



<b><u>Decision Ref:</u></b>	2021-0555
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Shares/Equities Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment) Fees & charges applied Failure to provide product/service information
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to an investment product.

#### **The Complainant's Case**

The Complainant states that in **March 2019**, he called into the Provider's branch seeking to increase the interest amount on his savings account. He asserts that he met with the Provider's staff member who went through investment products with him and he signed documents to invest his savings in an investment fund ("the Fund").

The Complainant says that in **August 2019**, he complained to the Provider regarding the fees and charges associated with the Fund. The Provider responded by letter dated **30 August 2019**. The Complainant took issue with the Provider's response and states that he sent a further 3 emails in September 2019, with the final email requesting that the Provider issue him a final response letter. The Complainant states that the Provider did not respond to his 3 emails; it issued a final response letter on **7 October 2019**.

The Complainant says he is surprised at the Provider's response and its recollection of events at the meeting in March 2019. The Complainant states that he recalls completing the risk questionnaire at the end of the meeting, after he had selected the Fund. The Complainant asserts that fees and charges were not explained to him and he states that the paperwork was completed before the questionnaire was completed. The Complainant says that he queried this at the time, and he was told that it was "*for [the Provider's] records*".

The Complainant states that he was mis-sold the investment product by the Provider. The Complainant rejects any suggestion that he entered into the investment against the Provider's advice. The Complainant states that the Fund was suggested to him with no assessment of his needs, using a questionnaire and he says that the Provider failed to present the applicable fees of the Fund, at the discussion stage.

### **The Provider's Case**

The Provider disputes the Complainant's complaint. The Provider asserts that a risk questionnaire was completed with the Complainant, that a list of suitable products was generated and provided to the Complainant before he invested in the Fund. The Provider asserts that the Fund was deemed to be unsuitable for customers such as the Complainant, who are classified as *defensive* investors based on the questionnaire.

The Provider says that the Complainant confirmed that he wished to proceed with the Fund despite the results of the suitability assessment carried out by the Provider.

In relation to fees and charges applicable to the Fund, the Provider asserts that this information was provided to the Complainant at inception.

Finally, the Provider refutes the complaint of poor customer service and complaints handling and submits that it complied with its obligations in this regard, pursuant to the applicable provisions of the Consumer Protection Code 2012 ("CPC").

### **The Complaint for Adjudication**

The complaint is that in March 2019, the Provider mis-sold an investment product to the Complainant by failing to adequately explain the fees and charges to him and by failing to assess his suitability for the investment product, before the sale.

The Complainant is also unhappy with the customer service provided by the Provider by failing to respond to his email communications of September 2019.

The Complainant wants the Provider to issue a refund of his investment of all of his monies held in all accounts by the Provider without deduction of the setup fees charged for entry to the Fund.

### **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 **29 November 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 submissions from the parties, within the period permitted, the final determination of this office is set out below.

The parties' submissions and documentation supplied, have been considered, as have the audio recordings of phone calls between the Complainant and the Provider. Arising as of those submissions, documentation and phone calls, I note the following:

I note that on 8 and 11 March 2019, the Complainant telephoned the Provider in order to set up a meeting, because one of his accounts was reaching maturity and he needed to make a decision as to what to do with the fund in this account. A meeting was arranged for 13 March 2019. As per the details in the Complainant's Complaint Form, he attended the meeting on 13 March 2019 regarding one of his savings accounts, in the hope of increasing the interest amount to be earned.

The Complainant then spoke to the Provider's investment manager on **27 August 2019** on the telephone. The audio recording demonstrates that the Complainant explained he had received a statement in relation to the performance of the Fund he invested in in March 2019, and the Complainant was querying why the investment amount decreased since March 2019. The investment manager explained that there is a once off arrangement fee of 1% of the investment amount which, in the Complainant's case was €995, and once that was applied, the amount actually invested in the Fund, was less than the investment amount provided by the Complainant.

The investment manager queried whether the Complainant had been told about the arrangement fee. The Complainant stated that he had not, to the best of his knowledge. In addition, it was explained to the Complainant that while the Fund had increased in value up to August 2019, there had been some volatility in the markets which had led to a reduction in value. It was further explained to the Complainant that the investment fund was well diversified in order to try to mitigate against market volatility and that markets will experience volatility for certain periods but if one looks at the performance of funds over the longer term, they give a better return than deposits, and tend to outrun inflation.

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The Complainant reiterated that he felt he hadn't been informed of the 1% arrangement fee. The investment manager looked up the notes from March 2019 and he informed the Complainant that the notes reflected that the fees were explained. The Complainant was asked whether he had been furnished with the Fund fact sheet. The Complainant responded that he was not sure and he could not remember but he may have been.

