



<u>Decision Ref:</u>	2021-0023
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Failure to inform of drop in value Delayed or inadequate communication Failure to provide warning re. Nature of investment
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to an investment product.

The Complainants' Case

The Complainants state that they attended a branch of the Provider in June 2017 in order to close a deposit account. The Complainants assert that the Provider then asked them if they would like to invest in a "portfolio". The Complainants state that they were reluctant to do so because of their age profiles and the risky nature of such investments but that the Provider's representative suggested a "low risk portfolio". The Complainants state that they were told that the product was 95% protected which they state that they both understood to mean that the money invested would be protected to 95% of its initial value. The Complainants state that they invested €50,000 into this fund based on this advice and information. They further assert that the Provider's representative issued documents, asked questions and recorded the answers and that the documents were placed on the table in front of them when they were asked to sign designated places on the documents. The Complainants state that in doing so, they were relying on the representations of the Provider that the portfolio was 95% protected. The Complainants state that, contrary to the Provider's assertions, they did not read the documents in 2017 and nor were they given an opportunity to do so. The Complainants acknowledge that they signed the documentation.

The Complainants assert that the value of the investment decreased by €3,871.21 over the term of their investment.

They further state that they met with the Provider in June 2019 and they found that the information given to them to be completely at variance with what was represented to them in 2017.

The complaint is that the Provider misrepresented and/or mis-sold the investment product to the Complainants which led them to believe, at the time of sale, that 95% of the total investment value was protected.

The Complainants want the Provider to refund them €3,871.21 for the financial loss they experienced as a result of the Provider's conduct.

The Provider's Case

The Provider states that on 29 June 2017, the Complainants met with the Provider's investment specialist where, during the course of the meeting, various deposits and investment options were outlined to the Complainants. The Provider asserts that the Complainants undertook a risk questionnaire where they were designated as "very defensive investor" and that they were provided with a list of suitable products, none of which were deemed or listed as being suitable investment products for the Complainants. The Provider asserts that the Complainants signed the Provider's investment product transaction form which confirmed that they wished to proceed and were disregarding the suitability assessment outcome carried out by the Provider.

The Provider states that the Complainants were provided with the regulatory documents in relation to the investment products which included the investment fund terms and conditions, the Key Investment Information Document and the product fact sheet. The Provider also states that the Key Investment Information Document notes that the funds does not offer capital protection, capital guarantee or guaranteed return and that it also prominently displays the statements that the value of the investment is changeable and that value can be lost. The Provider also submits that the Complainants sign documentation confirming that they had received and understood the regulatory documents and that they wished to proceed against the suitability outcome.

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 Complainants were 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 7 January 2021, 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.

From the submissions and documentation furnished in evidence, it is apparent that the facts and surrounding circumstances of this case are as follows.

The Complainants' position is that in June 2017, they sought to close their deposit account and during the course of that process, a representative of the Provider asked them if they would like to invest in a portfolio. The Complainants assert that because of their age profiles, being in their 80s and 90s, they expressed a reluctance because of the risky nature of such investments.

The Complainants state that the Provider's representative informed them that there was a low risk portfolio which was "95% protected". The Complainants stated that they believed that this meant that their money would be protected to 95% of its initial value and on this basis, they agreed to invest €50,000. The Complainants states they were then presented with documents to sign they said that although they did sign them, they did not read the documents.

The investment advisory application form has been furnished to this office. In addition, the completed risk profile questionnaire has been furnished and, amongst other things, in this document, the Complainants confirm that they have not performed any transactions in the listed investment products in the past four years, that they occasionally catch headlines of financial and economic news that they have no monthly disposable income and that they would classify their subjective risk profile as "very defensive".

At the bottom of the form it states that "based on the answers provided... The objective risk profile is set to defensive".

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The Complainants then go on to answer that they would prefer a lower return and stability in their investment, that they would need their invested money back within three years and if their investment was to fall in value they would sell immediately and put all in a deposit account.

