



<u>Decision Ref:</u>	2020-0378
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Accessibility issues Delayed or inadequate communication Failure to provide correct information
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint relates to the Complainant's Approved Minimum Retirement Fund (AMRF).

The Complainant's Case

The Complainant had a pension fund administered by the Provider, a Broker. The Complainant maintains that in late 2015, upon reaching the age of 60, she sought advice from the Provider as to the most efficient and appropriate manner to access the fund which had matured. The Complainant states that she was advised of the possibility of taking a portion (25%) of the fund as a cash lump sum and reinvesting the balance (75%). The Complainant asserts that she made it clear, on more than one occasion, that there was a possibility that she would need access to the re-invested funds at short notice in circumstances where she was renovating a holiday home. The Complainant contends that the Provider "*did not give any indication that there would be a problem in drawing down this fund*". The funds were subsequently invested in an Approved Minimum Retirement Fund (AMRF).

The Complainant states that in August 2016, she contacted the Provider seeking access to the re-invested funds. The Complainant further states that the Provider advised her, at this point, that she would gain access to the funds in "*3 to 5 working days*". The Complainant states that in late November/early December 2016, she was finally advised that she would not be able to access the funds. The Complainant was subsequently advised that she would not be able to access the funds until she "*was in receipt of a pension of €12,700 pa or aged 75*".

The complaint is that the Provider gave deficient advice to the Complainant as regards the investment of her pension funds. The Complainant wants to be given access to her invested funds.

The Provider's Case

The Provider maintains that, at the point of investment in the AMRF, the Complainant was advised that this investment *"could not be accessed until Age 75, although 4% of the fund could be taken on an Annual Basis, or until you had a Guaranteed Income of €12,700 per annum, at which time the Approved Minimum Retirement Fund could be converted to an Approved Retirement Fund and you could then access this as Taxable Income"*. The Provider asserts that the Complainant was *"agreeable to proceed on this basis"*.

The Complaint for Adjudication

The complaint for investigation is that the Provider gave deficient advice to the Complainant as regards the investment of her pension funds.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 7 October 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.

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Following the issue of my Preliminary Decision, the Complainant advised this Office under cover of her e-mail dated 13 October 2020, that she was happy to accept the proposed solution of compensation of €6,000.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Analysis

In this case, the Provider invested that portion of the Complainant's pension fund which she did not encash immediately into an Approved Minimum Retirement Fund (AMRF). There are certain Revenue rules with regard to the operation of retirement funds of this nature.

Specifically:

An individual wishing to have the balance of his or her pension fund, after taking any retirement lump sum, paid to him or her or transferred to an ARF, must, if under 75 years of age, have a minimum guaranteed annual pension income ("specified income") for life in payment at the time an ARF option is exercised in order to avoid having to put money into an Approved Minimum Retirement Fund or purchase an annuity.

...

Where the specified income requirement is not satisfied in the case of an individual aged under 75, he or she must, after taking a retirement lump sum, transfer the lesser of the balance of the pension fund or €63,500 to an AMRF or use it to purchase an annuity (or a combination of both).

The specified income must be in the minimum amount of €12,700 annually. Section 19(2)(b) Finance Act 2014 introduced a measure, effective from 1 January 2015, which allows for the payment or transfer on one occasion only in any tax year of up to 4% of the value of the assets in an AMRF to the AMRF owner however any such transfer is taxable. This is the maximum that can be withdrawn from an AMRF unless the 'specified income' requirement is met in which case the AMRF can be transformed into an ARF at which point the entirety of the funds become available subject to taxation and early encashment charges.

In the case of the Complainant, the sum invested (€57,049.82) was the entirety of the balance remaining in her pension fund after the lump sum had been encashed. Therefore, pursuant to the Revenue rules, the maximum amount which the Complainant is able to realise in any given year is 4% of the value of the invested funds. This will remain the position until the Complainant reaches the age of 75 unless she comes into receipt, prior to that point, of a specified income or pension in the minimum amount of €12,700 annually.

