



<b><u>Decision Ref:</u></b>	2018-0232
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Personal Pension Plan
<b><u>Conduct(s) complained of:</u></b>	Failure to advise on key product/service features Delayed or inadequate communication
<b><u>Outcome:</u></b>	Partially upheld

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

#### **Background**

The Complainant opened a retirement annuity contract (hereinafter his 'personal pension') in 1993 which provided for a guaranteed maturity value and a guaranteed annuity value on a certain future date on the basis of a stipulated minimum monthly premium. The Complainant takes issue with the fact that his monthly payments on his personal pension increased on a regular basis without any identifiable benefit to him in circumstances where the annuity to which is now entitled is no bigger despite paying increased premia of over €40,000 over and above the minimum monthly premia.

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

The Complainant opened his 'personal pension' in October 1993 with a company that was subsequently acquired by the Provider. The terms of the policy included a guarantee that, on the basis of minimum monthly payments of IR£100 (€126.97), the maturity value of the contract on the date of maturity in October 2017 (following 288 monthly payments) would be guaranteed at a minimum of IR£56,690 (€71,980) and the contract would, if the option was selected, provide a guaranteed annuity value of IR£5,669 (€7,198).

In the event, the monthly payments increased on a regular (annual) basis and by October 2017 the Complainant had made 288 payments totalling €80,309.92, with the final 12 premia payments being in the amount of €489.09. The total paid would have been €36,567.36 had premia remained constant at €126.97 from the beginning, a figure €43,742.56 lower than that actually paid. The Complainant states that he "*did receive notification of the proposed increases but I never agreed to it*".

The Complainant set out his complaint in the following terms in his letter of 31/08/2017:

*However, over the years [the Provider] kept writing to me suggesting that in order to preserve such a return I needed to increase my premium and they automatically deducted an increased amount from my account in the bank.*

...

*Over the years I was led to believe that my investment money going into my pension fund would be treated as one investment.*

In his letter provided under the cover of email of 22/10/2017, the Complainant stated:

*I have always believed that provided I paid each month the premium of €126.97 for 288 months the guarantee was protected and as such ring fenced. All additional contributions would accumulate over the period of 23 years and would accrue in a separate 'pot' subject to the returns achieved by the [personal pension] fund. In effect the additional premiums I paid amounting to €43,742.56 would benefit from the growth in the fund and would amount to an increased sum of money reflecting the annual cumulative growth in the fund on 20<sup>th</sup> October 2017.*

Thereafter, following some further miscommunication, the Complainant was advised that the market value of the contract at maturity was €112,794.43 however the annuity capable of being purchased with the said market value is substantial lower than the guaranteed annuity.

The complaint is that the Insurer has maladministered the investment. The complaint also relates to poor communication and the provision of inaccurate information.

The Complainant seeks that this office addresses "*the financial discrepancies and treat my monies invested in this policy based on the initial guarantees*". Initially, in his letter of 31/08/2017, the Complainant sought that all his invested money "*should be treated in a similar fashion and that my increased premiums should also reflect an increase in my pension based on the initial guarantees*" resulting in the awarding to him of an annuity in the amount of €14,000, that figure being calculated by reference to a pro-rata increase of the guaranteed annuity figure on the basis of the increased premia actually paid.

The Complainant has subsequently sought that the Provider provide him with the guaranteed annuity of €7,198 per year plus "*options to take payment*" of the additional €43,742.56 invested over the years with the benefit of the growth to which that amount should have been subject.

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

The Provider maintains that the increased premia were optional, and that the Complainant was at liberty to maintain the premia at the minimum monthly payments.

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The Provider further maintains that the additional premia invested by the Complainant were invested along with the other funds and did not give rise to any impact to the guaranteed returns. The Provider relies on the terms of the policy and insists that the returns offered to the Complainant are those to which he is entitled.

### **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 20 November 2018, 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, I set out below my final determination.

Before embarking on my analysis, it will be useful to set out the relevant terms from the policy before considering certain of the correspondence issued in this matter.

### **Policy Terms and Conditions**

The policy document provides as follows in the Third Schedule:

#### ***Final Maturity Value***

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*If the Life Insured survives to the Final Maturity Date and has not elected under the Fifth Schedule to take an Early Maturity Annuity he shall be entitled to a "Final Maturity Annuity".*

*The amount of the Final Maturity Annuity will be determined by applying the Investment Accounts on the Final Maturity Date (including any interim dividends added thereto) at the Company's then current annuity rate for the then current age of the Life Insured to provide the said annuity.*

*Provided that the Investment Accounts so applied shall never be less than the Guaranteed Maturity Sum on the Final Maturity Date, and the amount of the Final Maturity Annuity shall never be less than the Guaranteed Annuity set out in the First Schedule.*

### **Correspondence**

The Complainant has provided copies of letters from October 2011, October 2012, October 2014, and October 2015 (hereinafter 'the premia increase letters') in each of which an increase in premia is discussed. Each of these letters contains the following wording as regards the premium:

*At [the Provider] we recognise the importance of maintaining the real value of retirement income and protecting it against the eroding effects of inflation and the cost of living. Therefore, we propose the premium increase below.*

....

