DRN-4773994

The complaint

Mr T complains that The Prudential Assurance Company Limited undertook insufficient due diligence checks and failed to give appropriate warnings to him – before transferring his personal pension to a Qualifying Regulated Overseas Pension Scheme (QROPS) and investing in Blackmore Global funds.

Mr T is represented by a claims management company (CMC), which has made various arguments on his behalf. Except where necessary, I'll refer to all submissions made on Mr T's behalf as being from Mr T.

What happened

At the time of the transfer Mr T was approaching age 54, divorced and employed on a salary of £6,000. He rented his home and says he had no savings or investments other than personal pensions with two providers: Prudential and Zurich Assurance. His Prudential pension was invested in its with-profits fund.

An organisation called Aspinal Chase (AC) emailed Prudential on 5 February 2014 with a signed letter of authority from Mr T, requesting the necessary information and documents to make a transfer to a QROPS. It appears this resulted in AC being recorded as the servicing agent on Mr T's pension.

AC was based in the UK and Gibraltar. The footer of its letter indicated it was a consultancy providing pension tracing and administration services. There was no indication it was regulated by the Financial Conduct Authority (FCA). The sender's email signature read *"Aspinal Chase Ltd does not offer financial advice. For any products requiring advice we use external authorised and regulated advisors."* The reference to a limited company appears to relate to Gibraltar, as AC was never incorporated in the UK.

Initially, Prudential responded to AC that the address AC held for Mr T didn't match its records, and it would clarify that with Mr T. (It's not clear to what extent the address was actually incorrect, but this was evidently resolved.) AC made a further phone call to Prudential on 4 March to apparently chase for the outstanding information.

Prudential sent this information to AC on 10 March 2014. Its letter included the following:

> *"We will only make a transfer to an overseas scheme if:*
> *- it has applied for, and been registered as, a Qualifying Recognised Overseas Pension Scheme (QROPS), and provided that status is still valid.*
> *- the scheme is a tax approved pension scheme in the country where it is established and that country's legislation allows a transfer in from a UK approved pension scheme."*

Prudential listed the paperwork which would need to be completed, which included a receiving scheme declaration and transfer value acceptance form – as well as two HMRC forms. The letter itself lists the following enclosures:

- "SQ" x 1
- "MQ" x 2
- HMRC's APSS263 form (for transferring to a QROPS)
- Lifetime allowance declaration (for HMRC purposes)

The letter didn't list an insert provided by the Pensions Advisory Service (TPAS) for inclusion in transfer packs, known as the 'Scorpion insert', as being enclosed. But Prudential says that it would have been included as part of its print fulfilment process.

On 24 March 2014 Mr T signed an application form for a QROPS administered by Harbour Pensions (Malta). He declared on this that he was a UK and not Maltese resident, and applied to transfer in his Prudential and Zurich pensions. The adviser on this form was stated to be a named individual at St James International in the Czech Republic. The name of that adviser's regulator was left blank. Harbour Pensions itself was authorised by the Malta Financial Services Authority as a retirement scheme administrator. From what I can establish, this form wasn't subsequently sent to Prudential.

On 6 May 2014 Mr T's chosen QROPS – Harbour Pensions (Malta) – sent a transfer request directly to Prudential. The request referenced and enclosed these documents signed by Mr T and Harbour between 24 March and 6 May:

- A letter of authority from Mr T, signed on the same day he'd completed the Harbour application
- Completed and signed discharge forms
- Completed and signed HMRC forms APSS263 & CA1890 (for the transfer of 'protected rights')
- Completed HMRC APSS262 form (the QROPS provider's portion of the HMRC declaration)
- The QROPS's bank details
- HMRC's letter confirming that it had recognised Harbour as an overseas scheme on 9 April 2013
  A certified copy of Mr T's identity (his passport). This doesn't appear in the file Prudential provided to this service, but the copy Mr T's CMC obtained from Harbour has been certified by a named individual at "St James International (Prague)"

Mr T's signed APSS263 form involved him ticking two boxes to confirm he was aware that in some circumstances the transfer of funds (or a future payment by the QROPS) may be treated as an unauthorised payment giving rise to a liability to pay tax in the UK.

