DRN-5338433

The complaint

Mr H has complained, via his representatives, about a transfer of his group personal pension held with Aviva Life & Pensions UK Limited ('Aviva') to a small self-administered scheme ('SSAS'), which completed in March 2016. Most of Mr H's SSAS was subsequently used to invest in a loan note, with Dolphin Trust GmbH/German Property Group ('Dolphin'). The investment now appears to have no value as Dolphin entered administration in 2020. Mr H says he has lost out financially as a result.

Mr H believes Aviva failed in its responsibilities when dealing with the transfer request. His representatives say 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 they say was required of transferring schemes at the time. Mr H says he would not have transferred, and therefore wouldn't have put his pension savings at risk, if Aviva had acted as it should have done.

What happened

Mr H's transfer was initiated through an unregulated firm, Return on Capital Group ('ROC'). ROC was not authorised to give financial advice. Mr H was approached by his brother-in-law who worked for the firm and Mr H said he was told that his pension wasn't performing well, so the transfer was suggested to him.

On 26 February 2016, a company was incorporated with Mr H as director. I'll refer to this company as 'C Ltd'. Through that company, Mr H then opened a SSAS with Rowanmoor Executive Pensions Ltd ('Rowanmoor'). C Ltd acted as the SSAS's sponsoring employer.

Mr H's pension was transferred out on 17 March 2016. He was 48 years old at the time of the transfer and the transfer value was around £48,000. Together with another, smaller pension that was transferred at roughly the same time, around £50,000 was invested in the Dolphin loan note. The loan note had a five-year term and an interest rate of 10% p.a. to be paid on maturity. A 10% bonus was also to be paid at maturity. Dolphin Trust GmbH, now known as the German Property Group, is a German property venture which has gone into liquidation. The SSAS seems to have received interest from the loan note initially but it is now worthless, which means that Mr H is unable to access his pension benefits in retirement.

In February 2023, Mr H's representatives complained to Aviva on his behalf. Briefly, his 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 SSAS was newly registered; there wasn't a genuine employment link to the sponsoring employer; and Mr H had been advised by an unregulated business.

Aviva didn't uphold the complaint. It argued it was not required to carry out further checks as per the PSIG Code (discussed further below) because the request came through Origo, in its view a trusted electronic system with its own rigorous application process that would mean only legitimate businesses would be able to use it. And as Rowanmoor was such a trusted business, Aviva was satisfied it followed the correct process and carried out sufficient due diligence.

Our investigator did not uphold the complaint. But as Mr H and his representatives didn't agree with his conclusions, he was unable to resolve the dispute informally, so the matter has been passed to me to decide.

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Mr H's complaint should not be upheld. Aviva did not respond, but Mr H's representatives rejected it on his behalf and made additional comments.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I don't think that I need to change the findings that I reached in my provisional decision. I have set these out below and adopt them as my findings in this final decision. I have also addressed Mr H's representatives' additional comments at the end of this decision. I have decided that Mr H's complaint should not be upheld.

In my provisional decision I said:

<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 how personal pension providers deal with 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.*

In February 2013, The Pensions Regulator (TPR) issued its 'Scorpion' guidance to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing a pension below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes dealing with pension transfer requests and some consumer-facing warning materials designed to allow members to decide for themselves the risks they were running when considering a transfer.

The Scorpion guidance 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, and the FSA/FCA, all of which endorsed the guidance, allowing their names *and logos to appear in Scorpion materials.*

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. So the content of the Scorpion guidance was essentially informational and advisory in nature. Deviating from it doesn't therefore mean a firm has necessarily 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 right to transfer.

That said, the launch of the Scorpion guidance in 2013 was an important moment in so far that 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.

The Scorpion guidance was updated in July 2014. It widened the focus from pension liberation specifically, to pension scams more generally – which included situations where someone transferred in order to benefit from 'too good to be true' investment opportunities such as overseas property developments. An example of this was given in one of the action pack's case studies.

In a similar vein, in April 2014 the FCA had also 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.

There was a further update to the Scorpion guidance in March 2015, which is relevant for this complaint. This guidance referenced the potential dangers posed by 'pension freedoms' (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes were being used by scammers. At the same time, a broader piece of guidance was initiated by an industry working group covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG) Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way which balanced the need to process transfers promptly with the need to identify those customers at material risk of scams.

