



<b><u>Decision Ref:</u></b>	2018-0049
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Cash Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment)
<b><u>Outcome:</u></b>	Partially upheld

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

**Background**

The Complainant held an advisory investment account with the Provider.

The Complainant's complaint is that , at a meeting with the Provider on 27 March 2015 the Complainant says he was coerced into making a further investment of c.€200,000 in the Providers investment fund, that the Provider's fund was not a suitable investment for him, that he suffered losses of €30,000 as a consequence of making the additional investment in the Provider's fund and (iv) that he was advised to invest in the Provider's fund by an unqualified employee of the Provider.

**The Complainant's Case**

The Complainant states that he commenced doing business with the Provider in April 2009. The Complainant states that his account was handled by Mr PM Company Director of the Provider who advised him to invest approximately €290k in subordinated bonds in a number of Banks / Insurance Companies, which Mr PM advised suited the Complainants profile as they were low risk and would most likely give him an annual return of 10%. The Complainant states that rather than a return of 10%, that in fact he lost around €180K in the Bank bonds, however he did recover some of those losses in the insurance bond.

The Complainant submits that he had virtually no contact from Mr. PM during this time and eventually his account was taken over by a Mr. S who handled the account very successfully, made him money and met with him on a regular basis to update him.

The Complainant says that around February 2015 he was advised by Mr S that he would no longer be handling his account and invited him to a meeting on 27<sup>th</sup> March 2015 to meet Mr CM who would be handling his account going forward. The Complainant states that Mr S introduced him to Mr CM and he left the meeting.

The Complainant states that at that stage he was holding a fixed income portfolio which was giving him an income of around 5% per annum, and he was very happy with this.

The Complainant submits that Mr CM told him that the Provider was putting all small accounts into the Provider's own Allocation Fund which he said would give him at least a return of 7% per annum, but he expected it to exceed 10% per annum.

The Complainant's position is that he told Mr CM he was happy with the Fixed Income Portfolio he had, but the Complainant says Mr CM advised him that it was the Provider's Fund *or nothing* as the management of the Provider had decided not to keep small accounts.

The Complainant states that Mr CM convinced him to invest €200K in this fund and 12 months later, he found his investment to be down 30K.

It is the Complainant's position that he does not know why Mr CM got him to invest in this fund in view of the email he had subsequently sent to him explaining his actions, as follows :

*"Hi [Complainant],*

*It's a very simple two page document you just need to sign, I will get G to send on to you in the morning. If you can scan and send back before COB Thursday we will process for next week's NAV.*

*I am very sorry to hear that you want to redeem [the Complainant's name]. We are working very hard on your behalf to dampen the volatility in a difficult period. You had a positive year last year and my expectation (assuming market play's out as we expect) would be the same for this year.*

*From a risk point of view, as we previously discussed, the reason we sent nearly €200k back to your bank account last year was our concern that*

/Cont'd...

*markets would play out as they have and given your age profile etc. a more prudent level of exposure was advised.*

*If a call or meeting would help I am available at short notice to meet and discuss our outlook for both the fund and overall markets”.*

The Complainant question why Mr CM got him to invest 200K if he was concerned about the markets as he says he was a vulnerable person of 67 years.

The Complainant states that he had a meeting with Mr CM and Mr C on 18.02.16. The Complainant says that he asked for the minutes of the meeting from 27.03.15 and despite having all his files at the meeting the minutes could not be produced as he was advised they did not exist.

The Complainant's position is that at the meeting in February 2016, he got no guarantee that the funds would increase so he decided to withdraw his funds.

The Complainant says that he asked what the fund was trading at and was told 94.6, but says that when he got his money he only received 91.4. After the Meeting in February 2016, the Complainant sent the following email to the Provider's compliance manager:

*“Dear Miss F,*

*I have been a client of [the Provider] for the last 5 years or so, all was well up to 27.03.15*

*On that date I had a meeting with [Mr CM]. I was introduced to [Mr CM] by [Mr S] in a meeting room opposite reception. [Mr S] left the room and I continued with [Mr. CM].*

*On that date I held the following Fixed Income Portfolio:*

*...*

*[Mr CM] advised me to sell this portfolio and put €200K into [the Provider's fund] which he said would comfortably achieve growth of between 7-10% per annum and added that if I didn't follow this course of action [the Provider] would not be interested in handling my business.*

*I always felt I was a valued client of [the Provider] and didn't see myself as a hindrance.*

*Fast forward almost 12 months and I now find myself down 30K in this .. fund, if I had remained with my fixed income portfolio I would be down €1,637 ([Mr. CM] will verify this figure).*

/Cont'd...

*I met with [CM] and [G] today and asked him why he badgered me into the ... fund, he said it was not totally his decision to put clients into [the fund] it was [P] and others at the top.*

*During our meeting today I asked to see the minutes of our last meeting of 27.03.15 and as of 14.30 I was told no minutes were available, which means no minutes were taken by [Mr CM]”.*

The Complainant says that as a result of this email he was asked to attend a meeting in the Provider's office to discuss his concerns on 14<sup>th</sup> March 2016.

The Complainant states that he was met at first by Mr P Managing Director who asked him if there was something sinister going on and was he being tutored by an ex member of staff. The Complainant submits that he was asked by Mr P if *he had met him* and the Complainant told him no, then he says he was asked if he had a phone contact from him, which the Complainant states he strongly denied and felt insulted by Mr P's remarks.

The Complainant submits that they were then joined in the meeting by Ms F and Mr CM both of whom, he says, kept telling him that he got the correct financial advice and that his age was taken into account.

