DRN-3536677

The complaint

Mr L has complained about advice he received from Portal Financial Services LLP ('Portal') to transfer four pension plans he held with other providers to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ('UCIS').

Mr L is being represented by a third party but for ease of reading the decision I'll refer to all representations as being made by Mr L.

What happened

Mr L was introduced to Portal in 2014 after he'd been in contact with another business, from here on referred to as 'Firm C'. At the time, Firm C was an appointed representative ('AR') of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority ('FCA') to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice. Portal had an established business arrangement with Firm C, whereby Portal would provide pension transfer advice before referring the client to Firm C for investment advice on the transferred funds, and this arrangement was followed for Mr L.

At the time the fact-find was completed, Mr L was 51 years old, married and living in a property he owned but still had an existing mortgage of £70,000. He had a 17-year-old dependent child. He earned approximately £24,000 per annum, had cash savings of £8,000 and no other investments. His desired retirement age was recorded as 63 in the fact-find and his attitude to risk ('ATR') was recorded as 'balanced'.

It was noted Mr L held four existing pension plans:

- A personal pension plan ('PPP') with £7,622 held in a managed fund. The plan is provided by 'W'.
- A Free Standing Additional Voluntary Contribution ('FSAVC') with £6,616 held in a managed fund. The plan is also provided by W.
- A group Stakeholder Pension Plan ('SPP') with £12,241 held in a managed fund. The plan is provided by 'R'.
- A section 32 buy-out plan with a value of £83,132 with a Guaranteed Minimum Pension (GMP) of £3,172 at age 65. This was split between a managed fund and a with profits fund. The plan is provided by 'L'.

Portal noted that Mr L's objectives were:

- To consolidate his pension plans into one;
- To take tax free cash at 55;
- To benefit from a potentially higher investment performance;
- To move to a cheaper scheme;
- To have access to a greater investment choice; and
- To be able to pass benefits to his family.

Portal sent Mr L a suitability report dated 21 April 2015. It recommend that Mr L transfer his existing pensions into a new SIPP. It also said that the investment advice would be provided to him by Firm C.

The final transfer value of the combined pensions was £110,144.38. The total amount was transferred from the various providers to the SIPP between May and July 2015.

Firm C invested a total of £61,500 in the following UCIS:

- Brisa Investments – £6,900
- Biomass Investments – £8,500
- Lakeview UK Investments – £8,500
- Motion Picture Global – £8,500
- Strategic Residential – £8,500
- Tambaba Investments – £6,900

A small sum was left in cash to cover ongoing fees and the remainder of the pension was allocated to regulated investment funds.

After becoming aware that his pension funds had been invested in high-risk, unregulated funds, which had now lost their value, Mr L complained to the FSCS about the investments recommended by Firm C. However, his claim was rejected – he was directed to complain to Portal as it had recommended he transfer his pensions to the SIPP.

In June 2019, Mr L complained to Portal that the advice to transfer his pensions was unsuitable for him. He said Portal failed to obtain sufficient information to provide suitable advice. He said his ATR was categorised incorrectly as he didn't want to take any unnecessary risks. Overall, he said the advice was not in his best interests.

Portal didn't agree. It said it had thoroughly investigated Mr L's circumstances before giving the advice. It said Mr L's main objective was to be able to access TFC at age 55 and to consolidate his pensions into one more manageable and accessible platform and this meant the SIPP was suitable. Portal said it had used a reliable profiling tool to ascertain Mr L's "balanced" ATR. Portal said Firm C was responsible for any investment advice and had forwarded the complaint to them. Unhappy with this response, Mr L referred his complaint to our service.

An investigator considered the complaint and recommended it be upheld.
The investigator added that although Firm C were recommending the investments, Portal still should have considered these when advising on the transfer, as per the regulator's update of 2013. He said this would have alerted Portal to Firm C's intention to recommend investing in UCIS. The investigator also didn't think Mr L had a "balanced" ATR and believed that a "cautious" ATR rating was more appropriate given his situation. Based on this, he felt the investments selected were too risky for Mr L's ATR and that Portal had a responsibility to advise him of this.

