

The complaint

Mr D has complained about advice he received from Portal Financial Services LLP ('Portal') in relation to a defined benefit occupational pension scheme ('OPS') that he held with his former employer. Portal processed the transfer of Mr D's OPS benefits on an 'insistent client' basis to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ('UCIS').

What happened

Mr D was introduced to Portal in 2014 after he'd been in contact with another business, from here on referred to as 'Firm C'. At the time, Firm C was an appointed representative ('AR') of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority ('FCA') to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice.

Portal gathered information about Mr D's circumstances and objectives and carried out an assessment of Mr D's attitude to risk, which it deemed to be 'moderately adventurous'. It also completed a Transfer Value Analysis ('TVAS') report. Portal conducted a telephone review with Mr D on 20 February 2015, following which it sent him a letter explaining it wouldn't be able to recommend he transfer his OPS benefits because the critical yield (the growth rate required to match his OPS benefits) was too high at 23.6%. However, Portal said it could still help Mr D if he wanted to go ahead and asked him to return the enclosed 'insistent client form'.

Mr D returned the insistent client form on 3 March 2015. This asked him to confirm that he acknowledged his new pension was unlikely to achieve a growth rate of 23.6% and that he was giving up guaranteed benefits.

Portal sent a suitability report setting out its advice to Mr D. The covering letter was dated 12 March 2015, although the report was dated 17 March 2015. The report said Mr D was 62 years old, employed and earning approximately £35,000 a year. It noted Mr D was married, with non-dependant children and owned his own home, an investment property worth £80,000 and land worth £100,000. Mr D had disposable income of £1,185 per month, savings of around £7,000 and another pension with his current employer – it said he had no liabilities.

Regarding Mr D's OPS, the report recorded it had a cash equivalent transfer value ('CETV') of £35,224.55 and a scheme retirement age of 65. According to the suitability report, at 65 the scheme would pay a pension of £2,056 per year without taking any tax-free cash ('TFC'). But the pension would be £1,321 if TFC of £8,806 was taken.

The report stated Mr D's stated objective was to release cash from his pension to help his daughter purchase a property. Portal noted that it explored with Mr D other ways to generate the money required to meet his objective, but said that Mr D didn't have any other assets he could use and didn't want to take out any borrowing.

It then said:

“Due to the guaranteed benefits that you will be relinquishing with [Mr D’s OPS], it is against my recommendation to transfer your benefits... You have decided that you still wish to proceed with the Pension Release. On this basis, although we can help you release money from your pension, we are treating you as an insistent client.

You are aware that by taking this amount now, you will not have a guaranteed pension benefit, which you do currently have through your defined benefit (otherwise known as final salary) pension scheme. You stated that you are aware of the benefits that you are giving up, and that you wish to proceed on this basis, even though I have advised that it is extremely unlikely that we will be able to match the required annual return (the critical yield of 23.60%).”

Portal went on to explain this again in a section entitled ‘Our recommendations’, saying:

“You have decided that you still wish to proceed with Pension Release despite us advising you not to. We will assist you with this, and have treated you as an ‘Insistent Client’.

Having considered all of the information available to us including the charging structures of the transfers, available underlying fund choice, your personal circumstances and other factors, I have come to the following conclusions:

My recommendation is that:

- *You transfer your [OPS benefits] to a [SIPP].*

The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider.”

By following this recommendation you will:

- *Meet your stated objectives and release tax free cash to help your daughter purchase a property.*
- *Be able to take up to 25% of your pension as a Tax Free Cash Lump Sum to meet your needs; you have elected to take £8,806.”*

Portal said that it wasn’t providing advice regarding the investments within the SIPP as this was to be done by Firm C.

The transfer went ahead in April 2015 and £36,924.67 was transferred to the SIPP cash account. Mr D took £9,186.51 as TFC and in May 2015 Firm C invested £13,000 in UCIS as follows:

- Brisa Investments – £2,100
- Biomass Investments – £2,100
- Lakeview UK Invest – £2,100
- Motion Picture Global – £2,300
- Strategic Residential – £2,300
- Real Estate Invest – £2,100

A small amount was left as cash and the remainder, around £11,600 was allocated to regulated investment funds.

