



<u>Decision Ref:</u>	2020-0423
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Bonds
<u>Conduct(s) complained of:</u>	Value of policy at surrender less than expected or projected
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint refers to the management of an investment fund which the Complainants had invested in since 2010. The fund had been managed by the Manager of the Fund from 2010 up until the Provider, against which this complaint is made, was “*appointed to provide an advisory managed service*” on the 7th September 2016.

The Complainants’ Case

It is the Complainants’ position that while the fund was with the Manager of the Fund, they understood the fund had investments in ‘*Equities, sovereign debt, corporate debt, alternatives and Cash*’, and was categorised as medium risk. The Complainants say that “*there was no mention of Derivatives, Options, Put & Call, VIX etc.* These, the First Complainant states are “*highly volatile.*” The First Complainant also asserts that, following the change of fund management, “[*His*] *understanding was that the fund would be investing in Medium risk activities similar to that operated on [his] behalf by [the previous management company...]*”].

The Complainants allege that from January 2017 regular monthly updates on the fund stopped without any reason being given, that in early 2017 the fund started to report losses and the Complainants were concerned about the management of their investments. The First Complainant states that on 14th February 2017, at a lunch with the Provider, and others, he expressed disappointment with the losses in the fund and was advised that additional tools had been authorised for the fund and that given time the fund would turn

around. The First Complainant alleges that when he asked the Provider as to whether they should pull the investment immediately, the Provider's response was that they should give the fund manager time and re-assess in June 2017.

The Complainants' received an 'activity statement' in April 2017 from an independent fund accounting administration company, which showed a significant fall in the value of the fund. The Complainants immediately wrote to the fund manager, who responded by email on 6th April 2017. The First Complainant states that, to him, the email outlined reckless and speculative investments in instruments he had never heard of. The First Complainant then contacted the current Provider on his own initiative, and closed the investment in May 2017. It is the Complainants position that they suffered a loss of €201,756. The Complainants' want their losses restored to them.

It is the First Complainant's position that the Provider was appointed by him, following an introduction by the Fund Manager, to manage his Portfolio. The Complainant states that all assets, other than the Managed Fund was transferred to the Provider.

The First Complainant states that he has no issue with the claim that initially the Fund operated as a Medium Risk investment. The First Complainant says that his contention is and has been that a different strategy was applied in the months of January, February, March & April of 2017, and that this brought the Fund outside the realms of a Medium Based Fund.

The First Complainant submits that the Provider states that the Fund had an initial ESMA (*European Securities and Markets Authority*) rating of 5 suggesting a 'medium to high level of risk'. The Complainant refers to the Provider's statement- '*This we assume was disclosed to you prior to investment*'. In response the Complainants state that they first invested in the Fund in December 2014 and were advised that it would be on the same level of risk as the existing portfolio. The First Complainant states that he had been assessed as a Medium Risk, and whenever asked of his risk profile, always responded - "*I like to sleep at night*". The First Complainant states that there was no discussion with him that the Fund started out as a Medium/High Risk investment.

The Complainant states that the Provider outlines some performances of the Fund, and as previously outlined, the Complainants accept that investments can rise or fall. The Complainants submit that what they contend is that the Fund was mismanaged from December/January 2017. The Complainants say that it was the application of options, derivatives, long options, call options on the VIX currency option on the USD/Yen which suggests that the Fund was *trying to bite its tail* rather than being prudently managed as represented.

The Complainants state that the Provider has claimed, and had separately indicated in an e-mail of 20th February 2017, that it does not charge (and receive anything) on the Managed Fund Holding. The First Complainant states that he responded by e-mail to say that: '*I was unaware, until now, that you received no fee for the [Managed] Fund*'.

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The Complainants submit that the Provider claims that: *"...in regard of the Fund we understand that (that) the use of options and derivatives was carried out in accordance with the objectives and investment policy as set out in the published fund documentation"*.

The Complainant states that the Provider did not outline how it came to that conclusion.

The Complainant refers to the Provider's statement that: *'We further understand that [Fund Manager] indicated you as being a medium/high (ESMA 5) client with significant wealth...'* The First Complainant's response is that as far as he recollects, the Fund Manager had to perform a re-assessment of his risk profile to move him to a 4 so that he could participate in the Fund as a Medium Risk investor.

The First Complainant says that as regards their other investments, with the exception of his Bank, and occasion when he was considering investments, they are made only when another colleague also invests in the product, and this has worked well for him to date.

