DRN-4623118

The complaint

Ms W complains that she was mis-sold an investment by Equity for Growth (Securities) Limited (EforG). She says she was given misleading information about the security of the investment.

What happened

In January 2019, Ms W invested £10,000 into MIX2 Ltd loan notes. The loan notes were issued by an investment company incorporated within the Magna Group as a special purpose vehicle (SPV) that was to invest funds into various property projects. Accrued interest and capital was due to be repaid after a period of 12 months. Ms W first heard about the investment opportunity through a company called Hunter Jones (HJ), who were an appointed representative (AR) of EforG. She says HJ were involved in arranging her application to invest.

In January 2021, Ms W and the other loan note holders were informed that the Magna Group had run into problems. In its role as security trustee for the loan notes, EforG sent correspondence to investors telling them Magna had no apparent assets that could be acquired in order to repay investors.

In January 2022, Ms W raised a complaint with HJ. She raised concerns about the role of HJ in the arrangement of her investment. She said she was provided with reassurances about the security of the investment, which were misleading. She requested her capital be returned to her. HJ responded and didn't accept it had done anything wrong. Following this Ms W contacted our service. Her complaint was passed to EforG as it has responsibility as the principal firm in answering the complaint.

In August 2022, EforG responded to the complaint and didn't uphold it. Following this Ms W asked this service to investigate and complete an independent review of her complaint. One of our investigators provided a view on the complaint. Firstly, he considered this service's jurisdiction. He was satisfied that the evidence provided indicated that we could consider this complaint, so went on to issue an assessment on the merits of the complaint. He upheld the complaint. In summary he said:

- He didn't think HJ provided Ms W with advice as the evidence doesn't support this allegation. But he found there were other activities HJ undertook to make arrangements for the investment – and EforG was responsible for the acts undertaken by HJ.

- HJ, on EforG's behalf, didn't comply with its regulatory obligations. Had it done so, Ms W wouldn't have decided to invest or HJ should have concluded that it shouldn't allow her to invest.

- An email dated 10 December 2018 from HJ informed Ms W 'the Magna investment is safe, secure and will deliver'. It wasn't possible for HJ to make these statements based in fact. At best this was misguided, at worst it was purposely misleading and wrong. By making this statement HJ wasn't acting in Ms W's best interest or

providing information that was clear, fair and not mis-leading.

- For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for EforG to compensate Ms W for the financial loss she has suffered.

I issued a Provisional Decision in November 2023.
Regarding our jurisdiction, I said that I found the complaint to be one we could consider. In summary I found:

- There was evidence that HJ was carrying out a regulated activity – that being arranging deals in investments.

- I didn't accept EforG's view that HJ merely acted as an introducer, but rather it made a direct offer financial promotion, and this was ancillary to the arranging of Ms W's investment.

- I was satisfied that the activities carried on by HJ were ones for which EforG accepted responsibility as part of the AR agreement in place.

I went on to consider the merits of the complaint. In summary I found that EforG failed to meet its regulatory obligations and this led to Ms W taking out an investment she wouldn't have otherwise, so I thought it should pay her compensation.

Ms W accepted my provisional conclusions.

EforG responded and provided further submissions for me to consider. It has provided a copy of HJs activity records for Ms W, compliance evaluation and a copy of her declaration as self-certified sophisticated investor. EforG said it didn't agree the regulated activity of "arranging" has taken place, so the complaint is not within our jurisdiction. And also, the complaint should be rejected in any event, because HJ either did not have to comply with rules referred to from COBS; or complied with those rules in any event. It provided further arguments and evidence to support its position. In summary it said:

- The activity history received from HJ has a note on 19 October 2018 that contradicts Ms W's testimonies that "she was a novice investor" and that she was not sophisticated. These sales notes indicate she had invested before and refers to investing in stocks and shares with reference to £18,000 held in an ISA.

- The steps HJ took didn't amount to arranging with reference to relevant case law – so it wasn't carrying out the regulated activity of arranging.

- HJ's activities fall within the exception in Article 26 of the Regulated Activities Order (RAO) and "do not or would not bring about the transaction to which the arrangements relate". In the case of Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474, there was only sufficient causal potency to satisfy Article 26 in circumstances where the unregulated introducing agent was "significantly instrumental in the material transfers" through filling in sections of the application form, collecting the completed forms and AML documents by courier, and taking those forms to the investment provider. HJ did not carry out all of those activities, and its role was limited and administrative only. If HJ had stopped acting for any reason, it is a fair assumption that Ms W would have ensured that the investment was made via another introducing agent, or by liaising directly with Magna Group.

- HJ's role was limited to carrying out limited and administrative functions, providing

the means by which Magna and Ms W would be able to communicate as Magna had oversight of things like the application process and sending out the loan certificate and welcome pack. Although it doesn't have relevant evidence from Ms W's case of Magna corresponding directly with her.

- The sale of Ms W's investment falls outside of Article 25(2) in light of the limited role HJ's played in the sales' process, as an unregulated introducing agent. As supported by PERG 2.7.7BD: "The scope of article 25(2) of the RAO (the subject of PERG 2.7.7B G) was considered by the High Court in the case of Watersheds Limited v. David Da Costa and Paul Gentlemen. The judgement suggests that the activity of introducing does not itself constitute a regulated activity for the purposes of article 25(2) of the RAO. The FCA has considered whether the judgement necessitates any change to the views expressed in PERG 2.7.7B G and elsewhere in PERG. It appears to the FCA that the judgement should be considered in the light of the case to which it relates."

- The acts of introducing and/or promoting are not regulated activities. Further, the carrying out of the activity cannot be properly considered as ancillary to a regulated activity in circumstances where a "bright line" can be drawn between the regulated and unregulated activities based on the facts as set out by Judge Ouseley on the application of Tenetconnect Services Ltd v FOS [2018] EWHC 459 (Admin). In this case the introduction and/or promotion of the investment cannot be considered as inextricably linked to the alleged arranging of the investment in both substance and timing.

- There is no evidence that HJ communicated a financial promotion to Ms W, let alone a direct offer financial promotion. It doesn't believe there is evidence to support that Ms W was supplied with a MIX2 IM by HJ.