The Scorpion guidance for businesses was updated again in March 2016, with the Scorpion insert being updated in June 2016. However, Mr H's transfer request was received just before the guidance was updated. Even though the transfer payment was completed just *after the issuing of the latest guidance, I think the March 2015 guidance to businesses was more relevant here, given that the Origo request would likely have been actioned before the new guidance was implemented. In any case, the 2016 updated Scorpion guidance didn't contain any major changes that would influence the outcome of this decision.*

<u>The March 2015 Scorpion guidance</u>

When the Scorpion guidance was launched in 2013, it included two standard documents that scheme administrators could use to warn their members about some of the potential dangers of transferring: a short 'insert' intended to be sent to members when requesting a transfer, and a longer booklet intended to be used for members looking for more information on the subject.

The March 2015 Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested a transfer pack. It said to include the pensions scam leaflet in member communications. In the absence of more explicit direction, I take the view that the member-facing Scorpion warning materials were to be used in much the same way as previously, i.e. for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer, and the longer version (which had also been refreshed) made available when members sought further information on the matter.

When a transfer request was made, transferring schemes were also asked to use a three-part checklist to find out more about a receiving scheme and why their member was looking to transfer.

<u>The PSIG Code of Good Practice</u>

The PSIG Code was voluntary. But, in its own words, it set a standard for dealing with transfer requests from UK registered pension schemes. It was "welcomed" by the FCA and the Association of British Insurers (amongst others). And several FCA regulated pension providers were part of the PSIG and co-authored the Code. So many of the observations I've made about the status of the Scorpion guidance would, by extension, apply to the PSIG Code. In other words, personal pension providers didn't necessarily have to follow it in its entirety in every transfer request, and failure to do so wouldn't necessarily be a breach of the regulator's Principles or COBS. Nevertheless, the Code sets a benchmark of good industry practice in addition to the Scorpion guidance.

In brief, the PSIG Code asked schemes to send the Scorpion materials in transfer packs and statements, and make them available on websites where applicable. The PSIG Code goes on to say those materials should be sent to scheme members directly, rather than just to their advisers.

Like the Scorpion guidance, the PSIG Code also outlined a due diligence process for ceding schemes to follow. However, whilst there is considerable overlap between the Scorpion guidance and the PSIG Code, there are several differences worth highlighting here, such as:

- *The PSIG Code includes an observation that: "A strong first signal of [a scam] would be a letter of authority requesting a company not authorised by FCA to obtain the required pension information; e.g. a transfer value, etc." This is a departure from the Scorpion guidance (including the 2015 guidance) which was silent on whether anything could be read into the entity seeking information on a person's pension.*

- *The Code makes explicit reference to the need for scheme administrators to keep up to date with the latest pension scams and to use that knowledge to inform due diligence processes. Attention is drawn to FCA alerts in this area.*

- *Under the PSIG Code, an 'initial analysis' stage allows transferring schemes to fast-track a transfer request without the need for further detailed due diligence, providing certain conditions are met. No such triage process exists in the 2015 Scorpion guidance – following the three-part due diligence checklist was expected whenever a transfer was requested.*

- *The PSIG Code splits its later due diligence process by receiving scheme type: larger occupational pension schemes, SIPPs, SSASs and QROPS. The 2015 Scorpion guidance doesn't distinguish between receiving schemes in this way – there's just the one due diligence checklist which is largely (apart from a few questions) the same whatever the destination scheme.*

TPR began referring to the Code as soon as it was published, in the March 2015 version of the Scorpion action pack. Likewise, the PSIG Code referenced the Scorpion guidance and indicated staff dealing with scheme members needed to be aware of the Scorpion materials.

Therefore, in order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing transfer requests. Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member. Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence, including steps to potentially fast-track some transfers which, where appropriate, would be in a member's interest.

The considerations of regulated firms didn't start and end with the Scorpion guidance and the PSIG Code. 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 either the Scorpion guidance or the Code – 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 H said he was approached by his brother-in-law who worked for ROC. He said his brother-in-law was aware of his family situation which meant that he would likely need to provide for his son also in retirement, so it was important for Mr H to have a good pension. He said he was told by his brother-in-law that his pensions were performing poorly but if he transferred them to a SSAS and invested the funds with Dolphin, he would get guaranteed return rates of 10% per annum.

Mr H held another, smaller pension at the time, which was also transferred, but his representatives have confirmed he didn't have any other significant assets. Much of his transferred pensions have lost their value in the loan note after Dolphin went into administration, and only a small portion is held in cash.

