



<b><u>Decision Ref:</u></b>	2022-0184
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Cash Investment
<b><u>Conduct(s) complained of:</u></b>	Early withdrawal penalty Delayed or inadequate communication Complaint handling (Consumer Protection Code)
<b><u>Outcome:</u></b>	Partially upheld

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

This complaint arises from a communication to the Complainant regarding the 'cooling off period' for the Provider's investment plan.

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

The Complainant attended at the Provider's office on **14 February 2020** and entered into an investment plan with the Provider, in the amount of **€62,203.23** (sixty-two thousand, two hundred and three Euro and twenty-three cent).

The Complainant submits that he was reassured by the Provider's Agent that he had a 30-day cooling off period, within which he could change his mind on the investment. In a letter to this office of **11 April 2021**, the Complainant states that he understood the explanation given by the Provider's Agent on this date, to be the correct interpretation of a cooling off period. He believed that he would be permitted to cancel his contract within 30 days, and that *"a penalty or loss to my investment would not apply"*.

In an undated submission to this office, received with an email to this Office dated **15 February 2021**, the Complainant says that he did not receive any documentation from the Provider at their initial meeting or prior to commencing the investment on **14 February 2020**.

The Complainant states that he received a phone call from the Provider on or about **8 March 2020** (though the Provider says that the date of this call was **2 March 2020**). During this call, he enquired about cancelling his investment. The Complainant submits that he was told that a penalty would apply in that situation.

In his complaint of **4 June 2020**, the Complainant notes that he received a follow-up call from the Provider's Agent with whom he had initiated his investment. This Agent informed him that it was a very good time to invest, and the Complainant "*reluctantly went ahead with the investment*".

In reply to the Provider's submissions, the Complainant reiterated that he was given a reassurance that there would be no loss to his investment if he cancelled within the 30-day period. He noted that he made no reference to an "*exit penalty*" during the phone call of **2 March 2020**, and that he had not been confused, between the exit penalty and the loss that may be suffered on the investment.

The Complainant stated that it was during this call that he first "*learned of a "penalty" or loss to my funds due to market fluctuations*". The Complainant relies on an email of **9 April 2020** from the Provider, in which it noted that this concept could have been explained in further detail during the call of **2 March 2020**.

The Complainant disputes the Provider's contention that he did not request to cancel his investment. He maintains that he made a request in an email of **3 April 2020** for cancellation, with a full refund.

In relation to the Provider's submission that the Complainant expressed an interest in making a temporary investment, the Complainant states:

*"**Absolutely untrue.** I decided not to go ahead with the investment referenced as outlined previously as I was aware of the effect of the covid virus, as it was then referred to, may have on investments at that time and decided not to proceed on that date."*

The Complainant reiterated that he did not receive an investment product booklet prior to his investment of **14 February 2020**. The Complainant relies on the wording of the section entitled "*WHAT HAPPENS AFTER I APPLY*" in the product booklet, to argue that this documentation is only provided to consumers after an application has been made, and not beforehand.

The Complainant says that that he called a colleague who works for the Provider, and this colleague told him that plan documents would be issued only after a plan is taken out, and that *“nothing would be received on the day”*.

The Complainant says he contacted the Provider by phone on **9 April 2020**, and confirmed that the policy document would be issued after the investment plan had been entered into. He submits that he called the Provider again on **26 March 2021** and the Provider’s Agent confirmed that he would not have received any documentation prior to, or on the day of, taking out the investment plan.

### **The Provider’s Case**

In the Provider’s response to the investigation of this Office dated **16 March 2021**, the Provider explained that the Complainant holds a *“unit linked lump sum investment plan”*. The value of this plan is linked to the value of the units held in the Complainant’s chosen investment fund. As a result, the value of this investment changes daily.

This plan was designed to be held for a medium to long term, with a recommended minimum investment period of five years. If withdrawals are made on the investment within five years of its initiation, a penalty charge applies to the withdrawn amount. If the plan is cancelled within the 30-day cooling off period, this charge does not apply.

