An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0300
Sector:	Investment
Product / Service:	Online Share Dealing
Conduct(s) complained of:	Early withdrawal penalty
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to the Complainant's trading account held with the Provider.

The Complainant's Case

The Complainant opened a demo trading account with the Provider in **Autumn 2010**. Following on from this, the Complainant says he received a telephone call from a representative of the Provider promoting the opening of a live account and offering a bonus to start trading. The Complainant states that a representative of the Provider opened a live trading account on his behalf on **22 February 2011** and that he had an initial balance of €11,700 (consisting of the Complainant's capital of €10,400 and a bonus of €1,300). The Complainant traded on this account between **2011** and **2017**.

The complaint arises out of circumstances which followed from the closure of the Complainant's trading account. On **19 July 2017**, the Complainant sent an email to the Provider's customer support service attaching a withdrawal form and stating that he would *"appreciate if* [his] *money is refunded at the earliest date"*. His current balance, at that time, was €10,825.31.

Upon closure of this trading account on **31 July 2017** an amount of €9,477.05 was transferred to the Complainant's bank account. Upon receiving the amount of €9,477.05, the Complainant requested a *"computation reconciling"* the €9,477.05 and €10,825.31 figures.

The Provider emailed the Complainant on **24 August 2017** stating that *"there was a mistake about Inactivity Fees applied to* [his] *account, it* (sic) *now they have been refunded to your… account balance. Please feel free to request withdrawal of them."* The Complainant responded to this email on **24 August 2017** with another request asking for a *"computation reconciling the two figures"* of €10,825 and €9,477.05.

A representative of the Provider responded on **24 August 2017** stating that

> *"according to the information I was provided, the amount that was deducted was the total of the bonuses you had received. However, there was an extra cancellation by mistake and it's credited back to your account now"*.

The Complainant then contacted the Provider again on **24 August 2017** pointing out that he understood

> *"when registrating* (sic) *was that bonuses were first to suffer any losses, can I be provided with any documentation that I may have signed which indicates otherwise…It would be appreciated if all remaining monies in my…account were transferred into my bank account."*

A representative of the Provider responded on **24 August 2017** stating that in fact, the position regarding bonuses was *"the opposite"* to that stated by the Complainant. The representative stated that

> *"until you complete the required bonus volume, which is $10,000 volume for each $1 bonus received, the bonus is not a full part of your capital. You are able to use it for trades, but it's yours once the required bonus volume is completed. Until then, losses are incurred by the capital…you can find this at Bonus T&C article 8"*.

The Complainant replied on **30 August 2017** stating he did not *"recall seeing the attached terms and references at time of registration in 2010. Neither can* [he] *recall signing any documentation at that time"*. The Complainant requested that the Provider supply him with a copy of any documentation which came into being at the time of his registration. The Complainant stressed again that he would like a breakdown of the figures that resulted in the refund amount of €9,477.05.

On **31 August 2017**, the representative for the Provider stated that *"Terms and Conditions have always been present in our website and when you register, you accept to be bound by T&C and other legal documentations. The acceptance is indicated in the registration page."* The representative then supplied details of the Complainant's account at the time of closing as follows:

> *"You had 10,825.31 EUR in your account balance*
> *25 EUR inactivity fee applied on 08.02.2017.*
> *23.26 EUR inactivity fee applied on 07.07.2017.*
> *Upon your withdrawal request, a total of 1,300 EUR bonus was cancelled on 31.07.2017.*
>
> *The final amount was 9,477.05 EUR was sent to you via wire transfer",*

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On **22 September 2017**, the Complainant wrote to the Provider stating that *"it is disappointing that I haven't yet been provided with a detailed final account for my period of trading. Can you say when I can expect to receive same?"* The Complainant also stated that the following issues arose from the Provider's email of **31 August 2017**, namely:

> *"1. Treatment of Bonus: No 2 in terms of reference states: 'Bonus will be credited into your trading account on completion of your deposit'. My account was credited with the bonus at the opening of my trading account. This suggests there were different terms of reference in existence at that time. My understanding of the terms at that time was the bonus was available and would be first to cover any losses.*
>
> *2. Inactivity deductions: As far as I'm concerned I was never advised such deductions could apply. Please provide me with the documentation which entitles you to make those deductions.*
>
> *3. I would expect an adjustment in my favour in respect of having use of my monies over a seven year period.*

In this email, the Complainant stated that he thinks a return of the full capital he has invested would be a reasonable resolution to the issues he has raised. He requested a refund of €923.00.