With regards to the Section 32 transfer, our investigator noted that a critical yield of 3.2% was required to match the benefits the Section 32 plan offered at retirement. He noted the discount rate in this case was 4.7%. The investigator said this in itself didn't mean the transfer was unsuitable. However, some of the other reasons given for transferring were lower charges and more investment choice. He said that whilst the section 32 plan couldn't be switched to another fund, it was already held within a with- profits fund which met Mr L's ATR. Part of this plan was in a managed fund, which wasn't within Mr L's ATR but could've been transferred. He also noted that the charges for the section 32 plan were lower than the charges for the SIPP.

When considering the other pension plans, our investigator noted that the annual management charges were lower in the SIPP, but the suitability report didn't take into account the initial fees or the ongoing advice fees of Firm C. He noted that whilst the fund Mr L was currently invested in were higher risk than his ATR, he could've switched each of them. He didn't think that the reasons for the switch justified these increased charges. And he said the illustrations provided showed that even if mainstream investments had been recommended, it would have been unlikely that investment performance could've been improved to an extent that the transfer to a SIPP would be worthwhile.

Lastly, our investigator noted that there was no suggestion in the fact find that taking cash at age 55 was a priority for Mr L. And that, whilst having all of the pensions in one place might've been more convenient for Mr L, there was no real benefit in this when taking into account the additional costs of the SIPP, and this should've been explained to Mr L.

Portal didn't agree and responded in detail. In summary, it said Mr L's priorities were to be able to leave the full fund value to his wife and dependent upon his death and to consolidate his existing plans. He also liked the idea of taking TFC which the section 32 plan may not have been able to offer at retirement. It said Mr L had disliked the idea of an annuity to fund his pension income.

Portal maintained that it wasn't responsible for the advice provided by Firm C on where to invest the SIPP. It said that it had carried out due diligence on Firm C, which included requesting details of the most likely investment strategy envisaged for clients like Mr L. Furthermore, it said that the FCA allowed for two advisers to work together and advise on different aspects of a transaction.

Lastly, Portal said that any redress should consider any compensation due to Mr L from a potential claim about Firm C from the Financial Services Compensation Scheme (FSCS).

The investigator did not change his opinion. He maintained the complaint should be upheld for the same reasons. But also noted that TFC hadn't been a priority noted in the fact find. And he couldn't see anywhere that Mr L had indicated he didn't like the idea of an annuity.

Because the parties have been unable to agree, the case was referred to me.
I issued a provisional decision on 27 May 2022. In this, I set out why I thought the complaint should be upheld and what should be done by Portal to put things right.
I invited all parties to provide any further submissions by 6 June 2022, after which time I said I intended to issue a final decision.

Mr L agreed with my decision. Portal didnt provide any further comments. So the complaint has been passed back to me to make a final decision.

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.

Given that Mr L has accepted my provisional decision, and Portal hasn't provided any further submissions. I see no reason to depart from the finding I made within my provisional decision. I'll set them out below, again.

Portal advised Mr L to transfer his existing pension plans to a SIPP but says it didn't provide any recommendation regarding the investments held within the SIPP, as Firm C was meant to provide this. Although the intention was for another regulated firm to advise on and arrange Mr L's underlying SIPP investments, I don't think that meant Portal's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. I believe that as Mr L's financial adviser, Portal still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved. Suitable advice couldn't, in my view, be given without thinking about the intended investment.

The regulator's position

Having thought carefully about what happened here, I don't think Portal's advice to transfer was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time of the advice the regulator had made its view clear that it considered in order to suitably advise on pension transfers and pension switches, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

"Financial advisers (…) are under the mistaken impression (…) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…)

If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."

A further alert from the regulator in April 2014 stated:

"Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6)."

Portal says that this alert was specific to situations where the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. It believes this distinguishes the circumstances of Mr L's transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. Whilst I've given that possibility careful thought, I don't agree that the alert was limited to those very specific circumstances.

I can see that the 2013 alert makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Mr L's case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension switch and transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these are standards that have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. I think the 2014 alert supports this view as it clearly refers to what the regulator expects advisers to do when providing pension switch or transfer advice more generally. So, I think these alerts are relevant to firms in the position of Portal in this case.

