

## Complaint

Mr W and Ms G complain that Phoenix Wealth Services Limited (previously known as AXA Wealth Service Limited (AXA)) removed a key feature from its Family SunTrust - the non-proportionate allocation of growth facility, also known as the 'Flexibility Option'.

Mr W and Ms G also complain about the way AXA sold the Family SunTrust to them.

## Background

The AXA Family SunTrust (FST) allowed individual pensions to be grouped together and investment growth to be re-allocated between the members' pensions on a non-proportionate basis. AXA refers to this facility as the "Flexibility Option". To keep things simple, that's how I will refer to it in the rest of this decision.

In November 2014 Mr W has said he started discussions with his financial adviser about investing into the FST and his adviser communicated at length with AXA about this and specifically about the workings of the Flexibility Option. In November 2014 the adviser gave information to Mr W that AXA had provided in answer to some questions he had raised about the FST. This included a note from AXA's legal advisers dated May 2012 specifically concerning the Flexibility Option. Mr W says this provided him with reassurance about the Flexibility Option, that it would remain a feature of the FST and that if HMRC had concerns AXA could strongly challenge this.

In October 2015, Mr W completed paperwork to apply for the FST in his name only. AXA received this paperwork in early November 2015 and sent it on to HMRC to get the FST registered. It also emailed Mr W's adviser (as well as many other advisers) explaining that it was experiencing delays in registering FSTs because HMRC was querying the 'Flexibility Option'. It has later transpired that the IFA didn't receive this email.

Around nine weeks later Mr W's adviser contacted AXA as he'd not heard anything further about Mr W's FST application. At this point AXA's representative explained that HMRC were delaying registering FSTs because of concerns around the Flexibility Option. The adviser has explained he was surprised by this, that they hadn't been made aware of this and that they had previously been reassured that the Flexibility Option was unlikely to be successfully challenged by HMRC.

After AXA looked into this matter it found that the email it had sent in November 2015 had been sent to an incorrect address. It wrote to Mr W's adviser on 5 January 2016 explaining this. It also found that another letter from December 2015, which again explained why there were delays in HMRC registering the schemes, had also not been sent. The email from January 2016 set out the information that was included in the November 2015 letter, but also stated that the FST had now been registered with HMRC that month and that if it didn't hear anything further from Mr W it would assume he was content to proceed.

Around 8 January 2016, AXA spoke with Mr W's adviser and it was confirmed that Mr W still wanted to proceed with his FST application. His adviser said Ms G, Mr W's wife, also wanted to become a member of this FST. He also checked during the call that AXA was still using the Flexibility Option to make non-proportionate allocations of investment growth. He said he was aware that HMRC could always "*kick up*" but that he was also aware that AXA had obtained an opinion from Queen's Counsel saying that the option was robust. He commented on the fact that his client knew the counsel involved (being in the legal profession himself) and was happy to proceed.

It is noted that at this stage Mr W had already transferred some of his pension benefits into an AXA SIPP pending the registration of his FST, at the beginning of November 2015, not long after the application for the FST was submitted. As well as this AXA had no record of Mr W and Ms G applying to vary the terms of the FST, as they would've had to, to use the Flexibility Option.

In July 2016 AXA sent the adviser an email explaining that due to HMRC's concerns about the Flexibility Option and recent advice from its legal advisers it had made the decision to withdraw the Flexibility Option in the FST shortly. It formerly told Mr W of the withdrawal of the Flexibility Option in a letter dated 12 September 2016, after the official withdrawal date of 2 September 2016.

In the process of answering this complaint AXA also explained that whilst it formally informed FST investors of the intention to withdraw the Flexibility Option in line with the terms and condition in August 2016, it didn't include Mr W in this mailing because the Flexibility Option on his FST had not been activated. Therefore, the thirty days' notice period didn't apply.

Mr W has said the key reason he selected the FST was because of the Flexibility Option. His pension benefits at the time were significant and so it seems his intention was to make use of the Flexibility Option to mitigate his tax position and to grow his wife's pensions pot.

He said the email from AXA in January 2016, accepting previous information hadn't been sent correctly, was too late because by then he had already transferred his pension benefits from other providers into an AXA SIPP in readiness to be transferred into the FST. He felt the steps AXA had taken to notify him of the potential withdrawal of the Flexibility Option were insufficient. And had he known about the risk of withdrawal earlier he would have reconsidered his options.

Mr W has also said that while legal advice was taken when the scheme was set up, it's not apparent whether advice was taken prior to the decision to withdraw the Flexibility Option and without there being any formal challenge to AXA's position.