The Complainant states that the minutes of the meeting that were not available on 16.02.16 mysteriously appeared in his file.

The Complainant says that Mr P asked him if he felt vulnerable being alone at that meeting, the Complainant says he replied 'no' as he was not receiving financial advice. The Complainant's position is that subsequent to that meeting he received the a letter from the Provider saying that it had acted correctly.

The Complainants states that he has since learned that Mr CM was not a qualified Advisor on 27<sup>th</sup> March 2015 and in view of this he says that he is referring the complaint to the Financial Services and Pensions Ombudsman as he does not think it appropriate that a vulnerable OAP should be advised by an individual who is not a QFA.

The Complainant states that he lost €30,000 on the fund and seeks the return of this loss.

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

The Provider's position is that the Complainant was not coerced into making the investment in its fund. The Provider submits that the Complainant considered the

/Cont'd...

proposal for a number of days following the meeting of 27 March 2015 before issuing a written instruction for the investment to be made.

The Provider states that the Complainant had a pre-existing holding in its Fund and hence was familiar with the investment.

The Provider says that regular suitability reviews were carried out with the Complainant over the course of his relationship with the Provider. The Provider submits that its Fund was a suitable investment for the Complainant.

The Provider submits that the Complainant was not advised to invest in its Fund by an unqualified Provider employee.

The Provider refers to the fact that the Complainant decided to withdraw from the Fund, which was a medium term investment, after just 10 months.

### **Evidence**

#### **Application for Fund (completed in 2009)**

##### *"Part 3 Investment Information*

*Your answers to the following questions will help us to better understand your investment objectives and experience. ...."*

"Investment Objectives" - "**Additional Income**" was ticked

"Attitude to Risk" - "**Medium**" was ticked

"Investment Experience" - "**Limited**" was ticked

The above was updated and initialled by the Provider's representative - Mr S - in May 2012 and February 2013 as follows:

"Investment Objectives" - "**Additional Income**" was ticked

"Attitude to Risk" - "**Medium**" was ticked

"Investment Experience" - "**Good**" was ticked

/Cont'd...

Terms of Business

*“2. General Risk Warning*

*2.1 Most forms of investment involve some risk. The value of your investment may go down as well as up because of the volatile nature of stock market investments. Past performance may not be a reliable guide to future performance. The value of your investment may be subject to interest rate fluctuations which may have an affect on the price or incomes generated from the financial instrument”.*

*“7. Investment Objectives*

*7.1 [The Provider] are proceeding on the basis of your stated investment objectives. If these objectives are incorrect or you would like to discuss or amend your investment objectives with us. It is of critical importance that you contact us as soon as possible to review”.*

The Fund’s Additional Subscription Form (to be completed by existing investors only):

*“The undersigned hereby subscribes into the Fund as set forth above upon the terms and conditions described in the Fund’s current Prospectus. The undersigned hereby confirms that all of the representations, warranties and agreements made in the undersigned’s original Application Form apply to this subscription as if they were made on the date hereof, and certifies that all of the information set forth in the undersigned’s original Application Form remains accurate and complete on the date hereof. The undersigned represents that the person signing this request is an authorised representative of the applicant”*

Key Investor Information in respect of the Fund

*“Objectives and Investment Policy*

*Investment Objective*

*The investment objective of the Fund is to achieve long term growth in your investment by investing on a global basis in equities and equity related securities, other collective investment schemes (“CIS”), debt, securities, deposits and financial indices.*

*Risk and Reward Profile*

1	2	3	4	5	6	7
Lower potential risk/ rewards				higher potential risk/rewards”		

*The indicator above illustrates the position of this Fund on a standard risk/reward category scale.*

*This indicator is based on historical data and may not be a reliable indication of the future risk profile of the Fund. The risk and reward category shown is not guaranteed to remain unchanged and may shift over time.*

*The lowest category does not mean investment is “risk free”.*

*This indicator is not a measure of the risk that you may lose the amount you have invested.*

*The indicator opposite does not take account of the following risks of investing in the Fund:*

- *As the Fund invests in overseas securities, movements in exchange rates may, if not hedged, cause the value of your investment to rise or fall.*
- *Market Risk – the Fund may invest in transferrable securities which can be affected by stock market movements and factors including political events, economic news, earnings forecasts and regulatory policy.*
- *Bonds are affected by trends in interest rates and inflation. If interest rates rise the value of capital may fall and vice versa. Inflation will also decrease the real value of capital. The value of a fixed interest security is also affected by its credit rating.*
- *Credit Risk – The issuer of a financial asset held within the Fund may not pay income or repay capital to the Fund when due.*
- *Underlying CIS Risk – the Fund may be subject to valuation risk due to the manner and timing of valuations of the Fund’s investment in other CIS. Valuations of the Fund may not reflect the true value of the underlying CIS at a specific time which may result in significant losses or inaccurate pricing for the Fund.*
- *Liquidity Risk – Certain securities may become difficult to value, or sell at wanted price and time.*
- *Operational Risk – management, business or administration processes including those to do with the safekeeping of assets, may fail, leading to losses”.*

25<sup>th</sup> February 2015 – Provider representative GC to MS re recommendation for the Complainant

*“Please see attached valuation and recommendation for [the Complainant]”*

Valuation and recommendation

*“Introduction*

/Cont’d...

*The recommendation included in the presentation is for a medium risk client. From the answers in your risk profiling you have been deemed suitable to be classed as a medium risk client. The recommended portfolio would have a target return of 8% - 10%. This is consistent with a medium risk portfolio”.*

The recommendation was to sell some of the commodities and fixed income funds and buy Providers Asset Allocation Fund.

