



<b><u>Decision Ref:</u></b>	2020-0083
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Cash Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment)
<b><u>Outcome:</u></b>	Rejected

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

**Background**

The Complainant entered into an investment product with the Provider in 2015. He submits that at the time that he entered into the investment, he was not made aware of the early encashment clause, by the Provider.

The Complainant submits that he had made the Provider aware that he would need access to the funds in the short term and that the policy was therefore not suitable to him.

**The Complainant's Case**

The Complainant submits that on **17 July 2015** he met with an Agent of the Provider (a financial adviser) and was recommended to invest approximately €45,000 into one of its Funds. The Complainant submits that the adviser produced paper work at this meeting which he asked the Complainant to sign.

The Complainant submits that at this meeting he had informed the adviser that he may need access to these funds in six months' time.

The Complainant submits that on **24 July 2015** the Provider issued documentation to him, confirming his investment.

The Complainant submits that upon receipt of the documentation, he *"immediately became concerned and contacted the branch requesting a meeting with [financial adviser]"*

*to obtain an explanation of the losses showing on the graph on page 4 of this documentation as the Adviser had not informed me that Early Encashment penalties would apply to my investment if I wanted to withdraw the funds within the next five years."*

The Complainant submits that he *"eventually got a meeting with [the adviser] some three weeks later"*, in **August 2015**. The Complainant submits that he was advised that he had *"nothing to worry about as these losses would only apply to the profit on the original investment"*. The Complainant submits that at this meeting he had shown the adviser the graph in question and that the adviser reiterated that he *"had nothing to worry about"*, saying *"the loss would only be applied to the growth on the investment"* and stated *"worse case scenario, the maximum I could lose would be 5% of the overall value of the Bond should markets fall as they did in 2008"*.

The Complainant submits that at this meeting in August, he was asked to sign another form which was entitled *"An Attitude to Investment Risk"*.

He submits that although he signed this in August that it was backdated to **24 July 2015** at the request of the Adviser and thereafter dated **28 July 2015** by the Provider. He submits that he therefore *"did not complete a Risk Questionnaire until after my money was invested"*.

The Complainant submits that he would never have proceeded with an investment had he been told there would be penalties for early encashment, and that he clearly stated that he might need access to the funds in the short term.

The Complainant submits that he wishes to have his investment monies returned to him, together with an appropriate amount of interest for the period of time during which the Provider had his funds invested.

### **The Provider's Case**

The Provider submits that in **July 2015** the Complainant entered into an investment of €44,453 in a unit linked fund, categorised as suitable for a low to medium risk investor.

The Provider submits that the Complainant took out the Policy following a full sales meeting with one of its Advisers, on **17 July 2015** and that during the meeting the Adviser completed a financial review with the Complainant and it was identified that the Complainant had a sum of money which he wished to invest for a minimum of five years.

The Provider submits that the Adviser discussed the various categories of investment risk with the Complainant and the Complainant answered a series of 14 questions during the meeting, the responses to which identified the Complainant's attitude to investment risk to be low to medium.

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The Provider submits that the Adviser discussed the key features and risks associated with the product and provided the Complainant with a product brochure containing further details of the key characteristics and risks associated with the product, including the fact that it was not recommended where access to the funds may be required within the first five years and that an early encashment charge applied.

The Provider submits that the Complainant was provided with documentation, during the meeting and following commencement of the Policy, which clearly set out the risks associated with his investment and highlighted that early surrender charges were applicable in the first five years.

The Provider submits that the Adviser discussed with the Complainant the risks associated with and long term nature of the investment product and the fact that early encashment charges were applicable to the investment in the first five years, which were up to a maximum of 5% of the investment.

The Provider submits that by signing the documentation associated with the investment during the sales meeting the Complainant declared his understanding of the risks associated with the investment and its long term nature. The Complainant was also notified of his cooling off rights, in the event he did not wish to proceed with the investment. The Provider says that it has no record of the Complainant contacting it in this regard.

The Provider notes the Complainant's submission that at a meeting which took place in **August 2015**, he was asked to complete an Attitude to Investment Risk but the Provider contends that this document was in fact signed at the meeting which took place on **24 July 2015** (six days prior to the Policy documents being issued to the Complainant).

As regards the Complainant's submissions that he met with the Provider in **August 2015**, the Provider submits that its records reflect that the Adviser did meet with the Complainant on two separate occasions but its records reflect that these meetings took place on **17 July 2015** and **24 July 2015**, and it has no record of the Complainant contacting the Provider in relation to his investment after the Policy documents had been issued to him on **30 July 2015**.

