



<b><u>Decision Ref:</u></b>	2022-0017
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Shares/Equities Investment
<b><u>Conduct(s) complained of:</u></b>	Fees & charges applied Mis-selling (investment)
<b><u>Outcome:</u></b>	Upheld

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

The Complainant incepted an Investment Policy ('the Policy') with the Provider on **30 January 1989**, by way of a single premium of **IR £6,270.49 (€7,961.88)**. The Complainant made a **€30,000.00** top-up to the Policy on **17 January 2018** and a further **€50,000.00** top-up on **31 January 2018**. This complaint concerns the suggested failure of the Provider to advise the Complainant at that time that a 5% bid/spread applied to those top-ups.

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

The Complainant met with a Provider Financial Adviser, Ms J., on **6 December 2017, 13 December 2017** and again on **15 January 2018**, when she then made a **€30,000.00 (thirty thousand Euro)** top-up into the Policy, effective from **17 January 2018**.

Later again on **29 January 2018**, she made a further **€50,000.00 (fifty thousand Euro)** top-up into the Policy, effective from **31 January 2018**.

The Complainant says she was aware at that time that the net allocation on the top-up funds was 101.58%, the annual management charge was 0.75% and the exit tax on growth of funds was 20%.

The Complaint says her **Policy Annual Statement as at 17 January 2019**, dated 22 January 2019, showed policy charges of **€2,514.90 (two thousand five hundred and fourteen Euro and ninety Cent)**.

The Complainant's Broker emailed the Provider on **4 February 2019** to query these charges, as follows:

*"[Annual Management Charge] is stated as 0.75% of €114,977 yet the charges debited are €2,514.90. Can you please provide a full breakdown of the €2,514.90 as [the Complainant] has queried it".*

The Broker sent follow-up emails to the Provider on **20 February** and **22 February 2019**.

The Provider replied by email to the Broker on **6 March 2019**, as follows:

*"This [Policy] was original sold by our Financial Advisor channel who in turn have a different charging to brokers.*

*We received a top SP on 31/1/2018 of €50,000*

*The gross allocation to the client was 101.58%.*

*There is also a bid/offer charge of 5%*

*So the charges referred to were calculated as follows:*

*€50,000 less 1% Gov levy = €49,500 x 1.0158 x 0.05 = 2,514.10".*

The following month, the Complainant's Broker emailed the Provider on **2 April 2019**, as follows:

*"Two top ups were applied to the Policy of €30,000 and €50,000 in 2018 (one before the annual statement in question). There was a charges query in relation to the 2018 Annual statement (period 27/1/2018 to 17/01/2019) ...*

*... the documentation that was supplied to [the Complainant] at the time of investments by the [Provider] Advisor...clearly states that the charging structure of the top ups are as follows:*

*101.58% **Net Allocation Rate***

*0.75% Annual Management Charge*

*20% Exit Tax*

*1% Government Levy*

*It doesn't state anywhere that there is a 5% bid/offer spread and this was not communicated to [the Complainant] at all (verbally or in a written capacity). [The Complainant] is very aware of charges and charging structures so they are extremely frustrated that the policy has incurred an additional charge without it being disclosed.*

*We are assuming that the €30,000 also incurred the same 5% bid/offer spread in the [previous] Annual Statement ...*

*[The Complainant] feels that they have been completely misinformed and mis-sold an investment without full disclosure of charges ...*

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*As the investment policy is now in our agency we would like [the Provider] to address this matter with a full refund of the 5% bid offer spread charge of circa. €4,000 (5% of €80,000) directly to [the Complainant]”.*

The Complainant’s Broker informed the Provider by email on **20 May 2019** that the Complainant wanted the email of **2 April 2019** escalated to a formal complaint.

The Complainant received a **Final Response** from the Provider dated **10 July 2019**, wherein the Provider advised that the top-ups made to the Policy were made in accordance with the original policy terms and conditions, which provides for a bid/offer spread of 5%.

The Complainant says the bid/offer spread was not mentioned during her meetings with Ms. J. and instead the only charges outlined for the top-ups were the annual management charges, the allocation rate and the 1% government levy.

