An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0409
Sector:	Investment
Product / Service:	Investment
Conduct(s) complained of:	Fees & charges applied Delayed or inadequate communication Failure to provide accurate investment information Failure to provide correct information Failure to advise on tax implications/tax relief
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a life assurance based investment policy no XXXXX939 (the "Policy") held by the Complainants. The Policy was incepted by the Complainants following a meeting with an employee of the Provider on **19 August 2005**. The plan commencement date was 01 September 2005.

The Complainants paid a total of €182,616.12 in regular monthly instalments until **16 October 2015** which was the date that the Policy was surrendered. On **22 October 2015**, the Complainants were informed that a payment of €216,517.89 had been forwarded to the Complainants' bank account, which represented the total policy value of €237,154.62 less the exit tax liability of €20,636.73.

The Complainants' Case

The complaint can be summarised, as follows:

1. **Inaccurate and confusing figures provided to the Complainants in or around September 2012**

The Complainants submit that inaccurate information was furnished to them by the Provider in an annual statement dated **1 September 2012**, regarding the Policy value. The policy value was referred to in the statement as being €176,156.29 with a surrender value of €169,585.98.

Following receipt of this statement, the Complainants wrote to the Provider by letter dated 10 September 2012 querying the information contained in the annual statement of 1 September 2012. In this letter, the Complainants also sought clarification from the Provider as to why the value of the Policy was less than the Complainants had paid into it, when a "*performance table chart*" allegedly showed "*performance of this policy to be plus 6.6%*" between 1 September 2005 and 31 August 2012.

2. Management Charge

The second aspect of the Complainants' complaint relates to the management charge of 1.5% which applied to the Policy. The Complainants argue that the management charge should be 1%. In this regard, the Complainants assert that an employee of the Provider agreed, at a meeting which took place on **26 August 2005**, that the rate of the management charge applicable to the Policy would be 1%.

As such, the Complainants state that they require the fund management charge of 1.5% to be reduced to the "*agreed figure of 1% and the difference backdated and paid to us.* The Complainants have calculated the difference as being €3,000.00.

3. Taxation applicable to the gains under the policy

The Complainants claim that the taxation regime which applied to any gains on the Policy was not clearly explained to them. The Complainants submit that they were assured that the rate of tax on any gains made under the Policy would be 23% for the life of the policy, as this was the percentage of tax set out in the quotation provided to the Complainants and not 33% as referred to in the annual statement provided to them dated 1 September 2012.

The Complainants say that they "*require a guarantee that the exit tax will be 23% or lower but not higher on any gains made on this policy*".

4. Contribution related charges

A number of charges were payable on the Policy, including a contribution charge which was to be deducted from each regular contribution. The Complainants state that the contribution charges applied by the Provider to their Policy were not explained clearly to them. They say that if they had been correctly advised, they would have increased their contributions in order to reduce the level of contribution charges payable.

The Complainants say that they "*require the premium related change of €5,478.00 which is 3%*" to be repaid to them as it was not explained to them correctly that a single contribution of more than €5,000 would have had a 0% premium charge.

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5. Customer Service

The final aspect of the Complainants' complaint relates to the level of customer service provided to the Complainants.

The Complainants complain about delays that arose during the investigation of their complaint. They complain also about the number of the Provider's employees who dealt with their complaint. There is also an issue concerning a telephone call record that the Complainants say the Provider has not been able to furnish to them, that they say would assist them in substantiating one element of their complaint.

In this regard, the Complainants state that they require an apology from the Provider "*for their actions and shortcomings and compensation for the additional time and grief we have had to endure to prove our case*".

The Provider's Case

In relation to the various aspects of the Complainants' complaint, the Provider submits as follows:

1. Inaccurate and confusing figures provided to the Complainants

In relation to the management fee applied to the Policy, the Provider's position is that the return of 6.6% indicated on the graph is expressed to be a gross return and did not take into account the effect of exit tax and Policy charges (including the 3% contribution related charge and 1.5% fund management charge).

In addition the Provider states that the return on the graph referred to by the Complainants assumed that the Complainants remained invested in the fund chosen under the Policy for the duration in question. However the Provider asserts that this was not the case and the Complainants switched out of this fund and into a different fund in September 2008. The Complainants remained invested in this fund until January 2011 at which time they switched back into the previous fund.