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The issue in this complaint relates to instructions communicated to the Provider by the Complainant and to the advice given to the Complainant by the Provider in or around the time that the AMRF was purchased. The Complainant states that she made clear to the Provider on multiple occasions that she might need access to the re-invested funds at short notice. Such a requirement would render an AMRF unsuitable albeit that, in the absence of a 'specified income', the Complainant may have had little in the way of options. The Provider, on the other hand, insists that all the features and limitations of an AMRF were clearly communicated to the Complainant who was *"agreeable to proceed on this basis"*. The Complainant does not accept this.

There is a lack of documentary evidence, available to me, as to what was discussed between the parties prior to the investment of the Complainant's funds. I will now set out some key statements from what documentary evidence is available to me.

First is correspondence from the Provider dated 15 October 2015 addressed to the Complainant and referred to as a *"Statement of Suitability"*. This correspondence begins with the statement:

"Important Notice- Statement of Suitability"

This is an important document which sets out the reasons why the product(s) or service(s) offered or recommended is/are considered suitable, or the most suitable, for your particular needs, objectives and circumstances"

The Provider's representative by way of introduction writes:

"Thank you for taking the time to meet with me and discuss your financial planning requirements. Following my research during which I carried out a fair analysis of the market, I have identified AMRF option A from [named third party provider] as the most suitable product to meet your current requirements"

The correspondence then goes on to set out the Provider's understanding as to what are the *"Needs and Objectives"*, *"Personal Circumstances"* and *"Financial Situation"* of the Complainant. The above sections do not note that the Complainant was in the process of renovating her holiday home, which she states she informed the Provider of, and which was confirmed to have been known by the Provider in its final response letter, which states:

"as you were renovating a holiday home in [named location]"

The renovation of a property could plausibly be an event which would impact not only an individual's personal circumstances but also their financial situation. Such a project could reasonably support the idea that the Complainant would be seeking a suitable product that would allow access to the funds.

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The drafter of the correspondence under the heading “*Suitability and recommendations*” sets out the reasoning for the Provider’s recommendation of the AMRF:

“Based upon the information you have provided to us, we recommend that you invest in an approved minimum retirement fund (AMRF).

I recommend the approved minimum retirement fund (AMRF) because it is specifically designed for individuals like you [who] do not have a guaranteed pension income for life of at least EUR 12,700 a year and have not used EUR 63,500 to buy a pension for life. The plan will allow you to manage your retirement fund and make withdrawals on any return gained from the fund.

...

Based upon the information you have provided to us, we recommend the AMRF because it is suitable for investors who wish to manage their retirement fund and need to make withdrawals on any return gained from their fund”.

I note that the above statements make reference to withdrawals from the funds, with the qualification that it will allow “*withdrawals on any return gained from their fund*”. However, the above statements do not make reference to limits or to the Revenue rules, which came into effect from 1 January 2015 that set out that the maximum amount which the Complainant would be able to realise in any given year is 4% of the value of the invested funds.

A final qualification is offered on the final page of the correspondence under the heading “*Product Guarantees and Associated Risks*”. The above statements on withdrawals, appears to be further qualified with the following two statements:

“This product is not suitable for regular income withdrawals which can deplete the fund”.

“The original capital invested is not available until at least age 75”.

Below these statements the Complainant’s signature is requested. Notably the copy of this correspondence furnished to this Office, is unsigned by the Complainant and marked on the front page with the handwritten note “*Execution Only*”.

The next two documents furnished by the Provider, were issued by a named third party provider, in which the funds were invested.

The first document is the “*Policy Schedule*”. On the first page of this document the named third party provider draws attention to the existence of the Revenue restrictions, but does not provide details on them:

“An Approved Minimum Retirement Fund payable on the death of the insured and equal to the fund value subject to the Policy Conditions.

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Revenue Restrictions apply to withdrawals before your 75th Birthday”.

The next document is correspondence issued to the Complainant by the named third party provider dated 30 November 2015. The cover page of this correspondence states:

“I attach an important notice which should be read by you. If you have any queries regarding any aspect covered in the notice please contact us or your Financial Advisor as soon as possible”.

On page one of this correspondence under the heading *“MAKE SURE THE POLICY MEETS YOUR NEEDS”* the named third party provider gives details on an ARF and AMRF.