The Complainant notes that the Provider wrote to her on **8 February 2018** to confirm her top-up payment of **€30,000.00** to the Policy, as follows:

*“Thank you for your payment of €30,000 which has been invested in [the Policy] with effect from 17 January 2018 with an allocation of 101.58%.*

*A Government levy applies on all premiums paid (Currently 1.00%).*

*The details of this additional investment are as follows:*

<b>Fund Name</b>	<b>Price of units</b>	<b>Units Purchased</b>	<b>Amount</b>
[Named] Fund	€14.061	2145.813	€30,172.28”.

In addition, the Provider also wrote to the Complainant on **8 February 2018** to confirm her top-up payment of **€50,000.00** to the Policy, as follows:

*“Thank you for your payment of €50,000 which has been invested in [the Policy] with effect from 31 January 2018 with an allocation of 101.58%.*

*A Government levy applies on all premiums paid (Currently 1.00%).*

*The details of this additional investment are as follows:*

<b>Fund Name</b>	<b>Price of units</b>	<b>Units Purchased</b>	<b>Amount</b>
[Named] Fund	€13.957	3603.004	€50,287.13”.

The Complainant’s Broker says these letters confirm the amounts invested as **€30,172.28** and **€50,287.13** respectively, and that there is no indication of 5% bid/offer spread.

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

*“Bid/offer spread of 5% was never mentioned at all during meetings to do €80,000 worth of single premium top ups in Jan 2018.*

*Only noticed additional charge on annual benefit statement.*

*While meeting [Ms J.] only charges outlined for the top ups were [annual management charge], allocation rate and 1% Govt levy. No mention of 5% bid/offer charge.*

*Advice was an €80,000 top up based on better tax treatment with 0.75% [annual management charge], 101.58% allocation rate and 1% Govt Levy”.*

In her email to this Office on **17 March 2020**, the Complainant submits that:

*“ ... We’re not disputing the fact that there was an original bid/offer spread of 5% (although we weren’t ever aware of it). We have an issue in relation to the new advice received and the non-disclosure of the bid/offer spread. We were advised to cash in an existing [Provider] policy (held jointly with my husband) to avail of the better exit tax and transfer that along with additional monies to [the Policy]. We repeatedly asked about the charges involved and they were outlined as the AMC [annual management charge] and Government 1% levy ... We were given an increased allocation rate to negate the 1% levy and were told that there was no other charges attached to the policy and effectively 100% of our money would be used to purchased funds ... We weren’t informed at this point or any point of the 5% bid/offer spread even though we asked about all the charges from the commencement of this policy ... We feel that we were mis-sold the top up and felt that the bid/offer spread should have been disclosed as repeatedly requested [re charges]. We only realised the charge when we queried the extremely high charges (on the annual statement a year later) ... There was no indication of the 5% bid/offer spread in any of the initial top up policy documents and so how were we to know of the charge? ...*

*Only documentation that I have signed (regarding top ups) confirms AMC, Govt Levy and Allocation rate. There is no mention of Bid/offer spread or additional charges. Should this not have been disclosed at point of Top Up? Even when [Ms. J.] was asked to confirm all charges? ...*

*Again, we are disputing the fact that we were not informed of the bid/offer spread at the point of advice or top-up (even when we asked for all charges). Nor did the bid/offer spread appear anywhere in the subsequent policy documentation issued. Therefore we had no idea of the charge and no chance to exercise a refund during the cooling off period. The €30,000 was ‘a switch’ from one policy to another and should not have been subjected to any charges which is what we were led to believe”.*

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In addition, in her email to this Office on **29 September 2020**, the Complainant submits:

*"[Ms. J.] is a lovely lady and my issue is not with her specifically. She did not however...discuss the bid offer price charge which is the core of the issue".*

Furthermore, in her email to this Office on **16 August 2021**, the Complainant submits:

*" ... the main concern of mine in deciding where to invest my money was the charges. On several occasions I requested information on charges and commissions and never was the bid offer price mentioned. I would have thought this should have been referred to as the original policy was taken out in 1989. To emphasize the point, I was 25 years of age when I took out the original policy. I was 53 years old when I had money to invest and that I realised that doing a top-up to the original policy was an option ... "*

As a result, when she submitted her **Complaint Form** to this Office, the Complainant stated that she seeks from the Provider:

*"Full refund of the 5% (€4,000) as the charge was not disclosed at all at the time of making the top up. While it may be in original Policy from 1989, it was not made clear at all when I asked for all charges. Bid/offer spread was never mentioned or discussed as isn't mentioned on any documentation for the top ups (€30,000 + €50,000)".*

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

The Provider says that the Complainant incepted an investment policy ('the Policy') with the Provider on **30 January 1989** through her independent broker. The Complainant paid a single premium of **IR £6,270.49 (€7,961.88)** into the Policy at that time.

