

## **Before the Arbiter for Financial Services**

**Case ASF 045/2022**

**SI ('the Complainant')**

**vs**

**Momentum Pensions Malta Limited**

**(C52627) ('MPM' or 'the Service  
Provider')**

### **Sitting of 17 November 2023**

#### **The Arbiter,**

Having seen the **Complaint** made against Momentum Pensions Malta Limited ('MPM' or 'the Service Provider') relating to the Momentum Malta Retirement Trust ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered on her Retirement Scheme due to the alleged inappropriate investments allowed by the Service Provider on the advice of an unlicensed investment adviser. She alleged that the Retirement Scheme was invested in high-risk structured notes aimed for professional investors only, which were outside her low to medium-risk profile.

The Complainant also claimed that MPM failed to warn her of the financial dangers of her investments and, also, accepted dealing instructions where her signature was allegedly copied and pasted without her permission.

### *The Complaint*<sup>1</sup>

The Complainant explained that on 5 December 2014, she received an acknowledgement from MPM, as trustee, for the receipt of EUR 49,668.18 in the *European Executive Investment Bond*. In March 2022, the surrender value had however been estimated at EUR 12,968.80, exclusive of costs.

She submitted that “*her written and signed instructions were only for low-medium risk (lowest available)*” investments.<sup>2</sup>

The Complainant explained that on 19 November (2017),<sup>3</sup> she filed a formal complaint with the Service Provider regarding the severe loss of funds.

She noted that the Retirement Scheme remains with no financial recovery and that ongoing annual fees continued to be paid to the Service Provider which are further diminishing the Scheme’s value. She accordingly foresees no pension income from her Retirement Scheme.

The Complainant further explained that the option to surrender the policy would cause her to incur further costs but, on the other hand, leaving the retirement plan to continue would further reduce the Scheme’s value due, in particular, to fees.

The Complainant claims that, as trustees, the Service Provider should have never accepted any transfer of funds on the advice of her advisers, *Continental Wealth Management* (‘CWM’) which, she claimed, were not licensed to handle her funds.

She submitted that MPM should have furthermore prevented low/medium risk clients from having funds invested in professional-investor-only, high-risk structured notes. She claims that MPM should have communicated with and warned clients of the financial danger.

In addition, she claims that MPM should have not accepted dealing instructions where the client’s signature had been copied and pasted without permission.

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<sup>1</sup> Complaint Form on Page (P.) 1 - 7 with supporting documentation on P. 8 - 168.

<sup>2</sup> P. 2

<sup>3</sup> The Complainant erroneously referred to a date of 19 November 2018 (P. 2). Her complaint with the Service Provider was however actually made on 19 November 2017 (P. 11).

Given the significant losses, she believes that MPM should have offered to waive fees over the intervening years and should cover all of its own costs and those of other parties at the point of surrender.

The Complainant submitted that she had only requested low-risk investments. It however came to her attention that *Leonteq AG*, *Commerzbank AG* and *Investec* were, in contrast, high-risk investments that should have not been accepted by MPM without her permission or knowledge.

### *Remedy requested*

The Complainant requested the following remedies:<sup>4</sup>

1. An acknowledgement from MPM of the mismanagement of her Retirement Scheme resulting in significant losses;
2. Surrender of her account with no costs, including for MPM, to cover the costs from other parties; and
3. A full refund of the original investment without penalty, this being the sum of EUR 49,668.18 received by MPM on the 5 December 2014.

**Having considered, in its entirety, the Service Provider's reply of 19 May 2022, including attachments,**<sup>5</sup>

Where the Service Provider, in essence, explained and submitted the following:

### *Background*

1. That MPM is licensed by the Malta Financial Services Authority ('MFSA') to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme. The Scheme is licensed as a Personal Retirement Scheme.
2. That MPM is not licensed to provide investment advice.

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<sup>4</sup> P. 3

<sup>5</sup> P. 174 - 181

*Competence and prescription*

3. That the Complaint is prescribed pursuant to article 21(1)(b) of Chapter 555 of the Laws of Malta, and without prejudice, pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta.