*We will be applying these increases on 1<sup>st</sup> November 201\_ unless we hear from you with alternative instructions. If preferred, the premium may be left unchanged or a lesser or greater increase (see below) may be chosen.*

Each letter also provides a projection as to the market value at maturity of the policy on the basis of the proposed increased premia and a projection as to the retirement income that such a market value would be capable of generating. There is no reference to the guaranteed value or to the guaranteed annuity.

In a letter of 23/05/2013, the Provider gave the following explanation of the policy:

*Your policy has a guaranteed value of €71,981.00 and a guaranteed annuity of €7,198.10 per year which applies at 20<sup>th</sup> October 2017. These guarantees only apply on 20<sup>th</sup> October 2017 and the guaranteed annual annuity is based on a Single Life pension, payable yearly in arrears, guaranteed for 10 years and remaining level in payment.*

*These guarantees were calculated at policy inception and were based on the initial premium of €126.97 (IR€100) per month continuing until the maturity date. The guarantees do not increase if you decide to increase your premium. However, a*

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*reduced guaranteed value and annuity may be available if you had decreased or skipped premiums.*

...

*Premiums paid in excess of the initial €126.97 (IR€100.00) per month premium are not treated differently. All premiums have been invested in the [personal pension fund] and have benefitted from the annual dividends declared within the fund since policy inception.*

In response to a query as to maturity values, the Provider wrote to the Complainant on 23/08/2017 indicating that the market value at maturity would be €111,652.43 and indicating that, in the absence of withdrawing a lump sum, the policy would generate a monthly pension of €289.05, which would equate to an annuity of €3,468.60.

The information provided in this letter as regards the annuity or monthly pension figures was wrong insofar as it failed to mention the guaranteed annuity which would become operable at maturity. The letter also fails to refer to the guaranteed maturity value however this is less significant given that the market value was greater.

### **Analysis**

This complaint has a number of elements to it. The first area to which I will turn is the circumstances surrounding the annual increases in the premia of the policy. The Complainant suggests, in the first instance, that, though he was aware of the proposed increases, he did not agree to same. This is difficult to reconcile with the correspondence he has provided wherein the “*proposed*” increases are set out. These letters clearly outlined the Complainant’s option to keep the premia “*unchanged*”. The Complainant accepts that he received these letters however it is clear that he did not notify the Provider that he wished the premia to remain unchanged, as he could have done.

A perhaps more fundamental part of the Complainant’s complaint as regards the premia increase letters is the claim that the Insurer implied that the increase in premia was required in order to preserve the guaranteed figures. I do not accept this to be the case. While it is unsatisfactory that the premia increase letters did not refer at all to the guaranteed figures (a matter to which I will return below), I do not accept that the Provider ever linked the increase in premia to the guaranteed figures. More importantly, it is clear that the Complainant never actually apprehended this to be the case given his statement on his letter of 22/10/2017 (cited above) that he always understood the base payments to be “*ring fenced*”.

In essence, the product purchased by the Complainant had twin characteristics. In the first instance, the guaranteed figures were defined and these were set in stone, so to speak, provided that the monthly premia never dropped below the stated minimum. These figures were guaranteed regardless of the actual performance of the fund into which the Complainant’s money was invested. In parallel, the Complainant’s money was invested in a fund and this investment was subject to the normal vagaries of the market such that it might lose or gain in value over any given period.

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In the event of the Complainant retaining the investment until maturity (as he did), the Complainant would have the benefit (the choice) of the higher figure as between the guaranteed figures and the market value figures.

In this case, the Complainant had (and has) the choice between the market value at maturity (which is higher than the guaranteed value and with which he could/can purchase, if he wished, whatever annuity the market would tolerate) or he could opt for the guaranteed annuity. Alternatively, he could opt for some combination of both allowing for a lump sum payment of up to 25%. The product was, in essence, a standard pension investment with a guaranteed backstop attached to it wherein increases in premia offered the opportunity to outperform the guarantees. This is consistent with the Third Schedule of the policy set out above.

The value of the Complainant's investment in the fund was the subject of correspondence from the Provider and projected market values at maturity were provided in the premia increase letters on the basis of proposed increased premia.

These figures however related to the actual or projected market value figures and did not relate to the guaranteed figures. This is the key to this aspect of the Complainant's claim as I cannot accept that the Provider misled the Complainant by stating or implying that the premia increases were proposed to protect the guaranteed figures. Equally, it is clear that the Complainant never misunderstood the position insofar as he states:

*I had always believed that provided I paid each month the premium of €126.97 for 288 months the guarantee was protected and as such ring fenced.*

The premia increases were proposed to protect the market value. It is important to bear in mind that the Complainant would, at all times, have had the option of withdrawing the funds in advance of the maturity date. In this event, the guaranteed figures would have been irrelevant, and the only figures of relevance would have been the market values. Equally, if the market value at maturity outperformed the guaranteed values on both fronts, the guaranteed values would be irrelevant.

