



<u>Decision Ref:</u>	2019-0039
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Personal Pension Plan
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication Dissatisfaction with customer service Mis-selling
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns the advice given by the Provider in relation to the investment of pension monies into two funds. One of the funds afforded some level of capital protection while the other fund had the potential for a full loss of capital. The first fund matured with 95% of the capital being paid out. The second fund had a nil value on maturity.

The complaint is that the Provider incorrectly advised the Complainant to invest in the manner he did, and that the Provider incorrectly advised the Complainant to remain in the second fund at a time when it was substantially falling in value.

The Complainant's Case

It is the Complainant's position that in 2010 he contacted the Provider to arrange a meeting to discuss investment opportunities for his pension fund. The Complainant states that he outlined the low to medium risks he was willing to take. The Complainant says that in February 2011 the Provider presented him with 2 investment opportunities one with a 95% risk and one with a 30% risk. The Complainant states that he agreed to invest his pension fund in both.

The Complainant submits that his complaint relates to the investment in BRIC outperformer Tranche II Bond. The Complainant states that he invested 60% of his

pension fund €77,000 in this Bond on the understanding the risk he faced was a 30% loss as a worse case scenario.

The Complainant states that after a number of update emails he was unsure of what exactly the updates meant and requested a meeting with the Provider. The Complainant says that they met on 10/03/2014 and the Provider informed him that his investment was now valued at €16,000. The Complainant states that he was shocked and asked the Provider to cash it in and refund to him what was left. The Complainant submits that the Provider advised against this and persuaded him to leave the fund as it was. The Complainant says that despite numerous requests he only received one further update until he received his maturity letter on the 20/05/2016 for the fund informing him that there were zero funds left in the investment.

The Complainant's complaint is as follows:

1. *My understanding as explained to me was that I stood to lose 30% of my investment in a worst case scenario. It was never explained to me that I could lose all my investment and [the Provider] verifies this in his own investigation letter.*
2. *When I realised the extent of my losses I requested to cash in the investment on 10/03/2014, I was advised against it by [the Provider] at a time when I would have salvaged 16,000 euro from the investment.*
3. *Despite numerous requests I only received sporadic updates despite the promise I would receive quarterly updates. In fact my last update was received after persistent requests was for the final qtr in 2014. Which I didn't get until 26th March 2015.*

As regards a resolution the Complainant states that he is hopeful that it will be found that the initial investment advice he received was negligent and did not in anyway disclose to him the full extent of his exposure to potential losses.

The Complainant would like the Provider to return 70% of his €77,000 investment. Failing this the Complainant states that he would accept the €16,000 which was in the fund when he requested to cash it in.

The Provider's Case

The Provider states that the Complainant requested advice in early 2011 in relation to his cash holdings (circa €129,000) in a Small Self-Administered Pension Fund. The Provider says that it advised the Complainant to invest into two structured products (Tracker Bonds). The Provider says that one investment offered the investor a hard capital protection of 95% of the initial investment amount. The Provider states that the second investment provided a soft capital protection only with a potential for loss to some or all

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of the investor's capital. The Provider states that the Complainant and it agreed on a split of €52,000 into the first investment and €77,000 into the second investment.

The Provider submits that at maturity in early 2014 the first investment provided a return of 95% of the capital invested to investors. The Provider says that at maturity in March 2016, the second investment provided a nil return to the investors.

Evidence and submissions from the parties

The Provider submits that the Complainant states that (i) he advised the Provider that he was prepared to take low to medium risks with his pension fund (ii) that the second investment did not match his appetite for investment risk i.e. it presented a greater level or risk than he states he was prepared to take (iii) that he was told by the Provider that the maximum loss he could incur was 30% of his original investment (iv) that once he became aware that his capital was at a higher risk than he had initially instructed, he requested a meeting with the Provider and instructed him to "save the remaining capital" (v) that the Provider refused to follow his instructions and instead "persuaded him based on [the Provider's] professional expertise to leave the capital in the investment as it was set to recover" and (vi) that he only received sporadic investment updates despite a promise he would receive quarterly updates.

The Provider's position is that the Complainant confirmed to the Provider both verbally and in writing, that his appetite for investment risk was medium i.e. step 5 of the 7 step risk assessment pyramid with step 1 being "lower risk" and step 7 being "higher risk" (and not low to medium as claimed) and this statement is reflected in the documentation on its file.

