not receive your authority to transfer your mortgage to a Flexible or Fixed Rate, by [redacted date], the standard variable rate will apply from [redacted date]".

The Complainant completed and signed a **Fixed Rate Mortgages Form** on **25 June 2004** which details as follows:

“A fixed rate mortgage guarantees the rate on your mortgage will remain unchanged for the fixed rate period, although your payments may alter if you receive Tax Relief at Source.

...

The Fixed Rates currently available are:

<i>3.49% *Fixed Rate until 31/03/2006 (APR 3.5%)</i>	<input type="checkbox"/>
<i>4.20% *Fixed Rate until 31/03/2007 (APR 3.8%)</i>	<input checked="" type="checkbox"/>
<i>4.69%* Fixed Rate until 31/03/2009 (APR 4.0%)</i>	<input type="checkbox"/>

....

At the end of the fixed rate period: [Provider] may offer to continue the advance for such a period and at such a fixed rate as it may decide. It may also offer alternative available products. If such offer is made and you elect to accept then you must do so in writing, your acceptance to be signed by all parties to the mortgage and to be received by [the Provider] by a date specified by it. If no such offer is made or if an offer is made and no acceptance received as prescribed above, then, from the day following the expiry of any option selected above, the [Provider] shall apply in accordance with General Condition 2 of the Offer of Advance originally accepted by you being the Bank’s General Conditions Relating to Advances by [the Provider’s] House Mortgages Section, which varies the Interest Rate, and the said General Conditions relating to the Advances shall be construed accordingly.

...

I/We have read the information above regarding early repayment/conversion to another product within the fixed rate period, and the process at expiry of the fixed rate, and request transfer of my/our mortgage to the fixed rate indicated above, effective from 1 July 2004”

I note that the Complainant chose to apply a fixed interest rate of 4.20% to her mortgage loan account until **31 March 2007**, having confirmed that she read the information regarding the process at expiry of the fixed interest rate period. I have not been provided with any evidence that would indicate that the Complainant completed a **Flexible Transfer Form** to apply a tracker interest rate to her mortgage loan account.

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It is clear to me that the **Fixed Rate Mortgages Form** contained no reference to a tracker rate of interest being applied at the end of the fixed rate interest rate period in **March 2007**. Rather, the **Fixed Rate Mortgages Form** provided that the Provider may offer “*alternative available products*” on the expiry of the fixed interest rate period, and in the event that the Complainant did not accept an alternative interest rate product, the Provider’s home loan rate of interest would apply, in accordance with **General Condition 2** of the Offer of Advance dated **3 September 2003**, as outlined above. **General Condition 2** describes the nature of the Provider’s home loan interest rate as one that could be varied at any time. **General Condition 2** did not make any reference to the nature of the Provider’s home loan interest rate to be one that varies in accordance with the ECB rate.

Prior to the expiry of the fixed interest rate period on **31 March 2007**, the Provider submits that it issued a **Product Expiry Letter** to the Complainant together with a **Flexible Transfer Form** and a **Fixed Rate Mortgages Form**.

The Provider submits that it has been unable to submit a copy of the **Product Expiry Letter** which was sent to the Complainant in evidence, despite extensive searches. It is most disappointing that a copy of this letter was not retained by the Provider.

The Provider has however submitted a **template copy of the Product Expiry Letter**, which was in use at the time, in evidence. The template letter outlines that the fixed interest rate period is coming to an end and that the rate will change to the Provider’s standard variable rate or alternatively, the Complainant could choose a “*Flexible Mortgage*” or “*Fixed Rate Mortgage*”. The template Product Expiry Letter details the options that were open to the Complainant on the expiry of the fixed interest rate as follows:

***“Option 1: Flexible mortgage** – this is one of our most popular mortgages. The flexible mortgage tracks the European Central Bank base rate and although the base rate may change, the margin you pay is fixed for the life of the loan. The current rate is 4.95%*

.....

***Option 2: Fixed Rate mortgage** – If you’d like the peace of mind of knowing your interest rate will stay the same for a fixed length of time, why not choose from these options?*

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Simply choose the fixed rate term that suits you now. And remember, at the end of your fixed rate period you will have the flexibility to explore your options again.

Option 3: Standard Variable Rate – *if you decide not to take advantage of Option 1 or Option 2, the rate you will pay will be automatically revert to our Standard Variable Rate which is currently 5.59% (5.7% APR)*

...

If you would like any further information on the above options please feel free to contact us on [number]. Alternatively, you may wish to contact your Branch to arrange a Customer Service Review.”

The **Flexible Mortgage Information Sheet** enclosed with the Product Expiry Letter details as follows:

“The [Provider] Flexible Mortgage is a variable rate mortgage linked to the European Central Bank Rate. The rate of the Mortgage is the European Central Bank Rate plus a fixed margin of 1.15%. Whilst the mortgage rate will vary if the European Central Rate changes, the margin will remain the same. The current flexible rate we are offering is 4.65% (4.8% APR).

...

If you wish to transfer to Flexible Rate, please complete and return the Flexible Transfer Form.”

I have not been provided with any evidence that would indicate that the Complainant completed a **Flexible Transfer Form** to apply a tracker interest rate of ECB + 1.15% to her mortgage loan account. Rather, the Complainant signed a **Fixed Rate Mortgages Form** on **20 March 2007** which details as follows:

“A fixed rate mortgage guarantees the rate on your mortgage will remain unchanged for the fixed rate period although your payments may alter if you receive Tax Relief at Source.