In 2019 Mr D complained, via a representative, to Portal about the advice he received to transfer. Mr D said Portal should also be liable for the investment advice because investing in UCIS was unsuitable for him.

Mr D also submitted a claim to the FSCS about Firm S regarding the UCIS investments made using his SIPP funds. But Mr D told us the FSCS rejected his claim.

Portal considered Mr D's complaint and concluded that it had provided suitable advice. It said it had only given advice in respect of the transfer of Mr D's OPS benefits and it had advised Mr D against this. However, it said it assisted Mr D by processing the transfer on an insistent client basis, and Mr D understood the guarantees he'd be giving up. Portal said it hadn't provided specific investment advice as this had been provided by Firm C – it said there were no regulations that prevented one firm from advising on the pension transfer and another firm giving investment advice. As Firm C was regulated by the FCA, Portal said it was entitled to rely on it to provide the investment advice.

Mr D referred his complaint to our service. An investigator considered the matter and concluded that Mr D's complaint should be upheld. She didn't think Portal's advice was suitable. In summary, she didn't think Portal had explored Mr D's objectives fully – it didn't know how much Mr D required to help with his daughter's house purchase and it didn't properly explore alternatives, such as whether Mr D could've released cash from his other pension. The investigator also didn't think that Portal could restrict the advice it gave Mr D to just the pension transfer – she thought it needed to consider the suitability of the investments Firm C was intending for Mr D, and she thought that investing over 50% of his remaining funds in UCIS wasn't suitable. Overall, she didn't think Mr D was able to make an informed choice to proceed as an insistent client, based on the advice Portal gave him.

The investigator also didn't think Portal's 'insistent client' process was fair as it directed Mr D down this route before it had even provided its advice. The investigator recommended that Mr D should be put back into the position he would've been in but for the unsuitable advice and that Portal should pay him £300 for the distress and inconvenience caused. The investigator thought Portal was responsible for the whole of Mr D's loss, despite Firm C's involvement, as she didn't think Mr D would've opted to transfer his OPS benefits if suitable advice had been given.

Portal disagreed. In summary, it said:

- It advised against the transfer of Mr D's OPS benefits and made it very clear to him what benefits he'd be giving up.
- Alternatives to releasing cash from his OPS were discussed and discounted by Mr D – he was insistent on proceeding as he had significant retirement provisions elsewhere.
- It disclosed all of the risks of proceeding clearly and Mr D was in a fully informed position to make his decision.
- It should not be held responsible for the actions of Firm C, which was regulated by the FCA and was obligated to provide suitable advice.
- It carried out extensive due diligence on Firm C before partnering with it and it had a good understanding of the likely investment strategy Firm C would recommend for Mr D.
- The investigator had applied the FCA's guidance from 2013 erroneously as it only covered instances where the other firm was unregulated. As Firm C was regulated, Mr D has recourse to the FSCS.

As no agreement could be reached the case was passed to an ombudsman for a final

decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I'm upholding it for largely the same reasons as the investigator. I'll explain why.

The regulator's position

Portal facilitated the transfer of Mr D's OPS benefits to a SIPP but says it didn't provide any recommendation about the investments held within the SIPP as Firm C was providing this. Although the intention was for another regulated firm to advise on and arrange Mr D's underlying SIPP investments, I don't think that meant Portal's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. When advising upon a transfer out of an OPS into a personal pension or a SIPP, a financial business needs to also consider the underlying investment to be used – so the suitability of the overall transaction. Chapter 9 of the regulator's Conduct of Business Sourcebook ('COBS') deals with the requirements on a business making a personal recommendation in relation to a "designated investment".

On 18 January 2013 the regulator at the time issued an alert about advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP. This alert was issued because it had come to the regulator's notice that some firms were adopting advice models which didn't comply with the existing obligations and so there was a potential for consumer detriment.

The regulator made its position clear in the alert, where it said:

"Financial advisers (...) are under the mistaken impression (...) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The [FCA's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (...)