The Complainant states that as a pointer, he joined the Fund Manager on the recommendation of a colleague. The First Complainant states that he would not classify himself as a *'client with considerable investment experience'*. The First Complainant states that his then total net worth was about €5m of which €1.3m was invested in the Managed Fund (+25%).

The First Complainant states that he has no recollection of a specific discussion around the use of derivatives within the Fund at the meeting of 21st October 2016, when he was introduced to the Provider. The Complainant questions whether the Provider can point to any paper outlining these derivatives having regard to the content of his Account Opening Document. The Complainant questions whether it would have been incumbent on the Provider to advise that the use of derivatives by the Fund ran counter to his Account Opening Document.

The Complainant states that the Provider contends that he had direct contact with named fund manager *'...including monthly performance reports, and which were discussed in numerous meetings, updates and e-mails with him'*. The Complainant states that this is incorrect, and that the only e-mail that he had with the named fund manager was his of the 6th April 2017 and his reply on the same day. It is the Complainant's position that the pertinent monthly reports were withheld by the Fund Manager.

The First Complainant states that the loss that he has suffered is €1.3 ml reduced to redeemed figure of €1,098,244 = €201,756, not the €160,000 quoted by the Provider.

The Complainant states that the Provider undertook to keep in touch with the Fund Manager to monitor his investment.

The Complainant states that at the meeting of 10th April 2017, when he instructed the Provider to sell the investment in the Fund, the Provider's Broker confirmed to him that the Provider was aware that a number of big investors had left the Fund. The Complainant states he did not say as to when he knew of this position.

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The Complainant's position is that if the Provider's Broker had been monitoring his investment in the Fund on a weekly basis as he undertook to do, it would be expected that he would have asked the value of the fund on the particular day of enquiry. The Complainant states that had that been done, he should have alerted him as to the repercussions (the withdrawal of significant funds) that would have on the Fund and an earlier decision to exit the Fund could have been taken.

The First Complainant states that if the Provider's Broker did raise that question but was misinformed, then the Fund Manager would be at fault.

The First Complainant states that in summary, he invested in the Fund with the Fund Manager in 2014, on the same basis that he had invested with the firm since 2010, and the Risk profile was not to change.

The First Complainant states that in documents that he completed, he stated that he had not invested in derivatives, and crossed out that section in the Provider document.

The Complainant states that there was a significant change to the way the risk factor was applied in January, February, March and April 2017.

The Complainant says that there was an over concentration of particular risk applied and effective oversight of the operation of the Fund was not exercised.

It is the Complainant's position that he was misled by the Fund Manager at the meeting of the 14th February 2017.

The Complainant says that the withholding of the February and March Monthly Reports denied him the opportunity of exiting the Fund.

The Complainant states that it was only on receipt of the e-mail of 6th April that he became aware as to what risky actions were being taken on behalf of the Fund. The Complainant says that as soon as he became so aware, he immediately instructed the closure of his investment. The Complainant says that this was a decision solely taken by him.

The Complaint is that the Provider:

1. Has failed to give appropriate advise and correctly manage the Complainants' investment fund from January 2017 onwards;
2. Gave the First Complainant incorrect information at the meeting on the 14th February 2017, and kept vital information concealed from him at that time;
3. Intentionally ceased sending monthly reports on the fund, to the Complainants from January 2017;

4. Increased the investment risk on the Complainants' investment without the Complainants knowledge or agreement;
5. "Breached the terms of the operation of the fund, by participating in high risk investment strategies" from January to March 2017.

The Complainants want the Provider to repay the loss suffered on the investment, amounting to €201,756.

The Provider's Case

The Provider rejects the allegations that it failed to manage the fund efficiently, and states that: *"We conclude that [the fund manager] kept you apprised of the performance of your investment and that losses suffered were unfortunate, this was no way a consequence of a failure to review or monitor this or other investments."* The Provider also contends that *"[the Provider] is not and was not the Fund Manager."* Furthermore the Provider goes on to say *"[It] was appointed to provide ...an advisory managed service...and it is not the role of an advisor to ensure that the Fund Manager manages the fund in line with the Prospectus and Supplement."*

The Provider states that all information on the Fund, the subject matter of the complaint, was provided by the Fund Manager and not by the Provider. The Provider states that when it commenced its contractual advisory relationship with the Complainants they had already invested in this Fund via the Fund Manager.

The Provider states that the Provider had no relationship with the Complainants at the time they invested in the Fund and they were advised by the Fund Manager at that time.