The Provider wrote to the Complainant on **27 February 1989** to confirm that the Policy documents (including the **Policy Schedule** and the **Policy Conditions**) had been sent to her broker for her attention.

The Provider says that the single premium was used in 1989 to purchase units in the fund selected by the Complainant. The units were purchased at the offer price, in accordance with Section 1, Condition 4, 'Determination of Bid and Offer Prices', at pg. 3 of the **Policy Conditions**, as follows:

*"... The Offer Price per Unit shall be the Bid Price multiplied by 100/95 and rounded up by not more than 1 in 100 ... "*

The Provider says that how the offer price is determined has never changed over the years. In that regard, the Provider notes that the bid/offer spread is the difference between the price at which units are purchased (the offer price) and the price at which units are sold (the bid price). Where a policyholder invests money into a policy of the type incepted by the Complainant in **January 1989**, the policyholder purchases units at the offer price, and when the policyholder subsequently surrenders some or all of the units held in the policy, the units are sold at the bid price.

Provider records indicate that the Complainant, in joint names with her husband, incepted a different investment policy ('Policy B') with the Provider in **January 2001**, through her independent broker.

In **December 2017**, the Complainant contacted the Provider with a view to discussing Policy B directly with one of its tied agents. The Complainant was put in contact with Ms. J., a Financial Adviser.

The Provider says that around the same time she was engaging with Ms. J., the Complainant was also engaging with an independent Financial Adviser in relation to her investment portfolio. In that regard, the Provider received a **Letter of Authority** signed by the Complainant on **11 January 2018** permitting it to release details relating to the Policy to her Financial Adviser, which the Provider notes was prior to the top-ups being made. The Financial Adviser then requested specific information in relation to the Policy and the Provider furnished this information on **25 January 2018**. The Provider notes this Financial Adviser was shortly thereafter appointed as the Complainant's Broker on the Policy from **March 2018**.

The Provider says that following her meetings with Ms. J., the Complainant decided to make two top-ups to the Policy. The Complainant provided a written instruction to the Provider in relation to a **€30,000.00** top-up on **15 January 2018**. A further written instruction in relation to a **€50,000.00** top-up was provided on **29 January 2018**.

The Provider notes the top-ups were fully processed on **8 February 2018** and a written confirmation in respect of each top-up, together with a **Policy information Statement** reflecting both top-ups, was posted to the Complainant that day. The Provider says these letters confirmed the dates on which the top-ups were applied to the Policy, the allocation rate and the government levy. The letters also confirmed the unit price (being the offer price) on the date each top-up was applied and the number of units purchased in the fund. The **Policy Information Statement** reflected that the surrender value of the Policy, including the top-ups, was **€113,835.95**, based on a bid price of €12.965 on **6 February 2018**.

The Provider issued the Complainant with her **Policy Annual Statement as at 17 January 2019** on 22 January 2019, which showed Policy charges of **€2,514.90**. The Provider notes that the Complainant's Broker subsequently made a complaint on her behalf on **20 May 2019** in relation to the application of the bid/offer spread to the policy top-ups.

Following its review of the matter, the Provider issued its **Final Response** to the Complainant on **10 July 2019**, as follows:

*“ ... I understand that your complaint relates to the provision of this policy to you in 1989 and the charges applicable to your policy.*

*In relation to your comments regarding the provision of this policy to you in 1989, [the Provider] cannot comment on the advice provided to you at that time as your policy was sold by an independent Broker. We would encourage you to contact your broker to raise your concerns with them directly.*

*When you took out this policy you signed your application form confirming that you were satisfied with the nature of your policy and the applicable charges. The Bid/Offer spread is built into the unit price and this would have been explained to you when the policy commenced. The bid-offer spread is simply the difference between the price at which the Company can buy a share and the price at which the Company can sell it. The offer price is what the Company have to pay to buy shares from clients. The offer price is usually higher than the bid price.*