On 21 May Prudential asked Harbour to clarify if Mr T was prepared to pay the telegraphic transfer fee from his pension, which he confirmed he was on a letter dated 27 May. This was forwarded to Prudential on 2 June by AC from its Manchester address rather than by Harbour. From what I can see, before making the payment Prudential carried out a LexisNexis Watchlist report on Harbour Pensions, which didn't bring up any flags. It also checked that Harbour Pensions was still on HMRC's published list of recognised schemes. On 10 June 2014 Prudential transferred £25,724 from Mr T's Prudential pension as directed. (£16,339 was also transferred from his Zurich Scheme, so a total of £42,063. Zurich had also sent the Scorpion insert to AC but not to Mr T.) Prudential wrote to Harbour, AC and Mr T to confirm its transfer had been completed.

Following the transfer, Mr T's QROPS was invested in the Blackmore Global funds in accordance with his application form, under an 'advisory' relationship with St James International. However the extent to which Mr T was involved in that advice isn't entirely clear. Initial and annual fees were payable to Harbour, but no adviser charges were mentioned on the application form or are showing on the QROPS transaction statements themselves (up to 2018).

Mr T withdrew a tax-free cash sum of £10,355 from the QROPS as soon as he was permitted to under the tax rules, after his 55th birthday in mid-2015. He says this was the first (and I understand so far only) payment he received.

In 2017 Harbour Pensions was acquired by the STM Group, an international pensions operator. From the apparent result of a Subject Access Request as at 31 January 2018, Mr T's investments were stated to be worth £31,260 in total, and it seems the Blackmore Global fund strategy meant that approximately:

38% was held in a property fund
5% was held in a 'lifestyle' fund
20% was held in a sustainable fund
33% was held in a private equity fund
4% was held in cash

STM wrote to Mr T in August 2020 to explain that Blackmore Global was an Isle of Man Protected Cell Company (PCC) which was intended to lock in access to funds for ten years. STM was concerned that the company hadn't produced audited accounts, there was an 'unusual' lack of transparency regarding the underlying assets and their valuation, and other companies managed by the same directors had attracted adverse commentary.

In April 2021 the Isle of Man Financial Services Authority announced that Blackmore Global had been operating unlawfully as a collective investment scheme. Between March 2015 and May 2019 there had been regular and substantial redemptions of funds, despite the ten-year lock-in period, and the Authority didn't consider Blackmore was able to evidence that the transactions benefited, or were fair and reasonable to, the remaining shareholders.

In May 2021 a director of Blackmore Global PCC Ltd – of the same name as a director of AC (according to AC's email footer) – wrote to investors to propose a restructuring of the fund. A January 2023 update confirmed the funds were now in liquidation. They are now believed to have little value.

<u>Mr T's recollections of what happened</u>

Mr T explains that he was cold-called by AC who persuaded him that it would be in his interests to transfer his "frozen" pensions. He doesn't usually answer unrecognised callers on his phone, but he had been bereaved in 2012 and was still clearing debts left by his ex-wife, so it was a hard time for him.

Mr T agreed to meet with an adviser and a meeting took place at his home. The adviser said that his Prudential pension could make better returns if invested as recommended. Mr T doesn't recall the type of investments being discussed in any detail, or how the returns would be generated, or what risks were involved. His complaint to Prudential also says he was told that his ex-wife stood to benefit from the Prudential pension if he died, so the transfer would allow him to leave funds to his son.

When our investigator spoke to Mr T, he explained that he suffers from dyslexia and it was only what the person who came to his house said to him that he would acted on. He didn't realise his funds were being transferred to Malta, and only noticed this when he took out his tax-free cash sum in 2015 and saw Malta on the statement. That was what prompted him to contact another CMC (in 2017), and then his current one to bring the complaint.

Our investigator asked Mr T for his understanding of what he was signing. He said he thought his pension would be safe, but didn't really know what he was signing or doing. It was all new to him. He was only able to bring the complaint, despite doing so through a CMC, with the assistance of his boss who has helped him with the written documents. He only works in a shop three days a week and has to have help with documents, because when he has to read things it all 'joins into one'.

The investigator also shared a copy of the Scorpion insert with Mr T. He didn't think he had been sent this before and admitted that it would have been difficult for him to comprehend without someone else to assist him. So, he wasn't sure what he would have done differently if he'd received this insert from Prudential in 2014, as it would depend on who he could ask. His father had already passed away and he didn't think his mother could have helped. On thinking about it further it occurred to Mr T that he'd been in the same job in 2014, so he might have been able to get some assistance at work.