The Provider submits that the reason it requested the Complainant to complete a further Attitude to Investment Risk declaration was because when it went to submit the documentation for processing, it noted that it was *"missing the ATR Declaration but had two Plans of Action were sent, suggesting that the Complainant received two ATRs. The Complainant was then requested to sign a manual ATR Declaration which he did so one week after the first meeting on Friday 24<sup>th</sup> July 2015. [The Complainant] raised no concerns at this brief meeting."*

The Provider notes that following the commencement of the Policy, the Complainant obtained financial advice from an independent broker and in **December 2015** the Complainant, via his broker, instructed the Provider to switch 50% of his investment into a higher risk fund. The Provider notes that this was so, notwithstanding that the

Complainant's attitude to investment risk in **July 2015** when he met with its Adviser had been determined to be low to medium.

The Provider notes that the Complainant subsequently switched 100% of his investment into another fund, a medium risk fund, in **July 2016** and that the Complainant then surrendered the Policy in **December 2016**, with the assistance of his broker.

### **The Complaint for Adjudication**

The Complainant's complaint is that in July 2015, he was mis-sold the investment policy by the Provider, in circumstances where the Provider failed to warn him that an early surrender penalty applied to the policy, although he had advised the Provider that he may need access to the monies in the short term.

### **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 **4 March 2020**, 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.

In **July 2015**, the Complainant invested €44,453 in unit linked fund, categorised as suitable for Low – Medium risk investors.

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I note that it was a feature of the policy that an investor could switch investments between any of the range funds available, at any point. The Complainant elected, in **December 2015**, to switch 50% of the investment fund value into a higher risk fund and subsequently on **15 July 2016** requested 100% of the fund to be transferred to a medium risk fund. The Complainant subsequently, in **December 2016**, encashed the policy and at that time, incurred an Early Withdrawal charge in the amount of €2,003.21 (being 5% of the €40,064.28 value of the policy at that time.)

The Complainant has submitted that he was not made aware at the time of entering the contract that an early encashment fee applied within the first five years of the investment. He says that he had specifically indicated to the financial adviser that he might need access to the monies in the short term and therefore the product was unsuitable to him.

It is agreed between the parties that the Complainant met with the Provider initially on **17 July 2015**.

The Provider has submitted the following statement of the Adviser who met with the Complainant and sold the policy to him:

*[The Complainant] was referred in by [name] to discuss longer term options for a portion of his capital.*

*The sales process was followed and it was made clear to [the Complainant] that funds for discussion were funds that he was comfortable putting away for a minimum term of 5 years. As in every case the early encashment charges in years 1-5 were clearly and explicitly outlined and I was satisfied that [the Complainant] both understood and was happy with this.*

*I did not tell [the Complainant] that he could access the funds without penalty and would not have proceeded with the investment if I felt that [the Complainant] would need access to the funds within the minimum recommended term of 5 years as it would not have been suitable. The annual management charge and exit tax applicable on profits were also explained to [the Complainant]. The key point is that it was made very clear to [the Complainant] that this investment was for the longer term (the Plan of Action states 7 years) and encashment penalties applicable in years 1-5.*

*The application, Suitability Statement, Plan of Action and ATR were all printed off at this meeting and signed accordingly. However, it seems that the documentation sent to Dublin was missing the ATR Declaration (two Plans of Action were sent) indicating that [the Complainant] received two ATRs. [The Complainant] was then requested to sign a manual ATR Declaration which he did so one week after the first meeting on Friday 24<sup>th</sup> July 2015. [The Complainant] raised no concerns at this brief meeting.*

*I can find no evidence of any further meetings and do not remember meeting [the Complainant] in August as he contends. I have checked the CRM diary and there is no evidence of any meetings with [the Complainant].*

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I have had regard to the documentation which was signed by the Complainant on **17 July 2015**.