The Provider claims that the Complainant was provided with full details of the two recommended investments both verbally (on two occasions pre-sale and numerous occasions post sale) and in writing (via the product brochure, product terms/conditions and via a suitability statement).

The Provider states that included in the verbal and written details (product brochure and suitability statement) given to the Complainant was clear confirmation (that it says was pointed out to the Complainant) of any potential loss to the investors' capital. The Provider further claims that the Complainant was advised that the aggregate overall risk presented by the two investments did meet the Complainant's stated appetite for investment risk and that the Complainant understood and agreed with this statement.

The Provider further claims that the Complainant did not verbally request to encash the second investment in March 2014 as claimed, but instead discussed the matter with the Provider's advisor and, following this discussion, the Complainant elected to continue with the investment through to maturity. The Provider states that the Complainant was provided with a number of updates (both in person and by e-mail) and that it did not promise to provide quarterly updates.

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In November 2010 the Complainant contacted the Provider by telephone. The Provider had been recommended to the Complainant. The Provider states that the Complainant advised that he was seeking advice in relation to both his existing retirement planning benefits and future retirement.

In December 2010 the Complainant met with the Provider to complete and sign a Confidential Questionnaire which included an assessment of his appetite for risk with regards to investments. The Provider states that having read the 7 options available, the Complainant confirmed the description that most closely reflected his appetite for investment risk as:-

“You are prepared to take a longer term view in order to achieve superior capital appreciation. You appreciate that this will necessitate you taking greater risks, which ever in the long term, could result in real losses. However, you are prepared to take that risk when weighing up the potentially higher rewards and will do so with a proportion of your overall portfolio”.

In December confirmation was received from Revenue that the Self Administered Pension Scheme (SAPS) had received formal revenue approval from the Inspector of Taxes.

The Provider states that having received approval the Complainant signed the paperwork required to transfer the existing Pension into the newly approved SAPS.

In early January 2011 a cheque representing the transfer value of €129,357.66 was received from the Executive Pension Provider and credited to the scheme bank account. The Provider states that the Complainant was advised by telephone of this and in the conversation the Complainant requested advice for suitable investment opportunities (taking into account the Complainant's aforementioned appetite for investment risk).

The Provider states that in February 2011 the Complainant was telephoned by the Provider requesting a meeting to present two suitable investment opportunities for the cash funds in the SAPS. The Provider states that this meeting was held at the Complainant's retail unit on Monday 21st February 2011. The Provider states that in the meeting the Complainant was presented with two structured products one, the BRIC Currency Bond 2011, provided by Asset Management A (AM A) and the other, the BRIC Outperformer Tranche II provided by Asset Management B (AM B).

The Provider states that it was explained to the Complainant in the meeting on the 21st February 2011 what a structured product was and how it operated, the potential benefits of structured products in general and the specific features and potential of the two products from AM "A" and AM "B". The Provider states that in addition, the Complainant was advised of the potential loss to capital of each of the two recommended products

The Provider says that the Complainant was advised that the AM "A" product provided capital protection of 95% of the initial investment and the AM "B" product provided capital protection of 100% of the initial investment provided the worst performing BRIC index did not fall 30% or more than the base index at maturity. The Provider submits that in order to reflect the Complainant's appetite for investment risk (as outlined in the CFQ) it was recommended a split of 40% (€52,000) of the €129,000 into the AM "A" product and 60% (€77,000) into the AM "B" product.

The Provider states that Brochures of the respective products were provided to the Complainant and at this meeting the Complainant agreed with the recommendations and the proposed investment split.

The Provider explains that part of the paperwork for the two investments was completed at the meeting on the 21st February 2011 with the remaining paperwork being completed at a meeting two days later (again held at the Complainant's unit) on Wednesday 23rd February 2011.

The Provider states that as part of the documentation pack provided to the Complainant at the two meetings on the 21st February 2011 and 23rd February 2011, a Suitability Statement (also referred to as a Reason Why Letter) for each product was given to the Complainant which outlined the aforementioned features and potential benefits of the two investments as well as confirming the potential risk to the investors' capital at maturity (that the Complainant had already been advised of verbally). The Provider submits that the documents also confirmed the amount of introductory commission that would be paid by the two product providers to the Provider. The Provider states that the Complainant was provided with two copies of each Suitability Statement. One copy was for his own file and the other was signed by the Complainant and returned to the Provider for its file. The Provider says that at the end of each Suitability Statement the Complainant was asked to confirm that he had read the contents of the statement and the product brochure and that he was happy to proceed with the investment. The Complainant was also asked to confirm that he understood the level of capital of each product and that, in the case the AM "B" product, that potential losses within the investment were unlimited.

