DRN-5158757

The complaint

Mr B has complained, via his representatives, about a transfer of his Aviva Life & Pensions UK Limited personal pension to a Qualifying Recognised Overseas Pension Scheme (QROPS) in Gibraltar in June 2014. Mr B's QROPS was subsequently used to invest in The Trafalgar Multi-Asset Fund (the Trafalgar fund). The investment now appears to have little value. Mr B says he has lost out financially as a result.

Mr B says Aviva failed in its responsibilities when dealing with the transfer request. He says it should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence, in line with the guidance he says was required of transferring schemes at the time. Mr B 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

In November 2013 Mr B signed a letter of authority (LOA) allowing a firm called Sorensen Financial Services (SFS) to gather information about his pension. SFS was a firm authorised by the Financial Conduct Authority (FCA). The LOA said that another firm called Incentive Financial Limited (IFL) was acting as its introducer. In January 2014 IFL sent Mr B's LOA to Aviva asking for pension information.

In May 2014 a firm called STM, a pension provider registered and regulated in Gibraltar, sent a request to Aviva to transfer Mr B's pension funds into the STM Fidecs GIB Pension Transfer Plan. This is a QROPS registered in Gibraltar. STM enclosed the relevant forms to allow the transfer. Those included the appropriate HMRC forms completed by Mr B to allow a transfer to a QROPS and a letter from HMRC which showed the QROPS had been registered since 2011.

On 3 June 2014 Aviva transferred Mr B's pension funds of almost £60,600 to the STM QROPS. Soon after Mr B took a tax free cash (TFC) lump sum of around £15,150. Mr B was 57 years old at the time. On 1 July 2014 the QROPS invested almost £44,600 in the Trafalgar fund. This was a Cayman Island based investment fund. The fund subsequently went into liquidation causing investors to suffer a loss.

In August 2022, Mr B complained – via his representatives – to Aviva. Briefly, his argument is that Aviva ought to have conducted further due diligence and should have provided a strongly worded warning that he should not transfer.

Aviva didn't uphold the complaint. Amongst other things it said it was not responsible for assessing the suitability of the transfer. It also said there was no evidence the STM scheme was involved in pension liberation or scams. It added that it was not responsible for giving Mr B advice or to assess the suitability of the transfer. It also remarked that Mr B had a legal right to transfer. It was satisfied it was not responsible for any losses Mr B had suffered.

Mr B brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He didn't recommend the complaint be upheld. Mr B didn't agree with our Investigator's complaint assessment.

As our investigator was unable to resolve the dispute informally, 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.

While doing so 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.

My findings are similar to those our Investigator reached in his assessment of the complaint. So, my analysis as described below occasionally echo's the wording our Investigator presented.

<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 HMRC tests, 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 it 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, so called because of the imagery it contained.

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 checklist that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

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. It was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And its specific purpose was to inform and help ceding firms, like Aviva, 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 a turning 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. And where the recommendations in the guidance applied, without 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 other 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 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.

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.

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

Mr B didn't have a detailed memory of the events around the transfer. I think that's to be expected given the passage of time.

I'll add that we haven't seen all the documents that we would expect to see in these circumstances. For example we haven't seen Aviva's response to SFS's/IFL's request for transfer information.

However, Mr B told us that he was cold called and offered a pension review. Subsequently someone visited him and recommended a transfer to the Gibraltar QROPS and an investment in the Trafalgar fund. Mr B couldn't recall the name of the firm that initially contacted him or which made the recommendation to transfer. But we've seen evidence that IFL, on SFS's behalf, contacted Mr B concerning a transfer and requested information from Aviva. So it seems likely that an agent of SFS visited him.

Mr B told us that he was interested in the transfer as he was told he should make more profit from it than from remaining with Aviva. He could recall that the investment was with a company called Trafalgar who he believed was based in Gibraltar. He said the adviser wasn't pushy and he didn't think there was anything untoward about the proposed investment. Mr B wasn't concerned that it was overseas. He confirmed that he took TFC of around £15,000 which he spent on his home.

