DRN-5351919

The complaint

Mr W has complained about a transfer of his pension with Aviva Life & Pensions UK Limited (Aviva) to a Qualifying Recognised Overseas Pension Scheme (QROPS) in Malta in November 2014. About half of the QROPS fund was subsequently used to invest in Dolphin Capital, which later became the German Property Group (Dolphin). The investment now appears to have little value. Mr W says he's lost out financially as a result.

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

In 2014 Mr W's pension was with Friends Life, which later became part of Aviva, who is the respondent to the complaint. For ease I've just referred below to Aviva, references to which should be taken as including Friends Life, if the context so requires.

What happened

I issued a provisional decision on 10 February 2025. I've repeated here what I said about what had happened and my provisional findings.

'*On 28 April 2014, Mr W signed a letter of authority (LOA) authorising Aviva to release information to Global Partners Limited (GPL), based in Gibraltar, who'd be acting as Mr W's independent financial adviser. GPL was a financial adviser regulated in a European Economic Area (EEA) member state. The firm became Tourbillon Limited after June 2014 who were again an EEA regulated financial adviser and entered on the Financial Conduct Authority (FCA) register as having passporting rights to provide financial services within the UK.*

On 30 May 2014 Aviva received a request for information and transfer forms from GPL with the LOA. Aviva sent information and transfer documents to GPL in June 2014. The letter said a copy of TPR's 'pension liberation fraud awareness' leaflet was enclosed.

I've seen a confidential financial review questionnaire was completed by Portia (that's Portia Financial Limited (Portia), an unregulated firm) on 25 June 2014 and signed by Mr W on the same date. As I've set out in more detail later, Mr W says two different representatives from Portia visited him twice at home, although he understood them to be 'field representatives' of Servatus Limited (Servatus), based in Ireland. Servatus was an advisory firm, regulated by the Central Bank of Ireland, and an approved introducer to the Harbour Retirement Scheme (the Scheme), a QROPS based in Malta.

On 1 July 2014 Servatus issued a suitability report to Mr W. It referred to Mr W having met with a Mr B but the report was prepared by a Mr GW. Amongst other things, it said, following a risk profiling test, Mr W was in risk group 4. I think that was on a scale of 1 to 7 (where 7 was the highest risk). The narrative suggests it's no higher than medium which would fit with that. The report recommended the maximum Mr W should invest in Dolphin, described as an *'alternative investment', was 50% with the balance invested in Jupiter and JP Morgan diversified funds.*

Details of the Dolphin investment were set out. Under 'Risk Factors' the report said an investment in loan notes involved a high degree of risk. A fairly lengthy list of risk factors was shown. Fees were set out, including Servatus' adviser fee of 0.50%. A summary letter said a QROPS was a suitable product for Mr W. And that the Dolphin investment would help bridge a shortfall in his existing pension provision by providing higher returns. That would be balanced and brought into line with Mr W's attitude to risk by the JP Morgan and Jupiter funds (risk rated 4 and 2 (out of 7) respectively).

On 7 July 2014 Mr W signed an application form to join the Scheme. At section 4 he said he'd be transferring in his Aviva pension, the approximate value of which was £68,137.72. At section 8, about professional adviser and fees, he said Mr GW of Servatus was his adviser. And he confirmed he'd paid an initial fee of 0.5% to his adviser. On the same date Mr W signed documentation in connection with the Dolphin investment.

Mr W also signed forms to open a SEB Asset Management Bond which showed Servatus as the intermediary. SEB Life (SEB) is the trading name of SEB Life International Assurance Company Limited, part of the SEB Group, regulated by the Bank of Ireland. Mr W also signed SEB's Statement of Understanding – Acceptance of Risk Statement for Complex Investment Products. It said SEB had determined that Dolphin was a complex investment product. In signing the form Mr W confirmed, amongst other things, that he'd read all of the relevant promotional material and he fully understood the financial risks and costs associated with the investment. And that he understood he might make a loss and he could lose all of the capital he'd invested.