The Provider says that the Complainant first met with the Provider’s Agent on **10 January 2020**. During this meeting, the Agent explained the features of a particular investment plan to the Complainant. The Provider stated that:

*“[A]t no time during this meeting or any subsequent meetings or conversations that [the Agent] had with [the Complainant] did she inform him that he was guaranteed to receive his full investment back in the event of cancellation within his 30 day cooling off period. [The Agent] was always very clear that the value received back would reflect any losses that may have taken place during the period that the investment was in place.”*

The Provider says that the Agent explained the early withdrawal charge and the 30-day cooling off period to the Complainant. It notes that this practice is an industry standard, for lump sum investment products.

The Provider says that during this meeting the Complainant expressed an interest in temporarily investing in the Provider's plan. The Agent informed the Complainant that this would not be possible, due to the nature of the product. The Provider states that the Agent told the Complainant that he *"had to be sure before entering into such a financial commitment"*.

The Provider says that the Complainant was given a copy of the investment plan **product booklet**, and a generic **Customer Information Notice**. The Complainant agreed to review this documentation in advance of the next scheduled meeting of **14 February 2020**. The Provider relies on this documentation, which outlines that the cancellation of an investment within the 30-day cooling off period will result in the refund of an investment, *"less any fall in the value of your investment"*.

On Friday **14 February 2020**, the Agent met again with the Provider's Agent. The Provider says that the Complainant confirmed that he had reviewed the information provided to him at the last meeting, and that he wanted to make an investment.

The Provider's Agent then explained the features of the investment product to the Complainant again, which included the early withdrawal charge and the 30-day cooling off period.

The Provider says that an online application for the investment product was completed at this meeting, and the Complainant was provided with a paper copy of this application. The Complainant was issued with a 'Welcome Pack' on Monday **17 February 2020**, which included his **Investment Schedule**, **Customer Information Notice**, and **Terms and Conditions** booklet. The Provider noted that the latter two documents contain an explanation of the cooling off period.

The Provider says that on **2 March 2020**, it contacted the Complainant by phone to confirm that he had received his Welcome Pack and to survey the service he had received. During this call, the Complainant asked about his investment's exposure to the Chinese Market, and the Provider's Agent explained that there was no exposure, with this particular plan. The Provider's Agent recommended that the Complainant speak to the Agent with whom he incepted his plan, if he had any concerns. The Complainant asked about the cooling off period, and the Provider's Agent informed him that there was no guarantee that he would receive his full investment, if he cancelled his plan.

The Provider stated in that regard that:

*“[The Complainant] then spoke about a penalty being applied during the cooling off period and appears to have confused what he would potentially receive back under a cooling off cancellation (as a result in negative market performance over the investment period) versus what he would receive back if he cancelled his plan outside of his cooling off period (exit penalty being applied to value).”*

The Provider says that, due to the fact that the value of the investment is linked to a unit price on the day of cancellation, the Provider’s Agent could not inform the Complainant during this call, what his return would be if he cancelled the plan. It noted that it would take an additional working day for the unit price to be updated, so that the final value of the investment could be determined. The Provider states that, during this call, the Complainant confirmed that he was happy with the service of the Provider. He noted that he had received his Welcome Pack but had not reviewed it yet.

The Provider says that its Agent who met with the Complainant on **10 February 2020** and **14 February 2020** then called the Complainant to discuss his investment plan. The Provider has not indicated the date of this call, and no recording of this call was provided in evidence to this Office. The Provider states that, during this call, the Agent clarified that it was possible for the Complainant to receive back less than his investment, if the plan was cancelled during the cooling off period. She also discussed the early withdrawal charge and the effects of the cooling off period.

The Provider says that the Complainant confirmed that he understood, and that *“he got confused during the call of 2 March 2020 (between the cooling off cancellation and five year early withdrawal charge) and that he wished to remain invested.”*

The Provider says that the Complainant has not requested to cancel his investment plan, or to make a withdrawal from it. The Complainant did email the Provider between **3 April 2020** and **9 April 2020**, seeking a full refund of his investment amount. As he did not have an entitlement to this, his matter was set up as a formal complaint.

In its reply to the investigation by this Office, and a specific request that it respond to the Complainant’s allegation that information was not explained correctly to the Complainant during the call of **2 March 2020**, the Provider responded that the Complainant’s allegation was not correct. It noted that the information had previously been explained to the Complainant during the meetings of **February 2020**, and that the Agent correctly stated to the Complainant on **2 March 2020** that he may receive less than his full investment, if he cancelled during the cooling off period.

