



<u>Decision Ref:</u>	2022-0321
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The 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 €146,295.40 and the term of the loan was 30 years. The **Loan Offer** dated **25 August 2006** detailed that the type of loan was a "Repayment" loan. The mortgage loan was drawn down on **12 December 2006** on a fixed interest rate of 4.750%.

The Complainant's Case

The Complainant outlines that he submitted a mortgage application form to the Provider in **August 2006**. The Complainant submits that he drew down a mortgage loan with the Provider on **12 December 2006** on a three-year fixed interest rate of 4.75%.

The Complainant submits that during the application process he queried with the Provider whether a tracker interest rate would be available. The Complainant states that he was advised by the Provider that "a tracker mortgage was not available to [the Complainant] due to the type of mortgage [he] was applying for (an affordable home loan)." The Complainant submits that he took this advice "at face value." The Complainant further

submits that the application form was filled out by an employee of the Provider, and he only signed the bottom of the application form.

The Complainant states that although the Provider's investigation of his complaint can show that he should have been aware that his mortgage loan account would switch to the Provider's variable interest rate following the expiry of the fixed interest rate period, the Complainant submits that *"[t]his is technically correct but my point of contention is that at the very outset I was denied the opportunity of a tracker mortgage due to being mis-informed that a tracker was not available to my particular Loan type."* In this regard, the Complainant highlights that an employee of the Provider *"informed [him] verbally that [he] was not eligible for a tracker and then ticked the Variable Box on the form."*

The Complainant is seeking the following:

- (a) That a tracker interest rate be applied to his mortgage loan account; and
- (b) Redress and compensation.

The Provider's Case

The Provider submits that the Complainant met one of its staff members in one of the Provider's branches on **4 August 2006** to enquire about a mortgage.

The Provider states that it issued a Certificate of Loan Approval to the Complainant on **17 August 2006** for a loan amount of €145,500.00. The Provider details that this loan approval was due to expire on **17 February 2007**.

The Provider submits that it received a Confirmation for Lender Letter from the Complainant on **18 August 2006** *"acknowledging the Complainant's acceptance of the Council's offer to sell him the property at [redacted location]"*.

The Provider explains that a member of its staff assisted the Complainant with the completion of an Affordable Home Loan Application Form in **August 2006**. The Provider states that the completion of the form *"was done in full consultation with the Complainant and following instruction taken from the Complainant"*, that he wished to select a variable interest rate option.

The Provider submits that the *"Complainant would have been required to complete a separate form had he selected either a Fixed interest rate or a Tracker interest rate."*

The Provider refutes the Complainant's submission that its staff informed him that a tracker interest rate was *"not available to him due to the type of mortgage he was applying for an Affordable Home Loan."* The Provider submits that the staff member dealing with the Complainant's application in **2006** has confirmed that *"the Complainant was made aware that Tracker, Variable, Fixed and Split interest rate products were available to him during the mortgage application process"*. The Provider states that it is satisfied that the Complainant was given *"correct information"* and that the *"key features and benefits of each interest rate option were explained to the Complainant during the application process."* The Provider further asserts that the Affordable Home Loan Application form *"clearly showed Tracker interest rate as an option to apply for, in addition to Fixed, Variable and Split interest rate options."*

The Provider maintains that the Complainant would have *"been provided with the 'little book about buying your first home' [...] informing him of the availability of a Tracker interest rate, and how a Tracker interest rate operated."*

The Provider details that a Loan Offer was issued to the Complainant on **25 August 2006** which provided for a loan in the amount of €146,295.40 repayable over a 30-year term on the Provider's variable interest rate of 4.25%. The Provider submits that the Loan Offer was accepted and signed by the Complainant on **19 September 2006**.

The Provider details that on **02 October 2006** it received the following documentation in relation to the Complainant's mortgage loan:

- The Complainant's signed Acceptance Form dated **28 September 2006**;
- A letter from the Complainant's solicitor dated **28 September 2006**, enclosing the Loan Offer, cheque requisition and the solicitor's undertaking, HB47 document and a copy of the Charging order from the relevant county council;
- A signed direct debit mandate dated **27 September 2006**; and
- A letter from the Complainant's parents dated **19 September 2006**, *"confirming they gave the Complainant €5,000 as a gift"*.

The Provider details that it issued an Amended Loan Offer to the Complainant dated **03 October 2006** with a loan amount of €146,295.40 on the Provider's variable interest rate of 4.25%.

