



<b><u>Decision Ref:</u></b>	2022-0303
<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' principal private residence.

The loan amount was €390,000.00 and the term of the loan was 35 years. The particulars of the mortgage loan offer accepted by the Complainants on **01 June 2006** detailed that the interest rate was "*Fixed For 36 months*".

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

In **June 2006**, the Complainants note that they drew down a mortgage loan with the Provider on a 35-year term, with a fixed interest rate of 4.49% to apply for the first 36 months. On the expiry of the fixed interest rate period in **June 2009**, the Complainants submit that they were not offered a tracker interest rate and the Provider's standard variable interest rate of 3.49% was applied to the mortgage loan.

The mortgage loan account was facilitated through a broker, and the Complainants submit that this is how the Provider "*provided mortgages at the time*". The Complainants explain

that when applying for their mortgage, they received and signed a document entitled '**Mortgage – Reasons Why Letter**' dated **21 June 2006** from the broker in respect of selecting the mortgage product offered by the Provider which details:

*“Should you decide to choose a fixed rate at the beginning of your mortgage, you will have the choice of another fixed rate when this expires (as they continue to be available) or you can choose a variable or tracker rate”.*

The Complainants contend that although this letter was issued by their broker, their broker was acting on behalf of the Provider as a mortgage intermediary licenced under the **Consumer Credit Act 1995**.

The Complainants submit that the Provider refers to this letter as a *“Statement of Suitability”* and that under the **Consumer Protection Code** (Chapter 2, Common Rule 31) all financial service providers must provide a potential customer with a statement of *“why a product or service they are recommending is most suited to them”*. The Complainants further submit that this '**Mortgage – Reasons Why Letter**' dated **21 June 2006** should be regarded as a *“clear record for both the advisor and client of the discussion which took place and the reasons for the mortgage sale”*.

The Complainants submit that '**Mortgage – Reasons Why Letter**' only mentions one type of fixed interest rate, which provided for a variable or a tracker interest rate to be available on the expiry of the fixed interest rate period. The Complainants state that they were not given the option of a tracker interest rate on the expiry of the fixed interest rate period. The Complainants further submit that the Provider never informed them of the withdrawal of tracker interest rates from the market in **2008**.

The Complainants also submit that they are *“under the impression from reports”* that the Provider's *“variable rate was actually a tracker rate in 2006”* and therefore any reference in their mortgage loan documentation referring to *“a variable rate was in fact a tracker rate”*.

The Complainants are seeking the following:

- (a) The Provider to consider the Complainants' mortgage loan account as part of the Central Bank of Ireland directed Tracker Mortgage Examination; and
- (b) The Provider to give *“clear details and reasoning compared to other customers who may be included in the Central Bank Examination of Tracker Mortgages and not the simple answer of the fact it was withdrawn in 2008 due to the financial crisis”*.

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

The Provider submits that the Complainants were not offered a tracker interest rate on expiration of the fixed rate period in **2009** as *“there was no default or contractual entitlement established for the Bank to do so.”*

The Provider asserts that when the Complainants' fixed interest rate period expired in **June 2009**, a standard variable interest rate was applied to the mortgage loan account in accordance with **General Condition 7** of the **Letter of Offer**. The Provider states that it withdrew its tracker mortgage rates in **mid-2008** therefore, *“outside of default or contractually provided for tracker rates, there were no tracker rates available from the Bank after [mid-2008]”*.

The Provider details that the term *“prevailing variable rate”* is not defined in the Complainants' mortgage loan documentation, however, *“the term was a widely used and understood term”* and there was *“no indication nor commitment that the variable rate would be linked in any way to ECB rates or that the Bank was referring to an interest rate that was linked in any way to the ECB rates”*.

The Provider details that the Complainants' mortgage application form *“clearly noted the types of interest rates potentially available being [1] variable [2] fixed or [3] tracker.”* The Provider further states that the **Mortgage Handbook** supplied with their **Letter of Offer** included a 'Rates Explained Section' which included an explanation of both tracker interest rates and variable interest rates.

At the time of the mortgage loan application, the Provider explains that the Complainants were seeking to borrow *“at a loan to value ratio in excess of 92%”*. The Provider explains that given the loan to value, the Complainants *“were not eligible for a tracker rate and the application form as presented to the Bank from the Broker at that time was on the basis of a fixed rate.”* The Provider relies on its rate matrix dated **3 April 2006** in relation to the eligibility criteria for a tracker mortgage at the time.