The Provider states that its role was to give advice on the Complainant's Investment Portfolio. The Provider says that the Complainants could accept that advice or not. The Provider says that as previously stated, it was the Provider's Broker's view that time was needed to reach a final recommendation on the Fund based on its initial assessment. The Provider states that the Provider's Broker advised that he would need until June 2017 to make a recommendation to enable him to assess how the Fund was performing.

In relation to fund choice, the Provider states that it was not a party to this as the Complainants were invested in the Fund before they came to the Provider. The Provider states that the investment strategy of any Fund is a matter for the Fund Manager and the Provider had no control over this at any time.

The Provider submitted a copy of e-mails sent to the First Complainant in which details of what was discussed/agreed at meetings are set out. In relation to the meeting of the

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14th February 2017, the Provider says that no specific notes were taken at this meeting as this was a client lunch as opposed to the a formal meeting. The Provider states however, the Provider's Broker, has a clear recollection of what was discussed at this lunch. The Provider says that the Fund Manager, explained the under performance of the fund and where losses had originated in regard of an overly negative view on the market. The Provider says that there was a detailed discussion on markets on foot of this. The Provider states that the Fund Manager pointed out that losses were no longer what had been seen in the past.

The Provider states that at this meeting, the Provider's Broker, specifically stated June 2017 as a time when the Provider would issue a recommendation on the Fund. The Provider submits however, it was always in the Complainants' control to make the final decision in relation to any asset disposal.

The Provider states that the monthly updates were provided by the Fund Manager and not by the Provider.

The Provider states that it gave advice in accordance with the Complainants' investment objectives and risk profile. It says that it did not issue fund updates or statements which it states was not its role.

With regard to the suitability of the investments the Provider submitted a copy of the account opening documentation. The Provider submits that part of the account opening process included suitability and appropriateness assessments based on the information provided by the Complainants in the Account Opening Documentation. The Provider says that this included the Complainants' net worth of approximately €5m, their investment objectives, attitude to risk and knowledge and experience of financial instruments. The Provider states that based on the information provided by the Complainants it was determined that their existing Portfolio was suitable and appropriate for them.

Further communications from the parties

The Provider states that in August 2016, the Complainants' previous advisors, the "Fund Manager", wrote to its clients informing them of its intention to exit the market for providing investors advisory accounts, but the intent was to continue to maintain and manage the Fund in which the Complainants had invested through the Fund Manager in October 2014 prior to any contractual relationship with the Provider. The Provider states that the Complainants elected to come to it and completed an advisory account opening form in August 2016. The Provider states that the Complainants' account was opened on 7th September 2016 and they remained clients and operated under the Provider's advisory terms and conditions with ongoing advices being sought by the Complainants and furnished by the Provider. The Provider states that this means that the final decision to buy, sell or hold an investment remained with the Complainants.

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The Provider states that its Account Opening document was completed and signed by the Complainants in August 2016 and submitted to the Provider together with the relevant supporting documentation. An advisory account was opened on the 7th September 2016.

The Provider states that an Advisory service means that it will provide clients with advice on investment services and products. The Provider says however, it should be noted, that the decision to invest or not to invest or to hold an investment will be made by the client. The Provider states that under this service, it may also execute investment transactions on a client's behalf where the client has made an investment decision without taking any advice from the Provider. The Provider states that the account is not managed against an agreed specific benchmark.

The Provider was asked to comment on the Complainants' position that they had invested in Medium risk investments only, with the previous Provider. The Provider was also asked by this office what information was given to the Provider by the Complainant regarding the investment preference of the Complainants in September 2016.

The Provider's response is that as part of its account opening process, the Provider assessed suitability and appropriateness based on the information provided by the Complainants in the Account Opening documentation. The Provider states that the Complainants in Section F. "Attitude to Risk" declared themselves as a "Considered Investor", the description of which is classified as:

"You are looking for a balance of risk and reward. You accept during periods of market risk potential losses may exceed by a multiple the potential income from investments."

The Provider states that based on the information provided by the Complainants, a full Portfolio review was undertaken by the Provider's Broker and it was assessed that the existing portfolio was suitable and appropriate for the Complainants at that time. The Provider states that the Fund was a discretionary based multi asset fund and rated initially as an ESMA 5 fund in line with the Complainants' risk appetite. The Provider says that this rating was subsequently reduced to ESMA 4.

The Provider was asked by this office what assessment or review was undertaken by the Provider to establish the Complainants' investment objectives, attitude to risk and their investment experience before they started "advising" the Complainants in September 2016.

The Provider's response is that extensive information was declared in the Advisory Account Opening Document by the Complainants on the 26th August 2016. The Provider

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points out that Section 5 of that document provides detail in relation to Investment Objectives and Risk. The Provider states that Section 6 of that same form gives details regarding Experience.