From what Mr T is saying, he proceeded with a transaction that he didn't really understand in any great detail, except that he believed that it would improve the return on his pension (in a safe way) and allow his son to benefit in the event of his death. I think on balance he ought to have known that he was transferring his pension to Malta (even if this was something he had later become confused about). I say this because Mr T noticed Malta was written on the transaction statement when he received his tax-free cash. And the address of that scheme in Malta was given on a number of the forms Mr T signed. By the same token, it seems unlikely that the person he spoke to from AC would have sought to conceal that information from him, given that it was already a feature of the paperwork Mr T was signing.

<u>The complaint</u>

Mr T complained in April 2020 that Prudential had failed in its duty of care to him, because:

- It ought to have identified the warning signs of a possible scam highlighted in the Pension Regulator (TPR)'s Scorpion guidance, namely that:
    - unregulated introducers and advisers were involved
    - Mr T had been cold-called and offered a free pension review
    - he had no intention of moving abroad or needing such a complex pension structure
    - he was being advised to make an unregulated, high risk and non-diversified investment offering an unrealistic return
- Prudential ought to have warned Mr T of the existence of these warning signs and sent him a copy of the Scorpion insert.
- It ought to have made direct contact with Mr T to establish his understanding of the proposed scheme, investments, and who was advising on these.
- Prudential's failure to follow the relevant guidance denied Mr T the warnings that would have stopped him going ahead with the transfer of his pension, and the subsequent loss that followed.

Prudential has maintained throughout our investigation that Mr T's complaint should not be upheld. A summary of the key points it made up to my Provisional Decision of 12 April 2014 follows:

- Prudential was obliged to act on Mr T's written instructions to transfer to the QROPS. It also couldn't require him to take further advice.
- Its checks confirmed the QROPS was HMRC recognised (and remains so on an ongoing basis, under the STM Group).
- The Scorpion insert was included in the transfer pack that it sent out as part of the fulfilment process (so wasn't mentioned in the letter itself).
- Nothing indicated that the transfer was improper or an unauthorised payment.
- Whether the investments made within the QROPS were suitable for Mr T wasn't Prudential's responsibility, and the QROPS trustee had a responsibility to carry out due diligence into these.
- Mr T ought to raise his complaint with his original adviser, the QROPS trustees and/or the Maltese Financial Services Authority.
- No compensation can be payable when there is no evidence that Mr T has been involved in a proven scam or pension liberation situation.

- Prudential wasn't under a duty to contact Mr T to discuss how he was approached, or to question him on why he was deciding to transfer.
- No evidence (unaffected by hindsight) had been provided that Mr T would have acted differently had he seen the Scorpion insert.
- It couldn't have prevented the transfer anyway as the customer had a statutory and contractual right.

Provisional Decision of 12 April 2024

In this Provisional Decision I didn't uphold Mr T's complaint. The main part of my findings is repeated below.

I considered what would have been seen as warning signs of pension liberation at the time Mr T's transfer was requested by the Harbour QROPS. I noted that Page 8 of TPR's action pack of steps for ceding schemes to take at the time used an "exclamation mark" graphic to list six statements which it referred to as "warning signs". "Transfers overseas" wasn't one of the statements on that page, after which the guidance states *"If any of these statements apply, then you can use the checklist on the next page…"* I did however accept that this list of statements was introduced as *"**some** of the things to look out for"* (with my emphasis).

The previous pages of the action pack gave three examples of individuals who had succumbed to pension liberation scams. Each example was succeeded by a heading *"What were the warning signs"* and, using the same exclamation mark graphic, a range of warning signs were listed. Some of these were repeated in the list on page 8, and others were not.

In the first example, the individual transferred to a pension scheme which, after paying her a cash incentive, invested the funds overseas. The warning sign was shown as:

> ***"Transfers overseas***
> *One technique that pension fraudsters use is to send a large portion of the pension transfer overseas. This makes the funds harder to trace and retrieve when the arrangement is closed down."*

I've taken the view that the tenor of the Scorpion guidance was essentially a set of prompts and suggestions, not requirements – so it was essentially informational and advisory in nature. However firms needed to pay regard to its contents and where the recommendations in the guidance applied, it would normally have been reasonable for pension providers at least to follow the *substance* of those recommendations.

Along these lines, I considered whether it would be interpreting the Scorpion guidance too literally to make a distinction between something described as a warning sign on page four of the action pack and something described as a warning sign on page eight. Clearly, transferring funds overseas is a potential warning sign of pension liberation activity – and many liberation schemes I'm aware of have employed that strategy.