With regard to the Complainants' submission that the *“Mortgage – Reasons Why Letter”* dated **21 June 2006** that issued from the broker equated to a *“Statement of Suitability”*, the Provider states that this correspondence *“was issued to the Complainants by the Complainant's Broker and not the Bank. This is therefore a matter for the Complainants' Broker.”* The Provider details further that the correspondence of **21 June 2006** was *“issued by the Broker as a statement of suitability and [the Provider] do not believe that this fact has been disputed by the issuing party.”* The Provider asserts that it did not issue the letter to the Complainants and submits that the *“terms under which the Bank was prepared to provide finance to the Borrowers is as set out in the letter of offer”*.

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The Provider states that the broker was “*acting as a mortgage intermediary, not a tied agent of the Bank.*”

### **The Complaints for Adjudication**

The complaints for adjudication are as follows:

- (a) The Provider incorrectly failed to inform the Complainants that they were withdrawing tracker interest rates from the market in **2008**; and
- (b) The Provider incorrectly failed to offer the Complainants the option of a tracker interest rate upon expiry of the fixed interest rate period in or around **June 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 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 **09 August 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.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this Office is set out below.

Before dealing with the substance of the complaint, I note that 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 dated **27 September 2019**, which outlined as follows:

*“In the interests of clarity, the complaint that your client’s 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 documentation relating to the Complainants’ mortgage loan. It is also necessary to consider the details of any interactions between the Complainants and the Provider when the conduct complained of occurred.

An **Application Form** was completed by the Complainants on **10 April 2006** with a third-party broker. The Complainants were given the choice of a variable interest rate, a tracker interest rate or a fixed interest rate under the *“Mortgage type, rate and term details”* section of the loan application. A 1-year fixed interest rate was selected with a rate of *“3.79%”* handwritten on the application form.

A document titled **‘Mortgage – Reasons Why Letter’** dated **24 June 2006** has been submitted in evidence. This document appears to have been completed by the Complainants’ broker and it outlines why the broker is of the opinion that a mortgage with the Provider would be a suitable product for the Complainants. This document details as follows:

*“Having completed a Financial Health Check I have analysed your investment experience and objectives as well as other information relevant to your individual financial circumstances. After considering your financial needs based on the information provided by you, I recommend that you take out a mortgage with [the Provider].”*

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...

*I consider a mortgage with [the Provider] to be suitable for you and to be in your best interest for the following reasons:*

- *A choice of very competitive fixed and variable rates to choose from*
- *Should you decide to choose a fixed rate at the beginning of your mortgage, you will have the choice of another fixed rate when this expires (as they continue to be available) or you can choose a variable or tracker rate....”*

Upon an assessment of the Complainants’ mortgage loan application, the Provider issued an **Amended Letter of Offer** dated **19 May 2006** to the Complainants.

The **Particulars of Advance** contained in the **Amended Letter of Offer** detail as follows:

***“IMPORTANT INFORMATION AS AT 19<sup>th</sup> May 2006***

<i>Amount of Credit Advanced</i>	<i>€390,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>35 – 0</i>
<i>...”</i>	

The **Additional Particulars of Advance** in the **Amended Letter of Offer** detail as follows:

<i>“...</i>	
<i>Type of Advance</i>	<i>FLEXI ANNUITY</i>
<i>Interest Rate</i>	<i>4.49</i>
	<i>Fixed For</i>
	<i>36 months”</i>

**General Condition 5** of the **Loan General Conditions** details as follows:

*“The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While the interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant’s Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will*

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*fluctuate in accordance with the fluctuations in the applicable interest rate.  
Payment of the monthly instalments must be made by Direct Debit Mandate.  
..."*

**General Condition 7** of the **Loan General Conditions** details as follows:

*"The rate of interest applicable to this loan will be fixed for 36 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply."*

**General Condition 17** of the **Loan General Conditions** details as follows:

***"THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER, THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED ..."***

The **Loan General Conditions** also detail 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 **Amended Letter of Offer** dated **19 May 2006** detail as follows:

*"This Letter of Offer replaces the Letter of Offer dated 19/05/2006 which is hereby cancelled."*

I have not been provided with a copy of another **Letter of Offer** dated **19 May 2006**. The **Amended Letter of Offer** dated **19 May 2006**, which has been made available during the investigation, forms the basis of the mortgage contract between the parties.

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The **Form of Acceptance** was signed by the Complainants on **01 June 2006** on the following terms:

*“I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-*

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

*copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).”*

The mortgage loan statements provided in evidence show that the mortgage loan was drawn down on **15 June 2006**.

It is clear to me that the **Amended Letter of Offer** envisaged a fixed interest rate of 4.49% for a period of 36 months with the Provider’s prevailing variable interest rate applying thereafter. The nature of the variable interest 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 varied by the Provider during the term of the mortgage loan.