Towards the end of the page it states:

“if you do not have an income of €12,700 p.a., the first €63,500 of the balance must be either used to buy a pension or be invested in an Approved Minimum Retirement Fund (AMRF). From 1 January 2015, you will be able to withdraw up to 4% of the value of your ARMF each year. You will be taxed on withdrawals from your ARMF. You can use your AMRF to buy an annuity at any time. At 75 or when you become in receipt of the guaranteed pension income of €12,700 a year, your ARMF becomes an ARF. At this stage you can take all your money or leave it invested...”

Towards the end of page two of the correspondence from the third party provider, it repeats the statement that:

“From 1 January 2015, you will be able to withdraw up to 4% of the value of your ARMF each year. You will be taxed on withdrawals from your ARMF. You can use your AMRF to buy an annuity at any time. At 75 or when you become in receipt of the guaranteed pension income of €12,700 a year, your ARMF becomes an ARF. At this stage you can take all your money or leave it invested”.

From the documentary evidence furnished to this Office, it appears that the above statements were the first time that the Revenue restrictions were detailed in correspondence to the Complainant. While I note the Provider has submitted that it had fully explained the limitations of the ARMF and the implications of the Revenue restrictions, it has not furnished documentary evidence to support this assertion.

The Complainant has submitted a typed document which she states records the content of text messages between herself and the Provider’s Agent as follows:

“The following is a record of the text messages with [Provider’s Agent “L”, Provider (mobile number) and [Complainant (mobile number redacted)] regarding the early encashment of a fund handled by L/[third party Provider].

11th August 2016 – [Complainant to L]

/Cont’d...

"Hi [L] [Complainant] here. I will need to take my pension money in the next few weeks. Have decided to put it into our holiday home renovation. Away on hols in the morning for 10 days. Talk soon [Complainant]"

11th August 2016 – reply from [L]

"No problem [Complainant]. Give me a call when you return and we can get together. Enjoy your holidays"

8th September [Complainant] to [L]

"[L] I'm back from holidays and ready to go ahead with withdrawal of my pension fund whenever suits you sometime next week. Thanks [Complainant]"

8th September reply from [L]

"I am on annual leave myself until September 21st. Will contact you on my return to arrange paperwork"

25th October text from [Complainant]

"Hi [L]. Need to get paperwork completed on my pension payout. Away all next week. Text me a time and date. Thanks [Complainant]"

26th October reply from [L]

"Hi [Complainant], I have requested the necessary papers be sent to you by [third party provider]. When you receive same just let me know and we can get together to complete. Belated Happy Birthday, Regards [L]."

8th November [Complainant] to [L]

"Just home from holidays. No sign yet of the paperwork!!!! Regards [Complainant]"

8th November reply from [L]

"Hi [Complainant], I am away myself until next Tuesday. However, I spoke to [third party provider] and they have agreed to accept just a written instruction from yourself saying you wish to encash the total value of your fund. If you send it to me I will do the rest, Regards [L]."

22nd November to [L]

"Hi [L], Can you confirm receipt of my instruction by post last week. Can you also confirm my closing balance. Many thanks [Complainant]"

/Cont'd...

22nd November reply from [L]

"Hi [Complainant], Yes I emailed your letter to [third party provider] last Wednesday and your funds should be through in the next few days. I will have the final figure hopefully tomorrow. Regards [L]"

24th November from [L]

"Hi [Complainant], [third party provider] are looking for proof of your current Annual income as this is a Revenue requirement. Could you forward same to me at your convenience. Regards [L]"

28th November [Complainant] to [L]

*"Hi [L] checking that you received my email of **27th November** giving details of my salary details as requested. Thanks [Complainant]"*

28th November reply from [L]

"Got it now [Complainant]. Will send me (sic) to [third party provider] in the morning."

9th December [Complainant] to [L]

"[L] I don't suppose that you have any news for me!!! [Complainant]"

9th December reply from [L]

"Hi [Complainant], I have put a call into [third party provider] and am waiting a response. Will get back to you as soon as I hear from them, Regards"

12th December [Complainant] to [L]

"[L]. Any update from [third party provider]. Really getting anxious!!!! [Complainant]"

12th December reply from [L]

"[Complainant], I checked with [third party provider] and they have heard nothing so I called the Revenue Section dealing with this and they will be in contact with [third party provider] "shortly". They would not give me any further information and I have asked [third party provider] to try and expedite the matter I will get back to you as soon as I hear from them. Regards [L]."