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The Provider notes that in an email of **8 April 2020**, the Provider apologised to the Complainant “*if*” the information had not been properly explained during this phone call. It noted that its Agent had not listened to the phone call of **2 March 2020** prior to sending this email. An Agent of the Provider later listened to this phone call, and emailed the Complainant on **9 April 2020** which was the following day. The Provider says that, upon reviewing this call, it was satisfied that the information had been clearly explained to the Complainant.

The Provider stresses that the “*workings of the cooling off cancellation period*” were explained to the Complainant during his meetings of **10 February 2020** and **14 February 2020**. This information was further provided within the documentation provided to him on **10 February 2020**, in his Welcome Pack on **17 February 2020**, and again noted during the phone call of **2 March 2020**.

### **The Complaint for Adjudication**

The complaint is that in **February 2020**, the Provider failed to clarify the possible financial consequences on the value of the Complainant’s initial investment sum, during the ‘30-day cooling off period’, prior to the Complainant agreeing to go ahead with the investment plan.

The Complainant wants the Provider to return the initial sum of **€62,203.23** invested by him on **14 February 2020**.

### **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.

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A Preliminary Decision was issued to the parties on **11 April 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

### **Evidence**

- **POLICY BOOKLET**

At page six of the Provider’s product booklet, it is stated:

***“WHAT HAPPENS AFTER I APPLY?”***

*When we receive your application form, we will send you your Welcome Pack which includes:*

- *A plan schedule...;*
- *A detailed Customer Information Notice;*
- *A Terms and Conditions booklet...;*
- *A copy of this booklet.”*

Later, within the Provider’s product booklet in Section 5 at pages 21 to 23, it is stated;

***“Early withdrawal charge***

*This investment is designed for an investment period of five years or more. You can withdraw all or part of your investment before then, but you would have to pay an early withdrawal charge on the amount you withdraw.*

<b>When the withdrawal is made</b>	<b>Charge</b>
During the first year of your investment	5%
During the second year of your investment	5%
During the third year of your investment	5%
During the fourth year of your investment	3%
During the fifth year of your investment	1%

...



### **CAN I CHANGE MY MIND?**

*We want to make sure that you are happy with your decision to invest.... So we will give you 30 days from the day we send you your investment documents to change your mind. If you cancel the plan within 30 days, all benefits will end and we will refund your investment less any fall in the value of your investment that may have taken place during the 30-day period. The 30-day period starts from the day we send you your... Welcome Pack.”*

[My underlining for emphasis]

The generic **Customer Information Notice**, provided as part of the product booklet, states at page 37:

#### ***“Is there an opportunity to change your mind?”***

*When your investment documents are issued, you will have an opportunity to cancel the investment if you are not satisfied that it meets your needs. You may do this by writing [to the Provider] within 30 days of when we send you details of your investment.*

*On cancellation all benefits will end and [the Provider] will refund your payment, subject to taking off any losses that may have been incurred as a result of falls in the value of assets relating to the investment during the period it was in force”.*

[My underlining for emphasis]

- **LETTER OF 17 FEBRUARY 2020**

The cover letter to Welcome Pack, dated **17 February 2020**, states as follows:

*“Your financial adviser will have given you a copy of your product booklet/fund guide. You can also see this by logging in to your online account.”*

- **WELCOME PACK**

The product schedule provided within the Welcome Pack of **17 February 2020** states:

#### ***“Early withdrawal charge***

*The early withdrawal charges that apply to your plan are shown below. This has to be paid if you end your plan within the time period shown...”*

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The **Customer Information Notice** provided in the Welcome Pack notes:

***“Is there an opportunity to change your mind?”***

*You have an opportunity to cancel this plan if you are not satisfied that the benefits meet your needs. You may do this by writing to [the Provider] within 30 days of the date we sent you this pack. When the plan is cancelled all benefits will end and [the Provider] will refund your investment less any fall in value due to market fluctuations.”*

[My underlining for emphasis]

- **AUDIO EVIDENCE**

An excerpt from the Complainant’s call with the Provider of **2 March 2020** is outlined below:

*Complainant: If I was considering putting it on hold, it’s a 30 day, or is that nearly expired at the moment? You can just remind me of when exactly I commenced it.*