I note that the investment manager explained to the Complainant that the arrangement fee would have been set out in the Fund fact sheet also. The investment manager asked whether the Complainant would like to raise a complaint at this stage, and the Complainant confirmed that he would. The investment manager then stated that the Provider would carry out a full investigation of the complaint.

The Complainant then at the end of the call expressly stated to the Provider

*"my complaint basically is that I was not informed about a setup fee and had I been I would not have proceeded with any of this. It's as simple as that. I mean that kind of money I'd have just left things as they were quite simply."*

The investment advisory application form has been supplied in evidence to this Office. In addition, the completed risk profile questionnaire has been furnished and I note that in this document, the Complainant was asked how many of the terms *"inflation, equity, market volatility, currency risk, asset allocation"* he was familiar with, and he confirmed that he was familiar with all of those terms. In addition, he confirmed that he had not performed any transactions in structure deposits, investment funds, bonds, stocks, unit linked life insurance plans, or pension funds during the previous 4 years. He advised that he occasionally caught headlines of financial and economic news, he had more than €150,000 to invest and that he had between €500 - €1,000 monthly disposable income. Having confirmed that he already owned a family home, the end of the risk profile questionnaire classified his subjective risk profile as **"defensive"**.

At the bottom of the form, I note the statement that:

*"based on the answers provided... The objective risk profile is set to defensive"*

The Complainant then went on to answer additional questions, indicating amongst other things, that he would prefer a limited return and safety in his investment, that he would need his invested money back within three years and if his investment was to fall in value, he would feel concerned and uneasy, but he would remain invested and monitor the situation closely.

I note that based on these answers, the subjective risk profile was set to "defensive" and the determination of the final risk profile was categorised as "defensive". I also note that this document was signed by both the Complainant and a representative of the Provider on **13 March 2019**.

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The evidence suggests that the Provider then produced a list of suitable products based on the information provided and it is stated by the Provider that the list of suitable products was based on the responses provided to the risk profile questionnaire and the three additional suitability questions and, on foot of this, there were 5 products listed and deemed to be "suitable".

It is notable that the Fund, which is the subject of this complaint, is not listed as a suitable product.

In addition, the Provider has 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 €99,500 being invested.

The document goes on to provide the following:

*"Assessment of suitability (not applicable for SELL 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). [The 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]."*

[My underlining added for emphasis]

I note that the Complainant's signature is evidenced directly below the above quoted statement and dated 13 March 2019. I also note that within the same document the Complainant signed the declaration which declared, amongst other things:

*"I have agreed with the information provided within this document and the suitable products document*

*...*

*I/We have received and understood the Product Fact sheet.*

*I/We have received the MiFID client classification letter.*

*...*

*I/We have received the [Provider] Investment Funds Terms and Conditions document and accept the terms and conditions described therein.*

*I/We have received the MiFID Fees and Charges Sheet."*

I note that the Complainant's signature was entered on this declaration which was printed on the date of the meeting at 12:13 pm

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A copy of the Provider's Investment Funds Terms and Conditions booklet has been furnished in evidence. I note that this is one of the documents which the Complainant confirmed on the signed declaration, that he had received.

In relation to fees and charges, among other things, it provides as follows:

*"Entrance fees*

*The Bank charges entrance fees for subscriptions (i.e. buy transactions). Entrance fees are deducted from the gross subscription amount mentioned on the order form for a subscription. Consequently, the amount corresponding to the entrance fee is not invested in the [Provider] investment fund. The level of the entrance fee can be found on the KIID and the prospectus of the investment fund which are available on the Bank's website at [Provider's web address]. The KIID is also available in hardcopy in our HUBs"*

The **Key Investor Information Document** (KIID) for the Fund has also been supplied in evidence. This document sets out applicable charges and this includes the description of an "entry charge". The KIID refers to an entry charge of 3.50% and goes on to state:

*"this is the maximum that might be taken out of your money before it is invested or before the proceeds of your investment are paid out. In some cases you will pay less. For more information on the actual entry and exit charges, please contact your financial adviser or distributor".*

I note that a confirmation of subscription document that was issued to the Complainant has also been supplied. Among other things, this confirms the Complainant's order on 13 March 2019. It sets out the gross amount and then goes on to set out an entrance fee of 1% which is confirmed to amount to €995.70.

The Provider's case is that it is satisfied that the full details of the investment product were provided to the Complainant prior to the completion of the sale, whereas the Complainant refutes these assertions and he also maintains that the arrangement fee was never explained to him.

