



<b><u>Decision Ref:</u></b>	2022-0149
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Cash Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling Delayed or inadequate communication Complaint handling (Consumer Protection Code) Early withdrawal penalty
<b><u>Outcome:</u></b>	Upheld

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

The complaint concerns the Provider's suggested provision of poor investment advice and information to the Complainant in relation to an investment plan taken out with an investment company recommended by the Provider in his capacity as broker.

The Provider's regulatory status was revoked by the Central Bank of Ireland in **June 2019** and he is no longer authorised to engage in regulated activities as an insurance intermediary.

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

The Complainant submits that on **2 November 2017**, following advice, consultation, and recommendations made by the Provider, she transferred funds from an existing investment and opened a new investment plan with an investment company. The Complainant submits that she wanted to purchase a holiday home and wanted to use the funds to part fund the purchase.

The Complainant says that she specifically asked the Provider "*if there would be any problems or penalties if I transferred the funds to a new account and subsequently withdraw same*" as the previous plan she had invested in had been opened in **2002** and therefore would not be liable to any penalty for withdrawal. The Complainant further says that the Provider "*categorically told me there would be no problems or penalties*".

The Complainant asserts that in **June 2018**, she purchased a holiday home, and she subsequently contacted the investment company on **5 September 2018** to withdraw funds from the new investment account. The Complainant explains that she was informed that *“due to early withdrawal, I would suffer a penalty fee of €1,844”*. The Complainant states that she informed the investment company that *“my broker had arranged for me that there would be no such penalty fee”* but the investment company stated there was nothing on file to indicate this was the case.

The Complainant submits that she contacted the Provider by phone and was guaranteed that the Provider had *“set up the new account as a transfer”* and there would be no penalty attached. The Complainant further submits that the Provider stated that *“the person in [the investment company] was only someone in a call centre and was not familiar with the transfer”* and that he would meet with the Complainant on **12 September 2018** to sort the matter. The Complainant says that she requested the Provider to confirm the conversation by email but that the Provider did not meet this request.

The Complainant submits that she contacted the investment company on **11 September 2018** and was again advised that there was nothing attached to her file to determine that the penalty charge was avoided. The Complainant further submits that she met with the Provider on **12 September 2018** and that he advised that he had arranged with his *“consultant”* within the investment company, that no penalty would be charged on the account. The Complainant says that she informed the Provider that the investment company had no record of any exclusion of the penalty charge. In order for her to progress her query, she requested the name of the *“consultant”* which the Provider refused to clarify. The Complainant further says that the Provider then agreed, in the presence of a witness, that he would *“personally compensate me in the sum of €1,844”*.

The Complainant states that she received a letter from the investment company dated **13 September 2018** stating that her *“broker is an independent intermediary and is not a tied agent”*. It further stated that it was not responsible for the oversight of the financial advice that the broker provides. The Complainant states that she received a subsequent letter from the investment company dated **15 October 2018** to confirm that her funds would be transferred to her account and an early withdrawal penalty of €1,736.85 would apply.

The Complainant says that she issued a complaint letter to the Provider on **20 September 2018** at his registered address, but this letter was returned, as he no longer had his office there. The Complainant further says that she then sent the letter by registered post to the Provider’s home address, which was delivered, and she states that the Provider informed her in an email that he had forwarded the complaint to his secretariat for processing.

The Complainant states that she received an email from the Provider on **5 October 2018** stating that he had received and reviewed her communications. The Complainant states that to date, she has not received the sum outstanding.

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The Complainant wants:

- the early encashment penalty due on the investment product, to be reimbursed by the Provider, and
- the Provider to be investigated for mis-selling the investment product.

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

The Provider did not issue a final response letter to the Complainant despite numerous requests from this Office for him to do so, issued on **10 April 2019, 9 May 2019** and **27 August 2019**.

Further, the Provider did not respond to multiple requests for information and documentation sent by this Office on **31 March 2020, 13 May 2020, 25 May 2020, 4 June 2020, 19 December 2020, 16 September 2020, 28 October 2020, 13 October 2020, 2 November 2020**, and **26 November 2020**.