However and on reflection, I wasn't persuaded that at the time, with this reference to transfers of funds overseas, TPR was referring to the type of transfer Mr T was making to a QROPS. I reached this conclusion essentially because:

- The full paragraph I've quoted above makes it sufficiently clear that TPR was referring to schemes established *within the UK* for the purposes of liberation, which then shelter some of their funds overseas within the wrapper of that UK scheme.
- This is shown by the reference to a 'portion' of the funds being transferred overseas – *i.e.* the entire transfer isn't directly to an overseas destination.
- The reference to "*when the arrangement is closed down"* seemed to me to be a

reference to action TPR was taking at the time to identify UK schemes that had been used for liberation and take regulatory action against them.

- Within the same case study example that mentions an overseas transfer, TPR goes on to say: *"… HMRC launched an investigation and The Pensions Regulator took action against the trustees of this arrangement….The trustee in charge of this arrangement was replaced by a statutory independent trustee who traced the members' assets overseas."*
- QROPS were not, evidently, the focus of TPR's concerns at the time the 2013 action pack was issued.
- In Mr T's case the QROPS had been recognised by HMRC without issue for more than a year, so was unlikely to have been a vehicle for liberation – otherwise it would likely have already been removed from the QROPS list.

I considered these points were important because the purpose of the action pack at that time was to focus efforts on preventing pension liberation, rather than anything else. Although Prudential *might* have become suspicious about another type of scam as a result of carrying out investigations into the threat of liberation, this is of course dependent on what further investigation was necessary. And I was satisfied that Prudential knew enough about Mr T's transfer *not* to need to carry out any further due diligence.

In my view, none of the warning signs in TPR's action pack applied in this case. Harbour Pensions was not *recently* registered (or as it was a QROPS, 'recognised') by HMRC. HMRC's recognition letter to Harbour was dated 9 April 2013 and the transfer request was sent more than a year later on 6 May 2014. Further, Prudential had nothing to suggest Mr T had been approached unsolicited or put under pressure to transfer. Although Mr T was under 55 – the minimum age for accessing pension benefits – I was satisfied that the length of time Harbour Pensions had been operating as a QROPS without issue meant that the threat of liberation was sufficiently low for Prudential not to have been concerned by this.

It was on 24 July 2014 that TPR issued an update to the Scorpion guidance which shifted the focus away from just pension liberation to pension scams in general. This gave more prominence to overseas investments. And the potential for a QROPS to facilitate investments which were at risk of a scam in that wider sense, rather than liberating funds back to the member, was greater. But until that point, I wasn't persuaded that a QROPS transfer (unless potentially it was to a recently registered QROPS, or another warning sign of liberation was apparent) would have been viewed with particular concern.

<u>Responses to the Provisional Decision</u>

Prudential didn't respond to the Provisional Decision, but Mr T didn't agree with it. He raised the following points which I'll group under separate headings:

Definition of "liberation"
"Liberation" in the 2013 Scorpion guidance wasn't just limited to early release pension liberation, although that was the central message. TPR's initial press release said:

> *"People may be misled or not properly informed that tax charges and fees can erode their pension pot by more than half, leaving them with little to live on in retirement. The remainder of their funds are likely to be invested in highly dubious and risky, unregulated investment structures, often based overseas. The amount that has been "liberated" from pension schemes in this way is known to be in the hundreds of millions of pounds, with thousands of members affected…Where administrators receive a transfer request and detect the warning signs of liberation, such as pension money being passed back to the member before age 55.."*

Mr T is arguing that the use of "such as" and "in this way" referred to both immediate access to cash sums *and* unregulated investment structures being part of the liberation process –

with the liberation occurring at the point all of the funds are moved from *"a reputable, safe pension scheme…into a scheme which is in some way fraudulent"*. To interpret this any other way would mean that TPR had devised guidance which wasn't protecting the consumers who were most severely hit by fraudulent liberation activity.