26<sup>th</sup> February 2015 – Provider representative Mr. S to the Complainant

*“Have a look at the attached we can discuss on Monday”*

27 March 2015 – Investment Meeting

*“[The Complainant] confirmed to the meeting that he was happy with his medium risk mandate, looking for capital gain + income across a diversified basket of securities. In addition there had been no change to his financial circumstances”.*

*“CM reviewed the performance of [the Fund], noted it was up 4%YTD. CM reviewed the characteristics of the Fund, that it was a medium risk (ESMA 4) multi asset fund that held a diversified basket of equity, index / sector G7F’s, corporate bonds, sovereign bonds, cash, property and other funds. As a current investor [the Complainant] was happy with how the fund was doing”*

*“Both [MS] and CM discussed that given the backdrop to markets as outlined and the difficulty in actively managing a client account outside of a fund structure, that [the Provider] were recommending that clients would migrate their “market risk” portion of their portfolio to [the Fund]”*

*“Given [the Provider’s] outlook for markets CM articulated the view that it would be prudent for [the Complainant] to take a large part of his [Provider] portfolio back to cash with the balance to be invested into [the Fund]. [The Complainant] agreed with view.*

*CM advised that he would send [the Complainant] an e-mail later that day outlining what was proposed and [the Complainant] would review and confirm if he intended to proceed”.*

Copy of the Presentation on the Fund said to have been given in 2014

*“3 Years Managed Account Performance Figures*

...

/Cont’d...



*Warning: Past Performance is not a reliable guide to future performance.*

*Warning: The value of your investment may go down as well as up.*

*Warning: The investment may be affected by changes in currency exchange rates.*

...

*Disclaimer*

- ...
- *Investors are advised to take independent taxation and investment advice and ensure that investments are appropriate to their personal circumstances.*
- *The value of investments can rise as well as fall and past performance is no guide to future returns which are dependent on market conditions. Factors such as interest rates, currencies, leverage and liquidity can influence the value and the exit values of investments and by their nature are volatile and impossible to predict”.*

26 February 2015 – e-mailed presentation from Provider’s representative MS

*“The recommendation included in the presentation is for a medium risk client. From the answers in your risk profiling you have been deemed suitable to be classed as a medium risk client. The recommended portfolio would have a target return of 8% - 10%. This is consistent with a medium risk portfolio.*

*“Disclaimer*

*This report has been prepared by [the Provider] for information purposes only to assist investors to make their own investment decisions and is not intended to and does not constitute personal recommendations nor provide the sole basis for any evaluation of the securities discussed. Specifically the information contained in this report should not be taken as an offer or solicitation of investment advice or, encourage the purchase or sale of any particular security, option, future or other derivative investment. Not all recommendations are necessarily suitable for all investors and [the Provider] recommend that specific advice should always be sought prior to investment, based on the particular circumstances of the investor”.*

27<sup>th</sup> March 2015 – Provider’s representative Mr CM to the Complainant:

*“Thank you for coming into see us today, it was lovely to meet you.*

*To confirm what was agreed*

1. *We will liquidate the fixed income component of your portfolio releasing approx.. €240k*
2. *...*
3. *We will then invest the balance of the proceeds from the sales above into [the Fund] (€210k). Please print, sign and return the attached form.*

/Cont’d...

4. ...

*Finally [the Complainant's name] I can confirm all this is organised you [sic] will not be charging you any fees in relation to your .. account. Any fees accrued will come through [the Fund] investment directly".*

*[Disclaimer attached to e-mail]*

*This report has been prepared by [the Provider] for information purposes only to assist investors to make their own investment decisions and is not intended to and does not constitute personal recommendations nor provide the sole basis for any evaluation of the securities discussed. Specifically the information contained in this report should not be taken as an offer or solicitation of investment advice or, encourage the purchase or sale of any particular security, option, future or other derivative investment.*

*Not all recommendations are necessarily suitable for all investors and [the Provider] recommend that specific advice should always be sought prior to investment, based on the particular circumstances of the investor".*

30 March 2015 – Complainant to Provider representative CM

*"Pls proceed with the above. I will sign form and return to you".*

9th February 2016 – The Complainant to Provider representative CM

*"I am surprised and shocked to be down 30K on this fund it is totally against the advice you gave me when we met last March. I cannot afford to loose another cent I'm an OAP and cannot sustain this loss".*

16 February 2016 – Complainant to Provider's complaint handler

*"I have been a client of [Provider] for the last 5 years or so, all was well up to 27.03.15.*

*On that date I had a meeting with [CM]. I was introduced to [CM] by [Mr S] in a meeting room apposite reception. [Mr S] left the room and I continued with [CM]. ... [MS] returned to the room, invited us to lunch and the meeting concluded.*

*I'm 67 years of age and was alone with [CM] for the duration of the meeting. I'm an OAP with limited financial resources so I ask you to confirm by E-mail that you honestly believe that I was given the appropriate advice".*

25<sup>th</sup> July 2016 – Provider's response – to the Complainant, in relation to the complaint

*"You contend in your email of 16 February 2016 that [Mr CM] stated at the meeting of 27 March 2015 that "... [the fund] which he said would comfortably achieve growth of between 7-10% per annum ..". This contention is not accurate – [Mr CM] outlined that such figures were target returns over*

/Cont'd...

