DRN-5036413

The complaint

Mr P, with the help of a professional representative, has complained about a transfer from his Aviva Life & Pensions UK Limited (Aviva) pension policies to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in Malta in August 2014. The QROPS was subsequently used to invest in, amongst other things, Dolphin Capital Loan notes and the investment now appears to have little value.

Mr P says Aviva failed in its responsibilities when dealing with the transfer request. He says it should have done more to protect him and to warn him about the potential dangers of transferring his pension. Mr P says as a consequence of Aviva's failings, he proceeded with the transfer and says he has lost out financially as a result.

What happened

As a helpful summary, the available documentation shows the involvement of the following businesses or firms in Mr P's transfer:

- Servatus Ltd (Servatus) – an advisory firm regulated by the Central Bank of Ireland and an approved introducer to the Harbour Pensions QROPS. Servatus was at the relevant time also shown on the Financial Conduct Authority's (FCA) register as authorised in the UK with passporting rights.

- Harbour Pensions (Harbour) – a pension trustee regulated by the Maltese Financial Services Authority.

- SEB Life (SEB) - the trading name of SEB Life International Assurance Company Limited, part of the SEB Group, regulated by the Central Bank of Ireland. It is a life assurance company incorporated and regulated in Ireland, engaging in the cross-border distribution of insurance-based investment products.

- Portia Financial Limited (Portia) – There is no exact match on the FCA Register. There is a record of Portia Financial Services but this firm ceased to be authorised in 2007. There is also an entry for a Portia Financial Services Ltd and this firm was for a while an appointed representative of Quilter Financial Services Ltd (a firm regulated by the (FCA). However, it ceased to be regulated as an appointed representative on 16 March 2011, well before this transfer took place.

- Dolphin Capital (Dolphin) (now called German Property Group) – a German business which offered high yielding Loan Note investments often offering over 10% investment returns per year.

  Its underlying business was described as the renovation of derelict properties in Germany to provide residential accommodation.
  Dolphin Capital is now in insolvency proceedings in Germany, having collapsed in 2020 owing significant amounts to investors. There has been a total loss on all non-matured Loan Notes.

Mr P has a separate but linked complaint about a pension policy he held with another provider which he transferred to the same QROPS around the same time as this one with Aviva. I've considered both complaints together as the evidence provided on each one has relevance to both.

In 2014, Mr P held two pension policies with Aviva. He was 37 years old at the time. Mr P says he was cold called by a business called Portia. He says he remembers filling out a questionnaire at some point – perhaps on a plane – in which he indicated he was interested in retirement planning. He says it's possible Portia got his details from this and is how the contact came about.

Mr P says he was then visited at home by a representative of Portia and during the meeting he was advised to transfer his pension to a QROPS and invest in Dolphin in readiness for retiring abroad. He says Servatus were also involved, but he thinks Portia gave the advice. Mr P received a written recommendation to transfer from Servatus.

On 27 June 2014, Aviva received a letter of authority and a request for information from Servatus about Mr P's pension. This would suggest that Mr P's phone call and meeting with Portia happened shortly beforehand. On 4 July 2014, Aviva replied and provided Servatus with the information it requested including the necessary discharge or transfer form.

On 28 July 2014, Mr P completed the QROPS application form in which the name of a Servatus adviser was recorded as being Mr P's professional adviser. It also recorded the SEB investment platform would be used for the investments.

On 19 August 2014, Aviva received Harbour's completed transfer paperwork requesting the transfer of Mr P's pension to the QROPS. The paperwork included HMRC's confirmation of the Harbour retirement scheme was a recognised QROPS.

On 20 August 2014, Aviva carried out the transfer to the QROPS. Two amounts – just under £6,300 and just over £51,600 – were received on 22 August and 25 August 2014, respectively. Towards the end of November 2014, Mr P's pension with his other provider was transferred to the QROPS – an amount of just over £35,500.

On 2 December 2014, following the transfers the combined funds were sent to SEB to be invested in an SEB Asset Management Bond - around 50% was invested in Dolphin Loan Notes, and the remainder was invested in two investment funds.

The Dolphin investment is now illiquid with the company being placed in administration in 2020. My understanding from the statements provided, is that the bond contains some liquid funds.

In July 2022, Mr P complained to Aviva. Briefly his argument is that Aviva ought to have carried out due diligence, spotted and told him about a number of warning signs or risks in relation to the transfer including being contacted by an unregulated business regarding a high-risk investment.

