



<b><u>Decision Ref:</u></b>	2022-0096
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Personal Pension Plan
<b><u>Conduct(s) complained of:</u></b>	Mis-selling Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service
<b><u>Outcome:</u></b>	Substantially upheld

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

The Complainant made an investment in **2016**, in Company 1, by way of a loan note in the amount of **€70,000.00 (seventy thousand Euro)** through her broker, the Provider, against who this complaint is made.

The Loan Note had a term of 3 years and offered a return of **€28,000 (twenty-eight thousand Euro)**. This complaint concerns the Complainant's contention that in **2016**, the Provider failed to provide her with appropriate advice and mis-sold her the investment.

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

The Complainant says that in **July 2016** the Provider called to her home and advised her to invest in Company 1. The Complainant says that at no time did the Provider make any enquires as to her attitude to investment risk.

The Complainant says that at that time, she held a Personal Retirement Bond with a third-party provider in the amount of **€70,000.00 (seventy thousand Euro)** that had performed well over its lifetime and was soon to mature.

The Complainant says that based on the advice given by the Provider, she agreed to invest the entire **€70,000.00** value of her Personal Retirement Bond, in Company 1, by way of a non-regulated, loan note instrument

The Complainant says that the first correspondence she received from the Provider regarding the performance of her investment was his letter of **19 February 2019** in which he advised, among other things, that:

*"... You are aware that [Company 1] is not performing and your investment is not in a healthy financial state. It is with huge regret that I have to for the record finally put this in writing to you.*

*You took this investment out hoping to get a return after 3 or 4 years and this is not the case.*

*I have over the last 18 months spend (sic) a huge amount of time trying to liaise with [Company 1] through emails, phone calls and meetings. I thought there would be a solution to the problem the company was having but **clearly it now appears** to me that this is not the case and as you are the investor, I regret I must inform you of this. I have been promised solutions after solutions, but to no avail ...*

*I have to be totally honest with you at this stage and say [the Provider] can do no more ..."*

The Complainant sets out her complaint in the **Complaint Form** she completed, as follows:

*"I was never risk assessed by [the Provider] for this or any other product.*

*I had my pension fund in a Personal Retirement Bond with [a third-party provider] prior to this, this bond was about to mature and it had done very well over the bond's lifetime. [The Provider] was, as my broker aware of this and came to my home with the sole intention of getting me to sign up to the investment in [Company 1]. I was never offered any other investment and [the Provider] advised that I place 100% (€70,000.00) of my pension into this investment. I had accumulated this amount over the past 19 years of contributions and at the age of 48 at the time would this not have been a risky choice of direction for my entire pension fund?*

*[The Provider] also tried to get a further €35,000.00 investment from some of husband's pension plan.*

*[The Provider] sold this investment as being 100% Guaranteed with a 40% return over a three year period with interest payments being made annually throughout the period of investment; these payments were to be ring fenced until the end of the three year period when the investment would mature, none of this happened. I even got my husband to clarify this with [the Provider] after the meeting in my home, he confirmed that all of the above would happen.*

*Throughout the investment I haven't received any correspondence from [the Provider], [B.] Trustees Ltd or [[Named] Trustee Company Ltd]; [which was] involved in overseeing that the fund was performing as promised so that they could release further funds to the Indian investment and to ensure that things were covered by strict rules governing pension fund monies.*

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[B.] Trustees Ltd and [[Named] Trustee Company Ltd] both had my home address incorrect and had been sending letters informing investors that the investment was not performing as promised, however [the Provider] was also aware of the non-performing investment all along. The original default on the loan note occurred in October 2017 and yet in January 2018 [the Provider] told my husband in an email that "the Indian investment was coming along nicely". At this time [the Provider] would have known that the investment was not performing as promised yet choose to lie/misinform my husband, Also I happened to meet [the Provider] whilst on a night out with a friend on the evening of 01.06.2018 in [a public house], again he advised that all was fine with the Indian investment; again a lie.

The first correspondence I received from [the Provider] was a letter dated 19.02.2019 in which I was informed that all had gone wrong and that all of my investment had gone and that there was no more he could do.

I believe that this advice was negligent as I was 48 years old when given this financial advice from [the Provider] and that he advised that I invest everything I had in my pension pot and now I have nothing.

I have sent a letter of complaint to [the Provider] regarding this situation dated 06/11/2019, he has not responded. I don't know if he has informed his professional indemnity insurer of this complaint and he is not replying to emails about this either".