The Provider’s internal notes from **17 June 2009** detail that the First Complainant contacted the Provider in relation to the expiry of the fixed interest rate period as follows:

*“[First Complainant] rang to conf rate, I conf same conf july repymt. mr queried the 1 mnth left on int only as fx rate and int only was effective from the same date (drawdown) for 3yrs...checked loan offer and same correct, mr should have finished both int only and fx rate this month and repymt from july should be annuity on svr...Mr wants same amended. Emailed cus services req to look after & issue conf and repymt amt for july to clients...”*

Following the expiration of the Complainants’ fixed rate period on **10 June 2009**, the interest rate on the Complainants’ mortgage loan account switched to a standard variable interest rate of 3.49% in line with **General Condition 7** of the **Loan General Conditions**.

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It appears that the Complainants subsequently contacted the Provider to enquire about fixed interest rate options. The Provider issued correspondence to the Complainants dated **12 August 2010** detailing the then available fixed rates as follows:

*“Dear [Complainants],*

*Thank you for you[r] recent enquiry about the option of fixing the interest rate on your mortgage account.*

*We are enclosing the following information*

- 1) a quotation outlining what your mortgage repayments would be based on a fixed rate of interest (including insurance policy premiums where applicable)*
- 2) an illustration showing the effect on a typical mortgage repayment if interest rates were to vary by 0.5%, 1%, 2%, or 3%*
- 3) information outlining the advantages and disadvantages of the various interest rate options*
- 4) a Questionnaire and a Fixed Rate Instruction form for you to complete and return*

*Should you wish to proceed with the option of fixing the interest rate on your mortgage account, please complete item (4) above and return it to us.*

*Please read all the enclosed documents very carefully before you make any decisions.*

*...”*

The interest rates available listed for selection in the **Fixed Rate Instruction form** were as follows:

- “Fixed until 1<sup>st</sup> August 2012 at 4.15% (3.82% Typical APR)*
- Fixed until 1<sup>st</sup> August 2013 at 4.25% (3.90% Typical APR)*
- Fixed until 1<sup>st</sup> August 2015 at 4.80% (4.29% Typical APR)* ”

I have not been provided with any documentary evidence to suggest that the Complainants completed the relevant **Fixed Rate Instruction form** in order to apply a fixed interest rate to their mortgage loan account. The evidence shows that the Provider issued further correspondence to the Complainants on **13 January 2011**, **9 February 2011** and **8 July 2016** detailing the available fixed interest rates however the Complainants did not

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pursue the option of applying a fixed interest rate. Consequently, the mortgage loan account remained on a standard variable interest rate.

The Provider has provided a table detailing the interest rates that have applied to the Complainants' mortgage account as follows:

<b><i>“Effective Date</i></b>	<b><i>Reflected in Repayment Date</i></b>	<b><i>Interest Rate</i></b>	<b><i>Notes</i></b>
<i>Drawdown</i>	<i>01/07/2006</i>	<i>4.49%</i>	<i>3 Year Fixed Rate</i>
<i>02/06/2009</i>	<i>01/07/2009</i>	<i>3.49%</i>	<i>Standard Variable Rate</i>
<i>10/06/2009</i>	<i>01/07/2009</i>	<i>3.24%</i>	<i>Standard Variable Rate</i>
<i>03/05/2010</i>	<i>01/06/2010</i>	<i>3.65%</i>	<i>Standard Variable Rate</i>
<i>31/08/2010</i>	<i>01/10/2010</i>	<i>3.85%</i>	<i>Standard Variable Rate</i>
<i>31/05/2011</i>	<i>01/07/2011</i>	<i>4.25%</i>	<i>Standard Variable Rate</i>
<i>04/09/2011</i>	<i>01/10/2011</i>	<i>4.50%</i>	<i>Standard Variable Rate</i>
<i>04/12/2011</i>	<i>01/01/2012</i>	<i>4.25%</i>	<i>Standard Variable Rate</i>
<i>03/03/2013</i>	<i>01/04/2013</i>	<i>4.50%</i>	<i>Standard Variable Rate</i>
<i>01/12/2015</i>	<i>01/01/2016</i>	<i>4.25%</i>	<i>Standard Variable Rate”</i>

The Complainants submit that the Provider incorrectly failed to offer them the option of a tracker interest rate upon expiry of the fixed interest rate period in **June 2009**. In this regard, the Complainants appear to rely on the document titled '**Mortgage – Reasons Why Letter**' dated **24 June 2006** which issued to the Complainants from their broker. The Complainants maintain that this document is a **Statement of Suitability** for the purposes of **provision 31 of Chapter 2 of the Consumer Protection Code 2006**. **Provision 31 of Chapter 2 of the Consumer Protection Code 2006** provides as follows:

*“Before providing a product or service to a **consumer**, a regulated entity must prepare a written statement setting out:*

- a) the reasons why a product or service offered to a **consumer** is considered to be suitable to that **consumer**;*
- b) the reasons why each of a selection of product options offered to a consumer are considered to be suitable to that **consumer**; or*
- c) the reasons why a recommended product is considered to be the most suitable product for that **consumer**”*

*The regulated entity must give a copy of this written statement to the **consumer** and retain a copy.*

*This requirement does not apply where:*

- (i) the **consumer** has specified both the product and the provider and has not received any advice;*
- (ii) the **consumer** is purchasing or selling foreign currency, or*
- (iii) the **consumer** is seeking a basic banking product or service.”*

The Complainants appear to assert that because this document provided a “clear record for both the advisor and client of the discussion which took place and the reasons for the mortgage sale”, they were entitled to rely on it and had an expectation that they would be offered a tracker interest rate on the expiry of the 3-year fixed interest rate period.

It is important to firstly highlight that **provision 31 of Chapter 2 of the Consumer Protection Code 2006** did not come in effect until **01 July 2007**, which was after the Complainants’ mortgage loan application and the drawdown of the mortgage loan. Secondly, ‘**Mortgage – Reasons Why Letter**’ dated **24 June 2006** did not issue from the Provider. The Complainants’ third-party broker issued this document on foot of discussing the Complainants’ mortgage options with them. I have not been provided with any evidence to suggest that the third-party broker was a tied agent who acted for and on behalf of the Respondent Provider and engaged with the Complainants on behalf of the Respondent Provider. It is understood that in this instance the third-party broker was a separate regulated entity. Consequently, in circumstances where the Complainants were engaging with a broker with respect to their mortgage loan options, there was no requirement for the Provider to communicate directly with the Complainants in relation to the completion of the application form or to discuss their preferred interest rate option. The Provider’s first communication with the Complainants was when the formal loan offer was issued.

While the Complainants applied for a 1-year fixed interest rate of 3.79%, the Provider decided to formally offer the Complainants a mortgage loan by way of an **Amended Letter of Offer** dated **19 May 2006** which provided for a 3-year fixed interest rate of 4.49% with the Provider’s prevailing variable interest rate to apply on the expiry of the fixed interest rate period. The Complainants accepted and signed the terms and conditions of the loan offer to include the applicable fixed interest rate and the interest that would apply at the end of the fixed interest rate period, on **01 June 2006**. It is important to highlight that it is the **Amended Letter of Offer** dated **19 May 2006** which forms the basis of the contractual relationship between the parties. In order for the Complainants to have a contractual right to be offered a tracker interest rate on the expiry of the 3-year fixed interest rate period, that right would need to be specifically provided for in the Complainants’ mortgage loan agreement. However, the **Amended Letter of Offer** did not contain an offer of a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown or at any time during the term of the mortgage loan. While I acknowledge that

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the document titled '**Mortgage – Reasons Why Letter**' stated that the Complainants could choose a further fixed interest rate or a variable interest rate or a tracker interest rate on the expiry of the fixed interest rate period, it is important to note that this document was issued by a third-party and does not form part of the mortgage loan contract between the Provider and the Complainants.

The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in the **Amended Letter of Offer** dated **19 May 2006** was a choice that was freely made by the Complainants. It was open to the Complainants to decline the Provider's loan offer if they were dissatisfied that the terms and conditions did not meet their expectations or what was discussed with the Broker. The Complainants signed the **Amended Letter of Offer** having confirmed that their solicitor had advised them on the terms and conditions of the mortgage loan.

If the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan account at any stage before tracker interest rates were withdrawn by the Provider in **mid-2008**, the Complainants could have contacted the Provider. However, I have not been provided with any evidence to suggest that the Complainants contacted the Provider to explore the application of a tracker interest rate prior to the withdrawal of these rates by the Provider in **mid-2008**. Even if the Complainants had contacted the Provider, 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.

The Complainants maintain that the Provider was obliged to inform them of its intention to withdraw tracker interest rates from the market in **mid-2008**. The decision to withdraw tracker interest rates from the market was a commercial decision that the Provider as a business entity was entitled to make. The Complainants mortgage loan account was never on a tracker interest rate and moreover the Complainants did not have an entitlement to be offered a tracker interest rate at any stage during the term of the mortgage loan. Consequently, I do not consider there to have been any legal or regulatory obligation on the Provider to communicate its intention to withdraw its tracker interest rate offering from the market directly to the Complainants.

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 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.



JACQUELINE O'MALLEY  
HEAD OF LEGAL SERVICES

31 August 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.

### 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.