In July 2014 Aviva received a LOA saying Mr W's adviser was now Harbour Pensions Limited (HPL). On 15 July 2014 Aviva wrote to HPL and Mr W saying it had been agreed that information could be released to HPL and Aviva's records had been updated.

On 22 August 2014 Aviva received a transfer request from HPL to transfer Mr W's pension to the Scheme. The footer to HPL's letter said HPL was authorised and regulated by the Maltese Financial Services Authority (MFSA) to act as an administrator of retirement schemes. Completed documentation in support of the transfer request was enclosed, including a letter from HMRC dated 9 April 2013 giving the QROPS number and saying the Scheme would be entered on HMRC's list of Registered Overseas Pension Schemes (ROPS), published on HMRC's website.

Aviva sent information to GPL on 28 August 2014. The letter said a copy of TPR's leaflet was enclosed.

Aviva wrote to HPL on 18 November 2014 saying it was making arrangements to pay the transfer value of £69,194.19 to HPL's bank account. The transfer was completed on 20 November 2014 and a payment in that sum made.

Following the transfer, funds were sent to SEB for investment. Some £51,113 was invested in Dolphin with the balance (£50,386.28) in a managed portfolio. In total that's more than the transfer value paid by Aviva but Mr W had another pension with a different provider which was also transferred into the Scheme.

The Dolphin investment was a loan note to the company. The loan was to be repaid with pre agreed interest from the profits made by the property company. But Dolphin went into administration having allegedly failed to use investors' money to develop properties. There's no secondary market for the loan notes and investors are unlikely to get their money back.

In July 2020, through his representative, Mr W complained to Aviva. Briefly, his argument is that Aviva failed to assess the transfer request carefully and identify and tell him about a number of warning signs in relation to the transfer. Including (but not limited to) the following: the involvement of unregulated introducers and advisers; Mr W had been contacted by cold call and offered a free pensions review; the initial advice had been given by an unregulated firm (Portia); a complaint about the EEA passported firm couldn't be made to this service as there was no UK office from which advice was given; the transfer was to a QROPS in Malta – a complex pension structure for a retail client such as Mr W and when there was no indication he intended to move abroad; the proposed investment was unregulated and high risk; and the very high returns it was claimed Mr W would get were unrealistic.

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

The investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. In doing so I've taken into account Mr W's representative's comments in response to the investigator's updated view (which reached the same outcome as previously, that the complaint couldn't be upheld). Mr W's representative's comments related to first whether Mr W had received any version of the Scorpion warning and the implications of that and, secondly, on causation – that is what Mr W likely would've done had Aviva done what it should've.

What I've provisionally 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.

At about the same time as Mr W transferred his Aviva pension fund to the Scheme he also transferred a pension held with another provider. He's also complained about that transfer. That complaint has been dealt with under separate reference. But, in deciding each complaint, I've taken into account how both providers dealt with Mr W's transfer requests.

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

- *The Pensions Schemes Act 1993 and Personal Pension Schemes (Transfer Values) Regulations 1987 generally give 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. This came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age.*

- *On 10 June 2011, the Financial Services Authority (FSA) issued a warning about the dangers of "pension unlocking" and specifically referred to consumers transferring to access cash from their pension before age 55. (As background to this, the normal minimum pension age had increased to 55 in April 2010.) The FSA said that receiving occupational pension schemes were facilitating this. It encouraged consumers to take independent advice. The announcement acknowledges that some advisers promoting these schemes were FSA authorised.*

- *At around the same time, TPR published information on its website about pension liberation, designed to raise public awareness and remind scheme operators to be vigilant of transfer requests. The warnings highlighted that websites and cold callers* *were encouraging people to transfer in order to receive cash or access a loan.*

- *TPR launched its Scorpion campaign on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The FSA, and the Financial Conduct Authority (FCA)which had succeeded the FSA, endorsed the guidance. The guidance was subsequently updated, including in July 2014. I cover the Scorpion campaign in more detail below.*

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

- *Aviva was subject to the FCA Handbook and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance:*

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

<u>The Scorpion campaign</u>

The Scorpion campaign was launched in February 2013 and the guidance was updated regularly over the next few years. The updated guidance published on 24 July 2014 update is relevant in this case because Aviva received the request to transfer to the Harbour Retirement Scheme on 22 August 2014, almost a month after the updated guidance. And the transfer wasn't completed until 20 November 2014, almost four months later.