*Reply to the Complainant's complaints*

4. That the Complainant stated in her Complaint that receipt was acknowledged for '£49,688.18' in the *European Executive Investment Bond*. MPM replied that, on the 21 November 2014, '£42,646.15' was actually the sum transferred into the Retirement Scheme – from this amount, various fees were then deducted (not only of MPM's) and the amount subsequently transferred to the investment provider was of '€39,525.94'.<sup>6</sup> The Complainant was already informed of this in MPM's reply dated 28 February 2018 (as per the copy attached to the Complaint).<sup>7</sup>
5. MPM acknowledged that the Complainant did choose the 'lower medium' risk profile in its application form – it submitted that the lowest available risk was however that of 'Low', which was not selected by the Complainant.
6. It noted that the Complainant submitted her complaint to MPM on 19 November 2017 (not 2018). MPM replied on 28 February 2018.
7. In her complaint to MPM in November 2017, the Complainant did not request any refund or waiver of any fees. It was submitted that she did not raise this matter prior to filing her Complaint before the Arbiter.
8. MPM further noted that the Complainant stated in her Complaint that MPM should not have accepted dealing instructions where the client's signature was copied and pasted without permission. MPM submitted that the Complainant must clarify what she is alleging. If her allegation was that her signature was forged, MPM respectfully replied that this falls outside the competence of the Arbiter.
9. MPM explained that the Complainant appointed CWM/*Trafalgar International GmbH* ('Trafalgar') as her adviser. Before CWM ceased

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<sup>6</sup> P. 174

<sup>7</sup> P. 11 - 16

trading, it acted as adviser and provided financial advice to the investors. It was CWM who advised the Complainant to invest in the products which have led to the Complainant's losses. It was accordingly submitted that CWM is the proper respondent to this claim.

10. That from 2015, CWM advisers were individual employees of Trafalgar (referred to as 'Members' by Trafalgar, but Trafalgar had confirmed to MPM they were employees). As employees of Trafalgar, they were operating under *Trafalgar International GmbH* licences. Trafalgar's licence confirms that *Trafalgar International GmbH* is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation Licence 34D, Broker licence number D-FE9C-BELBQ-24, and Financial Asset Mediator licence 34F: D-F-125-KXGB-53. MPM submitted that it will amply prove these facts throughout the proceedings, including by communications sent by Trafalgar themselves.
11. MPM submitted that any investment trades placed for and on behalf of the Complainant by her adviser from 2015 onwards, who was employed and regulated by Trafalgar (as per *Index X* attached to the Complaint),<sup>8</sup> were therefore reviewed and strictly controlled via Trafalgar's Head Office in Germany. MPM highlighted that this was confirmed by Trafalgar itself.

The Service Provider claimed that from 2015 onwards, CWM was not an 'unlicensed investment advisor'.<sup>9</sup> The Complainant's adviser was an employee of Trafalgar (as confirmed by Trafalgar themselves) and was indeed regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities.

12. MPM explained that when Terms of Business with CWM were terminated by MPM, the CWM advisers were regulated as members/employees of Trafalgar, and Trafalgar immediately and in coordination with MPM assumed responsibility for THEIR clients as the regulated entity and principal. This was reflected in all exchanges with the affected members. Trafalgar contacted members by phone and by follow-up exchanges and

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<sup>8</sup> P. 149 - 153

<sup>9</sup> P. 175

appointed new advisers, internally, to work with the members. At no stage were the members left without an adviser. It was emphasised that there was complete continuity on the matter and the change was solely the individual's adviser. MPM attached an email sent to the Complainant dated 15 November 2017 in this regard.<sup>10</sup>

13. MPM alleged that, as it shall prove throughout the proceedings, at the time the Complainant became a member of the Retirement Scheme there was no law or rule requiring it to carry out any due diligence or ensure that CWM/Trafalgar was licensed. MPM reiterated that it had fulfilled all obligations incumbent upon it from time to time. It replied that, in particular, there was no obligation for it to verify whether CWM was a regulated entity or whether it was authorised to provide advice.
14. MPM submitted that it has at all times fulfilled its obligations with respect to the Complainant.
15. It further submitted that, as shall be proved throughout the course of the proceedings, the investments were made in line with both MPM's investment guidelines and MFSA's rules.
16. With respect to the Complainant's request for a refund of the original investment, it submitted that account must be taken of withdrawals effected by the Complainant as well as any interest payments and profits/income she benefitted from her Scheme.

*Momentum does not provide investment advice*

17. MPM replied that it has, at all times, fulfilled its obligations with respect to the Complainant and observed all laws, rules, and guidelines, including investment guidelines.
18. It highlighted that it is not licensed to, and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant.
19. MPM submitted that this was clear from the application form which specifically requests the details of the Complainant's professional adviser.

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<sup>10</sup> P. 178

Attention was brought to the fact that the Complainant also declared that she acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

20. It noted that, to further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business (attached to the application form) is dedicated solely to this point.

*MPM's concluding remarks*

21. MPM replied that:

- a. It is not responsible for the payment of any amount claimed by the Complainant and that it has, at all times, fulfilled its obligations with respect to the Complainant;
- b. It has not acted negligently nor has it breached any of its obligations in any way; and,
- c. The Complainant must show that it was MPM's actions or omissions which caused the loss she is alleging. It replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.