If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements..."

In the scenario set out in the alert, the other firm involved was unregulated. In Mr D's case, Firm C was authorised to conduct investment business under its AR agreement with Firm S. But this didn't absolve Portal from its duty to assess the suitability of the investments, even if it said to Mr D that it wasn't providing any advice on the underlying investments as Firm C was doing that. In my view, the update makes it clear that it wasn't open to Portal to separate out the two elements; its advice on the suitability of the transfer had to include the suitability of the underlying investments too.

A further alert from the regulator in April 2014 stated:

“Where a financial adviser recommends a SIPP knowing that the customer will (...) transfer (...) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (...), then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (...) at all as it will not be able to assess suitability of the transaction as a whole.”

Under COBS 2.1.2 Portal also couldn't seek to exclude or restrict its duty or liability to Mr D under the regulatory system. So, saying it wasn't advising on the investments didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mr D's funds would be invested.

COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr D. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr D to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction. COBS 9.2.2R included the following wording:

“(...) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.”

So as part of the fact-finding process Portal had to understand Mr D's objectives and assess the related risks. It wasn't free to ignore how Mr D's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr D would invest in within the wrapper, doesn't in my mind seem reasonably possible.

In addition, COBS 2.1.1R required a business to *“act honestly, fairly and professionally in accordance with the best interests of its client”*. And in order to ensure this was the case, and in line with the requirements COBS 9.2.2R, Portal needed to gather the necessary information for it to be confident that its advice met Mr D's objectives. It also needed to ensure that Mr D had the necessary experience and knowledge to understand the risks he was taking. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a 'fact find' process.

Once the fact finding was complete, COBS 9.4.7R required a business to 'explain why the firm has concluded that the recommended transaction is suitable for the client' – in other words, it needed to provide its client with a suitability report outlining its advice and the reasons for it.

Of additional relevance to this case is the 'insistent client' categorisation attributed to Mr D by Portal. Whilst there now exists specific guidance on this issue, there was no rule within COBS at the time relating to this - although COBS 10.3.3 referred to non-advised sales in situations where a business had told a client that a product or service it had asked them to undertake was inappropriate for them. And that, having regard to the circumstances, if a business deemed it to be inappropriate, it had the choice not to facilitate that service. Also, to accommodate 'insistent client' type situations in the case of opt-outs and transfers from defined benefit pension schemes, COBS 5.3.25R existed in an earlier iteration of the

handbook which required a business to 'make and retain a clear record' of its advice not to proceed and its client's instructions to nevertheless go ahead. It needed to then issue a further 'confirmation and explanation, in writing...that the firm's advice is that the (client) should not proceed'. It was also considered good practice for the business to obtain instructions to proceed in the client's own hand - this would constitute more compelling evidence of their insistence to go ahead.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

- 1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme;*
- 2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
- 3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*
- 4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading 'Suitability', COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

Portal completely omitted any analysis of the investments Firm C proposed for Mr D and the suitability of them for him – despite its duty to consider the investments when advising on the transfer into the personal pension. This was the case even if Mr D was an insistent client for the purposes of the transfer. The advice first had to consider whether the intended investments were suitable for Mr D.

I accept that as a result of its appointed representative agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portal's duty to do the same. As Mr D's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Mr D's best interests. And as I've said above, this had to include an awareness of where Mr D's funds would be invested.

I recognise that the FCA allows for two advisers to work together to provide suitable advice to their mutual client. However, the alerts make it clear that a firm that is asked to advise on a pension transfer needs to be aware of the intended investments before it advises on the transfer, in order to provide suitable advice. Portal should've requested this information from Firm C before providing advice. I haven't seen anything to suggest that Portal, at any point, checked to see how Firm C broadly proposed to invest Mr D's funds. I believe it should have given the unavoidable connection this had to the transfer it was proposing. And, as confirmed in the 2014 alert, if Portal didn't fully understand the underlying investment proposition intended to be held within a SIPP, then it should not have offered advice on the pension transfer at all. So, in the absence of Portal knowing the investment strategy Firm C intended for Mr D, it couldn't provide him with suitable advice to either remain in or transfer his OPS.