The materials in the Scorpion campaign comprised:

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

- *A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that could become aware of the scam risks they were facing.*

- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch* *out for" various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.*

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

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

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

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

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

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

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

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

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

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

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

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

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

I've considered what was said when Mr W's complaint was made, what we've been told during our investigation, including what Mr W recalled when he spoke to one of our investigators over the telephone, and the contemporaneous documentation.

Mr W's representative says Mr W filled in a questionnaire at an airport and was later cold called by GPL, offering a free review of his pension. He was put in touch with Servatus based in Dublin, and a 'field representative' of a different company, Portia, was sent to meet with him at his home. Mr W discussed his pension arrangements with the representative from Portia and was advised by them and Servatus that he should invest in overseas property. And by doing this he'd make much more money for his retirement than if his pension remained with his existing providers – over five years a return of 10% pa was guaranteed. On that basis he agreed to go ahead with the transfer. At the time he was 55, employed and earning about £23,000 pa. He had some savings but no investments and he wasn't a sophisticated investor.

Mr W was also able to provide some documentation he'd retained, including a copy of Servatus' terms of business and an undated document from Portia. The latter was *addressed 'Dear Client' and thanked the client for taking the opportunity to receive a free pension report from Servatus. It said the report would take between one and two weeks to produce and, once it was complete, Portia would re visit the client at home and present the information. The footer to the letter said that Portia didn't provide any financial or investment advice and wasn't regulated by the FCA.*

The investigator shared with Mr W a copy of the July 2014 Scorpion insert – 'A lifetime's savings lost in a moment'. Mr W said that was the first time he'd seen it – he hadn't been sent a copy, either by Aviva or the other provider. He said the insert would've made him have serious doubts about if he was doing the right thing. It referred to having been approached out of the blue over the phone and offered a free pension review – which is what had happened to him. And he'd felt under some pressure. The representative who visited was with him for quite a while and was very convincing. There'd been two separate visits by two different people – one to 'sell' and the other to do the paperwork. Mr W also said he hadn't sought advice and he wondered what had happened about the pension review as it hadn't taken place. He said he wasn't usually a reckless person. Most of his doubts were dispelled by Servtus' report which said he was a low to medium risk investor and the investment was medium risk. In another call Mr W said, if he'd have received the Scorpion insert, he'd have likely contacted a friend who knew more about financial matters than he did for advice. He reiterated that the leaflet described what had happened to him. He said it would've planted a seed of doubt and made him more cautious.

Mr W added that, after he'd had the Dolphin investment for five years, a representative had come to see him and told him his investment had grown to £75,000 and asked if he'd be interested in reinvesting although, if not, his money was safe.

I don't have any reason to think that what Mr W has told us isn't a largely accurate account of what happened. And it's consistent with the contemporary documents we've seen. Mr W thinks it was GPL who cold called him, offering a pension review. The documentation shows GPL was involved at the outset – Mr W signed a LOA in favour of that firm in April 2014 and Aviva received a request for information and transfer forms from GPL in May 2014 which Aviva sent to GPL in June 2014. But Mr W signed a LOA in favour of HPL in July 2014 and it was HPL who made the transfer request to Aviva in August 2014.

Mr W recalls that it was representatives from Portia who visited him at home. That's supported by the client confidential financial review questionnaire (or fact find) which Portia completed on 25 June 2014, which was presumably the date of Portia's initial visit. A weekor so later, Servatus issued its report, following which Mr W agreed to transfer to the Scheme. So it seems, regardless of any initial involvement on GPL's part, it was Portia and Servatus who took things forward.