*a 3 to 5 year period". The Provider submits that the Complainant's loss calculation is not accurate".*

## **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.

In the above regard, while accepting that there is a conflict between the parties as to what was advised at the meeting in March 2015, about the returns that could / would be achieved from the Fund, the fact remains that the Complainant had previously invested in the Fund, and would reasonably have been aware of the nature of the fund, in particular, that it was not a guaranteed fund, and that its performance was wholly dependent on how the markets performed.

A Preliminary Decision was issued to the parties on 23<sup>rd</sup> March 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 advised the Complainant to sell his existing portfolio and invest more monies into the Provider's own Fund.

/Cont'd...

The Provider's position is that in early 2015 it had concerns regarding the outlook for investment markets and hence it advised clients to review the level of their exposure to markets. Against this background, on 26 February 2015, the Complainant's relationship manager, Mr S, sent the Complainant some risk/volatility reduction recommendations for his portfolio including a proposed increase in the Complainant's holding in the diversified Provider Fund and the sale of his share holdings.

The Provider states that at that time Mr S (who it says is no longer employed by the Provider), was the Chief Investment Officer and a Director of the Provider. The Provider submits that in the 3 to 4 weeks following this email, the recommendations were discussed with the Complainant and refined. The Provider says that the Complainant agreed with Mr S to sell his share position and this was confirmed by an exchange of emails on 20 March 2015.

The Provider says that Mr S met with the Complainant on 27 March 2015 and recommended that he diversify his portfolio across a wider range of assets and also that he should consider moving his portfolio towards the lower end of the medium risk spectrum. The Provider states that under the Suitability criteria, the Complainant specified his risk tolerance as medium.

The Provider states that the Complainant was met by his relationship manager Mr S who had asked his colleague Mr CM investment manager, to accompany him to the meeting. The Provider says that Mr CM's role at the meeting was to provide an overview of the Provider's view on investment markets and to review the performance and composition of the Provider's Fund.

The Provider explains that at this time the Complainant was holding relatively large positions in some individual fixed income securities, that is, a Perpetual Bond c.€56,000 and a second Perpetual Bond c.€42,000. The Provider says that in its view it was prudent to reduce exposure to such individual securities and to broaden the spread of the Complainant's portfolio. Accordingly Mr S recommended that the Complainant sell his individual holdings and invest the proceeds in the Provider's Fund. The Provider says that the fund provides exposure to a wide range of securities diversified across a number of different asset classes. The Provider's position is that its recommendation not only broadened the exposure of the Complainant's portfolio but also served to reduce the stock specific risk in his portfolio. The Provider submits that at this time the Complainant was familiar with this Fund as he was already holding a smaller position in the fund. The Provider further states that as part of its risk reduction recommendation it also suggested that he should withdraw c.€180,000 from his portfolio and place these funds on longer term bank deposit.

/Cont'd...

On 27 March 2015, following the meeting, Mr CM sent an email to the Complainant summarising the meeting and concluded by stating:

***"Once you confirm you are happy to proceed with above, I will organise".***

The Complainant replied three days later on 30 March 2015 and stated:

***"Pls proceed with the above. I will sign form and return to you".***

The Provider states that in summary the Complainant's investment in the Fund formed part of a recommended risk reduction strategy which included:

- Risk reduction via withdrawing c.€180,000 from the market and placing on bank deposit.
- Reducing stock specific risk via disposal of higher risk individual bond holdings.
- Portfolio diversification across multi assets via further purchase of the Provider's Fund
- Sale of the Complainant's other holdings.

The Provider's position is that this recommendation was made in good faith and in the Complainant's own best interests. The Provider however states that it cannot guarantee that all of its recommendations would be financially beneficial, particularly over a short period of time.

As regards "Suitability" the Provider's position is that the Complainant opened his account with it in October 2009 and at that time he was 60 years of age. On his Account Application Form the Complainant indicated his attitude to risk as Medium. The Provider says that over the course of the following years the Provider met with the Complainant on a regular basis. The Provider states that at many of these meetings the Complainant's Know Your Client ("KYC") profile was revisited in order to determine if any changes had taken place in his circumstances and to confirm his continued suitability for the investments held in his portfolio.

The Provider sets out the following list of some of the Complainant's meetings with Mr S at which its meeting notes confirm that a KYC assessment took place:

16 October 2013 – The Provider states that this meeting took place to discuss the Complainant's portfolio and to consider some of its recommended investments. The meeting note states:

*"Overall [the Complainant] was happy with the proposal but wanted to wait for a couple of weeks as he might have some other investments outside of GRS to look at.*

/Cont'd...

*[The Complainant] instructed [to sell] the 6.5% ESB 2020 later in the month as he needs approx. £60k for a London property project".*

The Provider states that this note serves to indicate that as the Complainant approached age 65 he was still comfortable with looking at investment opportunities and he was about to invest in a UK property project.

14 January 2014 — The Provider states that at this time the Complainant was close to his 65<sup>th</sup> birthday. The meeting note states:

*"The purpose of the meeting was to review his portfolio and to update his Risk Profile Docs/ KYC". It was also stated that "[Mr S] updated his KYC documents with no material change to his circumstances noted".*

9 April 2014 - The meeting note states:

*"The purpose of the meeting was to review the performance of his personal / pension portfolio and to update his KYC documents".*

It was noted by the Provider that there had been no change in the Complainant's financial situation, risk profile or investment objectives.

27 March 2015 — *"[The Complainant] confirmed to the meeting that he was happy with his medium risk mandate, looking for capital gain and income across a diversified basket of securities. In addition there had been no change to his financial circumstances".*

The Provider's position is that Mr S was in regular contact with the Complainant following his further investment in the Provider's Fund and had telephone contact with the Complainant on a monthly basis, approximately.