He also feels that the timing of the withdrawal of the Flexibility Option was "*suspiciously*" close to the announcement that AXA was selling the FST to Phoenix Group. Therefore he thinks that in withdrawing the Flexibility Option AXA was in breach of contract and of its regulatory obligations to treat customers fairly. And AXA should be expected to show why it abandoned the key feature of the scheme despite the fact there had been no change in the law and when it had made confident representations which Mr W and Ms G had relied on. Having previously said the possibility of a challenge was low, it should not have abandoned the Flexibility Option without a "*fight*" unless there was good reason to do so.

Overall, Mr W feels he and his wife have lost out financially from a tax perspective. Also the FST has higher charges than the defined contribution schemes Mr W transferred his benefits from and does not offer the security of benefits his final salary scheme offered. He says he wouldn't have withdrawn from those schemes but for the Flexibility Option. He says they have also had to meet the costs of their adviser.

The complaint was assessed by one of our adjudicators who was of the view it should be dismissed without consideration of the merits. He said that the FST was a *controversial product* and there was always the risk the Flexibility Option could be withdrawn. He thought although AXA had not provided full details of why it had changed its interpretation, it was

satisfied this wasn't because of the sale to Phoenix. Ultimately, he felt the decision by AXA was one of commercial judgement and therefore not an issue this Service could consider.

I issued my provisional findings in August 2020 where I set out why I thought the complaint couldn't be upheld. An extract of this is set out below and forms part of this final decision:

***Did AXA act in line with the terms and conditions of the FST in withdrawing the Flexibility Option***

*Mr W has explained that the main reason for investing into the FST was to make use of the Flexibility Option. He feels that AXA knew this therefore the fact he didn't formally apply to vary the terms of the FST, as he had to in order to activate the option, didn't matter. As the Flexibility Option no longer exists and this point doesn't impact my decision, I don't intend to address it, apart from in relation to Mr W's contention that he feels AXA has acted outside of the FST's terms and conditions.*

*Had Mr W and Ms G varied the terms of the FST so the Flexibility Option applied, according to its terms and conditions AXA could cease to apply this option "only if there are changes in, or [AXA's] interpretation of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice. [AXA] can exercise this right upon giving you 30 days written notice so far as it is practicable to do so. The change will take effect from the date stated in the written notice".*

*So, I am satisfied that AXA had the ability to remove the Flexibility Option if it met the criteria in the terms and conditions. I have next considered whether AXA did indeed meet the criteria mentioned above. In particular, did it change its interpretation of the applicable pension laws and regulation. To do this, I have looked at the history of AXA's involvement and dealings with the FST.*

*AXA has provided me with information concerning the communication it had with HMRC about the FST. I have seen:*

- The template letters from the AXA FST manager to advisers where the scheme was applied for/or had been taken out. These are dated 2015 and 2016.*
- The timeline of the development of the FST scheme, provided by AXA.*
- Letters between HMRC and the FST team at AXA from May 2015 to July 2015 discussing the scheme and more specifically the Flexibility Option.*
- Six confidential reports from AXA's legal advisers of various dates.*

*From this information I can see that:*

- AXA started to look into the feasibility of launching the product in late 2006. In light of HMRC legislation and after legal advice it launched the FST on a limited basis in March 2008 and launched it fully in February 2009.*
- It's documented in the timeline provided by AXA that at this point in time HMRC's view was that the Flexibility Option was within the rules, but it was noted that HMRC provided no guarantees that position wouldn't change in the future.*
- For the next few years, until 2015 the information indicates AXA kept reviewing the scheme and despite some changes to pension regulation over these years AXA remained satisfied that HMRC was content with the scheme and that its Flexibility Option was within the relevant rules. This included further legal opinion in 2013 indicating that the environmental risk in the area of pensions had increased but that*

*the underlying legislation had not changed. In light of this AXA decided to continue operation of the FST unchanged.*

