DRN-3432147

The complaint

Mrs G has complained, with the help of a professional third party, about the transfer of her personal pension, previously held with Aviva Life & Pensions UK Limited ('Aviva') to an occupational pension scheme ('OPS') in August 2013. The investments made through the OPS now appear to have little value and Mrs G says she has lost out financially as a result.

Mrs G says Aviva failed in its responsibilities when dealing with the transfer request. She says that it should have done more to warn her of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance she says was required of transferring schemes at the time. Mrs G says she wouldn't have transferred, and therefore wouldn't have put her pension savings at risk, if Aviva had acted as it should have done.

What happened

On 25 April 2013, Aviva wrote to a business called Carrington Alexander Portfolio Review ('CAPR') acknowledging receipt of a letter of authority signed by Mrs G. The letter said it enclosed details of her pension as requested. This confirmed she held a personal pension with Aviva, with a value at the time of approximately £9,600 and a scheduled retirement date in October 2026. CAPR was not authorised or regulated by the Financial Conduct Authority ('FCA') or its predecessor the Financial Services Authority ('FSA').

Aviva also wrote to Mrs G on the same day, thanking her for her recent request and enclosing the forms she'd need to transfer her pension to another provider.

On 14 August 2013 a business called Craighead Administration Ltd ('CAL') wrote to Aviva. CAL was also not regulated by the FCA or FSA. It said it was the scheme administrator of the Bothbridge Pension Trust, an OPS, and that Mrs G had applied and been accepted as a member by the scheme's trustees, Cathcart Management (Services) Ltd. The letter said Mrs G was not an employee of the sponsoring employer but had been accepted. CAL said it enclosed transfer documents along with a member booklet for the OPS.

The OPS member booklet confirmed CAL was the scheme administrator. It included a warning on the front cover about operators offering to 'liberate' pension funds and said the OPS existed *"solely for the purpose of providing members with pension benefits at their chosen retirement date (age 55 and beyond)"*. Under a section titled "Why join the Bothbridge Pension Trust?" the booklet said, amongst other things, some of the advantages of membership were access to investment opportunities not available from mainstream pension providers and access to investments not ordinarily available to the general public.

Also enclosed with CAL's letter was a registration certificate from HMRC. This confirmed that the OPS had been registered on 12 April 2013.

On 28 August 2013, Aviva wrote to both CAL and Mrs G saying it had transferred funds representing the whole of her pension benefits to the OPS. The amount transferred was £9,914.11. The letter to CAL said that the effective date of this payment was 15 August 2013 – the day after the transfer request had been received.

Mrs G complained to Aviva in 2020. Her representative said the investments had failed and she'd lost her pension funds. They said Aviva hadn't followed the proper procedure in relation to the request to transfer and didn't warn Mrs G of the risks involved or provide the 'Scorpion' warnings to her. They said Aviva hadn't undertaken any specific checks as to whether the transfer was suitable and failed to provide Mrs G with advice.

Aviva didn't uphold the complaint. It said it wasn't responsible for the investments made. It also said, while it couldn't specifically evidence doing so, its process at the time was to provide the Scorpion warning insert to customers. And they thought it likely was provided. And it said it had agreed to the transfer based on Mrs G's instructions to proceed.

In March 2022 the Pensions Regulator ('TPR') appointed Dalriada Trustees Limited ('Dalriada') as independent trustees of the Bothbridge Pension Trust. An announcement from Dalriada about this indicated it was appointed due to concerns the scheme was not being run properly and members' benefits were potentially at risk. Dalriada said it was gathering information to determine the options available and how it could support members.

I issued a provisional decision in September 2024 explaining that I intended to uphold Mrs G's complaint. Below are extracts from my provisional findings explaining why, which form part of my final decision.

<u>The relevant rules and guidance</u>

Personal pension providers are regulated by the FCA and prior to that by the FSA. As such Aviva was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

- *Principle 2 – A firm must conduct its business with due skill, care and diligence;*
- *Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;*
- *Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and*
- *COBS 2.1.1R (the client's best interests' rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.*

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and they may also have a right to transfer under the terms of the contract). This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

The Scorpion guidance was launched by TPR. It was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the SFO, and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials. The guidance comprised the following:

- *An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies a number of warning signs to look out for.*

- *A longer leaflet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.*

- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "look out for" various warning signs of liberation. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.*

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

The FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn't necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights.