In addition, in her email to this Office on **20 May 2020**, the Complainant submits, among other things, that:

*"... I was not risk or stress tested in relation to the investment, I probably met [the Provider] once before he approached me with this investment and he made me feel very foolish if I didn't invest, it was guaranteed return ...*

*The investment looks like it was totally flawed from the outset with no security ...*

*How can [the Provider] not have been aware the interest agreed was not paid annually when he had so many clients tied up as he says "family and friends" in this fund? ...*

*[The Provider says] he is sorry he didn't inform me sooner ... why would you not inform your clients as soon as things started going astray to let them take whatever action they need to do?*

*[The Provider] did not advise me he had ceased trading in November 2019 – another clerical error to add to all the others...I do not see how [the Provider's] divorce or personal financial situation has anything to do with this? ...*

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*I am still trying to recoup my investment and pension that I have worked so hard to build up since 1997 approximately ...”*

In the **Complaint Form** she completed for this Office, the Complainant advises that she seeks for the Provider to reimburse her **€70,000.00 (seventy thousand Euro)**, as follows:

*“I would like to have the guaranteed sum return[ed] to me so that I can invest it accordingly for my future pension requirements”.*

### **The Provider’s Case**

The Provider says that he has known the Complainant for several years and was acting as her financial advisor, and as her husband’s financial advisor also. The Provider notes that the Complainant and her husband had both separate pensions which were under the Provider’s agency and they both also had life policies in place with him.

The Provider says that as a financial advisor, he had agencies with both [Named] Trustee Company Ltd and [B.] Trustees Ltd, who were the portal to transfer the pension funds to the loan note which was set-up by [Named] Trustee Company Ltd on behalf of Company 1. The Provider says he was approached by the Director of Company 1 in **January 2016** regarding an opportunity to bring on investors to build a substantial security business in India.

As he then began promoting that investment opportunity at the time, the Provider says he set-up a financial review with both the Complainant and her husband and met with them at their home in **July 2016** for what he thought at the time was an excellent opportunity to present this investment option to them.

The Provider says he presented the Complainant with the supporting documentation on the investment for Company 1 and that this investment option seemed favourable to her as there was a Personal Guarantee attached to it.

The Provider says that the Personal Guarantee was drawn up by [Named] Trustee Company Ltd and was a guarantee to protect the capital lump sum. As each investment was taken in by [Named] Trustee Company Ltd and before it went to Company 1, it was signed by the Personal Guarantor. The Provider does not have a copy of the signed Personal Guarantee, as this resides with [Named] Trustee Company Ltd.

The Provider says that at that time he did feel that the Personal Guarantee underpinning the investment was very strong however, he says he did explain to the Complainant that because both the Complainant and her husband were at the meeting, that they only invest one of their pension plans into this option, by way of diversification.

The Provider says the Complainant and her husband both agreed that for the investment, they use the Complainant’s Personal Retirement Bond, she held with a third-party provider.

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The Provider says in **July 2016** he proceeded to set-up the transfer into B. Trustees Ltd who were to be the Pension Trustees acting for the Complainant, who in turn invested the monies into Company 1.

The Provider says it was **July 2017** when the problems arose regarding the future of Company 1 and that [Named] Trustee Company Ltd, the loan note holders, started to ask questions as to the stability of this investment. The Provider says he was informed of the situation but was advised that all would be rectified, and the funding would resume very shortly.

The Provider says it was in **September 2017** that all funding through [Named] Trustee Company Ltd was stopped until all investors were paid up to date. The Provider says he met with [Named] Trustee Company Ltd on several occasions to see what could be done to bring Company 1 back in line.

The Provider says that in **October 2017** the Chairman of Company 1 reinvested €800,000.00 back into the company to cover the shortfall and that he was led to believe that the funds would be used to pay the outstanding balance that was due to the initial investors and that a new loan note was set-up direct with [B.] Trustees Ltd, which now had the facility to fund the company.

The Provider says that in his opinion, none of the initial investors were paid and it was then that [Named] Trustee Company Ltd decided to call in the Personal Guarantee which was in place for each of the investors. In that regard, the Provider says he received a document dated **5 October 2017** from the Personal Guarantor's accountants offering a statement of the Personal Guarantor's net worth, though this net worth was property of a Trust Company.

The Provider says it was **July 2018** when it became clear that the investment was not performing and that all loan note funding was stopped and that Company 1 was seeking alternative funding to support the company going forward, with [Named] Trustee Company Ltd informing all investors of the situation.

The Provider says that [Named] Trustee Company Ltd called in the Personal Guarantee only to learn that the Personal Guarantor's net worth was held in trust, which the Provider says in his mind deemed the Personal Guarantee null and void. The Provider says that [Named] Trustee Company Ltd, as the trustees who had drawn up the Personal Guarantee, should have ensured that the Personal Guarantor's net worth had been ringfenced from the outset.

The Provider says he took legal advice at that time, on behalf of his investors to see if anything could be done regarding the ringfencing of the guarantee and the Solicitors in question informed him that it would *"fraught with difficulty"*.