The Provider says that based on the information in this document provided by the Complainants, a full client review and portfolio review was undertaken and it was assessed that the existing portfolio was both suitable to the First Complainant's financial needs and appropriate for his financial experience.

The Provider states that also, on the 21st of October 2016, a meeting took place in the Provider's Offices between the First Complainant, the Provider's Broker and an employee of Fund owner and the manager of the Fund. The Provider states that the Complainant's portfolio was discussed in detail at this meeting. The Provider refers to an e-mail sent to the First Complainant from the Provider's Broker dated the 21st October 2016 from which it will be noted that he details what was discussed and agreed at that meeting.

The Provider was asked to explain why the monthly updates on the fund activities, sent to the Complainants' ceased in January 2017.

The Provider's response is that the Fund was not managed by the Provider. The Provider accordingly, says this is not a matter for the Provider. The Provider states that the monthly updates were issued from the Fund Manager. The Provider submits that these were at all times issued directly from the Fund Manager to the Complainants. The Provider states that it cannot advise on why these ceased in January 2017 and submits that this explanation should be sought from the Fund Manager.

The Provider states that the Fund price was updated daily by it to the Complainants' Account and the monthly fund updates were not relied on by the Provider in the provision of advice to the Complainants.

The Complainants refer to a significant drop in the value of the investment reported in an April 2017 activity statement. In this regard the Provider was asked by this office whether this was this the first time that there was a drop in the value of the investment.

The Provider's response is that this was not the first time there was a drop in value. The Provider states that it reviewed the historical trading of the Fund prior to the establishment of a relationship with the Provider on 7th September 2016. The Provider states that the Fund NAV (Net Asset Value) fell from €105 to €96 between June 2015 and September 2015 before recovering to €103 in early December 2015. The Provider states that it also fell back in February 2016 to €90 with an intra week low of €87.50.

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The Provider also sets out the percentage losses from September 2016 to May 2017. The Provider also submitted a chart showing the fund NAV from inception to close. The Provider states that the source of this information is the Fund Administrator, and M.. a provider of independent investment research.

The Complainants contend that high risk Investment strategies were implemented by the Provider in relation to the fund in the early months of 2017. This office asked the Provider whether the Provider accept that its strategies brought the fund outside a "Medium Risk Fund".

The Provider's response is that it wants to emphasise the difference between the Fund Manager and the Provider, the Provider says it has no control regarding the investment strategies of the Fund Manager.

The Provider says however, without prejudice to this, it would comment as follows:-

"We assume the inclusion of derivatives to the Fund is what is being referenced to. We are a stranger to anything different happening in the investment strategy of the Fund in "early months of 2017". In November 2015 (prior to the account opening with [the Provider]), the Board of Directors of the Fund approved the application to the CBI to expand the investment universe of the fund to include derivatives. Derivatives were introduced for efficient portfolio management in order to better protect the value of the fund during periods of equity market volatility. They were not introduced for any other reason and certainly not to increase the risk profile.

In May 2016, the use of derivatives was approved by the CBI and a revised Supplement introducing the use of derivatives was published. The Fund made use of derivatives from this point onwards.

Our understanding is that the revised Supplement was sent by the Fund Manager to the Complainants at that time which is standard market practice and is a regulatory requirement.

We would point out that the introduction of the efficient portfolio management and the use of derivatives did not alter the European Securities and Markets Authority ("ESMA") risk rating of this Fund. ESMA has produced guidelines as to how Investment Managers should represent risk and return to consumers on a scale of 1 to 7, with 1 being the lowest risk and 7 being the highest risk. [In this regard the Provider refers to the] ESMA's Guidelines — Methodology for Calculation of the Synthetic Risk and Reward Indicator in the Key Investor Information Document (published by the Committee of European Securities Regulators).

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The Key Investor Document ("KID") relating to the risk of the Fund published in 2014 had an initial rating of 5 suggesting a "medium to high level of risk" which is an annualised estimated volatility of 10% - 15%. A further KID was issued in 2015 in which the risk of the fund had reduced to a rating of 4 which is an annualised estimated volatility of 5%-10%".

The Provider states that based on the above it does not accept the Complainants' contention that the Fund Manger's strategies brought the fund outside a "Medium Risk Fund". The Provider states that this is clearly not the case, and also states that it was not the responsibility of the Provider, in any event.

This office asked the Provider whether the Provider had to "perform a re-assessment" of a client's profile before their risk profile can be moved from a different level.

