DRN-5056099

The complaint

Mr R has complained about a transfer from his Aviva Life & Pension UK Limited (Aviva) pension to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in 2014. The transfer enabled the pension fund to be invested in an unregulated overseas investment which Mr R says has caused him significant loss. Mr R says Aviva should have done more to protect him and to warn him about the potential dangers of transferring his pension.

Mr R is represented by a claims management company (CMC), which has made various arguments on his behalf. For simplicity, however, I'll refer to all submissions made on Mr R's behalf as being from Mr R except where necessary.

What happened

Available documentation relating to the transfer, or other proposed transactions that didn't proceed, shows the involvement of the following firms:

- 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.

- Henderson Carter Associates Limited (Henderson)– a UK regulated adviser firm at the time – now in liquidation

- The Pension Specialist Ltd – shown on the FCA register as a trading name of Douglas Baillie Limited, which was authorised and regulated by the FCA until 2016.

- Portia Financial Limited (Portia) – There is no exact match on the Financial Conduct Authority's (FCA) Financial Services 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 the transfer in this case 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 R held a group stakeholder pension plan with Aviva from April 2003. In August 2014, he asked Aviva to transfer this pension to the Harbour Retirement Scheme QROPS (Harbour). At the time, he was 54 years of age, had been unemployed since around 2009 and was reliant upon state benefits. From information collected at the time of the transfer by Servatus he held no other pensions and only had savings of around £20,000 that were a redundancy payment he had received in 2009. He's also said that he wasn't planning to move abroad.

Mr R says he was cold called in early 2014 by a company offering to review his pension arrangements. In a telephone call with this service, Mr R initially said this call came from Harbour. He later corrected himself and stated the call came from Portia. He said he was then introduced to an advisory firm based in Ireland called Servatus and a representative of Portia came and spoke to him about his pension.

Mr R has stated that both Servatus and Portia advised him to invest in an overseas property investment scheme, the German Property Group - formerly known as Dolphin. Mr R says they told him he would make more money on his pension than if he left it where it was. Mr R was advised to transfer his pension to a QROPS scheme based in Malta – Harbour - within which the investment into Dolphin was to be made.

The transfer of just under £37,000 to the QROPS was completed on 1 September 2014. Within the QROPS, around £25,000 was placed in an Asset Management investment bond with SEB Life. The bond was invested in Dolphin Loan Notes, an investment account and into a variety of funds within another platform provider, WH Ireland Limited Investment Account.

The Dolphin investment is now illiquid with the company being placed in administration in 2020.

From statements dated April 2022 it appears that aside from the Dolphin investment the bond still contains some liquid funds.

It also appears that from the bank ledger information provided Mr R took his 25% tax free cash sum in February 2015.

Over the relevant period, Aviva not only received and actioned the pension transfer request from Harbour. It also received separate requests for information and responded to these from two other firms, The Pension Specialist and Henderson Carter Associates (Henderson).

Below is a timeline of events leading up to the transfer.

- 10 June 2013: Aviva received a faxed request from The Pension Specialist, for information about Mr R's pension, along with a letter of authority (LOA) signed by Mr R on 9 April 2013.
- 11 June 2013: Aviva sent pension information to The Pension Specialist along with transfer forms.
- No transfer of a pension was made following this and The Pension Specialist appear to have had no further dealings with Mr R or his pension.
- Early 2014: Mr R was cold called by a firm (which, as above, he stated was initially Harbour but then corrected himself stating it was Portia). He was offered a free review of his pension. Mr R was put in touch with Servatus and a representative from Portia was sent to meet with him at his home.