Mr B said that, a couple of years later, STM wrote to him to say it had learned that Trafalgar was going into administration. Subsequently, the SFO wrote to him to say it was investigating matters connected with the Trafalgar fund. I understand the Trafalgar fund was the subject of court action which led to its liquidation. As a result it's likely that Mr B will have suffered significant losses.

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 told us that at the time of events it was its standard practice to include the Scorpion insert with transfer packs. But its shown us no evidence that it sent a transfer pack or any other communication directly to Mr B in the period between receiving SFS's LOA and the transfer completing. So I don't think it would be fair to conclude that Aviva did send the Scorpion insert directly to Mr B.

While I think that Aviva should have sent the Scorpion insert directly to Mr B, I'm not persuaded that doing so would have had an impact on later events. I say that as the available version of the insert at the time was published in February 2013. That focused heavily on the risks of taking advice from firms enticing consumers to release their pension funds early – before age 55. But Mr B was already 57 years old. So, he plainly wasn't trying to release the funds before he turned 55. In fact he could legitimately access his pension funds and was not trying to do so in any other unauthorised way. Instead he was attracted to the transfer by the greater returns he'd been told were likely from doing so. In those circumstances, I think it's unlikely he would have thought the Scorpion insert would have applied to his situation.

So, on its own, I don't think the Scorpion insert would have prompted Mr B to change his mind about transferring.

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 other appropriate action if it was apparent their customer might be at risk.

However, I don't think that any of the information presented to Aviva at the time would have given it cause for concern that Mr B was looking to liberate his pension.

As I've already said Mr B was over the age of 55 and so wasn't trying to take his pension funds early or in any other unauthorised way. So Aviva could be satisfied that he wasn't trying to liberate his pension. That was a key focus of the Scorpion guidance at that time.

Mr B told us that the catalyst for the transfer began with a cold call. This was a potential warning sign. But Aviva would not have been aware of this when dealing with the transfer. And in the absence of other warning signs I don't think it was required to do additional due diligence in the circumstances.

Mr B hasn't complained explicitly that the transfer to a QROPS itself was a warning sign that should have prompted further due diligence. But given that he was a UK resident who had no intention of moving abroad this is something I've thought about.

Aviva hasn't provided a full file of documents. However, from what it has kept I've seen that when STM sent it's transfer request it included: the relevant HMRC forms signed by both Mr B and STM; and a letter from HMRC confirming it had registered the QROPS in April 2011.

It's not clear if Aviva checked that the receiving QROPS remained on HMRC's published list at the time of the transfer. But if it had done so, it would have found out that the QROPS remained registered. That meant that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr B's statutory right, and potentially other legal rights, to transfer.

In addition the STM QROPS had been showing on HMRC's published list without issue for around three years. So in my view the QROPS was even less likely to have been a vehicle for early release pension liberation – otherwise HMRC would most probably have already removed it from the QROPS list.

Also, at that time, transfers overseas were not something the Scorpion guidance focused on. There is one reference to an overseas investment in one of the examples in the action pack. But in that case it was a UK based occupational scheme which was intending on investing overseas. And I'm satisfied it was that risk which TPR was highlighting as a potential warning sign of pension liberation activity. Many such schemes we're aware of have employed that strategy. However, it doesn't seem to me that TPR was referring here to the type of transfer Mr B was making, to a QROPS.

As I've said above the Scorpion guidance was heavily focused on the threats of consumers accessing pensions early. That wasn't happening here. So Aviva needed to take a proportionate approach to the information before it.

For the reasons I've already given above, I don't think that the fact that the transfer went offshore would have given Aviva a cause for concern in this particular case. And no other features of the transfer stood out as being warning signs of early release pension liberation.

Also, it wasn't until a 24 July 2014 update to the Scorpion guidance that the focus shifted away from just pension liberation to pension scams in general. This gave more prominence to overseas investments. And the potential for a QROPS to facilitate investments which were at risk of a scam in that wider sense, rather than liberating funds back to the member, was greater. But these weren't the issues the Scorpion guidance was directing Aviva to look out for at that time. So it wouldn't be fair or reasonable to expect a ceding scheme, like Aviva, to go further than the guidance was asking it to.