Portal appears to have been under the impression that, as it told Mr L it wasn't providing any advice on the underlying investments, this enabled it to provide advice on a restricted basis. But this wasn't right. It couldn't separate out the two elements. Its advice on the suitability of the transfer and switch had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portal was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these precepts if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Under COBS 2.1.2 Portal also couldn't seek to exclude or restrict its duty or liability to Mr L under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable - again, this had to include consideration of how Mr L's funds would be invested.

COBS 9.2 required Portal to take reasonable steps to make sure its recommendation was suitable for Mr L. To achieve this, COBS 9.2.2R said Portal had to obtain enough information from Mr L to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

COBS 9.2.2R included the following wording:

"(...) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment."

So, as part of the fact-finding process, Portal had to understand Mr L's objectives and the related risks. It wasn't free to ignore how Mr L's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr L would invest in within the wrapper, doesn't in my mind seem reasonably possible.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portal's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above. I've considered Portal's advice with these in mind.

As Portal didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Mr L's transferred funds would ultimately be invested. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, it says it saw no issue with this.

Portal also says that its advisers carried out extensive due diligence on Firm C, including background checks on key individuals, its accounts and information about previous complaints. It maintains that Portal followed FCA guidelines when only advising on the pension transfer by performing the attitude to risk assessment. It said Firm C wasn't bound by this assessment and could have recommended any investments they thought were suitable for Mr L. Portal says it was satisfied Firm C was qualified to provide investment advice and the FCA allows for one regulated firm to assess the pension transfer and the other to provide investment advice.

Portal hasn't provided us with evidence of the due diligence it carried out on Firm C in connection with this complaint. But even if Portal had carried the general due diligence checks it has mentioned, I don't think that satisfies the regulator's expectations as set out in the alerts. The checks it made on Firm C weren't specific to the investments envisaged for Mr L.

Portal also said that it requested details of the investment strategy Firm C was 'likely to deploy for clients such as Mr L', but hasn't said what information it was given in response to this request, if anything at all. I haven't seen any evidence that further checks were made by Portal to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was a necessary part of the suitability assessment carried out by Portal for individual clients. But I think it was also a reasonable due diligence requirement brought about by the ongoing relationship it had with Firm C. This would've highlighted any patterns of unsuitable or unaligned advice, which could be identified and addressed.

Furthermore, while Portal should have been aware of the general investment strategy that Firm C proposed for clients, it also needed to be aware of the specific investment portfolio intended for Mr L. Without this information, it would not be in any position to assess the suitability of switching his existing pension plans into the SIPP.

I accept that as a result of its AR agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portal's duty to do the same. As Mr L's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Mr L's best interests. And as I've said, this had to include an awareness of where Mr L's funds would be invested.

Portal has argued that the FCA has recently introduced provisions where both firms are regulated and that current guidance places the obligation solely on the firm giving the investment advice to take into account of "any loss of safeguarded benefits… on the retail client's ability to take on investment risk". But I don't think this applies here. The specific guidance it quoted is from COBS 19.1.6A(4) – but this only came into effect in October 2018. At the time of the advice, April 2015, COBS 19.1.6 did not provide for this scenario. In any event, I think the alerts from 2013 and 2014 were unambiguous that firms recommending a transfer had to consider the underlying investments. There was no implied exemption where other regulated firms were involved.

The reality is that having followed Portal's transfer advice, over 50% of Mr L's SIPP was invested in UCIS. I think the regulator's 2010 UCIS findings are relevant here. It said that as well as UCIS only being eligible for promotion to certain customers (generally sophisticated, high net worth investors), as an example, even when a customer was deemed eligible for the promotion of UCIS, suitable advice involved limiting a client's exposure to these investments to 3% to 5% of their retirement provision. In Mr L's case over half his SIPP - 58% - was invested in UCIS. I don't think UCIS was suitable for Mr L at all, let alone in the proportion invested. There's nothing to indicate Mr L had the requisite knowledge or experience to accept or understand the risks associated with these types of investments.