- Mr R says he was advised by both Servatus and Portia to transfer to a QROPS and invest in Dolphin Trust loan notes.
- 11 February 2014: Aviva wrote to Mr R providing information about his pension, a transfer quote and enclosing transfer forms. Records show Mr R requested this information in a call, but it's not clear when this call happened.
- 30 May 2014: Mr R completed the application for the Harbour Retirement Scheme. Within this document, Servatus is recorded as being his professional adviser.
- 11 June 2014: Aviva received a letter of authority (LOA) dated 10 June 2014signed by Mr R giving Harbour permission to obtains information about his pension, along with a request for information about Mr R's pension. The request made it clear the intention was to transfer the pension to a QROPS.
- 23 June 2014: Aviva wrote to Harbour providing information about Mr R's pension along with a transfer quote and transfer forms.
- On the same date, in a separate letter, Aviva wrote to Harbour to acknowledge the transfer was to be to an overseas scheme. It asked for HMRC's letter confirming the scheme was a QROPS.
- 11 July 2014: Aviva responded to a request for information about Mr R's pension from Henderson, an independent financial advisory firm. The date that this information had been requested by Henderson isn't clear, as Aviva refers to an email from Henderson dated 8 July but the pension enquiry form is dated 21 May 2014.
- 28 July 2014: Servatus' suitability report, addressed to Mr R, referred to Mr R meeting with Portia and stated the report provided general information on retirement planning as well as a recommendation around his existing retirement plans. The report set out Mr R's financial position and addressed Mr R's personal pension arrangements and an alternative option – the QROPS. It also included information on a "high yielding" investment in Dolphin Capital, recommending that Mr R invest half his pension money in Dolphin's high-yielding debt securities and the balance in two conventional investment funds including the asset management bond. As well as this it explained some of the risks involved in making the recommended investments, including the risk of investing in loan notes which didn't require licensing or registration with the regulator, the risks of not being able to recover the original investment and general risks of investing into property including liquidity, currency and legal risks.
- 19 August 2014: Harbour wrote to Aviva with the completed and signed discharge forms, the relevant HMRC forms all completed and signed, confirmation the scheme was recognised by HMRC, bank transfer details for the scheme and proof of Mr R's identity and address.
- 28 August 2014: Aviva completed the receiving scheme QROPS check – HMRC confirmed the scheme was recognised. The effective transfer date was locked in.
- 1 September 2014: the transfer was completed and backdated to 28 August 2014.

<u>Mr R's recollections about what happened</u>

Mr R says he was cold called while he was on holiday. He's said he had never spoken to the caller before and didn't know how they got his number. He said he was told that if he transferred his pension he would get his 25% tax free cash amount upfront and the rest would be invested overseas, in Malta. He also said he was told he would get his money back with interest after five years.

As above, Mr R told our investigator when he initially made the complaint to our service that he was cold called by Harbour. When asked again through his CMC Mr R stated that it was Portia that cold called him and he had forgotten the name of the firm when he spoke to the investigator.

Mr R said he was told the process “would only take five minutes”. He said that he was told if he didn’t do it now, he wouldn’t get the returns. When the investigator asked Mr R about whether he had seen the Scorpion insert from The Pensions Regulator (TPR) detailed later in this decision, he said he hadn’t. When presented with the insert, Mr R said he wouldn’t have gone ahead with the transfer if he had seen it at the time. Mr R also stated that he didn’t specifically remember signing the letter of authority for Harbour in June 2014. But he does remember someone coming to his house and that he signed some documents to “get the cash”.

When asked about the suitability letter addressed to him by Servatus, completed at the time of the transfer, Mr R said he doesn’t recall ever receiving any documents discussing the risks involved. But he had told Servatus that he was a low risk-taker. He said Servatus assured him that the investment and transfer would be suitable for his needs and requirements. He said he didn’t sign anything to confirm the risks had been discussed or that he understood that there were any risks associated with the transfer or the investment.
Mr R said that between 2013 and 2014 he was receiving multiple calls from firms informing him of the benefits of investing his pension in line with their recommendations and how to access his tax-free cash. He doesn’t remember the specific relationship with The Pension Specialist or Henderson at the time due to the significant influx of contact from firms regarding his pension.

Mr R has also said he doesn’t recall requesting a transfer prior to September 2014. And he only became interested in moving his pension due to the advice process and the information/reassurances that were provided to him at the time.

Points of complaint

Mr R complained to Aviva in January 2020 saying that Aviva failed to carefully assess the transfer and failed to identify any potential warning signs from TPR’s guidance to prevent pension scams, namely:

- The involvement of unregulated introducers.
- He’d been cold called and offered a ‘free pension review’.
- The receiving scheme was based overseas.
- There was a lack of (UK) regulated advice.
- The proposed investment in the scheme was unregulated and high risk.
- He’d been told that he could expect to see returns on his investment that ought to have looked unrealistic to Aviva.

Mr R said, had Aviva identified the presence of these warning signs and given him appropriate warnings, he would not have gone ahead with the transfer.

