



<b><u>Decision Ref:</u></b>	2018-0039
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Shares/Equities Investment
<b><u>Conduct(s) complained of:</u></b>	Delayed or inadequate communication
<b><u>Outcome:</u></b>	Partially upheld

**LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

The Complainants operated an Advisory Non-Managed Account. This account type is typically used where a client decides on their own investment strategy. It allows the Provider to give advice either proactively or reactively to the client regarding investment decisions. The complaint relates to the communication of the substantially increased Charges that were applicable to the account. The complaint is that the increased charges were not correctly and reasonably communicated to the Complainants.

**The Complainants' Case**

It is the Complainants' position that they had been clients of the Provider since June 2003 and were satisfied with its service until June of 2016.

In June 2016 the Complainants received a Fee Note for €2,113.41. The Complainants say they immediately queried this increase. The Complainants state that they subsequently saw in their account that the amount was taken by the Provider on the 13<sup>th</sup> June 2016 (the Complainants say, that this occurred before the Provider had notified them of the increased charges).

The Complainants state that they definitely did not receive a notification from the Provider of any alteration to Terms of Business including Fees in the previous 12 months. The

Complainants say that had they got such a notice it would have immediately raised a red flag given the size of the proposed increase.

The Complainants submit that as they could not reach a compromise with the Provider on what they considered a realistic increase they were forced to shop around. The Complainants say that two other Stockbrokers were willing to handle the account for an annual fee of €200 plus a transaction charge. This is the figure the Complainants had been paying the Provider. Accordingly, the Complainants decided to transfer their account to another Broker and instructed the Provider to transfer the Stocks/Shares by electronic transfer. The Complainants state that the Provider then reverted by telephone to advise it wanted €30 per share to carry out the transfer instruction (which would have cost approximately €1,500). The Complainants state that they refused to pay this given that they were being forced to take this action due to the Provider increasing its charges by 1000 per cent.

The Complainants state that they are well aware of how Banks and Insurance companies have to give a 14 day cooling off period when they change the rates and get the customers to sign that they agree the change.

The Complainants want a refund of the €2,113.41 and the transfer of the Shares to the new Broker for €500 as offered by them to the Provider..

In the Complainants' submission dated 11<sup>th</sup> August 2017, the First Complainant states that he did visit the Provider's website approximately once a week to check up on the value of the Portfolio and the Dividends which is the only part of the site the Provider showed him how to use on one occasion that he was in its offices.

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

The Provider states that the Complainants were not happy to pay the transfer out and fee charges. The Provider states that, as a goodwill gesture and in an attempt to resolve the matter, it offered to reduce the transfer out charge. The Provider states that its representative spoke to the Complainant on 20 September 2016 regarding these matters and made an offer to reduce the transfer out charge from €1,470 to €500 and to split the fee charge 50/50 i.e. refund half the €2,113 fee, but this was rejected by the Complainants. The Complainants then elected to pursue a formal complaint.

- The account type was initially set up as an Execution Only Account. The Annual Account Maintenance Fee applied to the account in 2005 and 2006 was €96.80 per annum.
- The account was amended to Advisory Non-Managed in 2007, however, there was no charge applied to the account during the period 2007 to 2013. Advisory Non Managed clients were written to on 28 February 2012 advising that there would be an amendment to the Rate Card and there would be an introduction of a €200 per annum Account Charge for Advisory Non-Managed accounts effective for 2012.
- This fee rate of €200 was applied to the account in 2013, 2014 and 2015.

- The Complainants were notified to his account online of changes to Terms and Conditions and Charges on 14 December 2015 which would be effective from 1 January 2016.
- The then current fee rate of 0.25% (€2,113.41) was applied to the account on the 13/06/2016.
- In section 3M, "Our Charges", of the Advisory Non-Managed Agreement, which the Complainants signed on 15 May 2007, it stated that:-  
*"Our charges will be in accordance with our published rate card in effect at the time the charges are incurred... Charges may change from time to time and we will notify you in advance of any such changes".*

Based on all of the above, it is the Provider's view is that it acted, at all times, in accordance with the terms of its agreement with the Complainants and it notified them of the revised charges in advance. The Provider states that it does not believe that it has breached the terms of the agreement or any regulations in relation to fees and therefore it sees no basis for the complaint.