The Provider states that the Complainant telephoned the Provider on **10 October 2006** and requested a three-year fixed interest rate to be applied to his mortgage loan. The Provider details that it issued a further Amended Loan Offer to the Complainant for the amount of €146,295.40 on a three-year fixed interest rate of 4.78%, with the Provider's

variable base interest rate to apply thereafter. The Provider submits that it *“required an ‘Application For a Fixed Rate Mortgage’ form to be completed by the Complainant”* as the Complainant sought to apply for a fixed interest rate.

The Provider states that on **11 October 2006** it received a letter from the Complainant’s solicitor dated **09 October 2006**, enclosing the relevant county council’s consent to the mortgage on the property.

The Provider details that on **12 October 2006** the Complainant signed an Acceptance Form to the Amended Loan Offer dated **10 October 2006**. On the same date, the Provider submits that the Complainant signed an Application for a Fixed Rate Mortgage form which provided that *“the **applicable variable rate then prevailing**”* will apply on the expiry of the fixed interest rate period.

The Provider states that it is satisfied that the documentation relating to the Complainant’s mortgage loan is sufficiently clear and transparent as to the Complainant’s interest rate entitlements. In this regard, the Provider submits that the *“Complainant’s Mortgage loan documentation expressly provided him with a contractual entitlement to a 3 year Fixed interest rate at drawdown and the Bank’s Variable Base Rate upon expiry of his three year Fixed interest rate period.”*

The Provider states that it issued a letter dated **11 December 2006** to notify the Complainant of the issuance of the loan cheque. The Provider also notes that the letter detailed *“a Mortgage Loan amount of €146,295.40, a Mortgage Loan term of 30 years, a rate of interest 4.75% for 3 years followed by the Bank’s prevailing ‘Variable Base Rate’.”*

The Provider details that the mortgage loan drew down on **12 December 2006** at which point the applicable interest rate was 4.75%.

The Provider explains as follows in relation to the applicable interest rate at the time of draw down:

“The Fixed interest rate at the time of drawdown was 4.75%, which is different from the 4.78% fixed interest rate quoted on the Amended Loan Offer dated 10 October 2006, as there was a reduction in rates from when the Complainant submitted the application for Fixed interest rate mortgages to when the loan cheque was issued [...]. This is in line with the ‘Important Note on Fixed Rate’ as set out in the Amended Loan Offer.”

The Provider submits that it has *“spoken to the Staff Member who assisted with the completion of the Mortgage application on 18 August 2006 in consultation and instruction*

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by the Complainant, and has confirmed that all rate options were explained to the Complainant and she absolutely refutes the Complainant's allegation that he was told that Tracker interest rates were not available for the Complainant to apply for".

The Provider states that it is not its practice or policy to offer advice to customers on interest rates. The Provider notes that *"staff provide information on all rates to customers, both at application stage and separately during the lifetime of the Mortgage Loan as requested"* and that all interest rates are *"publicly advertised and available to consult in all of the Bank's Branches."*

The Provider explains as follows in relation to the availability of tracker interest rates at the time of the Complainant's application for a mortgage loan:

"... Tracker interest rates were widely available from [early] 2004 to new and existing Home Loan customers until [late] 2008, when the bank withdrew from the Tracker Mortgage market [...]. The Affordable Home Loan Application Form [...] listed 4 interest rate options; Variable, Tracker, Fixed or Split, the Complainant choose Variable. The Complainant could have applied for a Tracker interest rate at application stage or at any time during this period, albeit had he applied for a Tracker interest before [late] 2008 prior to expiry of his Fixed interest rate period, a breakage cost/early redemption charge may have applied [...]."

The Provider states that while tracker interest rates were available as an option for the Complainant when he was applying for his loan, *"he ultimately applied for a specific rate (Fixed rate) as evidenced by the completed Application for Fixed Rate Application form"*.

The Provider's position is that the Complainant *"had no contractual right or entitlement"* to a tracker interest rate and its *"obligation"* to the Complainant was to *"honour the terms of the Mortgage Loan documentation, which it did and continues to do."*

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant a tracker interest rate in respect of his mortgage loan during the mortgage loan application process in **2006**.

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

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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 **26 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.

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

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider during the mortgage loan application process in or around **August 2006**.