It is the Provider's position that it is clear from the above that it went to considerable lengths to ensure that it was fully apprised of the Complainant's personal financial circumstances and that its recommended investments were suitable for him.

In relation to the Provider's Fund and the specific complaint the Provider states that it is important to note:

- Its multi asset Fund involved lower risk than the 4 individual securities previously held by the Complainant.

- As part of its recommendation on 27 March 2015 the Provider suggested that the Complainant should withdraw c.€180,000 from his portfolio and place these funds on longer term bank deposit.
- As at 27 March 2015 the Complainant was a pre-existing holder of the Provider's Fund and was familiar with its objectives, risk and diversified structure
- On page 2 of the portfolio recommendation document sent to the Complainant on 26 February 2015 it was stated:

*"The recommendation included in the presentation is for a medium risk client. From the answers in your risk profiling you have been deemed suitable to be classed as medium risk client. The recommended portfolio would have a target return of 8% - 10%. This is consistent with a medium risk portfolio".*

The Provider submits that it requested a firm of independent investment management specialists, to compare the risk/volatility of the Complainant's portfolio before and after his increased investment in the Provider's Fund. The Provider submitted a copy of same to this office. The specialists concluded that:

*"Based on both a quantitative simulation of both portfolios and a qualitative assessment of their risks, my firm view is that Portfolio 'B' (i.e. post [the Provider's] Fund investment) was materially less risky than Portfolio 'A' and that the advice to switch from 'A' to B' was both prudent and consistent with [the Complainant's] stated tolerance for risk".*

As regards the Complainant's allegations re Mr CM, the Provider states that Mr. CM is closely involved in the investment management process with the Provider and it was for this reason that Mr S asked Mr CM to accompany him to the meeting with the Complainant on 27 March 2015. The Provider states that Mr CM's role at the meeting was to provide an overview of our firm's view. As regards the Complainant's contention that Mr S left the meeting for a period of time – the Provider states that there is no basis for this contention.

The Provider states that following the meeting, which commenced at 12.30, the Complainant went for lunch with Mr S and with regard to the suggestion that Mr CM also attended this lunch, the Provider says that this is not the case. The Provider states that the recorded telephone conversation at 13.33 on 27 March 2015 between Mr CM and his colleague, Mr C, confirms that Mr CM was in our offices at that time and did not attend the lunch with the Complainant.

As regards the alleged Financial Loss, the Provider states that the Complainant decided to dispose of his entire position in the Provider's Fund after only retaining his increased holding in the fund for just 10 months. The Provider's position is that

/Cont'd...

at the time of his investment in the Fund it was made clear to the Complainant that the fund was a medium term investment in keeping with his investment time frame. The Provider states that it is never recommended to withdraw from a medium term investment fund after just 10 months.

In early 2016, on learning of the Complainant's unhappiness with the performance of the Fund, the Provider states that it arranged to meet with him on 16 February 2016. However the Complainant sent an email to Mr CM on 10 February 2016 and informed him: *"I want to withdraw funds no matter what happens next Tuesday"*.

Mr CM replied to the Complainant on the same day and stated:

*"I understood your decision would be made after we meet next week. Again I am sorry to hear that you want to redeem without speaking but let's meet next week anyway and we can talk through how we can go forward"*.

The Provider submits that the Complainant's decision to dispose of his holding in the Fund resulted in a loss. The Provider says that as previously stated, investment recommendations cannot be guaranteed and this is particularly the case over a short time period. The Provider states that it is the case that the loss the Complainant incurred would have been less if, on 30 March 2015, he had retained his individual bond holdings instead of purchasing the Provider's Fund. The Provider submits that this is not indicative of any wrongdoing on its part rather it serves to confirm that investment fund recommendations are not absolute predictions and should be measured over the medium term. The Provider states that it should be noted that the Supplement to the Prospectus document for the Fund, provided to the Complainant, stated at section 6:

*"The Fund is suitable for investors seeking long-term capital growth through exposure to ..."*

The Provider sets out what it considers was the actual loss that the Complainant incurred and for reference it also provided the hypothetical loss that would have been incurred if he had retained his individual bond holdings and ultimately sold them on the date that he exited the Fund i.e. 17 February 2016. The Provider's position is that it is important to ensure that these calculations are performed on a "like for like" basis. Accordingly the Provider has focused the calculations below on the matter which is the subject of the complaint i.e. the Complainant's decision to increase his holding in the Fund arising out of the meeting of 27 March 2015.



### Loss Calculation

Sale of individual bonds 30/03/2015	218,683
Purchase of 1,973.29 units of the Provider Fund	<u>210 000</u>
Cash retained	8,683.
Actual Loss	
10/04/2015 purchase 1,956.35 units in the Fund	210,000
30/06/2015 allocated 16.94 units in Fund	nil
17/02/2016 sale 1,973.29 units in the Fund	<u>181 037</u>
Loss on sale	-28,963
Cash retained	<u>+8 683</u>
Net Loss	-20,280
Hypothetical Loss	
Loss if bonds retained and sold on 17/02/2016	-12,921
Coupon payments if bonds retained until 17/02/2016	<u>+4 839</u>
Loss	-8,082

The Provider states that the Fund falls within the scope of the Markets in Financial Instruments Directive ("MiFID") rather than the Consumer Protection Code.

The Provider submits that Statutory Instrument 60/2007 - European Communities (Markets in Financial Instruments) Regulations 2007 contains a number of sections which are relevant in the context of this complaint - details are set out below.