Portal says it had a broad understanding of the investment strategy Firm C would apply for client's like Mr D, and Firm C had assured it that it didn't place client's funds in UCIS. But I think Portal needed to do more to satisfy itself that its recommendation was based on the expected investment proposition that Firm C intended for Mr D. It needed at the very least, to ask Firm C for an outline of that proposition. It appears that Portal failed to do that and as a result, a significant part of Mr D's pension fund was invested in high risk, illiquid funds. I would expect Firm C to have given a clear and honest outline of Mr D's investment proposition when asked to do so by Portal. On receipt of that, I would further expect Portal to have told Mr D that it couldn't recommend the transfer and that the investments were unsuitable.

There is a possibility that Firm C may not have been entirely forthcoming to Portal about its plans to spread a significant portion of Mr D's portfolio over unregulated investments. Had Portal requested this information and it had been advised that Firm C intended to invest Mr D in these unsuitable funds, then it could've questioned this. And in the event that Portal had been misled by Firm C as to the proposed investments, then it's likely Mr D would've realised that the investments Firm C went on to arrange differed to those Portal had based its suitability assessment on. And Mr D could've taken action accordingly.

Portal has said that it carried out extensive due diligence on Firm C, including background checks on the company directors, accounts and information about previous complaints. But it hasn't provided us with evidence of the due diligence it carried out on Firm C in connection with this complaint. And even if Portal did carry out general due diligence checks on Firm C, I don't think that negated the need to check the specific investments Firm C envisaged for Mr D. I also haven't seen any evidence that further checks were made by Portal to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was a necessary part of the suitability assessment carried out by Portal for individual clients. I think it was also a reasonable due diligence requirement brought about by the ongoing relationship it had with Firm C. This would've highlighted any patterns of unsuitable or unaligned advice, which could be identified and addressed.

In any event, although Portal doesn't agree, I'm satisfied that (as was clearly set out in the regulator's alerts in both 2013 and 2014) Portal couldn't restrict its advice merely to the transfer; it had to consider the proposed investments for Mr D, which it didn't do.

Notwithstanding what I've said above, I don't think the complaint turns solely on where Mr D's funds were invested.

Was the advice given suitable?

Portal maintains its advice was suitable, as it advised Mr D against transferring out of his OPS and it gave him sufficient warnings about the consequences of going against the advice. But having considered everything carefully, I don't agree.

Portal concluded that Mr D had a moderately adventurous attitude to risk and it believed he had *"suitable level of capacity for loss for the recommendation we have made for you"*. But it's unclear as to which recommendation is being referenced here – the one not to transfer, or the one to transfer as an insistent client. As it is followed by the recommendation to transfer his OPS benefits, I have assumed that it's the latter.

In any event, I don't think the assessment of Mr D's attitude to risk was correct. This is because I'm not persuaded Mr D had the necessary knowledge or experience to be able to understand the risks involved in investing in line with that attitude to risk. According to Portal's fact-find, Mr D didn't have any regular investments other than a small sum in an ISA. And in the attitude to risk assessment, Mr D said he had little experience investing in stocks and shares. I appreciate that Mr D agreed with some other statements that would suggest he had a higher attitude to risk, but that was for the adviser to determine based on all the facts and Mr D's circumstances. It wasn't reasonable for Portal to simply rely on statements made by Mr D when the evidence demonstrated otherwise.

I'm also mindful that since raising his complaint, we have been provided evidence showing that Mr D already had a SIPP which had been established in 2013. The evidence shows that of the £25,000 held in the SIPP, £23,400 was invested in UCIS. Whilst this would suggest Mr D had some experience of high-risk alternative investments at the time he met with Portal, Portal didn't establish this. And if it had, it may well have considered that Mr D was not in the position to take a higher risk with his OPS funds given he'd already invested in UCIS. And despite Mr D having these investments, I still haven't seen evidence to persuade me that had the necessary knowledge or experience to understand the risks involved with them.