Aviva’s response to the complaint

In its final response letter Aviva stated that it wasn’t its responsibility to assess whether the transfer was a good idea. It explained that as the Harbour Pension Scheme was recognised by HMRC it had no reason not to carry out the request at the time. It also said that it would only get involved in questioning a transfer request if it believed the request was fraudulent or a scam. And it would have gotten in touch with Mr R if it had thought something was wrong but in this case it had no cause for concern.

Aviva also stated that it appeared Mr R was receiving independent financial advice at the time from Henderson. Therefore, while there was no explicit information in the transfer paperwork that Henderson advised Mr R to transfer, given the timing and the almost immediate transfer request following the request for information, it felt it was fair to assume Henderson was involved.

I issued a provisional decision in July 2024 where I set out why I felt the complaint couldn't be upheld. An extract is set out below and forms part of this decision:

The relevant rules and guidance

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.*

The Scorpion campaign

Overview

As I have 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 early 2014 until September 2014 (almost six weeks after the July 2014 update).

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 betaken 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.

Therefore, whilst I don't think personal pension providers had to follow all aspects of the Scorpion guidance in every transfer request, I do think they should have paid heed to the information it contained; and, where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable to expect pension providers at least to follow the substance of those recommendations. I look at what this means in practice in the next section.

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

TPR said it wanted to see the use of the Scorpion insert in transfer packs become best practice. Sending the insert to customers asking to transfer their pensions was 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. I therefore think it reasonable for the Scorpion insert to have been sent by pension providers to transferring customers 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 customer, pension firms sent the insert to an intermediary in the hope that that intermediary would then share the insert with their client. I therefore consider it fair and reasonable to say the insert had to be sent direct to the member rather than, say, to an unregulated introducer.
Under the 2014 Scorpion action pack, firms were asked to look out for the tell-tale signs of pension scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The action pack points to the scam warning signs 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 transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.

Furthermore, 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>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.

In this instance, Aviva has said that the Scorpion insert would have been sent to Mr R when he requested information about his pension and the transfer value. It has said the insert was placed in envelopes when the transfer documents were sent and has provided a copy of a document they refer to as a "Trf Doc Spec" which shows which documents were sent out with each type of correspondence. The enclosures which were to be included with the transfer quote and other forms are listed in this document and it is stated that "pack 1" should "always have TPR booklet on pension scams inserted/included". However, this document, while informative, is dated 2015 and Aviva hasn't been able to provide anything that confirms the process in 2014. So based on this I am not satisfied that the correct Scorpion insert would have been included in the transfer pack that was provided to Mr R or that it was sent to him directly.

Aviva also said that as it had received a number of information requests from a variety of IFAs it had reasonably presumed that Mr R had appointed one as his adviser. So, it feels that one of these firms would have provided Mr R with the Scorpion insert. It said this would have been reasonable and sufficient because TPR guidance doesn't say anything about having to send a Scorpion insert – it just states a member must be made aware of possible scams and one way of doing this is the Scorpion insert. It also says that it doesn't state anywhere this has to be sent directly to a policyholder.

I have considered Aviva's interpretation of the guidance from the time, but my view is, for reasons set out above, whether Mr R was being advised by a regulated IFA or not (which I will come on to later in this decision) it would have been good practice and an easy step for Aviva to have sent him the Scorpion insert directly to Mr R when it received the information request from Harbour in June 2014 or to have made Mr R aware of possible scam activity and risks in any other way, which I can't see it did.

So overall, I am of the view Aviva should have sent Mr R the Scorpion insert. Having said that, given the timing of the initial request, this would have been the one from the 2013 Scorpion guidance which was focused on accessing pension benefits before the age of 55. As far as I can see Mr R wasn't planning to do this, so I don't think the warnings in the insert would have resonated with him and therefore unlikely would have made a difference to his transfer decision even if he had received it

Due diligence

Aviva has said that it went ahead with the transfer without contacting Mr R for further information because it had seen the scheme was a QROPS recognised by HMRC. Also, as the scheme didn't appear on any lists of schemes involved in pension liberation it was satisfied that there was no potential fraud or scam involved.

However, in my view, the mere fact Harbour was registered and recognised by HMRC wasn't enough to negate the need for Aviva to make further enquiries.