### **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 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 11<sup>th</sup> April 2018, 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, the final determination of this office is set out below.

The issue for investigation and adjudication is whether the Provider correctly and reasonably notified the Complainants of the substantial increase in charges for the administration of their account.

The Provider states that the Complainants were dissatisfied with the introduction and rate of the annual Advisory Account charge for 2016 of 0.25% plus VAT. The Provider says that the fee charged was €2,113.41 which was based on the value of their account as at 30 April 2016. The Provider submits that the Complainants' Portfolio Manager, called the First Complainant on 7 July 2016 to discuss the charge. The Provider says that the Portfolio Manager advised the First Complainant that the Provider's clients were written to and advised of this amendment to charges in late November/December 2015.

The First Complainant advised the Portfolio Manager that he did not receive correspondence from the Provider advising him of the introduction of this charge before it was levied. The Provider submits however, that a notification of a change to charges was in fact issued to the Complainant's account online on 14 December 2015. This notification was entitled "Important Information Regarding your account". The Provider states that this notification was viewed by the Complainant on 19 January 2016 at 11.55am.

The Provider's position is that from a review of its systems it has identified that the Complainants regularly accesses the account online using various devices.

The Provider states that subsequently after several interactions with the First Complainant about the charge via a telephone call on 7 July 2016 and e-mails dated 7 July 2016, 11 July 2016 and 29 August 2016 the Complainant decided to transfer his shareholdings to another Broker and sent a letter to the Portfolio Manager dated 25 July 2016 to instruct a transfer to a new Broker.

The Provider's position is that the First Complainant was advised of the transfer charge of approximately €1,500 in a telephone call by the Portfolio Manager on the 2 August 2016 at 14.29pm. The Provider says that the First Complainant was dissatisfied with the fee involved in transferring his shareholdings to another stockbroking firm and was unwilling to pay same. The Provider submits that the charge of €30 per line of stock to transfer out is outlined in "[The Provider's] Fees and Charges" dated 1 January 2016 and was posted electronically to the client's account on 14 December 2015. The Provider says that the notification was viewed by the Complainant, online, on 19 January 2016 at 11.55am.

The Provider states that in an effort to reach an agreement with the Complainants, the Head of Provider's Cork Office, advised him that the Provider, as a goodwill gesture, would be willing to reduce the fee. The Provider says that the Head of Provider's Cork Office spoke to the Complainant on 20 September 2016 at 11.26am and made an offer to the client to reduce the transfer out charge from €1,470 to €500 and to split the fee 50/50 i.e. refund half of €2,113 fee. The Provider says that the Complainant rejected this offer and instead proceeded to submit a formal complaint letter to the Provider, dated 16 September 2016.

## Evidence

### Advisory Account Agreement Non-Managed Account

The Complainants signed the Advisory Account Agreement on 15 May 2007.

Section 3M, "Our Charges" state that:-

*"Our charges will be in accordance with our published rate card in effect at the time the charges are incurred. A copy of our current rate card accompanies this Agreement. .. Charges may change from time to time and we will notify you in advance of any such changes. We will send you a list of current charges on request".*

### Chronology of Events

28<sup>th</sup> February 2012 – letter from the Provider to the Complainants – advising of the introduction of a €200 per annum Account Charge for Advisory Non Managed Accounts. Effective for 2012.

7<sup>th</sup> April 2015 - A letter was sent by the Provider to the Complainants by post advising them that from 11<sup>th</sup> May 2015 account reporting documentation would be sent to clients electronically via the online service. The Complainants were advised in that letter to contact their Portfolio Manager if they wished to continue to receive correspondence by post.

*"Your account reporting documentation, including contract notes, statements and corporate action notifications will be securely uploaded to "My Notifications" for you to access online... For your convenience, you will receive an alert by email or by text message notifying you of important documentation that we have uploaded securely for you to review online".*

14 December 2015 Notification Publication Date.

*"Important Information regarding your account(s)*

*Summary: Occasionally, [the Provider] needs to make you aware of important changes to your account or how it is handled. We only do so with good reason and for your benefit. We hope this communication clarifies any queries you may have".*

Message body:

*"Changes to Terms and Conditions*

*The rules governing how we administer the assets in your account have recently been updated. These regulations are for your protection and have been in place for some time. [The Provider] adheres to them strictly. However, these latest changes require your consent.*

*Your business is important to us, so we want to make this as easy as possible. Therefore, we have prepared a short Frequently Asked Questions document to help you understand what the changes are about. Please read it carefully. When you log in to your account, you will*

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be prompted to review and give your consent to these changes digitally. If you have already done so, thank you.