Based on these answers, the subjective risk profile was set to "very defensive". The final determination of the risk profile is categorised as "very defensive". This document is signed by both Complainants and a representative of the Provider on 29 June 2017.

The Provider then produced a list of suitable products based on the information provided and it is stated that the list of suitable products was being based on the responses provided to the risk profile questionnaire and the three additional suitability questions and on foot of this each and every product listed was deemed as "not suitable".

In addition, the Provider produced a completed "[Provider] investment product transaction form" which, amongst other things, sets out that the product type, the name of the product and the amount of €50,000 being invested. The document goes on to provide the following:

"Assessment of suitability (not applicable for sale transactions)

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). [Provider] has assessed whether this transaction is suitable for your particular needs, objectives and circumstances and considers that this transaction is not suitable.

By signing below, you confirm that you can sense that this order does not correspond to your risk profile and the additional requirements provided by you as part of the assessment of suitable products, and thus by placing this order you are disregarding the suitability assessment outcome and the advice of [Provider]."

The Complainants signed directly below the above quoted statement.

In the same document the Complainants have signed the declaration which declares, amongst other things:

- That they have agreed with the information provided within the document as the suitable products document
- That they received an overview of suitable investment products offered by the Provider
- That they received and understood the key investment information document,

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- That they received and understood the product fact sheet,
- That they have received the [Provider] investment funds terms and conditions document and accept the terms and conditions described therein.

The Complainants in their letter of 5 August 2019 to the Provider's Complaints and Resolution Team candidly state that they are aware that markets and value can go down as well as up but that they do not profess to have any expertise in the area of investment. The crux of the complaint is the assertion that the product was misrepresented to the Complainants and they were not informed that their investment was not 95% protected or that the full floor price was assessed as 95% of the net asset value in the last banking date of the previous April for each year after that. The Complainants' case is that they were induced to buy the product based on a misrepresentation.

The Provider states that it is satisfied the full details of the investment product were provided to the Complainants prior to the completion of the sale.

The provisions of the Consumer Protection Code 2012 (CPC) are binding on **regulated entities** and must, at all times, be complied with when providing financial services.

The CPC provides as follows:

GENERAL PRINCIPLES

A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

- 2.1 acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;
- 2.2 acts with due skill, care and diligence in the best interests of its customers;
- 2.3 does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;
- 2.4 has and employs effectively the resources, policies and procedures, systems and control checks, including compliance checks, and staff training that are necessary for compliance with this Code;
- 2.5 seeks from its customers information relevant to the product or service requested;
- 2.6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;

KNOWING THE CONSUMER AND SUITABILITY KNOWING THE CONSUMER

5.1 A regulated entity must gather and record sufficient information from the consumer prior to offering, recommending, arranging or providing a product or service appropriate to that consumer.

The level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the consumer, but must be to a level that allows the regulated entity to provide a professional service and must include details of the consumer's:

a) Needs and objectives including, where relevant:

- i) the length of time for which the consumer wishes to hold a product,*
- ii) need for access to funds (including emergency funds),*
- iii) need for accumulation of funds.*

b) Personal circumstances including, where relevant:

- i) age,*
- ii) health,*
- iii) knowledge and experience of financial products,*
- iv) dependants,*
- v) employment status,*
- vi) known future changes to his/her circumstances.*

c) Financial situation including, where relevant:

- i) income,*
 - ii) savings,*
 - iii) financial products and other assets,*
 - iv) debts and financial commitments.*
- d) where relevant, attitude to risk, in particular, the importance of capital security to the consumer.*

The regulated entity is only required to seek the information set out at a) to d) above where it is relevant to the assessment of suitability to be carried out under this Chapter.

5.3 A regulated entity must gather and maintain a **record** of details of any material changes to a **consumer's** circumstances prior to offering, recommending, arranging or providing a subsequent product or service to the **consumer**. Where there is no material change, this must be noted on a **consumer's records**.