I'm also not persuaded that Mr D had significant capacity for loss such that he could afford to take that level of risk with his pension, so close to his retirement age. Portal says that Mr D had other substantial retirement provisions, but I don't think that this is supported by the information it gathered at the time. Mr D had some land and an investment property, but these assets were not readily realisable and would depend on Mr D being able to find a buyer to release any cash from them. And while it appears Mr D had another pension, Portal didn't gather any information about this, for example, what type of pension this was, how much it was worth and what income it could provide. Portal also didn't determine how much income Mr D required in retirement, so it couldn't take a view on whether or not Mr D was reliant on the income his OPS provided at age 65. With all of this in mind, I don't think Portal could reasonably conclude Mr D had sufficient capacity for loss, such that he could afford to take a moderately adventurous risk with his OPS funds.

Portal correctly concluded that the critical yields of 23.6% (full pension) and 15.6% (if Mr D took TFC and a reduced pension) were not achievable at age 65. So, its incorrect assessment of Mr D's attitude to risk hasn't necessarily affected this aspect of the recommendation, as these growth rates were unachievable even if investing in higher risk assets. But, as I will go on to explain later in this decision, it has likely had consequences for Mr D in respect of the investments made by Firm C, which I think Portal ought to have advised Mr D on.

Although Portal advised Mr D not to transfer his OPS benefits because of the high critical yields, I don't think it provided full and clear advice to Mr D, such that it left him in a position to make an informed decision. Mr D's only objective was to help his daughter purchase a

property. So, Portal needed to explore the ways Mr D could achieve this – releasing money from his OPS was only one way to meet this objective.

Portal says that it did explore alternative means of meeting the objective and says this was fully explained in the suitability report. I've considered what it has said there, but I'm not persuaded that Portal explored the alternatives in any meaningful way. For example, Portal said that Mr D didn't wish to remortgage due to the early redemption penalties – but according to Portal's fact-fine, Mr D didn't have a mortgage, so this appears to be a generic reason rather than being specific to him. More importantly, Portal didn't actually establish how much Mr D needed or intended to contribute to his daughter's house purchase. I don't see how Portal could actually give Mr D suitable advice in respect of his objective without knowing this basic fact. And given its importance, this fails the fundamental test within COBS 9 of Portal knowing its client.

Mr D was only able to release around £9,000 from his pension after it had been transferred. The suitability report noted that Mr D didn't want to use his existing savings to raise the cash he needed and it also said Mr D wanted to use the TFC to supplement his disposable income. So, it seems to me that Mr D didn't actually intend to give the full sum released from his pension to his daughter. With this in mind, I think Portal ought to have explored Mr D taking a loan instead. Given the sum needed appears to have been relatively low and interest rates were also low at the time, this was likely to be affordable for Mr D given he had over £1,000 in disposable income each month. So, I think this is something which could, and should, have been explored in more than one very brief and dismissive sentence.

The suitability report also noted that Mr D didn't want to use his existing assets to meet this objective. Mr D had savings of around £7,000 – it isn't clear why he didn't want to use these funds, particularly when he had significant disposable income and would have been able to rebuild those funds quite quickly.

Mr D also had another pension. It isn't clear if this pension was the SIPP that Mr D established in 2013. But the value of this was lower than Mr D's OPS benefits so I think it is unlikely this was the pension that Mr D described as his "significant retirement provisions". If Mr D's other pension was a defined-contribution scheme, rather than an OPS, Mr D may have been able to access his TFC without taking his pension income. Or if not, he could have explored transferring this pension to a SIPP, rather than losing the guarantees associated with his OPS by transferring this pension. By failing to enquire about this pension to determine whether or not it could be accessed to meet Mr D's needs, I don't think Portal acted in his best interests – and so failed the requirement of COBS 2.1.1.

I appreciate Mr D may have dismissed these alternative options from the outset, but in giving suitable advice to Mr D I think Portal had to provide him with an alternative means of meeting his objective so he was in an informed position. I don't think the alternatives were explored in any detail. And without fully considering the alternatives and presenting them to Mr D in a balanced way, all he had was advice not to transfer his OPS benefits to meet this need. And in the absence of any alternative solution proposed, such as the cost of a loan to provide the sum required to his daughter, Mr D likely believed this was the only realistic option. On balance, if Mr D had been presented with alternative options and clear advice on what Portal considered to be a suitable way of meeting his objective, I think he would've likely followed this and left his OPS intact.