In my view, if Portal had requested information about the proposed investments and been advised that Firm C intended to invest over 50% of Mr L's funds in UCIS, it could've queried this, given how at odds it was with what an appropriate asset allocation for Mr L was given his attitude to risk.

I don't agree with Portal's assessment of Mr L's risk rating as "balanced" and will explain why later. However, I think that had appropriate enquiries been made, it would've become apparent something was wrong with Firm's C's proposal and that the transfer was therefore unsuitable and would likely to lead to Mr L being exposed to more risk than Portal considered appropriate. I think it's likely that, having realised how significantly the investments Firm C intended to make differed from those that were likely to be suitable for Mr L, Portal could've taken preventative action or at the very least made Mr L aware of the situation so he could, if servicing rights had already been transferred to Firm C, sought to take corrective action himself.

Overall, I think Portal needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Mr L. It should've asked Firm C for the specifics of this or, as a minimum, an outline of the proposition. Had it done so, and Firm C had given it a clear framework of the proposition, then I would've expected Portal to have advised Mr L that it couldn't recommend he transfer away from his OPS in those circumstances. If Portal had warned Mr L against investing in line with Firm C's proposal, I think it's more likely than not that Mr L would've listened to it and not gone ahead with the transfer.

In my view, the fact that Portal didn't take sufficient steps to consider the investment proposal for Mr L when assessing the suitability of the proposed transfer meant that it couldn't reasonably conclude the course of action it recommended was being made on a sound basis. And as a result of these shortcomings, it seems to me that Firm C was in effect given the freedom and opportunity to do as it wished with how Mr L's SIPP was invested.

Notwithstanding what I've said above, I don't think the suitability of Portal's advice turns solely on where Mr L's funds were ultimately invested. Portal's recommendation that he switch his existing pensions to a SIPP in the first place is an important consideration. And were it not for the transfer and Portal's incomplete and, in my view, flawed advice regarding this, I'm not persuaded Mr L would've ultimately gone on to invest as he did.

The advice to switch Mr L's Section 32 Buyout Plan

Mr L's section 32 plan contained the pension benefits he'd gained through an OPS with his former employer. According to the documentation provided by L, the section 32 plan came with a guaranteed minimum pension ('GMP') of £3,172.01 per year. L said it guaranteed to pay this to Mr L at age 65. However, Mr L's normal retirement date was age 63. So, L would only be able to pay the GMP at 63 if the underlying fund value supported payment of it.

Portal noted in the suitability report that the GMP was £2,956 per year at age 63. And its critical yield analysis was based on this figure. Although the difference in figures wasn't explained, I think it's unlikely to have had much of a difference here.

Transferring out of the section 32 plan would mean that Mr L would lose the security of the GMP and the 50% widower's pension. In my opinion, giving up the benefits and guarantees available under this plan and subjecting future pension income to the risks associated with unpredictable investment returns should only have been done if it could be shown that it was clearly in Mr L's best interests.

The COBS guidance (COBS19.1.6G) at the time of the advice, stated:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer, convert or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests."

Although the section 32 plan wasn't strictly an OPS (it contained deferred benefits from a previous OPS), I think it is reasonable to apply this regulation to the advice provided in respect of this plan. This is because the rule is predicated on the fact that defined benefit occupational pension schemes contain valuable guaranteed or safeguarded benefits. As the section 32 plan provided Mr L with a GMP of £3,172.01 at age 65, it also provided guaranteed benefits. I'm also mindful that in June 2015, less than two months after the suitability report date, and before the transfer of this plan completed, this rule was updated to include schemes with safeguarded benefits as follows:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-

out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

So, the starting point here for Portal in advising on Mr L's section 32 plan ought to have been that a transfer of a plan of this nature wouldn't usually be suitable. And generally, I think a transfer will only likely be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

At the time of Portal's advice Mr L was 51 years old, employed and in good health. He was a standard retail investor with 15 years until his normal retirement age and 12 years from the earliest point he could take the income from the section 32 plan. He owned his house with an outstanding interest-only mortgage still on it. He had £8,000 cash savings and no investments.

