



<u>Decision Ref:</u>	2020-0471
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Mis-selling (investment) Delayed or inadequate communication Failure to provide correct information
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the administration of an investment made by the Complainant with the Provider.

The Complainant's Case

The Complainant invested €99,000 with the Provider in 2017.

The Complainant submits that he received a phone call from the Provider in **July 2017** notifying him that his deposit account was due for renewal and interest rates were very low at the time. He submits that the Provider informed him that it had alternative investment products on offer which were more attractive and earning better returns and that time.

The Complainant says he explained to the Provider that the security of his savings was more important to him than interest earnings. The Complainant submits that the Provider requested that he visit its offices to discuss the investment and he says he refused to meet on that occasion. He says the Provider suggested that a member of its staff could call to his home and he declined this offer. The Complainant submits that the Provider suggested a third location and he agreed to meet at that location. He says the Provider gave him charts and graphs detailing the investment product and past performance over a period of the previous 10 years.

The Complainant submits that he declined the investment because he had previously had bad experiences of investments with third party providers. The Complainant submits that the Provider assured him that their offer was different and had proven positive growth over previous 10 years and was 95% secure. He says that he reiterated to the Provider that the security of his savings was an absolute requirement and earnings were not a critical consideration to him. He submits that the Provider reassured him that it was a very successful and popular product and it was being offered to customers as an alternative to deposit accounts.

The Complainant submits that he asked the Provider at that time if he invested his savings in the investment product would there be a sudden downturn in the value of his investment and he says that it reassured him that based on past performance and 95% capital protection, this would not occur. However, the Complainant says that the value of his investment has decreased – excluding the first 3 months of the investment. He submits that his investment has made a loss of €8,000 in less than two years. The Complainant submits that he is retired and the money he had invested was very important to him and to his financial security.

The Complainant submits that he contacted the Provider requesting details of where his funds were / are invested and about how these losses occurred. He contends that the Provider has refused to provide him with this data and claims it is not obliged to do so.

The Complainant states that he has instructed the Provider not to make any *“further unauthorised deductions”* or *“investments from his account”*.

The Complainant submits that the Provider failed/refused to provide him with information regarding his investment which he requested, he states, in order to establish how it handled his money/funds and where the losses have occurred. He says he cannot see much information, from what has been provided to him, in relation to the investment product. He says that it does not appear the Provider furnished him with the terms and conditions attaching to the investment product. The Complainant says, having reviewed all documentation provided to him in July 2017 he cannot find a copy of the investment fund’s terms and conditions and there was no copy included with the documents he received in 2019.

The complaint is that the Provider mis-sold him an investment product.

The Provider’s Case

The Provider received a complaint from the Complainant on **19 July 2019** and issued a Final Response Letter dated **30 July 2019**.

The Provider stated that the Complainant originally invested €99,000 and that it understood his disappointment with the performance of the markets, which impacted the fund’s performance.

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It stated that the intention of investing in funds is to provide a superior return to deposit accounts over a longer term. It notes that the value of the fund had reduced since his initial investment due to market volatility and that while the fund is not locked away for a fixed period, and he could access some or all of his funds at any time, as with all investment products the aim was/is for that these short term market corrections are evened out over a longer term, thus providing a better return.

The Provider states that it is satisfied that the Complainant was provided with all the relevant regulatory information prior to investing in the fund and on that basis, it is satisfied he was not misled prior to investing in the fund. It states that it is therefore not in a position to redeem the Complainant's investment for the €99,000 originally invested.

The Provider states that if the Complainant wishes to redeem his investment at its current value, he can do so by arrangement with the Provider.

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 26 November 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.

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

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Account notes from **March 2016** up to **July 2017** show that the Complainant had consistently told the Provider he was not happy with the rate of return he was receiving on his deposit account funds. At various stages he had asked for a renegotiation of the interest rates (which the Provider was unwilling to engage in), and told the Provider he would be "shopping around".

On **5 July 2017** the Complainant had a telephone call with the Provider wherein he was advised that the 12 month fixed term deposit account that his money was in did not allow him to lodge money into it during the 12 month term, although he can withdraw money from it. The Complainant asked "*So how can I invest this money with [the Provider]?*" He was told he could open a new account and then told about different types of accounts available.

