DRN-5155964

The complaint

Mr D has complained, with the help of a professional third party, about the transfer of his personal pension to a Qualifying Recognised Overseas Pension Scheme ('QROPS') in Hong Kong in January 2015. Mr D's QROPS was subsequently used to invest in Christianson Property Capital ('CPC') loan notes. Mr D says the investment now has little value and he has lost out financially as a result.

At the time of events complained of Mr D's pension was branded and administered by another company. Aviva Life & Pensions UK Limited has since become responsible for answering the complaint. So, to keep things simple, I'll just refer to 'Aviva' throughout my decision.

Mr D says Aviva failed in its responsibilities when dealing with the transfer request. He says that it 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 D says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Aviva had acted as it should have done.

What happened

On 30 July 2014, a company was incorporated with Mr D as director. And on 12 August 2014, Aviva wrote directly to Mr D giving a current value of his pension.

Aviva says it then received a signed authority for it to provide information about Mr D's pension to a business called Preferred Pension LLP ('Preferred'). Preferred was registered with the UK regulator, the Financial Conduct Authority ('FCA'), as an Introducer Appointed Representative ('IAR') of another business.

In early September 2014, Aviva sent Preferred a transfer pack in respect of Mr D's pension which included, amongst other things, a valuation and forms to request a transfer. The letter also referred to a leaflet from the Pensions Regulator ('TPR') being enclosed.

I understand that an application to transfer Mr D's pension benefits to a small, self-administered scheme ('SSAS') was sent to Aviva around 5 September 2014. This scheme was to be administered by a business called Cranfords, which sent the application on Mr D's behalf. And I understand the company that had been incorporated with Mr D as director would've been the sponsoring employer.

Aviva replied to Cranfords, acknowledging the application form and requested the completion of a 'Supplemental Transfer form' which asked a number of questions about how the proposed transfer came about. The application to transfer to the SSAS was withdrawn, before a transfer took place. And I understand the 'Supplemental Transfer form' wasn't completed by Mr D.

I can see that Aviva wrote to Preferred again on 23 September 2014, acknowledging an enquiry for information on transferring Mr D's pension benefits overseas. It said it enclosed relevant information along with another copy of TPR's information leaflet.

In November 2014, Mr D signed Aviva and HMRC application forms to transfer his pension to the GFS Superannuation Scheme 2 – a QROPS based in Hong Kong.

On 22 December 2014, Global Fiduciary Solutions Limited ('GFSL'), the scheme manager for the QROPS, sent an application to Aviva on Mr D's behalf to transfer his pension benefits. Along with the forms that Mr D had signed, GFSL included evidence that the receiving scheme had been recognised by HMRC from at least December 2013. And it also provided copies of Mr D's certified identity documents. These had been certified by a business called St. James International (Prague), which I'll refer to as 'SJIP'.

GFSL wrote to Aviva again on 13 January 2015. Its letter said that this was in response to a letter from Aviva and that it enclosed QROPS discharge forms.

Aviva wrote to Mr D and GFSL on 26 January 2015 confirming that the transfer payment of £73,614.03 had been made as requested. Mr D was 57 at the time. Approximately 97% of Mr D's funds were then invested in CPC loan notes.

In 2017 Mr D's GFS Superannuation Scheme No2 pension fund was transferred, in specie, to a different QROPS – the EFPG Diamond Personal Pension Plan, based in Gibraltar – with the same CPC investment being held. The scheme operator was European Financial Planning Group Limited ('EFPGL').

The application says that Mr D's adviser in respect of that transfer was Square Mile Financial Services ('SMFS') – a business based in Prague, Czechia which at the time appeared on the FCA register as holding passporting rights to provide certain services in the UK. But I've seen a letter from EFPGL to Mr D that indicates SMFS' involvement was requested by CPC, and SMFS had agreed to step in and assist as SJIP was no longer trading. And the moving of the pension fund and assets to the new QROPS does not appear to have been optional.