- Even if HJ did communicate a financial promotion to Ms W, it would have been an "Excluded Communication" so COBS 4.7 doesn't apply. Ms W was an exempt self-certified sophisticated investor, which meant an unauthorised person was able to communicate a financial promotion to her. HJ's business model involved benefitting from this exemption as it was acting as an unauthorised person communicating a financial promotion to a self-certified sophisticated investor.

- Even if this wasn't an excluded communication, HJ was not required to comply with COBS 4.7.7 in any event. COBS 4.7.7 states that: "a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security (NRRS) to or for communication to a retail client without the conditions in (2) and (3) being satisfied." COBS 4.7.7 does not apply to all financial promotions of NRRS, but to a firm which approves or communicates a "direct offer financial promotion" of NRRS to retail clients. Although Magna loan notes were NRRS, the financial promotion of the loan notes itself was not a "direct offer" financial promotion.

- Rather, HJ complied with the Financial Promotions Order (FPO) as prescribed in Part II of Schedule 5 of the FPO. Ms W's signed self-certification statement satisfy the test. An HM Treasury consultation on Financial Promotion Exemptions dated December 2011, says in 2005 when updates were made, the purpose of the Article 48 exemption and the Article 50A exemption was to place a greater degree of responsibility on investors to correctly certify when categorising themselves. If Ms W did not feel that she fell in to one of the exempt categories, she would not have signed the relevant investor statement. HJ had no reason to doubt that Ms W was a self-certified sophisticated investor because its sales notes from 19 October 2018

say she had invested before and refers to investing in stocks and shares ISA.

- Even if HJ was obliged to comply with COBS 4.7.9 and by extension with COBS 4.12.8R, it was not required to comply with COBS 4.12.11G, because COBS 4.12.11G, is a guidance and not a rule or a requirement. Guidance provisions in the FCA handbook are not binding. Further, COBS 4.12 only applies to non-mainstream pooled investments (NMPI), whereas, the Magna investment are NRRSs.

- It disagrees that HJ had to comply with COBS 10 because Ms W's investment in MIX2 was not in response to a direct offer financial promotion, to which COBS 10 applies.

- It considers HJ, in marketing Magna investment opportunities, acted in its own right in a capacity of an unregulated introducing agent only, and it did not arrange deals in investments pursuant to either Article 25(1) or 25(2) of the RAO. HJ did not go beyond what was necessary for them to provide their service of marketing promotional materials and allowing prospective customers to communicate their intentions to invest to Magna.

- There has been a fundamental misunderstanding with respect to HJ's role and the actions it took, which were fundamentally different to the authorisations it had the ability (but not the requirement or obligation) to use under the AR agreement. The pre-amble to the AR Agreement describes HJ's activities as: "…specialising in promoting specific investments in the fixed income and alternative property sector to self-certified investors. It then introduces these investors to appropriate investment providers. All prospective Investors are asked to detail what they are interested in investing. [Hunter Jones] then makes sure they receive suitable information. [Hunter Jones] does not offer any form of financial advice. It articulates the facts about each investment, by referring clients to the formal promotional material that each Investment Provider sends directly to the Investors." Whilst the AR Agreement subsequently granted HJ the ability to rely on EforG's authorisation to conduct business activities described in the AR Agreement that fall within the scope of EforG's FCA permissions pursuant to s.39 FSMA, HJ did not in fact use those authorisations. Ms W's decision to invest in Magna was not influenced by HJ, who merely introduced investors. Ms W was actively searching for investments and ultimately made her own investment decision as an exempt self-certified sophisticated investor.

- Under the AR Agreement with HJ, it was not permitted to communicate an inducement to engage in investment activity until the content of the communication had been approved for the purposes of s.21 FSMA and the communication was made to investors exempt under the FPO). HJ was also required to ensure that all financial promotions displayed on websites, associated social media accounts, sent via emails or printed were verified and approved by EforG. EforG did not approve or consent to the wording of HJ's email to Ms W on 10 December 2018. So HJ was acting outside of the AR Agreement and EforG cannot be responsible for the information contained within. But in any event, it considers this to be an excluded communication for the reasons previously stated.

- Since HJ ceased being EforG's AR in April 2020, it continued with its business model and are still trading in a capacity of an unregulated introducing agent, performing exactly the same activities as it was during the time it was an AR. If HJ's activities were considered by the FCA as regulated activities requiring authorisation, then it would have been required to either cease trading or seek an authorisation or become

an AR of another FCA regulated firm.

EforG also suggest that further information is required in order to reach a decision. This includes further details of Ms W's contact with HJ when making her investment to determine the role that HJ played in the sales process, and whether this amounted to the regulated activity of arranging investments. It has also requested further clarification of HJs role in the sales process, referring to its view the role played by HJ was narrow and well defined and does not, in fact, amount to arranging

Finally, EforG asks, if the Ombudsman disagrees with any of its points, that he shares his views prior to issuing his Final Decision. If there is a substantial difference in interpreting the regulation (for example, what constitutes a direct offer financial promotion), it says it is only fair that it can provide a further response.

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.

But, I've first reconsidered all the available evidence and arguments to decide whether this complaint is one I can look at. And I have not been persuaded to depart from my provisional findings on this.

Is the complaint one I can look at?

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the Financial Conduct Authority's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. This should be based on the relevant facts of the complaint. And if those facts are in dispute, I must decide on the balance of probability what happened.

There are a number of jurisdiction tests that must be met in relation to all complaints referred to us. In respect of this complaint where EforG says it is not subject to our jurisdiction, the following are relevant considerations.

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities.

Rule DISP 2.3.1R says we can:

"*consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*".

And the guidance at DISP 2.3.3G says:

"*complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility)*".

To carry out regulated activities a business needs to be an authorised person (s.19 FSMA). We can deal with certain complaints against EforG, as it is an authorised person. That may include complaints about the acts or omissions of its appointed representatives, such as HJ. That is why this complaint is against EforG, rather than HJ.

s.39 FSMA says:
"(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

So I've had to consider:

- What are the acts about which Ms W has complained?
- Were these acts done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity (DISP 2.3.1)?
- Were those acts ones for which EforG accepted responsibility?