An **Affordable Home Loan Application Form** was signed by the Complainant on **18 August 2006**. The required loan amount under the section titled "*Loan Details*" is €145,500.00. The following is detailed under the section titled "*Interest Rate*":

*"Variable **Tracker ***Fixed or Split*

** Variable interest rates increase and decrease with changes in market rates.*

*** Tracker interest rates increase and decrease with changes in market rates. If choosing Tracker, please complete the Tracker form enclosed.*

**** If choosing a fixed rate, please complete the Fixed Rate section which outlines terms of conditions associated with fixed rate loans."*

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The “*Variable*” interest rate option was ticked as the preferred interest rate on the application form.

The Complainant signed the application form on **18 August 2006** declaring as follows:

“I/We hereby declare:

...

- That all statements made and particulars given to you in connection with this application are strictly true to the best of my/our knowledge and belief and*
- That I/we will inform you of any changes in my/our situation which might affect this application.”*

The Provider issued a **Certificate of Loan Approval** to the Complainant dated **17 August 2006** detailing that the Complainant was granted loan approval for an amount of €145,500.00.

A letter issued from the Provider to the Complainant’s solicitor dated **25 August 2006** enclosing a **Loan Offer** dated **25 August 2006** offering a variable interest rate. The **Loan Offer** details as follows:

“Dear [Complainant],

I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €146,295.40 towards the purchase of the above property at a cost of €150,820.00 subject to the following terms and the attached General Conditions. [The Provider] will pay an indemnity bond of €1,529.90 directly to the indemnity insurance company on your behalf when the loan cheque is issued, at no cost to you.

<i>Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan:</i>	<i>€146,295.40</i>
<i>Cheque Issue Amount:</i>	<i>€146,295.40</i>
<i>Monthly Repayment:</i>	<i>€719.69</i>
<i>Interest Rate (Variable)</i>	<i>4.25 %</i>
<i>Interest Rate Basis:</i>	<i>Variable Base Rate</i>
<i>Repayment Period (Years):</i>	<i>30 Approx.</i>

*With your assistance, we look forward to completing the formalities of this loan as quickly as possible. We trust that everything will run smoothly and that you will very soon be moving into your new home. **There are a few special conditions – set out below – that must be met before the loan can be completed. If these conditions***

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are not fulfilled, we can unfortunately not issue your loan cheque. To avoid delays, please read the conditions very carefully, discuss with your solicitor and ensure everything required is done in good time.

...”

Two **Acceptance Forms** dated **25 August 2006** have been provided in evidence, with one signed by the Complainant on **19 September 2006** and the other signed by the Complainant on **28 September 2006** on the same terms, as set out below:

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

- (i) this Offer Letter in replacement of all previous offer letters;*
- (ii) the General Conditions for [Provider] Home Loans;*
- (iii) the [Provider] Building Society Mortgage Conditions;*
- (iv) the [Provider] Building Society standard Form of Home Loan Mortgage; and*
- (v) the Rule of [the Provider].*

Copies of which I/we have received and in respect of which I/we have been advised upon by my/our solicitor”

The evidence shows that the Complainant did not proceed to draw down this mortgage loan.

The Provider issued an **Amended Loan Offer** dated **03 October 2006** to the Complainant offering a variable interest rate mortgage loan in the amount of €146,295.40 repayable over a term of 30 years. However, I have been provided with no evidence to indicate that the Complainant accepted the terms of the **Amended Loan Offer** dated **03 October 2006**.

The Provider subsequently issued an **Amended Loan Offer** dated **10 October 2006** to the Complainant offering a fixed interest rate which details as follows:

“Dear [Complainant],

I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €146,295.40 towards the purchase of the above property at a cost of €150,820.00 subject to the following terms and the attached General Conditions. [The Provider] will pay an indemnity bond of €1,529.90 directly to the indemnity insurance company on your behalf when the loan cheque is issued, at no cost to you.

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Type of Loan:	
Total Amount of Loan:	€146,295.40
Monthly Repayment (Yrs 1 – 3):	€765.79 (See Important Notice)
Interest Rate (Yrs 1 - 3):	4.78% (See Important Notice)
After 3 years:	Variable Base Rate (currently 04.25 %)
Repayment Period (Years):	30 Approx.