I can see that in September 2020, EFPGL sent Mr D an annual update enclosing his statement. EFPGL said it had been advised there was "likely to be limited liquidity in the coming months" in respect of CPC investments. But it said it would ensure all members were treated fairly and that more information would be provided as soon as it became available. EFPGL went on to address a general email that Mr D might have been sent from a third party, that other members of the scheme had been sent. It said this third party appeared to have been appointed by someone with a connection to the GFS Superannuation Scheme. EFPGL said the third party, which was not regulated in any jurisdiction, was incorrect that the investment was in liquidation. And EFPGL didn't agree that SJIP had likely mis-sold the investment.

Mr D says EFPGL contacted him around April 2021 to suggest there might be a problem with his investment. And I understand in 2022 EFPGL informed members that the investments in CPC had lost significant value, had liquidity issues and it was unknown whether the investment would return any value.

In October 2023, Mr D complained to Aviva. Briefly, he said Aviva ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included that he'd been cold called, there were a number of unregulated introducers and advisors involved, Mr D hadn't received regulated advice, the transfer involved moving Mr D's pension overseas and the intended investment was in an unregulated, high-risk area.

Aviva didn't uphold the complaint. It said it had checked that the receiving scheme was recognised by HMRC and had issued TPR's Scorpion warning leaflet (so called because of the imagery it contained). So, Aviva thought it had done what was required of it. It also said that St James International was a “worldwide independent financial consultancy” and Aviva was not responsible for its advice.

The complaint was referred to the Financial Ombudsman Service. One of our investigators considered it but 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.

Aviva initially asked, as part of any review, that I think again about whether this was a complaint that we could consider. But it has since acknowledged that it previously gave consent to us looking into the complaint. And, as Aviva is aware, the rules governing our Service explain that consent can’t be withdrawn. So, I’ve considered, and my decision will focus on, the merits of this complaint.

I’ve taken into account relevant law and regulations, regulator’s rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The relevant rules and guidance

Personal pension providers are regulated by the 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 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 Serious Fraud Office ('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 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>

The Scorpion campaign was launched on 14 February 2013, and was initially focused just on pension liberation – namely, the access to pension funds in an unauthorised manner (such as before normal minimum pension age). However, it's the update to that guidance on 24 July 2014 that's most relevant to this complaint. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

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. And part of the requirements of a ceding scheme when processing a QROPS transfer, separate to the Scorpion guidance, was that they would always have needed to check whether the QROPS was on HMRC's published list and ensure the necessary HMRC forms were completed.

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

3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.

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

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

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

Mr D says he was cold called by Preferred and offered a pension review. He says he was initially told to transfer to a SSAS with Cranfords but this application didn't proceed. He says Preferred then introduced Mr D to SJIP and SJIP advised him, over the phone, to transfer to a QROPS and invested in Christianson Property Capital. Mr D says he was told he'd receive guaranteed returns of 10% while the UK investment market was 'stagnant', which was what drew him to the transfer. Mr D says SJIP incorrectly told him the investment and receiving scheme would be protected by the FCA. And he says he didn't receive any contact from Aviva about the transfer.

I haven't seen any evidence of any direct correspondence between Aviva and Mr D before the transfer completed. Nor have I seen anything to indicate it sent him any warnings directly.

As I mentioned, Aviva wrote to Preferred in September 2014 providing transfer packs. So, this business does appear to have been involved. And I don't have any reason to doubt what Mr D has said about him having been cold called.

I also note that, when the application to transfer to the QROPS was submitted, Mr D's identification documents were certified by SJIP. So, it also seems to have had some involvement in the eventual transfer. In addition, EFPGL's correspondence with Mr D supports that SJIP advised him. In its letter of May 2017, it noted that it'd been informed that SJIP – particularly the individual who had certified Mr D's ID – had originally been his adviser. An in the email it sent in 2020, EFPGL again referred to SJIP having advised Mr D to transfer, when noting it didn't have reason to think he'd likely been mis-sold the investment.

I haven't seen anything about Mr D's circumstances or what he's said that leads me to think he'd likely have embarked on either the transfer initially proposed, to a SSAS, or the one that subsequently went ahead, to a QROPS, on his own. Setting up a new company, opening a SSAS, transferring his existing pension and investing was a complicated arrangement, particularly for someone who doesn't appear to have had a great deal of investment experience. And Mr D doesn't appear to have had any prior connection with the QROPS. And he hasn't indicated he intended to move overseas – either to Hong Kong, where the QROPS was registered, or anywhere else.