I accept that Mr W didn't have any investment or pensions experience. I can't see he'd have decided to transfer to a QROPS and invest in Dolphin unless he'd been advised to do that. A QROPS is an unusual choice of pension vehicle for someone in Mr W's circumstances and when he wasn't planning to live or retire abroad. And the Dolphin investment is unusual too. I don't see Mr W would've even known about a QROPS as a pension vehicle or that he could invest in an overseas property development unless he'd specifically been told about that sort of arrangement. And given to understand he'd be better off as a result – so essentially he was advised to transfer so he could invest in Dolphin.

As to who gave that advice, the document from Portia says Portia isn't regulated and doesn't provide advice. And a search of the FCA's register confirms that Portia isn't shown (although there have been some firms with similar names but not at the time of Mr W's transfer). So any representative of that firm who visited Mr W at home wasn't authorised by the FCA and shouldn't have given any advice to Mr W. But, although Mr W says advice was given by

Portia, I don't think much turns on that as it's clear Servatus did advise Mr W anyway. The contemporary documentation – Servatus' suitability report dated 1 July 2014 and the application forms for the QROPS and the SEB Management Asset Bond – confirm that. I know Aviva won't have seen those documents. But they show that Mr W was advised by Servatus.

Mr W seems a bit confused about what happened. On the one hand he says both Portia and Servatus advised him but he's also said the promised pension review never took place. But it's clear from Servatus' report that some kind of review was carried out. The covering letter to the report says it addresses Mr W's personal or defined contribution pension arrangements and an alternative option, a QROPS, and information on the Dolphin investment is included.

Mr W says he wasn't given any warnings. Aviva's letters dated 4 June and 28 August 2014 say a copy of TPR's leaflet is enclosed. I'm unsure if that would've been the Scorpion insert or the longer booklet so I'd assume it was the insert. But in any case, the letters weren't sent to Mr W but to GPL and HPL.

The other provider said it sent a pension liberation fraud awareness leaflet to Mr W on 29 July 2014. It wasn't the Scorpion insert but providers could choose to provide substantially the same information in a different format. So it was open to the other provider to do that, and even if omitting the front page image from the Scorpion insert arguably meant the alternative format had less impact. The other provider has produced a copy of the warning document it says was sent to Mr W, along with transfer forms, under cover of the provider's letter of 29 July 2014.

But the copy of the letter dated 29 July 2014 from the other provider to Mr W I've seen doesn't indicate anything was enclosed. It says the provider's records have been updated to show GPL had authority to obtain information and that had been sent. And I've seen that the transfer information – sent to GPL – did indicate a pension fraud information leaflet was included. But I'd expect to see, if there were enclosures to the letter dated 29 July 2014 to Mr W, for those to be mentioned in the letter itself. Without that I can't be sure the letter included anything. Which would mean, even if the warning was included with the information sent to GPL, a copy wasn't sent to Mr W direct and so may not have been passed on to him by GPL – and particularly when it seems that, in the end, GPL didn't make the transfer request. So I accept what Mr W has said about not getting any warning information from Aviva or the other provider.

<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.

As I've said, Aviva's letters dated 4 June and 28 August 2014 say a copy of TPR's leaflet is enclosed. But the letters weren't sent to Mr W but to GPL and HPL. The insert should've been sent direct to the member. I don't agree with what Aviva has said about Mr W's advisers being well placed to explain pension liberation and pass on the leaflet. It would've defeated the purpose of the insert if, instead of sending it to their customer, providers instead sent it to the customer's representative in the hope it would then be shared with the customer. The insert should've been sent to Mr W when Aviva received the transfer request in August 2014. So it would've been the July 2014 version that Mr W should've received.