This email was not responded to and the Complainant wrote again to the Provider on **13 October 2017**, **2 November 2017**, **4 December 2017** and **9 January 2018** requesting a response. Ultimately, a formal complaint was made to this Office on the **13 March 2018**.

The Provider replied to this formal complaint by way of email dated **26 March 2018**. On the same day, the Complainant stated that the email dated **26 March 2018** from the Provider *"does not properly deal with the outstanding issues"*.

The Complainant stated that

> *"The fact that the bonus was credited to my account at opening also supports my understanding that it would first suffer with* (sic) *any losses. As most of the work in I* (sic) *getting involved was done over the phone with the* [Provider's] *representative I cannot recall ever agreeing to any terms and conditions. I don't accept referring me to a website deals with this issue.* [The Provider] *need to provide evidence in the form of documentation approved by me agreeing terms and conditions, as I cannot recall ever doing so."*

In this email, the Complainant also states that the Provider

> *"had use of* [his] *capital of €10400 for 7 years. In closing* [his] *account* [the Provider] *did not factor in any interest in respect of it. Say averaging 2% deposit interest per annum over the period would amount to in excess of €1400 interest."*

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Furthermore, the Complainant states in this email that the Provider has not addressed the inactivity deductions and reiterates that he would be prepared to settle the outstanding issues on return of the balance of his capital of €923.

The Complainant received a further email dated **3 October 2018** from the Respondent but was still not satisfied with the response contained therein. By way of email dated **5 October 2018**, this Office requested that the Provider fully review the complaint and address the issues contained therein as per its obligations under the Consumer Protection Code 2012 (as amended) ('the CPC').

Subsequent to the receipt of the Provider's Final Response Letter dated **11 October 2018**, more recently the Complainant has stated in an email of **19 April 2019**, that he was *"given to understand from* [his] *initial discussions with* [the Provider's] *representative, when contacted on phone by him to become a live trader, was that any shortfall would be first met out of the bonus"*. He has submitted two emails dated **22** and **23 February 2011** which he claims support his contention that his online registration for a live account was completed on his behalf by a representative of the Provider. The Complainant states that he *"cannot ever recall being referred to or receiving terms and conditions"*. He states that the terms and conditions document submitted by the Provider is not relevant to his position as it refers to dollar traders and he is a Euro trader. This email also re-iterates the Complainant's arguments regarding the shortfall in the amount he was ultimately credited with from the account and the lack of interest he received on the funds he kept on deposit with the Provider.

On **18 January 2020**, the Complainant made further submissions that initially he had opened a demo account with the Provider, arising from an interest he developed after having attended a few seminars on this type of trading. He states that having opened this demo account, he was contacted shortly afterwards on the telephone, by a representative of the Provider promoting and encouraging him to open a live account. The Complainant states that *"there was no discussion on terms and conditions"*. His understanding from the phone discussion was that the bonus was available so that he could gain some experience at trading *"before his own funds kicked in"*. He further states that during the time he was a trader, most of his funds were not invested and so were available for use by the Provider. Furthermore, he clarifies that the only time he had a problem with the Provider's customer service was trying to get a response to queries raised by him at the time of the closure of the account. Finally, the Complainant states that the bonus figure material supplied by the Provider in its **18 December 2019** submissions, is not the material that was on offer at the time of his registration.

On **9 February 2020**, the Complainant made further submissions to this Office advising that as the Demo Account *"operates on fake money"* it does not carry the implications that trading with real money on the live account does. The Complainant states that he has checked the Provider's website and the only details required to set up a Demo Account are name, e-mail address and telephone number. He states that there is no box to click to confirm that Terms and Conditions have been accepted, read and/or understood.