2. Fund Management Charge

The Provider submits that the Complainants were at all times aware of the fund management charge of 1.5% which applied to the Policy and that this charge was notified to the Complainants in the application form and the Policy Schedule, which was received by the Complainants when the Policy was incepted. The Provider further submits that the 1.5% charge was also confirmed in each of the annual statements furnished to the Complainants.

The Provider asserts that a separate policy was taken out by the Complainants in their capacity as directors of a company (Policy XXXXX677) following a meeting with the same employee of the Provider on 26 August 2015. The Provider submits that an agreement was reached with the Complainants, on behalf of the Company for the 4% upfront charge to be

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waived on that policy and that there was no reduction in fees agreed for the Policy that is the subject of this complaint.

3. Taxation applicable to the gains under the policy

The Provider submits that where a gain is made on an Investment, the Provider is *"obliged to deduct exit tax on the gain at the prevailing rate"* which is then remitted by the Provider to Revenue. The Provider submits that the rate of exit tax is set by the Government. The Provider submits that the Complainants were made aware of the rate of exit tax at the point of sale and that no representations were made that the rate of tax would remain static during the lifetime of the Policy.

4. Contribution related charges

The Provider's position is that the Complainants were made aware of the contribution related charged at the sales meeting which took place on 19 August 2005 and in policy documentation provided to them on 30 August 2005 in advance of the Policy commencing. The Provider also submits that information in relation to the contribution charges were provided to the Complainants during the life of the Policy, including in the annual statements.

In addition, the Provider submits that the Policy which was incepted by the Complainants was not the type of Policy to which a 0% contribution could be applied. The Provider states that the reason for this is that the Policy was a regular premium policy and not a single premium policy. The Policy was recommended to the Complainants as they confirmed that they wished to invest a set amount of money on a regular basis. As the contributions they paid each year exceeded €12,000 they benefitted from a reduction in the contribution related charge from 5% to 3%.

5. Customer Service

The Provider does not accept that the level of customer service provided to the Complainants fell below an acceptable standard and refers to the fact that it attempted to address the issues raised by the Complainants since the receipt of their complaint and in particular in the final response letters that issued to the Complainants on 30 November 2012 and 25 January 2013.

<u>The Complaints for Adjudication</u>

The complaints for adjudication are:

1. The Provider furnished the Complainants with inaccurate and confusing figures concerning the value of the Policy in or around **September 2012**;

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2. The Provider incorrectly applied a fund management charge of 1.5% having agreed to apply a reduced fund management charge of 1% at the inception of the Policy in **August 2005**;

3. The Provider failed to advise the Complainants correctly in relation to the Exit tax applying to the Policy at the inception of the Policy in **August 2005**;

4. The Provider did not adequately advise the Complainants in respect of the contribution related charges applicable to the Policy from the inception of the Policy in **August 2005**;

5. The level of customer service provided by the Provider to the Complainants was below the standard expected.

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 12 November 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, I set out below my final determination.

The Complainants first made their complaint to the Financial Services Ombudsman Bureau ("FSOB"), as it was then known, on **13 May 2013**.

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As the conduct complained of, relating to the sale of the Policy in August 2005, had taken place more than six years prior to making the complaint, the FSOB declined jurisdiction to investigate the Complainants' complaint on the basis of the then applicable legislation, the Central Bank and Financial Services Authority of Ireland Act 2004:

> *"A consumer is not entitled to make a complaint if the conduct complained of:*
>
> *(b) occurred more than 6 years before the complaint is made, or…"*

Following the commencement of Financial Services and Pensions Ombudsman Act 2017, as amended by the Markets in Financial Instruments Act ("the Act of 2017") on 1st January 2018, expanded time limits are provided for the making of a complaint where the complaint relates to a long-term financial service.

A long-term financial service is defined in the Act of 2017 as being:

> "'long-term financial service" means—
>
> *(a) subject to paragraph (b), a financial service the duration of which is a fixed term of 5 years and one month, or more, but, notwithstanding that the aggregate term of them may be 5 years and one month (or more), there does not fall within this paragraph a series of consecutive terms in respect of a financial service's duration (provided no individual one of them is 5 years and one month, or more, in length), or*
>
> *(b) a financial service that is life assurance to which, by virtue of Regulation 4 of those Regulations, the European Communities (Life Assurance) Framework Regulations 1994 (S.I. No. 360 of 1994) apply (not being life assurance falling within Class VII defined in the first Annex thereto) and regardless of whether the term of which life assurance is fixed at a specified calendar period or not;"*
>
> *…*
>
> *"(3) Notwithstanding the fact that the financial service does not fix its duration to be of a term such as is referred to in paragraph (a) of the definition of 'long-term financial service' in subsection (1), a financial service shall be regarded as falling within that definition if it would be reasonable for a consumer to expect its duration to be of at least the length referred to in that paragraph and that reasonable expectation arises by reason of—*
>
> *a) the manner in which the financial service operates to provide a financial benefit to the consumer,*
>
> *b) the type of assets with which its operation is connected, or*
>
> *c) representations made by the financial service provider,*
> *as distinct from where such an expectation arises in the case of—*

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(i) a current account with a financial institution, or

(ii) any other financial service of an indefinite duration that is widely available and does not possess specialised characteristics."'

Where a complaint relates to a long-term financial service, the expanded time limits for bringing a complaint are provided for in s. 51 of the Act of 2017.

On consideration of the new legislation, it was decided that the Complainants' complaint fell within the jurisdiction of this Office and was investigated accordingly.

I will deal with each of the matters complained of under headings, as follows;

1. **The Provider furnished the Complainants with inaccurate and confusing figures concerning the value of the Policy in or around September 2012;**

The Complainants received an annual statement dated **1 September 2012** under cover of letter dated **3 September 2012**. This annual statement showed the following information;

"Total Contributions paid to date:	*€180,615.12*
Current Policy Value at 31/08/2012:	*€176,156.29*
Current surrender value	
(net of assurance tax and Contribution Loyalty Bonus):	*€169,585.98"*

I note that the Complainants raised an issue with the valuations with the Provider by letter dated **10 September 2012**. In this regard, the Complainants' submit that they *"have a performance table chart from the 1 Sept. 2005 up to the 31 Aug 2012 which shows performance of this policy to be plus 6.6% for the value of this fund over that period. If this is the case how come my fund value is considerably less than what I have paid into it".*

The Complainants are unhappy with this in light of a performance graph which they had obtained from the Provider's website which shows that the performance of the fund had been +6.6% during the period 1 September 2005 and 31 August 2012.

I have considered the content of the performance graph submitted by the Complainants. It appears that this is a generic document which has been printed from the Provider's website on **03 September 2012**.

I note that the performance graph appears to demonstrate the overall performance of the particular fund during the period 1 September 2005 and 31 August 2012. At 31 August there appears to be overall growth of 6.6%.

The performance graph contains the following text:

> *"Very important to note: Index returns do not include taxation or charges and therefore, may not always be directly comparable to the performance figure of funds shown which may include fees".*

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I accept that the valuation of the Complainants' fund as contained in the annual statement was different to the valuation shown on the generic performance graph, furnished by the Complainant as at 31 August 2012. The reasons given by the Provider for the difference are as follows;

> (1) *"[The Complainants] did not pay a single premium into the Policy on 1 September 2005 but rather they paid monthly premiums into the Policy from that date on. The Premiums they paid purchased units in their selected fund. Unit prices fluctuate and so the number of units purchased each month by the premiums paid depended upon the prevailing unit price.*
>
> (2) *The return indicated on the graph (of +6.6%) is expressed to be a gross return. It did not take into account the effect of exit tax and Policy charges (including the 3% regular premium charge and the 1.5% fund management charge).*
>
> (3) *The return indicated on the graph (of +6.6%) assumed that the Complainants remained invested in the [initial fund] for the entire period in question. That is not the case however. As can be seen from our file of papers, [the Complainants] switched out of the [initial fund] and into [the alternative fund] – a cash fund – in September 2008. They then remained invested in [the alternative fund] until January 2011 at which time they switched back into the [initial fund]."*

The generic performance graph did not and could not take account of the above factors, which were specific intricacies relevant to the Complainants' Policy and the manner in which the investments were made by the Complainants. As such, it appears to me that there is no evidence to suggest that the Provider's valuation of the Policy, as at 31 August 2012 and contained in the annual statement was incorrect.

The Complainants also take issue with information that was furnished to the Complainant on **31 August 2012**. The Complainants submit that the figures provided during the telephone call on 31 August 2012, differ from those that were ultimately furnished in the annual statement dated **1 September 2012**. The Complainants submit that they were informed during the call that the *"value of the policy was €178,009.86 with a loyalty bonus of €6,570.78 included = €184,580.64"*.