That said, the launch of the Scorpion guidance was an important moment in so far it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

<u>What did personal pension providers need to do?</u>

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think *they should have paid heed to the information it contained. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:*

1. *As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.*

2. *When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for themselves the liberation threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.*

3. *I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process didn't involve the sending of transfer packs.*

4. *The Scorpion guidance asked firms to look out for the tell-tale signs of pension liberation scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The action pack points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.*

5. *The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.*

<u>*The circumstances surrounding the transfer – what does the evidence suggest happened?*</u>

Mrs G says she was contacted unsolicited by phone to discuss her pension. She says she was told her pensions were losing money but by transferring and investing she could make money for her retirement. Mrs G can't recall which business the person she spoke to was working for, as there were a number of different businesses involved, but says that she looked the business that had called up online and they seemed legitimate. Mrs G said she was persuaded to go ahead by the promise of good investment returns and her pension making money. So, she agreed to the recommendation to transfer from the business she spoke to and to pay that business a fee. Mrs G, who was 46 at the time, hasn't suggested *she was offered immediate access to her pension funds.*

Mrs G's recollections appear to be plausible. I haven't seen anything to suggest she received money from her pension following the transfer (before she turned 55). And I haven't seen anything to suggest that she was considering moving her pension or had requested any information from Aviva in relation to this before CAPR did so on her behalf. So, I think it is likely she was contacted unsolicited as she says.

Both CAPR and CAL wrote to Aviva on Mrs G's behalf during the transfer process. CAPR was the first to do so, requesting information and transfer forms. With CAL later sending the completed forms. On balance I think it was likely CAPR that was the party that contacted Mrs G – although I'd note that ultimately neither CAPR or CAL were regulated by the FSA / FCA.

Mrs G doesn't appear to have had any prior connection with the Bothbridge Pension Trust or the sponsoring employer, Bothbridge Ltd. Indeed, the information sent to Aviva as part of the transfer application confirmed she was not employed by Bothbridge Ltd. I've also not seen anything to suggest Mrs G had any more than a very limited experience of pensions and investments. So, in the circumstances I think it is unlikely she'd have sought to transfer her benefits to the Bothbridge Pension Trust – an OPS she had no connection with – on her own. And I think it's likely that she only did so based on the input of CAPR.

And based on what Mrs G has said about what CAPR said – that her Aviva pension was "losing money" and that by transferring she'd make significantly more money for her retirement – I think it is likely CAPR recommended the transfer. What it told Mrs G seems to have represented comparing the prospective benefits of the two schemes and suggesting the new scheme was more beneficial – which I think represented advice to transfer. And again, as she had no connection to the new scheme and wasn't already looking to transfer, I think this advice was the catalyst for the transfer.

I don't have a great deal of information about how Mrs G's pension was invested once it was transferred to the Bothbridge Pension Trust. But we do know her pension funds were transferred there. And as I've mentioned, TPR appointed Dalriada as independent trustees of the Bothbridge Pension Trust. And its announcements have indicated that it understood the majority of investments were made in unregulated, high risk trading and the company that primarily had been responsible for these trades had entered liquidation. So, at the time of its last update, Dalriada was unable to indicate what value still remained for pension scheme members. And so, I think Mrs G is likely correct that she has suffered losses in respect of her pension.

<u>What did Aviva do and was it enough?</u>

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

Mrs G says she wasn't sent the Scorpion insert by Aviva, and remarked that having now seen it she thinks she would've remembered it being sent previously, due to the striking imagery used on the cover.

Aviva says that it was its standard practice to send the Scorpion insert to customers and it believes it likely did so here.

The only correspondence that I've seen that Aviva had with Mrs G was its letter of 25 April 2013, enclosing transfer forms, and its letter of 28 August 2013, confirming the transfer had gone through. It is unlikely that the Scorpion insert was sent with the latter, given it would've been too late by then for the information to have made a difference. So, if Aviva did send the Scorpion insert to Mrs G, it would appear that the most likely point at which it did so would've been alongside the transfer forms. But there is nothing in the content of that letter that suggests the Scorpion insert was enclosed. The letter specifically referred to the documents enclosed – two transfer forms. There was no mention of anything else being included, nor a direction to consider the insert or some information being provided.

So, based on the available evidence, I haven't seen enough to safely conclude that Aviva did send Mrs G the Scorpion insert.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of pension liberation and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk. But Aviva hasn't suggested that it carried out any further due diligence here. Aviva has said that there wasn't any evidence to suggest that the receiving scheme was offering a pension liberation arrangement and that the member booklet that was provided pointed out that benefits could not be accessed before age 55. So, it felt that the Scorpion leaflet and action pack were not relevant.