The Provider says he did approach the Personal Guarantor and asked that he honour his commitment and return the monies owed to the investors, however the Personal Guarantor kept on stating that there were options on the table and was seeking new external investors to keep the venture alive. The Provider says he was informed for 8 months that a new solution was on the horizon.

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The Provider says there were several investment meetings/webinars setup by [Named]Trustee Company Ltd on behalf of the investors, and options were given to them as to what could be done.

The Provider says that after exhausting his efforts trying to see could a solution be given to protect his investors, he had no choice but to inform all of his investors of the situation and in that regard, he wrote to each affected investor.

In his **Final Response** letter to the Complainant dated **24 February 2020**, the Provider says:

*“... it became apparent that all the feedback I was getting were in my opinion lies, so as to “kick the can down the road with promises after promises”. I was hoping against hope that the situation would rectify itself, however it was February 2019 when I informed my investors of the dire situation ...”*

The Provider wrote to the Complainant on **19 February 2019**, as follows:

*“Following on from correspondence you received over the last 12 Months regarding the...investment from [Named Trustee Company Ltd] and all the meetings and Webinars that were organised on behalf of investors, it is with regret that I have to send you this letter.*

*You are aware that [Company 1] is not performing and your investment is not in a healthy financial state. It is with huge regret that I have to for the record finally put this in writing to you.*

*You took this investment out hoping to get a return after 3 or 4 years and this is not the case. I have over the last 18 months spend (sic) a huge amount of time trying to liaise with [Company 1] through emails, phone calls and meetings. I thought there would be a solution to the problem the company was having but **clearly it now appears** to me that this is not the case and as you are the investor I regret I must inform you of this. I have been promised solutions after solutions, but to no avail.*

*I have [sought] independent legal advice myself regarding the Personal Guarantee on your behalf, you are aware that [[Named] Trustee Company Ltd] have offered to [pursue] the Guarantee so that is a decision you will have to make yourself.*

*Separate from that I have also [sought] Legal advice myself regarding how the investment was set-up from the start with the Loan Note Trustee [[Named] Trustee Company Ltd] as it had come to light that the Personal Guarantee was not protected by [[Named] Trustee Company Ltd] themselves on initial set-up, however to quote my Solicitors [named redacted]:*

*“[We] have been looking at this in more detail. At present, given (1) the disclaimers and express acknowledgements that [[Named] Trustee Company Ltd] had no role in the original decisions to invest and (2) they have in our*

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*view discharged their limited duty of care by immediately flagging the issues with [Company 1]'s accounts (versus the company's investment memorandum estimates), we would see a potential case against [[Named] Trustee Company Ltd] as being fraught with difficulty".*

*By [pursuing] this legal action I'm afraid that we might be throwing good money after bad.*

*I have to be totally honest with you at this stage and say [the Provider] can do no more. If you wish to seek [advice] and take matters into your own hands I suggest you contact the [Company 1] chairman [name redacted] (the [Guarantor]) directly, his contact details are [details redacted]".*

The Provider says it was his understanding that the Complainant was fully aware of the investment situation prior to his letter of **19 February 2019**, in that the Provider assumed that she was receiving the same information from [Named] Trustee Company Ltd as did all of his investors. In that regard, the Provider says he has no idea why [Named] Trustee Company Ltd did not issue the Complainant with these investment updates but suggests that this must have been the result of a clerical error.

The Provider says he has deep regret that this happened to the Complainant and to all of his clients who invested in this investment.

The Provider says that as a broker, he was offering advice on an investment which he deemed suitable to the Complainant and at no time did he foresee the outcome.

The Provider says the Complainant invested in what was deemed a non-regulated product, which in his opinion does not come under the investor compensation scheme. The Provider says he transferred, on behalf of the Complainant, the Personal Retirement Bond she had invested with the third-party provider and which had not matured, into a Self-Invested Personal Retirement Bond through [B.] Trustees Ltd, who in turn invested the monies into Company 1. The Provider says that the intention was to invest the Complainant's money, to gain a return to add to her initial monies invested.

The Provider says that as the Complainant's financial advisor for several years, he understood her attitude to investment risk. He says it was for this reason that he approached the Complainant with the option to invest in Company 1, as it was in his opinion a valid option to enhance her portfolio because of the Personal Guarantee which underpinned the investment, coupled with the fact that a Loan Note was set-up through [Named] Trustee Company Ltd. (which he says was one of the largest Pension Trustees in the country at the time) allowing for this investment to be set-up. The Provider says he did not see any reason not to provide this as an investment option to the Complainant.

The Provider says that the reason he never presented the Complainant with any other investment option in **July 2016** was that as her financial advisor, he really believed that the opportunity to invest in Company 1 would be a successful option for the Complainant

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because of the security that came with it. The Provider says that at no time did he believe that this investment was going to present the difficulties that arose.