*Our records confirm that you met with [Ms. J.], [a Provider] Advisor in 2018 on three occasions. I have contacted [Ms. J.] for her comments in relation to your meetings and she has confirmed that you held an old [Policy] which was taken out over 30 years ago and because it was issued prior to the 01 January 2001, the growth on the policy is subject to 20% exit tax.*

*At your first meeting, [Ms. J.] advised that you raised your concerns about the amount of tax you were paying on the growth on your policies. [Ms. J.] confirmed that she explained that the growth of [Policy B] was subject to 41% exit tax and the growth of [the Policy] (because it was issued prior to the 01 January 2001) was subject to only 20% tax.*

*You decided after [Ms. J.] explained all the pros and cons that you wanted to encash [Policy B] and transfer the funds of €30,000 into [the Policy] under the original terms and conditions of the Policy, in order to pay exit tax of 20% instead of 41% on any growth of [Policy B], which had grown exponentially. [Ms. J.] confirmed that you also made an additional top-up of €50,000 into [the Policy].*

*At your second and third meetings with [Ms. J.] she has confirmed to me that you completed the paperwork and she explained everything including the charging structure as set up under the terms and conditions of the original contract [the Policy], exit tax, net allocation, government levy and choice of fund options.*

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When we received your recent top ups on 31 January 2018 the gross allocation was 101.58%. There was also a Bid/Offer charge of 5%. For clarity I have demonstrated below how the charges were calculated:

€50,000 top up LESS 1% Government levy Totals: €49,500

€49,500 x 1.1058 (gross allocation) x 0.5 (Bid/Offer) Totals: €2,514.10.

I have also included a confirmation letter that issued to you once the top up was completed. This letter also explains the applicable charges.

I note that [your Broker] have advised that the policy documents state that your charges are different than those outlined in the policy conditions which issued to you upon commencement of your policy. I have enclosed a copy of the relevant section of your policy conditions for your reference:

**“3A. VALUATION OF THE MANAGED UNITS FUND (SERIES 1)**

On each Valuation Date or Additional Valuation Date the Managed Unit Fund (Series 1) shall be valued before any creation or cancellation of Units thereof takes place.

**GROSS ASSETS:**

Where assets consist of Units in other Unit Funds, the maximum and minimum values placed on such assets shall be based on the values placed on the assets and on the liabilities of such other Unit Funds. Any other investments held shall be valued as in Condition 3 [‘**VALUATION OF UNIT FUNDS**’].

**LIABILITES:**

Liabilities shall be calculated as in Condition 3. Where Units in any other Units Fund are held, account shall be taken of any liabilities allowed for in placing a value on such Units.

**4. DETERMINATION OF BID AND OFFER PRICES**

In regard to each Units Fund the Bid Price per Unit on each Valuation Date or Additional Valuation Date shall be determined by the Company’s Actuary having regard to the number of Units in existence and to the maximum and minimum values of the gross assets and to the liabilities. The Offer Price per Unit shall be the Bid Price multiplied by 100/95 and rounded up by not more than 1 in 100.

The Committee may consolidate or subdivide Units at its discretion.”

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*Having reviewed your policy and taking the information provided by [Ms. J.] into consideration, [the Provider] is satisfied that you were provided with all relevant information and costs before making lump sum payments into this policy in 2018.”*

While this **Final Response Letter** only references the bid/offer spread in respect of the €50,000.00 top-up, the Provider confirms the bid/offer spread was also applied to the €30,000.00 top-up, as the bid/offer spread is a standard feature of the Policy.

The Provider says the **Policy Annual Statement as at 26 January 2018** that issued to the Complainant on 31 January 2018 was generated prior to the €30,000.00 top-up being fully administered and that this is why this top-up was not reflected in the statement. To reflect situations where transactions take place before an annual statement issues which may not have been administered by the time the statement issues, the Provider says it includes a warning in its statements and in this case, the **Policy Annual Statement as at 26 January 2018** stated:

*“ ... This statement reflects transactions administered as at the date stated above. Where the administration of a transaction notified on or before your last statement date was not completed on your last statement date, this will have the effect of overstating (where the transaction was the payment of an additional premium) or understating (where the transaction relates to cancellation of units) the investment return figure ...”*

The Provider says the **Policy Annual Statement as at 26 January 2018** explained that if a transaction, such as a top-up with a bid/offer spread element to it, occurred in or around the same time as the 2018 statement being issued, and it was not reflected in the 2018 statement, any impact of the transaction would be reflected in the investment figure in the 2019 statement. In this manner, the effect of the bid/offer spread of the €30,000.00 top-up was incorporated into the investment return figure in the **Policy Annual Statement as at 17 January 2019**.