**Application Form.**

The application form which was signed by the Complainant on **17 July 2015**, states that the fund selection was “*Low to Medium Risk – (fund name) 100%*” and includes a note that “*we strongly recommend that you invest for a period of five years or more*”

**Suitability Statement**

This was signed by the Complainant and the Provider on **17 July 2015**. It states:

*After considering the information you provided in the financial review carried out on 17 July 2015, I advise that you take out a single premium investment policy.*

*My analysis has identified:*

- *You currently have a lump sum, which you can afford to invest for at least five years, and*
- *You wish to improve the growth potential of your lump sum taking into account your stated attitude to investment risk; and*
- *You wish to have access to a diversified portfolio of investments.*

*[emphasis added]*

*I have provided you with a document with key information on the [Provider] [Funds] policy and explained the key features to you. I therefore recommend that you take out a [named product] policy, which I consider to be most suitable to you and in your best interests for the following reasons:*

- *[Named Product] offers a broad range of funds to suit all types of investors, from the most cautious to the most ambitious, including a choice of managed funds.*
- *Each fund within the range contains a combination of assets, such as stocks, shares, cash, gifts and property.*
- *Although stock prices can rise or fall, historical evidence shows that, while not a prediction for the future, over the medium to long term, stock market returns have consistently outperformed bank and building society deposit accounts.*
- *You have the facility to take an income from your investment.*
- *Your investment can be split between more than one fund, and subject to the payment of a fee, switches can be made between funds.*
- *Under current legislation growth in your investment accumulates free of income tax and capital gains tax. Gains on your investment are subject to tax on the occurrence of a chargeable event e.g. encashment. Any tax due on the occurrence of a chargeable event is automatically deducted by [Provider] and paid to the Revenue on your behalf.*
- *The product is a medium to long term investment and you do not intend accessing your investment for at least 5 years.*

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[emphasis added]

...

*This document together with your Financial Plan, Important Information and Plan of Action form your Statement of Suitability*

...

*I have read the above and confirm that I agree with the recommendation made by my insurance and investments manager and wish to take out the policy recommended.*

[Signed by the Complainant and “Insurance and Investments Manager” and dated 17 July 2015].

With reference to the Financial Plan, Important Information and Plan of Action, I note the following from each of these documents.

- **Important Information about a [named] Policy**

This document bears a date of 17 July 2015 and on the first page of information about the policy (page 3 of the booklet) it set out the following information about encashment:

**What happens if you want to cash in the policy early?**

[original emphasis]

*Cashing in the policy*

*You can encash all or part of the policy at any time. The encashment value at any point in time will be the value of the units allocated less an early encashment charge. Early encashment charges apply for the first five years in respect of each single premium paid. The early encashment charge is 5% for the first three years, 3% in the fourth year and 2% in the fifth year.*

[emphasis added]

- **Plan of Action**

This document includes a declaration that:

*“the various attitudes to investment risk categories have been fully explained to me. I have carefully considered my investment requirements with my Insurance and Investments manager and I am comfortable with the risk profile of the funds I have chosen.”*

The document noted that:

*“[Complainant] was referred in as he wanted to discuss longer term options for matured funds. [Complainant] ...did not wish to discuss protection as he is happy with existing plans in place and has his pension through work so did not wish to consider. [Complainant] after a financial review and ATR wishes to invest €44453 into*

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[named product] as he feels this multi asset, multi manager approach best meets his needs and matches his ATR of low-medium risk. [Complainant] is happy with remainder of funds on deposit for access in the event of an emergency.

[emphasis added]

It was signed by each of the parties on **17 July 2015**

Name Client 1: [Complainant's signature] Date: 17-7-2015

*I confirm that I have provided the customer(s) with a copy of their Financial Plan and Plan of Action.*

Adviser: [Adviser's Signature] Date 17/07/2015

- **Financial Plan**

This is dated **17 July 2015**.

It is a 12 page document which begins by stating "the purpose of our meeting today was to review your overall financial plans from an investment perspective. To understand your priorities and to ensure that your plans were aligned to this...This document sets out in writing my understanding of the important issues we discussed on 17 July 2015 and the actions agreed. If there are any errors or omissions please contact me immediately."

On page 9, under the heading "Investing a Lump Sum", it states that the Complainant had €83,452 in cash and noted that it was important to "retain some of your money in cash to provide for unexpected expenses or interruptions in income. You should also keep in cash or deposits any money you will need in the next five years". "During your review you established that you should keep €39,000 in cash."

[emphasis added]

This suggests that the fact that the investment was advised for a period of at least 5 years had been discussed between the parties.

It also states that "during your review you completed an attitude to risk questionnaire" and that the answers supplied by the Complainant indicated his attitude to risk was in the "low to medium risk investor" category.

- **Attitude to Risk**

There is some dispute between the Complainant and the Provider as to when the Attitude to Risk document, on file, was signed by the Complainant.

I note that the document is signed by Complainant and on its face bears the date of **24 July 2015**. The signature on behalf of the Provider bears a date of **28 July 2015**.