As noted above, the Complainant signed the Provider's Risk Profile Questionnaire and having considered the evidence available in this matter, I accept that it was reasonable for the Provider to classify the Complainant as Defensive in his attitude to risk.

Whilst the Complainant rejects any suggestion that he entered into the investment against the Provider's advice, I am satisfied from the documentary evidence before me that the Transaction Form for the purchase of the investment, makes very clear the Provider's position at that time that the investment was not suitable for the Complainant and it specifies on its face just above where the Complainant has signed, that "by placing this order you are disregarding the suitability assessment outcome and the advice of [the Provider]".

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I am cognisant of the “*Record of Conversation for Investment Fund Trade*” that the Provider separately documented that the trade was not based on the advice given. I also note that the separate entry, to the effect that the Complainant was happy to invest in the product in question “*basing on past performance. [The Complainant] aware that he came as a Defensive.*”

I also note that this document separately notes that “*Tax, Risk and Fees explained to customers. T&C for investments, terms of business, MiFID letter and product sheets handed over to clients. Funds to be debited from SAD account [number redacted]*”.

In addition to this reference to the fees information being given to the Complainant, I see that the product fact sheet which the Complainant confirmed in writing he had received specifies at page 2 of 3 under the heading “**FUND OVERVIEW**” that the “*Subscription Fee*” was “*1.00%*”.

I also note from the evidence made available that “*confirmation of subscription*” was issued by the Provider to the Complainant specifying the dealing date of **15 March 2019** and I note that on the face of this confirmation issued to the Complainant, the entrance fee of 1% is clearly specified, giving rise to a net amount within the investment of €98,574.30.

I also note that a month later, a Statement of Account dated **15 April 2019** was issued to the Complainant, specifying on its fact the fee for the purchase of the investment at “*995.70EUR*”, giving rise to a market value of €98,633.56.

In those circumstances, having examined the evidence available regarding the Complainant’s investment in March 2019, I am not satisfied that this bears out his suggestion that the Provider failed to explain the entrance fee to him at the time when he elected to proceed with the investment. Neither do I accept that the Provider bears any responsibility for the Complainant’s decision to proceed with the investment which was contrary to his stated risk profile of “*Defensive*” in March 2019.

On the basis of the evidence available therefore, I do not accept that there is any reasonable basis upon which this element of the Complainant’s complaint can be upheld.

In my opinion, if the Complainant had been surprised in April 2019 by the fee of 1% charged for entry into the investment, I would have expected him to have raised this directly with the Provider at that time, if, for any reason, he had misunderstood the nature of that fee at the time when the investment was being placed the previous month. There is no evidence however, that the Complainant raised any issue at that point.

Consequently, having considered the matter at length, I do not consider it reasonable to uphold the Complainant’s complaint that the Provider mis-sold him this investment in March 2019.

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The Complainant is also unhappy with what he says was poor customer service and complaints handling by the Provider. He says that a number of his emails went unaddressed. The Complainant's complaint was lodged following the telephone call on 27 August 2019. On 29 August 2019, the Provider wrote to the Complainant acknowledging receipt of his complaint and stating that his complaint was receiving the Provider's attention and that an update would issue to him no later than 23 September 2019, unless the complaint has been resolved. The Provider wrote again the following day on 30 August 2019 to set out its narrative and results of its investigations.

Following this, the Complainant sent an email to the Provider dated 5 September 2019 taking issue with the Provider's narrative as to how the Fund was introduced to him. The Complainant stated that he did not receive a response to this and accordingly, he followed up with another email on 24 September 2019 requesting a response. In the absence of a response to this email, the Complainant wrote again on 30 September 2019 requesting a final response letter without delay, and I note that the Provider issued its final response letter to him, on 7 October 2019.

Provision 10.9 of CPC, which concerns complaints, states:

- 10.9 A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the Complainant's satisfaction within five business days, provided however that a record of this fact is maintained. At a minimum this procedure must provide that:*
- a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;*
  - b) the regulated entity must provide the Complainant with the name of one or more individuals appointed by the regulated entity to be the Complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;*
  - c) the regulated entity must provide the Complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days, starting from the date on which the complaint was made;*

I appreciate that the Complainant takes issue with the result or outcome of the Provider's investigation into his complaint. I am also conscious that after the Provider's letter of 30 August 2019, a number of the Complainant's emails pursuing the matter further, received no response until the Provider issued its final response letter on 7 October 2019.



Although I have noted this short delay, I am satisfied overall that the Provider complied with its obligations under Provision 10.9 of the CPC, when addressing the Complainant's complaint.

Accordingly, for the reasons outlined above, 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**

21 December 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.