2011 FSA Warning

- This service had previously referred to an FSA warning to consumers dating from 2011 about transfers to QROPS. I had unreasonably dismissed this evidence saying it wasn't copied to firms at the time (unlike later FCA warnings). All FSA regulated firms ought to have been monitoring what their regulator was saying.
- Even though this announcement didn't specifically direct Prudential to put due diligence procedures in place in 2011, it provided sufficient information for it to be aware of the type of approaches and fraudulent situations their customers may face.
- It made specific reference to full overseas transfers to QROPS being utilized in the context of pension liberation. Only the 4th point of the consequences described related specifically to early release pension liberation, whereas the first point made direct reference to the "deals" being *"a complete scam and you will lose your entire pension".*
- TPR's 2013 Guidance was published by TPR in conjunction with the FSA, who had earlier issued the warning in 2011.

Interpretation of "warning signs" in TPR's action pack

- I'd adopted an overly literal interpretation of the action pack, which was contrary to my earlier finding that the overall tenor of the pack was *"essentially a set of prompts and suggestions, not requirements".*
- The pack, probably deliberately, didn't reference specific receiving scheme structures it wanted pension professionals to pay particular attention to. An important feature of any scam is that fraudsters constantly change the structures they work through.
- Whilst there was a focus on multi-member trust based UK occupational schemes, page 9 refers to a self-invested personal pension (SIPP).
- Taking a 'legalistic' interpretation leads to a perverse situation where a UK registered scheme intending to send part of the consumer's funds overseas is a warning sign. But if a consumer was moving to a scheme that was in itself overseas – which was much easier to identify – ceding schemes were entitled to ignore this.

Prudential should have spotted wider concerns in any event

- To reach the conclusion I have means that Prudential would have done no more than it would have done in scrutinising Mr T's transfer before the introduction of the Scorpion guidance in February 2013.
- Where there were well evidenced signs of some type of fraudulent / liberation activity, the FCA Principles and Rules didn't allow Prudential to adopt a narrow interpretation of the 2013 action pack, which was contradicted by wording elsewhere in TPR's press release.
- The transfer documentation showed no clear rationale for Mr T to move his pension provision overseas, such as confirmation of an overseas address.
- The Harbour QROPS being recognised by HMRC for more than a year didn't address these concerns. There was always likely to be a fairly lengthy period of time between a receiving scheme accepting pension funds and any fraud / liberation becoming known.
- No written pension transfer request will state this, but the most clearly obvious evidence of likely cold calling is the known presence of unregulated introducers/advisers. Prudential knew that Mr T had been contacted by / advised by at least two of these firms.
- There is no other explanation for the involvement of the UK and Czech-based firms. If Mr T had sought out an adviser to help him transfer his pension, that adviser would have been involved throughout the transfer.

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.

I've taken into account the relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive I've reached my decision based on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and wider circumstances.

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

Before I explain my reasoning, it will be useful to set out the environment Prudential was operating in at the time with regard to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- The Pensions Schemes Act 1993 and Personal Pension Schemes (Transfer Values) Regulations 1987 generally give 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, which is either registered with HMRC for tax purposes or is a QROPS.

- A QROPS must already be an overseas pension scheme, defined in short as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. Then it must be recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.

- To further be a QROPS a scheme must in short notify HMRC that it is a recognised overseas pension scheme, provide appropriate evidence of this to HMRC, undertake to adhere to HMRC's requirements and not be excluded by HMRC from being a QROPS. Schemes that have notified HMRC of this are included in a published list on HMRC's website.

- On 10 June 2011 and 6 July 2011, the Financial Services Authority (FSA) issued two announcements in quick succession to consumers. The first was about "pension unlocking" (later termed pension liberation from January 2012) and specifically referred to consumers transferring to new occupational schemes in order to access cash via loans from their pension before age 55. The second was about "early pension release schemes" and said that consumers had been approached by firms out of the blue through cold-calling or websites. It said firms may offer to do one or all of the following:

  "• To transfer your existing personal pension plan to a Qualifying Registered Overseas Pension Scheme (QROPS) or overseas pension structure to avoid you paying UK tax.
  • To transfer your existing pension to an alternative provider that will arrange for the money to be invested overseas, such as in property abroad. By doing this, the provider may claim that investing overseas is 'SIPP compliant', meaning you won't have to pay tax on the investment.
  • To receive cash from your personal pension plan ahead of your retirement. This may involve you handing over the control of your personal pension to an alternative provider as security for a loan or to sell your pension outright in return for cash."