*Provider: Yeah, so you have the 30-day cooling off period. So that would start from the day your welcome pack was issued, and your welcome pack was issued to you on the 17<sup>th</sup> of February, so you have until about the 17<sup>th</sup> of March to cancel your plan. I wouldn’t be able to guarantee if you’d get everything back [Complainant], it would depend on the pricing at the time, but you can, as you said, put on hold, or have a look at any of the plans or [inaudible]*

*Complainant: Oh, ok. My understanding was that the cooling off period actually included everything back. No?*

*Provider: Ehm, I just wouldn’t be able to say that myself exactly how much it would be, but it would just be, that would be the chance you’d get it back without having an early withdrawal penalty, or anything like that [Complainant].*

[My underlining for emphasis]

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*Complainant: Oh, I thought actually the, no, no, I thought actually just from communication in relation to previous plans the 30-day period was a period that didn't affect any loss to the plans. It was a decision-making period, it was a time period you had if you wanted to make any change or if you didn't want to go ahead with the plan. I didn't realise there was a penalty attached to it, to such a decision, if it was done, if it was made within the 30 day.*

*Provider: Yeah, it is, you're right, you're correct, it is that time where you can change your mind and decide that you're not going to get it, but just on my side, myself I just wouldn't be able to guarantee you would get everything, [Complainant], but what I can do is-*

*Complainant: Could you just, on that point, could you clarify that for me please. Or could you get that clarified for me*

*Provider: Yep, what I'm going to do is I'll get [Agent] to give you a call...*

*...*

*Complainant: I mean the 30-day must be very specific. If a decision is made within the 30-day for anybody like, it doesn't matter what MAPS you have taken out, like either there is a penalty or there isn't a penalty. It must be very specific, isn't it?*

*Provider: It just depends on each plan, [Complainant]. But, as I said, what I can do is [the Agent] will be able to give you a bit more light on that herself...*

*Complainant: ...I'm just surprised like that you can't answer that specific question. Or one of your colleagues there couldn't answer it. Sure, it must be a very specific like, it's either a yes or no, that there is a penalty or what is the penalty or else there isn't a penalty if you make a decision or you decide not to go ahead with the plan within 30 days.*

*Provider: As far as I'm aware if you've taken out a plan and there is a loss you might not be guaranteed the full amount back [Complainant]. That's why I said myself, I just wouldn't be able to guarantee it would be the full amount. It does depend on the plan, and it is on a case by case basis. So If you were to cancel the plan it would be looked at ...*

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*Complainant: Ok, so the 30-day cooling off period is individual, rather than, there's no policy on it within [the Provider], it's very individual in relation to the candidate, is it?*

*Provider: Yeah, it can take into account any losses or gains you've had in that time...*

- EMAIL

In an email from the Provider to the Complainant of **9 April 2020**, the following is stated:

*"I have listened to the call you made to our offices on 2 March 2020....*

*I appreciate that the Customer Service Representative that you spoke with on 2 March 2020 could have explained this in more detail to you. However, I note from the call that they advised that they would request for your Financial Adviser... to contact you as she would be able to explain this in more detail to you."*

### Analysis

The issue to be determined is whether, in **February 2020**, the Complainant was misinformed of the meaning and consequences of the 30-day cooling off period, or whether he was correctly told that he may receive back less on his investment, if he cancelled his plan during this period (separate from any penalty that would be charged if he cancelled the policy within the first 5 years but after the cooling-off period had expired).

The Complainant contends that he was not given accurate information verbally during the meeting of Friday **14 February 2020**. He further submits that he was not given documentation during this meeting, or during the earlier meeting of Monday **10 February 2020**.

I note the allegation that the Provider's Agent did not properly explain the 30-day cooling off period to the Complainant. The Complainant says that the explanation given to him on **14 February 2020** corresponded to his understanding of what a 'cooling off period' is, i.e. that he would receive his full investment back if he cancelled within that period. The Provider, however, submits that the 30-day cooling off period was explained to the Complainant, in line with the policy as outlined in the product booklet.

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It is clear that the meaning of this cooling off period was discussed on the day in question. In determining the clarity of this communication, I am cognisant of the fact that there is no objective evidence of this meeting. It appears to me that there may have been some form of misunderstanding between the parties on the day in question. I take the view from the Complainant's submissions and the phone call of **2 March 2020**, that he did not have a clear understanding of the 30-day cooling off period.

