



<u>Decision Ref:</u>	2022-0071
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Dissatisfaction with final fund value Errors in calculations Switching funds
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a Private Banking Investment Selection Policy (the “**Policy**”) held with the Provider which was incepted through a broker.

The Complainant’s Case

The Complainant submits that in **2006** she invested €432,673.00 (four hundred and thirty two thousand, six hundred and seventy three euros) with the Provider. The Complainant states that she lost money during the financial crash and that during the COVID pandemic, she could see that her fund was reducing in value again.

The Complainant says that as she is a pensioner, she became concerned with the reduction in her fund. She says that on **9 March 2020** she met with a Provider representative (“**Provider Agent 1**”) who told her to switch her fund, which then had a balance of €277,529.00 (two hundred and seventy seven thousand, five hundred and twenty nine euros) into a cash fund.

The Complainant maintains that her understanding was that the balance of that day, i.e. **9 March 2020** would be transferred into her cash fund. She states that she was "*shocked to see just got €268,326.01 into my account on 21 May 2020 after I sent in a request to encash it, as markets were not improving.*"

The Complainant submits that:

"I met with your agent on the 9 March 2020. There was a fund switch made on that date but you did not put it into effect until 10 March 2020 when the value was 268,793 instead of 277,529 which it was on the 9/3/2020. I feel this is very unfair, with the markets here so volatile at this time I decided it was better for me to switch into cash, it was never explained to me that I wouldn't get the value on that date that I requested the switch or when lodged money with you I wasn't told that the switch wouldn't take place until the following day."

The Complainant further submits that:

"I am now a pensioner with an income of 250 per week and I will need all these funds to live for the rest of my life."

The Complainant wants the Provider to refund her the difference in the value of her investment as outlined on **9 March 2020** and the value that she received, being **€9,202.02** (nine thousand, two hundred and two euros and two cents).

The Provider's Case

The Provider, in its **Final Response Letter** dated **31 July 2020**, states that in accordance with company procedures, all funds switch requests are given the effective date of the next business day which is the equivalent fund value of close of business on the date of receipt.

The Provider confirms that the Complainant's fund switch request was received on **9 March 2020** and that the request was for a 100% switch of her funds, to a Cash Fund and that she received the effective date of **10 March 2020** for this switch, which the Provider states *"gives you the fund value as of close of business on 9 March 2020."*

The Provider submits that its current systems are calculated using the most up to date unit price available. It states that this means that they use the unit prices from two working days before. The Provider states that as unit prices may fall as well as rise, on a daily basis, they are not guaranteed.

The Provider submits that as *"a company who deals with global unit funds, we are unable to give a value as of close of stock market on current business day, as we do not have those prices available to us."*

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The Provider submits that the Complainant later requested a full surrender of her Policy and this was processed on **1 May 2020** in the amount of €268,326.01 (two hundred and sixty eight thousand, three hundred and twenty six euros and one cent).

The Provider says that the Complainant met with her Private Client Manager, Provider Agent 1, on the **9 March 2020** and expressed concerns regarding the diminishing value of her fund. The Provider states that the Complainant decided to switch the full value of her Policy to the a Cash Fund and she submitted a signed instruction sheet to the Company, through Provider Agent 1, on the **9 March 2020**.

The Provider submits that:

*“while the value as at 6 March 2020 was discussed at the 9 March meeting, Provider Agent 1 did not suggest the Complainant would receive that value or indeed the value of the Policy on the 9th March 2020. No assurance was given to the Complainant on the value that would be received when the switch actually took place. In accordance with the Complainant's **Policy Conditions**, the fund switch request was processed taking into account the day the Company received the instruction. The unit prices used were those on the next working day after the instruction was received. As the instruction was received on the 9th March, the unit prices on the 10th March 2020 were used... Unfortunately for the Complainant markets were volatile at that time and the value of her Policy had fallen between values discussed at the meeting with her advisor on 9th March 2020 and the value received when the switch request was correctly processed on 10th March 2020.”*

The Provider says that it acted in accordance with its terms and conditions as housed in its **Policy Conditions** document.