Mr L's section 32 plan provided a guaranteed minimum income of £3,172.01 per year at retirement and could potentially pay more if the underlying fund performed well. There was also the potential for Mr L to take TFC if the underlying fund was large enough to pay the GMP. So, I think Portal should have recognised the significant benefits provided by this plan and proceeded with caution.

Transferring his section 32 plan meant that Mr L would be losing his guarantees and instead relying on investment performance from a new scheme. But I don't think his situation lent itself to taking such risks. I think it should've been clear that while Mr L may have been open to taking some risk, he wasn't prepared or able to take a significant amount.

Mr L was recorded as having a "balanced" ATR, but in my view, there is little available evidence to support this classification.

Portal's report defines balanced investors as having moderate levels of knowledge about financial matters and possibly having some experience of investment including more risky assets such as equities and bonds. They are willing to take on some investment risk with part of their assets if the potential rewards are high enough. But Mr L had no recorded investment experience and had cash savings of just £8,000. His pensions represented almost all of his of private assets other than his property. So, I think he had very little capacity for loss.

I've reviewed the fact find questions which relate to the level of risk Mr L was willing to accept. Whilst Mr L did agree that he found investment matters easy to understand, he also indicated he felt uncomfortable about investing the stock market, that he had little of experience of investing in stocks and shares. He agreed to the statement that he would tend to look for safer options even if it meant lower returns and that he was concerned by the volatility of the stock market. Taking all of this into account, I agree with the investigator, that Mr L could only accept a cautious level of risk for his pensions.

Before providing the recommendation, Portal carried out a transfer valuation analysis ('TVAS') as a means of comparing the transfer value of the section 32 plan with the benefits Mr L would be giving up. As the regulator has made plain, when considering whether to make a personal recommendation to transfer away from a defined benefit scheme, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme as sufficient in itself (COBS 19.1.7B G). In light of that, I think it's important to again emphasise that the starting point for the transfer advice in this case ought to have been that it was unsuitable. So, I think Portal ought to have made Mr L aware that it was most likely in his best interest to keep his section 32 plan.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The investment return (critical yield) required to match the section 32 plan at retirement was quoted as 3.2% per year if Mr L took TFC and a reduced pension at age 63. This compares with the discount rate of 4.7% per year for 11 years to retirement in this case. For further comparison, the regulator's assumed future growth rates for personal pensions illustrations were 2% (lower); 5% (intermediate); and 8% (higher).

I've taken this into account, along with the composition of assets in the discount rate, Mr L's 'cautious' attitude to risk and also the term to retirement. Although the discount rate of 4.7% was higher than the critical yield quoted, I'm mindful that Mr L's cautious ATR could've meant that investing line with that approach produced a lower return, closer to the regulator's lower growth rate. So, I think there was a real chance that Mr L could achieve the same level of benefits or lower. And there would be little point in Mr L giving up the guarantees available to him through his section 32 plan only to achieve, at best, the same level of benefits outside the scheme. With this in mind, I don't think that transferring this plan to the SIPP was in Mr L's best interests as he would be losing a guaranteed income, particularly as this plan accounted for the majority of Mr L's retirement provisions.

I have nevertheless considered whether Mr L had any other objectives that meant that transferring the benefits held in his section 32 plans was in his best interests.

Having considered the suitability report, I note that Portal stated Mr L wanted to take TFC at age 55; move to a cheaper scheme, have access to greater investment choice and pass the benefits on to his family.

The charges applicable to the section 32 plan were lower than the SIPP, so transferring this plan didn't meet this objective. I also can't see any reason why Mr L would've wanted to access a wider range of investments; Mr L didn't have the investment knowledge or risk appetite to invest in non-mainstream assets. The section 32 plan was split into two policies, one of which was invested in a with-profits fund, the other a managed fund. Although the with-profits fund wasn't able to be switched, this was already in line with Mr L's cautious risk profile. And while the managed fund fell outside of his risk profile, Mr L could've switched funds for free. So, I don't think this was genuine objective for Mr L, rather it was a consequence of the switch.