It is also noteworthy that, in reply to the Provider's statement that he had expressed interest in a temporary investment, the Complainant submits that he had "decided not to go ahead" with that plan. The Provider states that this form of investment was actually not possible; it would not have been an option for the Complainant to decide on. This indicates to me that there was some level of misunderstanding between the parties on **14 February 2020**.

Consequently, it is possible that the 30-day cooling off period was explained correctly to the Complainant, but that nevertheless, this was not understood properly by the Complainant during the meetings. This explanation is supported by the Complainant's statement during the phone call of **2 March 2020** that his understanding of the cooling off period was formed "*in relation to previous plans*".

Regarding the Complainant's submission that he did not receive any documentation from the Provider on **10 February 2020** or **14 February 2020**, I have considered the content of the telephone discussions between the Complainant and the Provider's agents; the Complainant's reliance on the comments of an unidentified colleague of his, who works for the Provider, is of limited assistance. I note that the Provider did not provide this Office with a recording of the call later in **March 2021**. However, I note that during the phone call of **9 April 2020**, the Provider's Agent informed the Complainant that the policy documentation would be provided to him after the investment plan was engaged. The fact that the policy documentation was issued to the Complainant after the investment was already in existence, is not in dispute, and is agreed between the parties.

I accept that a Welcome Pack was only issued to the Complainant, after the commencement of his plan. This does not operate to prevent consumers from receiving product information before making an investment, but the cooling-off period runs from the date of the Welcome Pack letter.

I don't accept the Complainant's argument regarding the product booklet section "*WHAT HAPPENS AFTER I APPLY*". The inclusion of a product booklet in a Welcome Pack, does not however prevent such a booklet being made available to potential consumers, prior to their decision to invest.

Indeed, it would be somewhat surprising that a person would make a decision to invest, without any such information being made available, but even in that event, once the investment goes into place, the welcome pack is issued to the investor, to ensure that the relevant information is made available to the investor (even if already held) so that it is available for consideration, during the cooling off period.

Likewise, the fact that there is a section outlining what the consumer can expect on applying to the Provider, does not suggest that this information is not to be given to the consumer prior to the application.

I consider the fact that there were two meetings within four days, between the Provider and the Complainant to be supportive of the Provider's submission that documentation was given to the Complainant during the first meeting, so that it could be reviewed before the second meeting. On the balance of probabilities, I find it to be more likely than not, that this documentation was provided to the Complainant prior to his application for the investment plan on **14 February 2020**.

I am satisfied that the wording of the early withdrawal fee, the 30-day cooling off period, and the possibility of receiving less than invested if cancelling, are all explained clearly within this documentation.

Finally, I have considered the communication from the Provider to the Complainant during the phone call of **2 March 2020**. During this call, I take the view that the Provider's Agent responded to the Complainant's queries in a significantly unconvincing manner. The Agent's comments implied that the Provider did not have an objective policy in place for the early withdrawal charge, and this in my opinion, had the effect of further confusing the very separate concepts of (i) the early exit charge and (ii) any potential loss due to fluctuations in the market, during the cooling-off period. In my opinion, this served to compound the Complainant's misunderstanding of his investment plan.

The **Consumer Protection Code 2012** (CPC) states at Provision 4.1:

*"GENERAL REQUIREMENTS*

*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."*

I do not believe that the Provider complied with its obligations under Provision 4.1 during the phone call of **2 March 2020**. I note that the effects of this inaccurate communication were somewhat limited, because the Complainant had already entered into his investment plan, but I am also conscious that the 30-day cooling off period expired, prior to the Complainant receiving clarification on this issue.

I was conscious of the Provider's position in the details submitted to this Office that the Provider said its agent had a recollection of phoning the Complainant from a particular branch and that she was *"confident that her call took place on Tuesday 3 March 2020, because Tuesday was one of the two days per week when she worked from that particular branch"*.

In those circumstances, on 6 January 2022, I asked the Provider to supply a copy of the mobile telephone bill, to identify the telephone call in question on that date, noting that the date in question was still within a period of 2 years, during which the telephone service provider was likely to be in a position to make the appropriate records available.

