An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0293
Sector:	Investment
Product / Service:	Approved Minimum Retirement Fund AMRF
Conduct(s) complained of:	Failure to provide correct information Fees & charges applied
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a personal pension plan, which was sold to the Complainant by the Provider, against which this complaint is made. The Provider is a broker.

The Complainant's Case

The Complainant submits that she had a matured pension plan, held within a non-interest-bearing account with a pension provider. This pension place was pending instruction from her as to what to do with the funds, until she had reached the age of 75 years. The Complainant submits that she intended to keep the funds in the same plan until her 75th birthday, at which time she intended to convert them to an approved retirement bond.

The Complainant submits that in October 2016, she attended an event where she approached the Provider, which was providing free advice. The Complainant submits that prior to investing in the new policy, that is the subject of this dispute, she informed the Provider that she did not want to reinvest the funds if it meant she had to pay extra charges for the investment fund. The Complainant submits that the Provider informed her that there would be no extra charges on the new policy and she submits that on receiving this advice, she made the decision to transfer the pension funds into the new policy.

The Complainant submits that on receiving the policy documentation in January 2017, she requested clarification from the Provider as to the exact amount that the product administrator had invested in the fund on her behalf versus the amount that she had invested in the new plan.

The Complainant submits that the Provider delayed its response to her queries on this matter for 17 months and allowed the 30 day cooling off period on the new policy to lapse, without having the information she required in order to make an informed decision as to whether to continue with the new policy.

The Complainant submits that the Provider did not explain to her, prior to purchasing the policy, that the annual charges for managing the fund would be deducted from the units invested in the fund, which in turn reduced the earnings from the investment fund. The Complainant submits that the Provider instructed the product administrator to deduct funds from the account to pay its commission, without her permission. The Complainant submits that if she had been aware of the extra charges and fees on the new investment plan, she would not have proceeded with it.

The Complainant argues that conversations with MG of the Provider did not touch on commissions or charges and fees to the Provider. She states that they did not discuss fees paid to the product administrator of 5% with a 1.5% annual charge. The Complainant states that she was not told about the 0.5% paid annually to the Provider from the 1.5% annual fee to the product administrator. She and her husband claim that the differences between the contribution and investment contribution were not discussed. They argue that the process of investing would have stopped if they had had all the information available. The Complainant argues that the documents provided were very vague and did not have any information about the fees/charges issues. The Complainant argues it took 17 months with emails, phone calls and meetings to get this information from the Provider. The Complainant indicates that she phoned the product administrator on the day she and her husband found out about the different investment amount (that is, the day the policy arrived) and the product administrator did not clarify the reason but referred them to the Provider.

The Complainant states that she sent an email to the Provider on 9 February 2017 and had a meeting with MG of the Provider on 14 February 2018 without getting clarification. The Complainant states that clarification came from MG some 17 months later at a meeting on 15 May 2018 at which time the information was explained but no documentation was provided to support the information. In respect of the meeting on 14 February 2017 at which MG claims the Complainant understood the policy and informed him she was happy with everything, the Complainant argues that they could not make a fully informed decision as not all the information was available and she did not know the details of the missing €440.45. The Complainant states that she received the policy documents received from the product administrator were posted to the day they were received on 20 January 2017. The Complainant argues that the documents made no reference to the missing money and it took another 17 months to get the correct information. The Complainant argues that this information should have been presented to her within the 30 day cooling off period.

In respect of the offer of €440.45 offered by the Provider in compensation, the Complainant argues that the offer was not accepted for a number of reasons. Given the ages of the Complainant and her husband, they state that were feeling abused, annoyed, bullied, frustrated, stressed-out angry and 'taken in' by MG especially in relation to what they characterise as the 'deliberate concealment' of the presence of the fee.

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The Complainant argues that MG admitted the €440.45 went to the Provider and that it was fees/commissions and 100% of the fund should have been invested. When asked what they wanted done to rectify the problem, the Complainant states that they demanded the fund be corrected to a 100% investment. At a follow-up meeting on 31 May 2018, there were advised that the schedule could not be changed but they should not have been treated as they had and that MG accepted that the Complainant did not give him the right to deduct money from the account. When MG suggested an offer of vouchers to the value of €440.45, the Complainant indicates that MG was requested to put the offer in writing and he stated that he would contact them within two weeks but the Provider did not put the offer in writing.

The Complainant states that the term 'allocation' was explained again and again but with no clarification as to why the amounts were different between the initial contribution and the amount invested. Although they accept that normal charges were explained to them, the Complainant states that the extra charge of €440.45 was not explained. The Complainant does not challenge the Provider's submissions in relation to the particular fund that was recommended to them in relation to risk. Rather, she states, the important issue of fees were not addressed properly, according to the Complainant and her husband. The Complainant states that there is no document which shows the commission received by him.

The Complainant states that she and her husband approached MG at the event with no intention of investing and with no enthusiasm on their part to invest as the money was already in an interest-free account with only two years to go to maturity. After serious discussions in relation to charges (that is, normal charges would apply – which would be no real change from their point of view) and the direct statement there will be no extra charges, the Complainant and her husband consented to invest they felt was probably better to have a broker available as required when the pension matured.

The Complainant argues that as the Provider can only advise on company products, it holds a written agency of appointment for, this means that the Provider is tied to the product administrator and is not independent. The Complainant points out that in the statement of suitability, there is no explanation of why the allocation is 98.5% rather than 100% and no information whatever on the 1.5% commission. The Complainant also points out that the statement indicates a 1.5% AMC (Annual Management Charge).

The Complainant's husband submits that it was not until a meeting on 15 May 2018 that MG finally explained to him and the Complainant where the missing money was and where it went. He states that MG asked what was needed to fix the problem. The Complainant's husband indicates that he asked that the paperwork in relation to the investment be redone to showing the investment amount and the other figures to reflect the change. MG indicated this could be a problem but he would see if it was possible. He states that at the following meeting on 31 May 2018, MG indicated it was not possible to change the policy. He states that MG then made an offer to pay €440 and he was asked to put it in writing, though the Complainant did not accept or reject the offer. The Complainant's husband states that MG stated he would contact them within two weeks, but there was no further contact from MG on this matter.