What are the acts about which Ms W has complained?

Ms W has said HJ advised her to invest in the Magna loan notes and gave her misleading information causing her to invest in something that wasn't right for her. In her complaint she says HJ sold her a product that was entirely unsuitable for her as she was a novice investor and this was a high-risk unregulated investment. She also says HJ misrepresented the investment as being secured by a regulated firm, implying it came with FCA protection. It also implied the investment was secured with bricks and mortar properties.

It is clear that Ms W has expressed dissatisfaction about HJ's involvement with her taking out this investment – indeed this was initially the business she complained to.

Were the acts about which Ms W complained done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity?

Regulated activities are specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) and include:

- Advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO) and
- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

There's insufficient evidence that HJ gave Ms W advice. So, the crucial issue for me to determine is whether HJ conducted any other regulated activities, such as making arrangements, and if so, whether it carried out activities ancillary to them.

Simply introducing someone to an investment may not involve making arrangements or any other regulated activities under the RAO.

But, what does the evidence show that HJ did?

I'm satisfied from the evidence available:

- HJ made a direct offer financial promotion to Ms W.
- The Magna loan notes were an investment under the relevant rues.
- HJ's activities amounted to carrying out the regulated activity of arranging deals in investments under Article 25 of the RAO.
- The direct offer promotion was ancillary to the arranging of the investment.

I will set out my reasons for reaching these findings.

The FCA Handbook defines (for the avoidance of doubt, all references to the Handbook are

as they were in the Handbook at the relevant time) a financial promotion as:

“(1) an invitation or inducement to engage in investment activity or to engage in claims management activity that is communicated in the course of business;”

The MIX2 Ltd IM is undoubtedly a financial promotion. This isn’t in dispute. Indeed, EforG approved it as such as evidenced by a section in the IM which says: “Equity for Growth (Securities) Limited (“EFORGS”) which is Authorised and Regulated by the Financial Conduct Authority, with registration number 475953 has approved the issue of this Document as a financial promotion in accordance with the provisions of section 21 of FSMA."

The FCA Handbook defines a direct offer financial promotion as a financial promotion that contains:

(a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or

(b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement; and which specifies the manner of response or includes a form by which any response may be made.

A controlled agreement is defined as "an agreement the making or performance of which by either party constitutes a controlled activity" - which includes investment activity with securities such as Magna loans notes.

Ms W has given her recollections of how she came to take out this investment. She has explained she was looking to take out an investment and got in touch with HJ. She dealt with an investment manager who provided her with details of the Magna investment opportunity. She corresponded by email and over the telephone with HJ. She recalls that during her conversation with the investment manager she was assured the Magna loan notes were a safe investment. After her bank rejected the payment for her investment, she received further reassurance from HJ that it was a secure investment and her bank were being overly cautious. Ms W says she was an inexperienced investor and relied on support from her mother to make financial decision. But at the time this investment was being arranged her mother wasn’t in good health, so she couldn’t rely on this support. Ms W says this made her vulnerable.

I haven’t been provided with recordings of any telephone calls between Ms W and HJ, but there is some contemporaneous evidence of the interactions she had with HJ about this investment during the period it was taken out.

Firstly, I’ve seen an email dated 19 October 2018 from the HJ investment manager to Ms W. This is an email asking her to complete a self-certification form. The content says:

“Further to our telephone conversation, I would like to share with you, the full details and due diligence documents of our latest UK Property Investment Opportunity, Magna Global. In order for me to do so, then I am required to ask you to complete a self certification form.

Please can you complete: Self Certification Form - Click Here

It is important for you to complete this form as the investment opportunity can only be introduced to a small number of investors, those who are either high net worth investors or sophisticated investors.”

There is further evidence of HJ's interactions with Ms W in the form of an email sent later the same day. This thanks her for completing the self-certification form and confirms they had spoken on the phone about the Magna opportunity and gave details of the opportunity. There is a further email of 25 October 2018 that says:

"It was great to catch up with you today. I hope the conversation answered all of your final questions and look forward to working with you for many years to come.

As discussed, I have completed the administrative side of the trade and it has now been processed. Your compliance call has been booked for 10am tomorrow…"

There is also an email sent by the HJ investment manager on 10 December 2018 following issues Ms W was having with her bank in transferring the funds. This provides reassurance about the security of the investments and plays down the concerns raised by the bank about Magna.

The statements in this email all point towards HJ seeking to reassure and persuade Ms W to complete the application by making payment – and in my view it demonstrates the critical role HJ played in Ms W making her decision to invest.

Ms W also says she was also offered similar reassurances over the phone by HJ to go ahead with the investment.

I've also reviewed the contact notes EforG sent from HJ's records. These indicate that HJ first sent Ms W information about the Magna opportunity in October 2018 (as referenced above) when it sent her *"the full details and due diligence documents of our latest UK Property Investment Opportunity, Magna Global"* as well as a self-certification form to complete. Over the next three months HJ contacted Ms W on multiple occasions before she agreed and funded the investment. The notes record in excess of 30 contacts being made, and there are other emails that we have copies of that aren't even included on the records. Many of the contacts were daily calls being made, a lot of which weren't answered. There is even a note that suggests the investment manager had resorted to calling on a withheld number in order to make contact with Ms W. The notes include reference to payment details being sent and paperwork being returned. There is also evidence of the nature of the conversations HJ had with Ms W, indicating a sales pitch being given, for example one note says *"made clear she doesnt* [sic] *want a hard sale. 10k magna pitched on 12 month. will be hard work but seems receptive*" These contact notes, in my view, indicate an active role played by HJ in arranging the investment and ensuring the transaction was completed.

On the acceptance form Ms W signed on 20 November 2018 to invest in the loan note it says *"I can confirm I have read and understand Information Memorandum dated 31st August 2018 and in particular the Risk Warnings contained therein."*

This further supports that she was provided with the IM before she invested. And on balance the evidence supports that it was HJ who provided this information to her. The available evidence also aligns with Ms W's recollections of how she came to take out the investment.

Having considered all of this evidence, my view remains that the evidence all points toward HJ providing an invitation to Ms W and promoting the investment opportunity to her. This was integral to her decision to invest and supported her through this process, corresponding with her over a number of months before the loan note certificate was eventually issued at the end of January 2019.