The Provider submits that it can "*find no record of any telephone call taking place on that date in relation to the Policy"*. The Provider also submits that there is "*no indication*" that the value of the Complainants' plan would have been €178,009.86, inclusive of the bonus, on 31 August 2012.

The Provider submits that the gross value of €178,009.86 (inclusive of bonus) "*would have had to have been based on a unit price of €1.396 per unit for [the Complainants'] 122,799.405 units in the [fund]; while this price had been available on 22 August 2012 and 23 August 2012, same would not have been available on 31 August 2012, when the unit price for [the fund] had been €1.381 per unit."*

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I note that the Complainants have not furnished any documentary evidence to support its position that the telephone call of **31 August 2012** took place. Similarly I note that the Provider has not denied that the call took place but has rather indicated that there is no record of the call. In this respect, I note that the Provider indicated to the Complainant in its letter of 25 January 2013, that the *"vast majority of telephone calls with our customers are recorded for training and verification purposes*". Further I am minded to note the above extract from the Provider's submissions, whereby the valuation that the Complainants submit was given by the Provider accords with a potential valuation for the Complainants' fund (albeit inclusive of bonus and on the basis of unit price figures from 22 and 23 August). In the circumstances, it appears to me that it is probable that a call took place on 31 August 2012 and that the figure of €178,009.86 may have been given as the value of the fund during that call.

As such, I accept that this valuation, was given by the Provider to the Complainants in the call of 31 August 2012. That being said, nothing turns on any such valuation being given by the Provider to the Complainants on 31 August 2012. The Provider is not in any way bound by a verbal or provisional valuation. Any valuation is based on the underlying value of the units at a particular date. It appears that the valuation given during the call was based on a unit value from an earlier date and on the basis of the bonus, which had not yet accrued, being included. The Provider's representative should have advised the Complainants during the call on 31 August 2012, of those qualifications to the valuation and that the official valuation would be given in the annual statement. That being said, it remains the case that the there is no evidence to suggest that the Provider's valuation of the Policy, as at 31 August 2012 as contained in the annual statement was incorrect.

The Complainants also take issue with the fact that the contribution loyalty bonus, which was due to be applied on the seventh anniversary was not applied by the Provider, by the time the annual statement issued to the Complainants.

I note the ***Policy Schedule*** details that the plan commencement date is 01 September 2005.

The ***Policy Conditions*** detail as follows;

> ***"Contribution Loyalty Bonus"***
>
> *This is the bonus payable in accordance with Section B. Condition 5*
>
> ***"Plan Commencement Date"***
>
> *This is the date on which the Plan starts. It is stated in the Schedule*
>
> ***"Plan Anniversary"***
>
> *An anniversary of the plan commencement date.*
>
> *…*

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"Contribution Loyalty Bonus

Provided you have not missed more than 6 Contractual Monthly Contributions in the first 7 years of your Plan and that units have not been encashed from the Plan equal to or exceeding 6 times the Contractual Monthly Contribution before the 7th plan anniversary, the Contribution Loyalty Bonus will be unconditionally allocated to your Plan on the 7th Plan Anniversary.

The value of the units unconditionally ***allocated to your Plan on the 7th Anniversary in respect of the Contribution Loyalty Bonus*** *will be determined by the Company having regard to any increase or decrease in the price of units since they were provisionally allocated to your Plan on the Plan Commencement Date." [**My emphasis**]*

I note that the Complainants' loyalty bonus was not processed and applied to their policy until 03 September 2012. The reason given by the Provider for this was that the 7th anniversary of the Complainants' Policy fell on 01 September 2012, which was a Saturday. As such, the annual statement quoted the value of the fund on the most recent business day, being 31 August 2012 and it could not contain the loyalty bonus.

It appears to me that the Policy Conditions provide that the Loyalty Bonus is to be applied on the 7th Anniversary of the Policy. In the circumstances where the 7th anniversary fell on a Saturday, I see no difficulty with the Loyalty Bonus being applied on the next business day, as occurred in this case. I also note that the annual statement clearly indicated that the figures represented were as at 31 August 2012 and that they were net of Contribution Loyalty Bonus. I note that the Provider issued updated figures to the Complainant on **12 September 2012**, to reflect the application of the loyalty bonus.