Portal says that Mr L wanted to take TFC at 55, but I don't think this was explored in any meaningful way. On the contrary, the fact-find notes that Mr L didn't consider accessing TFC to be a priority. The notes further state that he didn't have any plans to take TFC at 55, but he thought it would be an advantage to have his funds held in a pension that would allow this. While Mr L may have wanted the option to take TFC at 55, he was still over three years away from being able to do so. So, in my view, transferring out of the section 32 plan when Mr L didn't know whether he wanted to take TFC was premature. And doing so simply to have the option of taking TFC didn't outweigh the loss of guarantees.

The fact-find notes that Mr L wanted to pass his pension fund to his wife in the event of his death. Death benefits are an emotive subject and of course when asked, most people would like their loved ones to be taken care of when they die. The lump sum death benefits on offer through the SIPP was likely an attractive feature to Mr L. But whilst I appreciate death benefits are important to consumers, and Mr L might have thought it was a good idea to transfer his section 32 plan to a SIPP because of this, the priority here was to advise Mr L about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement. And I don't think Portal explored to what extent Mr L was prepared to accept a lower retirement income in exchange for higher death benefits.

I also think the existing death benefits attached to the section 32 plan were underplayed. Mr L was married and so the widower's pension provided by the plan would've been useful to his spouse if Mr L predeceased her. I don't think Portal made the value of this benefit clear enough to Mr L. This was guaranteed – it was not dependent on investment performance, whereas the sum remaining on death in the SIPP was.

Furthermore, Mr L had other pensions (will I address further below). If ensuring an amount was set aside for his wife on his death was important to him, he could've made arrangements in respect of these plans. Alternatively, Mr L could've explored life insurance. Ultimately, I don't think the potential for higher death benefits was a good enough reason to give up the guarantees attached to the section 32 plan.

Regarding the risks associated with its recommendation, I do accept that Portal covered some of these. However, disclosure isn't the same as suitability, and in my view Portal shouldn't have recommended the switch of the section 32 plan as it was not in Mr L's best interests and there were no other compelling reasons to do so.

The advice to switch Mr L's PPP, FSAVC and SPP

Mr L was advised to switch his PPP, FSAVC and SPP, which when switched to the SIPP had a total value of £26,564.59. It seems to me that, of Mr L's objectives, the main ones which might be met by these transfers were consolidating his pensions, greater investment choice and moving to a cheaper scheme (given that the remainder of his objectives would already have likely been met by the existing plans).

As noted above, I do not believe that Mr L had a balanced ATR and should have been classed as a cautious, or low risk investor. Mr L did not have a specified type of investment he was looking to move his funds into (e.g. overseas funds, specialised investments) and there was no stated intention to invest in funds which were only available via a SIPP platform. There is no reason to believe the providers he held his pensions with, all relatively large and well-known pension firms, would not have an appropriate funds if he remained with them. So, I think Portal should have investigated whether his needs could have been met within his existing arrangements. In my view, I think the benefits held in these pensions could have been switched internally to lower risk funds without having to change platforms and incur new charges. So, I don't think the SIPP was necessary to meet the objective of wider investment fund choice.

Whilst having the pension plans all in one place may've been more convenient for Mr L, I don't think this in itself is enough to justify the switch of these plans. I say this as Mr L had managed previously by having the pensions in separate plans with separate providers. And whilst this may've required slightly more administration when coming to retirement, I'd expect the benefits to be more significant than just the ease of having all the pensions in one place. Furthermore, if Mr L did want to consolidate his plans, he could've done so closer to retirement when he had a better understanding of his needs.

Mr L's PPP, FSAVC and SPP were all recorded by Portal as having an AMC of 0.75%. Whilst this was 0.25% higher than the SIPP AMC of 0.5%, there are other factors that needed to be considered. Portal was charging 3.8% of the total transfer value as an upfront fee, plus there would be ongoing advice charges from Firm C. In addition, a number of the investments which Mr L was subsequently advised to invest in would've carried additional charges. Without knowing what these fees were, it wasn't possible for Portal to say that Mr L would benefit from lower scheme fees as per his objectives.