Aviva didn't uphold the complaint. In summary it said it followed its processes correctly. It said the scheme was HMRC registered and a recognised QROPS, so it allowed the transfer as all requirements were met at the time.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. Mr P's representative raised a number of points in response to the investigator's conclusion that the complaint shouldn't be upheld, which I will refer to and address where I think it is necessary and appropriate to do so, below.

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 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 (as some of it is here) 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 Aviva 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 that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.

- To be a QROPS a scheme must 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 about the dangers of "pension unlocking" and "early pension release schemes". At around the same time TPR put up a notice on its website termed 'pension liberation', referring to websites and cold callers that encouraged people to transfer in order to receive cash or access a loan. 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.

- 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 guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The FSA, and the Financial Conduct Authority (FCA) which had succeeded the FSA, endorsed the guidance. The guidance was subsequently updated, including in July 2014. I cover the Scorpion campaign in more detail below.

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

  - Principle 2 – A firm must conduct its business with due skill, care and diligence;

  - Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;

  - Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and

  - COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

<u>The Scorpion campaign</u>

Overview

As I've said above, the Scorpion campaign was launched in February 2013 and the guidance was updated regularly over the next few years. The guidance published in 2013 and the 24 July 2014 update are relevant in this case because, from enquiry to completion, the process by which Aviva transferred the pension to Harbour ran from late June 2014 until August 2014.

The 2013 Scorpion campaign comprised the following:

- A Pensions Advisory Service insert (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 can be taken to avoid becoming a victim of such activity. These included background searches online, pointing out that any financial advisers should be registered with the FCA. TPR said at the time it wanted to see the use of the Scorpion insert in transfer packs become best practice.

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

- An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "look out for" various warning signs of liberation. If any of the warning signs applied, the action pack provided a 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 write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

The 2014 update to the Scorpion campaign

This update reiterated much of what was stated in the 2013 version. There was again an insert which was to be sent to members requesting a transfer of their pension and an action pack which provided guidance to scheme providers on what to look out for. And there was a larger booklet which could be provided to members if they wanted more information about the matter.

However, the main change was that the 24 July 2014 update widened the focus from pension liberation specifically, to pension scams. The action pack for trustees and administrators was entitled "Pensions Scams" whereas the action pack from 2013 was entitled "Pension Liberation Fraud". And, on the front page of the 2014 insert that was to be sent to members, it said "Pension scams. Don't get stung". The 2014 update also made references throughout to "scammers" and made comments in relation to a member losing their lifetime savings as a result of being scammed, as opposed to being subject to potential tax charges which could occur as a result of liberating a pension.

Other features of the 2014 guidance:

- It stated pensions scams in the UK were on the increase. With one-off pension investments, "pension loans" or upfront cash being used to entice savers.

- Trustees, administrators and pension providers had to ensure that members received regular and clear information about the risk of pension scams and how to spot a pension scam.

- It asked for the Scorpion insert to be included in the member's annual pension statement or in any other member communications.

- It highlighted some common features of pension scams such as phrases like "one off investment opportunities", "free pension review", "legal loopholes", "cash bonus" and "government endorsement".

- It stated that consumers being approached out of the blue over the phone, via text messages or in person door-to door was a common feature of a scam.

- Transfers of money or investments overseas, were also highlighted as something to watch out for and it explained this was because the money would be harder to recover.

- It said that if any of the warning signs applied, the action pack provided a checklist transferring schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request.

- If transferring schemes still had concerns, they were encouraged to contact the member to establish whether they understood the type of scheme they were planning on transferring to and to send them the pension scams booklet.

- It also encouraged transferring schemes to speak to the member at risk – over the phone, via email or letter – this could help the transferring provider to establish answers to more of the questions on the checklist; or to direct the member to Action Fraud or TPAS if the provider thought it was a scam; or if the member insisted on proceeding the provider could contact Action Fraud itself.

The 2014 action pack also included two examples of real-life scams where the individuals concerned lost most or all of their pension savings. One of the examples involved an individual under the minimum pension age who wanted to access some of her pension early. And the other concerned an individual (again under the minimum pension age) who had been approached out of the blue with an offer for a free pension review who had been offered a "unique investment opportunity" for his pension savings specifically in a property development overseas.

The status of the Scorpion guidance When it was launched in February 2013, the Scorpion guidance was described as a cross-government initiative by Action Fraud, the City of London Police, HMRC, TPAS, TPR, the SFO, and the FSA/FCA, all of which endorsed the action pack, allowing their names and logos to appear in the action pack and Scorpion insert.

