



<u>Decision Ref:</u>	2019-0023
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Approved Minimum Retirement Fund AMRF
<u>Conduct(s) complained of:</u>	Encashment delays Delayed or inadequate communication
<u>Outcome:</u>	Rejected

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

Background

The Complainant held an Approved Retirement Fund (ARF) plan with the Provider. Some of the plan funds were invested with the Provider in the Provider's Consensus Fund and some were deposited in a fixed term self-invested fund with another financial service provider. This complaint concerns the self-invested element of the ARF. The fixed term of the self-invested element expired on 5 April 2017.

While the fixed term of the deposit was nearing its end and afterwards the Complainant sought information from the Provider about re-investing the deposit and clarification regarding the maturity date of the fixed term and details about the exact value of the matured funds.

The Provider recommended a meeting with a financial adviser to undertake a review of the Complainant's financial plans including a risk profile assessment and a fund recommendation.

The Complainant was not interested in meeting a financial adviser. He was dissatisfied with the Provider's replies to his enquiries and raised a complaint with the Provider. The matter was not resolved by the Provider's response to his complaint and he submitted a complaint to the then Financial Services Ombudsman's Bureau.

The primary cause of his complaint is his claim that the Provider has persisted in alleging that the Complainant sought advice but he insists that he only sought information – not advice. The Complainant states that the Provider has refused to provide an answer to a question put to it by him regarding the re-investment of his funds.

The question he wants answered is *“Is there any reason why I should not add [the proceeds of my self-invested fund] to the [Provider’s] Consensus Fund?”*

Along with the primary cause of his complaint the Complainant has made several other complaints against the Provider that:

- The Provider neglected to give him adequate notice of the maturity of his fixed term deposit and attempted to bully him into undertaking a risk profile assessment.
- The Provider’s actions have resulted in financial loss for him and caused him substantial stress.
- The Provider failed to satisfactorily explain a discrepancy relating to the maturity date of his fixed term deposit.
- The practice of the Provider in relation to the date of maturing deposits with third parties is unjustifiable and has caused him loss.
- The Provider has disclosed statements that are ambiguous, misleading, misrepresentative and not in accord with the facts.
- The Provider has shown instances of negligence, has dishonoured commitments, has ignored facts and has demonstrated inconsistency in communication.

He also claimed that figures quoted by the Provider revealed a financial discrepancy but he subsequently withdrew this aspect of his complaint and it was not investigated.

After the Complainant had submitted his complaint he made a further allegation that the Provider had applied unjustified interest and other charges.

The Complainant’s Case

Following a telephone conversation between the Complainant and the Provider about the maturity of his fixed term deposit, the Complainant received an email recommending that he undergo a full financial review including a risk assessment leading to a fund recommendation. The Complainant’s response indicated that he did not want to take part in a financial review but he did want to know if he should add the proceeds of his policy to the Provider’s Consensus Fund.

The Complainant states that he did not request a fund recommendation but sought a statement of fact. The Complainant states that the Provider's refusal to answer his question (*"Is there any reason why I should not add these monies to the Consensus Fund?"*) is an attempt to bully the Complainant into participating in an unnecessary process and a denial of information that is prerequisite to the Complainant making an informed decision.

The Complainant claims that the first notice of maturity of his plan that he received was by text message on 01 April 2017 and that he responded to the Provider on the next business day. He states that the Provider's claim that it contacted him on 31 March 2017 is not in accordance with the facts.

The Complainant states that in his experience deposits placed with external institutions were available to the depositor on the maturity date and he claims that the Provider's practice in relation to the value date of maturing funds with third parties is unjustifiable and has caused him loss.

The Complainant indicates that the number of units he could have purchased in the Consensus Fund with the value available to him on 7 April 2017 was 18,693.5 whereas the number of units he could have purchased at 5 May 2017 was 18,600.25, a difference of 93.25 units. The cost per unit on 5 May 2017 was €2.268 and the Complainant claims that this illustrates a financial loss to him of €211.49.

The Complainant submits that his fixed term deposit should have matured on 3 April 2017 and the funds should have been available to him on that date because it was scheduled to mature on the 5th anniversary of its commencement and correspondence from the Provider clearly states that the investment commenced on 3 April 2012.

