DRN-5117039

The complaint

Ms L has complained about a transfer of her Aviva Life & Pensions UK Limited pensions to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in Malta in February 2015. Ms L's QROPS was subsequently used to invest in Dolphin Capital (which later became the German Property Group). The investment now appears to have little value. Ms L says she has lost out financially as a result.

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

What happened

Ms L had two pension plans with Friends Life. Friends Life have since become part of Aviva and it is Aviva that is the respondent for Ms L's complaint. For ease of reading I will refer to any actions or responses as being attributable to Aviva.

On 5 March 2014, Ms L signed a letter of authority allowing Global Partners Limited to obtain details, and transfer documents, in relation to her pension. On 25 March 2014 Aviva was sent Ms L's letter of authority by Global Partners Limited (GPL) and a request for transfer information. Aviva sent GPL the requested information on 25 March 2014. GPL was a financial adviser regulated in a European Economic Area (EEA) member state. The firm became Tourbillon Limited after June 2014 who were again an EEA regulated financial adviser and entered on the Financial Conduct Authority (FCA) register as having passporting rights to provide services within the UK.

Ms L says her interest in the transfer followed an unsolicited approach from a company that she says visited her and introduced her to the idea of investing in Dolphin. I will refer to this firm as Firm A. She says she was attracted by the prospect of the guaranteed investment returns of 9%.

In August 2014 Ms L received a financial recommendation report from a different firm, Servatus, a financial adviser authorised in another EEA member state. Servatus additionally held passporting rights to provide services within the UK. Servatus provided Ms L with the following recommendation: transferring her pensions to a QROPS with Harbour Pensions Limited in order to invest in a balance of Dolphin Capital and investment funds with SEB.

Ms L subsequently applied to start a QROPS with Harbour Pensions. The membership form, dated 3 February 2015, names Servatus as the professional adviser.

On 12 February 2015 Aviva received Ms L's transfer papers. These were sent in by Harbour Pensions. Included in the transfer papers were: Ms L's letter of authority; completed and signed transfer discharge forms; completed HMRC forms APSS263 and CA1890; HMRC letter confirming registration of QROPS from 9 April 2013; Ms L's two forms of identification certified by Servatus.

Ms L's pensions were transferred on 16 February 2015. Her combined transfer value was around £32,000. She was 49 years old at the time of the transfer. 50% of the fund value was used to invest in a 10.2% fixed interest loan note with Dolphin Capital. The remainder was placed in two balanced investment funds.

The investment in Dolphin Capital was a loan note to the company. The loan was to be repaid with pre agreed interest from the profits made by the property company. Dolphin Capital later changed its name to the German Property Group (GPG). GPG went into administration having allegedly failed to use investor's money to develop properties. There is no secondary market for these loan notes and, where they have failed to realise the intended returns investors are unlikely to get their investments back.

In March 2022, Ms L complained to Aviva. Briefly, her argument is that Aviva failed to enquire why she, as a UK resident with no intention of moving abroad, wanted to transfer and it failed to find out how the recommendation came about. She says that Aviva ought to have spotted, and told her about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the transfer was overseas, that QROPS are only suitable for a small number of people; that the Dolphin Capital investment was high risk and unsuitable for her as a retail client; that the claimed investment returns were unrealistic.

Aviva didn't uphold the complaint. It said it was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

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.

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

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

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

An overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

- Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.
- Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme, which is either registered with HMRC for tax purposes or is a QROPS. And indeed they may also have a right to transfer under the terms of the contract.

This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

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

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

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

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

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

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

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

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

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

I note that Ms L's representative stated, in response to our investigator's view, that Aviva didn't comply with the code of practice that was introduced by the Pension Scams Industry Group (PSIG). But the PSIG Code that it referred to was introduced on 16 March 2015 which was after this transfer had completed. As a consequence it is not fair or reasonable to hold Aviva to a standard that was not introduced until after the events complained about.

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

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

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

2. 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.

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

4. These were additional requirements over and above what a ceding scheme would always have needed to when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

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>

Ms L has explained that she received a call from Firm A. And that this firm visited her. In this case however, there is also compelling evidence that Ms L received financial advice from Servatus. Who, as I explained previously, were a firm that was regulated in an EEA country. And who had passporting rights to provide financial services in the UK. In her testimony Ms L recalls Servatus and suggested that a representative from Servatus also came to meet her with Firm A.