Important Note On Fixed Rate:

The fixed rate shown is the current rate. If there is an interest rate change before the main loan cheque is issued, the rate will be altered to the fixed rate on offer at the date of cheque issue, and this is the rate that will apply to the loan amount. If no fixed rate is available at that time, the variable rate will apply. (See General Conditions – 9)

With your assistance, we look forward to completing the formalities of this loan as quickly as possible. We trust that everything will run smoothly and that you will very soon be moving into your new home. **There are a few special conditions – set out below – that must be met before the loan can be completed. If these conditions are not fulfilled, we can unfortunately not issue your loan cheque.** To avoid delays, please read the conditions very carefully, discuss with your solicitor and ensure everything required is done in good time.

...

Conditions :

- Subject to this Offer Letter, dated 10/10/06 12:40, being signed by the borrower(s) in the Acceptance Form and the full signed Offer Letter being returned to [the Provider].
 - Subject to Fixed Rate Application Form being submitted to [Provider] prior to cheque issue.
- ...”

The **General Conditions for [Provider] Home Loans**, attaching to the **Amended Loan Offer** detail as follows:

“ ...

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3. Acceptance of terms and conditions: *By taking the loan from [the Provider], the borrower accepts all the terms and conditions set out in the application form, offer letter, these general conditions and the mortgage.*

...

9. Fixed Rate Loans: *Where a member applies for a fixed rate, it will be for a set period of time. When the fixed rate period ends, the loan will convert to a variable interest rate. If [the Provider] is then offering a Fixed Home Loan rate for a variety of defined periods, the borrower may opt to convert to a fixed rate again at that point, and defer conversion to a variable rate.*

An early redemption charge is payable in the following cases where the fixed rate period has not expired:

- 1. If a capital payment or full repayment is made to the loan.*
 - 2. If the loan is converted to a variable rate/tracker rate.*
 - 3. If the loan is converted to another fixed rate.*
- ..."

The Provider's **Mortgage Conditions** document attached to the **Amended Loan Offer** details as follows under the heading "*How interest on the Loan is calculated and charged*":

"2.1 The basis on which the interest rate on the Loan is calculated is stated in the Offer Letter.

2.2 The interest rate on the Loan may be increased or reduced by [the Provider] from time to time, however no change in the interest rate will be applied to the Loan during any period when the interest rate is a fixed rate."

The Complainant signed the relevant **Acceptance Form** on **12 October 2006** on the following terms:

"I/We, the undersigned, accept the offer of an advance made to me/us by [the Provider] on the terms and conditions set out in:

- (i) this Offer Letter in replacement of all previous offer letters;*
- (ii) the General Conditions for [Provider] Home Loans;*
- (iii) the [Provider] Building Society Mortgage Conditions;*
- (iv) the [Provider] Building Society standard Form of Home Loan Mortgage; and*
- (v) the Rule of [the Provider].*

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Copies of which I/we have received and in respect of which I/we have been advised upon by my/our solicitor”

The Complainant also accepted and signed an **Application For a Fixed Rate Mortgage** on **12 October 2006** which details as follows:

*“I/We wish to apply for a fixed rate of **4.78** for the for the first **3** year(s) of my/our mortgage.*

*I/We understand that when this fixed rate period has expired the loan will **convert to the applicable variable rate** then prevailing. The variable interest rate basis will be specified in the loan offer letter issued by [the Provider] (if the loan is approved).*

Important

I/We understand that in event of there being a change in interest rates before [the Provider] have issued our loan cheque, [the Provider] will apply the fixed rate currently available. If there is no other fixed rate available, the appropriate variable rate may apply.

I acknowledge that unfortunately, [the Provider] cannot inform customers individually of changes of interest rates prior to issuing their loan cheque.

...

This document forms part of the application for a mortgage, the conditions and the declaration of which also govern this document.

I/We confirm that we understand the workings of the Fixed Rate and wish to proceed with this application”

A letter issued from the Provider to the Complainant dated **11 December 2006** as follows:

“Dear [Complainant],

I refer to our letter of the 25/08/06. I am pleased to inform you that your loan cheque has been forwarded to your solicitors [Complainant’s solicitors]. I understand that an appointment has been made with your solicitor to complete the transaction.

The amount of the cheque will be made up as follows :

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Total	<u>€146,295.40</u>
Net Loan Cheque	<u>€146,295.40</u>

Term of Loan: 30 years Approx.
Rate of Interest: 4.75% Base Rate Yrs 1 – 3
After 3 years the Interest Rate will be: Variable Base Rate (currently 04.50%)
(APR4.7%)
Daily Interest: €19.04

Monthly Repayment €763.15
Total Monthly Repayment €673.15
..."