Lastly, despite the repeated statements Portal made in the suitability report advising Mr D not to transfer his OPS benefits, I think this was significantly undermined by the recommendation it gave Mr D to transfer his benefits to a SIPP. By doing this I think it effectively advised Mr D to transfer his OPS benefits. Portal explained how this met his objectives, but it also went further than this, saying:

“The reason I have recommended a pension transfer is due to the possibility that the benefits available at retirement with your recommended new pension will exceed the benefits that would have been available through your existing provider.”

In giving the advice not to transfer out, Portal had concluded the opposite given the high critical yields. So, this statement was extremely misleading and I think it would've left Mr D believing that Portal ultimately approved of his intended course of action.

I appreciate Portal says it was reasonable for it to make a recommendation as to where Mr D should transfer his funds to (the SIPP) following his confirmation that he wished to proceed as an insistent client. But as I've said above, I don't think Portal can make a distinction under the rules as to which part of advice it is recommending Mr D proceed with.

In giving suitable advice, I think Portal needed to consider the whole of the transaction, that is the transfer from the OPS and the intended investments. Instead, Portal appears to have applied a two-step approach, sending Mr D a brief letter advising him not to transfer out of the OPS without considering where Mr D would invest his funds. Only after securing Mr D's confirmation that he wanted to proceed as an insistent client did Portal provide a suitability report providing a recommendation on the transaction as a whole. However, Portal failed to establish what investments Firm C intended for Mr D, and instead simply recommended he invest in a cash deposit fund. But I think Portal needed to make it clear that it was advising him against proceeding with the transaction as a whole. By providing Mr D with a recommendation to transfer his benefits to a SIPP, I think Mr D could've believed that overall, Portal was recommending he go ahead with the transfer.

For completeness, I should say that the investments Firm C placed Mr D's funds in were not suitable for him. And in providing suitable advice, Portal needed to understand the investments envisaged for Mr D and determine whether these were suitable for him. As I've said above, I don't think Mr D had a moderately adventurous attitude to risk. I think at most it was likely to be a medium or balanced investor in relation to these funds – although without having a full picture of Mr D's other pension, it's possible it could've been lower. In light of this, I don't think UCIS was suitable for Mr D at all, let alone in the proportion invested. And there's nothing to indicate Mr D had the requisite knowledge or experience to accept or understand the risks associated with these types of investments. I appreciate that it has since transpired that Mr D already had a small SIPP which had already invested in UCIS, but if Portal had known this, I think this would've further evidenced that it was not suitable for Mr D to invest any more of his pension funds in UCIS.

So, when giving its recommendation Portal needed to consider the proposed transfer and the UCIS investments that Firm C intended for him. And I think it needed to make it clear to Mr D that it could not recommend he proceed with any aspect of the transaction as it was not in his best interests.

Overall, I don't think the suitability report was sufficient as a recommendation not to proceed. This is because it didn't fully explore Mr D's objective and the alternative means of meeting it, without releasing money from his OPS. I also think Portal muddled the waters by recommending he transfer his benefits to a SIPP, and it failed to consider where Firm C would invest Mr D's funds, meaning he wasn't put in an informed position to make his decision. So, I don't think the advice was compliant with the requirements of COBS.

Insistent client

Portal says that it applied a robust insistent client process and went above what was expected of it at the time. But notwithstanding the points I've already made above, I have serious concerns about the insistent client process Portal employed here.

Mr D discussed his desire to access his pension when he spoke with Portal in February 2015. Portal then sent him a brief letter, which said:

*"You currently have a pension with [former employer] which has a transfer value of £35,224, from which you could release a total amount of £8,806 as a tax free lump sum. However, as the critical yield (growth rate required to match your guaranteed benefits) with this provider is 23.60% it would be **against our recommendation** to do this. Furthermore, you will be waiving your entitlement to a guaranteed pension £2,056 per annum which is payable at retirement age 65.*

If you still wish to go-ahead with pension release, we can still help you with this. As this is against our recommendation, we now need you to complete and return the 'insistent client form' confirming you are aware of the benefits you would be giving up.