While promoting investments in this way isn't specifically listed in the RAO as a regulated activity, I'm satisfied it was ancillary to the activities of arrangements that HJ was also

involved in for Ms W's Magna investment.

Article 25 (Arranging deals in investments) of the RAO says:

"(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—

(a) a security, …

is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity."

The Magna loan notes are 'a security'. HJ's involvement with Ms W investment was involved and in my view more than acting as an unregulated introducer as EforG has suggested.

The FCA's perimeter guidance at PERG 2.7.7B says of Article 25(1): "The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."

EforG says there's been a misunderstanding of HJ's role and says it had a passive and very limited role in the transaction. So it did not arrange deals in investments pursuant to either Article 25(1) or 25(2) of the RAO. EforG has also referred to the case of Watershed Ltd v Dacosta [2009] EWHC 1299. It says this supports that the activity of introducing does not itself constitute a regulated activity for the purposes of Article 25 – and restates its opinion that this was all HJ was doing in this transaction. I agree that introducing on its own wouldn't likely constitute a regulated activity being carried out. But I've set out above the evidence of the role HJ carried out, which went beyond a mere introduction and amounted to arranging. Watershed Ltd v Dacosta is also clear that it's not necessary for the actions taken to "*involve or facilitate the execution of each step necessary for entering into and completing the transaction*". So, while there isn't evidence of every step of the transaction, I think the evidence we do have of HJ's involvement is sufficient to reach finding that it was carrying out the regulated activity of arranging.

EforG says Article 26 of the RAO exclusion applies to this transaction. Article 26 has an exclusion from Article 25 if the arrangements 'do not or would not bring about the transaction to which the arrangements relate'. EforG argue that Ms W was actively pursuing investment opportunities – and even if HJ wasn't involved it is probable she would have invested in Magna.

EforG has referred to the case of Adams v Options UK Personal Pensions LLP (2021) EWCA Civ 474 and what the court said in that case about Article 26 "Arrangements not causing a deal", implying 'causal potency' in the acts bringing about transactions. Having considered the case, I am not persuaded that it provides any support for EforG's argument that Article 26 applies in this case. The contact notes described above are clear that HJ was responsible for making Ms W aware of this opportunity, initially in 2018 before contacting her on numerous occasions from May 2019 to promote it – and I find it played a critical role in facilitating the transaction, in that it did cause the deal. It follows I'm satisfied that those acts by HJ were carried on by it under Article 25(1) and they are not excluded by virtue of Article 26.

Even if I am wrong, and Article 26 does apply, it only exempts arrangements under Article 25(1) - and I am satisfied that HJ did make arrangements that come within Article 25(2). As the guidance at PERG 8.32.2G states, Article 25(2) is potentially much wider (than Article 25(1)) “as it does not require that the arrangements would bring about particular transactions”.

I’ve considered EforG’s the wider comments to this service about HJ only acting as an unregulated introducer. It says despite the contractual arrangements within the AR agreement the acts carried out by HJ were acts of an introducing agent only. And it says HJ didn’t use the authorisations available, instead it acted as an unauthorised firm, communicating financial promotions without approval by complying with the conditions of an exemption contained in Article 27 of the RAO. This says that:

“A person does not carry on an activity of the kind specified by article 25(2) merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties.”

This of course would only be an exclusion to the activity under Article 25(2) not the Article 25(1) activity that I think was also carried out. But I do not think the exclusion applies here in any event. PERG 8.32.5 says of this exclusion:

“The Regulated Activities Order contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties.

In the FCA's view, the crucial element of the exclusion is the inclusion of the word ‘merely’. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).”

PERG 8.32.6

“For example, in the FCA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if:
(1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their financial promotion; and
(2) as part of the arrangements, the publisher or broadcaster does one or more of the following:
(a)brands the investment service or product in his name or joint name with the broker or product provider;
(b)endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
(c) negotiates special rates for his readers or viewers if they take up the offer;
(d) holds out the service as something he has arranged for the benefit of his readers or viewers.”

In the circumstances of how this investment was taken out, I think HJ's email and telephone calls to Ms W were intended to and did persuade, and so encouraged her to respond to the promotion. It also indicates HJs was sending and receiving paperwork and arranging payments. It was not merely to provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties.

In my view, the available evidence supports the testimony of Ms W in that HJ were actively pushing the investment opportunity. The numerous contacts made and the nature of the contact doesn't indicate that HJ played a passive role. EforG suggest HJ was merely simply putting an experienced investor seeking to make an investment in touch with a company seeking finance. But the evidence doesn't support this assessment of the situation. Rather, it indicates that HJ were active in arranging the investment for Ms W and sought to make it happen by continuing to chase and send information to her to complete the transaction. So, having considered EforG's further representations on this point, it remains I don't find the exclusion provided by Article 27 can be relied upon in this circumstance.

I note the arguments made by EforG that the carrying out of the activity cannot be properly considered as ancillary to a regulated activity in circumstances where a "bright line" can be drawn between the regulated and unregulated activities based on the facts as set out by Judge Ouseley on the application of Tenetconnect Services Ltd v FOS [2018] EWHC 459 (Admin). It doesn't think the introduction and/or promotion of the investment can be considered as inextricably linked to the alleged arranging of the investment in both substance and timing.

I don't agree with the point being made here, in light of the circumstances of how Ms W came to take out her investment. I've already acknowledged promoting investments isn't specifically listed in the RAO as a regulated activity, but my finding is that it was ancillary to the activities of arrangements that HJ was also involved in. The facts previously set out, in my view, clearly show that HJ went beyond a mere promotion and this was bound together with the arrangement of the investment. The contact notes show a continuous dialogue following the initial promotion leading to the completion of the transaction. So I don't think the evidence supports that there was clear separation between the activities of HJ. It follows that I don't find there was a bright line between the introduction and arranging of the investment as EforG suggest.