Ms L doesn't give a date for any meetings. But I have seen a copy of a letter from Servatus, addressed to Ms L, that is dated 11 August 2014. It starts by thanking her for meeting with Firm A. And goes on to provide her with what it described as a Financial Planning Report. It set out a recommendation that she transfer her existing personal pensions to a QROPS in order to invest in the way that she went on to do.

The statements for the QROPS show that a payment of £159.85, described as "*IFA Fees*", was made to Servatus on 2 March 2015. And, in her testimony, Ms L explains that she understood she would be charged something but couldn't recall being told what the charge would be. There is additionally the application for the QROPS that had a section entitled "*Professional Adviser and Fees*". In that section it indicated that Servatus were the adviser and that an initial fee of 0.5% would be paid from the QROPS. Ms L signed this form on 1 September 2014.

Overall, the evidence in this case causes me to think that Firm A was, more likely than not, acting as an introducer for Servatus who were a regulated financial advice firm. And that it was Servatus that provided the advice that Ms L acted upon.

What did Aviva do and was it enough?

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 have suggested that it would have sent a copy of the relevant Scorpion insert with its Transfer Pack. It has provided evidence of its process, although I note it is undated so it is not persuasive evidence that it was the process in place at the time of this transfer. In this case I don't think that matters because Aviva can provide no evidence that it corresponded directly with Ms L in the run up to this transfer. The evidence indicates that the only transfer request Aviva received was the one from GPL in March 2014. It responded to that by writing directly to GPL on 26 March 2014. That letter doesn't indicate that any insert or warning material was included. But, even if it was, sending scam warning information that was intended for its customer to a third party wasn't good enough to ensure that Ms L would receive it.

Had Aviva contacted Ms L in response to the request for the transfer pack, as I think it should have, then it would have sent her the Scorpion insert that was in use at the time. Which was the version published in February 2013. That would have warned Ms L of the risk of companies telling consumers that they could access cash from their pensions before age 55. Which wasn't what Ms L was being told and wasn't her reason for transferring. In short, the type of risk being warned about at that time wasn't something that was relevant to Ms L's circumstances. She had not been offered any cash incentives, and explains that she hadn't been rushed into the transfer. In fact, she explains that after she received the recommendation, she took several months to consider it before agreeing to go ahead.

For the above reasons, even though I think Aviva should have sent the Scorpion insert to Ms L, I don't think that it would have made any difference to what Ms L went on to do. It simply wasn't warning about the type of harm that Ms L was about to suffer. And the content would not, reasonably, have caused her to be concerned about the advice she'd received.

Due diligence:

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

Aviva received the following information from Harbour Pensions with the transfer request: transfer discharge forms; HMRC forms APSS263 and CA1890; confirmation that HMRC recognised the QROPS in April 2013; Ms L's identification documents certified by Servatus. It also checked that the receiving QROPS was on HMRC's published list. This step ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Ms L's statutory right, and potentially other legal rights, to transfer.

Given the information Aviva had at the time, one feature of Ms L's transfer would have been a potential warning sign of a scam: Ms L's transfer to a QROPS obviously involved moving money overseas. Aviva should therefore have followed up on it to find out if other signs of a scam were present. Given this warning sign, I think it would have been fair and reasonable – and good practice – for Aviva to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack 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 recognised by HMRC, 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 Ms L's transfer request, and the relatively limited information it had about the transfer, I think in this case Aviva should have addressed all three parts of the check list and contacted Ms L as part of its due diligence.

Had it done so, I think it likely that Aviva would have identified the following warning signs as being present in the transfer:

- Ms L was transferring her pension funds to a scheme not authorised by the FCA.
- Ms L's transfer funds would be invested overseas.
- The transfer hinted at unusual investment techniques with 50% of the fund destined for the Dolphin Capital loan note.
- Ms L's transfer may have come about as a result of an unsolicited approach.

Against this, Aviva would also have eliminated the following relevant warning signs:

- The QROPS was not a recently recognised scheme.