Due diligence:

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

Although there'd been previous contact from GPL, in the end a transfer request was received from HPL, not GPL. Pension transfers to QROPS are permitted under Section 169 of the Finance Act 2004 and are therefore authorised by HMRC. Aviva confirmed that the receiving scheme was a QROPS and listed as such by HMRC. At the time HPL, who operated the Scheme, was a licenced retirement scheme administrator authorised by MFSA. HPL was acquired by STM Group plc in November 2017 and STM Malta Trust and Company Management Limited, also authorised by MFSA, are responsible for the now renamed STM Harbour Retirement Scheme which is still listed by HMRC as a QROPS.

But, given the information Aviva had at the time, one feature of Mr W's transfer would've been a potential warning sign of a scam: the transfer to a QROPS obviously involved moving money overseas. Aviva should therefore have followed up on that to find out if other signs of a scam were present. Given this warning sign, I think it would've been fair and reasonable – and good practice – for Aviva to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. The nature/status of the receiving scheme

Sample questions: Is the receiving scheme newly recognised by HMRC, or is the receiving scheme connected to an unregulated investment company?

2. Description/promotion of the scheme

Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?

3. The scheme member

Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts.

I don't think it would've always 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've been apparent when dealing with Mr W's transfer request, and the relatively limited information it had about the transfer, I think in this case Aviva should've addressed all three parts of the check list and contacted Mr W as part of its due diligence.

<u>What would Aviva have found out and would it have changed the outcome?</u>

If Aviva had looked into the transfer more closely and contacted Mr W for more information, Aviva would've identified a number of warning signs: Mr W was transferring his pension to a scheme not authorised by the FCA; the transfer fund would be invested overseas and, potentially in unusual investments – half of the (combined) transfer value was to be invested in Dolphin; and Mr W's transfer request had come about following an unsolicited approach. But Aviva would've also seen that the QROPS wasn't a recently recognised scheme and wasn't associated with an unregulated investment company. Nor would Mr W be accessing his pension benefits before age 55 and he hadn't been offered any loans, savings advances, or cash incentives. Further, and importantly, Mr W was getting advice from Servatus (a firm which was regulated in an EEA member state and had passporting rights to the UK) and he'd have told Aviva that.

Aviva needed to consider the overall circumstances in order to determine if Mr W's transfer presented a scam risk. Although Aviva would've likely (had it conducted thorough due diligence) found there to be some of the pension scam warning signs indicated in the Scorpion action pack, I think Aviva would've ultimately concluded the risk was minimal. Mr W would've explained that he wanted to transfer to take advantage of the potential for improved investment performance and that he'd taken financial advice. So, overall, he wouldn't have given the impression to Aviva that he was being led through a process by another party acting in a potentially unlawful way – which would be the usual pattern for someone falling victim to a scam. Instead, he was acting on advice from a regulated party. His decisions followed financial advice and Aviva could reasonably have taken comfort from that.

Servatus was an overseas adviser. But, as Mr W was transferring to a QROPS, it wouldn't be unusual for overseas parties to be involved. The rules in place at the time allowed firms, that were properly regulated in an EEA state to have passporting rights to legitimately provide services in the UK.

Mr W's representative says Aviva should've warned Mr W that he wouldn't have the same regulatory protections as with a UK adviser. It is correct that Servatus didn't have a branch in the UK and so Mr W wouldn't have had any recourse via the UK's complaints and investor protection regime, such as to this Service or the Financial Services Compensation Scheme (FSCS), as opposed to their Irish equivalents. The Republic of Ireland also has a complaints system, financial services and pensions ombudsman and a statutory investor compensation scheme, which EU countries are required to have under the EU's Investor Compensation Directive.