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15th December [Complainant] to [L]

"[L]. Any news yet. I am really very cross at the length of time it is taking to get My money returned to me!! I can't really see what the Revenue with it (sic) other than my tax liability Please put pressure on the relevant parties. Revert back to me with details ASAP [Complainant]"

16th December reply from [L]

"Hi [Complainant] I am waiting for [third party provider] to open this morning and I will revert to you as soon as I have an update."

16th December [Complainant] to [L]

"Have you spoken with [third party provider]?? [Complainant]"

16th December reply from [L]

"Yes [Complainant], they have promised to be back to me before 2.00 pm. Will let you know shortly."

"[Complainant] I sent you an e-mail that I received from [third party provider] at 1.50 today."

19th December [Complainant] to [L]

"[L] Can you meet us sometime tomorrow. Please confirm [Complainant]."

19th December reply from [L]

"[Complainant], Unfortunately following your e-mail to [third party provider] and the reference to the Ombudsman, I am precluded from having any further discussion on the matter until the process has been resolved"

19th December [Complainant] to [L]

"[L], We at the very least need to have a discussion with you. It appears that we have been given a totally inappropriate policy. The Ombudsman reference was purely to see if we could move the matter with [third party provider] more quickly."

[Emphasis added]

While I have not been provided with screen shots or conclusive evidence of the content of these messages, in the absence of detailed records from the Provider, I have no reason to doubt the Complainant's recollection and record of events.

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In addition, in support of the Complainant's position I have been provided, in evidence, with copies of the emails referred to in the texts. I note that the content of the emails corresponds with the content of the text messages as outlined above. Furthermore, this record of the content of texts the Complainant states was exchanged between the Complainant and the Provider was submitted to this Office and exchanged with the Provider and the Provider did not challenge its accuracy.

It must be noted that the correspondence issued by the Provider at two points states:

"The plan will allow you to manage your retirement fund and make withdrawals on any return gained from the fund".

I have not been provided with any evidence that the Provider highlighted the existence of the Revenue restrictions, or fully or clearly detailed the limitations placed on the withdrawals. Indeed, I believe it was possible that the warning that *"this product is not suitable for regular income withdrawals which can deplete the fund"*, could be taken by the Complainant to mean that regular withdrawals would, in fact, be possible.

It would appear that the Provider has relied on the statements contained in the named third party provider correspondence to detail, to the Complainant, the precise restrictions/limitations that would apply to the ARMF. The Provider has not provided any documentary evidence that it informed the Complainant of the restrictions itself. I do not believe this was reasonable.

I accept that the Complainant, having been issued with such documents, ought to have been aware that while there was potential access to some funds in line with the revenue restrictions, the initial invested amount would not be accessible until she reached the age of 75 or secured a yearly income of €12,700.

While I accept that the statements contained in the correspondence issued by the named third party provider did sufficiently highlight the restrictions on withdrawals that are attached to an AMRF, I believe this did not absolve the Provider from its responsibility of informing the Complainant of this very important fact when selling her the AMRF.

The Consumer Protection Code 2012 (CPC) requires that a regulated entity must, among other things, ensure that in all its dealings with customers and within the context of its authorisation it:

Act honestly, fairly and professionally in the best interests of its customers and the integrity of the market;

Act with due skill, care and diligence in the best interests of its customers; and

Make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.

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I believe the Provider fell short of these standards in its dealings with the Complainant in terms of the information provided to her in relation to the sale of the AMRF. I believe this has caused the Complainant the considerable inconvenience of being unaware that she would not have access to her investment until she reaches the age of 75 or is in receipt of a guaranteed income of €12,700 per year. For this reason, I propose to substantially uphold this complaint.

I note the Complainant is seeking to be provided with access to her invested fund. I do not believe this is either an appropriate or a possible remedy. I believe the appropriate remedy is that I direct the Provider to pay a sum of compensation.

For the reasons outlined in this Decision, I substantially uphold the complaint and direct the Provider to pay a sum of €6,000 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) (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 €6,000, 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**

29 October 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.