I say this because Aviva knew that Mr R wanted to transfer his pension into an overseas pension scheme. On 19 August 2014 Harbour wrote to Aviva providing all the completed forms 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 R was intending to transfer his pension to an overseas scheme, which very likely would have involved overseas investments.*

The 2014 Scorpion Action Pack listed overseas investment as a possible warning sign of a scam. Whilst the update had taken place only nine working days before Aviva received the transfer request the transfer didn't complete until September. Therefore, I think Aviva had sufficient time to have become familiar with the changes to the guidance after the update and to have applied it to Mr R's transfer before it completed in September.

In addition, Aviva has said that it was reasonable for it to assume that one of the regulated IFAs that had made previous information requests was involved in Mr R's transfer request - The Pensions Specialist or Henderson- due to the timings of the pension information requests it had received. And so they could be reassured by the fact a regulated adviser was involved. However, I disagree - I don't think it was reasonable for Aviva to make this assumption without carrying out any further checks because in my view it wasn't clear at this stage in the process that there was, in fact, a regulated adviser involved.

I say this because the information request from The Pension Specialist happened almost a year before the process for the QROPS was started. So, I think the possibility of involvement of this firm in the transfer can be discounted.

In terms of Henderson, the information request it sent to Aviva was dated May 2014 but Aviva seems to have only replied to this request in July, having referred to an email from Henderson dated a few days before in July. It isn't clear whether the request from Henderson was sent when it was dated, in May, and Aviva delayed responding until July or if the request from Henderson wasn't sent until July when it emailed Aviva. It may well be that the request was sent in May but wasn't actioned until Henderson chased the information in July. Nevertheless, Aviva thinks that because of the close timings of the information requests from Henderson to those from Harbour it was reasonable for it to assume Henderson had been appointed by Mr R to advise on his transfer from his personal pension to the QROPS.

However, the request for information from Harbour was received by Aviva on 11 June 2014 and Aviva provided the information to Harbour on 23 June 2014, quoting a call with Harbour that seems to have taken place on 20 June 2014. So, it follows that, if Henderson's request was sent when dated (21 May 2014), Aviva would have responded to Harbour's request about one month after receiving Henderson's request. Conversely, if Henderson's request for information was received by Aviva in July 2014, that was two weeks after Aviva had already responded to Harbour's request.

But neither the information request from Harbour nor the subsequent request for the funds (19 August 2014) mentioned that Henderson was involved, which I would have expected it to do if it was involved. Nor did Henderson reference Harbour or an overseas transfer. And by asking for the same information without referring to the other's involvement, the two requests give the impression of having been independently generated.

So, in short, I don't think it was clear from the information Aviva had at that time that Mr R was working with an IFA and I don't think it was reasonable for Aviva to presume, without checking, that Henderson was involved in Mr R's transfer to the QROPS.

As well as this, had Aviva looked back through its system it would have seen that Mr R had made a number of requests for transfer information about his pension over the last year through at least one other party and also himself. And also, given the number of requests made via different parties but none actually going through, I don't think it was reasonable for Aviva to have presumed that Henderson was involved in this transfer to the QROPS.

Overall, I'm of the view that in exercising reasonable due diligence in line with its obligations under PRIN and COBS, Aviva should have followed up on the warning sign apparent to it at this time – namely that Mr R 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 this would have been to turn to the checklist, from the 2014 action pack, to structure its due diligence in regard to Mr R's transfer.

This provided a series of questions to help transferring schemes assess the potential threat of a scam by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the checklist could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer.

The checklist is divided into three parts (which I've numbered for ease of reading and not because I think the checklist 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 employer or a dormant employer, is that employer geographically distant from the transferring member and 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' 'one-off investments', 'free pension reviews' or allude to overseas investments?

3. The scheme member
Sample questions: Has the transferring member been contacted 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?

Opposite each question, or group of questions, the checklist listed actions that should help the transferring firm establish the facts.