Servatus was passported from Ireland to the UK and so for the period of this transfer was an authorised person under FSMA 2000. The right to passport financial services from one EU country to another is a feature of the EU's internal market, which applied to the UK at the time. The right was underpinned by the introduction of EU wide standards of investor protection and harmonised conduct of business rules. So, the UK's regulatory system permitted EU passported firms, if duly registered with the FCA on its public register, to *operate here as authorised persons under the FSMA 2000, and I think that, in the present case, that could have provided sufficient comfort for Aviva's purposes.*

As a firm that was regulated (albeit by a home-state regulator in another EU jurisdiction) the regulatory protections included the fact that Servatus would've been held to a high standard, mandated throughout the EU, by its own regulator. And, as an authorised firm, Servatus would've had to follow the applicable European regulatory standards and conduct its practice in accordance with those standards. Its operations would have been under some oversight by its regulator to ensure it was acting in the best interest of its client. It therefore would have had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system. So, in my view, Aviva could've been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under UK law.

Against that background, I don't see any reason why Aviva ought to have concluded that advice from a properly regulated firm with passporting rights was inferior to that of a FCA regulated firm. Or that Servatus wasn't acting in Mr W's best interests. Nor would it have been reasonable to expect Aviva to scrutinise the advice Mr W had been given.

I've also considered whether Aviva should've warned Mr W that it was unusual for him to be transferring to a pension overseas – and checked whether his reason for doing so was because he'd be moving overseas. At the time (unlike today) there wasn't a prospect of a tax charge that had to be levied by the ceding scheme in certain circumstances where someone transferred their pension overseas whilst remaining resident in the UK. I think whether it was appropriate for Mr W, as a UK resident, to be transferring his pension to Malta was a financial planning matter and not a matter that Aviva should've intervened in. And, as I've said, Aviva would've established that Mr W had taken regulated advice on that.

I've considered if it's reasonable to expect Aviva to have done more to warn Mr W about what he was intending to do, even if the scam threat would've appeared to be minimal. But I think that argument misreads what should, reasonably, have been expected of transferring schemes at that time. Investigations into the receiving scheme, and intended investments were a means to an end: to establish the risk of a pension scam. A firm needed to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights. Expecting a firm to share its due diligence "workings" in this way would cut across this (and could potentially be viewed as a self-serving tactic to hold on to a customer). Where the scam threat was assessed as being minimal (as I think it would most likely have been in this case) I don't think it would be unreasonable for the transfer to proceed as normal.

In reaching my findings I've borne in mind Mr W's representative's comments in response to the investigator's updated view and which centre, first, on whether Mr W received any version of the Scorpion warnings from the other provider and, secondly, on causation. As to the first issue, my findings aren't the same as the investigator's. There's nothing to indicate the Scorpion insert was sent and, for the reasons I've explained, I'm not satisfied the other provider did send any warnings in its own format to Mr W.

As to whether sight of the Scorpion insert or similar would've changed things, Mr W's careful attitude to financial matters and that he wasn't in a position to take risks has been stressed. Mr W doesn't strike me as someone who'd be reckless with his accumulated pension savings. Further, I do understand that whoever he spoke to would've been convincing and persuasive and Mr W was driven by the desire to improve his retirement provision. And I don't disagree that the insert wasn't to be read as only being applicable if every single warning sign was present. The insert warned about cold calls and being offered a free pension review to lure customers into one-off investment opportunities which Mr W says he'd *have recognised as warning signs applicable to his transfer. That said, I note from the QROPS statements that he appears to have paid a fee of £527.43 for Servatus' advice, so the review in his case wasn't actually free.*

The insert referred to 'scammers'. I don't see Mr W would've immediately thought that might apply to an adviser who was shown on the FCA's register. The insert said further information was available through TPR's website or by calling TPAS or Action Fraud. However, TPR's website at the time still focused heavily on early access pension liberation and the main recommendation was to seek regulated advice which is what Mr W had received. He wasn't accessing his pension before age 55 and he hadn't been offered upfront cash or any other incentive. So I don't think the majority of the warnings given would've resonated with him. So, in much the same way as Aviva would've been reassured by the involvement of a regulated adviser, Mr W would've also taken comfort from that and that he was doing the right thing by relying on regulated advice.