- However, in May 2015 HMRC asked for further details from AXA about how the pooled growth in the scheme was allocated to its members. This appears to have been prompted by an increase in 'pension liberation' scams (a type of fraud). AXA's response tried to reassure HMRC about the Flexibility Option, but HMRC advised that it had concerns over the model being used to allocate growth and it felt that this could be contrary to sections 172 (Assignment of benefits) and/or 172A (Surrender of benefits) of the Finance Act 2004.*
- Because of these concerns, HMRC stopped registering new schemes.*
- There was a further meeting between AXA and HMRC in September 2015.*
- HMRC resumed registration of the FST in October 2015. In the same month AXA issued communications to advisers that registration of the FST had resumed but it's discussions with HMRC were ongoing and all features of the product couldn't be guaranteed to remain into the future. Advisers were invited to withdraw applications from new clients.*
- Again in the same month AXA obtained further legal opinion in response to specific points HMRC raised at meetings between itself and AXA in September 2015.*
- This led to AXA writing to HMRC in October 2015 asking it to withdraw their objections in light of its most recent legal opinion.*
- There then followed much discussion between AXA and HMRC. And AXA again sought legal advice during this period.*
- In January 2016 AXA issued second communications to advisers informing them that HMRC continued to investigate elements of the FST and that registration of the new schemes was at their own risk.*
- However, because of the continued HMRC investigations AXA closed the FST to new business in May 2016.*
- In June 2016 HMRC advised AXA its investigations were continuing.*
- In July 2016 AXA obtained further legal opinion. The finding of this was that the risk environment within the area of pension had changed and more notably that HMRC continued to investigate the FST position even after submission in October 2015 of legal opinion and evidence that supported the Flexibility Option of the FST.*
- Later that month the Board of AXA made the decision that it was no longer appropriate to continue with the interpretation that disproportionate allocation of growth was appropriate within the pension framework as it was at that time.*

*Taking account of this information, I'm satisfied AXA had been carefully considering the nature of the Flexibility Option for some time. It also appears to have engaged quite heavily with HMRC over the years to ensure it was being compliant with HMRC's thinking and relevant regulation, as well as seeking legal opinion when it felt prudent. I therefore don't think this decision was made quickly without careful consideration. I'm satisfied it followed a genuine change in AXA's interpretation of applicable "pensions, tax or other law, legislation, regulation or industry codes of practice". And while I appreciate this happened around the same time as the sale to Phoenix was progressing, I think this was mere coincidence rather than central to the decision to withdraw the feature.*

*I am satisfied that previous legal opinion obtained by AXA over the years was "positive" in relation to the Flexibility Option of the FST. So, I think it was reasonable for AXA to have advised its customers throughout 2015 and early 2016 that the scheme continued to comply with HMRC pension rules. This reassurance came with the previous warnings that this feature couldn't be guaranteed to always remain in place. And that it was only when confirmation was received in June 2016 that HMRC continued with its investigations that led*

*to the further legal opinion in July 2016 and then the subsequent withdrawal of the feature.*

*I've noted Mr W's comments that AXA should not have withdrawn the Flexibility Option without "fighting" harder to keep it. There was no requirement for AXA to do that - all that was required was a change in AXA's interpretation of applicable pensions, tax or other law, legislation, regulation or industry codes of practice which as I've explained above, I'm satisfied it met. However, that aside I do think the details set out above show that AXA did "fight" to keep the Flexibility Option a part of the FST. It engaged and challenged HMRC and sought legal advice in order to show why the option should remain in place. But in the end, through that process of engagement with HMRC, it's interpretation of the pensions rules and regulations changed and it took a legitimate decision to withdraw the feature.*

### ***Insufficient warnings that the option could be withdrawn***

*It's already been accepted by AXA that it didn't send the information to Mr W's adviser in November 2015. And Mr W has said that had he received this information he would have considered doing something differently. I can appreciate this point however I need to consider whether it was reasonable that this was the only piece of information available to Mr W at the time that communicated the status of the Flexibility Option and how it wasn't guaranteed.*

*At the end of legal advice report that Mr W relied upon it is stated that:*

*The specialist legal advice confirmed that the more sophisticated version (allocation of growth on a discretionary and disproportionate basis) is also not caught by the anti-assignment/surrender provisions. Although there is the possibility of HMRC interpreting the anti-assignment/surrender provisions different and claiming that the legislation was designed to prevent this kind of scenario, the specialist legal advice confirmed that the possibility of a successful challenge was low; the product was regarded as being robust.*

*This report is based on our understanding of UK law and the practice of HM Revenue & Customs as at 3 September 2010. It assumes that tax rates, and the tax treatment of contributions investments and benefits will stay the same throughout the duration of a Family SunTrust Scheme. In practice they may change at any time, even retrospectively. Any tax implications depends on individual circumstances.*

*While I appreciate the use of the word robust, it doesn't state anywhere in the report that the Flexibility Option was guaranteed. So while I can understand why Mr W took some reassurance from this, I think someone in his position with his background would likely have understood that the report gave no guarantee. Further to this, I think there is a level of Mr W's own interpretation of this report. It seems to me that he chose to interpret this information as indicating that there was no risk the Flexibility Option would be withdrawn whereas the report doesn't state this anywhere.*

*Overall, in my view I think AXA did provide accurate information regarding the status of the Flexibility Option and I say this because as already illustrated, AXA didn't receive legal advice that stated the Flexibility Option could be a concern or should be withdrawn until July 2016 after which AXA made the decision to change its stance.*