The Provider notes however that the €30,000.00 top-up that took effect on **17 January 2018** was included as part of the *“Total amount paid into policy”* figure in the **Policy Annual Statement as at 17 January 2019**. Unlike the €30,000.00 top-up, the second top-up of €50,000.00 was made and administered within the 2019 annual statement period and this, the Provider says, is why it is reflected separately in the **Policy Annual Statement as at 17 January 2019**.

The Provider says that Ms. J. recalls her engagements with the Complainant during **December 2017** and **January 2018** and has provided a detailed statement setting out what occurred at the meetings, as follows:

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*“[The Complainant] contacted [the Provider] and asked for an advisor to engage with her in relation to her [Policy B] as [her previous broker] had ceased trading and she wished to discuss the investment. An introductory meeting was scheduled for the 6<sup>th</sup> of December 2017. At this meeting [the Complainant] highlighted her concerns in relation to the amount of tax she was paying on the growth of her [Policy B]. I explained to her that [Policy B] was subject to 41% exit tax on the growth. [The Complainant] requested a breakdown of all the exit tax she had paid to date on [Policy B] and this was issued to her in writing ... At this meeting [the Complainant] said that she also had an old policy with [the Provider] called [the Policy]. [The Complainant] requested up-to-date policy information in relation to [the Policy]. This was issued to her on the 21<sup>st</sup> of December 2017 ...*

*A follow-up meeting was scheduled for the 13<sup>th</sup> of December to discuss further. At this meeting I explained that the exit tax growth on her [Policy B] was subject to 41% and that because [the Policy] was issued prior to the 1<sup>st</sup> of January 2001, the exit tax on the growth of [the Policy] Investment was 20%. [The Complainant] decided that she wanted to encash her [Policy B] and top-up [the Policy], in order to help reduce the exit tax on the growth of her investments, down to 20%. It was explained to [the Complainant] that if she wished to top-up [the Policy], that it would mean that she would be topping-up [the Policy] under her own name (and not under joint name) and per the terms and conditions of her original contract. [The Complainant] was given time to consider her options and review her policy conditions. A Letter of Authority signed by [the Complainant] dated the 12<sup>th</sup> of January 2018, was received by [the Provider] from [her current Broker] in relation to [the Policy] and the information requested was forwarded to [this Broker]. I was notified of this Letter of Authority dated the 12<sup>th</sup> of January 2018.*

*At a meeting on the 15<sup>th</sup> of January 2018, I reiterated that if [the Complainant] wanted to top-up [the Policy] in order to reduce her exit tax liability on the growth of her investment, then it would mean that the top-up would be placed under her own name and per the terms and conditions of her original contract. We discussed the charges/liabilities on the policy, namely the 1% government levy, 20% exit tax and the annual management charge and we discussed the allocation rate. I did not discuss the bid/offer spread on the unit price, but did ask [the Complainant] to refer to her original [Policy] terms and conditions for further information as I was conscious at the time that [the Complainant] has also engaged with her Broker...in relation to this [Policy] Investment.*

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[The Complainant] decided to top-up her investment by €30,000. [The Complainant] subsequently contacted me after this date to say that she wished to invest a further amount into [the Policy] and a follow-up meeting was arranged on the 29<sup>th</sup> of January 2018. It was again outlined at this meeting, that the top-up would be placed under her name and per the terms and conditions of the original contract. Information about [the Policy]...was issued on the 8<sup>th</sup> of February 2018 along with two letters confirming her top-ups. It was also confirmed in writing from [the Provider], before, during and post top-up meetings, on information issued to [the Complainant] on the 21<sup>st</sup> of December 2017...issued to [Broker C] (as requested by [the Complainant]) and issued to [the Complainant] on the 8<sup>th</sup> of February 2018...under the important information section that; "The benefits which your policy provides and the terms and conditions that apply are set out in your policy conditions, the policy schedule and subsequent amendments and endorsements that may apply. A copy of your policy conditions is available on request". The Policy was transferred to [the Complainant's Broker] in March 2018".

