



<b><u>Decision Ref:</u></b>	2022-0215
<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 at point of sale 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**

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 is secured on the Complainant's private dwelling house.

The loan amount was for €194,000.00 and the term of the loan was 30 years. The **Letter of Loan Offer** dated **24 February 2009** provided for a variable annuity loan on an interest rate of 3.45%. The interest rate is described as "*PDH LTV Var>50%<=80%*".

**The Complainant's Case**

The Complainant states that prior to engaging with the Provider, she held a mortgage loan with another financial service provider. She submits that she attended the Provider's branch "*to do [a] lodgement for [her] employer*". The Complainant details that she was approached by a customer service staff member of the Provider and asked whether she had a mortgage.

The Complainant states that she subsequently met with the Provider's mortgage advisor and informed the mortgage advisor that she "*had a tracker mortgage*" with another financial service provider. The Complainant explains that she was informed by the mortgage advisor that the Provider no longer offered tracker mortgages.

The Complainant submits that the mortgage advisor offered her “€2,000 to win [her mortgage].” The Complainant details that this figure included “a gratuity of €1200 but [her] fees were also covered so this would have amounted to the balance of €2000”.

The Complainant notes that shortly after drawing down her mortgage loan with the Provider, she attended the Provider’s branch to enquire as to why her mortgage loan account was not on a tracker rate of interest. The Complainant submits that she called “numerous times over the years as [she] felt the rate was high and that [she] was finding [her] payments getting higher” but was informed that the Provider no longer offered tracker interest rates to customers. The Complainant asserts that she had to fix the interest rate on her mortgage loan account in order to meet her monthly repayments in **2010** as the Provider did not allow her to apply a tracker interest rate to the mortgage loan.

The Complainant is of the view that she was not given “the best advice at the time” of the mortgage loan application. The Complainant states that the Provider was “not clear” on how the chosen mortgage product “would effect [her] financially.”

The Complainant details that the “crux” of the matter is that she “did not approach the bank for a mortgage.” The Complainant submits that she was informed that the mortgage she was given “was the same as the one [she] had and this was NOT the case.” The Complainant notes that she believed she “was getting like for like”.

The Complainant states that despite her Letter of Loan Offer detailing that she should seek legal advice before signing the document, she “had a solicitor deal with the transfer” but on no occasion did she receive financial advice which she “now know[s] would have been necessary in order for [her] to make a proper decision in relation to my mortgage”.

The Complainant is seeking the following:

- (a) A tracker interest rate to be applied to the mortgage loan account from **2009** to date “even if this was higher at times”; and
- (b) A recalculation of the mortgage loan account from **2009** to date “to put me in the same position [she] was in with [alternate provider]”.

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

The Provider submits that it initially contacted the Complainant on **10 February 2009** to enquire if she would be interested in transferring her mortgage to the Provider, to which the Complainant responded that she was not interested in switching mortgages at present.

The Provider details that its records indicate that the Complainant subsequently approached the Provider and completed a mortgage loan application on **20 February 2009**.

The Provider states that it was not its policy in **2009** *"for Staff to offer advice on interest rates"* to customers. The Provider details that its staff provide information on interest rates at the mortgage loan application stage and during the term of the mortgage loan if requested. The Provider also notes that all its interest rates *"were publicly advertised"* through its website and in its branches.

The Provider notes that the Complainant indicated her preference was to apply for a variable interest rate at the time of the initial application. The Provider submits that there is no record of the Complainant requesting a tracker interest rate at the time of the mortgage loan application. The Provider submits that the decision as to which interest rate to opt for *"rested solely with Complainant"*. The Provider states that, based on the mortgage loan sought and the estimated value of the property, *"the Complainant qualified for the Variable > 50% & <= 80% LTV rate as specified in the Loan Offer."* The Provider states that a **Letter of Loan Offer** issued to the Complainant on **25 February 2009** which was signed by the Complainant, witnessed by her solicitor and returned to the Provider on **02 April 2009**. The Provider notes that the mortgage loan was drawn down on **07 April 2009** on a private dwelling house LTV variable interest rate of 2.95% for a term of 30 years.

