



<b><u>Decision Ref:</u></b>	2021-0364
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Personal Pension Plan
<b><u>Conduct(s) complained of:</u></b>	Switching funds Delayed or inadequate communication Failure to provide product/service information
<b><u>Outcome:</u></b>	Rejected

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The complaint relates to an **'Investment Pension Property fund'** held by the Complainant.

#### **The Complainants' Case**

The Complainant is very unhappy with the Provider placing a 6-month delay period on withdrawals or switches from his investment fund from **19 March 2020**, without clearly setting out in its Terms and Conditions that this could be implemented without prior notice to its investors.

The Complainant says that on 19th March 2020 he attempted to *"switch out of"* the fund through an online service. The Provider informed him on the same day that this was not possible, as the fund was now subject to a delay period for transactions. The Complainant was surprised and annoyed that he had received no notification of the Provider's intentions. He contacted the Provider again on 30th March 2020 and raised a formal complaint.

The Complainant says he was *"shocked to find out that there was no notice period at all"* to the investors, he says that he understands the reasons outlined to him by the Provider in this regard. He submits that his complaint is more specifically that the Provider's Terms and Conditions do not set out that the Provider can do this in the manner which it did, and that as a result, he was not on notice of this fact.

The Complainant says that the relevant section of the terms and conditions, headed ***"Delay Period"*** on page 29 of the Provider Terms & Conditions document, does not contain any

reference to the fact that the measures could be implemented by the Provider with immediate effect, with effectively no notice period given to an investor.

The Complainant says had he been aware of this fact, he would have *“switched out of the fund at the start of January 2020”*. He also states that he

*“spoke to and emailed the Provider customer services on several occasions during February and March of 2020 and was given contradictory information regarding the valuation frequency of Pension Property fund”*.

The Complainant goes on to say that *“It took several weeks to get a straight answer”*, and this he states delayed his decision to switch out of the Pension Property fund until he attempted to do so in March 2020.

The Complainant wants the Provider to allow him to switch out of the *“Pension Property fund P”*, at the unit price of the fund as of 19 March 2020. The unit price of the fund on that day is stated by the Complainant as *1.737 euro*. He also says the Provider should compensate him as he was unable to invest these sums in other funds from 18 March 2020.

### **The Provider’s Case**

The Provider maintains that it, in terms of the implementation of the delay period, it acted in compliance with the terms and conditions of the fund, which require no notice period to be provided. The Provider highlights, in this regard, that a notice period would defeat the very purpose which the delay period is designed to advance.

With regard to the suggested inaccurate information provided to the Complainant, the Provider concedes that incorrect advice was shared in the course of a phone call on 12 March 2020. However, the Provider maintains that correct advice had been given during a phone call on 02 March 2020, and that the correct advice was again supplied in an email of 13 March 2020. The Provider disputes the Complainant’s contention that the inaccurate advice was the reason why he failed to take any particular action, in advance of 19 March 2020.

### **The Complaint for Adjudication**

The complaint is that:

1. The Provider placed a 6-month delay period on switches from the fund effective from 19 March 2020, without clearly setting out in its Terms and Conditions that this could be implemented without prior notice to investors.
2. The Provider gave unsatisfactory information regarding the valuation frequency of the Complainant’s Pension Property fund when communicating with him in early 2020.

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## **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 **20 September 2021**, 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 substantive comments from the parties, within the period permitted, the final determination of this office is set out below.

It is useful to set out certain relevant terms and conditions of the fund in which the Complainant was invested.

## **Terms and Conditions**

### ***Delay Period***

*In certain circumstances, we may delay switches. These circumstances can include the following.*

- *If a large number of customers want to switch out of the same fund at the same time.*
- *If there are practical problems selling the assets in which the fund is invested.*

*In particular we may delay switches to or from the [various funds identified including that in which the Complainant was invested] for up to six months from the time we receive your request.*

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I note that the Complainant is aggrieved that he was not notified of the Provider's intention to place a delay period on the fund in which he was invested, which had the effect that he could not 'switch out' of the fund on the date he had intended to do so. The Complainant maintains that the fund terms and conditions "*do not mention that investors will not be notified in advance*" of any delay period being imposed.

The rationale for implementing the delay period, which I note the Complainant appears to accept, is effectively to stall the flight of monies from a particular fund, in certain limited circumstances. It would of course be counter-intuitive, in those circumstances, to notify customers and the market in advance of an intention to implement a delay period at some point in the future. Such an action would likely amplify the very conduct sought to be discouraged.

The Complainant does not have a particular difficulty, in principle, with the practice. Rather he says that he is aggrieved that the practice (of imposing a delay period without notice) is not clearly enshrined in the terms and conditions, thereby putting him on notice of the possibility of the delay period being put in place with immediate effect.