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The Complainant states that he would like the Provider to forward a screenshot of his Demo Account application as he does not have a record of his application. The Complainant also noted that the Provider has not addressed how any appreciation/deposit interest arising on the client fund's lodged in the client asset accounts with various banking institutions is dealt with, advising that he would like to hear further from the Provider in this regard.

Ultimately, the Complainant disputes the amount he was credited with by the Provider when he closed his account, the bonus deduction and the application of inactivity fees. The Complainant states that he is particularly dissatisfied that the Provider has not addressed the deposit interest arising on his capital over a 7 year period.

A further complaint is that the Provider provided poor customer service by failing to adequately respond to the Complainant, on a number of occasions.

The Complainant wants the Provider to return a sum of €923.00 to him, which the Complainant says was wrongfully withheld from him when he closed his trading account.

The Provider's Case

Following the submission of the formal complaint to this Office, the Provider sent a response to the Complainant by way of email dated **26 March 2018** advising that

> *"the bonus conditions were clearly stated on our website at the time you registered with us"*.

The Provider states that the bonus conditions were as follows:

> *"BONUSES*
> *9.1* [the Provider] *may elect to grant a benefit to Customer by depositing bonus amounts in Customer's trading account, subject to certain terms and conditions as shall be determined by* [the Provider]*, at its sole discretion. Such bonus amounts may not be withdrawn by Customer unless Customer complies with the applicable trading requirements posted on* [the Provider]*'s website as may be amended from time to time or as communicated to Customer.*
>
> *9.2 If* [the Provider] *suspects or has reason to believe that Customer has attempted fraudulent activity in order to claim a bonus, or any promotion,* [the Provider] *reserves the right to:*
>
> > *(i) Cancel or reject the bonus promotion, and any related Trading Agent bonus, at its sole discretion*
> > *(ii) To terminate Customer's access to services provided by* [the Provider] *and/or terminate the contract between* [the Provider] *and the Customer for the provision of services,*
> > *(iii) To block Customer's Account(s) and to arrange for the transfer of any unused balance to Customer.*

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9.3 If [the Provider] *suspects or has reason to believe that Customer has abused the terms and conditions of a bonus offer by hedging positions internally (using other trading accounts held with* [the Provider]*) or externally (using other trading accounts held with other brokers),* [the Provider] *reserves the right to cancel bonuses, and any trades or profits associated with Customer's account(s).*

9.4 Bonus promotions may be restricted in certain jurisdictions.

9.5 [the Provider] *reserves the right to cancel or reject bonus promotions at its sole discretion."*

The Provider also states in this communication that

"upon your withdrawal request, a total of 1300 EUR bonus was cancelled on 31st July 2017. After all the deductions including Inactivity fees (25 EUR + 23.26 EUR) the outstanding balance of EUR 9477.05 was paid to you via wire."

[My emphasis]

The Provider made further submissions by way of email dated **3 October 2018** when it again stated that

"the bonus amounts may not be withdrawn by Customer unless Customer complies with the applicable trading requirements i.e. $10,000 volume for each $1 bonus received. Upon your withdrawal request, a total of EUR 1300 bonus was cancelled on 31st July 2017. Subsequently, all the deductions including Inactivity fees (EUR 25 + EUR 23.26) the outstanding balance of EUR 9477.05 were paid to you via wire".

The email in question provided a hyperlink to further information about bonuses and requested that the Complainant treat the email as the Provider's final response. The Provider also sent a Final Response Letter dated **11 October 2018**, to the Complainant stating that it has acted in accordance with its Terms and Conditions, which the Complainant stated that he read, understood and accepted as part of the registration process. The Provider stated that the following articles of its Terms and Conditions permit it to charge inactivity fees and not permit the withdrawal of bonuses where the trader has not reached the required level of trading:

"36.1 Customer acknowledges that the Customer's trading account may be subject to inactivity fees unless prohibited by law. After 3 consecutive months of non-use ("Inactivity Period"), and every successive Inactivity Period, an inactivity fee will be deducted from the value of the Customer's trading account. This fee is outlined below and subject to client relevant currency-based account:
Inactivity Fee:
USD Account: $50
EUR Account: €50
GBP Account: £50

Applicable fees are subject to change periodically.