The Provider says Ms. J. has confirmed that she drew the Complainant's attention on more than one occasion to the fact that any top-ups paid into the Policy would be subject to the original **Policy Conditions**, which had been issued to the Complainant in **February 1989** through her then broker, and which set out how the offer price is calculated. The Provider says it is important to note that the basis upon which the offer price is calculated has not changed over the years since 1989. The Provider says the bid/offer spread is a standard feature of the Policy and one which the Complainant would have been made aware of when she took out the Policy in **January 1989**.

The Provider notes that the Complainant signed a note to confirm her understanding of the fund management charge, allocation rate, Government levy and exit tax applicable before the top-ups were made, and says that the reason why each of those specific items were drawn to her attention is, as follows:

1. While a fund management charge is provided for in the **Policy Conditions**, the amount of the charge is not specified. The fund management charge varies depending on the fund selected by a policyholder and it is for this reason a specific charge is not included in the **Policy Conditions**.
2. The allocation rate was a special enhanced rate of 101.58% agreed between the Complainant and Ms JMG.
3. The Government levy was only introduced pursuant to the **Finance Act 2009** and was not applicable in 1989.
4. The primary reason the Complainant decided to top-up the Policy was due to the substantial exit tax advantage it provided. As the Policy was taken before 1 January 2001, the exit tax rate is set at 20% and is deducted at a fund level. The current rate of exit tax on an investment policy taken out since 1 January 2001 is 41%.

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The Provider says it is clear from its records that the Complainant was informed on more than one occasion prior to the top-ups being made to the Policy, that the top-ups would be subject to the original **Policy Conditions**. The Provider notes that the Complainant took some weeks to consider her options before proceeding with the top-ups. The Provider says that while she did not have her **Policy Conditions** with her at the meetings with Ms.J., the Complainant did not suggest to Ms. J. that she no longer had a copy available to her when Ms. J. referred to them.

The Provider also notes that the **Policy Information Statements** that issued to the Complainant on **21 December 2017** and on **8 February 2018**, and separately to her Financial Adviser on **25 January 2018**, all confirmed that:

***“Important Information:***

*... The benefits which your policy provides and the terms and conditions that apply are set out in your policy conditions, the policy schedule and any subsequent amendments and endorsements that may apply. A copy of the policy conditions is available on request”.*

The Provider says it was always open to the Complainant (or her Financial Adviser and current Broker) to request a copy of her **Policy Conditions** if she no longer had those that had been provided to her at the time, the Policy was taken out in 1989.

The Provider reiterates that the bid/offer spread is a standard fixed feature of the Policy and was provided for in the **Policy Conditions** issued to the Complainant in **February 1989** and the basis upon which the offer price is determined has never changed over the years. The Provider says that when the Policy was sold to the Complainant in 1989, it would expect her broker at the time, to have explained how the Policy operated.

Although it is more a feature of the Policy, (and a common feature of policies at the time the Policy was taken out) the Provider accepts that the bid/offer spread could be regarded as a charge and it is for this reason that the Provider reflects it as a charge in the annual statements.

Notwithstanding the above, the Provider acknowledges that it would have been helpful if, in January 2018, the Complainant was reminded of the bid/offer spread feature before proceeding with the top-ups, notwithstanding that the Complainant was informed on more than one occasion that the top-ups would be subject to the original **Policy Conditions**.

For this reason, the Provider confirms that the offer of **€2,000.00** (two thousand Euro) previously made to the Complainant in its email to this Office on **31 July 2020** remains open to her, should she wish to accept it. The Provider says the amount offered also takes into account that it took longer than the Provider would have liked for a response to be provided to the Complainant’s Broker in 2019, following its bid/offer spread enquiries.

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In conclusion, the Provider says that the top-ups made by the Complainant in January 2018 were to an existing policy which she had taken out in 1989 with the assistance of her independent broker. The top-ups were made following a number of meetings between the Complainant and a Provider Financial Adviser, who recalls discussing with the Complainant the fact that the top-ups were being made to an existing policy and as a result were subject to the original **Policy Conditions**. The Provider says the bid/offer spread is implicit in the unit price and details relating to how the bid/offer spread is calculated are clearly set out in the **Policy Conditions** and have never changed over the years.

### **The Complaint for Adjudication**

The complaint is that the Provider failed to notify the Complainant that the bid/offer spread of 5% would apply to the two top-ups she made to her Investment Policy in January 2018.