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

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

From a few simple questions directed to Mr R, Aviva would have discovered a number of facts about the transfer. Under the first section of the checklist Aviva would have likely found that the prompt for Mr R to transfer his pension to the QROPS was a cold call. In making his complaint to this Service Mr R has said from the outset that he was initially cold called. In my view his assertion is plausible because Mr R wasn't a sophisticated investor – information *gathered at the time suggests he had no knowledge or experience of investing in unregulated investments nor of how to invest in an overseas investment. This was an unusual arrangement for someone in his circumstances and I think it's unlikely he would have become aware of such an option without a different party highlighting it to him. It was also not unusual that consumers were contacted this way for a review of their pension in order to get them to invest in Dolphin.*

Mr R's recollections as to who exactly cold called him changed from Harbour to Portia, but I think it's likely, given how long ago this took place, that he initially misremembered the name of the firm when speaking to the investigator. I also think that it's unlikely that Harbour cold called Mr R because as a firm authorised by the Maltese Regulator I think it's less likely Harbour would have been involved in cold calling practices. Furthermore, based on the cases we have seen at this service and what we know about how these investments were sold, I think it's more likely an unregulated firm initially called him to establish whether he was interested in having his pension arrangements reviewed, and on balance, I think this was Portia.

I also think it's likely Aviva would have learned from Mr R that he wasn't planning to move abroad and that he had been told by one of the parties he was in contact with about the high returns on an overseas property investment and that he would be able to access a cash sum.

In addition to this, under the third section of the checklist (as above) had Aviva used this to find out more about Mr R's transfer I think it would have discovered that Mr R had spoken to a number of related firms about this transfer and that he would have explained that he had been advised to make the transfer.

It therefore follows that it would have been reasonable for Aviva to have asked Mr R who was giving the advice. In these circumstances and in light of Mr R's submissions to this service in making his complaint, I think Mr R would have named both Portia and Servatus as being involved in the process. Mr R had obviously dealt with both firms and it's likely he would have 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 have reasonably assumed that the advice would have 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 issued a suitability report. It wouldn't seem unusual for an unregulated party to introduce consumers to a regulated party for advice.

It is therefore reasonable to suppose that if Aviva had made these inquiries, the presence of Servatus, as an authorised person advising Mr R, would have suggested that the transfer was unlikely to be a scam and that Mr R would enjoy regulatory protections in the unlikely event it turned out to be one.

<u>*What should Aviva have done and would it have made a difference?*</u>

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 R was being advised by a properly authorised adviser in this case reasonably would have given Aviva comfort the transfer was unlikely to be a scam or unauthorised pension withdrawal. In the circumstances, it would have been proportionate for Aviva to undertake no further due diligence. Nor would Aviva have had reason to provide Mr R with explicit warnings, nor to delay the transfer further.*

Having said this, Mr R ought to have received the general warnings about pension scams included in the Scorpion insert at some point during his transfer process. As I have said earlier this should have been when he first requested the transfer and this would have been the 2013 insert. However, this insert only concerned pension liberation so I don't think Mr R would have thought it relevant to him.

Even if Aviva had gone further and sent the 2014 insert to Mr R later in the process, I don't think this would have 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 R might have recognised as warnings signs in his transfer. The insert referred to more information being available about pension scams on TPR's website. However, 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 R. And the recommendation was to seek advice from a regulated adviser. So, I think Mr R, just like Aviva, would have 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 R, would have changed his mind about transferring.

<u>Other arguments</u>

I acknowledge that in its submissions to this service the CMC on Mr R's behalf has relied upon the fact they believe the transfer was a scam. However, it's important to make clear that a ceding scheme didn't need to know with any certainty that a scam was in play. A ceding scheme's duties were to recognise the presence of any potential warning signs of a scam, take proportionate actions to find out more about the transfer and warn the consumer if they thought they were at risk. But in the circumstances of this complaint, as I have already explained, if Aviva had undertaken more checks it would have discovered the presence of a regulated adviser, which would reasonably have reassured Aviva that a scam was unlikely and that Mr R would have sufficient regulatory protections in the unlikely event the transfer were a scam.

<u>Summary</u>

In summary, therefore, I am of the view that Aviva didn't fulfil its obligations under PRIN and COBS, nor did it follow the guidance set out in the Scorpion guidance – in not sending Mr R the Scorpion insert. This should have been sent directly to Mr R as a matter of course. Aviva also should have made further enquiries when it was evident the transfer was going overseas. However, if Aviva had done that, I think it would have been reassured by the presence of a regulated firm which was advising Mr R on the new arrangements for the investment of his pension. And I don't think Mr R would have changed his mind about the transfer if he had received either version of the Scorpion insert.

Aviva accepted the provisional findings and provided no further comments.