Further, Mr W did get some warnings. Although he's said Servatus' report reassured him, it did say, about the Dolphin investment, that loan notes provide a high degree of risk, the investment wasn't protected by the financial regulator or by a statutory compensation scheme, and loan notes are unquoted so there's no market to sell them. And SEB's Statement of Understanding – Acceptance of Risk Statement for Complex Investment Products did say Mr W might make a loss and he could lose all of the capital he'd invested. Mr W considered these risk warnings and went ahead with the transfer.

And, in view of what I've said about it not being necessary for Aviva to have given any further warnings, Mr W's position wouldn't have been that he'd have seen the insert (or similar) and then had further warnings from Aviva, so putting the warnings in context and perhaps emphasising them. I note what's been said about Mr W having developed some trust in Servatus who he believed to be professional and legitimate. Whereas Servatus was part of a complex network of unregulated and/or overseas firms which facilitated the transfer to the QROPS and the unregulated investment. But I don't see that clear communications from Aviva would've likely 'broken the spell' of reliance on these firms by Mr W. As I've said, I don't think Aviva would've considered it necessary to give Mr W any further warnings about Servatus given its regulatory status so it doesn't follow that his trust in Servatus would've been shaken, leading him to reevaluate the transfer. So, all in all, I don't think the Scorpion insert, on its own, would've changed things for Mr W.

I don't agree that my findings effectively negate the Scorpion campaign. What I'm saying is that, in Mr W's particular circumstances and for the reasons I've given, I don't think the insert would've changed the outcome by making him think again. Nor do I think, given the circumstances of his particular transfer, that Aviva would've been prompted to give any further warnings. The majority of the responses Mr W would've likely given to any questions Aviva asked wouldn't have given rise to concerns. And, despite what's been said, I don't think the mere act of contacting Mr W and asking questions about the transfer would have prompted a change of heart on his part. Even if coupled with an explanation that it was aimed at ensuring Mr W wasn't about to fall victim to a scam. He might've seen the fact that Aviva was probing things further but not expressing any reservations as positive and indicating that Aviva hadn't found anything of concern.

As to what's been said about causation not having been properly addressed, I reach my findings about that – including as to what Mr W would've likely done if Aviva had done all it should've – on the balance of probabilities. That is what I consider is more likely would've happened, taking into account all the available evidence (which might be incomplete, inconclusive or contradictory) and the wider circumstances. I don't disagree that what Mr W would've likely done has to be addressed taking into account his particular circumstances – what he likely would've done won't necessarily be the same as another consumer.

In reaching my findings about that I've considered very carefully all the factors Mr W's representative has pointed to. I don't disagree with what's been said about Mr W's personal circumstances and that he wasn't in a position – or shouldn't have been advised – to take a high degree of risk with his accumulated pension savings. And I accept he'd have taken seriously any warnings from Aviva, a known and trusted UK brand, and potentially preferred what Aviva had said over what Servatus might have told him. But, for the reasons I've explained, I don't think it would've come to that.

Mr W has suffered a significant loss and so my decision will be very disappointing for him, particularly as I've said Aviva's due diligence was lacking. But although Aviva should've done more, that's not enough for me to uphold the complaint. In short, even if Mr W had been given (as he should've been) the Scorpion insert or similar), I don't think that would've changed the outcome. And, even if Aviva had looked into the transfer further, it would've been reasonable for Aviva to conclude that it wasn't necessary to provide warnings to Mr W. So I can't say Aviva's failings caused Mr W's losses which means I'm unable to uphold the complaint.'

Responses to my provisional decision

Mr W didn't accept my provisional decision and, through his representative, made further comments. I've summarised the main points.