### **Decision**

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

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

A Preliminary Decision was issued to the parties on **13 December 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Recordings of telephone calls have been furnished in evidence and the content has also been considered for the purpose of this investigation.

I note that the Complainant met with a Provider Financial Adviser on **6 December** and **13 December 2017** and again on Monday **15 January 2018**, when she made a **€30,000.00** top-up to her Investment Policy, effective from Wednesday **17 January 2018**, and later again on Monday **29 January 2018**, when she made a further **€50,000.00** top-up to the Policy, effective from Wednesday **31 January 2018**.

The Complainant says she was made aware at that time that the net allocation on the top-up funds was 101.58%, the annual management charge was 0.75% and the exit tax on growth of funds was 20%. She says however that the 5% bid/offer spread was never mentioned by the Provider's Adviser when advising what charges would apply to the top-ups, nor was it referenced in the **Personal Financial Review for Fund Switches and Top-Ups** documents that the Financial Advisor gave her, and which the Complainant signed on **15 January 2018** and **29 January 2018**.

In that regard, the Complainant states in the **Complaint Form** that she is seeking from the Provider:

*"Full refund of the 5% (€4,000) as the charge was not disclosed at all at the time of making the top up. While it may be in original Policy from 1989, it was not made clear at all when I asked for all charges. Bid/offer spread was never mentioned or discussed as isn't mentioned on any documentation for the top ups (€30,000 + €50,000)".*

The Provider says its Financial Adviser drew the Complainant's attention on more than one occasion to the fact that any top-ups paid to the Policy would be subject to the original **Policy Conditions**, which had been previously issued to the Complainant in **February 1989** through her then broker, and which set out how the offer price is calculated. In that regard, the Provider says the bid/offer spread is a standard fixed feature of the Policy.

I note Section 1 - Condition 4, 'Determination of Bid and Offer Prices', at pg. 3 of the applicable **Policy Conditions** states that:

*"... The Offer Price per Unit shall be the Bid Price multiplied by 100/95 and rounded up by not more than 1 in 100 ..."*

The Complainant questions why this 5% bid/offer spread was not included along with the other charges that were brought to her attention at the time she met with the Provider Financial Adviser in **December 2017** and **January 2018**.

I note the Provider has distinguished the bid/offer spread from the charges that were specifically drawn to the Complainant's attention in **January 2018**, in that the Provider points out that the annual management charge rate was not specified in the original **Policy Conditions**, that the allocation rate was a special enhanced rate agreed between the Complainant and the Financial Adviser, and that the government levy was introduced pursuant to the **Finance Act 2009** and thus was not applicable in 1989 when the Complainant incepted her Policy.

In that regard, the Provider says the reason the bid/offer spread was not specifically brought to the Complainant's attention is that it is a standard fixed feature of the Policy and was provided for in the original **Policy Conditions** that issued to the Complainant in **February 1989** and that the basis upon which the offer price is determined, has not changed over the years.

I am of the view that when assessing the suitability for the Complainant to withdraw funds from Policy B and to make top-ups to her Investment Policy, the Financial Adviser ought to have drawn the Complainant's attention to the fact that a 5% bid/offer spread would apply to the top-ups, given that this is a significant feature of the Policy. It is clear from the evidence that she did not do so and indeed that she did not consider it necessary or appropriate to do so.

I am satisfied however, that the Provider had obligations under Chapter 5, 'Knowing the Consumer and Suitability', of the Central Bank of Ireland's **Consumer Protection Code 2012, as amended**, and that in failing to drawing the Complainant's attention to this significant issue, it failed to meet those obligations.

I do not accept that it was adequate for the Provider to simply refer the Complainant to the policy conditions, which had been in place since 1989, 29 years earlier. In my opinion, there can have been no reasonable expectation from the Provider that the Complainant (unlike the Provider's advisor) was familiar with those policy conditions to the degree that she understood that a 5% bid/offer spread would apply to her proposed transaction.

If the Financial Advisor had informed the Complainant that a 5% bid/offer spread would apply to the top-ups, this would have enabled the Complainant to have made a fully informed decision as to whether to proceed with the top-ups, allowing her to weigh the application of this bid/offer spread on top-ups to her Policy, against her stated objective to avail of the 20% exit tax on growth of funds. In my opinion, the Complainant was denied that opportunity.