On balance, it seems that HJ's interaction with Ms W amounted to arrangements under Article 25(1) of the RAO as HJ's involvement had the direct effect of bringing about the investment in the loan note. Articles 25(1) and (2) are not mutually exclusive. Some activities can fall under both limbs. So even if I'm wrong on this point, I also make a finding that HJ also made arrangements under Article 25(2) as it made arrangements with a view to transactions in investments as the evidence of contacts supports that HJ's promotion had the purpose of making Ms W invest.

Were those acts ones for which EforG accepted responsibility?

For us to be able to look at the merits (the rights and wrongs) of the complaint we have to be satisfied that the activities carried on by HJ were ones for which EforG accepted responsibility. To determine this, I've looked at the appointed representative agreement between EforG and HJ. The agreement says:

"The appointer [EforG] appoints the company [HJ] as its Appointed Representative pursuant to section 39 of the Act to carry out the UK Business under Regulation 2 of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, and to that end:

3.1.1 the activity which [HJ] is permitted to carry out pursuant to this Agreement is limited to arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments under article 25 of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 …"

This indicates EforG did authorise HJ through the AR agreement to arrange deals at the time Ms W invested.

I note further points have been raised by EforG in relation to HJ acting in its own right in a capacity of an unregulated introducing agent only, and not using the permissions it gained through the AR agreement. EforG suggests there has been a misunderstanding with respect to HJ's role and the actions it took, which were fundamentally different to the authorisations it had the ability (but not the requirement or obligation) to use under the AR agreement.

I refer back to the AR agreement again. I note the pre-amble that says HJ was specialising in promoting specific investments in the fixed income and alternative property sector to self-certified investors and providing suitable information. It confirms HJ does not offer any form of financial advice. This is in line with the section of the agreement that confirms the permissions granted (which didn't include advice). This section is clear that it is limited to arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments under Article 25 of the ROA.

The email correspondence I've seen between HJ and Ms W during the period when she was first contacted about the Magna investment until it was completed contains a footer below the signature that confirms it was an *"Appointed Representative (FRN808287) of Equity for Growth (Securities) Limited (475953) which is Authorised and Regulated by the Financial Conduct Authority".* This further demonstrates at the relevant time HJ was acting in the capacity of an AR of EforG.

EforG seeks to argue while HJ had permissions to carry out the regulated activities through the AR agreement entered into, it didn't use these permissions in this transaction. In other words, it says HJ was not acting as its AR here. But I've already concluded that the extent of HJ's involvement with the arrangement of Ms W's investment into Magna meant it was arranging. The more plausible explanation is that it was acting as EforG's AR and therefore arranging an investment using the permissions it was granted through the AR agreement. I'm also conscious, without an AR agreement in place, carrying on a regulated activity would be in breach of the general prohibition and therefore acting unlawfully. So there is good reason why an AR agreement was in place due to the nature of the business HJ was likely to be carrying out.

So, EforG authorised HJ to make arrangements for investments. It is my finding that this is what happened in this case. I can consider the direct offer financial promotion as it was ancillary to the arranging and that connection means EforG is responsible for anything done or omitted by HJ in carrying on the business for which it has accepted responsibility. And in any case my view is that the direct offer financial promotion was intrinsically linked to HJ's authority to make arrangements. So, my conclusion on jurisdiction is that this is a matter that we can look at as it involves a regulated activity and/or an activity that is ancillary to a regulated activity. EforG authorised HJ to carry on these acts. As such, it is responsible for the complaint.

As I am satisfied Ms W's complaint is one I can look at I will now consider all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Merits of the complaint

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint. In doing so, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice;

and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether EforG met its regulatory obligations when HJ, acting on its behalf, carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses

The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G).

I think Principles 6 and 7 are relevant here. They provide:

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

Principle 7 - Communications with clients - 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"

COBS 4 – Communicating with clients, including financial promotions

Principle 7 overlaps with COBS 4.2 - Fair, clear and not misleading communications, which I also consider to be relevant here:

COBS 4.2.1R:

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

There are also rules restricting who "non-readily realisable securities" can be promoted to and how to test whether the investment was appropriate for the potential investor. These rules are set out in COBS 4.7 and COBS 10. These rules are relevant in this case as the Magna loan notes were, in my view, non-readily realisable securities.

The FCA Handbook definition of a 'non-readily realisable security' is:

"a security which is not any of the following:
(a) a readily realisable security;
(b) a packaged product;
(c) a non-mainstream pooled investment;
(d) a mutual society share;
(e) a deferred share issued by a credit union; or
(f) credit union subordinated debt;"

The Magna loan notes are a security that is not readily realisable and none of the other exclusions apply. So Ms W's investment was a "non-readily realisable security.

COBS 4.7 - Direct offer financial promotions

At the time COBS 4.7.7R said:

“(1) Unless permitted by COBS 4.7.8 R, a firm must not communicate or approve a direct offer financial promotion relating to a non-readily realisable security to or for communication to a retail client without the conditions in (2) and (3) being satisfied.
(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:
(a) certified as a ‘high net worth investor’ in accordance with COBS 4.7.9 R;
(b) certified as a ‘sophisticated investor’ in accordance with COBS 4.7.9 R;
(c) self-certified as a ‘sophisticated investor’ in accordance with COBS 4.7.9 R;
(d) certified as a ‘restricted investor’ in accordance with COBS 4.7.10 R.

(3) The second condition is that firm itself or the person who will arrange or deal in relation to the non-readily realisable security will comply with the rules on appropriateness (see COBS 10) or equivalent requirements for any application or order that the person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion.”

COBS 10 – Appropriateness (for non-advised services)

At the time COBS 10.1.2 R said:

“This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion.”

COBS 10.2.1R:

“(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.

(2) When assessing appropriateness, a firm must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded.”

COBS 10.2.2 R:

“The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) the level of education, profession or relevant former profession of the client”

10.2.6G – Knowledge and experience:

“Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for her to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience.”

COBS 10.3 Warning the client

COBS 10.3.1R

"(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

COBS 10.3.2R

(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him."

COBS 10.3.3G

"If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances."

EforG has argued that the regulatory obligations under COBS 4.7 and COBS10 don't apply. Essentially it says HJ didn't communicate a financial promotion – including a direct offer financial promotion - and because of this the regulatory obligations set out above don't apply. It denies HJ sent Ms W an IM for the opportunity and says the information it did send was not an invitation or inducement to engage in investment activity.