- The FSA highlighted "*the possibility that these deals are a complete scam*", and the high fees and tax penalties in addition to potentially losing the entire pension. It said, *"Most of the alternative pension providers and their pension structures, including your investments,* *are usually based overseas so that the UK authorities have no way of controlling what they are doing. Making any changes to your pension arrangements is high risk. We encourage you to always use FSA authorised firms to provide your personal pension plan, give you advice on and help you with your pension. Remember, if the firm is not authorised by us, you will not have access to the Financial Ombudsman Service or Financial Services Compensation Scheme (FSCS) if things go wrong."*

- At around the same time TPR put up a notice on its website describing 'pension liberation' in a similar way to the first FSA announcement above. This referred to websites and cold callers that encouraged people to transfer in order to receive cash or access a loan. TPR's press release referred to this in February 2012, including quotes from the FSA who supported the initiative. However it was designed to raise public awareness about pension liberation, and remind trustees of their duties to members, rather than introduce any specific new steps for transferring schemes to follow.

- This changed when TPR launched its Scorpion campaign on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide specific guidance to scheme administrators on dealing with transfer requests in order to help prevent this activity. The FSA endorsed the guidance. I cover the Scorpion campaign in more detail below.

- Personal pension providers such as Prudential aren't regulated by TPR; they're regulated by the FCA (and FSA prior to April 2013). As such, they're subject to its 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 transfers, but the following have particular relevance to transfer requests:
  – *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;
  – *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 Scorpion campaign

The Scorpion campaign was launched on 14 February 2013 and the guidance was updated a number of times over the next few years (although not soon enough to impact the completion of Mr T's transfer). The 2013 Scorpion campaign comprised the following:

- A two-page insert from The Pensions Advisory Service (TPAS) designed 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 the following warning signs: being approached out of the blue by phone or text; pushy advisers or 'introducers' who offer upfront cash incentives; companies offering loans, saving advances or cash back from a pension; and not being informed about the tax consequences of transferring. It concludes by recommending actions that could be taken to avoid becoming a victim of such activity – pointing out that any financial advisers should be showing on the FCA's online register. TPR said at the time it wanted to see the use of the Scorpion insert in transfer packs become best practice.

- 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 which included case study examples of liberation. On page eight, it specifically said transferring schemes should “look out for” the following warning signs:
  - Receiving scheme not registered, or only newly registered, with HMRC
  - Member is attempting to access their pension before age 55
  - Member has pressured trustees/administrators to carry out transfer quickly
  - Member was approached unsolicited
  - Member informed that there is a ‘legal loophole’
  - Receiving scheme was previously unknown, but now involved in more than one transfer request

  ‘Transfers overseas’ was not on this list, but was referred to as a warning sign in one of the three case study examples – involving a UK registered pension scheme whose trustees were subsequently removed by TPR.

Not all of these warning signs would have been apparent from the information the ceding scheme had at the outset. But if any already were, the action pack provided a checklist 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 contact members, which could also establish answers to more of the questions on the checklist. Template wording was given for a warning to members, however this focused on the tax consequences of making an unauthorised payment from early access to the funds. They could also send members the (longer) booklet; direct them to TPAS or Action Fraud; consider delaying the transfer or seeking legal advice; or alert Action Fraud where there were concerns that a member was insisting on a transfer.

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 legal 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 like Prudential need to do?</u>

TPR had set a clear expectation in February 2013 that it wanted issuing the Scorpion insert as part of the transfer pack to become best practice. In my view sending the insert to members asking to transfer their pensions was a simple and inexpensive step for providers to take, and one that wouldn't have got in the way of efficiently dealing with transfer requests. I therefore think it reasonable for the Scorpion insert to have been sent to transferring members as a matter of course with transfer packs.

The contents of the Scorpion insert were directed towards consumers themselves and contained warnings about dishonest intermediaries who might be trying to scam them. It would have defeated the purpose of the insert if, instead of sending it to their member, a provider sent the insert to an intermediary in the hope that that intermediary would then share the insert with the member. I therefore consider it fair and reasonable to say the insert had to be sent direct to the member, rather to an unregulated third party.

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

In any event, 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 (and I note here that the 2013 version of the guidance itself was confined to pension liberation fraud) – 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 of any sort, 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>What did Prudential do and was it enough?</u>

The Scorpion insert

Prudential considers that it was acceptable for it to include this insert in the transfer pack it sent to the third party (AC), as it did so with Mr T's express authorisation. I think it would have been good practice for Prudential to itemise the inclusion of this insert in the transfer pack, but I'm aware that it has provided some evidence centrally to this service of a work order requiring this from November 2013 onwards (and the numbers that were printed, albeit not covering the time of Mr T's transfer).

