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| <u>Decision Ref:</u> | 2019-0090 |
| <u>Sector:</u> | Investment |
| <u>Product / Service:</u> | Investment |
| <u>Conduct(s) complained of:</u> | Failure to process instructions |
| <u>Outcome:</u> | Rejected |

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

Background

The First and Second Complainant are married and operate certain trading accounts jointly. The First Complainant opened an execution only account with the Provider that is the subject of this complaint, on 25 June, 2015, for the purposes of allowing him to invest in equities and bonds.

In an undated letter that was received by this Office on 21 January, 2016, the First Complainant states that he had terminated an account with a third party financial service provider (“TP1”) and transferred all of his holdings from TP1 to the Provider. During the course of executing that transfer, the Provider learned that the First Complainant was a citizen of the United States of America. On that basis, on 1 September, 2015, the Provider informed the First Complainant that it was no longer in a position to operate his account.

The First Complainant submitted a formal complaint to the Provider, which was received by the Provider on 5 February, 2016. By final response dated 8 March, 2016, the Provider confirmed that it was not in a position to operate an account on behalf of the First Complainant given that he is a US citizen.

The Complainants’ Case

The First Complainant, subsequent to opening his account with the Provider, hand delivered a bank draft in the sum of €20,000 to the Provider on 1 July, 2015. Over the course of several weeks, the Provider traded on his behalf without difficulty.

The First Complainant is also an Irish citizen who pays taxes in the State, owns a home in the State, votes in Irish elections and resides here. He has traded within the State for a period of thirty years.

When the Complainant transferred his holdings from TP1 to the Provider, he did so on the belief that the Provider would operate his account on the same conditions as TP1 previously had. The Provider was aware that he was a U.S. citizen when he opened his account and he was led to believe that would not inhibit his trading. Given his dual citizenship, he believed there should be no bar on him trading within the State.

He states that he did not receive a copy of a document entitled "Execution Only Account Opening Document", nor were the contents of this document discussed at the time of signing. The First Complainant believes that he is being unfairly discriminated against by the Provider due to his U.S. citizenship.

The Complainants want to be allowed to trade on the markets through the Provider.

The Provider's Case

The Provider points out that the First Complainant signed the "Execution Only Account Opening Document" on 25 June, 2015.

The Foreign Account Tax Compliance Act ("FATCA") was introduced in Ireland on 1 January, 2014. FATCA created a new U.S. tax information reporting and regime for payments made to certain foreign institutions and other foreign persons.

The Provider has agreements in place with a third party in respect of each client ("TP2"). TP2 provides clearing, settlement, execution, safe custody, nominee and associated services for Provider's clients, including for the Complainants. TP2 is not in a position to comply with the requirements of FATCA and, as a result, cannot hold an account for a U.S. Person. The Provider states that the First Complainant is a U.S. Person within the meaning of FATCA. The Complainants dispute this assertion. As a result of the designation of the First Complainant as a U.S. person, TP2 is not in a position to provide services to the Provider for the Complainants.

The Provider was not aware that the First Complainant was a U.S. citizen when he opened his account. It first learned of the First Complainant's citizenship on 21 July, 2015, by email from TP1. Subsequent to that discovery, the Provider ceased trading on the First Complainant's account. As a result of the fact that the First Complainant is a US citizen, the Provider cannot carry out trading activities on behalf of the First Complainant.

The Complaint for Adjudication

The complaint for investigation and adjudication is that the Provider wrongly ceased to carry on trading on behalf of the Complainants and that the Provider wrongfully cancelled the First Complainant's trading without his authority on the basis of the First Complainant's U.S. citizenship

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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 Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties 13 February 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.

In the absence of additional submissions from the parties, I set out below my final determination

A copy of the "Execution Only Account Opening Document" has been provided in evidence. At Section 7 of the Document I note that the First Complainant acknowledged:

1. *"I/We have carefully read, acknowledge and understand the terms of the below listed documentation which I/we have been presented with and have had an opportunity to consider. I/We hereby agree that by signing this acknowledgment that I/we will be bound by all terms and conditions contained in the following documents*

...

Terms and Conditions booklet:

- i. *Terms and Conditions of Service."*
2. *"The details provided in the Account Opening Document are a complete and accurate record of all information relevant to allow [Provider] to provide an execution only service to me."*

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3. *“By opening this account and signing below, the account owner represents that he/she/it is not a US person for the purposes of US Federal income tax and that he/she/it is not acting for, or on behalf of, a US person.*

...

If your tax status changes or you become a US citizen or a resident, you must notify us within 30 days.”

I note the Terms & Conditions Booklet at Page 3 under the **Heading “Execution only, Retail Client” ... US persons** sets out:

“An account cannot be opened for you if you are a US Person as we are not in a position to comply with the related US reporting requirements. For this purpose a US person is a citizen or a resident of the US, a partnership or corporation created or organised in the US or under the laws of the US or of any US State, and any estate or trust as defined by the US Internal Revenue Code. Any person holding a US passport regardless of country of residence is considered a US person.

You must satisfy yourself that you do not fall within this category of US person and in the event that an account is opened and you become aware that you do fall within this category you must notify [Provider] immediately so that the account can be closed”.

The First Complainant accepts that he opened an account with the Provider by signature. He has been provided with a copy of the document entitled “Execution Only Account Opening Document” during the course of this investigation and has not disputed that his signature is contained thereon. While he does not accept that he was given the document at the date of signing, as he does not dispute this is his signature, I find that he did sign it as a matter of fact and is, accordingly, bound by its terms.

I find that it was made clear at the outset of the contract that the Provider could not comply with US reporting requirements and therefore could not provide a service to a US Person. I also find that the Terms & Conditions clearly defined a US citizen and that this definition applied to the First Complainant.

The First Complainant accepts that he is a U.S. citizen. The Complainants have not furnished this Office with any documentation to support their contention that the Provider represented to the First Complainant that his U.S. citizenship would not prevent him from trading. By signing section 7 of the “Execution Only Account Opening Document”, the Complainants expressly warranted that they were not U.S. persons. Regardless of whether TP2 was correct in believing that FATCA applied to the First Complainant, this was a material term of the contract for services. The inaccuracy of the information provided by the Complainant resulted in the Provider being unable to provide him with the services contracted for.

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Had the First Complainant indicated that he was a U.S. citizen at the date he sought to open the account, the Provider would likely have refused to do so given the limitations of its intermediary TP2. Accordingly, I believe the Provider's decision to cease providing trading services to the Complainants was not unreasonable.

I do not believe it would be reasonable for me to require a financial service provider to comply with US reporting requirements and therefore I believe it was not unreasonable for the Provider to refuse to provide the service in question.

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

Conclusion

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

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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

11 March 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.