Mr H told his representatives that he was under the impression his brother-in-law was a regulated financial adviser and trusted him to advise him on the transfer, hoping for better pension returns.

A limited company, C Ltd, was set up which became the sponsoring employer of a SSAS that was established a short while later. Mr H was a director of C Ltd and trustee of the SSAS. The SSAS was used to invest in a relatively esoteric way – a five-year loan note, the returns from which depended on the performance of overseas property developments.

There's contemporaneous documentary evidence to show that ROC was involved in this process. The firm appears on Mr H's SSAS application form and as the recipient of a fee on the SSAS's bank statement shortly after the transfer.

ROC's role on Mr H's SSAS application form was recorded as providing advice on the SSAS to the member trustees. Whilst I haven't seen evidence of that advice, this indicates the advice was intended to allow the SSAS's trustees to comply with Section 36 of the Pensions Act. Such advice would have been in relation to the appropriateness of the Dolphin investment for Mr H's SSAS and would have indicated such an investment was appropriate in that context. As stated, ROC wasn't authorised by the FCA, but to act in this capacity it didn't necessarily need to be.

However, Mr H's testimony is very clear that it was his brother-in-law who advised him on the pension transfer and that he worked for ROC. Looking at the initial process to start the transfer, I think what was said to Mr H by his brother-in-law was likely to have amounted to advice or a personal recommendation for Mr H to transfer out of his personal pension to a SSAS to invest in Dolphin loan notes. In other words, ROC (and Mr H's brother-in-law) didn't confine themselves to the provision of Section 36 advice here. I say that because I can't see Mr H would've been prepared to enter into that sort of rather complex pension arrangement – including the setup of a company and becoming a director – or even known that it was available to him, unless he'd been told it would be a good idea and he'd be better off as a result. His representatives confirmed Mr H wasn't a high net-worth individual or an experienced investor and he followed advice from his brother-in-law when he proceeded with the proposal. That corresponds with Mr H's recollections, stating he was told that the proposed transfer would get him a better investment return, which is tantamount to advice to transfer.

There was another firm noted on the SSAS application form which signed the "identity verification certificate". In doing so, it confirmed that it had verified Mr H's identity. The firm was authorised by the FCA at the time of the transfer. It's not clear why an authorised financial adviser was required to take this step. But I haven't seen anything to suggest its role extended beyond doing this one specific task.

I've not seen anything to suggest the involvement of any other party that could, reasonably, have advised Mr H. So, I'm satisfied that ROC gave Mr H advice to transfer his pensions to a Rowanmoor SSAS.

<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.

Aviva said it did not send a Scorpion leaflet as the transfer request came through an *automated system, Origo, and from a well-known SSAS provider, Rowanmoor. It said that had any other request such as a quotation or fund information request been received from Mr H or his adviser, then Aviva would have followed its usual process and sent a leaflet. However, in this case, the transfer was actioned just a day later after the request had been received through Origo. Mr H also didn't receive a Scorpion leaflet from his other provider when he requested that separate transfer.*

Mr H may have been provided with a leaflet from Rowanmoor, however under the Scorpion guidance and the PSIG Code, it was for ceding schemes such as Aviva to send the Scorpion leaflet directly to their members and it was not enough to rely on a third party such as the SSAS provider to give such information to the plan holder.

Due diligence

As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore considered Mr H's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Aviva's actions using the 2015 Scorpion guidance as a benchmark instead.

The PSIG Code sets out certain situations where a transfer can be fast-tracked with minimal further due diligence. The bar for this is high (see section 6.2: Initial Analysis). Aviva hasn't explicitly argued that it fast-tracked Mr H's transfer request in line with the "Initial analysis" section (section 6.2.1) of the PSIG Code. This would have allowed it to fast-track a transfer request if it came from an accepted club (such as the Public Sector Transfer Club) or if Aviva had already identified the receiving scheme/administrator as being free from scam risk. Further details on how to manage that process were provided in Section 6.11 ("Internal white list approach").

Despite not framing its arguments in this way, it seems that Aviva is, in effect, saying it fast-tracked Mr H's transfer because it drew comfort from factors such as having received the transfer request through Origo and the involvement of a well-known SSAS provider, meaning more in-depth due diligence wasn't, in its view, required.

I've carefully considered Aviva's arguments that it took assurance from the involvement of Rowanmoor and Origo which it said mitigated the risk of a scam and therefore reduced the need for additional due diligence.

