DRN-5132566

The complaint

Mr F has complained about the actions of Aviva Life & Pensions UK Limited ("Aviva") when it transferred his personal pension to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in 2014. The QROPS subsequently invested in an asset that is unlikely to realise any value meaning Mr F has suffered a significant financial loss.

Mr F says Aviva failed in its responsibilities when dealing with his transfer request. He says that Aviva should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr F says he wouldn't have transferred, and wouldn't have suffered financial losses, if Aviva had acted as it should have done.

What happened

On 7 March 2014, Aviva received a request for information on Mr F's Aviva policy from Global Partners Limited. Mr F had previously signed a letter of authority allowing that business to seek information on his behalf. Aviva responded with the requested information – which included a transfer value and transfer forms – on 12 March.

On 29 May, Mr F signed a declaration to say he was satisfied with the recommendations contained in a report written by Servatus Ltd. The report recommended Mr F use a Harbour Pensions QROPS to invest up to 40% of his pension in a Dolphin loan note with the remainder invested in diversified funds.

On 20 June, Harbour Pensions Limited called Aviva requesting overseas transfer forms. These were sent to Harbour Pensions Limited and Mr F, by post and email, on 24 June. On 18 August, Aviva received completed transfer forms.

On 9 September, Mr F's policy was transferred to the Harbour Retirement Scheme (the "Harbour Scheme"), a QROPS based in Malta. The transfer value was approximately £55,000, 40% of which was invested in a Dolphin Capital Loan Note with the remainder invested in an account managed by WH Ireland Limited. Dolphin Capital (now known as the German Property Group) is a German property venture which has gone into liquidation.

Mr F was, and remains, resident in the UK. He was 48 at the time of the transfer.

In March 2019, Mr F (with the help of a claims management company) complained to Servatus about the suitability of the advice it gave. He didn't receive a response. In July 2021, Mr F complained to Aviva – which is the subject of this complaint. Briefly, Mr F's argument is that Aviva ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the catalyst for the transfer was a free pension review which he says he won in a prize draw – which was unusual; the presence of unregulated introducers; a QROPS was a complex arrangement and not necessary for his situation, especially as he wasn't intending to move abroad; Servatus Ltd could not be subject to a referral to the Financial Ombudsman Service; and he was transferring in order to invest in high risk, unregulated, assets.

Aviva didn't think it had done anything wrong. It said, in brief, that it had conducted adequate checks into the Harbour Scheme, it wasn't its role to assess the suitability of that scheme or the investments to be held within it, and that Mr F's adviser, Servatus, would be a more appropriate business to complain to.

Mr F referred his complaint to us. Our investigator didn't uphold his complaint. Mr F asked for an ombudsman to make a decision.

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.

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 regards 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 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 if certain conditions are satisfied. A member may also have a right to transfer under the terms of their pension. This 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. This came to be known as "pension liberation".

- The Pensions Regulator (TPR) launched the "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 Financial Services Authority ("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.

- In late April 2014 the FCA started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of SIPPs and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

- 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.

- Also relevant here is that 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.

<u>The Scorpion guidance</u>

The Scorpion campaign was launched on 14 February 2013, and was initially focused on pension liberation – namely, the access to pension funds in an unauthorised manner (such as before normal minimum pension age). The guidance was updated in July 2014. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

The materials in the July 2014 Scorpion campaign comprised:

- An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of pension scams 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 scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that they could become aware of the scam risks they were facing.

- An action pack for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch out for" various warning signs of a scam. 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 a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.

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 statutory rights.

That said, the launch of the 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 those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

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

<u>What did personal pension providers 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.

These were additional requirements over and above what a ceding scheme would always have needed to do 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.

The circumstances surrounding the transfer: what does the evidence suggest happened?

Mr F says he was cold called and told he had won a free pension review following a prize draw. His recollections as to who he then met are slightly inconsistent. When he complained to Servatus in 2019, he said someone from Servatus, a Dublin based firm, visited him at home on two occasions. When he complained to Aviva, he said he was put in touch with Servatus and a "field representative" from another firm. He said this representative visited him at his home.

The latter appears to be the most likely given a letter from Servatus to Mr F references an earlier meeting between Mr F and the other firm Mr F mentions. My decision doesn't turn on this, though, because the key issue is which firm ultimately advised Mr F. And, on that point, the evidence is clear – Servatus advised Mr F:

- Mr F complained to Servatus in 2019 about the suitability of the advice it gave.

- Mr F signed a declaration on 29 May 2014 to say he was satisfied with the recommendations contained in a report written by Servatus.