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The Provider's Case

The Provider states that it is satisfied that it made clear to the Complainant that there were upfront charges in respect of the investment and where those charges were going. The Provider states that the client was given the policy conditions booklet from the product administrator, a statement of suitability and was informed verbally of fees. The Provider states that it is satisfied that it explained the difference between 'investment contribution' and how this value difference from the 'single contribution' prior to the Complainant making the investment. In respect of the Complainant's cooling off period, the Provider states that the product producer took longer than expected to post the policy documents but as soon as they were received, they were provided to the Complainant. The Provider argues that the Complainant cooling off period began when she received the documents that were posted to her on 20 January 2017. It argues that the Complainants contacted it on 10 February and MG of the Provider visited the Complainant and her husband on 14 February 2017, three weeks after receipt of the documents, to ensure that they understood the policy. MG argues that the Complainant and her husband informed him that they were happy with everything. The Provider argues that although there is a cooling off period of 30 days in respect of the policy, the Complainant retired another pension, so she would have to set up another AMRF (approved minimum retirement fund) or annuity with another Provider as there would be no way to reinstate the old plan.

The Provider states that it made an offer to pay 1.5% of the funds, equalling €440.45, as a goodwill gesture. It states that the Complainant made no response to the offer. Despite a number of queries from this Office, the Provider has not confirmed whether this offer is still available to the Complainant. The Provider does not accept that it took 17 months before the difference between the amounts that the Complainant had invested and the amount actually invested in the fund was explained. The Provider argues that the Complainant was 'explained' many times that they would get a 98.5% allocation and that this was explained in the meetings between the Complainant her husband and MG in 2016 and 2017. MG argues that at the meeting in 2018, the Complainant and her husband informed him that they didn't quite understand properly what the allocation was and so the gesture of goodwill was offered to keep the Complainant happy.

In response to the Complainant's statement that the Provider was aware that she had no intention of reinvesting if she had to pay extra charges, the Provider argues that the Complainant asked MG to claim a pension benefit for her. It argues that the Complainant was then obliged to invest this in an AMRF or annuity as the old personal pension plan that she had sitting in cash with a third party Provider had a management charge so she would be losing the value of the fund every year through the management charge with the third party. The Provider argues that 100% percent of the funds from the old pension plan was transferred over to the new product administrator and the Complainant received a 98.5% allocation.

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MG on behalf of the Provider believes that he complied with the provisions of the Consumer Protection Code 2012 in relation to the matter. He states that he recommended that the Complainant retire the pension and invest in a low-medium risk multi-asset investment fund that should have low volatility as he believed this was a better alternative to leaving the fund in cash. MG argues that when the difference was explained to the Complainant, the Complainant agreed that a little bit of risk was worth trying to get the reward. MG argues that they reviewed a number of low to medium risk multi-asset funds and the choice was narrowed down between two. The Provider argues that the Complainant was made fully aware that there will be volatility within the fund and given normal market circumstances, the volatility should only be between 2% and 5%, though the volatility could be more in a financial crisis. MG further argues that he was in contact a number of times with the Complainant to deal with her social welfare benefits and advised her to start taking a 4% annual distribution from her AMRF fund but he wanted to first make sure that this would have no impact on any benefits she was receiving from the state. The Provider argues that the Complainant was provided with all relevant documentation and was also provided "*a serviced yearly with our market view and also to look at taking distributions from her AMRF policy*" (sic). The Provider has stated that it is satisfied that it complied with its obligations in respect of customer complaints but has not provided details of the date that the Complainant first made a complaint in relation to the matter.

In respect of the Complainant's assertion that the statement of suitability incorrectly referenced a 1.5% AMC rather than 1.7% AMC, and gave no information in relation to the 1.5% taken off the total investment, the Provider argues that the AMC on the plan is 1.5% but that the fund in question has an extra AMC and this was not documented in the statement of suitability. It argues that it is documented in the product administrator's application form and that the product administrator has now reduced the AMC on the fund. In respect of the assertion that there was no indication that the commission was going to be removed from the investment, the Provider argues that the Complainant was informed in writing that they would receive a 98.5% allocation. It further argues that the policy documents show the amount received and the amount invested, as indicated by the product administrator, and shows the commission received.

The Provider accepts that in discussions between the parties, the issue was always referred to as allocation and not commission. The Provider argues that an allocation charge was explained to the Complainant on a number of times at meetings in 2016 and 2017. It argues that the Complainant's husband showed some level of investment knowledge and claimed that he understood an allocation but at a meeting in 2018, the Complainant's husband said that he didn't understand this despite it being explained on two separate occasions. In relation to the assertion that the Provider did not explain that the annual charge would reduce the number of units invested, the Provider argues that the product producer would have had their annual management charge (AMC) highlighted in the policy book and the Complainant was fully aware that the pension fund would have an annual management charge. It argues that every AMRF and pension product in the marketplace has an annual management charge and this was the reason why the Complainant was willing to invest in a low to medium risk multi-asset fund instead of leaving the fund in cash.

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In respect of the assertion that the Provider directed the product administrator to deduct money from the account to pay commission to the Provider without consulting the Complainant, the Provider argues that the Complainant was advised in writing of a 98.5% allocation into the AMRF. In respect of the query from this Office if the special instructions from the Provider to the product administrator in respect of the commission were explained to the Complainant, the Provider states that the Complainant was advised of the fees many times verbally and in writing.