*I also think AXA did generally provide sufficient information that the Flexibility Option could be withdrawn by way of the terms and conditions of the scheme as well as the information AXA provided advisers in late 2015 and early 2016 concerning HMRC's enquires.*

*I do however accept that AXA didn't provide all the information to Mr W and Ms G at the correct time, but I don't think this would have made a difference to Mr W's actions.*

***Did this make a difference?***

*The information I've seen tells me that Mr W had already transferred his existing pension benefits at the point at which he should have received the email from AXA in November 2015 alerting him to HMRC's enquires into the Flexibility Option. I appreciate he did this in readiness for the transfer to the FST. But given the terms and conditions state the option wasn't guaranteed, as did the legal advice, I think it was clear that the option may not always have been a part of the FST. Therefore, there was risk in Mr W transferring his pension benefits before he had received confirmation from AXA that his application for the FST had been accepted. Furthermore, FST aspect aside, Mr W wasn't a client of AXA's FST at the point he transferred his existing pensions so there was always a chance AXA wouldn't accept his application overall.*

*So in this respect I think AXA could have done more to inform Mr W specifically of HMRC's ongoing concerns into the Flexibility Option just after he had submitted his application form. But given Mr W transferred his pensions just after he applied for the FST, and before he received confirmation his application had been accepted and the FST had been set up I don't think this has made a difference to where Mr W pension benefits are now.*

*Overall therefore, in my view AXA provided enough clear information about the Flexibility Option and its status at the point Mr W started to become interested in it. I am satisfied the legal advice Mr W is relying on didn't provide a guarantee that the Flexibility Option would always remain in place. I agree AXA made a mistake when it incorrectly addressed the email of November 2015 which would have informed Mr W of why his FST hadn't been registered yet and HMRC were delaying in doing so, but at that point Mr W had already transferred his pension benefits into a SIPP in readiness to go in the FST. So even if he had received that email in November 2015 his benefits would still have been transferred.*

Mr W and Ms G provided the following comments in response to my provisional findings:

1. "Almost all the information about AXA's dealings with the HMRC set out in the provisional decision was new to me. I feel that AXA, in order to treat its customers fairly, should have provided far more information to existing members of the FST, as well as to me, at the time. Furthermore, it should have provided far more information in response to my complaint. I understand that AXA might not have wanted to disclose privileged legal advice, but it should have been possible to provide a lot more explanation without doing so. Apart from being necessary to satisfy its regulatory obligations, it would have made AXA look less evasive and made me less suspicious of its actions and motives.
2. In the first paragraph on the second page of the provisional decision, it says, "the email from January 2016 set out the information that was included in the November 2015 letter, but also stated that the FST had now been registered with HMRC that month and that if it didn't hear anything further from Mr W it would assume he was content to proceed." That is not correct. The email on 5 January 2016 contains an italicised quotation of four paragraphs from the email of 2 November 2015 that begins, "*Important Note*". The words mentioned in the provisional decision appear in that italicised quotation. That is not a statement made on 5 January 2016, merely a

record that such a statement was made but not received on 2 November 2015. Nowhere in the email of 5 January 2016 is the implied offer not to proceed renewed.