While the Provider says the bid/offer spread is more a standard fixed feature of the Policy rather than a charge, I note it accepts that the bid/offer spread "*could be regarded as a charge*" and it is for this reason, that it reflects the bid/offer spread as a charge in the annual policy statements.

It is understandable, given that the bid/offer spread appears as a charge in the annual policy statements, that the Complainant would consider the bid/offer spread to be a charge, and more so, one that the Provider's Financial Adviser ought to have made her aware of, when discussing the charges associated with top-ups to her Policy, so that she could assess the suitability of proceeding. I note that in its email to this Office on **31 July 2020**, the Provider submits:

*"... we acknowledge that it may have been helpful if, in January 2018, [the Complainant] had been reminded of the bid/offer spread. For this reason, we would like to offer [the Complainant] a goodwill gesture of €2,000 with a view to resolving her complaint at this time ..."*

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I note that in her email to this Office on **12 August 2020**, the Complainant declined this offer, as follows:

*“... I think that the offer that [the Provider] has made should have been made at an earlier stage. I have been forced to engage the services of my...financial advisor. [My financial adviser] had contacted [the Provider] before I ever considered taking this to the ombudsman but [the Provider] weren't prepared to negotiate at all. I feel this has caused me stress and I have put a lot of time into this. I have decided not to accept the offer ...”*

In that regard, I note that the Provider acknowledges that it would have been “helpful” if, in **January 2018**, the Complainant had been reminded of the bid/offer spread feature before proceeding with the top-ups, even though it says that she had been informed on more than one occasion that the top-ups would be “*subject to the original Policy Conditions*”.

I take the view, however, that when giving a customer advice regarding a potential top-up investment into an existing policy, it is neither sufficient nor appropriate to simply advise the customer that the original policy terms and conditions apply, particularly where a policy feature/charge as significant as a 5% bid/offer spread applies. In that regard, I consider it unreasonable for the Provider to have expected the Complainant to be, or to suggest that she ought to have been, well-versed in the **Policy Conditions** that had been sent some 29 years earlier, to her then broker.

Although the Provider says that the Complainant did not ask for a copy of the policy provisions, this in my opinion did not relieve the Provider of its obligation to draw her attention to a significant aspect of those provisions, given that it is evident that she had made clear that she attached importance to the question of what charges she would incur if she proceeded with the top-up.

I am of the firm opinion that when the Provider's Adviser advised the Complainant in **January 2018** of the different charges that would apply, if she were to make top-ups to her Policy, that the Financial Adviser ought reasonably to have also advised the Complainant that a 5% bid/offer spread would apply to those top-ups, so that she could take that information into account in order to make an informed decision on whether or not to proceed. The Provider's failure to do so, in my opinion, not only ran contrary to its obligations pursuant to this Consumer Protection Code, as amended, but in addition I take the view that its failure to draw the Complainant's attention to this financial impact, was unreasonable, within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**, as amended.

As a result, I consider it appropriate to uphold this complaint.

In my preliminary decision on 13 December 2021, I indicated that it was my intention to direct the Provider to uplift the Complainant's policy value, by the amount of **€4,000.00** (four thousand Euro) in compensation, by way of conclusion of the matter.

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I noted however that the Complainant had made a partial withdrawal of €70,000.00 (€70,025.00 inclusive of part encashment charge) from the Policy on **21 October 2019**, so I advised that if it were the case that the policy had been terminated, I would instead direct that the Provider pay the Complainant this sum of **€4,000.00** by way of compensation, to an account of her choosing. I also noted that it was open to the parties to clarify this aspect of the status of the investment, by way of response to this Preliminary Decision, within the period permitted. No such clarification has however been furnished by either of the parties, and this absence of confirmation is addressed in my directions below.

It is my Decision therefore, on the evidence, that this complaint is upheld.

### Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2) (a)(b)(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 uplifting the Complainant's policy value, by the amount of **€4,000.00** (four thousand Euro), but if the policy has been terminated, I direct the Provider to instead pay the Complainant this sum of **€4,000.00** to an account of her choosing. I also direct the Provider to make an additional payment to the Complainant in the sum of **€1,500.00** (one thousand five hundred Euro) to an account of her choosing, such payment to be made 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**  
Deputy Financial Services and Pensions Ombudsman

10 January 2022

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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.