2. **The Provider incorrectly applied a fund management charge of 1.5% having agreed to apply a reduced fund management charge of 1% at the inception of the Policy in August 2005**

The Policy, the subject of this complaint was incepted following a meeting with an employee of the Provider on **19 August 2005**. There is a dispute as to who was in attendance at this meeting. However I do not think that it is material to this complaint to determine this dispute, as in any event the relevant documentation in relation to the Policy was signed by the Complainants on that date. The fact that the documentation was signed on that date is not in dispute.

The Policy documentation submitted to this office indicates that the fund management charge applicable to the Policy is 1.5% and that the Complainants signed the Policy documentation, having been notified of the charges associated with the Policy. The following are extracts from relevant documentation to support this;

- **[Named Product] brochure**

  "there is a management fee of 1.5% per year to cover the costs of the selection and management of investments."

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- **Application Form signed on 19 August 2005**

  The Costs

  I understand that current charges on my [Named Product] are as follows;

  "A fund related charge of 1.5% per annum of units attaching to the plan will be charged monthly by unit deduction."

  "COSTS

  The costs shown under the section entitled Costs have been explained to me and I understand them."

- **Policy Schedule**
  "Charges: *For an explanation of the charges that apply to your Plan, please see the charges section of your Policy Conditions."*

- **Policy Conditions**
  "6. Charges
  …

  Plan Value Charge
  ..

  We will deduct a monthly charge of one-twelfth of 1.5% (one and five-tenths of one percent) of the plan value. Each month this charge is deducted from your plan value by cashing in units equal in value to the monthly charge (see Section B, Condition 9)".

I also note that the annual statements issued from September 2006 to September 2012, (prior to the Complainants raising an issue with respect to the 1.5% charge to the FSOB in May 2013), confirmed the application of the *"fund management charge of 1.5%"*.

I note that prior to the Complainants raising their complaint to the FSOB, they raised the issue with the Provider directly in April 2010. The Provider has furnished a note of a call that took place between the Complainants and the Provider on 23 April 2010 that outlines *"Client querying mgt fee, he said he agreed with [Provider's employee] that he would get a reduced rate. Advised [Provider's employee] & she is meeting with client next week."*

I note that in support of the Complainants' submission that a reduction in relation to the fund management charge had been agreed in respect of the Policy, the Complainants submitted a handwritten note dated **26 August 2005** which is signed by the First Complainant and an employee of the Provider which states that:

> *"We agree to charging structure of no upfront charge and 1% pa annual fund management fee".*

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The Provider submits that this note was in relation to a separate policy which was taken out with the Provider by a company of which the Complainants were Directors. At this point it would be useful to consider the terms of this separate policy.

Policy XXXXX677

An application form was completed and signed by the Complainants in their capacity as directors of a company on **26 August 2005** in relation to a separate policy (Policy XXXXX677). While the application form in relation to Policy XXXXX677 states that this lump sum was available to the company following the sale of a business premises, the Complainants do not agree that this is the source of the lump sum. However, the source of the monies available for investment is not material to the consideration of this element of the complaint.

The documentation submitted to this Office by the Provider in relation to Policy XXXXX677 confirms that it is a single premium investment policy. The application form associated with Policy XXXXX677 dated 26 August 2005, was signed by both Complainants and states under the heading "Costs" that;

> *"…*
>
> - *The premium charge on your investment is 4%.*
> - *There is an annual fund related charge of 1%, which is deducted within the fund on an ongoing basis and is reflected in the price of the units"*

The Provider has submitted internal correspondence regarding the sale of policy XXXXX677 to the Complainants' Company. This includes an email dated **24 August 2005**. The subject line of this email is *Lump Sum Special Case, [the Company]* and says that;

> *"The Fund Series has a 4% upfront charge and 1% annual management fee but you have agreed…to discount the upfront fee to 0%.*
>
> *As the application form states 4% upfront, I suggest you and the customers sign a note confirming the agreed reduced charge…I have spoken to Product Development who have advised that credit will be 50% of the usual if the upfront fee is waived".*

However, the Complainants in an email to this office of **10 March 2019** set out their view that;

> *"Charges in relation to policy XXXXX677 were not reduced…They were at 1% and they stayed at 1%..."*

The Provider's employee also set out in internal email correspondence dated **25 January 2013** that:

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"Our [Product Name] policy had an annual fund management fee 1.5% as standard. We have no facility as a business to amend this. As an alternative and with sign off from compliance and product development team, we offered client the [Product Name] bond, which had a fund management fee 1% per annum. We waived the premium fee, as there would have been no premium fee payable with our [Product Name] product".