Section 34(1)(d) states that an investment firm shall employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.

In this regard the Provider states that, the Complainant's relationship manager was Mr S. In early 2015 Mr S was the Chief Investment Officer and a Director of the Provider. The Provider states that it is fully satisfied that Mr S was appropriately qualified and had the necessary knowledge and experience. The Provider states that Mr CM accompanied Mr S to the meeting with the Complainant on 27 March 2015. The Provider says that Mr CM provided the Complainant with information on investment markets and the Provider's Fund. The Provider states that it is fully satisfied that Mr CM was also appropriately qualified and had the necessary knowledge and experience.

Section 76 deals with conduct of business obligations when providing investment services to clients. The Provider states that the paragraphs within this section that are relevant to this complaint are those dealing with obligations on investment firms to act honestly/fairly; to provide clients with information that is clear and not

/Cont'd...

misleading so they can understand the risks involved and make informed decisions; to obtain all necessary information from a client in order to be in a position to make a suitable investment recommendation.

In this regard the Provider states that it is clear from its file note of the meeting of 27 March 2015, and from its Final Response Letter, that it acted honestly and fairly in its dealings with the Complainant.

The Provider states that it is evident from the information that it provided to the Complainant regarding the Fund on 27 March 2015 and on previous dates, that he was furnished with data that was clear and not misleading. The Provider's position is that the Complainant was fully aware from such documentation that he was investing in a medium risk multi asset fund.

The Provider submits that it obtained all necessary details re the Complainant's investment objectives, attitude to risk and investment timeframe when he completed the account opening documentation. The Provider states that in addition as outlined under Suitability it supplemented this initial information with frequent Know Your Client updates over the course of its relationship with the Complainant.

Section 94 deals with assessment of suitability and appropriateness. This section expands on certain aspects of Section 76 relating to the process whereby an investment firm obtains all relevant information from a client in respect of their investment objectives. Section 94(7) states that:

*"An investment firm, when assessing whether an investment service as referred to in Regulation 76(5) and (6) is appropriate for a client, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded".*

In the above regard, the Company states that the Complainant had made a previous investment in the Fund, accordingly the Complainant was fully aware of the medium risk nature of the Fund. The Provider says that the medium risk nature of the recommendation document provided to the Complainant on 26 February 2015 clearly set out the medium risk nature of the recommended portfolio. The Provider states that at the time that the Complainant made his further investment in the Fund in 2015 he had been a client of the Provider since 2009 and had demonstrated a good understanding and knowledge of investment markets.

Telephone Calls provided in evidence and considered:

On 12th May 2016 - Call with the Complainant where he requests to treat complaint as formal. Provider requests Complainant to document his complaint in writing towards the end of the call.

On 9th March 2016 - Mr P and the Complainant discuss upcoming meeting.

Calls from 27<sup>th</sup> March 2015:

12:18- Provider representative calls reception to book the meeting room, shortly before the 12:30 meeting

13:33- Provider representative (JC) calls the office looking for Mr S at 13:33 where he is advised by Mr CM that he should be back shortly. The Provider's position is that this demonstrates that Mr. CM left the meeting that he was attending with Mr S, before Mr S and the Complainant went to lunch.

15:29- JC calls the office looking for Mr S where he is advised that Mr. S has not yet returned to the office.

The Provider states that it appreciates the Complainant's unhappiness at suffering losses on his withdrawal from the Fund after 10 months. The Provider however states that it is satisfied that its recommendation of the Fund to the Complainant was suitable, made in good faith and in the Complainant's best interests. The Provider says it understands that the Complainant wishes to recover his losses however there is no basis for attempts to apportion blame on it for such losses.

The Complainant's response to the Provider's submission.

The Complainant submits that he was advised by Mr CM who was not a QFA at the time of giving him advise. The Complainant states that whilst the Provider may state that the fund is managed by another named entity, he says this is for optics and all clients were briefed on the fund by Mr. CM whom the Provider gives the title of Investment Manager.

The Complainant states that prior to the meeting on 27.03.15 Mr S informed him that the Provider was changing direction and he would no longer be his A/C manager as the Provider was putting all its clients into a new fund which was going to be managed by Mr CM and that the Provider would arrange a meeting where the Complainant would be briefed on this new fund by Mr. CM.

/Cont'd...

The Complainant states that he attend a meeting on 27<sup>th</sup> March where Mr S introduced him to Mr.CM and said Mr CM would talk him through the new fund and left the room.

The Complainant states that Mr CM informed him that he could no longer keep his Fixed Income portfolio as the management of the Provider was putting all its clients into a new fund.

The Complainant states that Mr CM said he would expect a minimum 7% PA interest on the fund and he should invest 200K in same. The Complainant says Mr CM asked him to consider this and come back to him. The Complainant submits that a friend of his Mr BE attended a meeting with the Provider in December 2016 and Mr. CM was telling him that the fund would achieve 7% interest and even put it in writing and says that this is evidence of the Provider still perpetuating an untruth 2 years after it gave him the same story.

The Complainant states that Mr S came back to the meeting room asked if they were done, then invited Mr. CM and the Complainant to lunch.

The Complainant says that despite what Mr CM states he did attend lunch with Mr S and himself.

The Complainant's position is that when they were in the Restaurant Mr. CM said he was up to his eyes and would have to make it a brief lunch as he had to return to the office so it's possible that he could have taken a Telephone call at 13.33.