- The Harbour Scheme application form (which Mr F signed) included a section headed "professional adviser & fees", in which an initial fee of 0.5%, to be taken from the Harbour Scheme, has been entered along with the adviser's details.

- A 0.5% fee was taken from Mr F's pension and paid to Servatus after the transfer.

I note here that there's documentary evidence indicating the involvement of two other firms. In March 2014, Aviva received a letter of authority signed by Mr F giving Global Partners Limited permission to seek information on his pension. And Portia Financial Limited sent a letter to Mr F in January 2015 which thanked him for choosing Portia to help assist with his transfer. Mr F hasn't referred to these other firms in any detail, and there's limited documentary evidence as to their involvement, so I consider them peripheral to what happened. For the reasons given above, it was Servatus that advised Mr F and that is crucial for reasons that I will come on to.

Mr F says he was told that every £100 of his Aviva pension would eventually be worth only £20 because of charges and that he would get far better returns – 6% p.a. – if he transferred and invested in overseas property. The Servatus report recommended Mr F use a Harbour Pensions QROPS to invest up to 40% of his pension in a Dolphin loan note with the remainder invested in diversified funds. The report said its projections assumed returns of 6% p.a. So, on this, Mr F's recollections are plausible and consistent – he was advised by Servatus to transfer to the Harbour Scheme in order to invest primarily in Dolphin and achieve returns in the region of 6% p.a. He wasn't seeking early access to his pension or any other unauthorised payment.

At the time of the transfer, Mr F was 48 years old. He lived in the UK and didn't intend to live overseas. His Harbour Scheme application form didn't reference any other pensions. He says he had some savings but no other investments.

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

Due diligence:

HMRC had accepted the Harbour Scheme as a QROPS in April 2013. I note too that the Harbour Scheme was on HMRC's published list at the time of transfer. These steps ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr F's statutory right, and potentially other legal rights, to transfer.

In light of the Scorpion guidance, I think firms also ought to have been on the look-out for the tell-tale signs of a pension scam and would have needed to undertake further due diligence, and take appropriate action, if it was apparent their customer might be at risk. Aviva received completed transfer forms on 18 August 2014, so it is the July 2014 Scorpion guidance that's relevant in this respect.

Given the information Aviva had at the time, one feature of Mr F's transfer would have been a potential warning sign of a scam under the July 2014 Scorpion action pack – there was a transfer of money overseas. Aviva should therefore have followed up on that to find out if other signs of a scam were present. I think it would have been fair and reasonable – and good practice – for Aviva to have turned to the check list in the action pack to do this.

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 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 F’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 Mr F as part of its due diligence.

There were a number of parallels between Mr F’s transfer and the warning signs identified by the check list, including the unsolicited contact that prompted Mr F’s initial interest in transferring and the investment that lay behind his decision to transfer which was overseas and could, reasonably, be described as being “unusual” or “creative”. Mr F was also transferring to a QROPS even though he was resident in the UK and didn’t appear to be contemplating a move overseas. Whilst the action pack didn’t specifically address such a scenario, it’s reasonable to say this should have appeared unusual to Aviva. Indeed, Aviva emailed the administrators of the Harbour Scheme during its due diligence process to ask whether Mr F was intending to reside overseas (although it doesn’t look like it received a response to this).

However, in aggregate, I’m satisfied Aviva wouldn’t have thought Mr F was likely falling victim to a scam. I say this because investigations into who had advised him would have revealed the presence of Servatus, which was an advisory firm regulated by the Central Bank of Ireland. Importantly, Servatus was also shown on the FCA’s register as authorised in the UK with passporting rights. This means that for UK purposes, 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.

The presence of Servatus as an authorised person advising Mr F would have indicated to Aviva that the transfer was unlikely to be a scam and that Mr F would enjoy some regulatory protections in the event it turned out to be one. This wouldn’t have been via the UK’s complaints and investor protection institutions, the Financial Ombudsman Service or the Financial Services Compensation Scheme. But 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.

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. 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 light of this it isn't unreasonable that, had it checked up on its regulatory standing, Aviva could have been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under UK law.

As outlined previously, firms 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 rights. I'm satisfied that the fact that Mr F was being advised by a properly authorised adviser would reasonably have given Aviva comfort the transfer was unlikely to be a scam. With that in mind, there wouldn't have been a need, and it wouldn't have been proportionate, for Aviva to have given Mr F any specific warnings beyond the warnings contained in the Scorpion insert (which I discuss below).