MG on behalf of the Provider argues that the Complainant and her husband approached him at a tradeshow wanting information on pensions. When discussing the options available, the Provider states that the Complainant was eager to retire her fund. He states that he performed a review for the client, explained how the pension was currently working, and retired the fund. MG states that he gave options to invest with every insurance company and explained what the Provider had to offer. He states that he went out to visit the Complainant a number of times and has also attempted to get distributions for the client of the 4% per annum to try to improve the Complainant's life financially. He argues that put in a lot of time and effort with the Complainant to make her and her husband as happy as he could.

MG disagrees with many comments made by the Complainant's husband in relation to items that he claims that MG had agreed, and which MG claims are untrue. MG clarifies that the offer of €440 was made as a goodwill gesture and that, at the time, he clarified with a representative body if it was possible to offer cash. Once he was informed this would be okay, he states that an offer was made to the Complainant but it seems that "*at every turn there is something lost in translation*". The Provider indicates that it contacted the Complainant in 2018 and 2019 to see if she and her husband wanted a 4% pay-out from the AMRF.

The Provider states it is happy with the advice it gave to the Complainant and her husband and believes that everything was made very clear to the Complainant and her husband at all of their meetings. The Provider rejects the assertion on behalf of the Complainant that it is a tied agent of the product administrator.

The Complaint for Adjudication

The complaint is that the Provider failed to adequately inform the Complainant of the charges and commissions on the policy in dispute prior to transferring her accrued pension funds into the disputed policy.

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Decision

A Preliminary Decision was issued to the parties on 17 June 2020, outlining my preliminary determination 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.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Letter from the Provider to this Office dated 6 July 2020.
2. Letter from the Complainant's representative to this Office dated 7 July 2020.
3. E-mail from the Provider to this Office dated 14 July 2020 advising that it does not wish to make a further submission.
4. Letter from the Complainant's representative to this Office dated 14 July 2020.
5. E-mail from the Provider to this Office dated 14 July 2020.
6. E-mail from the Complainant's representative to this Office dated 14 July 2020 advising that the Complainant does not wish to make a further submission.

Copies of the above submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office by the parties, I set out below my final determination.

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.

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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.

In so concluding, I am conscious that there are certain factual matters in dispute between the parties in relation to what was said or not said at certain meetings and as to what was explained or not explained to the Complainant prior to the investment decision being made. I am also conscious that the main dispute concerns a commission fee totalling €440.45. On the basis of the signed documentation that has been made available to me in relation to the investment, in addition to submissions of the parties, I am satisfied that a fair decision can be reached in the complaint without the necessity for holding an Oral Hearing.

The Provider, in its post Preliminary Decision submission dated **6 July 2020**, puts forward that:

> "*there is a significant conflict as to matters of fact that we feel might have been resolved in our favour by reference to the documentation submitted to* [this Office]".

It goes on to state that while *"it is, of course, within* [the Ombudsman's] *gift to elect not to hold an Oral Hearing should you feel that you can weigh contradictory evidence based on the documentation before you without hearing oral evidence".* The Provider then states *"that where you do so, the evidence should be overwhelming to enable you to determine that the Complainant has proven her allegations".*

The Provider submits that:

> "*Where the parties have not had an opportunity to advance their case by way of oral evidence, we would respectfully submit that overwhelmingly damning documentary evidence of the Respondent's conduct should be present in order to reasonably make a finding of unlawfulness on the part of the Respondent and in particular in order to refer the matter for further consideration by the Central Bank of Ireland".*

The Provider *does "not believe that documentary evidence of that nature is before you in this investigation and such documentary evidence as exists is in fact supportive of our position".*

It submits that the "*evidence before* [the Ombudsman] *is such that no adverse finding could reasonably have been made against us".*

Having reviewed the documentation and evidence on file, I remain of the view that I can reach a fair decision in this complaint without the necessity for holding an Oral Hearing.

I note the Provider also states *"*[the Ombudsman] [has] *preferred the Complainant's evidence to our evidence on the balance of probabilities but the penalties and sanctions which* [the Ombudsman] *propose to impose would normally require a far higher burden of proof."*

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The Provider seems to put forward the view that in a Court setting the evidence presented by it would have been taken as conclusive proof in its favour. It further argues that while it is at the discretion of the Ombudsman to hold an oral hearing, where he has not held one the Complainant should have been able to produce *"overwhelmingly damning documentary evidence of the Respondent's conduct should be present in order to reasonably make a finding of unlawfulness on the part of the Respondent".*

I would point out that this Office does not impose penalties or sanctions. This is not the role of this Office. This Office was established as an independent and impartial body for the resolution of complaints against financial service providers or pension providers. The Office was established as, and operates as an alternative, to the Courts for complainants. The Office was not established as a replica of the Courts, nor do we seek to replicate Court procedures. We operate in accordance with fair procedures in seeking to find a fair resolution to unresolved disputes. Where appropriate, I direct compensation and/or rectification. I do not impose penalties or sanctions.

On 23 December 2016, a fund in the sum of €29,363.38 was received by the product administrator on behalf of the Complainant from a third-party pension provider. The directed allocation was 98.5% which meant that 98.5% of the funds received were invested in the new fund. The investment amount was €28,922.93. The difference between the two amounts, equivalent to 1.5% of the overall funds received, is €440.45. The entire investment was placed in a specified fund which is described as a diversified portfolio of funds designed and managed for customers looking for low to medium risk investment. The annual management charge on the policy is 1.7% per annum and deducted by way of units on a monthly basis.

Available Evidence

The Provider has submitted a Statement of Suitability into evidence. The document is addressed to the Complainant and is written on the Provider's headed notepaper. The document provides as follows:

> "***Important Notice – Statement of Suitability***
>
> ***This is an important document which sets out the reasons why the products or services offered or recommended is/are considered suitable, for the most suitable, for your particular needs, objectives and circumstances.***
>
> *Dear [Complainant],*
>
> *Thank you for taking the time to meet with me in discussing your financial planning requirements.*

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Your Financial Objectives

Following an analysis of your financial needs and goals and based on the information with which you have provided me, I have dealt with your Pension funds only. Should you wish to discuss any other financial products, please feel free to contact me.