So far as TPR itself was concerned, it issued the guidance under the powers at s.12 of the Pension Act 2004, which provides:

"12 Provision of information, education and assistance

(1) The [TPR] may provide such information, education and assistance as it considers appropriate to those involved in –

(a) the administration of work-based pension schemes, or
(b) advising the trustees or managers in relation to such schemes as to their operation."

So, 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. Likewise, by and large, the contents of the action pack are framed in a way that is consistent with its stated purpose, namely as points to note or suggested actions a firm might take. For example, rather than telling firms they are expected to spot the warning signs of pension liberation fraud, the action pack lists "some of the things to look out for" and, rather than say that the presence of a warning sign requires the firm to run though the checklist, it states: "If any of these statements apply, then you can use the checklist …"

The language arguably strays into the imperative under the heading "Next steps if you have concerns", stating "Contact the member to establish whether they understand the type of scheme they'll be transferring to. Then "speak to the member at risk". But, overall, the tenor of the document is essentially a set of prompts and suggestions, not requirements. And this remained the same for the updated version of the Scorpion guidance that followed in July 2014.

Also, it would seem inconsistent to view the Scorpion guidance as representing a binding rule or legal duty on personal pension providers regulated by the FSA/FCA when such a duty didn't extend to those bodies that came under the regulator that drafted the guidance, the TPR. Furthermore, 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 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 all the above that the contents of the action pack were essentially informational and advisory in nature and that deviating from the action pack doesn't necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights.

That said, the launch of the February 2013 Scorpion guidance was an important moment in so far as 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 transfer requests. And this remained the case with all its subsequent updates. The campaign and guidance were 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 guidance.

So, taking all of this into account, I do think it's fair and reasonable to conclude providers should have recognised that the environment had changed, and more was now expected of transferring schemes. 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 Aviva need to do?</u>

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

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

2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a

transfer even if the transfer process *didn't* involve the sending of transfer packs.

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

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

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

Mr P's recollections of the events were recorded in a telephone conversation with our Investigator. Mr C remembers the following:

- He received a phone call out of the blue from Portia.
- He may have completed a questionnaire at some point indicating an interest in retirement planning, which might be how Portia got hold of his details.
- He had a meeting with Portia at his home.
- He was asked if he wanted to retire abroad, which he said he would but had no definite plans at the time. His main priority was to improve his retirement provision.
- He was told the anticipated return on his investment was 10% a year.
- He was issued a report from Servatus which recommended he transfer his pension to a QROPS and invest into Dolphin. He believes while Servatus were involved, Portia gave the advice.
- There was no pressure – no mention of a deadline and he thought it was a good investment opportunity.

I have no reason to doubt Mr P's recollections – they are in my view entirely plausible. I've seen nothing to suggest Mr P was a sophisticated investor or otherwise had the requisite knowledge or skill to invest in unregulated investments and invest in an overseas investment. This was an unusual arrangement for someone in his circumstances and I think it unlikely he would have become aware of such an option without a someone highlighting it to him. It was also not unusual that consumers were contacted in this way for a review of their pensions in order to get them to invest in Dolphin.

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

The Scorpion insert:

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

Aviva has provided a process document, which shows that it was standard practice to include a Scorpion insert with transfer pack requests / forms. But this document isn't dated, so I don't know what period in time this process relates to. Aviva sent the transfer request information to Servatus. There is no reference in the pack to a Scorpion insert. But even if one was included here, I don't know whether Mr P received it – he doesn't recall. In my view Aviva shouldn't have relied on Servatus passing it on to Mr P – it should've provided it to Mr P direct instead. I think this was a failing on the part of Aviva.

That said, given the timing of the initial request (received by Aviva on 27 June 2014) the relevant leaflet would have been the one from the 2013 Scorpion guidance. And this was focused on accessing pension benefits before the age of 55 – pension liberation. As far as I can see Mr P wasn't planning to do this. So, if he received it, I don't think it would've had much impact on Mr P on its own.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of a pension scam and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

Aviva says it allowed the transfer to go through because it met all its requirements at the time. And it appears its requirements were to check with HMRC that the scheme was registered and that it was a recognised QROPS.

But I don't think that just because the scheme was registered and recognised by HMRC meant Aviva didn't have to make further enquiries.