This document identifies the Complainant's attitude to risk as low to medium.

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The Complainant submits that that this form was not however completed by him until **14 August 2015**, following receipt of the policy documentation and has submitted that he was asked by the Provider at that time, to backdate his signature to **24 July 2015**.

The Complainant submitted that the policy documentation issued to him on the **24 July 2015** and by the time he was asked to complete the Attitude to Risk document in **August**, the cooling off period had elapsed.

The Provider's position is that it has no record of any meeting having taken place on or about **14 August 2015** but agrees that the Complainant was asked to complete another ATR document, on **24 July 2015**, because when the application documentation was being sent on for processing, it was noted that a signed Attitude to Risk declaration had not been included with the bundle of documents. It submits that a further declaration was sent to the financial adviser who then met with the Complainant again to arrange for it to be signed, and that this was done on **24 July 2019**, prior to the policy documentation issuing to the Complainant on **30 July 2015**.

The Provider (per letter of 04 January 2018) submitted in this regard, that:

*"the signed declaration was in fact received by the Company not later than 28 July 2015, prior to the Policy documentation being issued to [the Complainant] and before the commencement of the cooling off period. The receipt of declaration can be evidenced by the date of scanning on the Company's system and a system note recording the receipt the declaration input on 28 July 2015. In the circumstances, the Company respectfully submits that it is not possible that [the Complainant] signed the declaration on 14 August 2015, as he has stated".*

The Complainant responded to this, by letter dated **17 January 2018**, that:

*"They have stated that they received the signed attitude to risk document on 28<sup>th</sup> July 2015 yet I did not meet the adviser [name] until mid August 2015.*

*[The Provider] has said they can evidence this by means of their scanning process which I now would like proof of...It is their word against mine."*

This Complainant further submitted, on **04 April 2018** that:

*"there is absolutely no way the screen shot they forwarded to you could have been the form dated 24/7/15 which they are claiming they scanned on the 27/7/15 as I definitely did not sign that form until mid August."*

Upon review of the documentation for the purpose of adjudication, it was noted that the screenshot which had been initially submitted by the Provider to this Office at that time, was truncated. This Office wrote to the Provider in January 2020 and requested that it submit a copy of the complete screenshot in question.

The Provider subsequently furnished a complete screenshot and submitted that:

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*We confirm that our position remains as set out previously. The Attitude to Risk Declaration, which was signed and dated by [the Complainant] on 24 July 2015, was received by the Company's scanning department on 27 July 2015 and scanned onto the Company's workflow system at 11:45am that morning. We attach an extract from the Company's scanning records confirming this (attachment 1 below). We also attach a screenshot from the Company's workflow system which demonstrates the document was scanned on 27 July 2015 under the heading 'I and I Investment Documents – 27/07/2015'. The date is automatically inserted by the system. Once scanned, the document was available to view on the system from 28 July 2015. As the declaration was scanned onto the system on 27 July 2015, prior to the policy going into force, it is not possible for [the Complainant] to have signed the declaration in mid August 2015, as he has stated. As set out previously, the Company has no record of any meetings taking place between [the Complainant] and [the financial adviser] after 24 July 2015"*

I have had regard to the attachments furnished by the Provider. This does indeed appear to confirm that the document was received into its system on **27 July 2015**, as contended by the Provider.

When this was exchanged with the Complainant, he responded that:

*"As per the confirmation from [the Provider] dated 24 January 2020, [the Provider] confirmed the Attitude to Risk questionnaire was dated 24th July 2015 and then scanned up on their system on 27th July 2015.*

*This was over one week after the date I signed and completed this investment with the adviser [named] on 17th July 2015.*

*I was not asked to complete an Attitude to Risk questionnaire at my meeting on 17th July 2015 when I was recommended to do this investment with [provider]."*

This appears to suggest that the Complainant's recollection of events may be somewhat unclear and appears to contradict his earlier contentions in this regard.

I do not find any evidence that a meeting occurred with the Provider in August and on the basis of the screenshot furnished and the Complainant's updated position as regards when it was signed, I am satisfied that it was signed on **24 July 2014** and scanned into the Provider's system on **27 July 2015**. It was only then that the policy was commenced and the Complainant was issued with the policy documentation by way of covering letter on **30 July 2015**. I do not therefore accept the Complainant's suggestion that he was asked by the Provider to sign a new Attitude to Risk document at a time when the investment policy's cooling off period had already expired.