You currently have in place:

Life Insured [Complainant] Policy Owner [Complainant] Policy Number [xxxxxxxx] Product Type Personal Pension, Premium 35,938.81 Benefits, Total Premium Paid 35,938.81 Start Date 12/09/2011, Term NRA 72 Retirement Age 72, Indexation No Conversion no, Assigned To Lender no Annual Management Charge .75%, Allocation 100 Bid/Offer Spread n/a, Monthly Policy Fee Fund before maturity, cash fund and BCP bond, Fund Description policy matured Risk Profile, Current Value 39,024.91 Value if surrendered or transferred, Penalty deductible on surrender/transfer n/a, Performance n /a, Guarantees Applying n/a Potential Bonuses n/a

After reviewing your needs, we have confirmed that:

You have advised me that you would like to retire your pension.

You advised me that you want to invest in low low-medium type products.

*[**Provider**]*

At [Provider], our objective is to find the most competitive products, suitable to your needs. [The Provider] can only advise on company product that we hold a written agency of appointment for (these are noted in our "Terms of Business document").

Take note that there may be a more suitable product on the market that we do not offer advice on.

Recommendations

As you have informed me that you would like to retirement (sic) your pension now I have advised you that you can take 25% of your pension tax free now with the remainder going into an AMRF (sic) until your age 75 (sic). You may make withdraws (sic) out of your ARMF of 4% of the fund value per year (current revenue rules). You have advised me that you would like to take the tax-free lump sum now. We have looked at [six named funds with different product Providers] and you have informed me that you would like to invest your AMRF in [an identified fund].

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<u>You will receive 98.5% allocation and will have a 1.5% AMC.</u> There are no guarantees of a positive return and you may lose some or all of your money. (Emphasis added)

Important Information

I have provided you with Key Features and Terms and Conditions document which explain how this policy works in more detail. Please read it carefully and make sure you understand the benefits provided by the policy.

Should you have any further queries or require any further advice in relation to our discussion or have any other financial planning needs, please do not hesitate to contact me at any time.

[Signed by Provider]

<u>DECLARATIONS</u>

Please note that this recommendation must be read in conjunction with the specific terms and conditions for each product. Please take the time to go through the information issued to you. This contains the benefits in far greater detail. Should you have any queries, please refer them to myself.

…

The enclosed important Information about your Protection Policies outlines how the policy works in more detail. Please read through this and refer any queries to me. I would like to draw your attention to the information regarding the circumstances for claims payment and the precise conditions that must exist for a claim to be paid.

…

I wish to advise that I discussed the above in detail with my client and specifically drew their attention to the terms of the policy.

[Signed by MG on behalf of the Provider] all Date 1.12.16

Declaration to be completed by Client

- *We are happy to proceed on the basis of the recommendation given to me/us and wish to affect the policy recommended. We also confirm We have been provided with the disclosure illustration relating to the policy. Or We are happy to proceed with the alternative option given to me/us and wish to effect the alternative policy.*

- *We have read the related proposal form(s) carefully. We confirm that all of the information disclosed on it, whether completed by me/us or not, is accurate and is to be treated as if the form had been completed by me/us*

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Terms of Business - Please tick the appropriate answer

- *We acknowledge and confirm that We have been provided with a document setting your Terms of Business with me/us. Yes/No*

. . .

[Signed by the Complainant] *Date 1/12/2016*"

Although the Statement of Suitability refers to a 'Key Features and Terms and Conditions document', no such document has been submitted in evidence so cannot be considered by me in arriving at my decision.

The Complainant has submitted a Term of Business letter from the Provider. This indicates that the Provider is regulated as an investment intermediary under the Investment Intermediaries Act 1995 and as an Insurance Intermediary under the European Communities (Insurance Mediation) Regulations 2005. In relation to the services provided by the Provider, the letter notes that its principal business is to:

> "*provide advice and arrange transactions on behalf of clients in relation to life insurance, pensions and investments. The range of services that [the Provider] provide is based on the products offered by the product producers from whom a written a letter of appointment is held*."

The term of business letter indicates that the Provider acts as a broker that is, that its activities are provided on the basis of a "*fair analysis of the market*". In relation to commission and charges, the terms of business letter provides as follows:

> "[*The Provider] is remunerated by commission and other payments from product producers on completion of business. This payment is taken into account in the quotation and/or customer information notice that will be provided to you. Before completion of your application it is important that you read this information and that you understand the details contained. If in any doubt, please ask your [provider] adviser.*
>
> *Full details will be included in the policy/investment document issued by the product provider when your policy or investment is in force. Where we receive recurring commission, this forms part of the remuneration for the initial advice provided*."

The Complainant acknowledged that she had been provided with a copy of the terms and conditions letter and that she had read and understood them by her signature dated 1 December 2016.

The Complainant also submitted a fact find in relation to the personal finances of her and her husband, as completed with the Provider on 1 December 2016. Further, the Complainant submitted the policy conditions of the AMRF she invested in. Single Contribution is defined as the "*initial contribution invested by you in the policy. It is stated on the Schedule*."

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In respect of the regular management charge, the policy booklet indicates that the product administrator will calculate the amount of the management charge each month and that it will "*deallocate from the policy in a manner determined by the Company's Actuary a number of units allocated to the policy equal in value to the unit price to this charge*".

In the relevant policy application form, 100% of the investment was directed to a specified fund. The fund in question was identified in the application form as having a management charge of 0.2% above standard. In section 10, which bears no heading other than the indication that it be completed by the insurance intermediary, the form states that if no instruction is given, '*standard commission will be assumed*'. There is no indication of the level of this 'standard' commission. Under a heading "*special instructions*", "*5% .5 Trail*" is indicated. There is no indication that this section was viewed in advance by or explained to, and was certainly not signed by, the Complainant.