*[Provider Charges]*

Following a review, [the Provider] is changing its charges from 1 January 2016 to help maintain and improve our client service levels. While we are always reluctant to increase our charges, this is [the Provider's] first increase in many years and we are confident that we remain competitive with our peers. Copies of the new charges can be found using the following links: [The Provider] Fees & Charges and [the Provider] Online Charges. An Appendix of Your Accounts indicating if, and how, they will be impacted by these changes is included".

Appendix

"Revised Fees & Charges take effect from 1<sup>st</sup> January 2016. The table below shows how these charges will affect your fees & commissions. Other charges are applicable as outlined in the [the Provider] Fees & Charges enclosed;

Client Reference	Service Type	Charging Structure	Details	Minimum Fee
*****	Advisory Non Managed	Annual Fee & Commission	Fee: 0.25% with a minimum of €500 Commission: See Fees & Charges	€500 + VAT per annum

*[The Provider] Online Charges*

*Commission Rates i.e. Charges per Transaction*

*Minimum Charge €25*

*1.00% on First €25,000*

*0.50% on Balance*

*..*

*Stock Transfer Out Charge €13*

*(per line of stock or certificate, with a minimum charge of €40)"*

19<sup>th</sup> January 2016 – Notification Read Date

The above online notification was viewed at 11.55am on 19 January 2016. The attachment to the notification was an appendix which included details of the fees and charges specific to the Complainants' account.

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23<sup>rd</sup> May 2016 - The Complainant had a meeting with the Portfolio Manager and gave a written instruction to place 5 trades on the account.

25<sup>th</sup> May 2016 - The First Complainant emailed the Portfolio Manager and said that he got a text to say the contract notes were available in his notifications online. The Complainant requested that his contract notes be issued in paper format.

28<sup>th</sup> May 2016 - A letter was sent to the Complainants to advise of change to the Electronic Documentation settings on the account which would be to amend from electronic back to paper.

6<sup>th</sup> June 2016 - The First Complainant emailed the Portfolio Manager to advise that he had not received the contract notes.

7<sup>th</sup> June 2016 - An email was sent to the First Complainant by a Provider staff member, confirming that the settings on the account had been amended from Electronic to Paper. A copy of the contract notes were attached in the email, and a further copy also sent by post.

13<sup>th</sup> June 2016 - The Annual Advisory Account charge was applied to the Complainants' account. This charge was levied at 0.25% of the value of the Complainants' account at 30 April 2016, with a minimum charge of €500. This sum is subject to VAT of 23%. The total charge, including VAT, amounted to €2,113.41.

14<sup>th</sup> June 2016 - Invoice for €2,113.41 dated 14 June received by the Complainant.

7<sup>th</sup> July 2016 - Telephone call at 14.28pm from the Portfolio Manager to the First Complainant discussing the invoice for the 2016 charge.

7<sup>th</sup> July 2016 - Email from the First Complainant at 19.45pm to the Portfolio Manager regarding bill for 2016.

11<sup>th</sup> July 2016 - Email from the Portfolio Manager to the First Complainant explaining the reasons for the increase in the charge.

15<sup>th</sup> July 2016 - A telephone call at 17.00pm from the Portfolio Manager to the First Complainant discussing charges at other brokers and his intention to transfer the account to another broker.

27<sup>th</sup> July 2016 - A letter was received by the Provider from the First Complainant dated 25 July 2016 requesting that the account be transferred to another Broker.

27<sup>th</sup> July 2016 - A telephone call at 10.30am from the Portfolio Manager to the First Complainant no answer. The Portfolio Manager left a voicemail confirming that the Provider had received his letter to transfer.