I enclose a form with the various options available to you. Please can you complete and return both forms to us in the pre-paid envelope as soon as possible. Once we have this, I will arrange to send out all the relevant application forms and suitability report detailing our advice."

So, before Portal had even provided a formal suitability report, it paved the way for Mr D to proceed on an insistent client basis. The letter included the insistent client form. It's not in dispute that Mr D signed the insistent client form. But it was pre-completed, thereby removing the opportunity for Mr D to express in his own words why he wished to ignore professional advice and proceed with an unsuitable transfer.

I appreciate that it was not a regulatory requirement at the time the advice was given for Mr D to provide a letter in his own words explaining why he wished to proceed against Portal's advice. But regardless of this, Portal was required to ensure that it treated Mr D fairly and that it acted in his best interests. And I'm not persuaded that it did treat Mr D fairly when it went to such lengths to assist Mr D to identify as an 'insistent client'. To my mind, the process wasn't geared towards Mr D making a considered assessment of the reasons why he shouldn't be transferring – I think that would have involved Portal providing the full recommendation to Mr D, allowing him to consider this on his own and then revert to Portal if he still wished to proceed. On the contrary, I would go as far as to say that Portal's process was designed to facilitate the transfer. I don't think that providing Mr D with a means of proceeding against the advice, without establishing why he wanted to go against it and why he didn't want to explore alternatives demonstrates that Portal had his best interests in mind.

Furthermore, this declaration was also provided to Mr D before he received Portal's full suitability report, so he didn't have all of the information he needed to make an informed decision – all that was highlighted was the critical yield being unachievable, and the pension Mr D would be giving up. Only after receiving Mr D's confirmation that he wished to proceed did Portal send Mr D the formal suitability report. And while he received a recommendation not to transfer out of the OPS, this was followed by the recommendation to transfer out of the OPS to a SIPP in the same report. As I've said above, this seriously undermined the recommendation *not* to transfer out.

Overall, I think this shows that Portal made it altogether far too easy for Mr D to agree that he was an 'insistent client' rather than allowing him time to think about the advice not to go ahead with the transfer. Nevertheless, I've considered whether Mr D would've acted differently if Portal had employed a fair and transparent process.

Would Mr D have acted differently?

It is not in dispute that Mr D wanted some cash to help his daughter purchase a property. What is in dispute is whether Portal did enough to make Mr D aware of the other options open to him to do so, and whether, if made properly aware of the value of the benefits he was relinquishing and other available options, he would have acted differently.

My view is that he would. I think a balanced presentation of how Mr D could meet his objective of giving some cash to his daughter, without giving up the guaranteed income his OPS would provide would have persuaded Mr D to not proceed with the transfer. I say this because although Portal didn't establish how much Mr D required, it could not have been more than around £9,000, which is what Mr D was able to take as TFC as a result of transferring out of his OPS. Mr D already had £7,000 in savings, and if he didn't want to use these he could've taken a small loan which I think would've been affordable for him. Had Portal explained that it recommended he raise the funds he required this way, rather than transfer his OPS, and that this was what was in his best interest, I think he would've accepted this advice.

Portal may say the recommendation was for Mr D not to proceed with the transfer – which I consider to have been the suitable course of action. But my overall view of the suitability report is that it lacked balance and rigour – for all the reasons set out above. Had Portal conveyed a more balanced assessment, and not directed Mr D towards the 'insistent client' route, I think he would have acted differently and retained his deferred benefits.

Having very carefully considered this matter, overall, I don't think Mr D fully understood the risks and long-term implications involved in transferring his deferred pension benefits and investing as he did. As this is the case, I don't think he was in a position to make an informed decision about whether insisting on going ahead with the transfer was a suitable course of action. As such, my decision is that Mr D's complaint should be upheld.