As regards the minutes of the meeting held on 27<sup>th</sup> March, the Complainant states that it is his belief that these minutes were written retrospectively and constructed to respond to his complaint. The Complainant says that at a meeting with Mr CM and Mr GC on 18.02.16, he requested a copy of minutes from the meeting of 27.03 despite all his files being brought into the office no minutes could be found.

The Complainant states that the minutes of the meeting were taken by Mr CM and as a non qualified QFA and if Mr S attended the meeting, the Complainant questions why did Mr S not counter sign them as he was the QFA .

The Complainant states that the Complaints Manager Ms F emailed Mr S asking him if he attended the meeting on 27.03. The Complainant submits that if the Provider states in the minutes he was there why did Ms F have to email him asking if he was present.

/Cont'd...

As regards the Provider's statement that the Complainant needed £60K to invest in a London Property, the Complainant says that this is completely untrue, as he withdrew the money to loan to a relative.

As regards "Risk" the Complainant states that the Provider keeps *harping* on about risk and that is why it put him into the fund. The Complainant states that the Provider put all its clients young, old, millionaires etc. into the fund, the Complainant questions how could they all have the same risk profile.

As regards the Provider's statement that the Complainant exited the fund after 10 months and did not give it a chance, the Complainant's response is that if he had remained in the fund he would be down a further 10% so says he made a very wise decision to exit the fund.

As regards the Provider's statement that the: *"The Fund is suitable for investors seeking long term capital growth"* the Complainant questions if that was so why is the fund closed down after 3 years.

The Complainant states that the fund is down 12.78% YTD and the value is down from €20ML to €4.7 ML as of 30.05.17. The Complainant says that the fund was performing so badly that it is now closed.

The Complainant submits that the update meetings with Mr. S were general chats and ongoing risk was never discussed.

**LOSS:**

The Complainant submitted a spread sheet from his specialist which indicates the net difference to him being in the Fund or keeping his old portfolio.

The Complainant concludes that:

- A). He was advised by an Investment Manager who was not a QFA.
- B). The Investment Manager was managing the fund that he was advising him to invest in.
- C). As an OAP with limited resources he should not have been advised to put all his savings into one fund. He states he does not have any knowledge of financial markets and was depending on the Provider to look after his interests not its own.
- D). The Complainant states that setting up of the fund was a cost saving exercise by the Provider as it was administered by one person and was not in his interest.

E). The Complainant says that the fact that the fund has been closed down after 3 years is proof that it was not a suitable investment for him and many others.

The Provider's response of 31 July 2018 to the Complainant's above submission

The Provider refers to the Minutes of Meeting 16 October 2013 where it stated that the Complainant "...needs approx. €60k for a London property project".

The Provider states that in the Complainant's most recent submission the Complainant has stated that this is "completely untrue". The Provider's response is that it cannot understand how erroneous information would appear in a meeting note, however it appreciates that the Complainant contends that the note is not accurate.

As regards risk, the Provider states that, in early 2015 it had concerns regarding the outlook for investment markets and hence it advised clients to review the level of their exposure to markets. The Provider states that against that background it recommended to a number of relevant clients, including the Complainant, that they diversify their portfolios across a wider range of assets. The Provider says that this recommendation was made to suitable clients based on its assessment of their risk tolerance and investment objectives.

The Provider submits that the performance of the Fund has been disappointing. It says, however that its recommendation to invest in this fund was made in its clients' best interests and it cannot guarantee the performance of risk based investments. The Provider states that the performance of the Fund bears no relationship to its suitability for the Complainant.

As regards the Loss Calculation the Provider states that it is important to ensure that any loss calculation is carried out on a "like for like" basis. It says that, accordingly one must focus on the time period 30 March 2015 to 17 February 2016 i.e. the relevant period which relates to the complaint. The Complainant increased his holding in the Fund on 30 March 2015 and decided to sell his entire Fund holding on 17 February 2016.

The Provider states that the objective of the loss calculation is to calculate the actual loss incurred by the Complainant over the period and to compare such to the hypothetical loss that he would have incurred had he retained his 4 individual bond holdings on 30 March 2015 and subsequently sold them on 17 February 2016.

The Provider states that it is satisfied as to the accuracy of its calculations i.e.

/Cont'd...

Actual Loss	20,280
Hypothetical Loss	<u>8,082</u>
Loss Differential	12,198

The Provider states that in order to reconcile the calculation furnished by the Complainant in his recent submission it is necessary to make the following adjustments:

- Two of the bonds sold by the Complainant on 30 March 2015 were denominated in STG£ i.e. the Ishares Corp Bond and the Investec Perpetual Bond. The relevant figures in the Complainant's calculation would need to be converted from STG£ to euro.
- The sale of the Complainant's bonds on 30 March 2015 realised a total of €218,683 but only €210,000 of these proceeds was invested in the Fund. The cash retained of €8,683 would need to be incorporated into the Complainant's calculations.
- On 30 June 2015 the Complainant received a bonus allocation of 16.94 units of the Fund which related to his Fund purchase on 30 March 2015. Accordingly the relevant number of units in the Fund sold by the Complainant on 17 February 2016 was 1,973.29. This adjustment would need to be made to the Complainant's calculations.
- The Complainant's calculations include bond coupon payments for the full years of 2015 and 2016 in addition to a half year for 2017. The relevant period for the complaint and the loss comparison calculation is 30 March 2015 to 17 February 2016 and hence an appropriate adjustment would need to be made to the Complainant's calculations.