The policy schedule sets out the policy commencement date of 23 December 2016, and evidences a single contribution of €29,363.38 and investment contribution of €28,922.93. 100% of the investment was made in the identified fund. The management charge was identified as 1.7% per annum. On the third page of the policy schedule, after the projected benefits of the policy had been set out, the last line indicates as follows:

> "*The contribution payable for your policy includes all charges, expenses and intermediary/sales remuneration*."

It appears that all the documentation as set out above was sent to the Complainant by letter dated 20 January 2017 from the Provider.

The Complainants sent an email to the Provider on 9 February 2017 requesting clarification as to why the policy showed an investment of only €28,922 when her investment was actually €29,363. The email specifically asked the provider to explain the difference. The Complainant indicates that no written reply was received to this email but that MG arranged to meet them at their home. I note that this email was sent following a phone call between the Complainant and the product administrator on 24 January 2017.

According to the Complainant's account of the meeting of 14 February 2017, she and her husband told MG that they were unhappy about the difference between their investment and the actual amount invested in the fund. When asked where the €440 difference went, the Complainant's note indicates that MG said that it was a 'setup charge' with the product producer, that is, a special term agreement. The Complainant stated that MG explained that the only charge was 1.7%. In a note that appears to have been prepared by the Complainant and/or her husband in advance of the meeting on 14 February, the note indicates that MG had told the Complainant that as the amount contributed was less than €100,000, only 98% of the amount contributed is invested. The note has a follow-up question on where the difference went. No evidence has been submitted by the Provider in respect of the meeting of 14 February 2017, other than the submission that MG was informed by the Complainant and her husband that they were very happy with the policy.

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As no note or any record of what was discussed at this meeting has been provided by the Provider as one might have expected, I am accepting the Complainant's account of the meeting that took place and further accept that MG on behalf of the Provider did not explain the 1.5% charge to the Complainant other than to indicate that it was a 'special set up charge' imposed by the product administrator due to the level of their contribution.

The Complainant's timeline indicates that she met with a representative of the product administrator on 29 March 2018 in respect of the fees issue. The timeline notes that the representative in question did not clarify the difference between the investment and amount invested and referred them to the broker for clarification. The note indicates that the Provider gets 0.5% of the 1.7% AMC every year. Although the Provider has made no reference to this annual fee in its submissions, it has not disputed this assertion so I am taking it as having been accepted that the Provider receives 0.5% annually from the AMC payable by the Complainant to the product administrator.

In another note from the meeting of 29 March 2018, the note asserts that the product administrator informed the Complainant that it was not true that if the contribution is less than €100,000 that only 98.5% is invested and that they should write to the Provider for an explanation. The note further recounts that the product administrator indicated that it was instructed by the Provider to invest only 98.5% of the Complainant's contribution. Again the Provider has not disputed the accuracy of these statements imputed to the product administrator so it appears that there is some discretion available in relation to the level of the allocation to be directed by a broker, though I am unclear of the details of this.

In an email dated 8 May 2018, the Complainant's husband wrote to the Provider in advance of a meeting then scheduled for 11 May 2018 requesting a letter or paperwork "*clarifying the difference*" between the amount contributed by the Complainant and the lower amount invested of her behalf. It appears that no written response was received to this email as requested and that at the meeting, MG wrote "*98.5% allocation*" on a print out of the email. As can be seen from the submissions set out above, the parties have different accounts of what was said or accepted at the meeting of 15 May 2018 but it appears that MG of the Provider accepted some connection between the 1.5% special charge deducted in accordance with a special agreement between the Provider and product producer, and the commission that the Provider received from the product producer.

At a meeting on 22 June 2018 between the Complainant and her husband and the representatives of the product producer, the Complainant's note indicates that the product producer informed the Complainant that a broker "*can take a cover charge when setting up a new Policy but that it should have been explained to us*". Again a copy of this note was shared with the Provider and this suggestion attributed to the product administrator was not disputed by it.

The Complainant has submitted a letter received from the product administrator dated 16 August 2018. The letter indicates that the Provider is an independent broker with which the product administrator has an agency relationship.

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The product administrator states that it relies on the instruction sent by the Provider and is not privy to the sale of the contract and the fees agreed between the Complainant and the Provider. The letter goes on to say as follows:

> "*I have enclosed a copy of the documentation completed at point of sale and this reflects the commission rates advised by the Broker.*
>
> *I also enclose a copy of the policy schedule which shows your investment contribution of €28,922.93 which reflects the allocation rate of 98.5%. We paid your Broker 5% commission, 3.5% of this was paid directly from [the product administrator] and 1.5% was deducted from your allocation as instructed by the Broker. I respectfully suggest that if you wish to query this further I recommend that you meet with your Broker*.
>
> *The policy document issued to you reflects receipt of the funds at 23 December 2017.*
>
> *The annual management charge on your policy is 1.7% per annum and is deducted on a monthly basis by unit deduction. This is outlined in the policy terms and conditions*."

The Provider issued a final response letter to the Complainant dated 8 August 2018 in respect of her complaint. The letter refers to an email of 19 July 2018 in which, the Complainant's husband indicated their intention to make a formal complaint to his office and requesting a final response letter. The complaint mainly revolves around the Provider's failure to explain where the 1.5% deducted from the Complainant's contribution went until the meeting of 15 May 2018. In its final response letter, the Provider indicates that it understood that the Complainant was dissatisfied with the allocation rate received at 98.5% and that the Complainant believed this should have been made clear to her before taking out her AMRF policy. The Provider apologised that the Complainant felt that the level of excellent service it strived for had not been reached in her case and that this was their first complaint since inception in 2015. The letter continued as follows:

> "*Notwithstanding this we have tried to rectify the situation by amending the allocation on the policy to 100%, something [the policy administrator] are unfortunately unable to do. We then offered you, as a gesture of goodwill, a payment of 1.5% of your fund equalling €440.45.*
>
> *If you are willing to accept this payment, please inform us how you would like payment to be made. If by EFT (electronic funds transfer) directly into your bank account, please provide account details for this transfer*."

