



<u>Decision Ref:</u>	2019-0381
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Failure to provide accurate investment information
<u>Outcome:</u>	Partially upheld

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

Background

The complaint relates to an investment fund and to alleged misinformation given by the Provider regarding the fund value, communicated to the First Complainant in a telephone call in **June 2015**.

The Complainants' Case

The First Complainant states that he received correspondence from a third party company dated **10 June 2015** in which it was communicated to him that the fund in question was to be closed.

The First Complainant states that he subsequently telephoned the Provider on the **24 June 2015** to enquire as to *"how much I was getting."* The First Complainant states that he was informed by the Provider's representative that he could expect to receive €19,105.47. The First Complainant adds that *"I was not told this could rise or fall. I was told closure was on 4th September but [the Provider's representative] did not say there was any rise or fall pertaining. I believed I was receiving €19,105.47."*

The First Complainant states that subsequent to the above mentioned telephone conversation, *"I received an undated letter showing an amount of €17,033.31 gross."* The First Complainant states that he telephoned the Provider to query this and that he was subsequently furnished with a further letter from the Provider dated **18 September 2015**.

The First Complainant states that the aforementioned letter confirmed that *"I was told €19,105.47 was the value of the investment on the 24/6/15"*, however the letter continued by stating that *"unit prices may fall as well as rise."*

The First Complainant has emphasised that the Provider's representative *"did not say this to me on 24/6/15...I put down the phone believing we were getting €19,105.47 (possibly less exit tax). That was my belief then and now."* The Complainant concludes that the Provider *"did not give me the amount advised to me."*

The complaint is that despite communicating to the First Complainant during a telephone conversation on 24 June 2015 that the Complainants could expect to receive the sum of €19,105.47, the Complainants ultimately received a lesser amount. By way of resolving the complaint, the First Complainant states that he believes that the Complainants should receive *"the sum of €19,105.47 as this is the figure I understood from [the Provider] on 24/06/2015 that we were to get."*

The Provider's Case

In its Final Response Letter to the Complainants dated **24 November 2015**, the Provider states it is noted that the First Complainant *"contacted our office by telephone on the 24 June 2015 and was quoted a gross value on that day of €19,105.47."*

In its formal response to this complaint, the Provider submits that it

'... does not accept that it was confirmed or suggested to [the First Complainant] during the call that the value quoted would not fluctuate between 24 June 2015 (the date of the call) and 4 September 2015 (the date on which the fund was due to close). We respectfully submit [the First Complainant] would have been aware the value of his investment could rise and fall over time and that the return was not guaranteed'.

The Provider also refers to the nature of the Complainants' investment, stating that

"The [named] Fund in which you were invested is a unit linked fund. The value of the fund changes on a daily basis. The price of units may go down as well as up and are not guaranteed."

The Provider goes on to clarify that it acted as intermediary at the time of the sale of the investment in 2001. The Provider states that it *'holds some documents on file relating to the sale of the investment'* and referring to these documents, submits that it

'trust[s] it is evident ... that the risks associated with the investment were brought to the attention of [the Complainants] at point of sale and that they were aware

/Cont'd...

returns were not guaranteed and the value of the investment over time could fall as well as rise.'

The Provider refers in particular to the content of '*the specific quotation*' said to have been furnished to the Complainants in 2001. On page 1 of the quotation, it highlights the following:

'Investment returns in the short term can be volatile and there is a risk that when you cash in your policy, the value of the policy may be less than the amount you have invested.'

The Provider also refers to the '**ILLUSTRATIVE TABLE OF PROJECTED BENEFITS AND CHARGES**' contained on page 2 of the quotation, which contained the following warning:

'ACTUAL INVESTMENT GROWTH WILL DEPEND ON THE PERFORMANCE OF THE UNDERLYING INVESTMENTS AND MAY BE MORE OR LESS THAN ILLUSTRATED.'