The risk categorisation in the Attitude to Risk document dated **24 July 2015** is Low-Medium. Although this Attitude to Risk form was signed on **24 July 2015**, there are references throughout the documentation dated **17 July 2015**, to an Attitude to Risk document having been completed on that date, and which identified the Complainant's attitude to risk as Low – Medium, at that time. This also accords with the risk level of the investment product which the Complainant entered into with the Provider.

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There is nothing on the basis of the evidence before me which suggests that the investment product was unsuitable to the level of risk involved in the product. I note in this regard that the Complainant subsequently transferred the units from the investment into higher risk investment products, of his own volition, prior to encashing the policy.

In any event, the Complainant has not suggested that the policy was mis-sold because of the risk level attaching to it. Rather he says that it was mis-sold because he was not made aware by the Provider that an early encashment charge applied. In assessing this complaint, I have reviewed and taken into account the submissions of each party as well as documentation which was furnished to the Complainant at the meeting of **17 July 2015** and by cover of letter dated **30 July 2015**.

With reference to documents signed by the Complainant on **17 July 2015**, I have highlighted certain statements above, which I consider demonstrate that the Complainant had been advised that this was a medium to long term product. He signed the Statement of Suitability which attested that *“You currently have a lump sum which you can afford to invest for at least 5 years.”* ... *“The product is a medium to long term investment and you do not intend accessing your investment for at least 5 years.”*

I have also had regard to the Policy documentation which issued to the Complainant by cover of letter dated **30 July 2015**, enclosing Policy Schedule, Policy Conditions and an Important Information Notice.

The Complainant submits that when he received the policy documentation he became concerned about a “graph” on page 4 of the Policy Conditions. I have had regard to page 4 of the policy conditions and note that on this page, there is a heading *“Early Encashment charge.”* This states as follows:

**5.3 Early Encashment Charge**

*Any encashments from the policy, either full or partial, apart from part encashments used to pay a regular income as described in Condition 5.2, are subject to an early encashment charge. The amount of the early encashment charge is a percentage of the premium paid, and depends on the period of time since that premium was paid:*

<b>Number of years since each premium was paid;</b>	<b>Early Encashment charge:</b>
Up to one year	5%
1 to 2 years	5%
2 to 3 years	5%
4 years	3%
5 years	2%
Over 5 years	0%

Within the “[Named Policy] important information” document, under the heading “Encashments”, it provides:

*You can encash all or part of the policy at any time. The encashment value at any point in time will be the value of the units allocated less an early encashment charge. Early encashment charges apply for the first five years in respect of each single premium paid. The early encashment charge is 5% for the first three years, 3% in the fourth year and 2% in the fifth year.*

*[emphasis added]*

This “Important Information” also set out the “cooling off” entitlements of the Complainant:

*30 Days Cooling Off Option*

*If you are not satisfied with your policy, whatever the reason, you have 30 days from the date of the covering letter sent with this notice during which you may cancel your investment and receive a return of the investment made by you, less an adjustment for any downward movement in the unit price of the funds in which you are invested, occurring between the date of the policy commencement and the effective date of cancellation. To exercise this option please return the enclosed policy documents [address details] together with the Cooling Off Form (to be found at the end of this notice), duly completed by you, stating that you wish to withdraw from the investment.*

Overall, I consider that information regarding the early encashment charges was set out clearly and in such a way as was understandable to a layperson. If the Complainant was concerned about the existence of such a charge, when he received the policy documentation with the letter of **30 July 2015**, as he has indicated, it was open to him at that point or indeed at any time within the 30 day cooling off period, to cancel the policy by availing of the cooling off period and implementing his right to cancel the investment. He did not do this.

Having had detailed regard to the submissions of each party and the evidence furnished, I am satisfied that information about the features of the investment policy, including the fact that early encashment charges applied during the first five years of the investment was made available to the Complainant at the time he entered into the policy and that he was on clear notice of same.

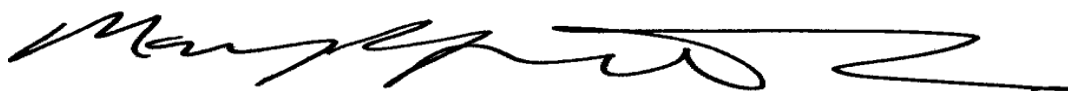
On the basis of the foregoing, I do not consider that there are any grounds upon which it would be appropriate to uphold this complaint that the Provider failed to advise the Complainant of the early encashment charge at the time when the investment policy was sold to him in **July 2015**.

**Conclusion**

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

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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**

27 March 2020

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.