The Provider details that the Complainant submitted the requisite documentation and *"an application was submitted to move her existing Mortgage facilities, held with another provider, to the Bank."* The Provider explains that between **February 2009** and **April 2009**, the Provider *"made a payment of €1,200 to existing customers who decided to switch their mortgage to the Bank (from another provider)."* The Provider details that the payment of €1,200 was credited to the Complainant's current account on **9 April 2009**.

The Provider maintains that it does not have any record *"of the Complainant providing any details of the rate applicable to her Mortgage Loan Account which was held with another Provider prior to switching her Mortgage Loan to the Bank."* The Provider asserts that tracker interest rates were not available to new customers such as the Complainant at the time of the mortgage loan application, as the Provider had withdrawn tracker interest rates for new customers.

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The Provider submits that the following interest rates were on offer by the Provider when the Complainant drew down mortgage loan account ending **3262** in **2009**:

<b>Interest Rate Type</b>	<b>Interest Rate %</b>
PDH LTV Variable <= 50%	2.75%
PDH LTV Variable > 50% & <= 80%	2.95%
PDH LTV Variable >80%	3.15%
1 Year New Fixed Owner/Occupier	2.40%
1 Year Existing Fixed Owner/Occupier	2.85%
2 Year Fixed Owner/Occupier	2.80%
3 Year Fixed Owner/Occupier	3.10%
4 Year Fixed Owner/Occupier	3.45%
5 Year Fixed Owner/Occupier	3.60%
10 Year Fixed Owner/Occupier	4.25%

On **25 March 2010**, the Provider states that the Complainant requested to apply a 3-year fixed interest rate to her mortgage loan account. The Provider submits that it issued a letter to her dated **31 March 2010** “*which confirmed the amount of the monthly repayment for the period of the fixed interest rate.*”

The Provider asserts that it wrote to the Complainant on **27 February 2013** “*advising her that the 3 year Fixed Rate period on Mortgage Loan Account ending 3262 was due to expire on 2 April 2013*”. The Provider states that **General Condition 3.4** of the **Letter of Loan Offer** sets out what is to happen on the expiry of the fixed interest rate period. The Provider explains that mortgage loan account ending **3262** converted to the Provider’s standard variable interest rate of 4% in accordance with **General Condition 3.4**. The Provider is of the view that the Complainant’s mortgage loan account “*operated in line with the Loan Offer and General Terms and Conditions attaching at all times and in line with the Complainant’s subsequent written instructions*”. The Provider details that the Complainant’s mortgage loan account remains on the standard variable interest rate.

The Provider notes that it has a record of two complaints lodged by the Complainant, one on **17 September 2013**, in which a **Final Response Letter** issued on **01 October 2013**, and the other on **03 August 2016**, in which a **Final Response Letter** issued on **19 August 2016**. However, the Provider maintains that it has no record of the Complainant making a complaint concerning the “*high*” interest rate on her mortgage loan account ending **3262**.

### **The Complaint for Adjudication**

The complaint is that the Provider failed to properly advise the Complainant in relation to her interest rate options when she applied for a mortgage loan in **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. 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 **29 March 2022** 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.

Following the issue of the Preliminary Decision, the Complainant made further submissions to this Office by way of e-mail correspondence on **17 April 2022** and **20 April 2022**, copies of which were exchanged with the Provider. The Provider did not make any further submissions.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below the final determination of this Office.

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In order to determine this complaint, it is necessary to consider the relevant provisions of the Complainant's mortgage loan documentation and details of certain interactions between the Provider and the Complainant in **2009** and **2010**.

In my Preliminary Decision dated **29 March 2022**, I noted that the Complainant completed a "mortgage loan application" with the Provider on **20 February 2009** where the Complainant indicated that she had a preference for a variable interest rate as follows:

"...

*Question*

*Answer*

*Do you want the interest rate to be fixed, variable or do you have a preference?* *Variable*

*Do you want the repayments to be regular, by a Lump sum or do you have a preference?* *Regular*

..."

However, that document is correctly called "*Consumer Protection Code – Know your Customer Product Finder Process*". A copy of the mortgage loan application was requested from the Provider during the investigation of this complaint by this Office. However, the Provider noted that having reviewed all branch files, it was unable to find a copy of the application form.