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36.2 Customer acknowledges that the Customer's trading account may be subject to an annual administration fee unless prohibited by law. After 12 consecutive months non-use ("Annual Inactivity Period"), an administration fee will be deducted from the value of the Customer's trading account. This fee is outlined below and subject to client relevant currency-based account: This is to offset the cost incurred in making the service available, even though it may not be used.

Administration Fee:

USD Account: $100
EUR Account: €100
GBP Account: £100

Applicable fees are subject to change periodically.

9.1 [the Provider] *may elect to grant a benefit to Customer by depositing bonus amounts in Customer's trading account, subject to certain terms and conditions as shall be determined by* [the Provider]*, at its sole discretion. Such bonus amounts may not be withdrawn by the Customer, unless Customer complies with the applicable trading requirements posted on* [the Provider's] *website as may be amended from time to time or as communicated to Customer"*.

The Provider states in the Final Response Letter that the bonus was subject to the following condition:

"The bonus amounts may not be withdrawn by Customer unless Customer complies with the applicable trading requirements i.e. €10,000 volume for each €1 bonus received."

The Provider then supplied the following computation of the Complainant's account balance:

Date	**Details**		**Balance**
10/10/2016	Balance		€10,825.31
08/02/2017	Inactivity Fee	€25	
07/07/2017	Inactivity Fee	€23.26	
31/07/2017	Cancel Bonus Adjustment	€1,300	
Total Debit		€1,348.26	
31/07/2017	Final Balance		€9,477.05

In its Final Response Letter, the Provider also apologised for not responding to a number of the Complainant's queries in a timely manner.

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In its submissions to this Office on **18 December 2019**, the Provider addressed the issue raised by the Complainant concerning the bonus and stated that

> *"*[B]*onuses are cancelled and removed from clients' trading account if the minimum trading volume are not met under the bonus Terms and Conditions, i.e. a bonus can only be withdrawn after the volume is met, if it is not met then the bonus is cancelled."* The Provider states that the *"Welcome Bonus Terms and Conditions were set out from the outset"*. The Provider further states in this letter that *"fees and/or charges are deducted from clients' accounts when they arise. In this instance, see evidence of deduction of inactivity and administration fees in the Complainant's account statement."*

The Provider states that it requires its Terms and Conditions to be accepted electronically during the online registration process. The Provider states that clients are required to click a checkbox that they have read, understood and accepted the Terms and Conditions. The Provider states that the Terms and Conditions inform clients of the Trading Conditions and Charges.

This Office had sought clarification from the Provider regarding the Terms and Conditions that applied to this complaint because two differing sets of Terms and Conditions had been supplied during the course of the investigation of this complaint. As part of its **18 December 2019** submissions, the Provider attempted to clarify the position concerning the Terms and Conditions. It stated that the second set of Terms and Conditions is the set of Terms and Conditions that apply to this complaint and that these Terms and Conditions were effective *"from 26.11.2015"*. The Provider stated that its Final Response Letter contained *"a typographical error"* and the applicable clauses to the dispute are clauses 37.1 and 37.2 of the second set of Terms and Conditions, as opposed to Clauses 36.1 and 36.2, as had been suggested. The Provider also stated in these **18 December 2019** submissions that *"Irish law governs the contract"* and it refers to clause 46.1 of the second set of Terms and Conditions.

The Provider states that the Complainant's complaint regarding the deposit interest arising on his capital, over the 7 year period he had an account with the Provider *"has no merit"*. The Provider states that *"there is no interest paid on brokerage/investment accounts"* and that is made clear in its Terms and Conditions under clause 11.2 which states:

> *"Interest is not payable by* [the Provider] *on client funds deposited by Customer"*.