I've considered the points EforG makes, bearing in mind my finding is that there was a direct offer financial promotion made by HJ to Ms W.

Ms W says she relied on an IM supplied by HJ before deciding to invest. Ms W's acceptance form for the loan note contains a section that asks her to confirm she has read and understood the IM dated 31st August 2018. Ms W signed the acceptance to declare this. HJ in its October 2018 correspondence to Ms W said that it would be sending full details and due diligence for the Magna investment. It is also my understanding from other complaints referred to this service that HJ sales process involved sending IMs to investors. All of this leads me to the conclusion HJ provided Ms W with an IM before she invested.

The content of the IM makes a clear reference to it being a financial promotion and EforG approving it for that purpose, so clearly fits the definition set out in the FCA handbook about promotions. As I've already set out the FCA Handbook also defines a direct offer financial promotion as a financial promotion that contains: (a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or (b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement.

The correspondence and contact between Ms W and HJ between October 2018 and January 2019 in facilitating the completion of this transaction, is evidence that a direct offer promotion was being made. This evidence supports it's likely HJ directed Ms W to Magna application material or specified how to respond. Even if I am wrong to say Ms W was sent an IM by HJ, the records of the contact otherwise are evidence of an invitation or inducement to make the investment. So I'm satisfied the evidence all points to HJ providing an invitation to Ms W and promoting the investment opportunity to her whilst it was an AR of EforG.

So I've gone on to consider whether EforG complied with its regulatory requirements.

COBS 4.7 says that a firm must not communicate a direct or approve a direct offer financial promotion relating to a non-readily realisable security unless two conditions are satisfied.

The first condition is the client has been certified or has self-certified as one of the categories listed.

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There is evidence that Ms W signed a self-certified declaration. I'd seen an email asking her to complete a form and an acknowledgement she did this - and EforG has now supplied a copy of a self-certified sophisticated investor declaration. This was electronically signed by Ms W on 19 October 2018 – which was around the time HJ first discussed the Magna investment with her. Ms W accepts she likely did sign a declaration but says she didn't meet any of the definitions. She says she wasn't a sophisticated or experienced investor.

Whilst the declaration Ms W signed contains much of the same wording that is set out in COBS 4.12.8R, it crucially omits the disclaimers at the beginning and end of the declaration and instead replaces it with "I accept that I can lose my property and other assets from making investment decisions based on financial promotions". So, this is evidence HJ didn't properly comply with the requirements under COBS 4.7.7R and COBS 4.12.8R, as the statement Ms W signed didn't contain the requisite wording.

This also raises a further concern that by not asking Ms W to complete the correct declaration, HJ prevented her from understanding the magnitude of risk she was exposing herself to. In my view there is a difference between asking someone to complete a declaration in which they confirm they "can lose property and other assets" versus one which states "the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested." The purpose of the wording required in COBS 4.7 is to emphasise the significant level of risk involved with the types of investments, any changes that play this down by reducing the detail is a failing and a further example of Ms W not being treated fairly.

From what Ms W has told us about her circumstances, she had little investment experience or knowledge that would allow her to meet the criteria to be classed as a sophisticated investor at the time. EforG has raised points in relation to Ms W's existing experience. EforG have pointed to a contact note from HJ's records that mentions that Ms W:

"has invested before and are seeking more opportunities"

"…has invested in Stocks and shares"

"… has about 18k in her ISA account but she is getting less than 2% returns"

While EforG says this evidence means HJ had no reason to doubt Ms W was a self-certified sophisticated investor, I don't agree. EforG hasn't provided any further details on the existing investment and the information collected appears to be limited. I don't think holding stocks and shares (including within an ISA wrapper) is necessarily an indication of a sophisticated investor or that Ms W had previously invested in similar investment products (which she says she hasn't). Having considered her circumstances again in light of EforG's comments, I'm

not persuaded that they demonstrate a sophisticated investor, so, my finding is that Ms W was not.

I'm also conscious that just relying on a declaration is also not sufficient to meet regulatory obligations. EforG is correct COBS 4.12.11G is the relevant reference for self-certified sophisticated declarations - this says:

(1) A firm which wishes to rely on any of the self-certified sophisticated investor exemptions (see Part II of the Schedule to the Promotion of Collective Investment Schemes Order, Part II of Schedule 5 to the Financial Promotions Order and COBS 4.12.8 R) should have regard to its duties under the Principles and the client's best interests rule. In particular, the firm should consider whether the promotion of the non-mainstream pooled investment is in the interests of the client and whether it is fair to make the promotion to that client on the basis of self-certification.
(2) For example, it is unlikely to be appropriate for a firm to make a promotion under any of the self-certified sophisticated investor exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge or expertise to understand the risks of the non-mainstream pooled investment in question. A retail client who meets the criteria for a self-certified sophisticated investor but not for a certified sophisticated investor may be unable to properly understand and evaluate the risks of a non-mainstream pooled investment which invests wholly or predominantly in assets other than shares in or debentures of unlisted companies.

I've seen no evidence that HJ took reasonable steps to ascertain whether Ms W was a sophisticated investor. I think it's likely that any such reasonable steps would have revealed Ms W did not meet the criteria. The information she has provided about her circumstances at the time do not support that she had requisite experience, knowledge or expertise. She had limited investment experience and I haven't seen evidence to support she had knowledge or expertise through other means.

EforG has challenged that it needed to do more to ensure that Ms W did indeed meet the criteria of a self-certified sophisticated investor and it wasn't sufficient to rely on the declaration only (referencing COBS 4.12). EforG has suggested COBS 4.12 only applies to NMPI, whereas the Magna investments are NRRS. It has referenced that COBS 4.7.9 is specific as to when the term NRRS can be substituted for NMPI in the regulations. And, as COBS 4.7.9 doesn't say the terms can be substituted in respect of COBS 4.12.9, COBS 4.12.9 can only apply to NMPIs. EFG also refers to an FCA Consultation Paper, CP20/8 on the marketing of speculative illiquid securities to retail investors to support its view that the rules that apply for NRRS are in COBS 4.7.7R, and not COBS 4.12.