The Complainant, in her post Preliminary Decision submission dated **20 April 2022**, submits that the "*provider was unable to produce a copy of [her] application form*" and that there is no application form available to corroborate that she chose a variable interest rate. The Complainant states that the two questions referred to above "*don't form part of the Mortgage Loan Application form.*" The Complainant asserts that the questions are from an "*unsigned fact find that the Bank completed prior to completing an application – which [she] did not complete.*"

The Complainant is correct that a mortgage loan application has not been submitted in evidence.

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Following the mortgage loan application process and engagement with the Complainant, the Provider issued a **Letter of Loan Offer** to the Complainant dated **25 February 2009**, which details as follows:

**"IMPORTANT INFORMATION AS AT 25 February 2009**

- 1 Amount of Credit Advanced €194,000.00
- 2 Type of Loan Annuity
- 3 Period of Agreement 30 years/360 months

...

**LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS DOCUMENT IS SIGNED**

...

**PART 1**

**PARTICULARS OF OFFER OF MORTGAGE LOAN**

- Offer Date 25 February 2009
- Customer Name [name of the Complainant]
- Mortgage Loan Amount €194,000.00
- Loan Term 30 years/360 months.

Repayment Details as at date of Offer

	<b>Term</b>	<b>Loan Type</b>	<b>Interest Rate Description</b>	<b>Published Rate</b>	<b>Adjustment*</b>	<b>Rate Applicable</b>	<b>Amount of Each Instalment (Includes PPP)</b>
1	30 Years	Variable Annuity	a. PDH LTV Var >50% <=80%	3.45%	0%	3.45%	€905.94

..."

**General Condition 3** of the **General Terms and Conditions of Offer of Mortgage Loan** details as follows:

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### **“3 INTERERST RATES**

#### **3.1 RATE NOT GUARANTEED TO DRAWDOWN**

*Due to fluctuations in interest rates, the Bank does not warrant or guarantee that the rate specified in the Particulars will apply on draw down:*

*(a) In the case of an offer at a variable rate the initial rate which will apply to the Mortgage Loan will be the rate prevailing at date of draw down.*

*(b) In the case of an offer at a fixed interest rate, the appropriate fixed rate which prevails at date of draw down will apply to the Mortgage Loan if this is different from the rate specified in the Particulars.*

*The Customer may accept this rate or, within 21 days of draw down, opt to switch to a variable rate prevailing at the time without incurring any early breakage cost under Clause 3.3.*

#### **3.2 FIXED INTEREST RATE MORTGAGE LOAN**

*In the case of a fixed interest rate Mortgage loan, the interest rate is the appropriate rate which prevails at the date of drawdown, and will be fixed for the period of time stated in the Particulars, subject to these conditions.*

...

#### **3.4 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE**

*At the end of any fixed interest rate period, the Customer may choose between:*

*(a) a further fixed interest rate period, or*

*(b) conversion to the appropriate variable interest rate Mortgage Loan at the Bank's then prevailing rates appropriate to the Mortgage Loan. If the Customer does not exercise this choice, then the Mortgage Loan will automatically convert to a standard variable interest rate Mortgage Loan.*

*(c) The new rate will apply no later than two working days following the expiry of the fixed interest rate period. The old fixed interest rate will continue until the new rate is applied.*

#### **3.5 STANDARD VARIABLE INTEREST RATE MORTGAGE LOAN**

*In the case of a standard variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the Bank from time to time, subject to these conditions.*

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### **3.6 LTV VARIABLE INTEREST RATE MORTGAGE LOAN**

**3.6.1** *LTV variable rate is available only where the property is or is intended to be the principal residence of the Customer. The applicable rate band will depend on the loan-to-value ratio ('LTV') of the amount of the mortgage loan relative to the value of the property set out in the Particulars of Offer of Mortgage Loan.*

*The interest rate applicable at any time, will vary according to the prevailing LTV variable rates set by the Bank from time to time, subject to these conditions.*

**3.6.2** *The Bank may adjust the LTV variable rate upwards if the Valuation Report values the property at less than the Property Price/Estimated Value shown in the Particulars of Offer of Mortgage Loan. The Bank will notify the Customer in writing of the new LTV variable rate.*

**3.6.3** *The Customer may at any time convert a LTV variable rate to a fixed interest rate Mortgage Loan at the Bank's then prevailing rates appropriate to the Mortgage Loan. However, the Customer may not convert the LTV variable Rate directly or indirectly from one LTV variable rate to another LTV variable rate in order to avail of a lower LTV variable rate."*

**Part 5- Statutory Notices and Other Notices** of the **Letter of Loan Offer** states as follows:

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

The **Acceptance and Consent** section of the **Letter of Loan Offer** was signed by the Complainant and witnessed by her solicitor on **2 April 2009** on the following terms:

*"I/We accept the conditions of this Offer and agree to mortgage the property to the Lenders as Security for the Mortgage Loan.*

...