The Complaint for Adjudication

The complaint is that the Provider wrongfully credited a lesser value to the Complainant's cash fund, than was detailed to her on **9 March 2020**, the date she gave the instruction to transfer; i.e. €277,529.00 (two hundred and seventy seven thousand, five hundred and twenty nine euros).

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 **4 February 2022**, 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.

Section 6, page 3, of the Provider's **Policy Conditions**, says as follows:

"Subject to consultation with your advisor you may decide to switch units in any of the Private Banking Investment Selection funds into another Private Banking Investment Selection fund at any time. The switch will take place at the respective prices of units on the next day that prices are calculated after you notify us."

[my underlining added for emphasis]

The Central Bank of Ireland's **Consumer Protection Code, 2012 (as amended) ("CPC")**, at page 7, Provisions 2.1 and 2.2 as follows:

"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."

The **CPC** says, at pages 21, paragraphs 4.1, says that:

"4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."

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The Provider says that the Complainant was issued with the Policy documents by letter dated **6 April 2006**. I note the contents of this letter and I am satisfied that the **Policy Conditions** were furnished to the Complainant at that time.

In its **Final Response Letter**, dated **31 July 2020**, the Provider wrote to the Complainant and said as follows:

"In accordance with Company procedures, all fund switch requests are given the effective date of the next business day which is the equivalent fund value of close of business of date of receipt I can confirm that your fund switch request was received on 9 March 2020. Therefore, you received the effective date of 10 March which gives you the fund value as of close of business on 9 March 2020. I can confirm that all of our current systems are calculated using the most up to date unit once available.

This means that they show the unit prices from two working days previous Unit prices may fall as well as rise on a daily basis and are not guaranteed. As a company who deals with global unit funds, we are unable to give a value as at close of stock market on current business day, as we do not have those prices available to us Global markets across the world close in different time zones and our systems were created to accurately reflect this data."

The Provider also submits that:

"It is important to mention that the Complainant had switched on multiple occasions previously during the term of her Policy and received confirmations setting out the effective dates for those switches (being the next working day in each case). By way of examples switches took place on the 27 April 2007, 21 November 2008, 24 November 2009, 11 December 2009, 10 February 2010, 17 February 2010, 17 February 2011, 2 December 2011, 13 December 2011, 2 September 2014, 1 October 2018 and 18 March 2020."

I note that the value of the fund on **9 March 2020** was €277,529.00 and that on **10 March 2020** it was €268,326.01.

I note the contents of the email, dated **9 March 2020** from Provider Agent 1, requesting that the switch be processed and I note the Complainant's signed **Authorisation Form** which asks for a switch and is dated **9 March 2020**. I also note that a confirmation that the fund switch had taken place was issued by letter to the Complainant on **18 March 2020** from the Provider.

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I am conscious that the Provider submits that

“while the value as at 6 March 2020 was discussed at the 9 March meeting, [Provider Agent 1] did not suggest the Complainant would receive that value or indeed the value of the Policy on the 9th March 2020. No assurance was given to the Complainant on the value that would be received when the switch actually took place.”

[My emphasis]

In my opinion, having furnished certain specific quotes to the Complainant, the Provider had a duty to inform her that this figure would change. The Provider says that “[Provider Agent 1] would not have been aware what the encashment value would have been at the meeting as the relevant unit price had not been calculated at that time.” I accept this. The Provider’s agent could not look into the future, and know what the switch value would transpire to be, but in my opinion, it was incumbent on the Provider, as the expert in this matter, to remind the Complainant that this would not be the actual value of the switch, and that the actual value would depend on the unit price the following day. It does not appear however, from the evidence before me that the Provider’s agent alerted the Complainant to this important aspect, so that she could make an informed decision, as to whether or not to proceed.