The Complainant states that a statement in a letter from the Provider in which the Provider claims that its adviser explained the adviser's position to the Complainant is ambiguous and misleading. He claims that the Provider's use of the terms "unhappy", "disappointed" and "concerns" are an attempt to misrepresent the reason for his complaint.

The Complainant claims that the Provider should have informed him of the maturity date at least one month in advance of the maturity of his deposit and that the failure of the Provider to do so is negligent. Other instances of Provider's negligence alleged by the Complainant are:

- A letter from the Provider describing an individual as the Complainant's financial adviser even though that individual had left the role effective from a date before the date of the letter.
- A letter from the Provider to the Complainant apologising for any confusion arising from the Provider communicating the name of the wrong financial adviser as the individual that could answer queries from the Complainant.
- In an email dated 4 April 2017 to the Provider the Complainant identified his immediate priorities as the addressing of problems arising from the lack of timely

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notice of maturity and the need to find the optimum place for the matured funds. He alleges that the Provider has failed to respond to these priorities.

- The failure of the Provider to resolve his complaints.
- The Provider's attempts to contact the Complainant by telephone and the Provider's attempts to get him to contact the Provider by telephone, even though the Complainant had stated that he wanted all communications to be in writing.

In an email to the Complainant the Provider states that its customer service team will be requested to write to him outlining what happened prior to the appointment of his financial adviser. The Complainant states that the Provider did not honour this commitment.

The Complainant claims that the Provider ignored the fact that he had stated to the Provider that there had been no material change to his personal circumstances or his attitude to risk in the period since he had previously completed a risk profile assessment.

The Complainant claims that an acknowledgement that the Provider had reopened his complaint that was posted 9 June 2017 is inconsistent with an email sent to him on the same day by the same person because the email includes a request for information from him that was not requested in the letter.

The Complainant claims that the Provider was negligent in its response to the Financial Services and Pensions Ombudsman by not providing a complete and legible copy of the Complainant's application form and by providing duplicate copies of the Terms and Conditions of the Complainant's ARF.

The Complainant claims that the only charges described in the Terms and Conditions are a yearly fund charge of 0.75% and a plan charge of 0.25% and the unit rebate and any interest charge identified in the online valuation report is unjustified.

The Provider's Case

The Complainant's investment plan is an Approved Retirement Fund (ARF). From its inception on 3 April 2012 the Complainant was invested in two separate investment funds within the plan:

- 50% investment in the Provider's Consensus Fund
- 50% self-invested in a deposit with an external institution for a fixed term of five years

The Provider states that the self-invested fund allows the investor to move some or all of their pension pot into a fund where the investor is in full control of the investment decisions. The Provider does not offer any advice and does not determine the suitability of the proposed investment within the self-invested fund.

The investor is responsible for the choice of investments and the monitoring of the investor's chosen investments within the self-invested fund. The Provider makes available online access so that self-invested funds can be monitored at any time.

The Provider points to the Declaration contained in Section 9 of the Complainant's self-invested fund instruction form which sets out the role of the Provider in the self-invested fund.

The Provider also points to Section 2.4 of the Terms and Conditions of the Complainant's ARF which also sets out the Provider's role in the self-invested fund. The Provider states that the Complainant was given a copy of the Terms and Conditions on 6 April 2012.

The Provider claims that in advance of the Complainant's five year deposit reaching maturity he sought advice on whether or not he should invest the matured deposit in the Provider's Consensus Fund (the Consensus Fund is not a self-invested fund). A financial adviser from the Provider contacted the Complainant by phone on 3 April 2017. This was the first time that this particular financial adviser had spoken to the Complainant.

The Provider states that the financial adviser explained to the Complainant that he works as part of a financial advice channel and cannot recommend a fund to anyone for investment without first of all completing a risk assessment as part of a fact find which would look at all aspects of the Complainant's financial situation and needs. The risk assessment would determine the Complainant's investor profile and determine the level of risk that the investor is willing to accept. The fact find and risk profile would establish if investing the Complainant's matured deposit into the Consensus Fund met with his needs, requirements and risk profile.

The Provider's position is that the Complainant was unwilling to take part in a fact find and risk assessment and as such the Provider could not recommend the Consensus Fund or any other fund to him.