I also asked the Provider to address the absence of any note or record or log of the content of the telephone call which it said took place, as a follow up to the telephone call the Complainant had received on **2 March 2020**. I asked the Provider to comment regarding its protocols for appropriate record keeping of verbal interactions with its customers in such circumstances.

When the Provider responded to this Office on 2 February 2022, it advised that, unfortunately, it had been unsuccessful in its attempts to obtain the itemised call record showing the exact time and date of the phone call in question on 3 March 2020. In addition, it confirmed that there was no recording of the call. The Provider confirmed that the agent's itemised call records had shown that the call to the Complainant was not in fact made from that mobile phone, on the date in question. The Provider clarified that because many of the agent's calls were from her company mobile, she had reasonably assumed that the call to the Complainant had also been made from that phone. The Provider advised that the agent had been working from the particular branch on the day in question and therefore must have used a landline at the branch. The Provider confirmed that the bank branch in question had confirmed to it that the *"line in their bank is not recorded and that their itemised call logs for the day cannot be retrieved"*.

The Provider was however, in a position to submit a copy of an internal email from the person who had spoken to the Complainant on 2 March 2020, to the Provider agent, requesting that the call be returned to discuss the matter with him and that a reply email be sent to confirm the outcome of the conversation.

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The Provider points to the email response sent by the agent in question on 3 March 2020 at 11:08 which advised as follows: -

*"I spoke with [Complainant] there and he said that he is more than happy to remain invested and that he is fully aware that markets are down and will recover. His query on the 30-day cooling off period he said was not about cancelling but whether the 30 cooling off period meant that his funds weren't invested straightaway, but I clarified that for him and he is happy".*

When the Complainant reviewed the Provider's submission in that regard, he disagreed with the timeline which had been suggested by the Provider and he completely refuted the suggestion that he had ever been "*more than happy*". I accept that he did not use this phrase during the phone call in question, nor did he state that he was fully aware that markets are down and would recover. It is unclear to me why the Provider's agent included such details, and I do not agree with the suggestion that the Complainant's query was whether the 30 cooling off period meant that his funds weren't invested straightaway, but that the agent clarified that for him, and he was happy. She provided no such clarification to him, as she was unable to explain how his investment would be impacted during the 30 day cooling off period, and she instead offered on a number of occasions to put the Complainant in contact with the advisor who had sold him the plan.

The Complainant pointed out that there was no evidence of an accurate note being taken in relation to the telephone call in question, as with the meetings on 10 February 2020. It is clear that the parties remain in disagreement as to when communications took place and the content of those communications. In that context, I note the Provider's obligation pursuant to the Consumer Protection Code 2012 (CPC 2012) Chapter 11, to maintain up to date records containing at least the following:

*"... all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service  
... a regulated entity must maintain complete and readily accessible records;  
however, a regulated entity is not required to keep records in a single location."*

It is certainly disappointing that the Provider's record keeping has impacted the ability of this Office to investigate the Complainant's complaint.

I am conscious however, that the complaint made by the Complainant is that in **February 2020** the Provider failed to clarify the possible financial consequences on the value of his investment, if he withdrew from the investment within the 30-day cooling off period.

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When the Complainant completed his Complaint form to this Office in June 2020, he advised that:

*"I opened an investment with [the Provider] rep on 14.02.2020. I was aware of COVID-19 on that date but I was re-assured that I had "30 day cooling off period" to change my mind if I wished without incur a penalty. I received a tel. call from [Provider] on approx. 08.03 (not sure exact date) this call was refer to later a welcome call. I enquired regarding cancel my investment (I was within 30 day period). I was informed a penalty would apply. This was in contract to what I was informed at my initial meeting on open the investment. I later received a follow up call from [the Provider] rep who I initiated my investment with and was assured that this was a very good time to invest. I reluctantly went ahead with the investment."*

I take the view that the Complainant's dissatisfaction at that time, and his belief that he had been misled at the time when the investment was originally sold to him in **February 2020**, arose from the content of the "welcome call" which the Provider has advised took place on 2 March 2020, and this indeed appears to be borne out by the audio evidence.