#### The Complainant's submission of 9<sup>th</sup> August 2017

As regards the minutes of the meeting of 16.10.13 the Complainant states he is not responsible for inaccuracies in the Provider's minutes. The Complainant submits that he had requested a copy of the minutes of the meeting on 27.03.15 uploaded to their system which would show date and time they were uploaded, but says he was not provided same. The Complainant says that the Provider has not stated why they contacted Mr S by email asking if he attended meeting on 29.03.15.

As regards the risk issue the Complainant's position is that the Provider has not addressed why it put all their clients into the particular Fund. The Complainant states that all the Provider's clients cannot have the same risk aversion.

As regards the Loss Calculation, the Complainant states that it can be seen very clearly when you deduct the sales value contract note from the purchase value contract note the loss is not as stated by the Provider even allowing for 8,082 cash.

/Cont'd...

The Complainant submits that the reason he extended the bond coupon payments for 2015, 2016 and 2017 was that if he was not forced into the fund he would still be holding these bonds and making an annual return from them as well as capital gain.

The Complainant's submission 25 August 2017 was as follows:

*"If you look at the buy Contract Note and the sell Contract Note it can be clearly seen what the loss was, also the consequential loss was due to me being forced into [the Fund].*

*This fund was badly run [which] resulted in it being closed down with losses of 20% + and the Manager of the fund [Mr CM] has been dismissed by [the Provider]"*.

The Provider's submission of 12<sup>th</sup> Sept 2017

The Provider states that there is no basis whatever for the Complainant's contention that Mr CM was dismissed from its firm.

The Provider states that it is extremely disingenuous of the Complainant to make a false allegation of this nature.

The Provider states that the Complainant's contention regarding the closing level of the Fund is not correct. The fund closed at a unit price of 84.50 thereby recording a loss of 15.5% from par.

**Analysis**

- The evidence shows that the Complainant would have been familiar with the workings of the Fund and the likely performance of same, as he had been investing in that Fund previously.
- The Complainant was given time to decide on the recommendations that were suggested at the meeting in March 2015. Three days after the meeting the Complainant communicated his acceptance of the recommendations and gave Mr CM the permission to action same.
- The short period that the Complainant was measuring the Fund's performance, has also to be noted. 10 months into its investment, would not be a reasonable time to expect the level of performance from the Fund that he had expected.

/Cont'd...



- The Fund was not a guaranteed fund where returns would be guaranteed to be provided. Therefore, the Fund was not a “risk free” Fund and I accept that this was made clear in the documentation. Security of capital was not a feature of this Fund. I accept that the risks that could lead to possible losses on the investment were clearly spelt out in the documentation.
- The Complainant questions Mr CM’s qualifications to give the advice that he is said to have given about the Fund. However, I am satisfied that Mr CM would have had some familiarity with the workings of the Fund and the evidence shows that he had financial and investment knowledge.
- There is a question as to whether Mr S was present at the meeting of March 2015, and it is noted that the Provider had to specifically ask Mr S whether he had been there when the advice had been given. The minutes of the meeting do reflect his attendance, however, I accept that it was prudent of the Provider to establish same directly with Mr S.

Against the above, I have noted the following:

- There is a distinct lack of independent advice, particularly where the product in question is concerned. It would be reasonable to expect to see greater evidence of Mr CM advising the Complainant directly that he should seek independent advice on the recommendation, but this is not evident here.
- The Complainant contends that Mr CM stated at the meeting of 27 March 2015 that the Fund would comfortably achieve growth of between 7-10% per annum. It is the Provider’s position that this contention is not accurate and that it had been outlined that such figures were target returns over a 3 to 5 year period. While I accept that such growth figures were more appropriately targeted over an extended investment period as opposed to a 12 month period, I do not see evidence of the projection been specifically advised to the Complainant for the stated 3 to 5 year period. In this regard it is noted that the Recommendation that was prepared for the Complainant merely refers to “8% - 10%” but does not specify over what period.
- There is no evidence of a recommendation from the Provider at the March 2015 meeting, of any alternative products / mix of funds for the Complainant to choose from.
- Mr S had been the Complainant’s adviser for some years and I accept that for such a difference in advice / recommendation to come from the new Adviser so soon after his introduction to him, could reasonably cause the Complainant to question same.

/Cont’d...

- It must be noted that the portfolio that the Complainant was already in was providing him with some return on his investments and this change in outcomes with the new arrangement, particularly not providing the expected return, would also be a reasonable concern for the Complainant.
- The Complainant was at an age where losses on his investment would reasonably not be welcome, and from the information available I am not satisfied from the evidence submitted that the possibilities of same were adequately highlighted to him at the investment meeting in question.

Overall, I consider that, if (as it is the Provider's position), that the Complainant's former adviser Mr S, was involved in the advice meeting of March 2015 – which led to the placement by the Complainant of the substantial monies in the recommended Fund, Mr S should also have signed off on that recommendation. I consider that this was reasonably necessary, as the investment arrangement was materially different to that which was already in place and for that to alter so soon after an introduction to a new Advisor, warranted greater involvement from the Adviser who was departing.

That said, I accept that the Complainant's expectation of achieving the level of returns so soon after entering the Fund was not reasonable, particularly given his knowledge of the Fund's objectives, risk profile and diversified structure, from having previously invested in same. I consider this is so, regardless of how that expectation arose.

To conclude, having regard to all of the above and in order to do justice between the parties, it is my Legally Binding Decision that the complaint is partially upheld and I direct that a compensatory payment of €5,000 be paid by the Provider.

## Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld/rejected, 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 to pay the Complainant the compensatory payment of €5,000.
- 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 period to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction/s 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.**

---

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

18<sup>th</sup> April 2018

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.