The Provider goes on to state that *"brokerage/investment accounts hold both money and financial instruments that allows clients to invest/trade in capital markets. No interests are paid on brokerage/investment accounts because the money in these accounts are used by the client to invest/trade in the capital markets with the aim of making a profit."*

The Provider notes in that regard that client funds are held in accordance with client asset regulations as required by firms authorised by the Central Bank of Ireland. The Provider submits that these client asset regulations require that all client assets be held separately from the Provider's own assets.

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The Provider states that it refutes the Complainant's contention that it provided poor service in respect of its failure to respond to a number of communications. It states that it provided an explanation of the deduction from the Complainant's account via email on **31 August 2017** and *"in addition, all information required was in our Terms and Conditions and screenshot which the Complainant had"*. Furthermore, the Provider states that *"Unfortunately, the Complainant did not follow the procedure for making a complaint"* and as a result *"the complaint was not handled in line with our Complaints Handling Process"*.

The Provider states that *"the Complainant is attempting to depict a story of a naïve trader who is unaware of the trading industry despite trading for a number of years and that he did not receive all necessary information."* The Provider states that it has demonstrated that the Complainant received all necessary information before opening his account via the Terms and Conditions which the Complainant stated that he read, understood and accepted as part of the registration process. The Provider also notes that the Terms and Conditions are available on its website 24/7.

On **31 January 2020**, the Provider made further submissions to this Office in response to the Complainant's further submissions dated **18 January 2020**. It stated that

> *"regardless of whether a client wants to open a demo account or a live account, our online registration requires and collects the same information along with requiring clients to click a checkbox that they have read, understood and accepted the Terms and Conditions. By clicking the checkbox and calling attention to the Terms and Conditions, which affords the client the opportunity to review the Terms and Conditions, the client demonstrates agreement to the Terms and Conditions"*.

In essence, the Provider states that the amount received by the Complainant reflects the Complainant's account balance minus any charges and bonuses due to the required level of trading having not been reached on the account.

The Complaint for Adjudication

The primary complaint is that the Provider did not correctly administer the Complainant's account, particularly in relation to the payment of the balance of the account, on closure. There is a secondary complaint of poor customer service and poor communication with the Complainant.

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.

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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 **18 August 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 relation to jurisdiction, this Office wrote to the Provider on **14 June 2019** noting that the Terms and Conditions booklet referred to in the Provider's final response letter dated **11 October 2018** stated that the contractual agreement between the parties was governed by the laws of England. On **1 July 2019**, a representative for the Respondent reverted to the Office enclosing a different, second set of Terms and Conditions and noted that clause 46.1 of this second set of Terms and Conditions states that Irish law governs the contract.

I note that the first set of Terms and Conditions state at paragraph 44 entitled **Governing Law and Jurisdiction** that:

> *"This Agreement, the rights and obligations of the parties hereto, and any judicial or administrative action or proceeding arising directly or indirectly hereunder or in connection with the transactions contemplated hereby shall be governed by, construed and enforced in all respects by the laws of England and shall be held within the venue determined by* [the Provider]*, at its sole discretion. Customer consents and submits to waive ay right that it may have to transfer or change the venue or any such action or proceeding. Customer further consents that any claim arising directly or indirectly hereunder or in connection with the transactions contemplated hereby if initiated by Customer…will be brought by it and resolved exclusively in the competent courts located within UK."*

I further note that paragraph 13 of the first set of Terms and Conditions deals with **Complaints** and states that:

> *"…The complaints procedure of* [the Provider] *follows the requirements outlined in the Irish Consumer Protection Code. Our complaints procedures apply in respect of all services provided by* [the Provider] *in relation to all E.U. clients who trade with* [the Provider].

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> *If, after having reviewed the customer complaint you are still not satisfied, you can refer the matter to the independent financial services ombudsman…"*

Paragraph 13 then provides details for this Office.