The Provider claims that it is standard in the industry for a financial institution to conduct a risk assessment with a client in order to ascertain the level of risk that a client is prepared to take with their money before recommending a fund that matches with their needs and requirements.

The Provider states that in the absence of the Complainant being willing to take part in a fact find including risk assessment the Provider gave no advice to the Complainant. The Complainant took no action with the proceeds of his matured self-invested deposits and those funds remained in the Complainant's self-invested liquidity account. The funds were correctly invested in the Complainant's liquidity account when the self-invested deposit matured.

The Provider claims that it is the Complainant's responsibility to monitor the maturity of his self-invested deposit. The Provider states that it does not, and there is no requirement for it to, send maturity correspondence on self-invested funds.

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The Provider claims that out of courtesy, it sent the Complainant a text message on 31 March 2017 to remind him about the upcoming maturity of his self-invested fund and a financial adviser from the Provider spoke to the Complainant on 3 April 2017 about the maturing deposit in advance of its maturity.

The Provider states that the maturity date of the Complainant's self-invested deposit was clearly recorded in his valuation report which was always available to the Complainant through the Provider's online services. The Provider claims that it is the Complainant's responsibility to access his self-invested valuation reports online.

The Provider states that the Complainant's ARF started on 3 April 2012 and the 50% of the ARF invested in the Consensus Fund started with effect from the start date of the plan which was 3 April 2012. The 50% of the ARF deposited in the self-invested fund, with an external institution, started with effect from 5 April 2012 and matured five years later on 5 April 2017.

The reason given by the Provider for why the Complainant's self-invested instruction to invest in a five year deposit did not start with effect from the same date as his investment in the Consensus Fund is because the process to place funds on deposit with an external institution took two days to complete. According to the Provider this timeline is normal for transactions of this nature within the industry.

The Provider states that the original proceeds for the Complainant's plan were received by way of third party cheque in respect of the Complainant's AVC fund. The cheque was lodged into a holding account on 3 April 2012. The following day it was confirmed to the external institution that the Provider wished to place funds on deposit on behalf of the Complainant. The deposit was then placed on 5 April 2012 for five years maturing five years later on 5 April 2017.

The Provider states that the Complainant was invested in his requested deposit for the full five years and received the full interest amount due to him and the funds were available to the Complainant in his liquidity account on 5 April 2017.

The Provider states that the opening and maturity date of the Complainant's self-invested deposit was recorded in his valuation report which was available to him in his online services.

The Provider states that the Complainant's original investment was €69,089.54 with an additional allocation of 1% giving a total investment of €69,780.44. €34,890.22 (50%) was invested in the Consensus Fund and €34,890.22 was available for the self-invested fund with the external institution. 1% of the available amount (€348.90) was put aside in the Complainant's liquidity account to cover charges and the remainder (€34,541.32) was deposited in the self-invested fund with the external institution.

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The Provider states that on 5 April 2017, on the expiry of the fixed term of the self-invested deposit, €34,541.32 was returned by the external institution along with interest of €662.40 and deposited to the Complainant's liquidity account on the same date.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 26 November 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.

Following the issue of my Preliminary Decision, the Complainant made an additional submission to this Office under cover of his e-mail and attachments dated 28 December 2018, a copy of which was furnished to the Provider for its consideration. The Provider advised this Office on 28 January 2018 that it did not wish to make any further submission.

Having considered all of the submissions and evidence, I set out below my final determination.

The primary issue that has been raised by the Complainant is that he wanted to know if he could invest the matured proceeds of his self-invested fund in the Provider's Consensus Fund but he claims that the Provider refused to inform the Complainant if it was possible for him to do what he wanted.

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On 1 April 2016 the Complainant received a text message from the Provider stating that a fixed term asset in his self-invested fund was about to mature and inviting him to contact his financial adviser for further information.

The Provider claims that the text was sent on 31 March 2016 and the Complainant states that the Provider is factually incorrect in its claim. Whether the text was sent on 31 March 2016 or 1 April 2016 is ultimately immaterial to the outcome of this complaint so I do not need to resolve the issue of whether the message was sent on 31 March or 1 April. I accept that it is possible that the text message was sent by the Provider on 31 March and not received by the Complainant until 1 April 2016.