The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. Here though, Aviva has indicated it was happy to take the word of the receiving scheme and administrator. I think this defeats the purpose of the Scorpion guidance. The receiving scheme had a vested interest in the transfer proceeding. And none of the parties that were involved in Mrs G's transfer, besides Aviva, were subject to regulatory oversight. In effect, Aviva has indicated it was willing to assume that unregulated businesses would have operated transparently and in the way that was not of concern. But in the context of guarding against pension liberation – and in an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption. And I don't think the receiving scheme booklet should've given Aviva the reassurance that it says it took, particularly given the other information it had received as part of the transfer request.

Included in the information that Aviva received in August 2013 was confirmation that the Bothbridge Pension Trust was registered with HMRC. But this had only taken place in April 2013. And the Scorpion action pack for businesses indicated that a newly registered receiving scheme was a potential warning sign of liberation activity.

Aviva was also aware that CAPR and CAL were the parties that had contacted it acting for Mrs G. And a simple check of the FCA register showed that these two businesses were unregulated. Aviva wouldn't have known whether these business had advised Mrs G. But I think their involvement, when considering the circumstances of the transfer more widely, ought to have prompted further questions.

In addition to this it had been confirmed that Mrs G was not an employee of the sponsoring employer and that the receiving scheme offered access to investments that were not mainstream or usually available to the general public. A scheme being sponsored by an employer that the consumer didn't work for, utilising unusual investments and being advised by an unregulated party were noted in the longer check list within the Scorpion action pack for businesses as something to ask about and potentially be a reason for concern.

Given these warning signs, I think it would have been fair and reasonable – and good practice – for Aviva to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack and structure its due diligence into the transfer to consider the other things this noted.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):

1. *The nature/status of the receiving scheme*

Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered or dormant employer, an employer that doesn't employ the transferring member or is geographically distant from them, or is the receiving scheme connected to an unregulated investment company?

2. *Description/promotion of the scheme*

Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?

3. *The scheme member*

Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat. Given the warning sign that should have been apparent when dealing with Mrs G's transfer request, and the relatively limited information it had about the transfer, I think in this case Aviva should have addressed all three parts of the check list and contacted Mrs G as part of its due diligence.

<u>What should Aviva have found out?</u>

Investigations under part one of the checklist would've resulted in Aviva learning that, not only was the receiving scheme newly registered and Mrs G wasn't employed by the sponsoring employer, but that sponsoring employer was also newly registered having only been incorporated on 9 April 2013. A simple check of Companies House would have revealed this information to Aviva. This part of the checklist also suggests that ceding schemes could ask receiving schemes for details of their investment providers. I think that *would've been prudent here and could also have revealed that the investment businesses were likely to be unregulated – given the mention of potentially unusual investments in the scheme booklet.*

As I've said, Aviva should already have been aware of the potential intention to use unusual investments, from the scheme booklet. But the second part of the checklist suggests asking for copies of any promotional material to see how these were described. And this would either have shown that marketing information wasn't available, which itself would've been unusual, or provided further information about the investments.

I think making contact with Mrs G in relation to the third part of the checklist would've been appropriate. And, while this would likely have confirmed that she hadn't been offered access to her pension benefits before age 55, I think it is likely she would have told it that she'd been cold called. And, more importantly, I believe she'd have confirmed that she'd only spoken to the unregulated businesses – as there is no evidence of the involvement of a regulated firm at any stage – and that transferring had been recommended to her.

Being advised by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion insert itself makes this point.

My view is that Aviva should have been concerned by CAPR and CAL's involvement because of their regulatory status and as there wasn't a regulated adviser involved. And their actions pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

<u>What should Aviva have told Mrs G – and would it have made a difference?</u>

I think Aviva ought to have provided Mrs G with the Scorpion insert which would've drawn her attention to cold calling being a sign of concern. More than that though, Aviva's failure to uncover this risk of illegal advice and then warn Mrs G about it meant, in my view, it didn't meet its obligations under Principles 2, 6 and 7 and COBS 2.1.1R. With those obligations in mind, it would have been appropriate for Aviva to have informed Mrs G that the firm she had been advised by was unregulated and could put her pension at risk. Aviva should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so Mrs G risked falling victim to illegal activity and losing regulatory protections. And Aviva didn't need to determine that illegal activity was taking place in order to give those warnings.