It is this point which the Complainant emphasises. He states that if he had been aware of the possibility that a delay period could be introduced without notice, and made effective immediately, he would have sought to switch out his funds at an earlier date. The Complainant clearly set out this position in his email to the Provider of 30 March 2020 in the following terms:

*I fully understand why this moratorium was done but I was shocked to find out that there was no notice period at all given to customers like myself.*

*I have read the explanation of "Delay Period" on page 29 of your T&C document (attached) and there is no mention at all that there would be no notice period given to investors if a Delay Period needed to be activated.*

*If I had known that the Delay Period would be instant with no notice period I would have switched out of this fund just like I did for most of the other funds I was invested in during the month of January or February.*

*So my main complaint is that the T&C is not sufficiently clear to an investor regarding the delay period and that there is no notice given.*

I have set out the relevant portions of the terms and conditions of the fund above, where the issue of a '**Delay Period**' is dealt with. These terms clearly authorise the Provider to impose a delay on requests to switch out of a fund, if certain criteria are met. I am satisfied that the criteria were met in this instance (owing to COVID-19, it is clear that there were a large number of customers seeking to switch out of the same fund at the same time) and indeed I do not understand the Complainant to dispute this. The issue is simply whether the Provider was obliged, within the terms and conditions to specify that in such an event, no notice period would apply. I don't accept that it was obliged to specify this.

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The terms and conditions do not refer to a notice period. The natural and ordinary interpretation of any provision which omits any reference to a notice period (subject to a review of the entire document wherein the provision is located) is that there will be no applicable notice period. In this regard, I disagree with the Complainant's submission that the absence of such a provision should mean that a notice period is applicable.

It is unclear to me why the Complainant formed the opinion "*after having read the T&C was that all investors in the fund would be notified prior to the moratorium being applied*". A notice period is typically an additional protection or measure which is called out specifically, and derives its force from an express, rather than any suggested implied, reference in contractual documentation. I take the view that the absence of a reference to a notice period, in the ordinary course, is understood to mean that no notice period is applicable.

In this instance, the Provider sought to delay the Complainant's request to switch out his funds by a period of six months, from the date of the request. I am entirely satisfied that the terms and conditions of the fund entitled the Provider to take this course of action. I am also satisfied that a review of the terms and conditions should have alerted the Complainant to the risk that this could occur without notice, given the absence of any provision referring to a notice period. Indeed, it is clear to me that providing for a notice period of the implementation of a delay period, would be self-defeating.

Separately, the Complainant complains that he spoke to the Provider on several occasions in February and March 2020 and "*was given contradictory information regarding the valuation frequency*" of his fund. The fund in question is valued on a monthly basis. The Provider explains that this is the most practical frequency for valuation, given that (i) the underlying assets are properties, (ii) updated valuations (which are carried out by a third party) for each property inform the overall fund value, and (iii) property values are "*not particularly volatile*".

With regard to the 'valuation frequency', the Complainant was correctly advised during a phone call of **02 March 2020** that the fund was valued on a monthly basis ("*the pension property fund, it does only update once a month and it's at the end, normally the last working day of the month*").

During a subsequent phone call on **12 March 2020**, the Complainant relayed what had been advised to him on 02 March 2020 in response to which he was told:

**Provider:** *I would assuming that they would have actually getting calculated like the pricing date each day but there could be just something in the background that is [indecipherable] I can see pension property fund P. Again, I would have to follow up with the team on that because, to me, I wouldn't have been aware that that would have been calculated on a monthly basis.*

**Complainant:** *Did you think it was calculated on a daily basis?*

**Provider:** *Well that's what I would have assumed based on the rest of the funds.*

...

**Provider:** *Again, I would have to follow up for that with you, just to see, because there could, you know, because we're obviously not trained financial advisors and there's so many funds there, that there is sometimes, where we would say each fund updates on a price per day, there can be funds that can update differently but, again, we wouldn't kinda know the full funds of that, that's why you have to check with another team that deals specifically with that.*

I note that on the following day, **13 March 2020**, the Provider sent the Complainant an email which included the following information:

*While the Property Pension Fund P (Exempt IP) may only be valued once a month, the other funds you are invested in are priced more frequently. As you can see from the tables below, all of your other funds were priced daily on 24 February, 25 February, 26 February and 27 February.*

It is clear that the agent with whom the Complainant spoke on 12 March 2020 was not aware that the property fund was priced on a monthly basis however this individual was equivocal and indicated that she would need to check this information or that the Complainant would need to confirm with the team dealing specifically with this product. The Complainant had however, been clearly advised in unequivocal terms on 2 March 2020 of the correct position, which was again outlined in writing on this occasion, at lunchtime, on 13 March 2020. The error of the previous day was thus very swiftly corrected.

I do not view this error as being significant enough to warrant a finding against the Provider. Indeed, it seems to me that the manner in which the Provider's agent expressed her view on 12 March 2020, would tend to dissuade reliance on the opinion expressed, particularly when set against the unequivocal view expressed 10 days earlier.

I would also note that the error was corrected several days in advance of the imposition of the delay period. Insofar as the Complainant states that if he had been given "clear information" on this issue he "would have switched out of this fund well before March 19". I don't accept this. He received clear information on 2 March 2020, but did not instruct a switch and I don't accept that the short-lived ambiguity caused on 12 March 2020 can be characterised as a reason for failing to take certain action before 19 March 2020 when that ambiguity did not exist either before 12 March 2020, or indeed after 13 March 2020.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider, or conduct within the terms of **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017** that could ground a finding in favour of the Complainant, I do not consider it appropriate to 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.



**MARYROSE MCGOVERN**  
Deputy Financial Services and Pensions Ombudsman

12 October 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—

- (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.