I say this because Aviva knew that Mr P wanted to transfer his pension into an overseas pension scheme. On 19 August 2014, Aviva received all the completed forms from Harbour required to facilitate the transfer and these documents clearly set out the scheme was a QROPs based in Malta. So, it was clear at this point in time that Mr P intended to transfer his pension to an overseas scheme, which very likely involved overseas investments.

The 2014 Scorpion Action Pack listed overseas investment as a possible warning sign of a scam. While the update had taken place only a few weeks prior to Aviva receiving the transfer request, it should've reasonably been aware of and familiar with the changes to the guidance and to have applied it to Mr P's transfer.

It's worth bearing in mind that the 24 July 2014 update to the Scorpion guidance shifted the focus away from just pension liberation to pension scams more broadly. 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.

Overall, I think that in exercising reasonable due diligence in line with its obligations under PRIN and COBS, Aviva should've followed up on the warning sign apparent to it at this time – namely that Mr P was planning to transfer his pension overseas which was a common theme of pension scams to understand more about the transfer.

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

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

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

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat.

Given the warning sign that should have been apparent when dealing with Mr P's transfer request, and the relatively limited information it had about the transfer, I think in this case Aviva should've addressed all three parts of the check list and contacted Mr P as part of its due diligence.

<u>What would Aviva reasonably have discovered?</u>

From a few simple questions, Aviva would have discovered a number of facts about the transfer from Mr P. Under the first section of the checklist, it would've likely found that the prompt for Mr P to transfer his pension to the QROPS was a cold call.

That said, Mr P would also likely have said that it was possible his details had been obtained from a questionnaire he believed he'd completed at some point prior to the call noting his interest in retirement planning. So, it might not have been a cold call in the true sense.

I also think it's likely Aviva would have learned from Mr P that, while the idea of retiring abroad sounded good, at 37 years old he had no firm or immediate plans to move abroad. And that he'd been told by one of the parties he was in contact with about the high annual returns he could expect from on an overseas property investment.

In addition to this, under the third section of the checklist I think Aviva would've discovered that Mr P had spoken to, or dealt with, two firms about this transfer and he would've explained that he had been advised to transfer his pension.

So, it would've been reasonable for Aviva to have asked Mr P who gave the advice. In these circumstances and based on what Mr P told us, I think he would've named both Portia and Servatus as being involved in the process. Mr P had obviously dealt with both firms – he'd met with Portia and then received a suitability report from Servatus. So, it's not unreasonable that he would've thought both were connected to the advice he'd received.

The Scorpion checklist recommends that, in order to establish whether a member has been advised by a non-regulated adviser, the transferring scheme should consult the FCA's online register of authorised firms. Aviva should have taken that step, which is not difficult. Had it done so it would have discovered that Servatus appeared on the FCA register as a firm that was passported from Ireland to the United Kingdom. This means that for UK purposes throughout the period of this transfer Servatus was an authorised person under s.31(1)(b) of the Financial Services and Markets Act (FSMA) 2000 and Schedule 3 to that Act.

With this information I think Aviva could've reasonably assumed that the advice would've come from only one of the firms and that was most likely Servatus. Portia had referred to Servatus for regulated advice and Servatus was the firm who then issued a suitability report. It wouldn't seem unusual for an unregulated party to introduce consumers to a regulated party for advice.

So, I think it is reasonable to assume that, if Aviva had made these inquiries, the presence of Servatus, as an authorised person advising Mr P, would've suggested that the transfer was unlikely to be a scam and that Mr P would enjoy some regulatory protections in the unlikely event it turned out to be one. Mr P's representative has raised the point that this protection would not be the same as if a UK based adviser had given the advice. It says the advice from a foreign IFA would have been unusual and should have been considered as yet another red flag Aviva failed to identify and highlight to Mr P.

I accept the regulatory protections would not come via UK's complaints and investor protection institutions, the FOS or the FSCS. But instead through its own regulator, The Republic of Ireland which also has a complaints system, financial services and pensions ombudsman and a statutory investor compensation scheme, which EU countries are required to have under the EU's Investor Compensation Directive. Furthermore, As a firm that was regulated (albeit by a home-state regulator in another EU jurisdiction) the regulatory protections included the fact that Servatus would have been held to a high standard, mandated throughout the EU, by its own regulator. And as an authorised firm, Servatus would have had to follow the applicable European regulatory standards and conduct its practice in accordance with those standards.