Assessing suitability

5.16 When assessing the suitability of a product or service for a consumer, the regulated entity must, at a minimum, consider and document whether, on the basis of the information gathered under Provision 5.1 and 5.3:

- a) the product or service meets that consumer's needs and objectives;*

b) the consumer:

i) is likely to be able to meet the financial commitment associated with the product on an ongoing basis;

ii) is financially able to bear any risks attaching to the product or service;

In addition, Section 33, subsections (3), (5) and (6) of S.I. No. 375/2017 - European Union (Markets in Financial Instruments) Regulations 2017 provide:

(3) When providing investment advice or portfolio management an investment firm shall obtain the necessary information about—

(a) the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service offered to the client by the investment firm,

(b) the client's or potential client's financial situation, including his or her ability to bear losses, and

(c) the client's or potential client's investment objectives, including his or her risk tolerance

that is necessary to enable the investment firm to recommend to the client or potential client those investment services and financial instruments that are suitable for the client and, in particular, are in accordance with his or her risk tolerance and ability to bear losses

(5) When providing investment services other than investment advice and portfolio management, an investment firm shall—

(a) ask the client or potential client to provide information regarding his or her knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded,

(b) take that information into account in order to assess whether the investment service or product envisaged is appropriate for the client, and

(c) where a bundle of services or products is envisaged pursuant to Regulation 32(19) and (20), consider the appropriateness of the overall bundled package for the client

(6) Where the investment firm considers, on the basis of the information provided pursuant to paragraph (5), that the product or service is not appropriate for the client or potential client, the investment firm shall warn the client or potential client; and the warning may be provided in a standardised format.

The Consumer Protection Code 2012 provides as follows:

GENERAL REQUIREMENTS

- 3.1 *Where a **regulated entity** has identified that a **personal consumer** is a **vulnerable consumer**, the **regulated entity** must ensure that the **vulnerable consumer** is provided with such reasonable arrangements and/or assistance that may be necessary to facilitate him or her in his or her dealings with the **regulated entity**.*
- 3.2 *A **regulated entity** must ensure that the name of a product or service is not misleading in terms of the benefits that the product or service can deliver to a **consumer**.*
- 3.3 *A **regulated entity** must ensure that all instructions from or on behalf of a **consumer** are processed properly and promptly.*

The Provider states that it does not regard the Complainants as being a 'vulnerable person' within the meaning of the Consumer Protection Code 2012.

A 'vulnerable person' is defined in the 2012 Code as follows:

"vulnerable consumer" means a natural person who:

- a) *has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or*
- b) *has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties).*

As outlined above, the Complainants signed the Provider's Risk Profile Questionnaire. Furthermore, it appears the Complainants did not seek any independent advice or time to consider the investment. Notwithstanding the age of the Complainants at the time, age does not qualify as a stand-alone criterion to come within the above definition of "vulnerable". Having read the Complainants' correspondence and carefully considered the content of the phone call audio recordings supplied in evidence, I do not believe that there is sufficient evidence to warrant the classification of the Complainants as vulnerable.

In addition, having considered the evidence in this complaint, I accept that it was reasonable for the Provider to classify the Complainants as Very Defensive.

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While the Complainants' position is very clear and has been well articulated, I cannot ignore the persuasive evidence of the signed documentation which evidences that a suitability assessment was carried out, that the product information was provided to the Complainants and, crucially, no product was recommended as being suitable to the Complainants. I am also satisfied that the documentation adequately warns the Complainants of the unsuitability of the product and that this was acknowledged by the Complainants in the form of their dated signatures.

In light of all of the forgoing and having taken into consideration the documentary evidence and submissions from both parties, I accept that the Provider had adequately assessed the suitability of the product and had provided an appropriate level of information and advice to the Complainants at the time it was taken out in 2017.

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.

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**

2 February 2021

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—

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(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.