3. In the third paragraph on the second page of the provisional decision, it says, "it is noted that at this stage Mr W had already transferred some of his pension benefits into an AXA SIPP pending the registration of his FST, at the beginning of November 2015, not long after the application for the FST was submitted." That misses a critical point. I have checked with my financial adviser, and he has confirmed that the documentation to set up the FST and the transfer forms for 4 pensions were sent to AXA on 30 October 2015. As the email of 5 January 2016 acknowledges, these forms were received by AXA on 2 November 2015, the day on which the email should have been sent to the adviser saying that AXA could not guarantee that all the then current features of the product would remain in the future, particularly drawing attention to the Flexibility Option in this regard, and giving me the opportunity not to proceed. The adviser then met me in person on 3 November 2015 to receive further signed documentation to pass on to AXA. That would have been an ideal opportunity to make a decision to stop the process but, as he hadn't received the email, we were not aware of it. If the email had been sent to the right address on 2 November 2015, I could not only have elected not to proceed with the application to set up the FST but could also have instructed AXA not to proceed with the transfers of pension benefits from the schemes listed above. This is a critical point and, in my view, demonstrates that the ombudsman's conclusion on this issue is flawed. If the AXA email of 2 November 2015 had been correctly addressed, I would have been notified of the potential problems with the Flexibility Option before my FST application had been processed and, more importantly, before anything irrevocable had happened to my various pension scheme benefits. I have no doubt at all that I would have either decided not to proceed at all or else decided to wait and see what happened in the discussions with HMRC before going ahead with such an important change – which would simply have delayed the decision not to proceed at all. I would never have transferred my various pension benefits out of the vehicles they were in without a good reason. The FST's Flexibility Option was that reason and without a strong degree of confidence (not, I accept, certainty) that the Flexibility Option would continue I would have left all my pensions as they were. Had the 2 November 2015 email reached my adviser, I would, at an absolute minimum, have put everything on hold pending the resolution of the future of the Flexibility Option and then decided not to proceed later in 2016.
4. In the first paragraph on the final page of the provisional decision, it says, "I agree AXA made a mistake when it incorrectly addressed the email of November 2015 which would have informed Mr W of why his FST hadn't been registered yet and HMRC were delaying in doing so, but at that point Mr W had already transferred his pension benefits into a SIPP in readiness to go in the FST. So even if he had received that email in November 2015 his benefits would still have been transferred." This is not true, as I have explained above. If the email of 2 November 2015 – the very date on which AXA received my application to join the FST and to transfer my pension benefits from the existing vehicles - had been correctly addressed then the transfers could easily have been stopped – and would have been.
5. In the third paragraph on the sixth page of the provisional decision, it says, "Further to this, I think there is a level of Mr W's own interpretation of this report. It seems to me that he chose to interpret this information as indicating that there was no risk the Flexibility Option would be withdrawn whereas the report doesn't state this

anywhere.” I disagree with this characterisation of my interpretation of the material provided to me and I do not believe it is supported by the text of my complaint. I knew that AXA could change the scheme in accordance with its rules but I took considerable comfort that a change to the Flexibility Option was unlikely to happen because AXA had taken legal advice from a highly-rated QC that supported the legality of the scheme. At the time when my adviser sent the forms to AXA to set up the FST and transfer my pensions into it, I still believed that AXA believed that the Flexibility Option was “robust”. I do not think the scheme could fairly have been called robust when it was being actively investigated by HMRC in the way described in the provisional decision. AXA’s failure to bring this to my adviser’s attention in time for me to withdraw my application to join the FST and stop the transfers of my pension schemes did “make a difference” contrary to the conclusions in the provisional decision.”

AXA confirmed it had received the provisional decision but made no further comments.

### **My findings**

I’ve reconsidered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint. And while I have taken account of all the comments Mr W and Ms G have made in response to my provisional findings, I am not persuaded to change my initial outcome.

Mr W is correct that the offer to not proceed was not renewed in the email to his adviser in January 2016. However, I don’t think this makes a difference to the outcome of my final decisions. I say this in part because by then the FST had been registered but also for the reasons I have explained further below, which are also in response to comments 3 and 4 that Mr W has made.

I have thought carefully about the points Mr W has made about the timing of the transfer of his other pensions and the failure to receive the important email in November 2015. I have seen that in the complaint letter Mr W submitted to this Service he stated that he sent the application forms for FST to AXA on 30 October 2015 and at the same time he gave notice to transfer assets from four of his five then existing pensions arrangements in readiness for the FST. He also provided details of when the transfer of each of those pensions were completed – 3 December 2015, 29 January 2016, 9 February 2016 and 27 July 2016.

Mr W has argued that had he received the email in November 2015, as he should have, he would have stopped the transfer of those pensions. I agree this is something that may have happened, and I can see that not receiving the email of November 2015 would have prevented Mr W from stopping the transfer that completed in December 2015. However, the transfers from three of his pensions didn’t complete until *after* his adviser had found out from AXA that the email from November had been incorrectly addressed and also what the information it contained was – that HMRC was making enquiries into the flexibility option. But I haven’t seen anything that confirms that Mr W made any attempt to stop their transfers, so I am not convinced that receiving the email in November 2015 would have caused Mr W to have in fact done anything different because even after he was provided with the information about HMRC in January 2016 he had the opportunity to stop the pension transfers but he didn’t.

I can appreciate why Mr W was satisfied by the legal report and especially the fact it was written by a QC who he was familiar with. I have no reason to doubt this report nor any of the



others I cited in my provisional findings. I am satisfied they all were an accurate reflection of the position of the flexibility option at that point in time. Taking comfort from the report is reasonable, however the fact remains the flexibility option was not guaranteed and that was really something Mr W should have borne in mind throughout the time he was dealing with the FST, AXA and the flexibility option.

### **My final decision**

My final decision is that I don't uphold this complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Ms G to accept or reject my decision before 29 October 2020.

Ayshea Khan  
**Ombudsman**