After the preliminary decision of this Office was issued, the Provider made a number of submissions. Firstly, on 3 January 2022, he wrote:

*"I have just accessed the above today .  
I contacted your office last year and left a voice mail .  
The claims made by [the Complainant] are totally false .  
I told one of your colleagues this already .  
I will call your office on Monday next 10 Jan at 11.00am irish time .  
A direct number would be most helpful. "*

On 11 January 2022, the Provider raised a number of queries in writing, regarding the processes of this Office, which were replied to in detail by this Office on 17 January 2022. Later that day, the Provider wrote, referring to a submission he had made the previous day (which had crossed with the letter from this Office) and he also advised:

*"Thanks you for response.  
I sent a submission yesterday .  
So will await outcome .  
Not sure if it is proper but if client is out of pocket and can demonstrate same I would be willing to compensate as a gesture."*

The Complainant commented in detail on the Provider's submission of 16 January 2022, and he subsequently sent his observations in reply, on 10 February 2022. Thereafter both parties made further submissions regarding the issues arising, all of which have been considered for the purpose of this adjudication.

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### **The Complaint for Adjudication**

The complaint is that the Provider mis-sold the investment to the Complainant in late **2017** by failing to:

- provide appropriate advice to the Complainant in relation to the investment account;
- act with due care and diligence in the best interests of its customer;
- tell the Complainant that a penalty charge would be applied to the account in respect of an early withdrawal.

The Complainant also says that the Provider failed to inform her that he was no longer authorised by the Central Bank and failed to handle her complaint within the regulatory timeframes as set out in the Consumer Protection Code 2012.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **21 December 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

In my preliminary decision, I indicated my opinion that the attitude adopted by the Provider in responding to this complaint was very disappointing. As he was a regulated

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insurance intermediary at the time of the conduct complained of in 2017, he has been called upon repeatedly to respond to the investigation of this Office.

I am satisfied that the Provider was given numerous opportunities to respond to queries and requests made by this Office, but he failed to do so. Instead, he elected to make some general observations, after the preliminary decision had been issued.

There are two main aspects to the present complaint, incorporating essentially the Provider's suggested unsuitable recommendation of an investment product, and his failure to respond to the complaint.

### ***The Investment Product***

The Complainant opened a savings plan (plan number 0646\*\*\*\*) on **25 February 2002** and has submitted evidence to that effect. She has argued that an early withdrawal penalty applied to this plan for the first five years, so it had long since ceased to be applicable by the time advice was received by the Complainant from the Provider in **2017**.

The Complainant submits that she received advice from the Provider in and around **October 2017** to switch her investment from her initial plan to a new plan (plan number 1197\*\*\*\*). She submits that she was informed "*categorically*" by the Provider that no early withdrawal penalty would apply to the new plan. She has explained that the funds in the plan were required by her, to fund the purchase of a holiday home so I accept that her concern that there be no early withdrawal penalty attached to the plan, was logical in this context.

She has argued that she would not have transferred the funds and opened the new plan if she had been aware of the early withdrawal penalty which would apply. Again, I take the view that, in light her impending need for the funds, this position is logical and credible. The Complainant has submitted a letter dated **27 October 2017** in evidence to demonstrate the transfer of her funds from the initial savings plan to the new investment plan recommended by the Provider. She has also submitted a welcome letter dated **2 November 2017** from the investment company in respect of the new plan.

A letter from the investment company dated **13 October 2018** has also been submitted in evidence. The investment company says that a welcome pack contract was sent by it to the Complainant on **28 October 2017** which contained important documents such as her Plan Document, Terms and Conditions, and a Customer Information Notice. The investment company stated that she was encouraged to read the documents.

The investment company has stated that in section 4.3 of the Terms and Conditions booklet, it was provided that if she withdrew from her plan within the first five years, an early withdrawal charge would apply. The investment company further stated that section 2 of the Customer Information Notice, set out that if she withdrew from her plan during the first five years, an early withdrawal penalty would apply.

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The Complainant has not denied that the Terms and Conditions of the plan provide for an early withdrawal penalty, and she seems to have accepted that a penalty arose when she withdrew her funds. Her issue is that she was assured by the Provider in 2017, that there was no early withdrawal penalty applicable. In the absence of contradictory evidence, or indeed any adequate evidence from the Provider, I am satisfied that I should accept that the Complainant was informed by the Provider that there was no early withdrawal penalty attached to the plan, when she opened the new plan in 2017, and transferred her funds into it, from her existing investment.

I am further satisfied that I should accept her evidence that she would not have transferred her funds if she had been aware of the penalty. In light of the Complainant's need for the funds in the short-term, towards the purchase of a holiday home, the Provider's recommendation that she transfer from a plan with no penalties to one with an early withdrawal penalty, is difficult to understand.