2<sup>nd</sup> August 2016 - The Portfolio Manager called the First Complainant to acknowledge receipt of the instruction and to confirm the transfer request. He also reminded the First Complainant of the transfer out charge of €30 per line of stock. Given that he held 49 lines of stock, this charge amounted to €1,470. The Complainant maintained that the charge was excessive and was unwilling to pay same. The Company stated that details of this €30 charge were included on the notification that was issued to the Complainants' online

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account dated 14 December 2015 - Stock Transfer Out Charge - per line of stock or certificate.

29<sup>th</sup> August 2016 - An email was received by the Provider from the First Complainant offering to pay the Provider €500 to transfer the shares to the Broker.

5<sup>th</sup> September 2016 - A response letter was sent to the Complainant to acknowledge receipt of email dated 29 August 2016.

7<sup>th</sup> September 2016 - A letter was received from the Complainant to say that he had sent a letter to the Regulator on 6 September 2016.

14<sup>th</sup> September 2016 - A response letter was sent to the Complainant confirming that the notification of the fees was made available to him online on 14 December 2015 and a copy was enclosed in the response. The Provider enclosed a copy of his Advisory Account Agreement and Fee schedule. The Provider advised him that his account had changed to paper since 30 May 2016. The Provider confirmed that it was not in a position to offer another proposal on reducing the charge. This was presented as the Final Response for the purposes of making a complaint to the Financial Services Ombudsman.

16<sup>th</sup> September 2016 - A letter was received by the Company from the Complainant who confirmed he had a letter from the Ombudsman who was looking for a "Final Response Letter".

20<sup>th</sup> September 2016 - A telephone call from a Provider representative to the Complainant confirming that the recent letters overlapped in the post.

20<sup>th</sup> September 2016 - A telephone call from a Provider representative at 11.22am to the First Complainant to offer to do the transfer to the new Broker for €500 and to split the management fee by 50/50.

23<sup>rd</sup> September 2016 - A letter was received from the First Complainant to the Provider representative in response to telephone calls on 20 September 2016 regarding offer made and confirmation that he would send a letter to the Financial Services Ombudsman.

*"I note that you say the revised fees were advised online in December 2015 but I did not see them. You must appreciate that I am from the generation that never had a computer before 2012 in my case. My computer training consists of an 8 week night class in my local community school, .... I was neither advised nor agreed to receive communications online. I have refused the bank and others to deal online.*

*The first I knew that ye were sending stuff online was when I did some trades on 23<sup>rd</sup> May and when I found out I immediately insisted that I get all documentation in writing, a point you confirm in your letter".*

### **Analysis**

The issue for investigation and adjudication is whether the Provider correctly and reasonably notified the Complainants of the substantial increase in charges for the administration of their account.



In the above regard the evidence submitted shows that:

- Up to and including 7<sup>th</sup> April 2015 the Complainants had been receiving postal communications about their account, in addition to the information they themselves were accessing On-line. In a submission dated 11<sup>th</sup> August 2017 the First Complainant states that he did visit the Provider's website approximately once a week to check up on the value of the Portfolio and the Dividends which is the only part of the site the Provider showed him how to use on one occasion that he was in its offices.
- On 7<sup>th</sup> April 2015 the Provider wrote to the Complainants by post advising them that from 11 May 2015, the account reporting documentation would be sent to clients electronically via the online service. The Complainants were advised in that letter to contact their Portfolio Manager if they wished to continue to receive correspondence by ordinary post. This letter stated that:

*"Your account reporting documentation, including contract notes, statements and corporate action notifications will be securely uploaded to "My Notifications" for you to access online... For your convenience, you will receive an alert by email or by text message notifying you of important documentation that we have uploaded securely for you to review online".*

The Complainants do not deny receipt of the letter of 7<sup>th</sup> April 2015, but do say that the first time they knew the Provider was sending account information on line was when doing some trades in May 2016. On discovering same, the Complainants then insisted that all documentation be provided in writing. It was only in the following month (June 2016) when the Complainants received the Fee Note for €2,113.41 that they realised that new charges were being applied.

I note that there is no clarification in this letter of 7<sup>th</sup> April 2015 as to what "*corporate action notifications*" meant, nor were examples given of what "*corporate action notifications*" involved. If such "*corporate action notifications*" were going to include notification of increased charges, I consider this could reasonably have been highlighted in this letter.

