

Complaint

Mr and Mrs B have complained about the decision by Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA), to remove a key feature from their Family SunTrust - the non-proportionate allocation of growth facility. They say AXA did not provide them with an adequate explanation as to why it did this. Mr and Mrs B say they have lost out financially as a result of this being removed.

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. In the paperwork I've seen this facility is referred to as the "flexibility option". To keep things simple that's how I will refer to it in the rest of this decision.

In May 2013, Mr and Mrs B opened the FST and applied to vary the terms to invoke the flexibility option. Mr B has said the flexibility option was the key reason he chose the FST. Mr B already had one pension in payment. This had used up 70% of his existing lifetime allowance. The lifetime allowance was due to reduce further in the 2014/15 tax year. Mr B's other uncrystallised private pension was at that time already nearing the new lifetime allowance, so he was advised there was a high possibility of him exceeding the new lifetime allowance and being liable for a 55% tax charge. So by using the flexibility option within the FST he was able to pool his and his wife's pensions assets and allocate the growth to his wife to build her pension.

In August 2016 AXA sent Mr B a letter explaining that with effect from 2 September 2016 the flexibility option of the FTS was to be withdrawn. It said:

"Consequently we [AXA] periodically review Family SunTrust to ensure that we continue to be satisfied that the Flexibility option remains suitable for clients and in line with the evolving regulatory and tax environment. Unfortunately, in our most recent review we concluded that it was no longer appropriate for us to continue to offer the flexibility option".

AXA said from 2 September 2016 all allocations of investment growth would take place on a *proportionate* basis. Unhappy with AXA's actions Mr and Mrs B complained to AXA and then brought their complaint to this service. In summary they said:

- They were still trying to understand what change caused AXA to alter its interpretation. They said they were told in February 2017 that AXA was not at liberty to provide further information about this.
- They want to know what legislation and tax treatment of the scheme changed, leading to the decision to withdraw the flexibility option.
- They can't see why AXA is unable to give any reasons for the change. The contract is between AXA and them and it is not fair for AXA to alter the contract to its advantage and Mr and Mrs B's loss, and claim its reasons are confidential.
- Their adviser, who was proactively allocating growth in the FST from 2014-2016 was unaware that the scheme had not been endorsed by HMRC.
- It is not surprising that AXA says that its reason for the change is not because of its sale to Phoenix because a commercial deal is not a legitimate reason to allow it to change the contract.
- AXA reportedly had the FST confirmed as legitimate by Queen's Counsel, after discussion with HMRC. How could Mr and Mrs B have been aware that HMRC

would've opposed the scheme. They believed this was a properly constructed policy agreed at the outset by HMRC.

The complaint was assessed by one of our adjudicators who felt it should be dismissed without consideration of the merits. He said that there was always a risk the flexibility option could be withdrawn, and the terms and conditions of the scheme allowed for this. He thought although AXA had not provided full details of why it had changed its interpretation, it had said this was not because of the sale to Phoenix. He was therefore satisfied AXA was entitled to remove the flexibility option and had done so within the terms and conditions.

Mr and Mrs B disagreed with the adjudicator's recommendation and responded essentially reiterating their complaint points. In addition, Mr and Mrs B's adviser made the following representations on their behalf:

- This product, with this feature, was available from 2008. Mr and Mrs B invested in it five years later, during which time AXA had consistently communicated and reassured clients that it was in open discussions with HMRC to ensure that AXA's interpretation of the rules was deemed compliant. This included reassurance that AXA had taken advice, including from Queen's Counsel who had confirmed the validity of the scheme.
- AXA had said in an article that "we had hoped that, given time, we would have been able to work with HMRC to agree an undertaking. However, given the upcoming sale of the AXA Wealth business, we are no longer in a position to take a longer-term view". This supports Mr and Mrs B's view that the only thing that changed was AXA selling its book of business to Phoenix. In removing the option, it was putting its own interests before its clients.

AXA also responded to the adjudicator's view and said:

- Its decision to withdraw the flexibility option was the result of a change in interpretation that took place prior to the sale rather than a decision that was in consequence of the sale.
- That change in interpretation gave right to an entitlement under the terms of the policy to withdraw the flexibility option.
- Having made the decision to withdraw the flexibility option in July 2016 the Scheme Administrator was required to give 30 days' notice before the withdrawal became effective. Given it was writing to all scheme members about withdrawing the option it decided it made sense to close the FST to new business from the same date in preparation for the sale later in the year.
- Whilst the closure of the product was related to the sale, the withdrawal of the option was not. These decisions were reached independently.
- It does not agree that the FST was a controversial product or that it was inevitable that HMRC would oppose it. It was aimed at more sophisticated investors and not one to be taken out without financial advice.

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

The terms and conditions of the FST state:

[AXA] has the right to decide that the provisions set out in the "Operative provisions" in part 3 of the document [i.e. the provision of the flexibility option] will cease to apply..... [AXA] can

exercise this right only if there are changes in, or [our] interpretation changes of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice. [AXA] can exercise this right upon giving....30 days written notice so far as practicable to do so.

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 development of the FST as well as the communications that took place between AXA and HMRC regarding the flexibility option. 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.*
- The confidential reports to AXA from legal counsel regarding the flexibility option.*

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 also note that AXA gave notice on 2 August 2016, which was just over 30 days before the option was officially withdrawn (on 2 September 2016), as required by the terms and conditions. I therefore don't think AXA acted unfairly or unreasonably when it withdrew the flexibility option and it acted in accordance with its terms and conditions when it did so.