I note that at the time of the transfer, Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Aviva could have taken comfort from this, but I disagree. The Scorpion guidance and the PSIG Code gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance and the PSIG Code for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of single-member SSASs; they don't have to be registered with TPR. In the absence of that oversight, Aviva was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustees would comply with legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of Rowanmoor's business was regulated by the FCA doesn't change this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) weren't FCA- regulated so I see *no reason why they would have operated with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Aviva could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr H's transfer.*

For similar reasons, I also don't think Aviva could have taken comfort from the involvement of Origo. Aviva accepts that it could not have relied on Origo carrying out the due diligence checks as recommended by TPR. However, it points to the fact that Origo had a robust application process for members and that membership would not be automatically granted. It says Origo required members – which would have included Rowanmoor – to commit to a Memorandum of Understanding ('MOU'). In this MOU members would acknowledge that they would put systems in place in line with good industry practice to prevent any use that was fraudulent or otherwise unlawful or contrary to TPR guidance.

However, I don't think that assurances to a third party in an MOU or initial checks when agreeing membership were something Aviva could reasonably rely on when weighing up potential scam risks for their customers in a particular transfer. I note the importance of what the due diligence in question was aimed at preventing – pension liberation and scams, the end result of which can often be the loss of entire pension funds – and the clear steps that were expected of ceding schemes to prevent this happening. Not to mention the duties of ceding schemes under PRIN and COBS 2.1.1R. I don't think Aviva's reliance on other parties' checks and processes and essentially delegating its own responsibilities was good enough here.

So I'm satisfied Aviva shouldn't have (quasi) fast-tracked Mr H's transfer request. Instead, the initial triage process should have led to Aviva asking Mr H further questions about the transfer as per Section 6.2.2 ("Initial analysis – member questions"). I won't repeat the list of suggested questions in the PSIG Code in full. Suffice to say, at least two of them would have been answered with "yes":

- *Have you been promised a specific/guaranteed rate of return?*
- *Have you been informed of an overseas investment opportunity?*

Under the Code, further investigation should follow a "yes" to any question. The nature of that investigation depends on the type of scheme being transferred to. The SSAS section of the Code (Section 6.4.3) points to the following as being potential areas of concern:

a) *Employment link: a lack of an employment link to any member of the SSAS.*

b) *Geographical link: a sponsoring employer that is geographically distant from the member.*

c) *Marketing methods: a SSAS being marketed through a cold call or an unsolicited approach.*

d) *Provenance of receiving scheme: a SSAS registered within the previous six months or a recently registered sponsoring employer or administrator operating from 'virtual' offices, or using PO Boxes for correspondence purposes.*

Underneath each area of concern, the Code set out a series of example questions to help scheme administrators assess the potential risk facing a transferring member.

Not every question would need to be addressed under the Code. Indeed, the Code makes the point that it is for scheme administrators to choose the most relevant questions to ask *(including asking questions not on the list if appropriate). But the Code makes the point that a transferring scheme would typically need to conduct investigations into a “wide range” of issues to establish whether a scam was a realistic threat. With that in mind, and given the relatively limited information it had about the transfer, I think in this case Aviva should have addressed all four sections of the SSAS due diligence process and contacted Mr H to help with that.*

What should Aviva have found out – 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 identified and communicated to Mr H in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack).

Aviva would have known or should have found out from the information provided to it that C Ltd and therefore the SSAS had only been registered with HMRC in February 2016, shortly before Rowanmoor had sent it the transfer request in March 2016. If Aviva had asked him whether he was employed by C Ltd and how it’d come to be set up, I think he would have told Aviva that he’d been directed to establish the company to facilitate the transfer of his pension, that he had no real employment link to it, and that he was employed elsewhere. Those discoveries should have caused Aviva concern about the lack of a genuine employment link between Mr H and C Ltd.

Aviva could have identified the investment was of a type the PSIG Code determined as being linked to high fraud risk. As set out above, I’m satisfied ROC gave advice to Mr H. Under the PSIG Code, Aviva had a duty to ask Mr H about the advisory process. This should have prompted Aviva to carry out further due diligence and find out more about ROC’s involvement in the transfer.

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 advice in the UK. The PSIG Code (and the Scorpion guidance) make much the same point. Indeed, the PSIG Code says firms should report individuals appearing to give regulated advice that aren’t authorised to do so.