The Provider is satisfied that it made the Complainant aware that the investment was a non-regulated investment at the financial review in **July 2016** and that it was agreed to invest only the Complainant's pension plan proceeds and not also those of her husband.

The Provider says he offered this investment as an option to the Complainant because in his opinion the Personal Guarantee backing made it a suitable option for her. The Provider says he had been dealing with the Complainant for a long time before this, and at no time did he feel that this option was not suitable for her.

In relation to the Complainant's comments that the original default on the loan note occurred in **October 2017** but that the Provider stated in an email to her husband in **January 2018** that *"the investment was coming along nicely"* and subsequently when she met the Provider on **1 June 2018** he again advised that *"all was fine"* with the investment, the Provider says that as the Chairman of Company 1 had recently reinvested €800,000.00 back into the company, he had no reason to believe that the company was not performing and moving in the right direction.

The Provider says he is happy that he complied with Principles 2.1, 2.2, 2.3, 2.5, 2.6 and 2.8 of Chapter 2, 'General Principles', of the Central Bank of Ireland's **Consumer Protection Code 2012 (as amended)**, as well as Provisions 4.1, 4.2, 4.12, 4.13, 4.14, 4.18 and 4.46 of Chapter 4, 'Provision of Information', and Provisions 5.1, 5.3, 5.16, 5.17, 5.19 and 5.29 of Chapter 5, 'Knowing the Consumer and Suitability', and Provisions 10.7, 10.9, 10.10 and 10.11 of Chapter 10, 'Errors and Complaints Resolution' of the Code.

The Provider says he does not have in place professional indemnity insurance. He says that due to his personal and financial situation, he was diagnosed as suffering from severe stress and depression and had no option but to apply for bankruptcy in late **2019**. The Provider advises that his licence to practice financial advice was revoked by the Central Bank of Ireland in **February 2020** and thus he can no longer act as a financial adviser. The Complainant says it must have been a clerical error that the Complainant did not receive correspondence from him at that time, confirming that he had ceased trading.

The Provider says he is deeply sorry that this has happened to the Complainant and notes that he had family members, close friends and colleagues who invested in the same investment and that he is disgusted with the Directors of Company 1 for the manner in which they wasted and lost investors' money.

The Provider says he received an email from the Director of Company 1 on **25 February 2020** that stated:

*"... Our Trustees closed off our funding in late 2017, wrongly in the view of our legal advisors.*



*Since then, we have gone back to the market to seek fresh investment. Once we secure this investment, we can address the outstanding loan note holders.*

*Apologies that I cannot provide any more information at this time as our potential new investors have had us sign [Non-Disclosure Agreements] ...”*

In that regard, the Provider says his hope is that a solution to the Complainant’s investment will come in due course.

Having considered his **formal response** to the complaint investigation received from the Provider dated **16 August 2020**, this Office had cause to write to the Provider on **21 September 2021** asking for the following information at Questions 1 - 14:

1. *Please provide an explanatory note on the Provider’s compliance with each of the following Provisions of the Central Bank of Ireland’s **Consumer Protection Code 2012 (as amended)**: Provisions 5.1, 5.3, 5.16, 5.17, 5.19 and 5.20.*
2. *Please provide a copy of the written Statement of Suitability that the Provider prepared for and issued to the Complainant prior to arranging her investment with Company 1 as required by Provision 5.19 of the **Consumer Protection Code 2012 (as amended)**? If the Provider did not prepare and/or issue this Statement of Suitability, please set out in detail why he did not do so.*
3. *In his **Formal Response**, the Provider advised that:*

*“Yes I organised a financial review with [the Complainant] and her husband and we discussed the performance of her pension plan as with all investments reviews I took. I offered this investment as an option to her coupled with a Personal Guarantee backing it and it was my opinion a suitable option as I had been dealing with her for a long time, and at no time did I feel that this option was not suitable for her”.*

*Please now confirm whether:*

- (i) *the Provider carried out a financial review with the Complainant prior to his arranging her investment with Company 1 and if he did, please provide a copy of this financial review documentation along with any contemporaneous notes the Provider has in relation to this review;*

*and*

- (ii) *the Provider furnished the Complainant with key information documents including information on the charges and risks of the investment with Company 1 and if so, please provide a copy of all such documentation.*

4. *In his **Final Response Letter** to the Complainant dated **24 April 2020**, the Provider states:*

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*“... Regarding the “risk assessed or stress test” as I was your financial advisor for several years I understood your attitude to risk ... ”*

*Please advise in detail how the Provider assessed the Complainant’s attitude to risk and her suitability to invest the sum of **€70,000.00** which she had accumulated in a Personal Retirement Bond with a third-party provider, into an unregulated speculative investment, where returns were not guaranteed?*

- 5.** *In his email to the Provider of **4 July 2016** prior to the Complainant investing with Company 1, the Complainant’s husband asked the Provider,*