In March 2014 the AM "A" BRIC Currency Bond 2011 matured with a return to investors of 95% of the original investor. The Provider states that the maturity proceeds were sent to the Trustee Company for credit to the bank.

The Provider states that on Monday 10th March 2014 the Complainant met with the Provider to discuss the maturity of the AM "A" BRIC Currency Bond 2011 and the Complainant requested advice as to a suitable investment opportunity for the maturity proceeds. The Provider states that it advised the Complainant that one option would be to open an execution only investment account with a Stock Broker via the SAPS thereby facilitating the purchase of individual stock, traded funds, investment funds and real estate investment trusts (REITS). The Provider states that the Complainant mentioned

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that he already had a similar account with the Stockbrokers and that the Complainant would like to open such an account via the SAPS for €48,000 of the funds in the scheme bank account. The Provider states that it discussed with the Complainant the potentially suitable investments that could be included in the account with an emerging market exchange traded fund and two REITs (Green REIT and Hibernia REIT) being part of that discussion.

The Provider submits that in the meeting on 10th March 2014 the Complainant discussed the performance to date of the Asset Management "B" BRIC Outperformer Tranche II. The Provider says that from the investment updates the Complainant had received he was already aware that the product was not performing well, with the indicative performance at the time a negative return of circa 87%. The Provider says that it advised the Complainant that ahead of this meeting it spoke to the Investment Manager at AM "B" to obtain feedback on the performance to date of the BRIC Outperformer Tranche II investment and on his thoughts on the potential outlook for the product were for the remaining 2 years of the initial 5 year investment term. The AM "B" Investment Manager advised the Provider of the reasons for the performance of the product (in particular the Brazilian and Russian indices) versus the base index i.e. the S&P 500 index. The Provider states that he mentioned that he had invested some of his own pension funds into the BRIC Outperformer Tranche II investment and whilst an early encashment was possible it was his view that the performance of the BRIC indices versus the S&P 500 would improve over the following 2 years and therefore he personally would not be taking the option of encashing early. The Provider submits that having discussed this the Complainant confirmed that he had decided to leave the investment to run its course.

The Provider says that on the 13th March 2014 the Complainant met again with it to complete the paperwork for the Stockbroker Select account via his Trustee Company. The Provider says that this was sent to the Trustee Company on the 14th March 2014. The Provider states that it asked the Complainant whether, once the account had been established, whether he would like assistance in the process of making investments online. The Provider says that the Complainant confirmed that he had experience of dealing with a Stockbroker online and at that point therefore the Complainant did not require any assistance.

The Provider says that between the 2nd April 2014 and the 17th April 2014 the Complainant made various investments via the Stockbroker Select online account including Bank shares, Emerging Market shares, a Food Company's shares and in REITS.

The Provider states that in May 2016 the Complainant was sent the maturity certificate of the Asset Management "B" BRIC Outperformer Tranche II which confirmed a nil return to investors in the product.

The Provider submits that on the 22nd June 2016 an e-mail was received from the Complainant thanking for the letter enclosing the maturity certificate and criticising the investment advice that had been provided to him. The Provider says that the

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Complainant had claimed that “even when I wanted to cash in, you advised against it, I wonder why??” and made reference to the (initial) commission received by the Provider.

The Provider states that on the 22nd June 2016 it telephoned the Complainant to discuss the contents of his e-mail. The Provider says that the Complainant repeated the claims contained in the e-mail and advised that he would “tell as many people as possible to avoid receiving investment advice from [the Provider]. The Provider says that the Complainant then stated that “I hope you have a nice life” and hung up the telephone.