Although that leaves me with some residual doubt as to whether this work order was sufficiently understood to be a comprehensive part of Prudential's processes by 10 March 2014 – when Prudential supplied the transfer pack – I don't think I need to determine that point here. The reason for this is that the transfer pack, and therefore the insert if included, went to AC rather than Mr T.

I've explained above why, given the purpose of the insert, it wasn't reasonable for Prudential to rely on AC passing it on to him. In my view it doesn't matter that TPR didn't spell this out in its guidance, both given the non-binding nature of this guidance and also Prudential's wider obligations to its own regulator, the FCA, to act in Mr T's best interests and treat him fairly.

At the same time, Mr T has said he would have had difficulty following the messages in this insert without the assistance of others. Even with the benefit of such assistance, many of the messages in the insert wouldn't have echoed with what he was doing.

The whole first page of the insert was referring to pension access before the age of 55. Mr T has mentioned nothing that would suggest he was offered this, and in fact waited until the minimum UK pension age (55) to do so. The insert doesn't mention QROPS or transferring overseas at all, underlining that it wasn't the focus of the campaign at that time.

There are also messages about not providing information to cold-callers, and ensuring that any advisers are registered with the FCA. On balance, given that much of the leaflet didn't engage with what Mr T was doing, I'm not persuaded that he would have taken all these steps and aborted making the transfer, on the strength of Prudential directly sending him the Scorpion insert alone. So even though Prudential failed to send him this insert, I don't think that changes the outcome of the complaint.

Due diligence

Prudential set out that its process for a QROPS transfer at the time would involve checking that the receiving scheme was recognised by HMRC. In Mr T's case it had a copy of a letter from HMRC to Harbour confirming that it had recognised the scheme more than a year previously. And it also re-checked HMRC's published list of QROPS at the time the transfer was made, to make sure HMRC hadn't withdrawn that recognition.

These steps ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr T's statutory right to transfer. Prudential's argument seems to be that it was therefore obliged to make the transfer and there was no wider duty to enquire into Mr T's intentions by making it. Mr T on the other hand says there was such a duty on Prudential.

I've considered to what extent the steps Prudential took would reasonably have satisfied it there were no concerns in terms of TPR's Scorpion guidance. Of the items listed as warning signs on page eight of the action pack, the Harbour scheme wouldn't have stood out as being newly registered (i.e. recognised) by HMRC. Prudential also had no information to suggest Mr T had been cold called, was accessing his pension early or had been offered incentives to transfer.

Mr T suggests that it ought to have been apparent that he was liberating his pension in a wider sense, because he was making an inappropriate investment that might result in the loss of his entire fund. However, that wasn't the main message given both in the action pack and insert at that time, of consumers receiving upfront offers of cash. In my view if TPR intended ceding schemes to "look out for" these wider signs, that would have been reflected in the list. As I've mentioned in my recent Provisional Decision, there was more of a focus on the nature of the investment being made in the July 2014 update to the action pack. However, Mr T's transfer had been completed by that date.

In my view, what TPR was asking ceding schemes to focus on in February 2013 is more relevant here than the content of the July 2011 FSA warning. As I've said before, I've not been able to establish that pension providers' attention was specifically drawn to that warning. However, even if I accept that Prudential was aware that some consumers had suffered losses as a result of transferring to a QROPS, that's not the same as saying that *all* QROPS transfers had to be placed under suspicion as soon as the January 2013 Scorpion campaign gave ceding schemes a new role to carry out due diligence. To my mind that would have disturbed the balance I've set out above between a consumer's right to make a legitimate transfer and those areas in which the threat of liberation activity was greatest.

Instead it was appropriate for Prudential to concentrate on which transfers (including those to QROPS) were at greater risk of liberation. It was clear from the focus of the first iteration of the Scorpion campaign that TPR thought that the greatest risk lay with schemes that had only recently been registered/recognised by HMRC, and/or the member was given an unsolicited offer of early access to cash. That's for good reason, because a scheme which had remained on HMRC's QROPS list for a longer time without issue was less likely to be involved in this sort of activity.

Whilst I understand Mr T's point that it can take many years to identify that a transfer involved a fraudulent investment and not early release pension liberation, that doesn't change the position in my view that a scheme which was recently established and recognised by HMRC was at more risk of becoming involved in *any* type of scam. And I think that was why the focus in the action pack current at the time of Mr T's transfer was on this.