The Provider also submits that:

'The unit holding on 4 September 2015 was 13,687.86 and the unit price on that date was 1.24441. The surrender value of the policy was €17,033.31. Exit tax of €1,777.73 was deducted from the surrender value. The balance of €15,255.58 was paid to [the Complainants]'

The Complaint for Adjudication

The complaint is that the Provider led the First Complainant to believe, during a telephone conversation on **24 June 2015** that the Complainants could expect to receive the sum of €19,105.47 following the closure of their fund, but the Complainants ultimately received a lower 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 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

/Cont'd...

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 30 October 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, within the period permitted, the final determination of this office is set out below.

Analysis

I have listened to the recording of the call between the First Complainant and the Provider on 24 June 2015, furnished in evidence the Provider and I have noted the following extract relating to the value of the fund:

Provider representative: '*... Now the value that's in this policy, will I call it out to you ...?*'

First Complainant: '*Yes please*'.

Provider representative: '*So the gross figure ... the most up-to-date one that I have is €19,105.47 ... so that's the gross figure ... as we were discussing ... unfortunately they are closing that fund ...*'

The Provider representative then goes on to explain about the verifying documentation needed from the Complainants by the fund manager, in order for the Complainants to receive the redemption proceeds following the fund closure. There appears to be no further reference to the value of the fund during the call.

I have noted the Provider's specific comments, contained in its written submissions to this office, regarding the content of the above call:

- The First Complainant was '*quoted a gross value on that day of €19,105.47*'. [underscore emphasis my own]
- '*We hope that it is clear from the call recording that no assurance was given to [the First Complainant] that the surrender value would be €19,105.47 when the fund closed on 4 September 2015. The value quoted during the call was clearly stated to be the gross value at the time of the call*'. [underscore emphasis my own]

/Cont'd...

- *'[The First Complainant] was provided with the gross value of the policy at that time of the call however it was neither indicated nor confirmed to him during the call that this would be the final surrender value of the policy when the fund closed on 4 September 2015.'*

[underlining emphasis my own]

I am cognisant of the **General Requirement 4.1** set out in Chapter 4 of the Consumer Protection Code 2012 (as amended), which confers obligations on the Provider regarding the provision of information to its customers:

'A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information'.

Having listened to the call recording of the 24 June 2015, I am not convinced that the Provider adhered to its obligations in the above regard. Despite numerous contentions by the Provider that the gross value of the fund was clearly relayed to the First Complainant over the 'phone, as being 'point in time', i.e. that this was the value as of 24 June 2015 only, I am not satisfied that this was in fact communicated to the Complainant with such clarity.

There was no reference during the call to the value quoted being the value '*at the time of the call*'. It was instead confirmed that €19,105.47 was '*the most up-to-date figure*' available, and it was made clear that this figure was a "gross" figure. The representative did not however refer to it being the value as of 24 June 2015, and did not clarify that the value could possibly fluctuate on/before fund closure date on 4 September 2015, which was some 10 weeks away. I also note that the First Complainant did not raise any query as to what a "gross" figure meant, or what potential reduction/s might occur before any net figure would be paid out to the Complainants.

It is clear from the telephone recording that the First Complainant was unsure as to what was happening with the fund. In referring to the letter he had received, prior to the telephone call, the First Complainant stated in this telephone call that he: "*[didn't] have a clue what they're talking about*".

When advised that the fund was going to be closed, he stated, "*what does that mean?*" The response received to that question was that:

"Whatever funds are in your policy, Sir, they will send the funds to your account once they get in your identification and the application form'.

Thereafter, the representative quoted the value that was in the fund, without giving any warning that the funds could fall in value before the closure date.

Therefore, in this context, I can understand the basis of the First Complainant's assertion that '*I was told €19,105.47. There was no warning or any message that this could change*'.

/Cont'd...

As a result, I am satisfied that the impression left with the First Complainant following the call was that the sum of €19,105.47 ‘... [was] what [he] expect[ed] to receive’.