I accept on the evidence therefore, that the new plan recommended by the Provider in **October 2017** was unsuitable for her needs at that time, on the basis of the early withdrawal penalty, and that she was given incorrect information by the Provider in respect of the key product features.

In recommending an unsuitable investment plan, the Provider breached a number of clauses of the Consumer Protection Code 2012 (**CPC 2012**):

*"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.*

*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. ....*

*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. ..."*

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Accordingly, in view of the evidence that the Provider recommended an investment product to the Complainant in 2017, in breach of the Provider's obligations under the CPC, because it was unsuitable to her needs at that time, I am satisfied that the Provider's conduct in 2017, was contrary to law within the meaning of **Section 60(2)(a)** of the **Financial Services and Pensions Ombudsman Act 2017** and indeed otherwise improper within the meaning of **Section 60(2)(g)** of that Act, and I consider it appropriate to uphold this element of the complaint on that basis

#### *Failure to Respond to the Complaint*

A letter of complaint dated **20 September 2018** was sent by the Complainant by email to the Provider dated **24 September 2018**. The Complainant states that a copy of the letter was delivered to his home address by registered post on **21 September 2018**.

By email reply on **25 September 2018**, the Provider confirmed that the registered letters had been received at his residence, claimed that he had not opened them, and indicating that he had requested that the letters be forwarded to his Dublin office. A registered letter sent by the Complainant to the Provider's Dublin office was however returned.

I am satisfied on the basis of the Provider's email of **25 September 2018**, that the complaint was received by him.

In her letter of complaint of **20 September 2018**, the Complainant set out in detail the advice she had received from the Provider in respect of transferring her investment funds from one plan to another and she explained what she had wished to use the funds for. She said that she had specifically asked the Provider if there would be penalties if she withdrew the funds and that the Provider had categorically informed her that there would be no penalties. She further said that the previous plan had been opened in **2002** and by **2017**, was not subject to any penalty for early withdrawal.

The Complainant stated that she purchased the holiday home in **June 2018** and contacted the investment company on **5 September 2018** to withdraw funds for the purchase. She was informed that a penalty fee of €1,844 would apply due to the early withdrawal. She states that the investment company told her that there was no indication on the file that there would be no penalty fee applicable.

The Complainant set out that she had a call with the Provider on **5 September 2018** in which the Provider confirmed he had set up the new account as a transfer and that there would be no penalty fee. She stated that the investment company confirmed its position that an early withdrawal fee applied during telephone calls on **10 and 12 September 2018**.

The Complainant stated that she met with the Provider on **12 September 2018** when again the Provider confirmed there was no penalty to be paid and stated that this had been arranged with his "*consultant*" in the investment company, whose name he refused to provide.

The Complainant also says that the Provider had agreed (in the presence of a witness) to compensate her for the early withdrawal fee of **€1,844** but he had not done so.

The Complainant argues that the Provider was at all times aware that she intended to purchase a house and required the funds invested with the investment company, to do so. The Complainant argues that she would never have transferred the funds from the original plan if she had been aware of the penalty associated with the new plan and that the plan had been sold to her under false pretences.

The only written communication that appears to have been received from the Provider in response to the complaint (and an additional complaint in respect of rent proceeds from the holiday home which does not fall within the jurisdiction of this Office) is an email of **5 October 2018** which states as follows:

*"I have now received all your various communications and reviewed same.  
Your recollection of events that lead to where we find ourselves varies vastly from my version.  
I have today filed a sworn affidavit with my legal reps outlining all the events.  
...  
If you persist in spreading untruths concerning my relationship with you to third parties action will be taken.  
Given your recent stance I have no choice but to end all interaction with you on any level.  
I will prepare a final statement of account and transfer any outstanding balances."*

By letter dated **13 October 2018**, the investment company sent a complaint response letter to the Complainant in respect of the early withdrawal penalty. The letter stated that the plan was commenced on **28 October 2017** through her financial adviser, the Provider. The letter stated that the Provider was an independent intermediary and not a tied agent of the investment company. It stated that it was not responsible for any oversight in the financial advice that the Provider gave the Complainant. As above, the investment company set out that its contract with the Complainant provided for an early withdrawal penalty.

A complaint was made to the Office by letter dated **10 December 2018** both in respect of the early withdrawal penalty and a separate rent issue. The Complainant was advised that only issues concerning the Provider's activities as an investment intermediary can be investigated by this Office.