My view is that Aviva should therefore have been concerned by ROC’s involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I’m satisfied such a breach occurred here. Aviva’s failure to uncover that and to warn Mr H 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 H that the person 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. It would also have been appropriate for Aviva to have informed Mr H of the other warning signs it had identified. I’ve seen nothing that leads me to think Aviva could reasonably have dismissed these warning signs and proceeded with Mr H’s transfer without informing him of its findings.

I don’t think this would have been a disproportionate response given the scale of the potential harm Mr H was facing and Aviva’s responsibilities under PRIN and COBS 2.1.1R. And I don’t think any such warnings would reasonably have caused Aviva to think it was running the risk of advising Mr H, that it was replicating the responsibilities of the receiving *scheme, or that it was putting in place unnecessary barriers to exit.*

However, what I need to consider is whether receiving further warnings from Aviva would have changed Mr H's mind about proceeding with the transfer.

Mr H was approached by his brother-in-law, rather than, for example, being cold called out of the blue by an unknown adviser. I think these circumstances are significant in determining whether any warnings from Aviva would have prevented Mr H from transferring his pension.

Had Aviva sent Mr H a Scorpion leaflet and further, more detailed warnings, Mr H may have taken these into account and reviewed the transfer advice in that light. However, I'm not persuaded this also would have led to Mr H not going ahead with the transfer.

The Scorpion leaflet would have informed Mr H about the risk of losing a pension to a scam and given him scenarios that would normally indicate a scam risk, such as being cold called, being promised high or guaranteed returns, and investing in an overseas investment. Some of those scenarios may well have resonated with him and prompted questions, but he was advised by a family member, whose recommendations would likely carry more weight and potentially more trust than if he had been contacted out of the blue by someone unknown to him. Mr H wasn't cold called, so an important factor for a scam risk in the Scorpion leaflet did not apply to him, which likely also would have given him some reassurance. I think he most likely would have referred back to his brother-in-law to get further reassurances that the transfer and investment was in fact legitimate and safe. So, I don't think providing Mr H with a Scorpion leaflet would have prevented the transfer in these circumstances.

I understand that Mr H was under the impression his brother-in-law was an authorised financial adviser. If Aviva had acted in line with the PSIG Code, then it should have found out that ROC was involved in the transfer advice and should have informed Mr H that ROC (and his brother-in-law) were in fact unregulated to give such advice and that this may lead to a criminal breach of FSMA rules. But that in itself would not necessarily mean that Mr H would have stopped the transfer.

Mr H relied on the advice of a family member and, as he told his representatives, had reassurances about guaranteed performance and a 'safe investment'. I don't think he would have ignored such a warning from Aviva, but he most likely would have discussed this with his brother-in-law – in Mr H's view a subject matter expert and a trusted family connection – who would have had a focus on the prospect of better returns needed by Mr H to provide for his family. Mr H said his brother-in-law was aware of his family situation, meaning he needed good retirement benefits as he would have to carry on providing for his son and he was concerned whether his existing pensions would cover this. Someone in this situation, I think, would naturally trust a family member who is familiar with the circumstances more than a somewhat anonymous pension provider. And he had concerns whether his pension would be sufficient for the future in his particular situation, so this was another driving factor for him to go ahead.

So given the close family connection and Mr H's concerns about providing for the future, I don't think knowing that his brother-in-law wasn't a regulated adviser would have dissuaded Mr H from transferring.

So overall, even though I don't think Aviva met its due diligence obligations under the PSIG Code and COBS 2.1.1R, I'm not persuaded further action on the back of such due diligence would have prevented the transfer and Mr H's pension losses. I'm therefore unable to uphold the complaint.

Section 27/28 FSMA

Mr H's representatives have argued that section 27 of FSMA applies to this complaint, in essence because the arrangements to transfer his pension to the Rowanmoor SSAS constituted an 'agreement' which had been made in consequence of actions carried on by ROC in contravention of the general prohibition. Their argument is that, unless relief is otherwise granted under section 28 of FSMA, Mr H may be entitled to recover money transferred under the agreement and associated losses.

I'm not persuaded that any 'agreement' with Aviva, in the context of section 27, was being made at the point Mr H exercised his rights to transfer away. He had already entered into an agreement with Aviva some time previously – which was essentially the existing personal pension policy – and transferring away may have involved exercising clauses in that contract. But I've seen no evidence to suggest that any party was acting in contravention of the general prohibition when that agreement was made."