I note that the second set of Terms and Conditions state at paragraph 46 entitled **Governing Law and Jurisdiction** that:

> *"This Agreement, the rights and obligations of the parties hereto, and any judicial or administrative action or proceeding arising directly or indirectly hereunder or in connection with the transactions contemplated hereby shall be governed by, construed and enforced in all respects in accordance with the laws of Ireland and* [the Provider] *and the customer hereby irrevocably submit to the exclusive jurisdiction of the Irish Courts."*

I further note that paragraph 47 of the second set of Terms and Conditions under the title **Binding Effect**, states at Sub-Section 3 that the:

> *"Customer hereby ratifies all transactions with* [the Provider] *effected prior to the date of this Agreement, and agrees that the rights and obligations of Customer in respect thereto shall be governed by the terms of this Agreement."*

I further note that the first set of Terms and Conditions is set out in the form of a Customer Account Letter between the Complainant and the Provider (before its change of name in February 2014).

The second set of Terms and Conditions is set out in the form of a Customer Agreement between the Complainant and the Provider "**Effective from 26.11.2015 until Further Notice**".

I note that the Provider has stated in its submissions to this Office dated **18 December 2019** that it is

> *"an online broker that requires* [its] *Terms and Conditions to be accepted electronically during* [its] *online registration process"*

The Provider supplied a screenshot as follows:-

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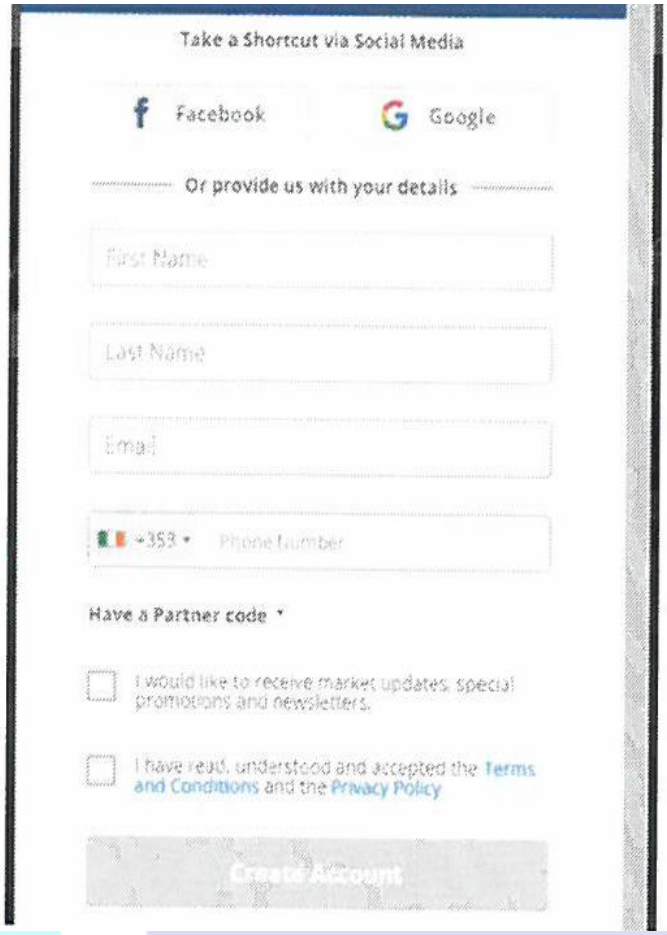

I note that the Complainant has stated on numerous occasions that he *"cannot ever recall being referred to or receiving terms and conditions"* and the Provider has provided no direct evidence which shows that it referred the Complainant to either set of Terms and Conditions. The Provider has also not supplied any direct evidence to counter the contention by the Complainant that it was a representative of the Provider who registered the Complainant for a live account following a telephone conversation in **February 2011**.

The email dated **22 February 2011** from the representative of the Provider to the Complainant, offering congratulations to him on his new trading account, supports the contention that a telephone conversation took place between a representative of the Provider and the Complainant, during which "*an extremely generous bonus"* was *"discussed*".