So, it doesn't follow that a transfer to a QROPS automatically became something to be suspicious about during this early phase of the Scorpion guidance – or something that should, as a matter of course, have prompted Prudential to conduct further due diligence of the type Mr T is arguing for. That depended on what other warning signs of liberation were apparent, not just the nature of the scheme Mr T was transferring to. And I don't think the 2011 FSA warning alone provided enough of a basis for Prudential to expect that *any* QROPS transfer wasn't going to be in its clients' best interests.

Mr T says I've adopted an overly literal interpretation of the action pack, which divorces the reference to an overseas transfer in one of the case study examples, from what Prudential was expected to look out for on page eight. However, it's clear from the context that this reference was to a UK scheme, which had facilitated early-release pension liberation (of the nature the action pack was focusing on), and then moved funds overseas to make them difficult to track down.

As Mr T points out, SIPPs are mentioned in the action pack's checklist – but specifically those SIPPs which are not authorised by the Financial Conduct Authority. A QROPS in another EU country will generally be authorised by the equivalent regulator to the FCA in its country of establishment, in order to qualify for that definition. So I don't think this changes what was the focus of the Scorpion campaign at the time on early access to cash sums.

I appreciate that scams are always changing, but I don't agree that it's a question of Prudential 'ignoring' that a transfer to a QROPS could potentially represent a liberation risk. Rather, it was expected to follow the substance of TPR's recommendations and I can't fairly say that, before July 2014, these expected it to flag up all QROPS transfers. Again, I think the answer lies in what other warning signs of liberation activity were apparent at the time.

Just because other warning signs weren't apparent here, that doesn't mean Prudential should have been doing no more than it would have done prior to the Scorpion guidance being introduced. If Mr T's QROPS had only been recognised for a matter of months – or Prudential perhaps became aware that Mr T was accessing his pension early or receiving a cash incentive – then the further steps in the action pack would have been engaged. I have to bear in mind that providing the Scorpion insert would also have given Mr T an opportunity to raise concerns with Prudential himself if he *was* getting early access to cash. It's simply that in this case he wasn't.

Mr T says other warning signs *were* apparent, but I don't agree. It's usually the case that a transfer is requested directly by the ceding scheme, not an adviser or introducer. So, it's rare that the ceding scheme will see evidence of an adviser continually involved throughout the process – and I don't think the absence of such evidence was of itself remarkable. AC was an unregulated firm and appeared again towards the end of the process, but Prudential simply couldn't know – unless it a reason to ask flowing from the Scorpion guidance – whether AC advised Mr T, or what other advisory firms were involved. The footer of AC's email indicated that it would refer Mr T to *"external authorised and regulated advisors."*

As Mr T was transferring to a QROPS, it wouldn't be unusual that overseas parties would be involved as well as the UK firm. The name of a Czech firm didn't necessarily mean this firm had advised Mr T either – its role might have been limited to certifying his passport, as the only evidence Prudential likely saw suggests. Even though this firm is named on the QROPS application, Mr T also doesn't have a recollection of how it was involved.

I'm far from persuaded that the presence of other parties amounts to knowledge Prudential had that Mr T had been cold called. And I don't think there would have been a purpose to Prudential attempting to piece together the very limited information it had about who might have advised Mr T. The action pack set out a framework under which it would have got to the bottom of that matter by asking Mr T, but only if the circumstances warranted it (because the transfer had been deemed at heightened risk of liberation activity). And in this case, the circumstances didn't warrant such enquiries of Mr T.

Mr T's remaining point is that Prudential should have formed a view that he was unlikely to have a valid reason for transferring his UK pension to a QROPS, because he didn't give any indication he'd moved abroad. However at the time (unlike today) there wasn't a specific tax charge levied by the ceding scheme because someone transferred their pension overseas whilst remaining resident in the UK.

Whether it was appropriate for Mr T to be transferring his pension to Malta was, in my view, a financial planning matter – and not one in which Prudential was in a position to intervene. Without a reason to suspect that the transfer was in some way connected to pension liberation – the threat Prudential was tasked with identifying at the time of Mr T's transfer – I don't think it had sufficient reason to question what Mr T's reasons were for establishing the QROPS, or the reason for any other parties' involvement.

My final decision

Whilst I appreciate this will come as a disappointment to Mr T, I do not uphold this complaint or make any award. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 28 May 2024.
Gideon Moore
Ombudsman