I'm satisfied any messages along these lines would have changed Mrs G's mind about the transfer. The messages would have followed conversations with Mrs G so would have seemed to her (and indeed would have been) specific to her individual circumstances and would have been given in the context of Aviva raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mrs G aware that there were serious risks in using an unregulated adviser even if she was not liberating her pension. I think the gravity of any messages along these lines would prompt most reasonable people to change their mind. I've seen no persuasive reason why Mrs G would have been any different, because she doesn't seem to have been considering a transfer before being cold called and although she has said looking the business that contacted her up online had suggested they were legitimate, she'd have been receiving information from a reliable source that it potentially was not. So, I consider that if Aviva had acted as it should, Mrs G wouldn't have proceeded with the transfer out of her personal pension or suffered the investment losses that followed.

The cause of Mrs G's loss

I bear in mind that this complaint is similar to the type of claim that in legal proceedings would be treated as a claim for damages for negligent failure to give someone the information or advice to which they were entitled. In that kind of case, the court asks itself whether there is a sufficient connection between the harm for which the claimant seeks damages as compensation and the subject matter of the defendant's duty of care. The court looks to see what risk the defendant's duty was supposed to guard against and whether the claimant's loss represents that particular risk coming to fruition.

So, it's important I bear in mind that the Scorpion guidance was directed towards protecting people from the risk of pension liberation and that doesn't appear to have happened here. The loss was suffered because Mrs G accepted unsuitable advice from a party who wasn't authorised to act as a financial adviser at all, and it wasn't (as far as can be established taking into account what Mrs G has said) a case of seeking to cash in a pension in an unauthorised way.

Nonetheless, the circumstances that gave rise to this complaint were very similar to those of a pension liberation scam: the transfer followed unsolicited contact from an unauthorised business and involved joining a new pension scheme to house an investment and the involvement of recently established businesses. The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by checking the FSA/FCA register. And Aviva's obligations under the Principles and COBS were of general application and went well beyond just protecting its customers from pension liberation. In the circumstances, even though this doesn't appear to be a case of pension liberation, I'm satisfied there is sufficient connection between the harm Mrs G wants to be compensated for and the risk that Aviva had a duty to guard against. So, I do consider it fair and reasonable for Aviva to compensate Mrs G for her losses.

Responses to my provisional decision

I gave both parties an opportunity to make further comments or send further information before I reached my final decision.

Mrs G's representatives said she was largely agreed with my provisional findings. But the concern was that the Aviva scheme was underperforming. So, using a notional value could lead to the calculation showing she hadn't incurred a loss. And so, they thought I should require compensation to be no less than the amount originally transferred.

Aviva didn't accept my provisional findings. In summary, it said it felt I'd adopted an unduly stringent interpretation and application of the requirements at the time. It said the Scorpion guidance had only recently been introduced, its processes were being updated and the FCA often permitted transitional periods of up to six months for operational changes.

It also said that the Scorpion guidance at the time was to look out for the tell-tale signs of pension liberation – which wasn't what was happening here. And it wasn't required to interrogate each transfer and had a duty to not unreasonably block transfers or be seen to give regulated advice. Aviva still thought there were not tell tale signs of a scam and there wasn't any evidence that supported CAPR, or CAL which it said I'd implied, had provided advice. And it didn't agree with my finding that it had.

Aviva thought there was uncertainty over the actions of the parties involved and the involvement of unregulated firms wasn't enough to point to a breach of FSMA.

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.

When doing so I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. Aviva has said that there is no material evidence to support my findings. Notwithstanding that Mrs G's testimony is evidence, where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The Scorpion guidance was published on 14 February 2013. I agree it wouldn't be reasonable to expect business to have updated their processes overnight to embed this guidance. But I don't agree with Aviva that a period of six months grace is fair or reasonable.

The Scorpion guidance was ultimately intended to reduce the risk of consumers falling victim to pension liberation scams. Bearing in mind the obligation on Aviva to act in consumers best interests and conduct its business with due skill, care and diligence, I think pension providers like it, ought to have acted promptly. And I think a period of around one month to embed any changes would've been reasonable. It's also worth noting that on 10 June 2011 the FSA, the then regulator, issued a warning about the dangers of "pension unlocking" which specifically referred to consumers transferring to access cash from their pension before age 55. It said that receiving occupational pension schemes were facilitating this. And it encouraged consumers to take independent advice. At around the same time, TPR published information on its website about pension liberation, designed to raise public awareness and remind scheme operators to be vigilant of transfer requests. The warnings highlighted that websites and cold callers were encouraging people to transfer in order to receive cash or access a loan. So, the guidance wasn't the first indication from the regulators that liberation scams were becoming a concern.