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 into 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 know Mr and Mrs B want to know what changed in AXA's interpretation, but I don't need those specifics to make my decision. I have seen the privileged legal advice reports and I am satisfied that it was on this basis, as mentioned above, that AXA took the decision to withdraw the option.

I know Mr B says he wasn't made aware that HMRC wasn't in agreement with the FST. But from all I have seen it seems to me that this was because HMRC's concerns over the flexibility option only came in 2015 at which point Mr B's adviser would have been notified by AXA about the delays in HMRC registering new schemes. Until this point HMRC had remained in contact with AXA about the flexibility option and had discussed it at length. But it

hadn't at any point said it wasn't in agreement with it. So, it's not unreasonable that AXA continued to reassure its clients about the option. It's also not unreasonable that HMRC's concerns about the option grew against the everchanging backdrop of pension rules and regulations which is fluid and being tightened up all the time due to various scams/problems within the area of pensions. AXA had the foresight to allow the option to be changed or withdrawn because of this and ultimately, while disappointing for all clients of the option, this happened to be the case in 2016 after the legal advice report acknowledged the option should be withdrawn.

While I appreciate what the article says it's not unreasonable that AXA made the decision to withdraw the option as it couldn't speak for the new business, Phoenix. And it would have been wrong to continue to offer something that its legal advisers had accepted was controversial without getting Phoenix's agreement.

Overall therefore, while I appreciate M and Mrs B's disappointment at the withdrawal of the flexibility option, I am satisfied that the terms of the scheme had always warned that the option could be withdrawn if certain criteria was met. And in my view, taking account of all the information I have seen, I am satisfied AXA met this criteria. Ultimately this was a business decision carried out in accordance with the term and conditions and because of this AXA isn't obligated to communicate detailed reasons why and details of what changed in its interpretation especially as some of this information would reasonably be commercially sensitive.

AXA confirmed receipt of the provisional decision but provided no further comments or information.

Mr and Mrs B provided the following comments:

- Why didn't HMRC have concerns about the flexibility option of the FST earlier, given the Finance Act was in force from 2004.
- If HMRC was concerned about potential misuse of the policy why didn't AXA provide tighter controls to ensure the flexibility option couldn't be used in this way.
- To the point in the provisional decision that refers to the terms and conditions of the flexibility option allowing AXA to withdraw it in certain circumstances, Mr B said his recollection was that this point was conveyed in his document as the "interpretation" might change given a change in pension rules - not that the interpretation of the *present* FST rules might change. While there was no change in specific tax and pension rules only the interpretation, Mr B wanted the marketing information given to clients to be looked at to see if the phrasing on interpretation matches the terms and conditions accurately.
- They agreed that from the provisional decision AXA seemed to have acted fair and reasonably. But if it only focused on the actions and behaviors of one party rather than both that doesn't feel fair. They questioned why no consideration has been made for the fact they had done everything AXA had required of them in applying for and using the FST and why this didn't seem to have any impact on what happened with the flexibility option.

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 Mr and Mrs B's comments, I am not persuaded to change my initial outcome.

I appreciate their concerns over HMRC's involvement and why these weren't raised earlier. But I can't speak for HMRC – the focus of my decision is only on AXA and examining the actions it took in relation to the flexibility option of the FST. I suspect however that the reason may have been because the world of pensions has evolved greatly over the years - new regulations have been put in place and existing regulations amended. At the same time small groups have found ways of *bending* some regulations to suit their, sometimes nefarious, aims. However, as I have said this is only my view and I haven't, and in fact, can't question HMRC over its decisions and practices.

As to why AXA didn't provide tighter controls around the FST – it isn't for me or this Service to direct AXA to have taken this course of action in this specific situation. All I can do is look at the actions taken by AXA and assess whether they were reasonable in the given circumstances and whether they were in line with the terms and conditions of the contract both parties were party to.

I have looked at the marketing material that has been made available to me and I can't see anything that states AXA's right to withdraw the flexibility option would only come into play *if* there were changes in pension rules. Everything I have seen states the right to withdraw will come into effect if there are changes in, *or* AXA's interpretation changes of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice, as mentioned above. I think this is a clear term and goes hand in hand with the information AXA provided through ad hoc means to advisers of FST clients. I therefore think it's unlikely that the terms and conditions would have been altered over the years.

I agree that Mr and Mrs B did everything they had to in taking out the FST, utilising the flexibility option and in maintaining it for the years they did. This isn't in question. However, this doesn't impact AXA's actions. Ultimately the contractual obligations that both parties accepted stated the option could be withdrawn if certain circumstances were met, and from everything I have seen I think AXA met those obligations. It acted in accordance with the terms and conditions of the contract guiding it. While it's unfortunate the option had to be withdrawn, as illustrated in the provisional findings I think this was not a quick decision made by AXA and I am satisfied the decision was made after appropriate legal consultation and after AXA did all it could to persuade HMRC its concerns were not necessary. So, in not upholding this complaint I am not commenting on whether Mr and Mrs B acted fair and reasonably, I am assessing whether AXA acted fair and reasonably in doing what it did. The fact Mr and Mrs B also acted in the same way doesn't negate the fact that AXA acted in accordance with its terms and conditions.

My final decision

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

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

Ayshea Khan
Ombudsman