In circumstances where the handwritten note was made on the inside cover of the application form in relation to policy XXXXX677 and further where this note was dated **26 August 2005**, I cannot accept that it was intended that the note would relate to the Policy (number XXXXX939), which is the subject of this complaint. I also note that the handwritten note indicates an agreement to a 0% upfront charge and that there was no upfront charge on the Policy (number XXXXX939).

The documentation in relation to the Policy (number XXXXX939) had already been signed and accepted by the Complainants on **19 August 2005,** on the basis of the 1.5% charge. I also note that the Complainants were issued with their Policy Schedule and Policy Conditions that clearly indicate that the charge of 1.5% was to apply to the Policy (number XXXXX939) by letter dated **30 August 2005**. That letter detailed as follows;

"I suggest that you study these documents closely. If you wish to make any changes to your plan please write to our Customer Service department at the above address."

I also note that there was a *30 Day Cooling Off Option* outlined in the Important Information to the Policy. If it was the case that the Complainants were of the view that the terms of the Policy with respect to charges did not reflect what they considered to have been agreed then the Complainants could have decided to cancel the plan at that time within the 30 day period.

Having regard to the evidence submitted, I am of the view that the Provider was correct in applying the 1.5% annual charge to the Policy (number XXXXX939).

3. **The Provider failed to advise the Complainants correctly in relation to the Exit tax applying to the Policy at the inception of the Policy in August 2005**

From a review of the documentation submitted to this office, it appears that the Complainants were made aware of the rate of exit tax applicable at the point of sale. The following are extracts from relevant documentation to support this;

- **[Named Product] brochure**
  "Taxation

  The assets owned by funds available to your [Product Name] plan and any investment growth achieved are not subject to tax on an ongoing basis. However, an exit tax will apply when you encash your investment or on death. Currently, the exit

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*tax rate is the standard rate of income tax (currently 20%) plus 3% and is payable on any growth in the investment***."**

- **[Named Product] Quotation – Part 1**
  "Important Notes"
  ..

  *" **3. Your quotation is also based on the following assumptions**:*
  …

  (c) The tax rate applicable to gains on life assurance policies will be 23% and all other taxations rules and rates will remain unchanged throughout the term of your Policy".

- **[Named Product] Quotation – Part 2**
  A.(7) Information on taxation issues
  …

  "Should you encash your plan, in part or in full, any amount payable is subject to exit tax which is currently the standard income tax rate (currently 20%) plus 3%. Exit tax is payable on the excess, if any, of the policy value over the cumulative contributions paid (or, on a part encashment, over a proportion of the cumulative contributions paid). Any exit tax due will be deducted by [the Provider] and remitted to the Revenue Commissioners
  …

  The information in this section is a general summary of the taxation implications of your plan, based on our understanding of the current legislation. Owing to the individual nature of each case, we recommend that you establish all tax implications with your professional advisers."

It is understood that when the Complainants' encashed the Policy in October 2015 that the exit tax rate was 41%. Having regard to the content of the Policy documentation it is clear that the information contained was on the basis of "current" tax rates then applicable.

The Complainants were also notified in Part 2 of the Quotation that the taxation information was general and to seek professional advice to establish tax implications for their own individual circumstances.

It does not appear to me that any representations were made to the Complainants that the rate of exit tax would be fixed at 23% for the lifetime of the Policy. In any event the rate of exit tax is not set by the Provider. The rate of exit tax payable on profits such as those obtained under the Policy are set by the Government and are calculated pursuant to the provisions of the Taxes Consolidation Act, 1997 (as amended) and are therefore outside of the Provider's control.

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4. **The Provider did not adequately advise the Complainants in respect of the contribution related charges applicable to the Policy from the inception of the Policy in August 2005.**

Under the terms of the Policy, the Complainants paid a contribution charge of 3% on each regular contribution made (i.e. €2,000 per month). The Complainants submit that it was not explained to them correctly that a single contribution of more than €5,000 made in respect of the Policy would have had a 0% premium charge.

Therefore the Complainants say that they require the premium related charges of €5,478.00 (which they say is 3% of the fund management charge paid as of 1 September 2012) to be repaid to them.