The Provider's response is that a risk profile of the Fund or of a single investment in a portfolio is a separate matter to that of a client and is a matter for the Fund Manager. The Provider states that there was no change in the risk profile of the Fund since the Complainants opened their account with the Provider. The Provider states that it would further point out that prior to the account opening with the Provider the risk profile of the fund actually went down from an ESMA 5 to an ESMA 4 rating. The Provider states that its role was to ensure that the portfolio was suitable to the clients' financial needs and appropriate to their financial experience.

The First Complainant asserts, in a response to an email from the Provider in February 2017, that he was "unaware, until now (that it) received no fee for the "NFund".

The Provider was asked by this office to explain "who is getting the 1% fee and how long is that arrangement to run".

The Provider's response is that the 1% fee was charged on the assets that the clients actually held with the Provider. The Provider says that the Fund assets were held with the external custodian. That there was no separate fee payable for advice in relation to the Fund at question.

The Provider was asked by this office to respond to the First Complainant's statement that: *"The withholding of the Feb and March monthly reports denied me of the opportunity of exiting the fund"*.

The Provider's response is that this is simply not the position. The Provider says firstly, it is the Fund Manager's role to provide the monthly report/update to the Investor and not the Provider's role. The Provider says secondly, the Provider's Broker was in regular

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contact with the First Complainant updating him on the position of the fund and it was always in his control and his sole discretion to exit the Fund.

The Provider states that on the 30th of January 2017, a meeting took place at the Provider's offices between the First Complainant and the Provider's Broker. The Provider says it was noted that the Fund was down since inception and that a strong performance in November 2016 had been diluted by weaker December and January returns. The Provider states that it was agreed that the Provider's Broker would review the position again at the end of June 2017 at which point the Complainants would make a decision as to whether or not to hold the Fund for a further six months.

The Provider states that the Provider's Broker kept the first named Complainant apprised of the performance of his investment regularly. The Provider says that in this regard, it refers to an e-mail dated the 30th January 2017 between the Provider's Broker and the First Complainant. The Provider states that it would further point out that the first named Complainant was fully aware of his ability to exit the Fund at any time.

The Complaints state that they invested in the fund with the Provider on the same basis as they had with the Fund Manager. The Complainants says that the risk profile was not changed and on the documentation filled in, they stated that they had *"not invested in derivatives and crossed out that section in the Provider document"*.

The Provider's response to the above is that its role was to advise the Complainants on their Investment Portfolio of which this fund was a part of. The Provider says that the use of derivatives for efficient portfolio management was utilised by the Fund Manager, the Advisory Account being opened in the Provider.

The Provider states that in relation to the Account opening Form, it accepts the Complainants position on how they completed the form regarding Derivatives. The Provider says, however, being an investor in a fund that utilises derivatives for efficient portfolio management is very different to direct investment in derivatives such as CFD's, Options and Futures which is the information being collected on this form. The Provider submits that efficient portfolio management is not the same as investing in derivatives.

The Provider stated in its Final Response Letter *"it is not the role of an advisor to ensure that the Fund Manager manages the fund in line with the Prospectus and Supplement"*. The Provider was asked by this office to explain whose role it was, and the extent of the Provider's role.

The Provider's response is that the Fund was a CBI regulated fund with a Custodian (S.. Trustees) appointed to hold assets and an Administrator appointed to value and monitor the performance of the Fund and report on deviations from the prospectus. The Fund also

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had a Board of Directors. It is the Administrator's responsibility to monitor the activities of the Fund Manager and report to the Board. The Provider states however, while it is not its responsibility to monitor the activities of the Fund Manager, it is its view that the use of options and derivatives for the purposes of efficient portfolio management was carried out in accordance with the objectives and investment policy as set out in the published fund documentation.

The Provider's position is that its role in this relationship was to provide Portfolio advice, a service whereby it provides advice and the client makes the final decision and this includes the continued holding of an investment. The Provider states that during the 21st of October 2016 meeting with the First Complainant and the Fund Manager, CM, at the Provider's offices, the Provider's role was explained to the First Complainant by RP who explained that he would monitor the performance of the Fund, and would make an official recommendation on the Fund in June 2017. The Provider says the First Complainant agreed with this approach and confirmed that he had been watching the Fund closely and that while he was disappointed on its performance to date, he also felt that more time was needed. In this regard the Provider refers to an e-mail dated 21st of October 2016 from the Provider's Broker to the First Complainant following this meeting.