The Provider’s position is that having investigated the complaint and reviewed the client file its findings are:-

1. Based on the information provided by the Complainant in December 2010 (and reflected in the Confidential Questionnaire) the investment advice given to the Complainant in February 2011 was both appropriate and suitable and matched his appetite for investment risk.
2. Before making the investments in AM “A” BRIC Currency Bond 2011 and the AM “B” BRIC Outperformer Tranche II the Complainant was provided with a product brochure for each contract. Each Brochure provided potential investors with a description of the particular product, the key features of the particular product and the investment risks associated with each product.
3. At the point of making the investments in the AM “A” BRIC Currency Bond 2011 and the AM “B” BRIC Tranche the Complainant was provided with Suitability (Reasons Why letter) which confirmed the features of the particular product and the investment risks associated with the product. At the end of each Suitability Statement (provided in duplicate, one of which the Complainant retained for his file), the Complainant was asked to sign to confirm that he had read and understood the contents of the product brochure and that he was happy to proceed with an investment. The Complainant also signed each document to confirm that he understood the level of protection provided by each product and, in the case of the Asset Management “B” BRIC Outperformer Tranche II, that the 100% capital protection feature of the product applied in certain circumstances only and the potential losses of the investment were unlimited.
4. In March 2014 at a meeting with the Complainant he was reminded of the facility to encash the AM “B” BRIC Outperformer Tranche II before the end of the 5 year investment term. Having discussed the option the Complainant elected not to proceed with the encashment at that time.

The Complainant’s response to the Provider’s letter of 29th August 2017

“Having heard the arguments put forward by [the Provider] that I was fully aware of the risks of full capital wipe out involved in my investment and that as such they

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are not responsible in anyway, I would like to clarify and further explain my claim further.

[The Provider's] recommendation for me to Invest in BRIC Outperformer Tranche II was prepared based on my instructions to achieve the objective of protecting my initial capital. These instructions were confirmed in letter from [the Provider] to me dated 23/02/2011, ...

On page 2 of this letter please see highlighted area stating that [the Provider] classifies this investment as Medium Risk. On the same page, highlighted, it also states that this investment offers a SLIGHTLY higher risk than my attitude to investment risk which was to protect my initial capital.

I also indicated on a risk assessment profile pyramid that I would be willing to accept some "real losses" to achieve a higher return, I was led to believe that these real losses would not be more than 30% However this is a full 2 steps above the level on the pyramid which indicates my investment could suffer "significant erosion or total wipeout"...

As soon as I became aware that my capital was at a higher risk than I had initially instructed and faced being totally wiped out I requested a meeting with [the Provider] to instruct him to cash in the investment and to save the remaining capital. However he refused to follow my instructions and instead persuaded me based on his professional expertise to leave capital in the investment as it was set to recover.

I have limited knowledge of investments and risks associated with certain investments and that is why I sought the advice of [the Provider] a professional investment advisor who was supposed to suggest investments based on my objectives and to protect my pension investment based on these. I hope you understand my claim that I in no way instructed [the Provider] to put my pension capital at such a high risk".

Client Confidential Questionnaire October 2010

"Risk Profile

Please select from the below statements which most matches your attitude to risk

[the following was selected by the Complainant]

"You are prepared to take a longer-term view in order to achieve superior capital appreciation. You accept that this will necessitate you taking greater risks which even in the longer term could result in real losses. However, you are prepared to take that risk when weighing up the potentially higher rewards, and will do so with a proportion of your overall portfolio".

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Provider File Note of 12th January 2011

"[The Complainant] requested [the Provider's] advice in relation to suitable investment opportunities for the €129,000.+ received. [The Provider and Complainant] spoke in general about the various types of investment media open to [the Complainant] and how these would relate to [the Complainant's] appetite for investment risk as per the Confidential Questionnaire and previous meetings. [The Provider] advised [the Complainant] that he will revert once suitable investment opportunity (or opportunities) has arisen".

Provider's File Note dated 21st February 2011

"[The Provider] introduced the [AM "B"] BRIC Outperformer II product. [The Provider] told [the Complainant] that, like the [AM "A"] product, the [AM "B"] product was also a structured product but this time with a longer duration of 5 years. [The Provider] went on to say that the investment was a relative play of the four BRIC economies versus the US S& P 500 index. [The Provider] referred [the Complainant] to the section of the brochure entitled "investment Rationale".