I also note from this letter of 7<sup>th</sup> April 2015 that an "*alert*" was to be sent to the Complainants by way of text message or by e-mail of such important documentation that was going to be uploaded on the website. I consider that where charges were going to be substantially increased from, at a minimum level of €200 to a minimum level of €500, and with a higher amount of charges being a possibility where the 0.25% was applicable, such notification by text message or e-mail should have reasonably occurred here, and it should reasonably have been highlighted in those communications that charges were being substantially increased. Evidence of such an "*alert*" notifying of the important documentation advising of substantially increased charges, has not been submitted into evidence by the Provider.

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- The Provider submitted a system report of the Online Notification, which records that the notification was published on 14<sup>th</sup> December 2015 and that it was read / accessed by the Complainants on 19<sup>th</sup> January 2016. However, this report does not appear to evidence the extent to which the Notification was accessed, that is, whether it was only the message summary or the attached documents that were accessed by the Complainants. The attachments to the notification were separate appendices which included details of the fees and charges specific to the Complainants' account. The Complainants' evidence is that the notifications were not read by them.

I consider that the content of (i) the Summary of the notification and (ii) the message body itself should have included a greater warning to alert the Complainants to a substantial increase in charges. However, what appears to have been required of the Complainants, by the Provider, was to access a number of appendices before discovering what the substantial increase in charges that were being advised by the Provider were.

The notification also asked the Complainants to answer an on-line questionnaire in relation to the updated rules governing the administration of the assets in the account. The Provider has not submitted evidence of the completion of the on-line questionnaire by the Complainants. Had this been submitted, I consider, it would have supported its position that the Complainants had actually read the notification.

- The Provider has submitted copies of what it says was contained in the notification of 14<sup>th</sup> December 2015 and the appendices it says were attached. The Provider also provided the Complainants on 14<sup>th</sup> September 2016 with: *"Information regarding an amendment to your fees that was made available to you online on the 14<sup>th</sup> December 2015 and I have attached a copy for your records. .. also attached a copy of your most recent signed Terms of Business and Fee Schedule"*.

In the above regard, I note that there are some discrepancies in the information that was sent on 14<sup>th</sup> December 2015 and with that contained in the 14<sup>th</sup> September 2016 communication. The Online Charges sheet said to have been sent to the Complainants in December 2015 records that the *"Stock Transfer Out Charge was €13 (per line of stock..)"*. However, the charge sheet sent to the Complainant in September 2016 recorded that: *"Stock Transfer Out Charge was €30 (per line of stock...)"*. Both charge sheets had an effective date of 1<sup>st</sup> January 2016.

As regards the provision of information to a customer I consider that it is prudent and reasonable to expect that a Provider ensures that all information it communicates is clear and comprehensible, and that key items are brought to the attention of the customer. The method of delivery of information must not disguise, diminish or obscure the importance of the information being communicated. That said, I consider that a Provider cannot be wholly responsible for a client not accessing information that it had posted on-line. The Complainants have not indicated any deficiency by the Provider in its systems which prevented them from actually accessing the posted information, but that they themselves were not as adept in using the online process.

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Having regard to all of the above, I consider that there should be evidence of greater and better communication by the Provider of its proposed substantial increase in charges to the Complainants. As I consider there was a shortfall in the Providers communications, it is my Legally Binding Decision that the complaint is partially upheld, and I direct that the Provider is to, in the circumstances of this complaint and considering what is fair and reasonable, only apply 30% of the charges that were in place and effective as of 1<sup>st</sup> January 2016. The Provider is to refund any charges applied to the Complainants' account, that were over and above this 30% (this includes the "Stock Transfer Out" charge that applied from 1<sup>st</sup> January 2016).

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider make the refund of charges as outlined above.
- Pursuant to **Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, where the amount is not paid by the expiry of the 35 day appeal period.
- Pursuant to **Section 60(8)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Respondent Provider is now required, not later than 14 days after the expiry of the 35 day appeal to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction outlined above.

**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.**

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

8<sup>th</sup> May 2018

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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) in accordance with the Data Protection Acts 1988 and 2003.