*I/We acknowledge and accept that the rate of interest which applies to the Mortgage loan may be different from the rate shown in the Offer, and in the case of fixed interest rates, the rate which prevails at the date of drawdown is the rate which will apply for the period of time stated in the Particulars.*

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*I/We hereby confirm, that I/we have read the within Terms and Conditions attaching to this Offer, and acknowledge that I/we have received a copy thereof”.*

The **mortgage account statements** submitted in evidence show that mortgage loan account ending **3262** was drawn down on a variable interest rate of 2.95% on **07 April 2009**. The Provider has submitted that the interest rate that was applied to the mortgage loan account at draw down was lower than the interest rate provided for in the **Letter of Loan Offer** on foot of a decrease in the interest rate which occurred between the date of issue of the **Letter of Loan Offer** and the drawn down date.

It is clear that the **Letter of Loan Offer** provided for a LTV variable interest rate of 3.45%. The nature of the Provider’s LTV variable interest rate was one that could be adjusted by the Provider as opposed to a tracker interest rate that fluctuated in line with the variations to the ECB refinancing rate.

The Complainant wrote to the Provider on **25 March 2010** to request that a 3-year fixed interest rate be applied to her mortgage loan. The letter details as follows:

“ ...  
*Can you fix my mortgage for 3 years at 3.19% apr from immediate effect.*  
...”

The Provider wrote to the Complainant on **31 March 2010** outlining as follows:

“...  
*With reference to your recent request I confirm that a fixed interest rate of 3.19% (including the existing interest adjustment of 0.00%) will apply to your mortgage loan from 31 March 2010 **for a period of 3 years**. The Monthly repayment for the period of the fixed interest rate will be €888.71 (includes PPP) and will be revised on its expiry in accordance with the rate then applicable.*  
...”

The **mortgage account statements** show that a fixed interest rate of 3.19% was applied to the Complainant’s mortgage loan account on **31 March 2010**, in accordance with the Complainant’s request.

Prior to the expiry of the 3-year fixed interest rate period, the Provider issued a letter to the Complainant dated **27 February 2013**, detailing the following:

“ ...

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*I am writing to let you know that the fixed rate period on your Home Mortgage Loan Account above expires on 2nd April 2013.*

*As a result of this, I would be grateful if you could complete the enclosed form detailing the new mortgage rate you wish to avail of and return to us at the above address. Below is a sample of the rates currently on offer from [the Provider].*

*In the absence of your instruction, [the Provider's] Standard Variable Rate of 4%, APR 4.060%, with repayments of €971.08 including PPP cover, which was taken out upon drawdown of the mortgage loan will be applied. With agreement, this may be changed to another rate at a later stage.*

<b>Rate Description:</b>	<b>%</b>	<b>APR %</b>	<b>Repayment</b>
<i>a.PDH LTV Var&gt;50%&lt;=80%</i>	<i>4.04</i>	<i>4.102</i>	<i>€975.25</i>
<i>1 Year Fixed</i>	<i>4.15</i>	<i>4.074</i>	<i>€986.76</i>
<i>2 Year Fixed</i>	<i>4.65</i>	<i>4.177</i>	<i>€1,039.94</i>
<i>3 Year Fixed</i>	<i>4.88</i>	<i>4.292</i>	<i>€1,064.88</i>
<i>5 Year Fixed</i>	<i>5.35</i>	<i>4.624</i>	<i>€1,116.71</i>
<i>..."</i>			

The **mortgage account statements** show that the interest rate changed to the Provider's standard variable interest rate of 4.00% on **03 April 2013**.

The evidence shows that the Complainant queried the interest rate on her mortgage loan account on **17 September 2013**. I have been furnished with an internal note from the Provider dated **17 September 2013** which outlines as follows:

*"The above client is querying the interest rate on account. Currently 4.4%. client was sure it should be in tracker. Can you please investigate same and advise so I can revert to client..."*

The Provider explains that it made a commercial decision in **late 2008** to withdraw tracker interest rates for new mortgage customers and existing mortgage customers who wished to change from their current contractual interest rate to a tracker interest rate. The Provider states that existing customers with tracker mortgages were not affected by this.