The Provider’s letter to the Complainants dated 18 September 2015 appears to have issued following the First Complainant’s telephone call to the Provider, which was after the Complainants subsequently received confirmation that the fund value being paid out, was a sum of ‘€17,033.31 gross’ (i.e. a lesser figure than the Complainants state they believed they had been due to receive). On 18 September 2015, the Provider advised:

‘I can confirm that the value of your policy was €19,105.47 when you called our office on 24 June 2015. The value provided to you in June was based on the latest unit price at that time and the unit holding position available. Unit prices may fall as well as rise and are not guaranteed in any way.’

[emphasis added]

It is somewhat unfortunate that the above qualifying information as to the value of the fund, was not relayed to the First Complainant on 24 June 2015 (in advance of the fund closure date). Instead, this was communicated to him on 18 September 2015, which was subsequent to the fund closure date on 4 September 2015.

I am also cognisant however of the underlying intrinsic nature of the investment taken out by the Complainants in **2001**. Having examined the documentation, which it seems was given to the Complainants at the time of starting the investment, I have noted that ‘*the specific quotation*’ made clear to the Complainants that:

‘Investment returns in the short term can be volatile and there is a risk that when you cash in your policy, the value of the policy may be less than the amount you have invested.

...

‘ACTUAL INVESTMENT GROWTH WILL DEPEND ON THE PERFORMANCE OF THE UNDERLYING INVESTMENTS AND MAY BE MORE OR LESS THAN ILLUSTRATED’.

Therefore I am satisfied that the inherent nature of the investment taken out by the Complainants was one in which the ultimate value at the time of encashment could not be guaranteed and was, by definition, ever fluctuating, given how tied it was to overall investment performance. Although the circumstance leading to the payment out under the investment in 2017, was different from that originally envisaged in the above quotation (as the Complainants were not voluntarily exiting the fund but the fund was being formally closed) nevertheless, this did not alter the manner in which the fund would operate, pending closure on the duly appointed date.

I am also cognisant that the Complainants did not suffer any actual financial detriment as a result of the incomplete information given by the Provider’s representative during the call of 24 June 2015. Rather, the consequence of the incomplete information, was simply disappointment in due course, when ultimately, in the remaining period, the value of the investment fell. The Complainants could not have done anything to change the ultimate outcome of the value of their fund, because the fund closure date was already pre-

/Cont’d...

determined to take place on 4 September 2015; the value to be paid out to the Complainants was therefore always going to be the fund value, as of that date.

Based on the evidence before me, I do not believe that it would be appropriate for the Complainants to recover the difference in value between what was anticipated and what was actually received. This is because the intrinsic nature of the investment was manifest, irrespective of what was said to the First Complainant during the call of the 24 June 2015.

I believe however that there was a failure on the part of the Provider in respect of the clarity of its communications with the First Complainant during the call of 24 June 2015. This may have been because the primary purpose of the telephone call on that date, appears to have been to secure a better understanding of what exactly was happening with the investment.

Be that as it may, the Provider will be aware that any valuation given for an investment of this nature, cannot be relied upon as in any way indicative of the ultimate value of the investment. No reliable figure becomes available until the investment has been ended, and that final figure has thereby been crystallised. It would have been better practice for the Provider to have made this clear to the Complainants, during the telephone call, given that a valuation was being discussed.

I fully accept that the fund value of €19,105.47 may have been 'up to date' as of 24 June 2015. However it could – and should in my view – have been made clearer by the Provider's representative that the fund value being confirmed over the 'phone was 'point in time' only (i.e. as of 24 June 2015) and this figure was likely to change in advance of the fund closure date. I am therefore of the view that the Provider has a case to answer in respect of its obligations under General Requirement 4.1 of the 2012 Consumer Protection Code (as amended).

Accordingly, on the basis of the evidence available, it is my Decision to partially uphold this complaint on the basis of the lack of clarity made available by the Provider in its communication with the Complainants on 24 June 2015.

Conclusion

- My Decision is that this complaint is partially upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, 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 Complainants in the sum of €150 to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

21 November 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.