In any event though, here Aviva received transfer forms on 13 August 2013, and completed the transfer shortly after. This was six months from when the Scorpion guidance was introduced, and in my view was more than enough time for it to have been considered by Aviva and embedded into its processes.

Aviva has said that the Scorpion guidance at the time was focussed on looking out for pension liberation, which wasn't happening here. But, for the reasons I set out in my provisional findings, Aviva's responsibility to Mrs G didn't end with the Scorpion guidance.

Based on the information that is now available, following the complaint, I agree that it doesn't appear that pension liberation was taking place. But I'm looking at what Aviva did or ought to have done at the time. The only information available at the time to indicate pension liberation was not a risk was the scheme member booklet for the receiving scheme. Aviva has said in response to the complaint that it relied on this information, although it isn't' clear if this was actually considered at the time of the transfer given it has also suggested that the Scorpion guidance may not have been embedded in its processes. But as I've said I don't think this booklet was enough for it to have been reassured. Relying on it meant Aviva was taking the word of the receiving scheme and pension administrator, neither of which were subject to regulatory oversight, that they were being truthful and acting as they should have done, when the guidance indicated some businesses weren't doing so. The Scorpion guidance gave businesses, like Aviva, a key role to play. And I don't think, taking the word of the receiving scheme, was enough in this case to say Aviva had done what it should have.

So, even though we now know that pension liberation does not appear to have been taking place, I don't think Aviva could have reasonably concluded that at the time without undertaking further due diligence. As I explained in my provisional findings, I think further due diligence would have revealed several other things that the Scorpion guidance said were warning signs at the time. And things that, given its responsibilities under PRIN and COBS – which were relevant here – ought to have given it cause for concern, specifically Mrs G being advised by an unregulated party.

Aviva has said that it doesn't agree that there is material evidence that Mrs G was advised by CAPR, noting she said that she now couldn't remember which business had done what. It said it thought CAPR was likely acting as an unregulated intermediary, which it was entitled to do. And Aviva didn't agree, as it says I've implied, that CAL provided advice.

To clarify, I don't think CAL provided advice. It was the administrator of the receiving scheme and doesn't appear to have been involved until the application to transfer was made. This was several months after transfer forms had been requested. And appears to have been after the idea of transferring was first put to Mrs G. I simply mention CAL's unregulated status to highlight that CAL's involvement wasn't something that should have given Aviva comfort that Mrs G was not at risk.

Mrs G did say, while the complaint has been ongoing, that she couldn't remember who had advised her. But this was several years after the events took place. And she has been clear and consistent about what she was told – that her Aviva pension was losing money and she'd be better off transferring. Again, where evidence is incomplete, I make my decision on the balance of probabilities, taking account of the information that is available.

For the reasons I've explained, I think Mrs G was advised to transfer. She had no prior connection with the OPS, and I've not seen anything to suggest she had more than a limited experience of pensions and investments. So, I think it is unlikely she'd have sought to transfer her benefits to the OPS had an adviser not suggested it. And CAPR appears to have been the first business to have contacted her about the transfer – given Aviva's first response was to it, acknowledging a letter of authority. I've seen no evidence of any other party being involved until CAL submitted the application to transfer. So, on balance, I think it was CAPR that advised Mrs G to transfer, even though it was not authorised to provide that type of advice. I think, had Aviva done appropriate due diligence at the time and made enquiries, Mrs G would have been able to distinguish the roles of the businesses. And I think she'd have confirmed she'd been advised and that it was CAPR that did so.

And this should've given Aviva cause for concern in this specific case – as it went beyond an unregulated business just being involved. I think it would have been appropriate for Aviva to have informed Mrs G that the business she had been advised by was unregulated and that only authorised financial advisers are allowed to give advice on personal pension transfers, so she risked falling victim to illegal activity and losing regulatory protections.

I don't think this would have been a disproportionate response given the scale of the potential harm and Aviva's responsibilities under PRIN and COBS 2.1.1R – which again were relevant even given the focus of the Scorpion guidance at the time. And I don't think any such warnings would reasonably have caused Aviva to think it was running the risk of advising Mrs G, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit. And I think a warning along those lines would've dissuaded Mrs G from transferring.

So, I remain of the opinion that, if Aviva had acted as it should have done, Mrs G wouldn't have proceeded with the transfer, or suffered the investment losses that followed.