From a review of the documentation provided to this Office I note that the **Reasons Why letter** signed by the Complainants and dated **19 August 2005** includes the following statements:

- *"You currently have surplus income, which you can afford to invest for at least 7 years;*
- *You wish to save a set amount on a regular basis"*

The **Application Form** in respect of the Policy signed by the Complainants and dated **19 August 2005** set out the costs associated with the Policy and provides that:

> *"…*
>
> - *A contribution charge of 5% will be deducted from each regular contribution that I pay. If my regular contribution is above €12000 per annum, this charge will be reduced to 3%.*
> - *A contribution charge of 5% will be deducted from each single contribution that I pay. If my single contribution is above €5000, this charge will be reduced to 0%..."*

In this regard, the Complainants signed the Policy **Application Form** on **19 August 2005** which includes a declaration in relation to costs which states that;

> "*The costs shown under the section entitled costs has been explained to me and I understand them*".

It is submitted by the Provider that as the annual contributions made by the Complainants were greater than €12,000, the Complainants benefitted from the reduced premium charge of 3%.

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The ability of the Complainants to make lump sum payments into the Policy is set out in **section B2** of the **Policy Conditions** which were provided to the Complainants under cover of the letter dated 30 August 2005. Under the heading "**Contribution Options**", the document states:

> *"**Payment of Lump Sums***
>
> *You may at any time pay a lump sum into this Plan subject to [the Provider's] current minimum lump sum.*
>
> *The current minimum lump sum may be changed by the Company from time to time and the current amount of the lump sum is available at any time on enquiry…"*

Charges are dealt with under **section B6** of the Policy Conditions as follows:

> "**Premium Charge – Regular Contributions**
>
> *When we receive each initial Regular Contribution, we will deduct a premium charge. We will then use the balance to buy units in your chosen unit fund or funds. If the annualised contribution is less than €12,000, the premium charge is 5% of the initial Regular Contribution. If the annualised contribution is €12,000 or greater the premium charge is 3% of the Initial Regular Contribution.*
>
> ***Premium Charge – Lump Sum***
>
> *When we receive a lump sum payment from you, we will deduct a premium charge. We will then invest the balance in your chosen fund or funds. If the lump sum is less than €5,000 the premium charge is 5% of the lump sum. If the lump sum is €5,000 or greater, the premium charge is 0% of the lump sum….*

The Provider contends that while it was open to the Complainants to make additional lump sum payments into the Policy in excess of €5,000 in order to avail of the 0% premium charge attaching to such payments, the Provider submits that no such payments were made.

From a review of the documentation it would appear that in order for the Complainants to be in a position to avail of the 0% premium charge applicable to lump sums, they would have had to pay a lump sum in excess of €5000. The payment of the €5,000 lump sum would be *in addition* to the monthly contribution of €2,000 which the Complainants had agreed to at the commencement of the Policy.

Having reviewed the audio of a call made by the First Complainant to the Provider, I note that the First Complainant requested that the Provider suspend or reverse indexation on the Policy as there was "*too much going out every month*". In addition, the Complainants requested via written correspondence dated 30 August 2010, 25 July 2011 and 10 August 2012 that the amount of the monthly contribution would be reduced to /remain at €2,000.

/Cont'd…

In addition to the above, it is evident that the Complainants were provided with annual statements in relation to the Policy. Having reviewed the annual statements submitted, each annual statement provides a figure for the contribution related charges deducted from the regular contributions made by the Complainants.

In circumstances where the Complainants' signed the declaration contained in the application form confirming their understanding of the relevant charges applicable to the Policy my view is that they understood this information.

In the event that the Complainants had any queries in relation to the operation of the Policy including the contribution charges applicable, it was open to them to contact the Provider at any time as set out in the Policy documents furnished to the Complainants on 30 August 2005 under the heading "*Make sure this Plan meets your needs*".

Having regard to the above I am of the view that the information furnished to the Complainants clearly outlined the charges applicable to the Policy.

5. The level of customer service provided to the Complainants by the Provider was below the standard expected.

The Complainants are dissatisfied with the level of customer service they received from the Provider regarding the manner in which queries raised in respect of the Policy were dealt with by the Provider.

From a review of the file, the following correspondence/events are relevant in considering this aspect of the complaint,

3 September 2012 The Complainants were issued with a copy of the annual statement in respect of the Policy.

3 September 2012 Telephone call by the First Complainant to the Provider querying the information contained in the annual statement dated 1 September 2012 by reference to the performance graph.