...

The Fixed Rates currently available are:

*5.00% *Fixed Rate until 31/03/2009 (APR 5.1%) ✓*

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5.04% *Fixed Rate until 31/03/2010 (APR 5.1%)

5.06%* Fixed Rate until 31/03/2012 (APR 5.1%)

....

At the end of the fixed rate period: [Provider] may offer to continue the advance for such a period and at such a fixed rate as it may decide. It may also offer alternative available products. If such offer is made and you elect to accept then you must do so in writing, your acceptance to be signed by all parties to the mortgage and to be received by [the Provider].

If no such offer is made or if an offer is made and no acceptance received as prescribed above, then, from the day following the expiry of any option selected above, the [Provider] shall apply in accordance with General Condition 2 of the Offer of Advance originally accepted by you being the Bank's General Conditions Relating to Advances by [the Provider's] House Mortgages Section, which varies the Interest Rate, and the said General Conditions relating to the Advances shall be construed accordingly.

...

I/We have read the information above regarding early repayment/conversion to another product within the fixed rate period, and the process at expiry of the fixed rate, and request transfer of my/our mortgage to the fixed rate indicated above, effective from 1 April 2007"

I note that the Complainant chose to apply a fixed interest rate of 5.00% to her mortgage loan account until **31 March 2009**, having confirmed that she read the information regarding the process at expiry of the fixed interest rate period. It is clear to me that the **Fixed Rate Mortgages Form** contained no reference to a tracker rate of interest being applied at the end of the fixed interest rate period in **March 2009**. Rather, the **Fixed Rate Mortgages Form** provided that the Provider may offer "alternative available products" on the expiry of the fixed interest rate period, and in the event that the Complainant did not accept an alternative interest rate product, the Provider's home loan rate of interest would apply, in accordance with **General Condition 2** of the Offer of Advance dated **3 September 2003**. As previously outlined, **General Condition 2** did not make any reference to the nature of the Provider's home loan interest rate to be one that varies in accordance with the ECB rate.

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If the Complainant wished to apply a tracker interest rate to her mortgage loan account in **March 2007**, the Complainant could have selected a tracker interest rate by completing the **Flexible Transfer Form**, but she did not do so. Therefore, a fixed interest rate of 5.00% applied the mortgage loan account until **March 2009**.

The Provider states that it issued a further **Product Expiry Letter** to the Complainant prior to the end of the fixed interest rate period in **March 2009**. The Provider explains that it has been unable to retrieve a copy of the specific letter that issued to the Complainant, despite extensive searches. It is disappointing that a copy of this letter was not retained by the Provider.

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;*
- 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 Provider is obliged to retain all documentation relating to the mortgage loan account for a period of six years from the date the relationship with the mortgage holder ends which includes all correspondence with the consumer.

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The Provider has however furnished a copy of a **template Product Expiry Letter** in evidence which was purportedly in use at the time. The template letter outlines that the fixed term period is coming to an end and that the interest rate will automatically roll to the Provider's standard variable rate unless the customer selected a new fixed interest rate over 2, 3 or 5 years.

In circumstances where the Provider did not receive a response from the Complainant, the Provider issued a letter dated **22 April 2009** to the Complainant which details as follows:

"Dear [Complainant]

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%.

The revised gross monthly repayment to your mortgage is 741.73 Euro. If applicable, this figure will be reduced by any tax relief at source (TRS) applied to your account.

If you would like to discuss the options available to you, please contact our Mortgage Services team...."

In circumstances where the Complainant did not elect to choose a further fixed interest rate in **March 2009**, the interest rate on her mortgage loan account converted to the Provider's standard variable rate of 3.85% and has remained on a standard variable interest rate since.

The Complainant is seeking a *reinstatement* of a tracker interest rate to her mortgage loan account. However, upon a careful consideration of the Complainant's loan documentation, it is clear to me that the Complainant's mortgage loan account was never on a tracker interest rate. The Complainant drew down her mortgage loan in **2004** on a discounted variable home loan interest rate as opposed to a tracker interest rate. The nature of the variable rate was one that could be adjusted by the Provider as opposed to one that tracked the ECB rate. If the Complainant wished to pursue the option of applying for a tracker interest rate mortgage loan at the time of her mortgage loan application, the Complainant could have indicated to the Provider that she had a preference for a tracker interest rate.

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However, the Complainant did not do so. The Provider offered the Complainant a mortgage loan on a discounted variable interest rate in **2004**, which was accepted by the Complainant. The discounted variable interest rate applied until **30 June 2004**. The Complainant subsequently chose to apply a fixed interest rate to her mortgage loan account in **June 2004** and again in **March 2007**, despite having also been offered a tracker interest rate. If the Complainant wished to apply a tracker interest rate to her mortgage loan account, the Complainant could have chosen to apply a tracker interest rate at the end of the discounted variable interest period in **2004** or at the end of the fixed interest rate period in **2007**, however the Complainant did not pursue this option on either occasion.

I note that tracker mortgages had been withdrawn from the market by the Provider from **late 2008** and therefore the Complainant could not have been offered a tracker interest rate when the fixed rate expired in **March 2009**.

Furthermore, for the avoidance of doubt I am of the view that the Complainant had no contractual or other entitlement to a tracker interest rate when the fixed interest rate period concluded in **March 2009**. In accordance with **General Condition 2**, the Provider offered the Complainant fixed and variable rate types.

For the reasons outlined 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.

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**

11 October 2021

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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.