I don't share the opinion EforG has put forward – rather I don't see the wording of COBS 4.7.9 provides an exhaustive list of where the terms NMPI and NRRS can be substituted. COBS 4.7.9 specifies that NMPI can be substituted for NRRS when discussing certification. In my view, the fact that the certification wordings themselves can equally apply to NRRS and NMPI strongly suggests the rules are intended to apply to both types of investment. In respect of the FCA consultation paper, I note this uses the words 'generally' and 'in some instances', and it is a brief comment within the preamble. I don't think it is giving a clear definitive statement on the application of the rules – or that COBS 4.12 doesn't apply to NRRS.

EforG has also made a point saying it was not required to comply with COBS 4.12.11G, because it is guidance and not a rule or a requirement. It goes on to state guidance provisions in the FCA handbook are not binding. While I accept there is a difference between

guidance and rules, I don't think this means COBS 4.12.11G doesn't have relevance to my considerations. In my view it is a factor that is relevant to my consideration of overall what is fair and reasonable in the circumstances (as set out at the start of my findings on the merits of the complaint).

In response to my provisional decision, EforG raised further points on why it doesn't believe the regulatory obligations apply. I've considered these but haven't found reason to change my thinking.

EforG says even if a financial promotion was communicated, it considers it to be an "Excluded Communication" so COBS 4.7 doesn't apply. It refers to Ms W being an exempt self-certified sophisticated investor, which meant an unauthorised person was able to communicate a financial promotion to her. It says HJ's business model benefits from exemptions when communicating with self-certified investors. It refers to the FPO to support this point. It says s.50A of the FPO, supports the view HJ was acting as an unauthorised person and was therefore able to communicate a financial promotion to Ms W under an exemption.

I don't accept this argument. At the relevant time HJ was an AR of EforG and as part of this agreement HJ had permission to carry out certain specified regulated activities – crucially including the ability to arrange deals in investments. I've already explained why I'm satisfied a regulated activity was being carried out in the circumstances. In this situation, the logical conclusion to reach is HJ was using the permissions it gained through the AR agreement when arranging an investment for Ms W. And I am satisfied HJ was acting as EforG's AR here, and therefore using its permissions.

By arguing HJ "was not using permissions" EforG is effectively saying HJ was not acting as its AR – this is a point I have already dealt with earlier in my decision. But to reconfirm my earlier conclusion, EforG authorised HJ to make arrangements for investments and it is my finding that this is what happened in this case. This means that I remain of the view the regulatory obligations I set out do apply to the sale of Ms W's investment in Magna.

EforG has also made a further submission that even if a finding is made that this was not an excluded communication, HJ were not required to comply with COBS 4.7.7 (or COBS 10, which I deal with later in this decision). It returns to its view that the financial promotion of Magna loan notes itself was not a "direct offer" financial promotion. It says it hasn't seen evidence Ms W received a MIX IM, and the IM itself was not classed as a direct offer financial promotion because it did not contain the terms and conditions or provide the means to invest. It notes HJ didn't provide the prospective investors with the ability to invest online or otherwise. I've already explained why I'm satisfied that Ms W was provided with a direct offer financial promotion. For the reasons given previously, I'm satisfied the evidence of the nature of contacts HJ had with Ms W at the relevant time were an invitation and/or inducement to make the investment into the Magna loan notes. So, EforG's points about the receipt of, and contents of the IM, don't lead me to say a direct offer promotion wasn't made to Ms W by HJ . So, it remains that the regulatory obligations are relevant.

EforG says HJ did not have to comply with COBS 4.7.7 or COBS 4.7.9. Instead, it says HJ complied with the FPO. It again refers to Ms W's signed self-certified sophisticated investor statement. Its view is the existence of this declaration means under Article 48 and 50A of the FPO, there is a distinction from someone in Ms W's position compared to ordinary retail investors. It has also referenced a December 2011 HM Treasury consultation to support its argument there was a responsibility on Ms W to correctly certify when categorising herself and the existence of a signed statement is sufficient to satisfy the FPO requirements.

In response to the above points, I reiterate comments I've previously made. I'm satisfied the capacity HJ was acting in at the time Ms W took out her investment was as an authorised firm, therefore it needed to comply with the regulatory requirements relevant to this status. Also, for the reasons already noted above, I don't accept that HJ can blindly rely on the self-certified sophisticated investor statement in the way it suggests, avoiding compliance with FCA rules and guidance. The guidance at COBS 4.12.11G indicates it is unlikely to be appropriate for a firm to make a promotion under the self-certified sophisticated investor exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge or expertise to understand the risks - which I haven't seen that HJ did.

In summary, my finding is that HJ breached the first condition required under COBS 4.7.7 by making the direct offer promotion to Ms W when she was not or should not have been certified as a sophisticated investor. I also haven't seen evidence that she met either of the other categories that would mean the promotion could be made to her. Even, if I'm wrong on this, I have identified another reason why the complaint should be upheld.

As set out in my provisional decision, I've found EforG didn't meet its regulatory obligations in respect of COBS10 - appropriateness. While EforG disagrees that HJ had to comply with COBS 10 because Ms W's investment was not in response to a direct offer financial promotion, I've already explained why I don't accept this argument. And this failing alone is enough for me to reach a finding that the complaint should be upheld.

HJ was obliged, under COBS 10, to "ask the client to provide information regarding her knowledge and experience … to enable the firm to assess whether the service or product envisaged is appropriate for the client" and "determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded".

EforG does not say that HJ carried out any checks – its position is that it was not obliged to do so given its limited role as introducer. For all the reasons I set out above – I don't agree that it was just an introducer and must therefore conclude that no checks were carried out. I've already explained that I'm satisfied a direct offer financial promotion was made to Ms W, so the relevant rules on appropriateness testing were engaged. Had these rules been followed, I think it would have identified that Ms W had little investment experience and knowledge for the same reasons as I've already explained (in respect of Ms W's circumstances at the time).