22. MPM consequently requested the Arbiter to reject the Complainant's claims.

## **Preliminary**

### ***Competence of the Arbiter***

In Section B of its reply dealing with '*Competence and prescription*', the Service Provider raised the preliminary plea that the Arbiter has no competence to consider this Complaint as it was prescribed based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta ('the Act').<sup>11</sup>

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<sup>11</sup> P. 174

In its reply, the Service Provider did not further elaborate on, or substantiate, the said matters.

However, in its final note of submissions, Section A titled '*Time-barring*',<sup>12</sup> the Service Provider provided some further details on its plea but just limited itself to certain aspects. In essence, in its final note, MPM submitted that the Complainant had been informed of all fees and that in 2014, had also been informed of her right to cancel. Additionally, MPM submitted that in her formal complaint made with the Service Provider, the Complainant did not request any refund or waiver of any fees, and so this matter was not raised prior to the filing of her Complaint with the Arbiter. It therefore considered that '*this part of the Complaint should be rejected*'.<sup>13</sup>

The Arbiter notes however that in her Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant did not complain that she was not informed about the applicable fees and/or that she was not informed of, or not provided with, her right to cancel the underlying policy. Her Complaint did not raise any such aspects.

The reference to fees that the Complainant made in her Complaint to the OAFS was only with respect to her belief that MPM should have waived certain fees and costs due to the alleged significant losses she suffered on her Retirement Scheme.<sup>14</sup> The request for the waiving of fees relates to the merits of the case and the extent of compensation requested, which will be considered accordingly by the Arbiter.

The submission that the Complainant '*did not request any refund or waiver of any fees*' in the formal complaint made to the Service Provider, but only raised this in the Complaint before the OAFS, does not prejudice her right to include rebate of such fees in the remedy she asks from the Arbiter. The Complainant included such rebates in the Complaint filed with the OAFS when she claimed full refund of her original investment which obviously includes all fees deducted. The extent of compensation forms part of the considerations under the merits

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<sup>12</sup> P. 283

<sup>13</sup> *Ibid.*

<sup>14</sup> P. 2 - 3



of the case as outlined above and will indeed be treated accordingly by the Arbiter.

The Arbiter further points out that, as summarised earlier above, the Complaint submitted to the OAFS involves the significant claimed losses on her investments due to the following key alleged failures by the Service Provider:

- a) the failure to prevent the alleged inappropriate investments given the claim that the Retirement Scheme was invested in high-risk structured notes aimed for professional investors only which were not in line with her low to medium-risk profile;
- b) the failure to prevent an unlicensed investment adviser, CWM, from advising her on the investments;
- c) the failure to warn her about the financial dangers of her investments;
- d) the failure to refuse to accept dealing instructions which featured her signature being copied and pasted without her permission.

The submissions with respect to the plea of prescriptions raised by the Service Provider did not cover the above aspects. The Arbiter, accordingly, outrightly dismisses MPM's claims with respect to competence and prescription in respect of the Complaint in question.

Furthermore, even if, for the sake of the argument only, had such pleas been raised with respect to the claims and key alleged failures as summarised above (which MPM did not do so in its reply and subsequent submissions), the Arbiter still finds no basis on which he could accept such pleas with reference to Article 21(1)(b) or article 21(1)(c) of the Act.

This is because the conduct complained of involves the conduct of MPM which occurred beyond the entry into force of the Act and hence falls outside the provisions of Article 21(1)(b) of the Act. MPM was still the Complainant's trustee and RSA in respect of her Retirement Scheme after the coming into force of the Act on 18 April 2016. Furthermore, the disputed investments still featured in her investment portfolio beyond such date,<sup>15</sup> and her appointed adviser, CWM, was still occupying the function of investment adviser in relation to her Scheme

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<sup>15</sup> P. 63 - 70

until it ceased trading in 2017. MPM itself declares that it no longer accepted business from CWM as from September 2017.<sup>16</sup>

The conduct complained of, as highlighted above, involves conduct which falls under article 21(1)(d) of the Act, as it is conduct continuing in nature and is thus considered to have occurred beyond the entry into force of the Act.

Furthermore, with reference to article 21(1)(c) of the Act, it is noted that the Complainant registered her complaint in writing with the financial service provider on 19 November 2017, and no evidence has been provided, nor emerged, that this was *'later than two years from the day on which the complainant first had knowledge of the matters complained of'* as provided in the said article. The disputed realised losses on her investments indeed occurred in 2017 as shall be considered further on in this decision.