The CMC on Mr R's behalf didn't accept the provisional findings. It responded with detailed comments. I have summarised its most relevant points below:

- Aviva should have told Mr R that it was unusual to transfer a pension to a QROPS unless there was an intention to move abroad and that he would be putting his pension at risk by losing UK financial regulation which meant he couldn't complain to FOS or FSCS.

- Aviva should also have told Mr R to seek FCA regulated advice because his intended investments were high risk.

- Mr R had no right to refer a complaint to the Financial Services Compensation Scheme (FSCS) and no right to use the Financial Ombudsman Service (FOS) regarding any advice received from Servatus, because Servatus had no UK branch office. Receipt of a suitability report from Servatus, therefore, provided Mr R with no better level of protection than if he had received advice from a wholly unregulated firm. There may have been a complaint process through the Irish regulatory system, but for a UK resident with an existing FCA regulated pension, that represented a move into an entirely different jurisdiction with different law and regulation.

- The provisional decision points out that Aviva should have conducted further due diligence. If it did this, it would have identified the presence of Servatus but it still should have had some concerns. So Aviva should have done more and contacted Mr R to make him aware of these points. This wouldn't have been too onerous for Aviva to do.

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.

Having considered the CMC's points carefully, I am not persuaded to depart from my provisional findings.

Firstly, a ceding pension scheme is not expected to act as a general pension adviser to a member who tells it he wants to leave their scheme. The Scorpion guidance is aimed at spotting and averting potential pension transfer scams against the member, rather than delivering general advice about the merits of different regulatory systems or high-risk investments. So, for it to be reasonable to expect a ceding scheme to have concerns and raise these with its member, there must, viewed overall, appear to be a real risk their member is falling victim to a scam. For Mr R's transfer, viewed overall in that way and if Aviva had taken the steps it should, I don't consider that would have been the case.

The CMC argues that Aviva should have warned Mr R he would put his pension at risk by losing UK financial regulation and the ability to complain to FOS or recover from the FSCS. It is correct that Servatus didn't have a branch in the UK and so Mr R wouldn't have had any recourse via UK's complaints and investor protection institutions, the FOS or the FSCS, as opposed to their Irish equivalents. The Republic of Ireland 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.

However, Servatus was passported from Ireland to the UK and so for the period of this transfer Servatus was an authorised person under FSMA 2000. The right to passport financial services from one EU country to another is a feature of the EU's internal market, which applied to the UK at the time. The right was underpinned by the introduction of EU-wide standards of investor protection and harmonised conduct of business rules.

So, the UK's regulatory system permitted EU passported firms, if duly registered with the FCA on its public register, to operate here as authorised persons under the FSMA 2000, and I think that, in the present case, that provided sufficient comfort for Aviva's purposes.

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. It therefore would have had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system.

So, in my view, 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.

A significant point of my provisional findings is that Aviva should have carried out further due diligence – it wasn't in line with its obligations under PRIN and COBS nor was it in line with the Scorpion guidance for Aviva just to be satisfied that the QROPS was registered with HMRC. It certainly had to do more. However, in the course of making further enquiries Aviva would have found that Servatus was involved in giving Mr R advice. Having checked Servatus' regulatory status, Aviva would have found it was regulated by the Central Bank of Ireland and, under an EU passport, was authorised to act in the UK. Therefore, it is reasonable that this would have given Aviva some comfort that the likelihood of a scam was minimal. Essentially, while there were some potential points of concern within the transfer of Mr R's pension, the fact a regulated adviser was involved and recommended the transfer as suitable for Mr R meant Aviva could have reasonably been reassured it was legitimate. It would have been reasonable for Aviva to assume that Servatus' suitability advice was not part of a scam, and that Mr R was well aware of the risks of transferring abroad.

Therefore, upon discovering Servatus gave Mr R advice to transfer to the QROPS and discovering it was a regulated firm that was passported from Ireland into the UK, Aviva could have reasonably assumed that Mr R's regulated adviser was acting in the best interest of Mr R, its client, and would have made him aware of the relevant risks and issues.

I therefore remain of the opinion, given ceding schemes had to undertake proportionate due diligence, it would have been reasonable for Aviva not to have raised a concern with Mr R 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 needing to give him the warnings for which the CMC contends. And I consider Mr R would have gone ahead with the transfer.

I therefore remain of the opinion that this complaint cannot be upheld.

My final decision

My final decision is that I don't uphold this complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 30 October 2024.

Ayshea Khan
Ombudsman