[The Provider] gave [the Complainant] a product brochure and both went through the brochure together noting and discussing:-

- ...
- *The product offers a soft capital protection feature in that the investors capital is 100% protected at maturity provided the relative performance of the worst performing BRIC stock market in March 2016 (assuming of course the product has not matured at any of the previous event dates) is not less than 70% of the base index (the S&P 500 index). It was point out therefore to [the Complainant] that the investor's capital is at risk should the relative performance of any of the four BRIC economies be less than 70% of the S&P 500 index in 5 years time and that the loss of capital would equal the performance of the worst performing BRIC index relative to the base index".*
- *[AM "B"] have categorised the investment as Low to Medium Risk but [the Provider] had categorised the product as slightly higher (i.e. medium risk) due to the soft capital protection feature (as opposed to a hard capital protection feature).*

[The Complainant] confirmed that he would be happy to invest a portion of the €129,000 to be invested into the [AM "B"] product. [The Provider] and [the Complainant] discussed the split of the funds available and agreed on €52,000 into the [AM "A"] product and €77,000 into the [AM "B"] product".

Provider File Note of 23rd February 2011

"[The Provider] reminded [the Complainant] about the features of the two products, in particular, the capital protection offered by each. [The Provider] also reminded [the

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Complainant] that it was the combination of the two products together (with their corresponding risk profiles) which matched [the Complainant's] appetite for investment risk".

23 February 2011 – Provider's Suitability / Recommendation Letter:

"I have prepared this recommendation based on the following information:

Your Objectives

- *You wish to seek attractive potential returns on your retirement capital while protecting your initial capital.*

... I am recommending the BRIC Outperformer Tranche II to you for the following reasons:

- *It has a 5 year maximum investment term – potential for early repayment of capital on every 6 month anniversary;*
- *It has 100% capital guarantee at maturity once certain conditions are met (30% barrier from relative difference between BRIC and BASE Indices at maturity only);*
- *..*
- *There are 4 different outcomes from investing in the BRIC Outperformer Tranche II, 3 of which result in a full return for capital plus any accumulated coupons, and one which may result in partial or full loss of capital.*
- *..*
- *[The Provider] classifies this investment as Medium Risk"*

Risk

- *This bond is suited to investors who ...*

"You are prepared to take a longer-term view in order to achieve superior capital appreciation. You accept this will necessitate you taking greater risks which, even in the longer term, could result in real losses. However, you are prepared to take that risk when weighing up the potentially higher rewards and will do so with a proportion of your overall portfolio.

- *This investment therefore offers slightly higher risk than you current attitude to investment risk. However, when combined with your investment in the [AM "A" BRIC Currency Bond 2011, the suggested risk of the two bonds meets your current attitude to investment risk".*

...

Understanding Risk

[The Provider] is making you aware that there is a potential loss of your initial capital. In the case of the BRIC Outperformer potential losses, while not expected, are not limited. You should also be aware that if the investment is encashed early any profit or losses will be dependent on market conditions".

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In relation to the recommendation the Complainant was asked to read and sign the following:

"To be completed by the client Ref .. Asset Management – The BRIC Outperformer Tranche II

I have read and fully understood the above contents and the product brochure, and I am happy to proceed with the investment.

I understand that the 100% Capital Protection feature of this investment will apply under certain circumstances only and the potential losses within this investment are unlimited".

Application Form

Declaration: I/We acknowledge that investments may fall as well as rise in value and that this product has been designed to form a part of an investor's overall portfolio. I/We declare that (i) the details above are correct (ii) I/We have read understood and accept the Terms and Conditions set out in this brochure and agree to be bound by them. I / We have read, understood and accept the BRIC Outperformer Tranche II brochure. ..."

Warning: The value of your investment may go down as well as up. You may get back less than you put in. Warning: If you cash in your investment before maturity date you may lose some or all of the money you put in".

The Application form is signed by the Complainant and date 21/02/2011

BRIC Outperformer Brochure:

"The BRIC Outperformer (Tranche II) offers investors the opportunity to diversify their portfolio and invest in asset classes that are often difficult to access and a strategy that represents a source of significant opportunity in the current market while ensuring there is a strong element of capital protection".

"Warning: The value of your investment may go down as well as up and you may not get back the amount you originally invested".

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“Investors should be aware that investing in the BRIC Outperformer (Tranche II) can result in capital loss”.

“Warning: These figures are estimates only. They are not a reliable guide to the future performance of this investment. The value of your investment may fall as well as rise. This product is not guaranteed and some or all of your capital may be lost”.