**Hence, the Arbiter is dismissing the pleas of prescription and competence raised by the Service Provider for the reasons amply explained and shall proceed to consider the merits of the case next.**

### **The Merits of the Case**

**The Arbiter will decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>17</sup>**

The Arbiter is considering all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555<sup>18</sup> which stipulates that he should deal with the complaints in *'an economical and expeditious manner'*.

### **The Complainant**

The Complainant, born in 19XX, is of British nationality and resided in XXX at the time of her application for membership<sup>19</sup> as per the details contained in her

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<sup>16</sup> Affidavit by Susan Brooks at P. 188

<sup>17</sup> Cap. 555, Art. 19(3)(b)

<sup>18</sup> Art. 19(3)(d)

<sup>19</sup> P. 126 - 139

MPM's Application Form dated 20 September 2014.<sup>20</sup> Her occupation was indicated as *'Housewife'* in the said form.<sup>21</sup>

The Complainant was accepted by MPM as a member of the Retirement Scheme on 7 October 2014.<sup>22</sup>

Her risk profile in the MPM Application form was indicated as *'Lower to Medium'* which was defined as ***'There is a small degree of risk to the capital with potential for moderate growth over the longer term'***.<sup>23</sup>

Her *'Attitude to Risk'* was stipulated as *'Lower Medium'* in the Annual Member Statements issued by MPM.<sup>24</sup>

During the course of the proceedings it was not indicated, nor has it emerged, that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail client. Indeed, during the hearing of 18 October 2022, the Complainant declared that:

*'I think from all the information that I gave it would have been absolutely clear that I have no financial background, no legal background, nothing of this at all. And it was for this reason that I needed experts in order to handle the money that I had'*.<sup>25</sup>

## Particularities of the Case

### ***The Retirement Scheme in respect of which the Complaint is being made***

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta and authorised by the MFSA.<sup>26</sup>

*Continental Wealth Management* ('CWM') was indicated as the Complainant's appointed professional adviser in respect of her Scheme's account.<sup>27</sup> CWM

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<sup>20</sup> P. 129, 134

<sup>21</sup> P. 127

<sup>22</sup> P. 142

<sup>23</sup> P. 128 – Emphasis added by the Arbiter

<sup>24</sup> P. 34, 36

<sup>25</sup> P. 182

<sup>26</sup> <https://www.mfsa.mt/financial-services-register/>

<sup>27</sup> In the Scheme's Application Form for Membership, the Complainant's professional adviser was indicated as *'Continental Wealth Trust'* (P.127) although the name used in the Scheme's Summary Sheet issued with MPM's

provided investment advice to the Complainant with respect to the selection and composition of the tailored investment portfolio underlying her Scheme.

The investments within her Scheme were accordingly directed by the member who received investment advice from CWM as her investment adviser, with the investments subject to the oversight and acceptance of MPM as the trustee and RSA of the Scheme.

### ***The Retirement Scheme's Underlying Investments***

The Retirement Scheme acquired a life policy, the '*European Executive Investment Bond* issued by *Skandia International*' ('the underlying policy') within which the underlying investment portfolio was held.<sup>28</sup> According to a statement issued by MPM which was presented during the case, MPM received the sum of GBP 42,464.15 into her Retirement Scheme in November 2014.<sup>29</sup> According to the said statement, after the deduction of fees and charges, the remaining sum of GBP 39,525.94 was then invested into the underlying policy and the said premium was used to invest in a portfolio of investment instruments.<sup>30</sup>

The underlying policy acquired by the Scheme was issued by Skandia International on 1 December 2014 with the policy being denominated in EUR.<sup>31</sup> The premium in EUR into the underlying policy for investment amounted to EUR 49,668.18.<sup>32</sup>

The investment transactions (excluding FX positions) that were allowed to be undertaken within the underlying policy - as emerging from the '*Historical Cash Account Transactions*' Report covering the period '02/12/2014' to '01/12/2017'

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Welcome Letter of 8 October 2014, was '*Continental Wealth Management*' ('CWM') (P. 142). CWM is also the name of the '*Professional Adviser*' as reflected in MPM's Annual Member Statements for the year ending 31 December 2015 and 2016 (P. 34 & 36).

<sup>28</sup> P. 108-120

<sup>29</sup> P. 32

<sup>30</sup> Pg. 31 & 68

<sup>31</sup> P. 146

<sup>32</sup> P. 144 & 146. GBP 39,525.94 was approximately equivalent at the time of the investment to €49,669.18

2017<sup>33</sup> and a 'Valuation Statement' as at '30 June 2018'<sup>34</sup> both issued by *Old Mutual International* ('OMI')<sup>35</sup> are summarised in Table A below.