*“In the frequently asked questions; ‘HOW SAFE IS MY INVESTMENT’ it says to refer to the information memorandum for full details of the personal guarantee; I can’t find any further information on this”.*

*In his email of **6 July 2016**, the Provider responded, as follows:*

*“The personal Guarantee from [named redacted] this is to cover the Interest and the capital. I have attached a Sample Guarantee so you can confirm what is offering is true and legal and resides with the trustees of your pension plan”.*

*Please provide a copy of this sample guarantee and advise why the Provider only furnished the Complainant with a sample guarantee and not a copy of the actual guarantee.*

- 6.** *In his email to the Provider of **4 July 2016** prior to the Complainant investing with Company 1, the Complainant’s husband asked the Provider,*

*“In the information memorandum; ‘NOTICE TO INVESTORS’ it says you may lose your entire investment. It also state that neither the company nor its directors, employees, agents or advisors shall be liable in any way for any loses. Does the personal guarantee override this statement?”*

*In his email of **6 July 2016**, the Provider responded, as follows:*

*“As I mentioned before this is a regulatory requirement by the central bank that this must be added to all investment options as standard practice. However the Personal Guarantee just steadfasts the safety of the investment and YES the guarantee does override this statement. Furthermore this statement is also on all your existing investments at present with [named third party providers]”.*

*In that regard, please answer the following:*

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- (i) *Is the Provider satisfied that his above answer is clear and that it correctly and fully addressed the concerns raised by the Complainant's husband? If so, please explain in detail why the Provider considers it to be so.*
- (ii) *Why did the Provider advise the Complainant's husband that the 'NOTICE TO INVESTORS' "is a regulatory requirement by the central bank that...must be added to all investment options as standard practice" when the Provider then arranged for the Complainant to sign a letter that included the following warning:*

*"\*This investment or product does not require licensing, authorisation or registration with the Central Bank of Ireland/Financial Regulator and as a result, it is not covered by the Central Bank/Financial Regulator's requirement designed to protect customers or by a statutory compensation scheme".*

- (iii) *Why did the Provider advise the Complainant's husband that "the Personal Guarantee just steadfasts the safety of the investment and YES the guarantee does override this statement" when the Provider then arranged for the Complainant to sign a letter that included the following warning:*

*"The value of your investment can fall as well as rise".*

*Please provide a copy of the Information Memorandum relating to the Complainant's investment with Company 1.*

- 7.** *Please provide an explanatory note on the Provider's compliance with each of the following General Principles of the **Consumer Protection Code 2012 (as amended)**: General Principles 2.1, 2.2, 2.3, 2.5, 2.6 and 2.8.*
- 8.** *Please provide an explanatory note on the Provider's compliance with each of the following Provisions of the **Consumer Protection Code 2012 (as amended)**?: Provisions 4.1, 4.2, 4.12, 4.13, 4.14, 4.18 and 4.46.*
- 9.** *Please provide an explanatory note on the Provider's compliance with each of the following Provisions of the **Consumer Protection Code 2012 (as amended)**: Provisions 10.7, 10.9, 10.10 and 10.11.*
- 10.** *Please advise in detail, with supporting documentation, how the Provider first become aware of the Company 1 investment?*
- 11.** *Please provide a note as to the role [Named] Trustee Company Ltd played in the Complainant's investment with Company 1.*
- 12.** *Please provide a note as to the role [B.] Trustee Ltd played in the Complainant's investment with Company 1.*

**13.** For clarity, please set out a detailed chronological timeline in relation to the Complainant's investment, from **July 2016** to date. This timeline should detail key interactions that took place between the Provider and the Complainant, [Named] Trustee Company Ltd, [B.] Trustee Ltd and Company 1.

**14.** How many other investments did the Provider arrange for his clients in Company 1 and what is the approximate value of the total of these investments?

In response to these detailed questions, the Provider emailed this Office on **11 November 2021** to advise that:

*"Sorry for the late reply, I have reviewed your letter dated 21<sup>st</sup> September 2021, unfortunately, I will am (sic) not in a position to answer any of the questions you have requested regarding this dispute. I have lost my business, lost all my properties, lost my reputation...I have been declared Bankrupt. I wish I could turn back time. I am disgusted with [Company 1], for leading me on, to present this investment to my Clients. Whatever the decision of the FSPO will be the decision, however, I have no insurance in place to cover the outcome. It has been the most stressful time of my life and I apologise for what has happened to [the Complainant]'s investment".*

### **The Complaints for Adjudication**

The complaints are that the Provider:

- Mis-sold an investment product to the Complainant in 2016;
- Failed to provide appropriate advice to the Complainant regarding the investment;
- Failed to communicate with and/or update the Complainant regarding the investment;
- Failed to act with due care and diligence in the best interests of the Complainant;
- Failed to inform the Complainant that he had ceased trading; and
- Failed to engage with the Complainant's formal complaint in line with the timeframes set out in the Central Bank of Ireland's **Consumer Protection Code 2012 (as amended)**.