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The Complainant was not an existing customer at that time. The evidence shows that the Complainant applied for a new mortgage with the Provider in **February 2009**. At this time, she had the option to apply for a new mortgage loan on a fixed interest rate or a variable interest rate.

There was no option to select a tracker interest rate because the Provider no longer offered tracker interest rates as part of its product offering in **2009**. The Provider withdrew its tracker interest rate products from the market in late **2008**. This was a business decision that the Provider was entitled to make.

In my Preliminary Decision dated **29 March 2022**, I noted that the evidence shows that the Complainant completed a mortgage loan application on **20 February 2009** and chose to apply for a variable interest rate. However, as detailed above, the Provider has been unable to submit a copy of the mortgage loan application in evidence.

Rather, the Provider submitted a document titled Product Finder Process in evidence.

I have had regard to the Product Finder Process document submitted in evidence, together with the Complainant's own evidence. I note that the Complainant submitted as follows in her Complaint Form to this Office:

*"I was asked if I would switch to [the Provider] and they would pay my legal fees. When I met the mortgage adviser she requested documentation to get mortgage with [the Provider]. She said [Provider] don't do tracker mortgages anymore and that the tracker rate was higher than what she was offering, but she would give me €2,000 to win my mortgage".*

In these circumstances, it is clear to me that the Complainant was informed by the Provider at the time of applying for a mortgage loan that tracker interest rates were not available with the Provider. The Provider carried out a suitability assessment and it was determined that a variable interest rate was a suitable product offering. The Complainant was then offered that product in the Letter of Loan Offer, which she duly accepted. The evidence shows that the Provider did inform the Complainant of the interest rate options that were available with the Provider at that time.

It appears that the Complainant is of the view that the Provider should have advised her of the long term advantages between staying on the mortgage loan with the other financial service provider compared with taking out the new mortgage with the Provider.

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While the Provider could provide information to the Complainant on its product offerings in **2009**, the decision as to which interest rate to select, and whether to move her mortgage loan from her previous financial service provider, rested solely with the Complainant.

If the Complainant wanted independent advice about rates available in the market in **2009**, or a comparison between the Provider's offering and her existing mortgage loan, the Complainant could only get that advice from an independent third-party advisor as opposed to a representative of the Provider who was employed by the Provider to sell the Provider's mortgage products. The Complainant in her own evidence acknowledges that getting financial advice "*would have been necessary in order for [her] to make a proper decision in relation to [her] mortgage*".

The Complainant, in her post Preliminary Decision submissions, appears to place particular emphasis on the fact the mortgage loan application has not been submitted in evidence and the fact that the Product Finder Process document appears to be an unsigned document. In this regard, it is important to note that neither the mortgage application form nor the Product Finder sales engagement document formed the basis of a mortgage loan agreement between the Complainant and the Provider.

Consequently, the Complainant was free to change her mind as to her preferred interest rate option after completing the mortgage loan application process with the Provider and before signing any Letter of Loan Offer and entering into a contractual relationship with the Provider.

In circumstances where a variable interest rate was assessed as a suitable rate, the Provider subsequently issued a **Letter of Loan Offer** dated **24 February 2009** offering the Complainant a private dwelling house LTV variable interest rate mortgage product. If the Complainant was not satisfied with the variable interest rate offered by the Provider in **February 2009**, the Complainant could have contacted the Provider to explore other potential interest rate options with the Provider or indeed decline the Provider's loan offer and remain with her previous financial service provider or apply for a new mortgage loan with an alternative financial service provider. However, the Complainant did not do so, and decided to accept the terms and conditions of the **Letter of Loan Offer** and draw down a new mortgage loan with the Provider on a variable interest rate.

In the circumstances of this matter the evidence does not support the Complainant's complaint that the Provider failed to properly advise the Complainant in relation to her interest rate options when she applied for a mortgage loan in **2009**.

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

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## **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.**



**JACQUELINE O'MALLEY  
HEAD OF LEGAL SERVICES**

27 June 2022

## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

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.

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**Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.