Its operations would have been under some oversight by its regulator to ensure it was acting in the best interest of its client. So, it would've had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system.

In light of this, I don't think it's unreasonable that Aviva could (and would if it had checked up on Servatus' regulatory standing) have been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under United Kingdom law.

What should Aviva have done and would it have made a difference?

Aviva needed to check for the risk of pension liberation and scams in a way that was proportionate to the warning signs. I think the knowledge Mr P was being advised by a properly authorised adviser in this case reasonably would've given Aviva comfort the transfer was unlikely to be a scam. In the circumstances, I consider it would've been proportionate for Aviva to undertake no further due diligence. So, it follows it neither had reason to provide Mr P with explicit warnings, nor to delay the transfer further.

That said, as I referred to earlier on, Mr P ought to have received the general warnings about pension scams included in the Scorpion insert at some point during his transfer process. I think this should've been when the transfer pack was request. And this would've been the 2013 insert. But as this insert only concerned pension liberation, as I concluded earlier on, and despite what Mr P's representative argues that he would've been concerned by the leaflet, I don't think it would've had much impact on its own.

And even if Aviva had gone further and sent the 2014 insert to Mr P later in the process – for example when the transfer request was received – I don't think this would've changed his mind about proceeding with the transfer. The insert warned again about cold calls and offers of a pension review to lure customers into one-off investment opportunities which Mr P might have recognised as warnings signs in his transfer – although perhaps not, given Mr P said the initial contact might have come from him showing an interest in retirement planning from completing a questionnaire. The insert referred to more information being available about pension scams on TPR's website. But the information at the time on that website for customers still warned of accessing pension benefits early ('cashing in') or being promised more tax-free cash, both of which didn't apply to Mr P. And the recommendation was to seek advice from a regulated adviser. So, I think Mr P, just like Aviva, would've taken comfort from the fact that a regulated adviser had advised him. So, I think it's unlikely the contents of these documents, had Aviva sent them to Mr P, would've likely changed his mind about transferring.

Summary

Overall, I find that Aviva neither fulfilled its obligations under PRIN and COBS, nor did it follow the Scorpion guidance in not sending Mr P the Scorpion insert. This should have been sent directly to Mr P as a matter of course. Aviva should also have made further enquiries when it was evident the transfer was going overseas.

But if Aviva had done that, I think it would've been reassured by the presence of a regulated firm which was advising Mr P on the new arrangements for the investment of his pension. I can see Mr P's representative has said that Aviva should've noted that Mr P was based in the UK with no intention of moving abroad, so a QROPS wasn't a reasonable product for him. But whether it was a reasonable / suitable product or not wasn't Aviva's responsibility to determine or pass a value judgement on. That was the role of the adviser. And upon discovering Servatus gave Mr P advice to transfer to the QROPS and discovering it was a regulated firm that was passported from Ireland into the UK, Aviva could've reasonably assumed that Mr P's *regulated* adviser was acting in his best interests and would've made him aware of the relevant risks and issues.

So, given ceding schemes had to undertake *proportionate* due diligence, it would've been reasonable for Aviva not to have raised a concern with Mr P that he might be the victim of a scam, once the presence and role of Servatus was discovered.

Even if Aviva had taken all the steps I've said it should have taken, those steps would not have resulted in Aviva reasonably needing to give him further warnings. So, it follows that Mr P would've still gone ahead with the transfer.

Finally, I'd like to briefly address two further points Mr P's representative raised in response the Investigator's view. They referred to causation and said we had provided no evidence why Mr P would've disregarded Aviva's concerns and would've still transferred even if it had carried out due diligence. And they said given Aviva's failings, as a minimum it must contribute to Mr P's losses.

I've explained above that if Aviva had carried out further due diligence, which it ought reasonably to have done, there would've been no reason for it to give any warnings or raise concerns with Mr P – beyond the issuing of the Scorpion insert I've already referred to.
So, there would be no reason in the circumstances why Mr P would've acted differently and not gone ahead with the transfer. And because I've found Mr P wouldn't have acted any differently, it follows that Aviva doesn't need to do anything to put things right.

So, while I understand Mr P has lost out financially by investing in high-risk investments, which were likely unsuitable for him, in the circumstances and for the reasons I have set out above, I don't think it is fair and reasonable for Aviva to put right those losses.

My final decision

For the reasons above, I've decided to not uphold this complaint, so I make no award in Mr P's favour.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 November 2024.
Paul Featherstone
Ombudsman