- The QROPS was not associated with an unregulated investment company.
- Aviva would not likely have identified reference to loans, savings advances, or cash incentives in any promotional material or in the written suitability report that Ms L could have provided it.
- Ms L wasn't going to be accessing her pension benefits before the age of 55.
- Ms L was getting advice from Servatus which was regulated in an EEA member state and had passporting rights to the UK.
- Ms L had not been pressured or rushed to transfer having had time to consider the recommendation she'd been given.
- Ms L had full documents from a legitimate QROPS scheme that she could have provided to Aviva on request.

Aviva needed to consider the overall circumstances in order to determine whether Ms L's transfer presented a scam risk. So whilst Aviva would likely have (had it conducted thorough due diligence) found there to be some of the pension scam warning signs indicated in the Scorpion Action Pack, I think it would have ultimately concluded that the risk was minimal. I say this because Ms L would have explained that she wanted to transfer to take advantage of the potential for improved investment performance. And, key in this case, was that Ms L had received financial advice.

Overall, Ms L wouldn't have given the impression to Aviva that she was being led through a process by another party acting in a potentially unlawful way – which would be the usual pattern for someone falling victim to a scam. Instead, it would have established that Ms L was acting on advice from a regulated party. I haven't seen anything that Aviva would, reasonably, have been aware of that should have alerted it to the potential of Ms L being misled in this way. It's an important point that goes to the heart of this case: Ms L's actions would have appeared to be following financial advice and a business could, reasonably, have taken comfort from that.

I have considered the fact that Servatus was an overseas adviser. But as Ms L was transferring to a QROPS, it wouldn't be unusual that overseas parties would be involved. The rules in place at the time allowed firms, that were properly regulated in an EEA state to have passporting rights to legitimately provide services in the UK. I see no reason why Aviva ought to have concluded that advice from a properly regulated firm with passporting rights was inferior to that of a FCA regulated firm. Or that Servatus was not acting in Ms L's best interests. I don't think it would be reasonable to expect Aviva to scrutinise the advice that Ms L had been given. It would have been enough for it to satisfy itself that Servatus was regulated and possessed passporting rights.

I've considered if it's reasonable to expect Aviva to have done more to warn Ms L about what she was intending to do, even if the scam threat would have appeared to be minimal. But I think those arguments misread what should, reasonably, have been expected of transferring schemes at that time. Investigations into the receiving scheme, and intended investments were a means to an end: to establish the risk of a pension scam. As I've said previously, a firm needed 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. Expecting a firm to share its due diligence "workings" in this way would cut across this (and could potentially be viewed as a self-serving tactic to hold on to a customer). Where the scam threat was assessed as being minimal (as I think it would most likely have been in this case) I don’t think it would be unreasonable for the transfer to proceed as normal.

I’ve also considered whether Aviva should have warned Ms L that it was unusual for her to be transferring a pension overseas – and checked whether the reason for doing that was because she was moving or planned to move overseas. At the time (unlike today) there wasn’t a prospect of a tax charge that had to be levied by the ceding scheme in certain circumstances where someone transferred their pension overseas whilst remaining resident in the UK. I think whether it was appropriate for Ms L to be transferring her pension to Malta was a financial planning matter that it wasn’t Aviva’s role to intervene in. And, as I have said, it would have established that Ms L had separately taken advice on that.

It therefore follows that I’m satisfied Ms L wouldn’t have stopped the transfer even if Aviva had done more thorough due diligence in line with the Scorpion action pack. The end result of any such due diligence wouldn’t have resulted in any warnings being given to Ms L. And I don’t think the mere act of contacting Ms L and asking questions about the transfer would have prompted a change of heart. The majority of the responses she would likely have provided would not have given rise to concerns. In addition, Ms L had a written recommendation from a financial adviser that set out the details of the Dolphin Capital investment. It highlighted, amongst other things, that: loan notes provide a high degree of risk, the investment was not protected by the Financial Regulator or by a statutory compensation scheme, loan notes are unquoted so there is no market to sell them. Ms L considered these risk warnings and went ahead with the transfer.

My final decision

For the reasons given above, I don’t uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Ms L to accept or reject my decision before 3 February 2025.

Gary Lane
Ombudsman