The question that next arises is the manner in which the Provider should have applied the additional premia funds of €43,742.56. The Complainant has advanced two propositions. In the first instance he argued that the monies should be treated "*based on the initial guarantees*" such that a proportionate increase to the guaranteed figures should accrue. There is no basis for such a construction either in the personal pension documents or in the premia increase letters. As noted in the Provider's letter of 23/05/2013 "[t]he *guarantees do not increase if you decide to increase your premium*". However, the Complainant does not seek to maintain this position in more recent correspondence to this office.

The second proposition advanced by the Complainant is that the monies should be deemed to have been invested in a separate "*pot*" and that he should be entitled to the benefit of the guaranteed figures (on the basis of the minimum payments having always

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been met) together with a further amount representing the accrued and accumulated value of the additional €43,742.56. Again, I can see no grounds on which such a construction could be imposed on the Insurer either by reference to the Third Schedule of the policy (or any other schedule) or by reference to the correspondence sent to the Complainant. Indeed, the Complainant himself has stated that “[o]ver the years I was led to believe that my investment money going into my pension fund would be treated as one investment”. The position was set out in clear terms in the letter from the Provider of 23/05/2013 parts of which are reproduced above.

The Complainant purchased a policy that exhibited the twin characteristics referred to above. The benefit of increasing the premia was the possibility of securing a higher market value at maturity, thereby hopefully providing the capability (if desired) to purchase an annuity product more favourable than the guaranteed annuity. Unfortunately from the point of view of the Complainant, in this case only one of the those positive outcomes was achieved. In the event, the regular increases in premia paid by the Complainant has resulted in him generating, in market value terms, a figure roughly €40,800 more than the guaranteed maturity value having paid €43,742.56 more than he would have needed to pay to secure the guaranteed figure. The market value is, however, roughly €32,500 more than the total value of monies invested, representing a significant gain.

The downside, from the Complainant’s point of view, is that the annuity which the market value at maturity is capable of purchasing is only circa €5,250 per annum, i.e. a significant amount lower than the guaranteed annuity which would have been available without the additional €43,742.56 in premia. It bears mentioning however that the Insurer has (belatedly) offered, as it should have done, the option of taking 25% of the market value as a lump sum (€28,190) together with 75% of the guaranteed annuity (€5,398.58). This serves to lessen the impact somewhat of the ‘downside’.

While I do not propose to uphold the Complainant’s complaint in relation to maladministration, I am however satisfied that the Complainant has substantiated his complaint insofar as it relates to poor communication and the provision of inaccurate information. It is unsatisfactory that the premia increase letters failed to make any reference whatsoever to the guaranteed figures. The premia increase letters also refer to the retirement income capable of being purchased with the projected maturity value. The failure to reference here the guaranteed annuity (which was greater in each instance than the retirement income actually cited by the Provider) was unreasonable. This could easily have been the source of confusion albeit that the Complainant in this case appears to have been at all times aware the guaranteed figures were “ring-fenced” and not in peril.

In addition, the Complainant appears to have been provided with inaccurate information on numerous occasions as to the options available to him on the maturing of the policy with frequent failures on the part of the Provider to refer to the guaranteed figures, in particular to the guaranteed annuity. The Complainant has provided letters of 23/08/2017, 23/08/17 and 02/05/2013 evidencing this and has also referred to numerous other letters, phone calls and meetings. It would seem that the Provider was, at times, entirely unaware of the guaranteed aspect of the terms of the original product. Furthermore, it took some

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considerable time for the Provider to offer the Complainant the option of taking 25% of the market value as a lump sum together with 75% of the guaranteed annuity.

When a Provider is furnishing information to a consumer about a financial product, particularly in relation to matters relating to pensions, it is extremely important that such information is clear and accurate to assist consumers to plan for their retirement and make informed decisions.

Whilst the precise terms of the policy, in particular those as to the guarantees, may have originated in a product provided by a different company to the Provider, this does not excuse the Provider from its obligations to be aware of the detail of products held with it by its customers. The conduct in question was repeated on numerous occasions over an extended period and I am quite satisfied that it warrants compensation.

I understand that the guaranteed annuity remains available to the Complainant pending the outcome of this decision and that should remain the position within a reasonable period. I therefore partially uphold this complaint and direct that the Complainant be afforded the opportunity, at his election, within a period of 3 months from the date of my Legally Binding Decision to realise his funds either by reference to the current value of the fund or by reference to the guaranteed annuity. This should include the option of taking 25% of the market value as a lump sum (or some lower percentage) together with 75% of the guaranteed annuity as previously offered.

In addition, I direct that the Provider pay a sum of €5,000 to the Complainant for the inconvenience caused.

### **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), (f) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by affording the Complainant the opportunity, at his election, within a period of 3 months from the date of my Legally Binding Decision to realise his funds either by reference to the current value of the fund or by reference to the guaranteed annuity. This should include the option of taking 25% of the market value as a lump sum (or some lower percentage) together with 75% of the guaranteed annuity as previously offered. I also direct that the Provider make a compensatory payment to the Complainant in the sum of €5,000, 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.

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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.

**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

13 December 2018

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.**