Putting things right

Fair compensation

My aim is that Mrs G should be put as closely as possible into the position she would probably now be in if Aviva had treated her fairly.

The Bothbridge Pension Trust only seems to have been used in order for Mrs G to make an investment that I don't think she would have made from the proceeds of this pension transfer but for Aviva's actions. So, I think that Mrs G would have remained in her pension plan with Aviva and wouldn't have transferred to the Bothbridge Pension Trust.

To compensate Mrs G fairly, Aviva must subtract the actual value of her entitlement under the Bothbridge Pension Trust from the notional value if the funds had remained with Aviva. If the notional value is greater than the actual value, there is a loss.

Actual value

Aviva should ask Dalriada, the new trustees of the Bothbridge Pension Trust, whether Mrs G's entitlement can be valued at the date of my Final Decision. Mrs G may be asked to give Aviva her authority to enable it to obtain this information to assist in assessing her loss, in which case I expect her to provide it promptly.

If the Bothbridge Pension Trust can't be valued, that's likely to be because the position of the investments made by the former trustees is uncertain – which Dalriada's most recent announcement suggests is likely to be the case. Until any value can be realised from all the scheme's investments, Mrs G's entitlement can't be determined, and further costs are likely to be incurred from any liquid funds the scheme holds. So, if the new trustees cannot provide a value, I consider it appropriate to treat the actual value of Mrs G's entitlement from the Bothbridge Pension Trust as nil at the date of my Final Decision.

In return Aviva may ask Mrs G to provide an undertaking. Aviva may ask Mrs G to do either of the following, when the value of her entitlement under the Bothbridge Pension Trust has been finalised:

- Make a full transfer of her entitlement back out of the Bothbridge Pension Trust to Aviva's pension plan. Aviva may then recover that value from its pension plan so that Mrs G isn't overcompensated. **Or,** if this isn't possible:

- Withdraw her entitlement from the Bothbridge Pension Trust as tax-free cash and income payments over a period of time agreed between Aviva and Mrs G, so that the net amount Mrs G receives can be returned to Aviva and she is not overcompensated.

Aviva will need to meet any costs in drawing up the undertaking. If Aviva asks Mrs G to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Notional value

This is the value of Mrs G's funds had she remained invested with Aviva up to the date of my Final Decision.

Aviva should ensure that any pension commencement lump sum or gross income payments Mrs G received from the Bothbridge Pension Trust are treated as notional withdrawals from

Aviva on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Mrs G's representative has argued that the value originally transferred should be used instead. But I don't agree this is appropriate, particularly when considering the aim of redress being to put Mrs G, as close as possible, to the position she would've been in.

Payment of compensation

I don't think it's appropriate for further compensation to be paid into the Bothbridge Pension Trust given its uncertain position. There also doesn't appear to be any reason why Mrs G needed a pension arrangement that wasn't privately held, administered by an established provider and under FCA regulation.

So, Aviva should reinstate Mrs G's original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mrs G was invested in).

Aviva shouldn't reinstate Mrs G's plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Aviva to determine whether this is possible.

If Aviva is unable to reinstate Mrs G's pension and it is open to new business, it should set up a **new** pension plan with a value equal to the amount of any loss on the date of my Final Decision. The new plan should have features, costs and investment choices that are as close as possible to Mrs G's original pension.

If Aviva considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mrs G is entitled based on her annual allowance and income tax position. However, Aviva's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mrs G doesn't incur an annual allowance charge. If Aviva cannot do this, then it shouldn't set up a new plan for Mrs G.

If it's not possible to set up a new pension plan, Aviva must pay the amount of any loss direct to Mrs G. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mrs G is retired. (This is an adjustment to ensure that Mrs G isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mrs G is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mrs G was yet to take her 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to her in cash.

Alternatively, if the loss represents further 'crystallised' funds from which Mrs G had already taken her 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it's paid direct to her in cash.

If payment of compensation is not made within 28 days of Aviva receiving Mrs G's acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Aviva deducts income tax from the interest, it should tell Mrs G how much has been taken off. Aviva should give Mrs G a tax deduction certificate in respect of interest if Mrs G asks for one, so she can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Aviva is reinstating Mrs G's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mrs G was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation must be provided to Mrs G in a clear, simple format.

My final decision

For the reasons I've explained, I uphold Mrs G's complaint. I require Aviva Life & Pensions UK Limited to make an award to Mrs G by carrying out the steps outlined in the 'putting things right' section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 16 January 2025.

Ben Stoker
Ombudsman