### **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

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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 **22 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.

I note that in **July 2016**, the Provider recommended that the Complainant invest **€70,000.00 (seventy thousand Euro)** in a non-regulated loan note instrument for Company 1.

The Complainant at that time held a Personal Retirement Bond with a third party provider in the amount of **€70,000.00 (seventy thousand Euro)** that she says had performed well over its lifetime and was soon to mature.

The Complainant says that based on the advice furnished by the Provider, she agreed to invest the entire **€70,000.00** value of her Personal Retirement Bond, in Company 1.

The Complainant says that the first correspondence she received from the Provider regarding the performance of her investment was his letter of **19 February 2019**, wherein he advised her that her investment had effectively been lost.

The provisions of the Central Bank of Ireland's **Consumer Protection Code 2012 (as amended)** are binding on regulated entities providing financial services, such as the Provider.

In the context of this complaint, I note that Chapter 2, 'General Principles', of the Code provides that:

*"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;*

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- 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 ...*
- 2.5** *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”.*

In addition, Chapter 4, ‘Provision of Information’, of the Code provides that:

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

- 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.*
- 4.2** *A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following:*
  - a) the product or service meets that consumer's needs and objectives;*
  - b) the time necessary for the consumer to absorb and react to the information provided ...*
- 4.18** *The term ‘broker’ may only be used where the principal regulated activities of the intermediary are provided on the basis of a fair analysis of the market ...*
- 4.46** *Prior to offering, recommending, arranging or providing an investment product, other than a tracker bond, a regulated entity must provide a consumer with information on the following, where relevant:*
  - a) capital security;*
  - b) the risk that some or all of the investment may be lost;*
  - c) leverage and its effects;*
  - d) any limitations on the sale or disposal of the product;*
  - e) restrictions on access to funds invested;*

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- f) *restrictions on the redemption of the product;*
- g) *the impact, including the cost, of exiting the product early;*
- h) *the minimum recommended investment period;*
- i) *the risk that the estimated or anticipated return on the investment product will not be achieved;*
- j) *the potential effects of volatility in price, fluctuation in interest rates, and/or movements in exchange rates on the value of the investment; and*
- k) *the level, nature, extent and limitations of any guarantee and the name of the guarantor.*

*This information must be provided in a stand-alone document except where such information is already required to be disclosed under the Life Assurance (Provision of Information) Regulations 2001 or any other regulations made under Section 43D of the Insurance Act 1989 concerning provision of information for life assurance policies and where such information is disclosed to the consumer in a manner which complies with such Regulations”.*

Furthermore, Chapter 5, 'Knowing the Consumer and Suitability', of the Code provides that:

**“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) dependents,*
- v) employment status,*
- vi) known future changes to his/her circumstances.*

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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.*

**5.4** *Where a consumer refuses to provide information sought in compliance with Provisions 5.1 and 5.3, the regulated entity must inform the consumer that, as it does not have the relevant information necessary to assess suitability, it cannot offer the consumer the product or service sought.*

**5.5** *A regulated entity must endeavour to have the consumer certify the accuracy of the information it has provided to the regulated entity ...*

**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 ...*

*d) the product or service is consistent with the consumer's attitude to risk.*

**5.17** *A regulated entity must ensure that any product or service offered to a consumer is suitable to that consumer, having regard to the facts disclosed*



*by the consumer and other relevant facts about that consumer of which the regulated entity is aware.*

*The following additional requirements apply:*

*a) where a regulated entity offers a selection of product options to the consumer, the product options contained in the selection must represent the most suitable from the range available from the regulated entity; and*

*b) where a regulated entity recommends a product to a consumer, the recommended product must be the most suitable product for that consumer*

*...*

**5.19** *Prior to providing or arranging a product or service, a regulated entity must prepare a written statement setting out:*

*a) the reasons why a product or service offered to a consumer is considered to be suitable to that consumer; or*

*b) the reasons why the product options contained in a selection of product options offered to a consumer are considered to be the most suitable to that consumer; or*

*c) the reasons why a recommended product is considered to be the most suitable product for that consumer.*

*The reasons set out in the statement must reflect the information gathered under Provision 5.1 to assist the consumer in understanding how the product(s) or service(s) offered or recommended meets, where relevant, the consumer's:*

- i) needs and objectives;*
- ii) personal circumstances; and*
- iii) financial situation.*

*The written statement must also include an outline of the following, where relevant:*

- iv) how the risk profile of the product is aligned with the consumer's attitude to risk; and*
- v) how the nature, extent and limitations of any guarantee attached to the product is aligned with the consumer's attitude to risk.*

*The regulated entity must sign the statement and provide a copy of this statement on paper or on another durable medium, dated on the day on*

which it is completed, to the consumer prior to providing or arranging a product or service, and retain a copy.