It is disappointing that there is, however, a dearth of evidence available as to those communications between the parties <u>at the time of the opening of the live account</u>. No adequate evidence in that respect was made available by the Provider in reply to the Summary of Complaint sent by the FSPO to the Provider in November 2019, which requested, amongst other things, a copy of any correspondence sent to the Complainant and/or documents made available to the Complainant, at that time, to notify him of the terms and conditions applying to bonuses and fees and charges on the account.

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The Provider instead appears to rely upon the fact that the terms and conditions were available on its website "*24/7*". It is also disappointing that the Provider has not indicated any efforts made to communicate the up to date set of terms and conditions to the Complainant from November 2015 onwards.

I accept the submission of the Provider that the relevant Terms and Conditions are available on its website 24/7 but this does not demonstrate that the Provider brought the Terms and Conditions to the attention of the Complainant at the time the Complainant entered into the agreement nor does it obviate the need for the Provider to meet its responsibility in that regard. In my opinion, it is possible that the Complainant was made aware of the details of the terms and conditions on the Provider's website, at the time of the creation of the live account, if it was he (rather than a representative of the Provider) who clicked on the relevant acceptance link. Disappointingly however, the set of terms and conditions which were made available by the Provider in evidence at the outset of the investigation of this complaint, contained clauses which included one specifying that the parties' relationship was subject to a provision at 44 entitled "*Governing Law on Jurisdiction*", referring to the governing laws of England, which seems unlikely to be correct.

Whilst I note that different terms and conditions came into effect in November 2015, it remains entirely unclear as to how the provisions of those altered terms and conditions were brought to the attention of the Complainant at that time.

In this regard, I note that the Provider is under an obligation pursuant to provision 2.6 of the CPC to *"make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer"* and is under a further obligation pursuant to provision 4.22 of the CPC to *"provide each consumer with the terms and conditions attaching to a product or service, on paper or on another durable medium, before the consumer enters into a contract for that product or service"*.

There is no objective evidence available to this office as to how the Complainant was initially made aware of the Terms and Conditions of the trading account, if at all. Indeed, it remains unclear as to why these Terms and Conditions referred to the laws of a different jurisdiction. Likewise, it is equally unclear how or when the Provider placed the Complainant on notice of the changed Terms and Conditions in November 2015, if it did so at all.

More specific conditions relating to a "welcome" bonus have been submitted to this Office in the form of screenshots and print outs. As with the general Terms and Conditions, the Provider has put forward no adequate evidence to suggest that the Complainant was made aware of these Terms and Conditions prior to the creation of the account. Indeed, even the terms and conditions which came into effect in November 2015, whilst making reference at Provision 9 to "bonuses", and whilst containing some information, do not include the detail which is referred to in the screenshot supplied in evidence by the Provider, that the execution of a minimum trading volume of 10,000 base instruments for every $1 bonus, must be completed within a 12 month period. Indeed, as the Complainant points out the reference to dollars in the screenshot, appears inappropriate, as the account he held was one which traded in Euros.

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The Complainant says that he understood when on the phone with a representative of the Provider in **February 2011** *"that bonuses were first to suffer any losses"* but the absence of any audio evidence or other records from the Provider is such that it is impossible to determine at this remove as to what discussions ensued between the parties at that time.

I note that both sets of Terms and Conditions contain provisions that deposit interest will not be paid on client funds lodged to trading accounts. It seems to me that the Complainant did not familiarise himself with the contents of the terms and conditions of the trading account, whether or not they were drawn to his attention as being available on the website. Quite apart from his failure to do so, I am satisfied that the Complainant can have had no expectation of securing interest from the Provider, given that nowhere was any such arrangement documented.