So, on balance, I think it was the discussion he had with the businesses he spoke to that led to the transfer. And I think he was likely advised to do so. Mr D has said that he was told his pension, and the UK market was stagnant and that by transferring and investing he'd receive a guaranteed return of 10% per year. And I think what Mr D has said he was told, essentially that the new arrangement would perform better that his existing pension and be to his benefit, represented advice to transfer.

Preferred was on the FCA register as it was registered as an IAR. But an IAR is different to an authorised representative ('AR') – which Aviva ought to have been aware of. The FCA register explains that while an AR can carry out the regulated business that its principal firm allows it to, and the principal firm is responsible for that business, an IAR can only introduce customers to the principal firm or members of the firm's group, and/or give out certain kinds of marketing material. So, Preferred wasn't authorised to advise Mr D. And I've seen no evidence that it introduced him to its principal firm or a member of the firms group. It is unclear if Preferred advised Mr D initially to transfer to a SSAS. But ultimately that transfer did not go ahead, so I'm more concerned with who advised Mr D to transfer to the QROPS.

Based on the available information I think it was SJIP that advised Mr D to transfer to the QROPS in Hong Kong – not least because that information appears to have been relayed to EFPGL by the investment provider and / or original QROPS provider. And crucially I think this is what Mr D would've understood and what he would've told Aviva if asked.

SJIP was a business registered in Prague, Czechia. It is unclear if it was authorised by the financial regulator in Czechia but it wasn't shown on the FCA's register as authorised in the UK with passporting rights. Aviva has said 'St James International' is a "worldwide independent financial consultancy". It doesn't appear however that SJIP is affiliated with a larger, international group. And the 'St James International' to which I assume Aviva is referring appears to be registered in Mexico and also doesn't appear on the FCA register.

I also think Mr D is correct that he has likely incurred a loss. Aviva suggested in response to the complaint that there wasn't evidence of this but as I've said EFPGL indicated from 2020 that there were liquidity issues with the CPC investment. And, in other complaints that we have dealt with, I've seen evidence of a letter EFPGL sent to other investors in 2022 saying that the CPC investment was "distressed" had lost significant value and had significant liquidity issues. It is unclear if the same letter was sent to Mr D but on balance his investment is likely to have encountered similar problems.

<u>What did Aviva do and was it 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.

The covering letters for the two transfer packs that Aviva sent out in September 2014 (one standard, one for overseas transfers) both indicated that TPR's Scorpion leaflet was enclosed. However these letters, and the enclosures, were sent to Preferred. And I haven't seen anything to show that copies were sent directly to Mr D.

Although the insert was sent to Preferred, Aviva had no way of knowing whether it would pass that information on to Mr D. And, as I've said above, the purpose of issuing the Scorpion materials was so that consumers could see, for themselves, the risks involved with such transfers. So, sending it to a party who might have a vested interest in not passing the information on was not pragmatic. And, on balance, I don't think I can reasonably say that this information was shared with Mr D, in line with good industry practice at the time.

Due diligence:

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

Aviva appears to have limited its due diligence in respect of the QROPS transfer to checking that the receiving scheme was recognised by HMRC and sending the Scorpion leaflet (although, as I've explained, I can't fairly say this was sent to Mr D).

Checking that the receiving scheme was recognised by HMRC ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr D's statutory right, and potentially other legal rights, to transfer. But I don't think that was sufficient. The Scorpion guidance had been broadened to cover scams more generally. And I don't think the limited due diligence done was enough to rule out the possibility of Mr D falling victim to a scam.

Given the information Aviva had at the time, one feature of Mr D's transfer would have been a potential warning sign of a scam, according to the Scorpion action pack for businesses. This was that it involved the transfer of money overseas, making it harder to recover. And contrary to what Aviva has suggested, the wording of this warning was not confined to investments overseas at that point.

Even though the QROPS was recognised by HMRC and transfers to QROPS were permitted, given this warning sign, and the limited other information that Aviva had, I think it would have been fair and reasonable – and good practice – for it to have followed up on it to find out if other signs of a scam were present. And I think the most reasonable way for it to have looked into the proposed transfer would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. The nature/status of the receiving scheme

Sample questions: Is the receiving scheme newly registered with HMRC.