- I hadn't placed enough weight on Portia's involvement. If Mr W had been asked by Aviva he'd have mentioned both firms – Portia and Servatus.
- I'd said I didn't think much turned on whether Portia technically gave advice or not because Servatus advised Mr W, as evidenced by the written report from Servatus. But, if there were two firms giving advice, both must be regulated. If not, there was a significant risk that the unregulated firm hadn't adhered to the regulatory provisions and which could affect the way in which the consumer understood any advice from the regulated firm. Advice from an unregulated firm also brings with it the breach of the general prohibition and potential implications under sections 27 and 28 of FSMA.
- If Mr W had said he'd only met with an unregulated firm, Portia, who he'd thought had advised him and who he found convincing, Aviva should've treated that as a major scam concern. Aviva shouldn't have considered the scam risk as minimal simply because an EEA regulated firm had later produced a report addressed to Mr W.
- Looking at the overall circumstances, a number of scam warning signs would've been identified: the unsolicited start to the process; the advisory process involving the receipt of some unregulated advice; the overseas nature of the transfer, with no rationale; and the high risk and unregulated nature of the intended investment. Aviva couldn't have considered there was a minimal scam risk.
- Mr W fell victim to a scam of exactly the kind that the July 2014 Scorpion action pack was designed to protect against. Aviva had failed to comply with any of the guidance aimed at protecting Mr W. But I'd ruled against him on the basis of a hypothetical situation. And, although I'd said I didn't have any reason to think what he'd told us wasn't a largely accurate account of what happened, I hadn't accepted his evidence on the issue of causation.

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've considered very carefully the points made by Mr W in response to my provisional conclusion and which centre on causation – Mr W accepted my findings of fact and my conclusions as to the rules and guidance in place at the time and what that meant pension providers had to do, as well as what I'd said about Aviva having failed to send the July 2014 Scorpion insert and that its due diligence had been lacking.

Although I accepted Mr W's evidence as to what had happened, a decision about what he'd likely have done if Aviva had done all it should've is more finely balanced and necessarily based on a hypothetical situation. It won't always be obvious how things might've played out. For example, exactly what Mr W would've said in response to any enquiries from Aviva and whether he'd have mentioned both Portia and Servatus. And what he'd have said about the precise roles played by each firm. Including if Portia acted more as an introducer and information gatherer for Servatus

Again in reaching my conclusions about that, I take into account the contemporaneous written evidence. Here there's the undated letter from Portia – which said Portia wasn't regulated and didn't provide advice and that the report would be from Servatus, although Portia would present the information – and the fact find which Portia completed. Further, when Mr W's complaint was made, Portia was described as a 'field representative' of Servatus. I think all that points to Portia being an introducer. Which would be reflected in what Mr W would've told Aviva about who was advising him. I accept that Mr W only met with Portia, not Servatus) and that he may have understood, from the discussions he had with Portia, that advice was being given by Portia. But, ultimately Servatus was the adviser and it was Servatus who said a QROPS and investment in Dolphin was suitable for him. And that's what Aviva would've understood the position to be – that Mr W had a regulated adviser in place even if he'd also had some involvement with Portia, an unregulated firm.

In the circumstances, I don't agree that Aviva would've understood that there were two firms giving advice, one of which wasn't regulated and which should've prompted Aviva to give Mr W warnings about advice from an unregulated firm being in breach of the general prohibition in FSMA and unlawful. Nor do I consider sections 27 and 28 of FSMA are relevant here.

I don't disagree, as I said in my provisional decision, that there were some warning signs. But Aviva needed to consider things in the round. And I think, overall, Aviva could've concluded the scam risk was minimal and where, as here, Mr W was acting on advice from a regulated entity. I think it's important not to approach the matter with the benefit of hindsight. Mr W says the process by which very high numbers of consumers were persuaded to transfer to a QROPS to invest in Dolphin loan notes has been widely described as a scam. But I don't think there's any suggestion that, at the time, Aviva should've immediately recognised Mr W's transfer as such.

All in all I haven't been persuaded to revise my views. I've set out above what I said in my provisional decision and it forms part of this decision. For the reasons I've given I'm not upholding Mr W's complaint and I'm not making any award.

My final decision

I don't uphold the complaint and I don't make any award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 26 March 2025.

Lesley Stead
Ombudsman