The loan notes Ms W invested in are not a straightforward product. There were multiple risk factors associated with them – including the inherent risks of property developments (delays, budget overruns etc), as well as the track record of Magna. There was also a liquidity risk. The loans notes weren't easily tradable on a recognised exchange, and so could not be readily sold. All of these points (and this is not an exhaustive list) would need to be considered in order to understand the investment. It's important to give these specific risks for context, as it demonstrates that the investment was complex, risky and specialist. Ms W's testimony is that she understood it to be a low-risk product, which suggest she didn't properly understand what she was investing in.

All of this indicates that this wasn't a suitable investment for the majority of retail consumers. EforG knew or ought to have known this. So had HJ carried out the checks it should have, it would have identified that the investment in Magna loan notes was not appropriate for Ms W. She had neither the knowledge nor experience to understand the risks involved in the investment. Her existing investments were in mainstream products like stocks and shares ISA and cash deposits. So, I don't think this is strong evidence that Ms W had a good understanding of investing in complex high-risk investments.

COBS 10.3 does provide for situations where firms can proceed with arrangements after giving warnings if the client still wants to proceed. But as set out in COBS 10.3.3G "If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances." I don't think it would have been fair for HJ to proceed here, even if Ms W did accept a warning, as it ought to have been aware she clearly did not have the capacity to understand all the risks involved with investing in Magna loan notes.

So, my conclusion is HJ was required to follow the relevant rules set out by the regulator. It failed to do this when making the direct offer promotion to Ms W and making the arrangements for the Magna investment. I'm satisfied that, had HJ done everything it should have it would have concluded that it should not make the direct offer promotion to Ms W and she would not have made the investment that was inappropriate for her.

In addition to the above failings I've identified, I've also found evidence that HJ provided misleading information to Ms W about the risk of the Magna investment. As set out above this wasn't a straightforward product and contained multiple risks. When Ms W was in the process of transferring funds to open the investment, her bank queried the payment she was trying to make. She contacted HJ about this. The response she received from HJ provided reassurance that there was no concerns with the investment. However, the information given to Ms W was in my view misleading and sought to downplay the risks. HJ made the following statements in an email dated 10 December 2018:

"I can reassure you that the Magna investment is safe, secure and will deliver."

"Feel free to contact me via the telephone and I can go over any points you are unclear about but this really does seem like a case of scaremongering from the bank. You're not the first investor in Magna nor will you be the last. I can appreciate that they are trying to protect you however if the "Customer Protection Manager" did his/her homework a little bit better, they would have easily found these answers themselves".

EforG says Ms W's decision to invest had already been made by this point as she submitted an application form. But crucially this information was made before Ms W had committed funds to the investment. So, it was entirely possible for her to change her mind and not proceed. I think this information is relevant to her decision to invest.

In my view describing the investment as "safe, secure and will deliver" was misleading. It was not fair and reasonable to describe the loan notes in such a way. There is no apparent basis for these statements, which appear to be completely at odds with the true nature of the investment. The statements made by HJ seek to cover up the risk of the investment and put Ms W off revaluating whether to invest or not.

In response to my provisional decision, EforG says it did not approve or consent to the wording of HJ's email to Ms W dated 10 December 2018. So HJ was acting outside of the AR Agreement and EforG cannot be responsible for the information contained within. It also considers this to be an excluded communication. I don't find these arguments persuasive. I've already explained why I'm satisfied that EforG authorised HJ to make arrangements for investments and this email forms part of those arrangements. It needed to comply with the regulatory requirements relevant to this status – which include it being required to provide clear fair and not misleading information. I haven't found EforG's comments make me think this evidence shouldn't be considered in the context that I have set out.

Overall, I find this correspondence had the effect of making the investment appear to be something it was not - suitable for an average retail investor seeking a straightforward

product. I think this email led Ms W into believing she was investing something that was safe and secure – not a complex, risky and specialist product. This was not treating Ms W fairly or acting in her best interests. I think it is likely that if the email sent to her had been clear, fair and not misleading Ms W would have likely concluded the loan note was not the sort of investment for her and decided to not commit funds and withdraw her application. So I find this to be a further reason to support why it would be fair and reasonable to uphold this complaint.

EforGs requests

I note EforG has requested that further investigation is completed – including obtaining information regarding Ms W's contact with HJ when making her investment to determine the role that HJ played and further clarification of HJ's role in the sales process. I do not find further investigation is required in order to reach a fair and reasonable outcome on this complaint. Extensive investigation has already been completed to determine the circumstances of how the investment transaction came about - including submissions from both parties on the sales process and interactions with HJ. I'm satisfied both parties have had ample time to submit evidence to support their case.

EforG has also requested that it is given a further opportunity to comment on any responses given to the points it has raised if the ombudsman doesn't accept them. I've considered this request, but don't find that I'm required to provide a further opportunity for EforG to respond. I set out my provisional findings in detail and have considered the further points made by EforG in response. I haven't found that these change my overall thinking or the substantial reasons I've given for upholding the complaint. I've also provided further reasoning and clarification in this decision. Again, I'm satisfied EforG has had significant time to provide everything it wants to be considered, so I don't think delaying the resolution of the complaint is fair overall to all the parties. So, I'm satisfied it is appropriate for me to draw the complaint to a conclusion and issue a Final Decision.

For the reasons provided, I uphold this complaint.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Ms W as close to the position she would probably now be in if she had not taken out this investment.

I think Ms W would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Ms W's circumstances and objectives when she invested.

What should EforG do?

To compensate Ms W fairly, EforG must:

- Compare the performance of Ms W's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

- EforG should also add any interest set out below to the compensation payable.

- Pay Ms W £300 for the upset caused by losing her life's savings and worry of how it will be paid back.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
MIX2 Loan Note	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

If at the end date the portfolio is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Ms W agrees to EforG taking ownership of the portfolio, if it wishes to. If it is not possible for EforG to take ownership, then it may request an undertaking from Ms W that she repays to EforG any amount she may receive from the portfolio in future.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EforG should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Ms W wanted to achieve a reasonable return without risking any of her capital.

- The average rate for the fixed rate bonds would be a fair measure given Ms W's circumstances and objectives. It does not mean that Ms W would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold the complaint. My provisional decision is that Equity for Growth (Securities) Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 12 April 2024.

Daniel Little
Ombudsman