“Warning: The value of your investment may fall as well as rise and your attention is specifically drawn to the section “risk factors” in this brochure and the base prospectus. Prospective investors should be able to bear the economic risk of an equity investment and be able to withstand a total loss of capital. This product is not guaranteed and some or all of your capital may be lost”.

Risks Factors and Warnings

The description of the investment risks and warnings that follows is not, and does not purport to be, exhaustive. The BRIC Outperformer (Tranche II) described above has derivatives linked to the BRIC indices which involve different types of risks and are complex. Investors should make sure they understand the Certificate and the associated risks before making the decision to invest in order to ensure that the BRIC Outperformer (Tranche II) corresponds with their investment objectives and financial profile. Investors should refer to the risk factors set out in the Base Prospectus for a description of some additional risks associated with the Certificates” [The Market Risk, Credit Risk, Event Risk, Early Repayment Risk and Tax Risk are then set out]

A full Fact Find / Confidential Questionnaire was completed with the Complainant and the following Risk analysis was undertaken;

“Risk Profile

Please select from the below statements which most matches your attitude to risk

[the following was selected by the Complainant]

“You are prepared to take a longer-term view in order to achieve superior capital appreciation. You accept that this will necessitate you taking greater risks which even in the longer term could result in real losses. However, you are prepared to take that risk when weighing up the potentially higher rewards, and will do so with a proportion of your overall portfolio”.

Provider File Note 10th March 2014 – after the AM “A” bond had matured at 95% of initial investment amount.

“Discussion on performance and future prospects of AM”B” BRIC Outperformer II investment. [The Complainant] unhappy with performance. What are options at this point? [The Provider] advised [the Complainant] the two options were to either encash the investment and suffer a significant loss of capital (latest calculations show a -80% plus relative change between Brazil index and base index (SP 500) or to maintain the investment in the hope that EM conditions improve and the investment shows some improvement in performance. [The Provider representative] advised [the Complainant] that he had spoken to [the product developer] about the performance and prospects for the future. [The Provider’s representative’s colleague] advised [the Provider representative] that he was a fellow investor in the BRIC Outperformer and that he had chosen not to encash at this time as he expected conditions to improve over the next 2 years. He added the caveat that this was his decision and he could offer no guarantees of an improvement in values. [The Complainant] reiterated his disappointment in the performance but that he would hold off and see how things developed. [The Complainant] quoted “in for a penny, in for a pound””.

Provider File Note of 25th March 2015

“Discussed [AM “B”] BRIC II investment. Advised [the Complainant] performance very poor. General discussion on why performance poor. [The Provider] had not brought latest update. [The Provider] to e-mail to [the Complainant] asap”.

The Provider’s File Note of 22nd June 2016

“[The Complainant] went on to claim that when they had met previously (in March 2015) [the Complainant] had advised [the Provider] that he had wanted to encash the investment at that time but claimed that [the Provider] had advised “no don’t do that it will work out in the end”. [The Complainant] claimed that at that time (of the meeting) the cash in value was in the region of €15,000 i.e. around 21% of the original investment. [The Provider] advised [the Complainant] that was not the case and that having disused with [the Complainant] the pro’s and cons of encashing the investment at that time, coupled with the feedback [the Provider] had received from the product developer (who had invested his own pension fund monies into the contract), [the Complainant] had elected to continue with the investment”.

Statement of Recollection from the Provider’s Employee:

“.. The [Am “B”] Investment Manager advised [the Provider] of the reasons for the poor performance of the product (in particular the Brazilian and Russian indices) versus the base

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index i.e. the S&P 500 index. He mentioned that he had invested some of his own pension funds into the BRIC Outperformer Tranche II investment and whilst an early encashment was possible, it was his view that the performance of the BRIC indices versus the S&P 500 should improve over the following 2 years and therefore he personally would not be taking the option of encashing early. He added he could not of course offer any guarantees. Having discussed this with [the Provider], [the Complainant] confirmed that he wished to leave the investment to run its course”.

The Complaint for Adjudication

The complaint is that the Provider incorrectly advised the Complainant to invest in the manner he did, and that the Provider incorrectly advised the Complainant to remain in the second fund at a time when it was substantially falling in value.

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 on 3rd January 2019, 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.