Analysis

There does not appear to be any dispute in respect of the suitability of the investment advice offered by the Provider to the Complainant. Instead the focus of the complaint is in respect of non-disclosure of fees and commission. Every document submitted into evidence shows that the investment allocation in respect of the Complainant's investment was set at 98.5%.

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There is no evidence before me that the Complainant had any entitlement to expect that 100% of the funds being transferred from the third party provider in December 2016 would be invested on her behalf in the identified fund with the product administrator. The Statement of Suitability and policy schedule clearly show that the allocation in this case was 98.5% and this is the percentage of the Complainant's funds that were in fact allocated. I accept that the annual management charge or AMC applicable to the fund in question of 1.7% was properly notified to the Complainant.

I note that the Statement of Suitability indicates that the AMC would be 1.5%. I note, however, that the policy documentation received from the product Provider in January 2017 shows that the AMC was 1.7% and that this was understood by the Complainant at that time. While I therefore acknowledge that the Statement of Suitability ought to have reflected the true AMC of 1.7% and not 1.5%, I accept that the AMC of 1.7% was notified to the Complainant. Further I accept that the policy conditions properly explained that the AMC would be deducted by way of unit deduction from the investment.

The issue that arises is the non-disclosure of fees and commissions payable to the Provider in respect of the advices and services provided to the Complainant. The simple fact is that I have no evidence before me to substantiate the Provider's arguments that the fees and commissions were explained to the Complainant by the Provider. For their part, the Complainant and her husband have argued strenuously that despite seeking clarification in relation to the difference between the amount that they invested and the amount that was allocated to the investment in relation to any other charges, it was not until a meeting on 15 May 2018 that the Provider admitted to them that it had received a commission from the product administrator in the form of the 1.5% that had been deducted from their investment.

I can find no disclosure of the level of commission or fees to be received by the Provider in documentation produced by the Provider. I note only three references to commissions and fees. First, the Terms of Business letter sent by the Provider explains that fees and commissions will be payable by the product administrator in the following terms

> "[*The Provider] is remunerated by commission and other payments from product producers on completion of business. This payment is taken into account in the quotation and/or customer information notice that will be provided to you*".

This is a very generic explanation and does not disclose any specific fees or commissions payable in respect of the Complainant's investment. Second, section 10 of the policy application contains a '*special instruction*' under a heading "*special instructions*", "*5% .5 Trail*" but is far from clear that this is the directed commission (if this is what this entry is supposed to signify) or why this rate has been set. Further there is no evidence that this section was ever shown to the Complainant or brought to her attention. Finally, there is a year on year estimate of the commission to be paid by the product administrator to the Provider on the fourth page of the policy schedule.

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This is the clearest disclosure of the commission to be earned by the Provider from the Complainant's investment and seems to equate to 5% of the initial contribution in the first year and 0.5% annually thereafter, with a steady increase in units held assumed. While this page ought to have provided some clarity to the Complainant, I note that no connection between the 1.5% 'set up charge' and the 5% commission is disclosed.

Even in the Provider's responses to the complaint, there is no disclosure of the fact that the commission that it received in this case appears to have been a full 5% of the investment or that it receives 0.5% annually from the 1.7% annual management charge.

The only reason that these matters have been unearthed is through enquiries made by the Complainant of the product administrator. In the absence of any evidence from the Provider to the contrary, I assume that the information provided by the product administrator in respect of the 5% commission and 0.5% annual charge is accurate. There also appears to be a correlation between the 98.5% allocation and the level of commission to be received by the Provider as agreed in a special agreement between the Provider and the product administrator. This correlation has not been explained, nor has the detail of the special agreement been disclosed.

Based on all of the available information, and especially that coming from the product administrator, it appears to me that the 1.5% 'set up charge' was set at the option of the Provider and was ultimately paid to it in addition to the standard 3.5% commission from the product administrator. It was not a charge imposed by the product administrator as the Provider appears to have told the Complainant, even though it was originally deducted by the product administrator from the Complainant's initial investment on the Provider's instruction. It may be that the Provider has a policy in respect imposing the additional set up charge where the investment amount is less than €100,000 but I can find no evidence that any such policy or agreement with the product administrator was explained to the Complainant. It was certainly not explained to this Office in the course of this investigation.

As set out above, I am not thereby holding that the Complainant's investment was less than was promised to her. As I accepted above, it was made clear to her that her allocation would be 98.5% and that the AMC would be 1.7%. The issue here is that there was a marked lack of transparency in relation to the commissions and fees to be received by the Provider arising from his advice to invest in the identified fund with the identified product administrator.

The Provider, in its post Preliminary Decision submission dated **6 July 2020**, puts forward that the statement in my Preliminary Decision that *"I have no evidence before me to substantiate the Provider's arguments that the fees and commissions were explained to the Complainant by the Provider",* is incorrect.

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It states that:

> "*…the statement of Suitability and the policy documents both record the charges. The Complainant acknowledged- by way of her signature- that she had received, read and understood our terms and condition. As such, you have preferred the Complainant's proposition that the charges were not explained to her despite documentary evidence to the contrary, her confirmation in writing, and our submission which confirms that they were explained to her. It would therefore seem that the burden rested with us to disprove the Complainant's case rather than with her to prove her allegations against us. This appear[s] on its face to be an error of law as the burden of proof should rest with the Complainant".*

The Provider, in its post Preliminary Decision submission, states that:

> "*the complainant claims to have approached us with no intention of investing. If you accept that, then it is hard to understand why she approached us at all. If you think it is inconceivable that she would have approached us without intending to invest, then does it have any consequences at all for her credibility in relation to the balance of her complaint?"*

The Complainant responded to this statement in a post Preliminary Decision submission dated 7 July 2020, stating:

> "*We approached him with a Tax issue. My wife and I were both already on an adequate pension. This investment was already in a "Non-interest account" with approximately 2 years to go to* [the Complainant's] *retirement date [75 Years of age] – there was no reason for us to / put it at risk".*

The Provider goes on to state that:

> *"it is simply not credible that the Complainant was unclear in relation to the commissions and charges following the meeting on 14 February 2017. Were that true, she surely would not have continued to push for an explanation in the days, weeks or months that followed but did not do so until the following year…it cannot sustainably be claimed that it was not addressed at that meeting and the Complainant, if dissatisfied with the explanation, would not have let the matter sit until the following year…therefore for her to allege that we ignored her queries for 17 months is simply incorrect… we have found it very difficult to fathom how such an allegation can be advanced against us and if our frustration in that regard was evident in our defence of this complaint, we apologies, but it does not change the fact that the allegation is untrue".*

Based on the evidence before me I remain of the view that I have not been provided with the evidence to substantiate the Provider's arguments that the fees and commissions were appropriately explained to the Complainant by the Provider.

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I believe the Provider's arguments display a lack of understanding of the important requirements on regulated financial service providers to make full disclosure of all relevant material information and to maintain the necessary records to demonstrate that it has done so.

An important General Principle of the Consumer Protection Code 2012 is Provision 2.6 which provides that:

> "*A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it . . . makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer*".

Further, under Provision 4.54, "*Prior to providing a product or service to a consumer, a regulated entity must:*

> *a) provide the consumer, on paper or on another durable medium, with a breakdown of all charges, including third party charges, which will be passed on to the consumer; and*
>
> *b) where such charges cannot be ascertained in advance, notify the consumer that such charges will be levied as part of the transaction.*"

Pursuant to Provision 4.57:

> "*Prior to offering, recommending, arranging or providing a product or service a mortgage intermediary and a firm authorised under the Investment Intermediaries Act 1995 must disclose, on paper or on another durable medium, to a consumer the existence, nature and amount of any fee, commission or other remuneration received or to be received from a product producer in relation to that product or service. Where the amount cannot be ascertained, the method of calculating that amount must be disclosed. The disclosure must be in a manner that is comprehensive, accurate and understandable*."

Provision 4.58 provides that:

> "*Where remuneration is to be received by an intermediary from a product producer on an ongoing basis in respect of a product or service, the intermediary must disclose to the consumer on paper or on another durable medium, prior to the provision of that product or service, the nature of the service to be provided to the consumer in respect of this remuneration."*

I accept that the Provider has breached Provisions 2.6, 4.54, 4.57 and 4.58 of the Consumer Protection Code 2012 (CPC). In respect of Provision 2.6, I am not satisfied that the Provider has made "*full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer*".

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Repeatedly explaining that the Complainant was only entitled to a 98.5% allocation does not actually disclose the '*special charge*' of 1.5% payable to the product administrator or the fees and commission the Provider was to earn, and certainly not a manner that sought to inform the Complainant. Far from seeking to inform the Complainant, the Provider's attempt to explain away the 1.5% as a 'set up charge' imposed by the product administrator conceals the fact that this was to be paid straight back to the Provider as part of its commission.

I am therefore satisfied that it has also been proven that Provision 4.54 CPC has been breached as there is evidence of "*third party charges, which will be passed on to the consumer*" in the form of the 1.5% set up charge that was paid as part of the 5% commission but no disclosure of this was made to the Complainant. There is no evidence that, prior to arranging the investment, the Provider disclosed the "*nature and amount of any fee, commission or other remuneration received or to be received from a product producer in relation to that product or service*" in respect of the 5% initial commission or 0.5% annual commission under Provision 5.54. Finally, there is no evidence that "*the nature of the service to be provided to the consumer*" has been disclosed in writing in respect of the ongoing remuneration of 0.5% of the 1.7% AMC.

In my Preliminary Decision, I stated:

> *"In addition to the regulatory breaches involved in this complaint, the Provider may indeed be in breach of fiduciary principles. However, I do not propose to consider this aspect of the relationship."*

I did however, indicate my intention to bring the matter to the attention of the Central Bank of Ireland.

The Provider has argued, in its post Preliminary Decision submission that, in light of the above comments regarding evidence provided by it, it would:

> *"respectfully submit that it was unfair to have speculated in the Preliminary Finding that we have been culpable of a breach of fiduciary duties in circumstances where it is acknowledged by* [the Ombudsman] *that you did not give consideration to that issue and we ask that you contemplate the removal of that comment"*.

For the avoidance of doubt, I have made no finding in relation to the Provider's fiduciary responsibilities, as I believe this is a matter more appropriate to the Central Bank. Therefore, I remain of the view that it is appropriate to refer this Decision to the Central Bank for any action it may deem necessary.

In addition to upholding the complaint on the basis of the Provider's failure to disclose its commission and fees to the Complainant, I have two further concerns. The first is the failure of the Provider to explain its conduct to the Complainant. This occurred when she first raised the query by email dated 9 February 2017 and again in response to this complaint.

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I am not satisfied that the Provider gave a sufficiently clear account of its behaviour in the context of the complaint, despite being given the opportunity to do so. The Provider gave inadequate clarifications to the Complainant in relation to the 'missing 1.5%' and short and inadequate replies to queries raised by this Office. Indeed two specific questions raised by this Office were simply not answered by the Provider, despite the inadequacy of an initial answer to each question being pointed out to it.