Overall, for the reasons I've just set out, I don't think that the advice to switch the PPP, FSAVC and SPP to the SIPP were suitable. I think Mr L's immediate and genuine objectives could've been met by remaining in these plans and undertaking internal fund switches where necessary.

The investment advice

As noted above, the regulator's 2013 and 2014 alerts applied to pension switches and not just transfers. So, when giving its recommendation Portal needed consider the whole of the transaction. That is, it needed to understand the investments envisaged for Mr L and determine whether these were suitable for him or not.

I don't think Mr L had a balanced ATR; as I have explained, I think Mr L had a cautious ATR given his experience and capacity for loss. In light of this, I don't think investing in UCIS was suitable for Mr L at all, let alone in the proportion invested. There's nothing to indicate Mr L had the requisite knowledge or experience to accept or understand the risks associated with these types of investments. So, I don't think Portal should've recommended that Mr L proceed with any aspect of the transaction as it was not suitable for him and it wasn't in his best interests.

I've thought about whether, if he'd been correctly advised by Portal, Mr L would have gone ahead with the switches anyway. Having carefully considered all the circumstances in this case, I don't believe he would. There's nothing to suggest that he was seriously considering moving his pensions prior to being referred to Portal for a pension review. It is clear from the available information that he did not have any particular reason to switch his existing plans, other than consolidation, which was for purely administrative purposes.

Mr L couldn't access his benefits at the time, and didn't have any concrete plans to do so. And he says he didn't want to take any risks with his pension so, I don't think he would've insisted if Portal had clearly explained why it wasn't in his best interests. And as a professional adviser which, unlike Firm C, was authorised to provide transfer advice, Portal's recommendation would've carried significant weight and could, I believe, have dissuaded Mr L from proceeding with the switch and subsequent investments. Alternatively, had Mr L proceeded against such advice, Portal could've discharged its professional responsibility to him appropriately. For example, it could've treated him as an insistent client. However, there's nothing to indicate Mr L would've acted against the advice he was given.

Overall, I consider that the losses suffered by Mr L are as a result of the unsuitable advice provided by Portal. Had it not been for this unsuitable advice, I don't believe Mr L would have gone ahead with the switch of his existing pensions, or invested such a large share of his fund in UCIS. So, I think Portal is fully responsible for his losses.

I recognise that it can be argued Firm C may have also separately caused some of

Mr L's losses. So, I've considered whether I should apportion only part of the responsibility for compensating the loss to Portal. In the circumstances, though, I think holding Portal full responsible for the whole of the loss represents fair compensation. I don't accept that anything Firm C did was an intervening act which absolves Portal of its responsibility for Mr L's losses.

I think it's important to emphasise that Firm C and Portal were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients - pension-release advice and investment. Because Firm C wasn't authorised to provide pension transfer advice, it referred Mr L to Portal. Portal advised Mr L to transfer to a SIPP, it set up the SIPP and arranged for his existing pension benefits to be transferred to it. I acknowledge that Firm C advised Mr L to invest a significant share of his SIPP funds in UCIS. But, as I've explained, Portal's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mr L on the investments. It was only as a result of Portal's involvement that Mr L transferred the funds held in his existing pensions to the SIPP. Portal's role was pivotal, since the eventual investments were fully reliant on the funds being transferred first; if that hadn't happened, Mr L couldn't have invested as he did.

Portal has suggested that as Firm C is no longer trading Mr L can complain to the FSCS about the advice it gave him.

In terms of the FSCS, I am aware that, as a fund of last resort, the FSCS won't pay out on claims where it is aware that another firm was involved in the transaction, and it considers that firm might also be responsible for a consumer's losses. In Mr L's case, he's told us that the FSCS turned his claim down. So, this means holding Portal responsible for only part of the loss could risk leaving Mr L out of pocket. But I think it's important to point out that I'm not saying Portal is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portal gave unsuitable advice and it is responsible for the losses Mr L suffered in transferring his section 32 plan and switching his other pensions to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position.
So, overall, I think holding Portal fully responsible for the whole of the loss represents fair compensation in this case.