The Provider was requested by this Office to issue a final response letter to the Complainant on **10 April 2019**, **9 May 2019** and **27 August 2019** but failed to do so.

A formal investigation of the complaint was then commenced by this Office in March 2020, when a Summary of Complaint was issued, including a list of questions asked of the Provider and a list of documents requested from him.



The Provider did not respond to any of the multiple requests for information and documentation sent by this Office on **31 March 2020, 13 May 2020, 25 May 2020, 4 June 2020, 19 December 2020, 16 September 2020, 28 October 2020, 13 October 2020, 2 November 2020, and 26 November 2020.**

The Provider emailed this Office on **30 October 2020** confirming that the email address to which multiple items of correspondence had been sent was a correct email address which was used “daily”.

I am satisfied therefore that the relevant correspondence was brought to the attention of the Provider who simply chose not to respond. The email address in question was also confirmed by him during a call to the Office on **17 May 2020.**

In respect of the complaint, an authorised financial service provider has the following obligations under the CPC:

*“10.7 A regulated entity must seek to resolve any complaints with consumers.*

*10.8 When a regulated entity receives an oral complaint, it must offer the consumer the opportunity to have this handled in accordance with the regulated entity’s complaints process.*

*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;*
- d) the regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint; where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the Complainant of the anticipated timeframe within which the regulated entity hopes to resolve the*

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*complaint and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman; and*

*e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of:*

- i) the outcome of the investigation;*
- ii) where applicable, the terms of any offer or settlement being made;*
- iii) that the consumer can refer the matter to the relevant Ombudsman, and*
- iv) the contact details of such Ombudsman."*

The evidence indicates to me that none of these obligations were met in the present matter by the Provider at any time before he ceased to be authorised by the Central Bank of Ireland in **June 2019**. He simply ignored his obligations to the Complainant. His conduct in this regard was in breach of law and, in my opinion, was unreasonable within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The lack of response must have been hugely disappointing and frustrating for the Complainant. I note that according to the complaint, the Provider first attempted to deny that an early withdrawal penalty applied to the plan, and then latterly agreed to compensate the Complainant for the penalty amount, before ultimately denying her allegations and refusing to engage with her complaint. This conduct is unacceptable at any level, though I note that because he was no longer regulated, his obligations to engage in an appropriate complaints resolution process or to engage with this Office, were effectively removed.

As the Provider failed however to respond to the Complainant's complaint, in accordance with his obligations under the Consumer Protection Code, during the time when he was authorised by the Central Bank of Ireland and also failed to respond to this Office in reply to the formal investigation of this complaint, up to the time when he ceased to be regulated in June 2019, I am satisfied that the second aspect of this complaint should be upheld against the Provider.

The Provider's unsuitable recommendation to the Complainant had a clear and direct financial consequence for her. The Complainant had to pay the figure of **€1,736.85** to the investment company in order to access her monies which had been unsuitably invested.

In this regard, the Complainant has submitted a letter from the investment company dated **15 October 2018** in evidence which confirms that she withdrew **€34,736.85** from her investment plan (almost all of the available funds) and that this was subject to an early withdrawal penalty of **€1,736.85** which had "*been applied to this withdrawal*".

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I accept that the Complainant would not have had to pay that sum if her funds had remained in the original saving plans as the period of the early withdrawal charge had elapsed. I am of the view that the Complainant is entitled therefore to redress from the Provider in this regard.

In circumstances where the complaint is upheld, I consider it appropriate to direct the Provider to make a compensatory payment to the Complainant, to take account of her financial loss, and in addition to provide redress for the considerable inconvenience to which she has been put, in seeking to recover those monies.

I consider it appropriate therefore to direct the Provider to make a compensatory payment to the Complainant as outlined below. It will be open to the Provider to make payment to the Complainant, either by way of electronic transfer to an account of the Complainant's choosing, once IBAN details are confirmed directly by the Complainant to the Provider or alternatively, should the Complainant wish, such monies can be paid by the Provider to the Complainant, by way of cheque.

### 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)(a) (b) and (g)**.
- Pursuant to **Section 60(4)(d)** 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 **€3,000** (to include the figure of €1,736.85 she was required to pay to the investment company in order to access her monies in late 2018) and to make that payment 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, or within the same period of 35 days from the date of her confirmation in writing to the Provider that she wishes to receive that payment by cheque.
- I also direct pursuant to **Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, 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 April 2022

## **PUBLICATION**

### **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.