The Complainant asked whether the Provider had an office anywhere, and was told there were offices in various named locations. The Complainant asked about a particular office.

The Provider's agent asked whether the Complainant had considered options other than deposit accounts. The Complainant asked for more information. It was explained that investment options were available. The Provider's agent told the Complainant that he could not give a rate of return into the future, but that the lowest risk option had yielded 4.11% and 2.33% over the previous 2 years. He was told that this type of investment was not 100% capital guaranteed but mechanisms were in place to protect between 85 and 95% of the investment. The Complainant asked for more details to be sent to him, and ultimately it was agreed that an agent of the Provider would call him. The Complainant indicated that a particular office was the one he wanted to deal with.

On **18 July 2017** the Complainant contacted the Provider in relation to an email he had received and explained that the email he received was encrypted. He had been looking for a fund's performance for the period from April to date, having been given the figures for the 3 previous years. He was having difficulty deciphering the figures he had been provided with. He was not particularly impressed with the figure given for that three month period, but it was explained to him that a long term investment fund ought not be judged on the basis of a three month window. He was told that there are different floors for different funds, thereby preventing the value of them going below a certain level. The Complainant said that there would need to be some return after one year. It was explained to him that, because of the charge being 1% of the fund, it would need to perform better than 1.5% or so in order to return some profit to him. It was explained to him that there is risk with all funds but the risk on certain funds is minimal. The Complainant asked "*how can I get into that?*" and if there was a cooling off period. He was told they would arrange a meeting and there was no cooling off period, but he could withdraw his funds (albeit at a loss, if that was the value at withdrawal). He was reassured that the fund has consistently increased in value over the last number of years.

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On **25 July 2017** a meeting took place between the Provider and the Complainant. A note of that meeting records the following:

“Met with customer in [location]. Went through risk questionnaire and customer advised defensive. Following discussion customer decided to invest 99k in [FUND] investment. Advised of risks and tax obligations. Gave customer full pack and copy of transaction forms and suitable products T7[sic]C’s and mifid letter. Customer lodged cheque for 99k from [third party bank] and knows funds wont be invested until funds clear.”

The Complainant signed a declaration on the Transaction Form to the effect that he had, amongst other things:

- Agreed with the information provided within the Transaction Form and the suitable products document;
- Received an overview of suitable investment products offered by the Provider;
- Received and understood the Key Investment Information Document;
- Received and understood the Product factsheet;
- Received the MiFID client classification letter;
- Received the Provider’s investment funds terms and conditions and accepted those terms and conditions.

The Transaction Form also sets out the fund that the Complainant has chosen, and contains the following declarations:

“The main characteristics of this investment product, detailed within the list of suitable products, have been explained to and understood by you (investment advisory reference holders). [The Provider] has assessed whether this transaction is suitable for your particular needs, objectives and circumstances and consider this transaction is suitable.”

It is also noted that the fees and charges are set out in the terms and conditions.

The MiFID letter confirms that the Complainant has been categorised as a “retail client”.

The product factsheet sets out a “Product Score” of 3 and that a score of 2 or 3 corresponds with a defensive risk profile. It also contains the following information/notices:

“No fixed return

No capital protection

No fixed maturity date”

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"Performance figures are based on past investment returns.... Past performance figures may be misleading and are not a reliable indicator for future returns"

The following notices are displayed in prominent boxes:

"Warning: if you invest in this product you may lose some of all of the money."

"Warning: Past performance is not a reliable guide to future performance."

"Warning: the value of your investment may go down as well as up."

"Warning: This fund may be affected by changes in currency rates."

The Key investor Information document contains the following information/notices:

"The fund does not provide any capital protection or capital guarantee nor does it offer a guaranteed return".

"Past performance should not be seen as a good indicator of future performance."

The risk profile questionnaire (signed by the Complainant confirming that it represented a true and accurate account of their information) contains the following pertinent information and entries:

"Q. How many of the following terms are you familiar with? Inflation, Equity, Market Volatility, Currency Risk, Asset Allocation?"