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 D'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 D as part of its due diligence.

I don't think this would've been an unreasonable burden on Aviva. Or that it would've been inappropriate. Indeed, in respect of the initial request to transfer to a SSAS, Aviva sent a supplemental questionnaire to Cranfords, which included a section for Mr D to complete, asking several questions that the Scorpion guidance suggested. So, I don't think asking similar questions in respect of the QROPS transfer would've been difficult.

I'd just note, for the avoidance of doubt, I haven't seen anything to suggest that the supplemental questionnaire in respect of the initially proposed transfer to a SSAS was actually shared with Mr D by either Aviva or Cranfords. Rather the application seems to have been withdrawn at the point that information was requested.

<u>What should Aviva have found out?</u>

Aviva would've known the receiving QROPS was recognised by HMRC and had been for roughly a year at the time. But I think if it had asked further questions of Mr D it would've found a number of things about the transfer, and why he was considering it, which the Scorpion guidance warned about.

I think he'd have told Aviva that he'd been cold called and offered a pension review – two things the action pack for businesses mentioned as warning signs. I think Aviva could also have learned that the proposed investment was relatively unusual and that, although he was transferring his funds to a QROPS, he wasn't intending to move overseas, which too was unusual. And it would have become aware that Mr D had been initially contacted by an introducer (which it already had some information in support of given it had corresponded with Preferred, an IAR).

Most importantly though, I think Mr D would've told Aviva that he'd been advised to transfer to the QROPS by SJIP.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "*check whether advisers are approved by the FCA at www.fca.gov.uk/register*". In other words, they should consult the FCA's online register of authorised firms. I'm satisfied after confirming who had advised Mr D, Aviva should have taken that step, which is not difficult, and it would quickly have discovered that SJIP was indeed unauthorised.

Being *advised* by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion guidance itself makes this point.

My view is that Aviva should have been concerned by SJIP's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

Again, I note that Aviva referred to 'St James International' as a "worldwide independent financial consultancy". But I haven't seen anything that supports SJIP was the same entity it is referring to or that it was part of a larger group. Ultimately SJIP was not authorised by the FCA to provide the advice to Mr D that it did. And, nor does, 'St James International' appear to have been on the FCA register either. So, I don't think Aviva could reasonably have taken any comfort in the name of the adviser that was involved.

What should Aviva have told Mr D - and would it have made a difference?

Had it done more thorough due diligence, there would have been a number of warnings Aviva could have given to Mr D in relation to a possible scam threat as identified by the action pack. But the most egregious oversight was Aviva's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr D accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Aviva to have informed Mr D that the business he had been advised by was unregulated and could put his pension at risk. Aviva should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections.

None of the declarations that Mr D signed as part of the application to transfer warned of these risks, or the others mentioned by the Scorpion insert. I also don't think warning Mr D of this would have been a disproportionate response given the scale of the potential harm he was facing. And I don't think any such warnings would reasonably have caused Aviva to think it was running the risk of advising Mr D, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

I'm satisfied any messages along these lines would have changed Mr D's mind about the transfer. The messages would have followed correspondence with Mr D so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Aviva raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr D aware that there were serious risks in using an unregulated adviser. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. I've seen no persuasive reason why Mr D would have been any different.

Aviva has suggested that Mr D's earlier application to move his pension to a SSAS indicates he was committed to transferring. But I don't agree. I'm satisfied that Mr D had limited investment experience and that he was cold called. And I think, if anything, this indicates that Mr D was being led by the businesses that had cold called and advised him. If Aviva had warned him that those businesses were potentially not acting in his best interests and giving advice they were not authorised to, I think that would've impacted Mr D's opinion of and confidence in the businesses providing him with advice. And I think it would've resulted in him not going ahead with the transfer.

So, I consider that if Aviva had acted as it should, Mr D wouldn't have proceeded with the transfer out of the personal pension or suffered the investment losses that followed. I therefore uphold Mr D's complaint.

Putting things right

Fair compensation

My aim is that Mr D should be put as closely as possible into the position he would probably now be in if Aviva had treated him fairly.