- 5.20** A regulated entity must include the following notice at the beginning of the statement of suitability or, if applicable, the statement of advice as required under Provision 13.14:

**Important Notice – Statement of Suitability [or Advice]**  
**This is an important document which sets out the reasons why the product(s) or service(s) [advice] offered or recommended is/are considered suitable, or the most suitable, for your particular needs, objectives and circumstances.**

- 5.21** Where a regulated entity has provided an oral explanation to the consumer of the product(s) or service(s) offered or recommended, a regulated entity must include a record of such explanation in or with the statement of suitability ... ”

The Complainant says that when this investment was sold, at no time did the Provider make any enquires as to her attitude to investment risk.

The Provider says that as the Complainant’s financial advisor for several years, he understood her attitude to investment risk. The Provider was asked by this Office to submit a copy of the written **Statement of Suitability** that he ought to have prepared for and issued to the Complainant prior to him arranging her investment, as required by Provision 5.19 of the **Consumer Protection Code 2012 (as amended)**, along with a copy of the financial review documentation he prepared with the Complainant at that time.

In addition, the Provider was asked by this Office to set out in detail how he had determined the Complainant’s attitude to risk and her suitability to invest the sum of **€70,000.00** which she had accumulated in a Personal Retirement Bond with a third party provider, into an unregulated speculative investment, where returns were not guaranteed.

The Provider has furnished this Office with an undated single-page letter that is both addressed to the Complainant and signed by her, and which reads:

“Dear [the Complainant],

*Following our recent financial review I would like to confirm the following information regarding your investment decision:*

*You have decided to invest in [Company 1’s]\* via your Self Invested PRB\**

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***\*This investment or product does not require licensing, authorisation or registration with the Central Bank of Ireland/Financial Regulator and as a result, it is not covered by the Central Bank/Financial Regulator's requirement designed to protect customers or by a statutory compensation scheme.***

*This is a speculative investment and returns are not guaranteed, However there is a Personal Guarantee Given (sic) ny (sic) the chairman [named redacted] in the event of a default the investment would be covered. All the information is provided in the [Information Memorandum] you received.*

*You are familiar with the terms and conditions of this investment as per the product information document of which you have a copy.*

*Past performance is not a reliable guide to future returns.*

*The value of your investment can fall as well as rise.*

*It is important that any investment portfolio is diversified and balanced amongst various assets classes to reflect the investor's attitude to risk and their personal circumstances".*

With an investment such as the non-regulated loan note instrument that the Provider recommended to the Complainant, it is reasonable to expect the Provider to have assessed the Complainant's appetite for risk and the suitability of such an investment for her. The Provider has not however provided any evidence to demonstrate that this occurred.

The Provider has also not confirmed or explained in his **Formal Response** to the complaint investigation, dated **16 August 2020**, or at any time since, whether any such suitability assessment was carried out prior to or at the time of the investment.

The Provider says that he was offering advice on an investment he thought was suitable for the Complainant, yet there is no evidence to show that a **Reasons Why Letter** or a **Statement of Suitability** was issued to the Complainant before or at the time of the investment setting out the nature, risks, and suitability of the investment, and containing the appropriate investment warnings.

In addition, the Provider has not explained to this Office why he had considered the Complainant's attitude to risk and her suitability to invest the sum of **€70,000.00** which she had accumulated in a Personal Retirement Bond with a third party provider, into an unregulated speculative investment, where returns were not guaranteed.

I am satisfied that the Provider had very well defined and very serious obligations pursuant to the **Consumer Protection Code 2012 (as amended)** and I am of the opinion that the

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Provider has failed to demonstrate that he met these obligations when he sold the investment to the Complainant in 2016.

On the basis of the evidence available, I do not accept that the Provider properly assessed the Complainant's appetite for risk or the suitability of this investment for her, nor am I satisfied that the Provider adequately advised on or explained the risks associated with this investment to the Complainant in 2016.

I am satisfied that the Complainant placed a lot of trust in the Provider and invested on his advice alone. The Provider's conduct in this regard is grave and very concerning, particularly as the Complainant's investment funds apparently represented the total of her pension savings.

The Complainant says that the original default on the Loan Note occurred in **October 2017** but that the Provider only first informed her of this in his correspondence to her dated **19 February 2019**.

The Provider says it had been his understanding that the Complainant was kept fully aware of the investment situation, in that he understood that [Named] Trustee Company Ltd had been writing to the Complainant with updates regarding the status of her investment.