10 September 2012 Letter from the Complainants seeking clarification in relation to the information contained in the annual statement and performance graph.

12 September 2012 Letter from the Provider to the Complainants enclosing a policy information statement containing:

- Basic Policy details
- Current premium details
- Policy surrender details
- Policy surrender value

/Cont'd…

- Queries
- Charges details

17 September 2012 Letter from the Complainants to the Provider querying the management charge of 1.5% applied to the Policy.

25 September 2012 Letter from the Provider to the Complainants enclosing a policy information statement containing;

- Basic policy details
- Current premium details
- Policy surrender value

1 November 2012 Letter from the Complainants to the Provider seeking a meeting to discuss issues raised in their correspondence of 10 September 2012 and 17 September 2012

9 November 2012 Letter from the Provider to the Complainants enclosing a policy information statement containing;

- Basic policy details
- Current premium details
- Policy surrender value
- Premium history
- Loyalty bonus details

16 November 2012 Meeting between the Complainants and staff of the Provider

19 November 2012 Letter of Complaint sent by the Complainants to the Provider. In this letter the Complainants outline as follows;

> *"We do not wish to be contacted by a range of different people again. We would like [named person] to be our point of contact."*

30 November 2012 Letter from the Provider to the Complainants setting out the Provider's findings in relation to the issues raised in the correspondence of 19 November 2012. I note that the Provider also advised the Complainant of their right to refer the matter to the then FSOB, and also outlined as follows;

> *"I would be happy to arrange for you to visit our Head Office to view your original policy file. If you would like to proceed with such a meeting, please contact me at your earliest convenience."*

/Cont'd…

I note that the letter also provided a direct contact number for the named member of the Complaint Management Team.

10 December 2012 Letter from the Complainants to the Provider setting out their dissatisfaction with the findings contained in the letter of 30 November and raising additional queries to be addressed by the Provider.

11 December 2012 Letter from the Provider to the Complainants, acknowledging the letter of 10 December 2012, outlining that the matters would be investigated and that the named Complaint Management Team would be in contact in 20 working days.

15 January 2013 Letter from the Provider to the Complainants outlining that the investigation was ongoing and that the named representative would be in contact.

22 January 2013 Letter from the Complainants to the Provider outlining that they would refer the matter to the FSOB.

25 January 2013 Letter from the Provider setting out its response to the queries raised in the letter dated 10 December 2012 and outlining the Complainants' right to refer the matter to the FSOB.

Provision **10.9** of the Complaints Resolution section of the ***Consumer Protection Code 2012***, details as follows

> *"A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the complainant's satisfaction within five business days, provided however that a record of this fact is maintained. At a minimum this procedure must provide that:*
>
> *a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;*
>
> *b) the regulated entity must provide the complainant with the name of one or more individuals appointed by the regulated entity to be the complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;*
>
> *c) the regulated entity must provide the complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days, starting from the date on which the complaint was made;*

/Cont'd…

d) the regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint; where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman; and

e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of:

i) the outcome of the investigation;

ii) where applicable, the terms of any offer or settlement being made;

iii) that the consumer can refer the matter to the relevant Ombudsman, and

iv) the contact details of such Ombudsman.

Having reviewed the correspondence submitted by the parties I cannot find fault with the Provider in relation to the level of customer service provided to the Complainants in relation to this complaint. The correspondence from the Provider dated 30 November 2012 and 25 January 2013 give detailed responses to the queries raised by the Complainants. While the Complainants may not have been satisfied with the contents of this correspondence, I do not consider that there was any undue delay in responses being issued to them and that the Provider acted in accordance with the timelines as set out in the Consumer Protection Code 2012.

The Complainants also take issue with the number of employees of the Provider who dealt with their complaint. Where a complaint is made to a Provider, it may not always be possible for a complainant to expect to deal with the same person(s) during the consideration of the complaint. The Provider was obliged under the Consumer Protection Code 2012 to provide the Complainants with a point of contact for the consideration of the complaint and it did so.

I note that the Complainants indicated in their letter of 19 November 2012 to the Provider that there was a specific person that the Complainants wished to deal with, however there was no obligation on the Provider to assign that person as the case handler in relation to the Complainants' complaint.

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

/Cont'd…

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

5 December 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.