The transfer of Mr D's pension to the GFS Superannuation Scheme 2 only seems to taken place in order for Mr D to make an investment in CPC loan notes, on the recommendation of SJIP. I don't think he would have made that investment from the proceeds of this pension transfer, but for Aviva's failure to carry out appropriate due diligence and provide him with relevant warnings. So, I think that Mr D would have remained in his pension plan with Aviva and wouldn't have transferred to the GFS Superannuation Scheme 2 (and then to the EFPG Diamond Personal Pension Plan) if Aviva had done as it should have.

To compensate Mr D fairly, Aviva must subtract the actual value of the pension funds, now held in the EFPG Diamond Personal Pension Plan following the in-specie transfer, from the notional value if the funds had remained with Aviva. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the EFPG Diamond Personal Pension Plan value at the date of my Final Decision. To arrive at this value, any amount in the EFPG Diamond Personal Pension Plan bank account is to be included, but any overdue administration charges yet to be applied to the EFPG Diamond Personal Pension Plan should be deducted. Mr D may be asked to give Aviva his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr D to the position he would have been in but for the actions of Aviva. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with CPC loan notes investment, which EFPGL has indicated has suffered significant losses and is illiquid. Therefore as part of calculating compensation:

- Aviva should seek to agree an amount with the EFPG Diamond Personal Pension Plan as a commercial value for the illiquid investment above, then pay the sum agreed to the EFPG Diamond Personal Pension Plan plus any costs, and take ownership of that investment. The actual value used in the calculations should include anything Aviva has paid to the EFPG Diamond Personal Pension Plan for illiquid investment.

- Alternatively, if it is unable to buy them from the EFPG Diamond Personal Pension Plan, Aviva must give the illiquid investment a nil value as part of determining the actual value. In return Aviva may ask Mr D to provide an undertaking, to account to it for the net proceeds he may receive from those investments in future on withdrawing them from the EFPG Diamond Personal Pension Plan. Aviva will need to meet any costs in drawing up the undertaking. If Aviva asks Mr D to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr D should not be disadvantaged while he is unable to close down the EFPG Diamond Personal Pension Plan. So to provide certainty to all parties, if the illiquid investment remains in the scheme, I think it's fair that Aviva must pay an upfront sum to Mr D equivalent to five years' worth of future administration fees at the current tariff for the EFPG Diamond Personal Pension Plan, to allow a reasonable period of time for the scheme to be closed.

Notional value

This is the value of Mr D's funds had he remained invested with Aviva up to the date of my Final Decision.

Aviva should ensure that any pension commencement lump sum or gross income payments Mr D received from the EFPG Diamond Personal Pension Plan are treated as notional withdrawals from Aviva on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

I don't think it's appropriate for further compensation to be paid into the EFPG Diamond Personal Pension Plan given Mr D's dissatisfaction with the outcome of the investment initially facilitated by the transfer, which that scheme now holds.

Aviva should reinstate Mr D's original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr D was invested in).

Aviva shouldn't reinstate Mr D's original plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Aviva to determine whether this is possible.

If Aviva is unable to reinstate Mr D's pension and it is open to new business, it should set up a **new** pension plan with a value equal to the amount of any loss on the date of my Final Decision. The new plan should have features, costs and investment choices that are as close as possible to Mr D's original pension.

If Aviva considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr D is entitled based on his annual allowance and income tax position. However, Aviva's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr D doesn't incur an annual allowance charge. If Aviva cannot do this, then it shouldn't set up a new plan for Mr D.

If it's not possible to set up a new pension plan, Aviva must pay the amount of any loss direct to Mr D. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr D is retired. (This is an adjustment to ensure that Mr D isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mr D is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr D was yet to take his 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to him in cash.

Alternatively, if the loss represents further ‘crystallised’ funds from which Mr D had already taken his 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it’s paid direct to him in cash.

If payment of compensation is not made within 28 days of Aviva receiving Mr D’s acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Aviva deducts income tax from the interest, it should tell Mr D how much has been taken off. Aviva should give Mr D a tax deduction certificate in respect of interest if Mr D asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Aviva is reinstating Mr D’s plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mr D was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation must be provided to Mr D in a clear, simple format.

My final decision

For the reasons given above, I uphold this complaint. Aviva Life & Pensions UK Limited must now put things right in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or reject my decision before 27 March 2025.

Ben Stoker
Ombudsman