On 3 April 2016 the Complainant received a letter from the Provider identifying the individual who would act as the Complainant's financial adviser and providing a contact number that the Complainant could use to contact the adviser. The evidence of both the Complainant and the Provider indicates that there was telephone contact between financial adviser and the Complainant on that date. Topics discussed in the telephone conversation included the exact maturity date of the Complainant's self-invested fund and the Complainant's dissatisfaction with the amount of notice he received about the maturing deposit.

On 4 April 2016 the financial adviser emailed the Complainant. He recommended a meeting with the Complainant to conduct a full review of the Complainant's financial plans including a fund recommendation based on the financial adviser's assessment of the Complainant's risk profile.

The Complainant responded to the financial adviser indicating that he did not wish to participate in a financial review and set out a number of questions for the financial adviser.

The financial adviser returned an email on 5 April 2015 in which he clearly stated his role within the provider: *"I work as part of [the Provider's] advisory arm and therefore, I am not in a position to assist you if you do not wish to engage in an advice process"*.

The role of financial advisers in the provision of services to consumers is regulated by the Central Bank. Under the Central Bank's code of practice financial advisers are required to gather details of a consumer's needs and objectives, personal circumstances, financial situation and attitude to risk before making investment recommendations for the consumer. The gathering of information for this process is called fact finding.

Financial advisers are in a vulnerable position when dealing with a client who will not provide the necessary information for a risk assessment to be carried out. In such circumstances financial advisers could be in danger of being the subject of allegations of giving bad advice or mis-selling.

They have a clear obligation not to give advice in the absence of knowing certain details about their customer.

The Complainant has accused the Provider of attempting to bully him into undertaking a risk profile assessment. However, the Provider's financial adviser could not engage meaningfully with the Complainant, or provide the Complainant with the information that the Complainant sought, unless the Complainant took part in the fact finding process.

In the absence of the Complainant's willingness to participate in the required fact finding process with the Provider's financial adviser, the adviser had no option but to direct the Complainant elsewhere so that the Complainant could get responses to the Complainant's enquiries.

The financial adviser directed the Complainant to the Provider's customer services team, which is the part of the Provider service for providing information to customers including customers who want information but who do not want to avail of the Provider's advisory service. The financial adviser also informed the Complainant that the Complainant had the option of engaging a financial broker of his own choosing.

The Provider's financial adviser acted appropriately and reasonably in directing the Complainant to the Provider's customer service team after it had been made clear by the Complainant that the Complainant did not want to engage in a fact finding process. I have been provided with no evidence to support the Complainant's claim that the Provider attempted to bully the Complainant into undertaking a risk profile assessment.

The Complainant emailed the Provider's customer services team on 5 April 2017. He expressed his email in the form of a complaint against the Provider's financial adviser. His email included phrases such as:

- *"I consider some of [the financial adviser's] answers and his overall performance to date most unsatisfactory"*
- *"What part of the following statement does he not understand..."*
- *"Surely his insistence on another risk assessment is unjustifiable"*
- *"I see no justification for his statement..."*
- *"I must dispute the maturity date quoted by [the financial adviser]"*
- *"I note that he has made no comment regarding ..."*
- *"Surely simple courtesy requires that he should have acted in a different manner"*

- *"I reserve the right to make such further complaints as I deem appropriate"*

The role of the Provider's customer service team is to give information to customers but this team is not responsible for responding to complaints. Given the tone and content of the Complainant's email I believe it was reasonable and appropriate that the customer service team treated the Complainant's email as a complaint and forwarded it to the Provider's complaints team.

I note that in his email to the customer service team the Complainant asks the question that he claims the Provider has refused to answer and which is the primary cause of his complaint i.e. *"Is there any reason why I should not add [the proceeds of my self-invested fund] to the Provider's Consensus Fund?"* By using the word *"should"* instead of the word *"can"* the Complainant is making a request for advice rather than a request for information.

Even though the Complainant may have wanted information, he has phrased his request for information in the form of a request for advice. The customer service team would not be able to advise him of any reason why he should or should not invest in the Consensus Fund. This is not a refusal by the customer services team to give the Complainant information.

If the Complainant wanted to know if it was possible to add the proceeds of his self-invested fund to the Consensus Fund, he should have simply asked can I add the proceeds of my self-invested fund to the Consensus Fund rather than asking if there was a reason why he should not to do.