It is not clear from the documentation before me why the Provider understood this to have been the case, given that the Complainant and the Provider, as her financial advisor, both signed a document to the [Named] Trustee Company Ltd on **28 July 2016** that provided, among other things, that:

*"I understand that [[Named] Trustee Company Ltd] will not carry out any on-going monitoring or management of the investment and that such monitoring and management will be my sole responsibility".*

The Provider says he was informed in **July 2017** of problems regarding the future of Company 1 and that [Named] Trustee Company Ltd, the loan note holders, had started to ask questions as to the stability of this investment.

The Provider says he became aware in **September 2017** that all funding through [Named] Trustee Company Ltd was stopped until such time that all investors were paid up to date. The Provider says he met with [Named] Trustee Company Ltd on a number of occasions to see what could be done and was advised that all would be rectified, and the funding would resume very shortly.

While the Provider was not required to track the performance or status of Company 1 or to periodically update the Complainant in this regard, I am of the opinion that the Provider, as her financial adviser, ought to have contacted the Complainant in **July 2017** and/or **September 2017** to inform her of the information he had obtained, concerning the performance of her investment, and his failure to have done so is concerning. In light of the foregoing, I am of the opinion that the Provider has failed to demonstrate that he acted with due care and diligence in the best interests of the Complainant.

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The Provider has advised that he applied for bankruptcy in late **2019** and ceased to practice financial advice and he has furnished a copy of a letter from the Central Bank of Ireland dated **20 February 2020** in support of this. As the Provider was ceasing to practice and as the Complainant was a client of the Provider, the Provider should have notified the Complainant of this. There is no evidence however, of this having occurred. The Provider says his failure to notify the Complainant of his ceasing to trade, must have been a clerical error on his part. This is very unsatisfactory.

The Complainant made a formal complaint to the Provider by way of letter dated **6 November 2019**. I note the Provider was still trading as a financial advisor at the time when the Complainant made this complaint. Receipt of this complaint letter has not been disputed by the Provider, but the Provider did not respond to the Complainant's complaint until he issued her with his **Final Response** letter dated **24 April 2020**, acknowledging receipt of her letter of complaint.

Chapter 10, 'Errors and Complaints Resolution', of the **Consumer Protection Code 2012 (as amended)** details the manner in which a complaint should be handled by a regulated entity. It is clear that the Provider did not in any way endeavour or attempt to respond to the complaint in compliance or purported compliance with the Code. The complaint was effectively ignored by the Provider until after the Complainant had sought to make a complaint to this Office. This is extremely disappointing, and in my opinion, it was unprofessional conduct.

Although the Provider made some responses to this Office concerning the Complainant's complaint, the detailed evidence one would expect to note, surrounding the manner in which the product was sold to the Complainant, has not been evidenced in any fashion by the Provider, in his communications. He describes the investment as an excellent opportunity and that arising out of the fact that he had been the Complainant's Financial Advisor for several years he "*understood her attitude to investment with risk*", but there is no evidence that his understanding in that regard was documented in any way or that the Complainant was given an opportunity to discuss this understanding with the Provider, or to consider whether this aligned with her own understanding of her attitude to risk.

There is no objective evidence before me as to why, in **2016**, the Provider took the view that an unregulated loan note investment was suitable to the Complainant for the transfer of an amount of €70,000 which she had built up over quite a number of years. On the basis of the limited evidence available to this Office, I take the view that I must accept that this investment was mis-sold by the Provider to the Complainant in 2016, as there is no evidence that the Provider properly assessed the Complainant's appetite for risk or the suitability of this investment to her, nor indeed is there any evidence that the Provider advised or explained the risks associated with that investment. The evidence before me indicates that in the Provider's dealings with the Complainant in 2016, his conduct was unreasonable and improper within the meaning of **Section 60(2)(b) and (g)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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I am however mindful of the single page letter which the Complainant signed which contained a warning box to the effect that the investment did not require licencing authorisation or registration with the Central Bank of Ireland, and that it was not covered by the Central Bank's requirement designed to protect customers. In my opinion, the Complainant bears an element of the responsibility, for proceeding on the strength of one meeting with the Provider in July 2016, to invest the value of an investment she had built up over many years, into a product that was identified to her as a "speculative" investment, where returns were not guaranteed.

Accordingly, for the reasons outlined above, I am satisfied that it is appropriate to substantially uphold the complaint against the Provider. In marking that decision, I am conscious that it seems that all of the Complainant's investment has essentially been lost. Taking account of the Complainant's own level of responsibility, I consider it appropriate to direct the Provider to make the payment specified below to the Complainant, by way of compensation, in order to conclude.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2)(b) & (g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider make a compensatory payment to the Complainant in the sum of **€60,000** (sixty thousand Euro) within a period of 35 days from today. 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 Complainant, 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)**

21 March 2022

**PUBLICATION**

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### **Complaints about the conduct of financial service providers**

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.

### **Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.

v