It is the Provider's position that it does not accept that the Complainants did not know that derivatives were being utilised by the Fund prior to the meeting on the 14th of February 2017. The Provider refers to a phone call between the First Complainant and the Provider's Broker on the 8th December 2016 wherein the Provider's Broker specifically refers to the use of derivatives within the Fund in the context of efficient portfolio management.

The Provider says that it had an advisory relationship with the Complainants. The Provider states that it provided investment advice over the period and also reviewed the clients other investments (as requested by the clients) which are held with other investment managers.

The Provider submits that it fulfilled and discharged its duty of care in regard to the advisory relationship as between the Provider and the Complainants. The Provider says that the Provider's Broker, gave his view on the Fund Manager's Fund using his expertise at all times. The Provider states that the Provider's Broker did not have, as no broker or investor has, the benefit of hindsight.

The Provider says that clearly the investment performance of the Fund was disappointing and it is regrettable when any client suffers loss, but for all investors risk reflects expected reward and the Provider cannot be held liable simply because an investment falls in value.

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The Complainants submission of 6 December 2018

The Complainants states that they wish to highlight that the Provider undertook in writing and verbally on numerous occasions, that it would monitor the performance of the Fund on their behalf.

The Complainants states that they invested with the Fund Manager in October 2014.

The Provider took over the advisory services in Sept 2016 when the Fund Manager exited from providing investors advisory services, and undertook to monitor the investment on a weekly basis. The Complainants state that the fund had not performed as expected since their initial investments were made.

The Complainants states that on 21/10/16 at a meeting with the Provider, they expressed their disappointment with the performance of the Fund and enquired as to whether they should exit from it. The Complainants submit that at that meeting, and confirmed in their e-mail of that same date, they were speaking with the Provider on a weekly basis and suggested that they review the position in January 2017 and re-visit it in June 2017.

The Complainants state that on 25th November 2016 they received an e -mail from the Provider to say that the Fund had performed very well in November and had improved by 6%. The Complainants say that the Provider confirmed that they would continue to monitor the investment on a weekly basis.

The Complainants state that on 2nd December 2016 the Provider was still positive regarding the Fund and would continue monitoring it weekly as regards its progress.

The Complainants submit that at a meeting between the Provider and the First Complainant on the 30th January 2017, the First Complainant stated that he was disappointed with the performance of the Fund, and that this disappointment was expressed with the intention to exit the Fund.

The First Complainant's position is that the Provider advised, and confirmed in an e-mail, that he should hold until June 2017 (the Complainant says he then sent a note mentioning hold until March). The Complainants state that the Provider confirmed that it was continuing to speak with the Fund Manager on a weekly basis.

The Complainants state that on 14th Feb 2017, at a lunch, and when Fund Manager had left the table, the First Complainant was disturbed as to the information and change of investment strategy being adopted by the Fund Manager as explained over lunch. The Complainants state that the First Complainant enquired as to whether they should exit the fund forthwith. The Complainants state that the Provider's advice was to remain until

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June 2017 and then review. The Complainant states the Provider was to continue to monitor matters on a weekly basis.

The Complainants state that the changed investment strategy being pursued by the Fund Manager was outlined in an e-mail to the First Complainant dated 6th April 2017, on foot of which the First Complainant instructed the Provider to exit the Fund immediately.

The Complainants' position is that the above demonstrates that the First Complainant had a positive belief that the Provider was acting on his behalf and was monitoring the Fund, on his behalf, on a weekly basis. The Complainants submit that this undertaking was freely given by the Provider on numerous occasions. The Complainants further submit that the relationship between the First Complainant and the Provider is demonstrated "*most admirably*" in the recorded telephone conversation of the 8th December 2016.

The Complainants question what 'monitoring on a weekly basis' and 'speaking with [Fund Manager] on a weekly basis' entail? The Complainants state that the only correspondence received from the Provider, independent of a meeting, was the positive note of the 25th November 2016 that the Fund had improved by 6%. The Complainants state that no warnings were received from the Provider as to the collapsing results being experienced with the Fund.

The Complainants say that the First Complainant had misgivings about the running of the Fund since 21st October 2016, but was reassured by the advice he was given by the Provider on numerous occasions, that he should remain in the Fund.

The Complainants state that they were fortunate that having consulted with the joint investor that the First Complainant instructed the exiting of the Fund on the 10th April 2017. The Complainants state had they continued to act on the advice of the Provider, the loss on the investment would have been considerably worse when the Fund was wound up in May 2017.