In my Preliminary Decision, I commented on the manner in which the Provider dealt with the requests required and requested by this Office from the Provider to assist in the investigation of the complaint. The requested evidence encompassed documentation and correspondence relevant to the investment in question and the subsequent complaint that the Provider is obliged to retain records of. Despite reminders, the Provider abjectly failed to submit the evidence sought. Despite the fact that there may have been some cross-over between the evidence submitted by the Complainant and that sought by this Office, no attempt whatever was made by the Provider to comply with the direction of this Office and no explanation was forthcoming as to why it failed to supply this evidence. Not only is this in breach of the Provider's obligations under ***Section 47 of the Financial Services and Ombudsman Act 2017,*** it undoubtedly compounded the frustration of the Complainant and her husband who have indicated that it took 17 months to receive any answers from the Provider and who are clearly frustrated with the explanations that the Provider gave to them. The response of the Provider to the complaint fell well short of the standards expected by this Office and amounts to a failure to provide an explanation for the conduct complained of when it should have been given pursuant to ***Section 60(2)(f) of the Financial Services and Pensions Ombudsman Act 2017.***

The Provider, in its post Preliminary Decision submission, details that it is:

> *"disappointed the we have drawn criticism in relation to the manner that we have advanced our defence of the allegations against insofar as the provision of documentation is concerned… in our anxiety to comply with the directions of your Office in relation to documents, we perhaps naively sought to clarify by phone the perceived documentary deficit but understand that you cannot discuss a complaint with one party in the absence of the other".*

My difficulty with the manner in which the Provider dealt with this Office does not relate to the manner in which it "*advanced its defence*" or the fact that it sought to communicate by telephone. My difficulty relates to the fact that the Provider failed to submit the evidence sought.

The Provider was informed of the procedures of this Office regarding the formal nature of investigation. In its email to this Office dated 18 November 2019, it asked:

> *"Could you be more specific in the schedule of evidence on what you require? To my knowledge you have received the full file and this is what you would use as the evidence".*

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In response to this communication, this Office clarified the documentation being sought as set out below. This was notwithstanding that the Provider had been informed in exactly the same terms in August and September 2019:

> *"We require the following as soon as possible and no later than 10 working days, as set out in the Summary of Complaint issued to you on 28 August 2019 and 18 September 2019.*
>
> ***Schedule of Evidence Required***
>
> 1. *A schedule of evidence being submitted.*
> 2. *A copy of the policy schedule and policy documentation, including the terms and conditions of the fund pertaining to the complaint.*
> 3. *A copy of all correspondences between the relevant parties involved in relation to the complaint regarding the sale/recommendation of the investment fund.*
> 4. *A copy of all documentation generated by the Provider, its agents and servants, to include all memoranda, emails, letters, files, notes and reports, relevant to the investment fund and complaint in question.*
> 5. *A copy of any notes, records, minutes, memoranda etc., prepared by the Provider regarding the investment fund pertaining to this complaint.*
> 6. *Details of all fees, charges, commissions, expenses and any other costs that have been or will be paid by the Complainant or his pension fund to the Provider in respect of the service given by the Provider to the Complainant.*
> 7. *Details of all commissions, expenses paid to the Provider by the product administrator as a result of the Provider selling the product in dispute to the Complainant.*
> 8. *Evidence that the Provider explained the charges to the Complainant and where the charges were going, prior to the investment.*
> 9. *A copy of any additional documentation sought to be relied upon by the Financial Service Provider or which the Provider considers desirable to put before the Financial Services and Pensions Ombudsman by way of response to this complaint"*

The second matter of concern is in respect of the Provider's response to the initial complaint raised by the Complainant to the Provider directly, prior to the involvement of this Office.

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Due to the insufficiency of evidence submitted by the Provider, I am unable to determine when a complaint was first raised but it appears that the Complainant's concerns ought to have been classified as a complaint well before the email of 19 July 2018 when a final response letter was requested. I have no evidence that the Provider complied with its obligations in respect of complaints under the Consumer Protection Code 2012, for example, in terms of acknowledging the complaint within 5 days as mandated by Provision 10.9.

In light of the Provider's failure to disclose its commission and fees to the Complainant, and its failure to provide any (or any adequate) explanation for its conduct, I am substantially upholding the complaint. I note that the Provider offered to pay the sum of €440.45 to the Complainant as a goodwill gesture, reflecting the 1.5% 'special charge' taken out of her initial investment. As the Provider has not confirmed that this offer is still available, I am unable to find that the Provider had adequately responded to the complaint prior to an adjudication by this Office. In any event, when the non-disclosure is coupled with the Provider's failure to explain its conduct to the Complainant, I do not feel that the level of suggested compensation is adequate.

In my Preliminary Decision, I indicated that I believed it is appropriate to direct that the Provider pay a sum of €3,000 in compensation to the Complainant in light of all of the circumstances of this complaint.

The Provider has stated in its post Preliminary Decision that it:

> *"would ask* [the Ombudsman] *to have regard to the fact that the loss suffered by the complainant is accepted to have been in the sum of €440.45 and that* [the Provider] *offered this by way of compensation to her. We make no criticism of the Complainant for refusing to accept the offer, but it was a sum which would have compensated her for her entire loss. As a matter of Law, compensation is intended to put the Claimant back into the position that she would have been in had the matters complained of not occurred. We can understand that, because we did not handle this complaint in the manner expected by your Office, there may be a punitive element to your award, but the compensatory payment proposed by you in the amount of €3,000 is almost seven times the amount of the Complainant's loss. We would ask that in the event of you upholding your Preliminary Finding, that you give consideration to reducing the Compensatory payment".*

I would point out that there is no "punitive" element to my direction. As I have already pointed out, this Office does not impose penalties or sanctions. The direction I make is to compensate the Complainant for the loss, expense and, in particular, the inconvenience sustained by the Complainant as a result of the conduct of the Provider.

As I have outlined in this Decision, because of the issues raised in this complaint, and the risk that other customers could be affected by the same issue, I am bringing this matter to the attention of the Central Bank of Ireland for any action it may deem necessary.

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For the reasons outlined in this Decision, I substantially uphold this complaint and direct the Provider to pay €3,000 in compensation to the Complainant.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the grounds prescribed in ***Section 60(2) (a) and (f).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €3,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

7 September 2020

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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.