Is Portal responsible for all of Mr D's loss?

In my view, the fact that Portal didn't take sufficient steps to consider the investment proposal for Mr D when it proposed that he transfer his OPS, meant that it couldn't reasonably conclude the course of action it recommended as a solution to Mr D's needs was being made on a sound basis. And as a result of these shortcomings, I don't think Mr D fully understood the risks and long-term implications involved in transferring his OPS benefits. As this is the case, I don't think he was in a position to make an informed decision about whether insisting on going ahead with the transfer was a suitable course of action.

With a full and balanced assessment of his options and the ramifications of relinquishing guaranteed benefits, I don't think Mr D would have transferred his OPS benefits to release his TFC in the first place. And as a result of transferring, Firm C was in effect given the freedom and opportunity to do as it wished with how Mr D's SIPP was invested.

I think it was clear from the outset that Mr D was seeking to rely on the advice he reasonably expected to obtain from Portal. And I think Portal's failings in appropriately assessing the overall suitability of the transaction it was recommending played a pivotal role in Mr D's decision to transfer, and to be dealt with as an insistent client. Overall, I consider that the losses suffered by Mr D are as a result of Portal's inappropriate advice and failings in its insistent client process. And had it not been for these, I don't believe Mr D would have gone ahead with the transfer.

I've considered whether I should apportion only part of the responsibility for compensating the loss to Portal. In the circumstances, though, I think holding Portal fully responsible for the whole of the loss represents fair compensation. I don't accept that anything Firm C did was an intervening act which absolves Portal of its responsibility for Mr D's losses.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension transfer advice and investment. Portal advised Mr D not to transfer but as I've said above, I think it actually strayed into advising him to transfer out, the insistent client process it followed was flawed and it didn't provide Mr D with enough information to make an informed decision.

Portal set up the SIPP and arranged for Mr D's existing pension benefits to be transferred over. I acknowledge that Firm C advised Mr D to invest a significant share of his SIPP funds in unsuitable funds. But I think it is fair to hold Portal fully responsible for Mr D's loss. Ultimately Portal recommended Mr D should transfer his OPS to the SIPP, without ensuring the subsequent investments he would go on to make, through Firm C were suitable for him. So, in my view, the entirety of Mr D's loss stems from Portal's unsuitable advice and flawed insistent client process. Portal's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mr D on the investments. It was only as a result of Portal's involvement that Mr D transferred his OPS to the SIPP. Portal's role was pivotal, since the eventual investments were fully reliant on the funds being switched over first; if that hadn't happened, he couldn't have invested as he did.

In terms of the FSCS, I am aware that, as a fund of last resort, the FSCS won't pay out on claims where it is aware that another firm was involved in the transaction, and it considers that firm might also be responsible for a consumer's losses. In Mr D's case, he's told us that the FSCS turned his claim down. So this means holding Portal responsible for only part of the loss could risk leaving Mr D out of pocket. But I think it's important to point out that I'm not saying Portal is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portal gave unsuitable advice and it is responsible for the losses Mr D suffered in transferring his OPS to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. So, overall, I think holding Portal fully responsible for the whole of the loss represents fair compensation in this case.

Putting things right

A fair and reasonable outcome would be for the business to put Mr D, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Portal must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr D's acceptance of the decision.

Portal may wish to contact the Department for Work and Pensions (DWP) to obtain Mr D's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which

will take into account the impact of leaving the occupational scheme on Mr D's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr D as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr D within 90 days of the date Portal receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr D.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

In addition, Portal should pay Mr D £300 for the disruption to his retirement planning.

My aim is to return Mr D to the position he would have been in but for the actions of Portal. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portal is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr D to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr D to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I require Portal Financial Services LLP to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require Portal Financial Services LLP to pay Mr D any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Portal Financial Services LLP to pay Mr D any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Portal Financial Services LLP pays Mr D the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr D.

If Mr D accepts my final decision, the money award is binding on Portal Financial Services LLP. My recommendation is not binding on Portal Financial Services LLP. Further, it's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 10 June 2022.

Hannah Wise
Ombudsman