The Complainants state that they were most disappointed to note that the Provider confirmed that it knew that a significant number of investors had already exited the Fund by the time the Complainants instructed the investment to be closed.

The Complainants submit that it is not good enough for the Provider at this stage to claim that it was providing an advisory service only. The Complainants state the Provider clearly undertook to monitor this Fund on a weekly basis and that this changed the relationship with their clients.

The Provider's submission of 21 December 2018

The Provider states that the Complainants were advised and it was agreed that the Provider would make a decision in relation to the Fund at the end of June 2017. The Provider states that the Provider's Broker was in contact with the Fund Manager and getting updates on the Fund Performance. The Provider states that he was monitoring it weekly, hence the price of the fund was updated weekly through the Provider's internal process.

The Provider states, however, this did not mean that simply because the Fund fell in value at any given time, the advice would be to exit it. The Provider says that the fund value fell on previous occasions and recovered. The Provider submits that it has demonstrated this in its submissions. The Provider states that the Complainants were aware the fund fell in value in January, February and March but the Provider's Broker expected the fund to recover in value and hence, he continued to recommend giving the Fund Manager to the end of June 2017 to review it again. The Provider says that this was discussed with the First Complainant and agreed. The Provider states that the final decision to buy, sell or hold an investment always remained with the Complainants. The Provider states that the Complainants could have chosen not to accept this advice if they did not agree with it. The Provider reiterates that it did not have the benefit of hindsight and this was the position taken at the time.

The Provider submits that the Provider's Broker, rejects that he told the first named Complainant that *"he knew that a significant number of investors had already exited the Fund by the time the First Complainant instructed closing the investment"*. The Provider states that the Provider's Broker simply remarked that there had been redemptions, but obviously he could not base his advices to the Complainants purely on the decisions of others to exit.

Evidence

Under the Risk and Reward section of the KIID (Key Investor Information Document) the following was stated:

"Derivative Risk – The Fund will enter into various financial contracts (derivatives) with other parties".

Advisory Account Opening Document with the Provider:

"B. Derivatives

You would consider using derivatives

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For hedging – to reduce risk or increase income but not as a tool to increase risk
[the “No” box was ticked by the Complainants].

For speculation – understanding that you may lose part or all of your capital so invested. **[the “No” box was ticked by the Complainants].**

Please indicate your investment experience in the following instruments: CFDs, Options, Futures” [the Complainant was given the following options “None” “Basic” “Good” “Extensive” .. [The Complainant chose “None”]

“Do you have a professional qualification, work as an investment manager or adviser or are a member of a recognised investment association? [The Complainant answered “No”]

“Is there any other reason why we should deem you to be a professional investor”
[this was left blank].

Correspondence

21 October 2016 – The Provider to the Complainant

Fund Manager’s Fund

*“You noted the performance has been disappointing
We are speaking to [Fund Manager] on a weekly basis
As suggested we should meet again in January to review the situation and review again in June”.*

8 December 2016 – Provider telephone call with the First Complainant

In this call the Provider advised the First Complainant that the Fund Manager had: **“the ability to use derivatives”.**

30 January 2017 – Provider to the Complainant

*“[Fund Manager Fund]
Note that you are -60k on the investment since inception, the strong performance (+6%) in November has been somewhat diluted by weaker December and January returns.*

I am suggesting that you review again the position at the end of June and make a decision then whether to hold for another 6 months or sell”.

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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 Complainants were 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 **30 October 2020**, 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.

On **19 November 2020**, the Provider acknowledged receipt of the Preliminary Decision and advised that it did not wish to make additional submissions.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Complaints for Adjudication

I accept that the Complainants' assertion that the Provider increased the investment risk on the Complainants' investment without the Complainants' knowledge or agreement, is a complaint that falls to be decided in a separate complaint against the Fund Manager.

Likewise the complaint that the Provider breached the terms of the operation of the fund, by participating in high risk investment strategies from January to March 2017, is an issue to be decided in a separate complaint against the Fund Manager.

Therefore, the complaints that will be adjudicated upon as part of this complaint are that the Provider:

1. Has failed to give appropriate advise and correctly manage the Complainants' investment fund from January 2017 onwards;

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2. Gave the First Complainant incorrect information at the lunch meeting on the 14th February 2017, and kept vital information concealed from him at that time;
3. Intentionally ceased sending monthly reports on the fund, to the Complainants from January 2017;

I accept that that it was the Provider's role to provide Portfolio advice, a service whereby it provides advice and the client makes the final decision and this includes decisions with regard to the continued holding of an investment.