I appreciate that some consumer representatives argue that liberation could include a high-risk investment being used to re-route a consumer's pension funds into the hands of a fraudster, without the consumer benefiting directly in any way. However, for the reasons given previously, that activity wasn't the focus of TPR's Scorpion campaign at the time of Mr B's transfer. And that's what I think it's important for me to recognise here.

The main message given both in the action pack and insert at that time was of consumers receiving earlier access to cash than they was entitled to. So I don't think it would be fair and reasonable for me to expect a ceding scheme to have been on the look out for something else.

There was always a possibility that some consumers might suffer losses from making inappropriate investments as a result of transferring to a QROPS. That might also happen where they transferred to some UK schemes, such as Self-invested Personal Pensions (SIPPs). So it doesn't to my mind mean it would have been a proportionate response to place *all* QROPS transfers under suspicion as soon as the February 2013 Scorpion campaign gave ceding schemes a new role to carry out due diligence.

As I mentioned, Aviva's role was to balance out the risk of enabling pension liberation with the risk of unfairly holding up legitimate pension transfers that were not for the purposes of liberation. I think it was appropriate for Aviva to concentrate on which transfers (including some of those to QROPS) were at greater risk of liberation. It was clear that TPR thought that the greatest risk lay with schemes that had only recently been registered/recognised by HMRC, and/or the member was given an unsolicited offer of early access to cash. That's for good reason, because a scheme which had remained on HMRC's QROPS list for a longer time without issue was less likely to be involved in this sort of activity.

That was consistent in my view with the approach TPR had taken to transfers to SIPPs in the 2013 action pack checklist. Not all SIPPs were under suspicion – only those claiming to be a SIPP but which were not authorised by the Financial Conduct Authority. They would rightly be seen as at greater risk of liberation. A QROPS in another EU country will generally be authorised by the equivalent regulator to the FCA in its country of establishment, in order to qualify for that definition.

Since receiving our Investigator's complaint assessment Mr B's representatives have argued that Aviva should have challenged Mr B's motivation for transferring. They said that if it had done so Mr B would have seriously reconsidered his position. But neither the Scorpion materials nor any other guidance said, in the absence of warnings signs, there was any obligation for Aviva to speak with or challenge Mr B's motivation for transferring. Aviva was not required, nor was it authorised, to assess the suitability of the transfer or Mr B's chosen investments. Nor was it required or authorised to give him advice about doing so.

Further, Mr B's representatives said that as Mr B was not experienced in investment matters he "would have been *vulnerable to take any advice given by the advisor on face value*". Mr B's representatives seem to be implying that given Mr B's lack of pension and investment experience Aviva should have been treating him as vulnerable and engaging in further due diligence as a result. However, if that is the representatives' intended implication I reject it.

Many, if not most, consumers considering transferring from personal pensions are not experienced in pensions and investment matters. Indeed, my understanding is that it was exactly such inexperienced customers that the Scorpion materials were intended to protect. So I don't think it would be fair and reasonable to consider that ceding schemes like Aviva would be obliged to engage in additional due diligence than the Scorpion material advocated in situations where the consumers involved were likely to be inexperienced.

Indeed there is nothing within the Scorpion guidance which indicates that ceding schemes should be undertaking any sort of assessment of the specific consumer's level of pensions/investment experience. So I don't think Aviva was under any requirement to consider Mr B to be 'vulnerable' or to challenge his motivation for transferring.

I'll also repeat that I'm satisfied Mr B wouldn't have stopped the transfer even if Aviva had sent the Scorpion insert. As I've already said the insert was focused on the threat posed by liberation – and the consequences of taking cash from a pension before the age of 55 in particular. Mr B wasn't in a position to do that, as he was already over 55. So I don't think sending the insert to him would have affected his motivation to transfer.

I have considerable sympathy with the position Mr B now finds himself in. He's told us about the impact that the loss of a significant part of his pension savings has had on his retirement plans. However, for the reasons given above I don't think it would be fair and reasonable to attribute any losses Mr B suffered as a result of the transfer to Aviva's actions.

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 Mr B to accept or reject my decision before 9 April 2025.

Joe Scott
Ombudsman