This is disappointing. In my opinion, it is not good enough that the Complainant wasn’t furnished with incorrect information; in my opinion, the Provider was under an obligation not to omit relevant information, to inform the decision-making process.

I note the Provider’s submission that “*following switches made prior to March 2020, the Complainant received confirmations of the effective dates and prices which took into account the time of receipt of those instructions.*” In my opinion, simply because such switches occurred in the past did not mean that the Complainant fully understood the process involved, or the risk of significant movement in the unit price at this unusual time. The Provider seems to infer that the Complainant *must* have known about the financial consequences of switching (as she had done it before). However, the Provider’s obligation during the discussions on 9 March 2020, was to make the consequences of a switch obvious, clear and transparent to the Complainant.

I note the Provider’s submission that

“the reference to values based on two previous working days was in relation to the values that are visible when checked online e.g. If viewed on the 9th March 2020, the value of the Policy as at 6th March would have been visible. This is supported by the value quoted in [Provider Agent 1’s] letter to the Complainant of 24 June 2020 when she outlined the changes in values that were discussed at their meeting.”

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I note that switching the Complainant's fund to a cash fund seemed to be discussed, by the Provider, as a potential option, in the context of market volatility, as this option included "85% protection", and the contents of the email from Provider Agent 1, dated **28 April 2021** include:

"we did discuss not switching to the cash fund given market volatility"

Making a decision of that nature however, in my opinion, required a full understanding by the Complainant as to precisely how the switch would work, and the date on which the value would be crystallised.

Although Provider Agent 1 records a discussion with the Complainant, in her letter dated **24 June 2020**, that different fund values are associated with different days throughout the year, I am not satisfied that this amounts to explaining that it will be the next day's fund value, which is unknowable (and may well be lower or indeed higher than today's amount) that will be the value that switches to the cash fund.

I note that Provider Agent 1's note of her meeting with the Complainant on **9 March 2020** lacks any record of explanation that might have been given to the Complainant on **9 March 2020** regarding Section 6 of the **Policy Conditions**. I note the Complainant's signed **Authorisation Form**, dated **9 March 2020**, includes no information regarding Section 6 of the **Policy Conditions** or the implications of switching a fund, or the date on which the fund value will be calculated.

The Provider submits that as "*a company who deals with global unit funds, we are unable to give a value as of close of stock market on current business day, as we do not have those prices available to us.*" I accept this. There was no duty on the Provider to provide the Complainant with the definite value which would be available the following day. This would be impossible. The fact that the amount was unknown and unknowable, and the risk that necessarily attached to that fact, should however have been clearly explained and there is no evidence before me that it was. I am satisfied that the Complainant was entitled to have the details and implications of Section 6 of the **Policy Conditions** fully explained to her on **9 March 2020**, before she made her decision to proceed with the switch, but there is no evidence before me that the Provider did so. I am satisfied in those circumstances, that the Provider's failure in that regard constitutes conduct which is unreasonable within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

I am satisfied nevertheless, that the Provider acted within the scope of its **Policy Conditions** when transferring the funds, and I am of the firm opinion that the Complainant was on notice of those Policy Conditions. However, in my opinion, the Provider failed to meet its obligation to the Complainant, on the day when she gave the instruction to switch, to ensure that she fully understood the consequences of proceeding to instruct the switch to the cash fund, and how the valuation of the switch would work.

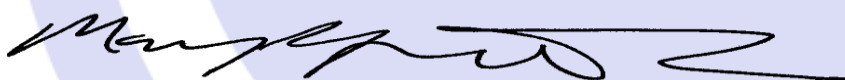
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Accordingly, on the basis of the evidence before me, I consider it appropriate to partially uphold this complaint, arising out of the Provider's failure to fully inform the Complainant regarding the manner in which the switch instruction would operate.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2)(b)**.
- 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 €2,000 (two thousand euro), 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.



MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

28 February 2022

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.