In the 21st of October 2016 meeting with the First Complainant and the Fund Manager, at the Provider's offices, the Provider's role was explained to the First Complainant who explained that he would monitor the performance of the Fund, and would make an official recommendation on the Fund in June 2017. The Provider says the First Complainant agreed with this approach and confirmed that he had been watching the Fund closely and that while he was disappointed on its performance to date, he also felt that more time was needed. In this regard the Provider refers to an e-mail dated 21st of October 2016 to the First Complainant setting out this position, following this meeting.

However, this did not mean that simply because the Fund fell in value at any given time, the advice would be to exit it. The Provider says that the fund value fell on previous occasions and recovered.

It is the Provider's position that it does not accept that the Complainants did not know that derivatives were being utilised by the Fund prior to the lunch meeting on the 14th of February 2017. The Provider in this regard, refers to a phone call between the First Complainant and the Provider's Broker on the **8th December 2016** wherein the Provider's Broker specifically refers to the use of derivatives within the Fund in the context of efficient portfolio management.

The Provider was asked by this office to respond to the First Complainant's statement that: *"The withholding of the Feb and March monthly reports denied me of the opportunity of exiting the fund"*.

As regards who should have provided the Complainant with the monthly report/ update, it is the Provider's position that it is the Fund Manager's role to provide the monthly report/update to the Investor and not the Provider's role. The Provider says, the Provider's Broker was in regular contact with the First Complainant updating him on the position of the fund and it was always in the First Complainant's control and his sole discretion to exit the Fund.

The evidence shows that on 30th January 2017, a meeting took place at the Provider's offices between the First Complainant and the Broker. At this meeting it was noted that

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the Fund was down since inception and that a strong performance in November 2016 had been diluted by weaker December and January returns. The Provider states that it was agreed that the Provider's Broker would review the position again at the end of June 2017 at which point the Complainants would make a decision as to whether or not to hold the Fund for a further six months.

I accept that the first Complainant was fully aware of his ability to exit the Fund at any time, which he duly did in April 2017. The timing as to when is the best time to exit a fund is something that would have to be weighed up having regard to all the facts. I accept that it is a decision solely for the investor. Such a decision should be based on an evaluation of all information, which would include the appointed financial expert's view. That said, it must be accepted that an expert could not know for certain how the markets were actually going to perform.

The Complainants state that on the documentation filled in with the Provider, they stated that they had *"not invested in derivatives and crossed out that section in the Provider document"*.

The Provider's response to the above is that its role was to advise the Complainants on their Investment Portfolio of which this fund was a part. The Provider says that the use of derivatives for efficient portfolio management was utilised by the Fund Manager.

The Provider states that in relation to the Account opening Form, it accepts the Complainants' position on how they completed the form regarding Derivatives. The Provider says, however, being an investor in a fund that utilises derivatives for efficient portfolio management is very different to direct investment in derivatives such as CFD's, Options and Futures which is the information being collected on the form in question. The Provider submits that efficient portfolio management is not the same as investing in derivatives.

I accept the Provider's position that the use of derivatives for efficient portfolio management is very different to direct investment in derivatives such as CFD's, Options and Futures. However, I consider that had such differentiation between the two uses of derivatives been explained to the Complainants, it may have helped to better inform the Complainants.

Likewise when it was known by the Provider that the Complainants were adverse to the use of derivatives, it should have prompted the Provider to explain their use, particularly at the time when the Fund Manager had decided / begun to introduce them into the fund mix.

While, I also note that the Provider says it was not the party that issued the monthly updates, I would have expected some communication / advice to have been given from either or both of the providers as to who would be issuing the updates when the Provider came on board as advisor to the Complainants. I consider it a wholly unreasonable position that the Complainants would be left without any communication from the providers on who would be furnishing such information.

That said, the evidence does show that the Complainant was made aware that derivatives could form part of the Fund Manager's investment strategy. The documentation supplied to the Complainants made this clear. It is also noted that in the telephone call of **8 December 2016** the Provider advised the Complainant that the Fund Manager had the: "*ability to use derivatives*". The Complainants had this opportunity to query this information, but did not.

Likewise, when the Provider communicated that it would be monitoring the position on a weekly basis, and in the absence of receipt of the usual updates, I would have expected the Complainants to query the absence of the updates at an earlier point.

Having regard to all of the above, I partially uphold this complaint and direct the Provider to pay the compensatory payment of €8,000 (eight thousand euro) to the Complainants for the Provider's failings identified above.

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)(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 make a compensatory payment to the Complainants in the sum of €8,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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.

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GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

23 November 2020

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

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.