Putting things right

My aim in awarding redress is to put Mr L as far as possible in the position he'd be in now if Portal had given him suitable advice. I think Mr S would have retained his existing pension arrangements.

What should Portal do?

To compensate Mr L fairly, Portal must determine the *combined fair value* of his transferred pension benefits as outlined in Step One and Step Two below. If the *actual value* is greater than the *combined fair value*, no compensation is payable.

actual value

This means the actual amount payable from the SIPP at the date of the calculation.
My aim is to return Mr L to the position he would have been in but for the actions of Portal. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market), as their value can't be determined. That appears to be the case

here.

To calculate the compensation, Portal should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investments. If Portal is unable to buy the investments, it should give them a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portal has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portal may ask Mr L to provide an undertaking to account to it for the net amount of any payment he may receive from the illiquid investments.
That undertaking should allow for the effect of any tax and charges on what he receives. Portal will need to meet any costs in drawing up the undertaking. If Portal asks Mr L to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

fair value – step one

If Mr L had been given suitable advice, I think he would have remained in the section 32 plan.

Portal should determine the notional value of the section 32 plan from L on the basis that it had continued in the original funds.

If that isn't available, Portal must use the benchmark shown below.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Transfer value of the section 32 plan	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 90 days of the business receiving the complainant's acceptance)

If at the date of calculation the cost of securing a future GMP equal to that under the section 32 plan exceeds the notional value or other benchmark, Portal must use the cost of securing the GMP instead of the notional or other benchmark value as the fair value in this step.

The cost of securing the future GMP is to be determined in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

The calculation should be carried out as at the date of my final decision, using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr L's acceptance of the decision.

fair value – step two

Portal must compare the total value of the PPP, FSAVC and SPP transferred to Mr L's SIPP with that of the benchmark shown below to determine the fair value of Mr L's personal pensions if suitable advice had been given.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Combined transfer value of the PPP, FSAVC and SPP	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 90 days of the business receiving the complainant's acceptance)

To arrive at the fair value when using the fixed rate bonds as the benchmark, Portal should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sums paid into the SIPP should be added to the fair value calculation from the point in time when they were actually paid in. Any withdrawal, income, or other payment out of the SIPP should be deducted from the fair value (in respect of any funds other than the section-32 plan) at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Portal totals all those payments and deducts that figure at the end instead of deducting periodically.

The combined value of the sums produced by the above two steps is the ***combined fair value***.

Portal may wish to contact the Department for Work and Pensions ('DWP') to obtain Mr L's contribution history to the State Earnings Related Pension Scheme ('SERPS or S2P'). These details should then be used to include a 'SERPS adjustment' in the calculation of the cost of providing future GMP, which will take into account the impact of surrendering the GMP on Mr L's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mr L's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr L as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the ‘compensation amount’.
The compensation amount must, where possible, be paid to Mr L within 90 days of the date Portal receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portal to pay Mr L.

It’s possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90-day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90-day period in which interest won’t apply.

SIPP Fees

The wrapper only exists because of illiquid investments. In order for the wrapper to be closed and further fees that are charged to be prevented, those investments need to be removed. I’ve set out above how this might be achieved by Portal taking over the investment, or this is something that Mr L can discuss with the wrapper provider directly. But I don’t know how long that will take.

Third parties are involved, and we don’t have the power to tell them what to do. If Portal is unable to purchase the investment, to provide certainty to all parties I think it’s fair that it pays Mr L an upfront lump sum equivalent to five years’ worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the wrapper to be closed.

Why is this remedy suitable?

I’ve decided on this method of compensation because:

- Mr L wanted Capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It’s a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr L’s risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr L into that position. It does not mean that Mr L would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr L could have obtained from investments suited to his objective and risk attitude.

In addition, Portal should pay Mr L £300 for the upset and concern caused by transferring the majority of his retirement provision into a SIPP which was then invested in a number of unregulated investments.

My final decision

For the reasons given above, I uphold this complaint and direct Portal Financial

Services LLP to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr L to accept or reject my decision before 11 July 2022.

Rob Deadman
Ombudsman