It is clear from the Complainant's Complaint Form which he sent to this Office at the time when he originally made the complaint, that he had entered into the investment on the understanding that if he wished to change his mind within the 30-day cooling off period, he could leave the investment without incurring a penalty. This was in fact the correct position, such that if he had terminated the investment within the 30-day cooling off period, the percentage charge set out at the table above on Page 7 of this Decision, would **not** have been incurred by him, during the 30-day cooling off period.

I take the view that if the terms of the communication from the Provider had been clear during the welcome call on 2 March 2020, this complaint may never in fact have arisen. The Complainant at that time, was well within the cooling off period and, unfortunately, when he was told by the Provider's agent on more than one occasion, that she could not guarantee that he would get everything he had invested back, he took this to mean that he would be charged a penalty. There was however no penalty to be charged during the 30-day cooling off period. Rather, any movements in the market price over the days when he had been invested might have given rise to a loss, but this would have arisen entirely separate from any early withdrawal penalty.

I am satisfied from the details within the policy booklet which was sent to the Complainant that he was on clear notice of the relevant policy provisions. The audio evidence makes clear that on 2 March 2020, he had not read the information, but he had received it.

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The policy booklet contains details of the early withdrawal charge and which percentage will apply, entirely separate from the provisions under *“Can I change my mind?”* which made it clear that if the investment was terminated within the first 30 days, the Provider would *“refund your investment less any fall in the value of your investment that may have taken place during the 30-day period”*. Whatever the Complainant’s concerns, he did not however take any steps to withdraw from the investment, during the 30 day cooling off period.

When the Complainant communicated with the Provider on 3 April 2020, he advised that he found it:

*“extraordinary that a representative of [the Provider] who rang me regarding my investment was unable to clarify what, if any, penalty would apply...in this case 30 days after I agreed to the investment contract during this period of time I the investor should be able to cancel the investment without incurring any penalty?”*

He went on to explain that when he received the subsequent telephone call from the Provider agent who had sold the investment to him, she had explained that it was a very good time to invest and that he *“reluctantly went ahead with the investment”*.

In my opinion, it was entirely a matter for the Complainant to make a decision as to whether to maintain the investment without cancellation within the 30-day cooling off period available to him. It was a matter for him to decide himself, based on his level of *“reluctance”*, as to whether or not to proceed with the investment and also whether to let it continue beyond the 30-day period, being clearly on notice of the early encashment penalties which would then be applicable. It seems to be apparent from the evidence that the Complainant was somewhat in two minds as to whether or not to invest, but ultimately, he let the 30-day cooling off period expire without withdrawing from the investment and then subsequently, the following month, he expressed dissatisfaction regarding the level of information he had been given.

Although the Complainant has suggested that he was never referred to the *“Welcome Pack”* I am satisfied that this documentation was made available to him once the investment went into place, quite apart from any such written information he was given before he elected to place the investment.

Be that as it may, I take the view that the Provider’s communication with the Complainant on 2 March 2020, was not to the standard required and, in many ways, led to the Complainant finding it appropriate to maintain a complaint against the Provider.

It is also very disappointing that the records of the Provider’s discussions with the Complainant on 3 March 2020 are incomplete. This poor communication and poor record

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keeping in my opinion was unreasonable conduct, within the meaning of **Section 50(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

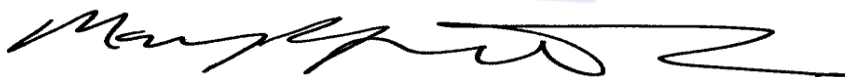
Accordingly, on the basis of the evidence available, I consider it appropriate to partially uphold this complaint and to mark this decision, I intend to direct the Provider to make a compensatory payment to the Complainant, as directed below.

It will be a matter for the Complainant to himself decide whether or not to remain invested but, at this point, the investment has been in existence for more than 2 years and the Complainant remains exposed to an early withdrawal encashment penalty of 5%, which will reduce to 3% during the fourth year of the investment, and to 1% during the fifth year of the investment. It is important however, for the Complainant to understand that this early encashment penalty was an entirely separate matter from any fall in the value of the investment owing to market movements during the 30-day cooling off period which originally applied from the time when the Welcome Pack was issued to him.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(b)**.
- Pursuant to **Section 60(4)(d) 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 sum of **€800**, 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)**

3 June 2022

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## 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.