The mortgage loan statements provided in evidence detail that the mortgage loan was drawn down on **12 December 2006** on a fixed interest rate of 4.75%.

It is clear to me that the **Amended Loan Offer** dated **10 October 2006** envisaged that an initial three-year fixed interest rate of 4.78% would apply to the Complainant's mortgage loan account with the Provider's variable base rate to apply on the expiry of the fixed interest rate period. The applicable fixed interest rate had decreased to 4.75% when the mortgage loan was drawn down and this is the interest rate that applied to the Complainant's mortgage loan account at inception. The Provider's variable base interest referred to in the Complainant's mortgage loan documentation 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 from time to time.

The Complainant submits that the Provider did not offer him the option of a tracker interest rate when he applied for his mortgage loan with the Provider in **2006**. The Complainant further states that he was advised by the Provider that a tracker interest rate was not available in respect of "affordable home loan" mortgages, which the Complainant sought to apply for.

This Office has been provided with a statement in an email dated **10 January 2020** from the Provider's representative who met with the Complainant when he applied for a mortgage loan with the Provider in or around **August 2006**. It appears that this statement is not contemporaneous evidence but rather an account of the Provider's representative's recollection of events. The statement contained in the email dated **10 January 2020** details as follows:

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“a) The complainant was made aware of all the interest rate products that were available to him when I met him on 18th August 2006. I made him aware of the variable rates, fixed rates and trackers rates and I explained the pros and cons of each product type.

b) In response to the complainants submission that he was verbally informed by a member of the Provider’s staff that a tracker rate was not available to him due to the type of mortgage he was applying for, I categorically refute that. There is no way that the complainant was told that tracker rates were not available to affordable housing applicants as this was not the case. It was never the case. There was no confusion in this regard.

c) In response to the Complainant’s submission that the application form was filled in for him by one of the Provider’s staff members, I can tell you that I assisted in the completion of the form, in consultation with the customer. He signed the form and dated it.”

The evidence shows that the **Affordable Home Loan Application Form**, that was signed by the Complainant on **18 August 2006**, clearly provided the Complainant with the option to choose from a various range of interest rates to include a tracker interest rate. This application form also explained the nature of each of the interest rate types and specifically provided that a tracker interest rate form was required to be completed by the Complainant if he wished to apply for a tracker interest rate.

The Complainant submits that he did not complete the application but merely signed it. I do not consider it unusual for a representative of the Provider to assist a potential customer in completing a mortgage loan application form however it is the customer who signs the application form to confirm that all particulars in the application form are accurate. If the Complainant was not satisfied that the particulars detailed in the application were accurate, the Complainant was under no obligation to sign the application form and proceed with the application.

I have not been provided with any evidence to indicate that a representative of the Provider informed the Complainant that he was not eligible for a tracker interest rate on the basis that he was an affordable home loan applicant. A tracker interest rate option was clearly detailed as an option to choose to apply for on the application form however the Complainant opted for a variable interest rate.

It is important to note that it was always a matter for the Complainant to decide as which mortgage product and interest rate best suited his needs and circumstances and whether he wished to proceed with the offering being made available by the Provider. Indeed, if the Complainant wanted independent advice about the interest rates available in the

market in **2006**, the Complainant could only get that advice from an independent third-party advisor.

On foot of the Complainant's application for a variable interest rate mortgage loan, the Provider issued a formal loan offer offering the Complainant a variable interest rate, which was accepted by the Complainant. However, the Complainant did not draw down on the particular mortgage loan offer.

The Complainant later indicated his preference for a three-year fixed interest rate by completing an **Application for a Fixed Rate Mortgage on 12 October 2006** and signing and accepting the **Amended Loan Offer** dated **10 October 2006** on **12 October 2006**.

If the Complainant wished to pursue the potential option of applying for a tracker interest rate at this time, the Complainant could have indicated to the Provider that he had a preference for a tracker interest rate instead of a variable interest rate or a fixed interest rate by approaching the Provider and completing an application for a tracker rate mortgage. However, the Complainant did not do so. The Complainant signed and accepted the **Amended Loan Offer** on **12 October 2006** which provided for a three-year fixed interest rate and proceeded to draw down the mortgage loan on **12 December 2006** of his own accord.

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

Conclusion

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

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



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

20 September 2022

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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.