A. I am familiar with all these terms."

"Q. Have you completed any transactions in investment products such as structured deposits, investment funds, bonds, stocks, unit linked life insurance plans, pension funds during the past four years?"

A. I have not performed any transactions in such investment products."

"Q. Do you stay informed about financial and economic news:"

A. I occasionally catch headlines of financial and economic news."

"Q. What is your subjective risk profile?"

A. Defensive"

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The Provider's agent set the objective risk profile for the Complainant to "Defensive".

Part II of the assessment provides examples of 4 different strategies, and the differences in term, risk, risk tolerance, and return for each. The Complainant indicated that his preferred scenario was "*Limited return, safety*"; A return of investment within 3 – 5 years; and that if the investment was to fall in value his reaction would be to "*take a long term view expecting the value to rise again*".

The risk profile was again indicated at "Defensive", and the Complainant accepted this.

The List of Suitable Products consists of a selection from a range of 16 funds. 5 were marked "suitable" and 11 marked "not suitable".

The Complainant invested in the fund and began to receive statements. He telephoned the Provider on **7 February 2018** having received a statement that day. He stated that he was "horrified" to discover that the value of his investment had gone down by nearly €1,000. It was explained that a fee of 1% would have been deducted from the initial investment of €99,000. It was explained that the fund had experienced a dip due to market volatility, but the fund value will fluctuate and the Complainant ought to give the fund "time to grow".

This pattern essentially repeated itself over the next year culminating in the Complainant submitting his complaint to this office in **September 2019**.

The Complainant has suggested that the Provider guaranteed him returns on the investment. He alleges that it was mis-sold to him. He also contends that he has not been furnished with information about how the fund was invested/managed.

Analysis

There is no evidence to support the assertion that this product was mis-sold. The documentation furnished to this office does not support the assertion of mis-selling. Recordings of telephone calls between the Complainant and the Provider have been furnished in evidence. I have considered the content of these telephone calls. The content of the telephone calls do not support the Complainant's contention that he was a reluctant investor or was subjected to any form of undue pressure to enter into the investment that he did.

I should point out that the manner in which the Complainant spoke to the Provider's agents on many of these calls was totally inappropriate and unacceptable.

It is perfectly understandable that a person will be upset and disappointed when an investment they have made does not perform as they had hoped.

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It was not however, acceptable for the Complainant to describe the Provider's agents as "toe rags", "low life" and to use profanities on a regular basis as the Complainant did. I might comment that the Provider's agents remained calm and professional at all times in spite of this.

The documentation furnished does not contain any misrepresentations, does not guarantee any particular return for the investment, and is clear as to the level of risk. Furthermore, in the context of an investment where the Complainant sought a return in a period of 3-5 years, it is unreasonable for him to allege that he had been misled simply on the basis of the fund's performance during a given 6 month window.

The Complainant does not believe he received the terms and conditions. However, he signed a declaration confirming that he had received these on 25 July 2017.

Furthermore, the terms and conditions do not in any event contain provisions that would be relevant to the crux of this complaint (the allegation of mis-selling). I am not satisfied that the Complainant was not provided with a copy of the terms and conditions for investment funds by the Provider.

Finally, the Complainant contends that he has not been given information as to how the fund has been invested. The Complainant has received regular statements as to the performance of the fund, which include an "Investment Report". Whilst it is not clear what information the Complainant is in fact looking for, he was provided with a suite of documentation about the fund when he decided to invest, and did so as a nominee of the Provider – in other words, once in the fund it is not open to him to direct how the fund is operated, his choices are simply to remain invested in that fund, withdraw his money from it, or reallocate his money across different funds.

The Complainant was unhappy with the interest his money was earning in his deposit account. He made a decision to invest his money where there was a possibility it could earn more. However, there was also a risk that he could lose some of his investment. This was clearly pointed out to him.

The Complainant is disappointed with the performance of a fund in which he has invested. His disappointment is understandable, however there is no evidence of wrongful conduct on the part of the Provider.

For the reasons outlined in this Decision, I do not uphold this complaint.

Conclusion

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

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

17 December 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.