In coming to that conclusion, I have considered whether the act of contacting Mr F and asking questions about his transfer – which Aviva should have done – would have prompted him to change his mind about the transfer. Those questions would, for instance, have reminded Mr F of the fact that a significant financial decision had been set in train by a cold call and that he was moving his pension outside of his country of residence – both of which may have seemed less judicious on questioning and therefore potential prompts, in themselves, for further thought. But, like Aviva, I'm satisfied Mr F would, ultimately, have taken comfort from the fact that he had been advised by a regulated adviser.

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.

There were two obvious opportunities when Aviva should have sent Mr F the Scorpion insert: following the initial request for transfer papers in March 2014 and when Harbour Pensions Limited called Aviva in June 2014 to request overseas transfer forms.

I've seen nothing to indicate Aviva sent Mr F the Scorpion insert on either occasion. However, the version of the Scorpion insert that was in use at that time – the February 2013 version – was focussed on the threat posed by offers to access pensions before the age of 55. Therefore, even though some of the warning signs highlighted in the insert would have had parallels with Mr F's situation, as he wasn't intending to access his pension early I don't think the insert would have caused him alarm. In that respect, Aviva's failure to send the insert was immaterial – it wouldn't have prompted him to question what he was doing or made a difference to his decision to transfer.

Our investigator said that Aviva should have sent the July 2014 version of the Scorpion insert, which covered more than just the threat posed by liberation. But I don't think this version of the Scorpion insert would have made a difference to Mr F's thinking either. It highlighted the following warning signs for someone to be on the lookout for:

- claims that a pension pot can be accessed before age 55;
- being approached out of the blue over the phone, via text message or in person door-to-door;

- being enticed by upfront cash; and
- being offered a free 'pension review' or being lured by 'one off' investment opportunities.

It went on to say that if someone thought they were being targeted by scammers, they should not be rushed or pressured into a decision and that they should call TPR before signing anything – or Action Fraud if an offer had already been accepted.

Some of the warnings and actions listed didn't apply to Mr F. But some did: he was approached unsolicited, and he was offered a free pension review (albeit as a result of a prize draw). It's unclear whether the Dolphin investment was presented as a one-off opportunity but the overall tenor of the insert was to be cautious about "too good to be true" claims about various investments. So this also had parallels with Mr F's situation. And this version of the Scorpion insert warned about scams in general rather than the narrower warning about pension liberation. So that too may have put Mr F more on guard than he otherwise would have been had he received just the February 2013 version of the insert.

However, on balance, I don't think messages along the lines of the above would have been enough for Mr F to change his mind. It strikes me as doubtful that he would have just aborted the transfer without further research. And if he had conducted further research I think Mr F, 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 the July 2014 Scorpion insert would have changed Mr F's mind about transferring.

I note here that some of Mr F's comments refer to a version of the Scorpion insert that came after his transfer so they aren't a relevant consideration here. Likewise, I haven't addressed Mr F's comments about the longer version of the Scorpion warning materials as there wouldn't have been cause for Aviva to have sent this to Mr F.

I've considered whether being asked due diligence questions by Aviva would have primed Mr F to have been more receptive to the messages contained in the Scorpion insert and prompted him to "join the dots" about the risks he was taking (or, depending on when it was sent, primed him to have been more concerned when asked those due diligence questions). In other words, I've considered the likely *cumulative* impact of everything Aviva should have done and not just the impact a due diligence process, and the Scorpion insert, would have had in isolation. But I return to what I said before which is that Mr F was being advised by a regulated adviser so I'm satisfied he would, ultimately, have taken comfort from that.

I've also considered everything Mr F has said about his character at the time which, to summarise, was cautious and prudent and why that, along with the relative importance of his Aviva pension to his retirement planning, meant he wouldn't have proceeded with the transfer had he been given appropriate warnings.

I don't disagree with the characterisation of Mr F as being relatively cautious. I note here that on his Harbour Scheme application form, Mr F was recorded as "medium risk", which was the middle of five ratings. And the same form recorded his investment objective as being the second most cautious of four categories, which meant Mr F was willing to accept a "small amount of risk to provide for potential growth over the medium to long term".

My disagreement is with what this would have meant for Mr F had he been sent the July 2014 Scorpion insert. I don't think Mr F would have had any misgivings as a result of the insert because he would have been under the impression (or would have found out) that he had been advised by a regulated firm. I think this would have neutralised the fact that the insert had referenced cold calls, free pension reviews and one-off investment opportunities.

Ultimately, Aviva would have been entitled to take comfort from the presence of a regulated adviser. It wouldn't have been its job to question the advice that adviser gave. Likewise, Mr F wouldn't have had cause to be concerned about his adviser. I therefore don't uphold Mr F's complaint.

My final decision

For the reasons given above, my final decision is to not uphold Mr F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 13 February 2025.

Christian Wood
Ombudsman