The Complainant makes it clear in his email to the customer services team that he requires all communications regarding the matter to be in writing but the initial attempts by the Provider's complaints team to contact the Complainant were by telephone.

After being reminded by the Complainant that he wanted all communication to be in writing the Provider's complaints team wrote to the Complainant on 7 April 2017 stating that it was intended to respond to the issues he had raised in his complaint by 28 April and enclosed a copy of the Provider's Complaints Guide.

The Provider responded to the Complainant's complaint on 21 April 2017. On 2 May 2017 the Complainant submitted additional enquiries to the complaints team. The Complainant was informed that his complaint had been re-opened and that the Provider aimed to respond to his complaint by 23 May 2017. The Provider issued a second response to the Complainant on 9 May 2018.

On 6 June 2017 the Complainant sent an email to the Provider in which he stated that the response of 9 May 2017 only provided what the Complainant described as some financial data in response to his email of 2 May 2017 and did not provide anything resulting from the re-opening of his complaint.

On 9 June 2018 the Provider re-opened his complaint again and wrote to him asking what information he would like the response letter to contain and what outcome the Complainant was seeking as a resolution. The Provider repeated these requests in a further email to the Complainant dated 14 June 2017.

On 15 June 2017 the Complainant informed the Provider that he would seek redress by means other than the Provider's complaints process.

The investigation of this complaint has not uncovered anything that was contrary to law or that was unjust, unreasonable, oppressive, discriminatory or significantly improper on the

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part of the Provider. The explanations given by the Provider adequately explain the Provider's conduct and the explanations were given within an appropriate timeframe.

While the Complainant is dissatisfied with the amount of notice he received about the maturity of his self-invested fund, there is nothing in the Terms and Conditions booklet or the policy document that indicates the Provider would give more notice than was given and there is no regulation or guideline or code of conduct that obliges the Provider to give more notice. The documentation for the self-invested fund explains that the investor [in this case the Complainant] is responsible for the management of the fund until maturity when the value of the fund will be returned to the Provider.

The Complainant disputes the maturity date of his self-invested fund claiming that it should have been 3 April 2017 instead of 5 April 2017.

In its response the Provider explains that, although his ARF commenced with effect from 3 April 2012, his instruction to self-invest with an external financial service provider did not start with effect from the same date because the process to place the self-invested portion of his fund on deposit with the external provider took two days to complete. This is a reasonable response to the question of why the maturity date of the self-invested fund differs by two days from the start date of the ARF.

The Provider points out that during the five year term of the self-invested fund, the maturity date was at all times available to him through the online services provided by the Provider. As part of its response to the complaint the Provider submitted a copy of a booklet entitled "Your Guide to the Self-invested Fund". On page 10 of the booklet there is a statement as follows "*It is important that you monitor the Self-Invested Fund regularly to ensure that you are happy with the deposit account you have chosen and that you are aware of any maturity date if it applies*".

While the Provider incorrectly identified an individual as the Complainant's financial adviser even though that individual had left that role, there was no significant consequence suffered by the Complainant because of the mistake and the Provider subsequently apologised to the Complainant for the mistake.

The Complainant claims that the only charges described in the Terms and Conditions are a yearly fund charge of 0.75% and a plan charge of 0.25%. However, section 2.3 of the Terms and Conditions clearly states that additional fund charges may be incurred within the self-invested fund in relation to third-party fund managers.

I accept that the Provider's financial adviser dealt with the Complainant appropriately when he referred the Complainant to the Provider's customer service team after it became clear that the Complainant did not want to participate in the fact finding/risk assessment process.

The Complainant's communication to the Provider's customer service team left the customer service team with no option but to refer the matters that were raised by the Complainant to the Provider's complaints team.

The Complainant phrased his request for information in the form of a request for advice and the Provider could not give him advice because he did not participate in the fact finding process. I accept that the Provider did not refuse to give the Complainant information as claimed by the Complainant in his complaint. I believe the Provider acted reasonably and correctly in its dealings with the Complainant. Any financial loss experienced by the Complainant has not arisen because of the conduct of the Provider.

For this reason 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.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

11 February 2019

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.