In circumstances where the Provider is regulated by the Central Bank of Ireland, I am satisfied that it is obliged to comply with the provisions of the Central Bank's Consumer Protection Code. I am also satisfied that the Provider's obligations in terms of maintaining records, have not been adequately met. In that regard, the CPC 2012, as amended, requires as follows:-

> 11.5 A ***regulated entity*** must maintain up-to-date ***records*** containing at least the following:
>
> a) a copy of all documents required for ***consumer*** identification and profile;
> b) the ***consumer***'s contact details;
> c) all information and documents prepared in compliance with this Code;
> d) details of products and services provided to the ***consumer***;
> e) all correspondence with the ***consumer*** and details of any other information provided to the ***consumer*** in relation to the product or service;
> f) all documents or applications completed or signed by the ***consumer***;
> g) copies of all original documents submitted by the ***consumer*** in support of an application for the provision of a service or product; and
> h) all other relevant information and documentation concerning the ***consumer***.
>
> [My emphasis]
>
> 11.6 A ***regulated entity*** must retain details of individual transactions for six years after the date on which the particular transaction is discontinued or completed. A ***regulated entity*** must retain all other ***records*** for six years from the date on which the ***regulated entity*** ceased to provide any product or service to the ***consumer*** concerned.

In addition, whilst I accept that the Provider responded promptly to queries raised in relation to the Complainant's account between **24 August 2017** and **31 August 2017**, it is clear that the Provider failed to address the substantive issues raised by the Complainant and indeed it also failed to respond to emails from the Complainant on **13 October 2017**, **2 November 2017**, **4 December 2017** and **9 January 2018**. In fact, it was only after the Complainant made a complaint to this Office that the Provider began to re-engage with the issues raised by the Complainant.

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I am particularly disappointed with the Provider's suggestion that its failure to handle the Complainant's dissatisfaction in line with the Provider's complaints handling process, arose owing to a failure on the Complainant's part to "*follow the procedure for making a complaint*". I am entirely satisfied that the Complainant made his dissatisfaction abundantly clear to the Provider and I take the view that the failure on the part of the Provider to comply with its complaints handling obligations, arose as a result of the Provider's own failures, rather than any failure on the part of the Complainant.

As a result, I am satisfied that the Provider breached provision 2.8 of the CPC by not acting *"speedily, efficiently and fairly"* in handling the complaint. The Provider also failed to adhere to provision 10.7 of the CPC by not seeking to resolve the complaint raised by the Complainant and has not demonstrated satisfactorily that it has a written procedure for the handling of complaints in place pursuant to 10.9 of the CPC. There is no evidence before this Office which would lead me to accept the Provider's contention that *"the Complainant did not follow the procedure for making a complaint"* and as a result *"the complaint was not handled in line with our Complaints Handling Process"*.

On the basis of the evidence before me, I am satisfied that the terms and conditions governing the relationship between the parties which came into effect from November 2015 onwards, were such that the Provider was entitled to reclaim the bonus payment as the Complainant had not met "*the trading requirements posted on* [the Provider's] *website as may be amended from time to time or as communicated to the customer*". As those specific trading requirements remain unclear, as indeed it remains unclear as to whether they were in fact amended from time to time, it is impossible for this office to determine whether or not the Provider was correct to decide that the Complainant had not met those trading requirements.

In my opinion, the Provider has a significant case to answer to the Complainant for the manner in which it has failed to keep adequate records of its interactions with him, for having no evidence to offer as to how it notified the Complainant of the relevant Terms and Conditions of the trading account at the time when the "*live*" account was put in place or subsequently in November 2015, or how it notified the Complainant of the "*trading requirements*" which are referred to and, in addition, for the manner in which it failed to meet its obligations to address the Complainant's complaint in early course.

In those circumstances, I take the view that it is appropriate to substantially uphold this complaint and to mark that decision I consider it appropriate to direct the Provider to make a compensatory payment to the Complainant in the sum of €800, to an account of the Complainant's choosing.

I also intend to refer this matter to the Central Bank of Ireland given my concern regarding the Provider's apparent failure to meet its obligations pursuant to the Consumer Protection Code to keep adequate records of its interactions with the Complainant or to recognise the dissatisfaction which he expressed as a complaint within the meaning of the CPC.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld on the grounds prescribed in ***Section 60(2)(b) &(g).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €800, 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.

MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

10 September 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.