Responses to my Provisional Decision

After issuing my provisional decision, Aviva did not respond, but Mr H's representatives got back to us and disagreed with the outcome, in particular about the issue of whether more warnings provided to Mr H from Aviva would have made a difference.

Mr H's representatives have said that even though the starting point of being advised by a family member would be that of trust, such trust would have been broken if Aviva had given Mr H the information that ROC and his brother-in-law, Mr W, were not regulated. They said that Mr H would have found out that he had been misled about his brother-in-law's regulatory status – which he would have been able to confirm by checking on the FCA register – and therefore would not have gone ahead with the transfer.

They also point out that if Mr H would have gone back to his brother-in-law, armed with the information Aviva should have provided him, Mr W would not have been able to "explain away" the concerns Aviva should have passed on to Mr H. This would have further prevented a transfer and the investment losses that followed. He would have been aware that ROC wasn't regulated and that scam warnings applied to his transfer request, so he would not have gone ahead with it. And if he still did, he would have needed to be a reckless person, for which there is no evidence.

I appreciate the above points, but I'm still not convinced that warnings from Aviva about the nature of the transfer and the regulatory status of Mr W would have made a difference and prevented the transfer.

I think the crucial point was not only the family connection, but also that Mr H was promised much better returns and a safe investment – something he was looking for to provide for his family in retirement. Mr H's representatives have stated that the need to provide for his family would be a reason for Mr H to stay in his previous, safer, mainstream pension. This might be true in hindsight, but the issue lies with the promise of higher returns, above what he could expect of his previous pension. And Mr H was in a position where he sought higher than average returns to be able to provide for his son. So even if Aviva had raised concerns and pointed out a scam risk, the prospect of allegedly safe and high returns – promoted by a family member – would likely have outweighed any worries about scams or higher investment risks.

The family connection in this is also essential, as even though some of the warnings from Aviva and from the Scorpion leaflet may have resonated with Mr H, it's more likely than not that he would place his trust in a known, personal contact, rather than warnings from his pension provider. I appreciate that there would have been a cumulative impact following communication from Aviva about the overseas investment risk, the process of setting up a company as the sponsoring employer for the SSAS, and the adviser firm. And I don't think Mr H would have ignored this. But I disagree that his brother-in-law would not have been able to provide assurances if Mr H had gone back to him after receiving such warnings. Just as much as the initial selling points were higher returns and an investment in 'bricks and mortar', Mr W would likely again have stated the benefits of the investment and reassured Mr H about its potential. And given Mr H's need for better returns as well as the circumstances of being advised by a personal connection – rather than being cold called and having to place trust in an unknown adviser – I'm not convinced this would not have been enough reassurance for him to go ahead.

Lastly, I appreciate that Mr H's representatives believe the turning point would have been that Aviva should have told Mr H that ROC and Mr W were not regulated to give pension transfer advice and doing so would lead to a criminal breach of FSMA, as this would have made Mr H aware that he had been "misled" by his brother-in law. Mr H's representatives pointed out that Mr W's only defence would have been that he and ROC were indeed regulated to give advice under s36 of the Pension Act about the appropriateness of the investment for the SSAS. Regardless of its regulatory status, ROC was, in Mr H's eyes, a legitimate, trading firm giving financial advice and Mr W was part of this business and a knowledgeable professional. So even if Aviva had told Mr H that ROC was not regulated to give pension transfer advice, I doubt that this would have deterred him from transferring. Mr W could have explained to him that he is not formally providing pension transfer advice but merely giving recommendations and advising about the investment. Even though I have found that this did in practice amount to advice, Mr W would likely have framed this as a formality and reassured Mr H about the investment's legitimacy. And he would have been able to underline this with predicted return figures, brochures, and having Mr H's interests at heart, given the family connection.

I therefore also reject the notion that Mr H would have needed to be a reckless person to go ahead with the transfer despite any warnings. Because in the circumstances, with the added pressure of having to provide for his son in his retirement, it's more likely than not that he – as many others in his position – would have followed his family member's advice, despite any further communication from Aviva.

So overall, I'm not persuaded that warnings from Aviva would have stopped the transfer. I'm therefore not changing the outcome of my provisional decision.

My final decision

My decision is that I don't uphold Mr H's complaint about Aviva Life & Pensions UK Limited and I don't make an award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 7 April 2025.

Lea Hurlin
Ombudsman