A Submission dated 28 January 2019 from the Provider (with an attached spreadsheet which was used to determine the investment split) and a submission dated 27th January 2019 from the Complainant, were received by the Financial Services and Pensions Ombudsman after the issue of a Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both

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parties for any additional observations arising from the said additional submissions. The Provider subsequently made a further submission dated 4th February 2019 and the Complainant advised on 6th February 2019 that he did not have anything further to add. I have considered the contents of these additional submissions for the purpose of setting out the final determination of this office below.

In its post Preliminary Decision submissions the Provider refers to the Complainant having an appetite for investment risk rating of 5/7. The Provider goes on to state that the products it recommended matched this 5/7 appetite for risk. The Provider's position is that any alteration of the fund split would have not matched the 5/ rating.

The Provider states that the only interest the product producer had was as a personal investor and not as a provider with a financial interest.

The Complainant's response to the Provider's post Preliminary Decision submissions was that he never saw the spreadsheet that the Provider is relying upon for determining the fund split. The Complainant states that the categorisation of 7 for the no capital secure product was never explained to him. The Complainant again questions the Provider's risk rating and its matching of products to that risk rating.

The Complainant states that he would not have been aware of the nature of the product developer's interest in the fund.

Analysis

It is the Provider's position that it reminded the Complainant that it was the combination of the two products together (with their corresponding risk profiles) which matched his appetite for investment risk. However, I would have expected to see such alleged advice being reduced to writing for the Complainant from the outset. I have not been provided with any evidence of such advice having been specifically set out for the Complainant, prior to him investing.

Capital Protection was the Complainant's stated requirement, and in that regard I find it difficult to understand why the investment split would have been 40% of the capital into the lower risk product, and 60% of the overall capital being put into the higher risk product of the two products. The Provider states that the Provider and the Complainant discussed the split of the funds available and agreed on €52,000 into the [AM "A"] product and €77,000 into the [AM "B"] product. However, there is no evidence that the Complainant was advised of a different more cautious split, as I would have expected. In the absence of such recorded advices, it appears to me that a more cautious recommendation was not advised to the Complainant. That said, I do consider that the Complainant signed up to a product knowing that not all of his capital was protected.

I have concerns about what was advised by the Provider to the Complainant at the time when the fund had greatly depreciated, and when the Complainant expressed a wish to

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crystallise his losses by encashing at that time. The Provider accepts that it advised the Complainant of the advice it had received from the product developer. The Provider's position is that having discussed with the Complainant the pros and cons of encashing the investment at that time, coupled with the feedback the Provider had received from the product developer (who had invested his own pension fund monies into the contract), the Complainant had elected to continue with the investment.

I consider that the Provider was wholly incorrect in influencing the Complainant with the information it had received that the product developer had invested his own pension monies in the fund and that his advice was that things would improve. It is noted that this information about the product developer investing changes throughout the Provider's submissions from investing *his own* pension fund monies to investing *some* of his monies. The fact that a person with any interest in the fund has invested in the fund, should not have been used by the Provider as an influencing factor, as that other party's circumstances were most probably totally different to that of the Complainant. For instance the amount that the other party invested may have been greater or less than what the Complainant had invested. The two individuals were most probably of different ages. Their risk appetites may have been different. Their personal, family, business, health needs and obligations would have been different.

While I am not satisfied with the advices that were given to the Complainant post the sale of the investment, I do consider that the level of information supplied to him from the outset did alert him to some possibility of losses on his capital. However, for the identified shortcomings in the advice that was apparently given as to the division of capital into the two funds and in relation to the wholly inappropriate advice that was given when the fund had fallen in value, I consider that a substantial compensatory payment is merited.

As regards the post Preliminary Decision submissions I consider that it remains unclear why the Complainant's stated objective of capital protection could not have been uppermost when recommending the split of funds.

I cannot accept that it would, as the Provider states, be inappropriate to recommend any other combination just because there was an appetite risk rating of 5/7.

As regards the Provider's alleged advice as to the value of the fund in 2014, that is the Complainant says he was advised of a value of €16,000, I consider that there would have been no doubts on the matter had the Provider followed up the advice it gave, in writing, following the said meeting in 2014.

Having regard to all of the above it is my Legally Binding Decision that the complaint is substantially upheld and I direct the compensatory payment of €25,000 (twenty five thousand euro).

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Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €25,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the provider. I also 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**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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

13th 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

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.