**Table A**

| Type | Name of Investment  | Date bought | CCY | Purchase amount | Date sold/<br>Matured or<br>Called | Sale price | Realised<br>Capital<br>Loss/Profit<br>(exclusive<br>dividends/<br>interest) |
|------|---|-------------|-----|-----------------|------------------------------------|------------|---|
| SN   | <i>Leonteq November COSI<br/>Blue 1</i>                           | 05/12/2014  | GBP | 6,897.10        | 25/02/2015                         | 7,000      | +102.9  |
| SN   | <i>Leonteq November COSI<br/>Blue 2</i>                           | 05/12/2014  | GBP | 5,516.40        | 16/11/2015                         | 5,651.40   | +135  |
| SN   | <i>Commerzbank 1Y6M AC<br/>Phoenix Worst AKS Invn<br/>UBNT</i>    | 05/12/2014  | GBP | 12,455.80       | 03/05/2017                         | 8,285.76   | -4,170.04   |
| SN   | <i>Leonteq 1.5Y MB Exp Cert<br/>on Herbalife &amp; Invensense</i> | 15/12/2014  | GBP | 13,000          | 15/06/2017                         | 2,297.23   | -10,702.77  |
| SN   | <i>Leonteq 7.20% Multi Barrier<br/>Reverse Convertible</i>        | 19/03/2015  | GBP | 7,405.60        | 10/03/2017                         | 1,754.95   | -5,650.65   |
| SN   | <i>EFG Multi Barrier<br/>Autocallable</i>                         | 21/05/2015  | EUR | 2,000           | 21/05/2018                         | 2,000      | 0   |
| SN   | <i>Investec 6Y 90% Cap<br/>Protected Growth Note DEC<br/>15</i>   | 08/12/2015  | GBP | 6,000           | Open position                      |            |   |

<sup>33</sup> P. 63 - 70

<sup>34</sup> P. 88 - 95

<sup>35</sup> Skandia International eventually rebranded to Old Mutual International -

<https://www.privatebankerinternational.com/news/skandia-rebrands-as-old-mutual-international-221214-4474878/>

It is noted that according to the OMI 'Valuation Statement' as at '30 June 2018', two further investments of EUR 5,000 each were made in two funds, the 'Carraig Multistra Rudolf Wolff GBL Inc C' and 'Smartfund 80% Protected Balanced Fund Class A Eur Shares' in May 2018, and hence after CWM ceased to be the Complainant's investment adviser.<sup>36</sup>

These investments are not considered to be part of the disputed investment portfolio.

It is noted that even when taking into consideration the income or interest received from the respective investments, the Complainant still suffered a material overall loss on her total portfolio as per Table B below.

**Table B**

| Type | Name of Investment                                 | Date bought | CCY | Realised Capital Loss/Profit (exclusive dividends/interest) | Total Income/Interest received from investment <sup>37</sup> | Realised Capital Loss/Profit (inclusive of dividends/interest) |
|------|--|-------------|-----|---|--|--|
| SN   | Leonteq November COSI Blue 1                       | 05/12/2014  | GBP | +102.9  | 157.50   | +260.40  |
| SN   | Leonteq November COSI Blue 2                       | 05/12/2014  | GBP | +135  | 450  | +585   |
| SN   | Commerzbank 1Y6M AC Phoenix Worst AKS Invn UBNT    | 05/12/2014  | GBP | -4,170.04   | +1,873.2   | -2,296.84  |
| SN   | Leonteq 1.5Y MB Exp Cert on Herbalife & Invensense | 15/12/2014  | GBP | -10,702.77  | +1,950   | -8,752.77  |
|      |  |             |     |   |  |  |

<sup>36</sup> P. 93

<sup>37</sup> One interest payment of GBP 157.5; Three interest payments of GBP 150 for a total of GBP 450; Six interest payments of GBP 312.20 for a total of GBP 1,873.20; Six interest payments of GBP 325 for a total of GBP 1,950; Eight interest payments of GBP 140 for a total of GBP 1,120.

|    |   |            |     |  |  |           |
|----|---|------------|-----|--|--|-----------|
| SN | <i>Leonteq 7.20% Multi Barrier Reverse Convertible</i>  | 19/03/2015 | GBP | -5,650.65  | +1,120   | -4,530.65 |
| SN | <i>EFG Multi Barrier Autocallable</i>                   | 21/05/2015 | EUR | 0  | No sufficient data available from the official statements provided |           |
| SN | <i>Investec 6Y 90% Cap Protected Growth Note DEC 15</i> | 08/12/2015 | GBP | No sufficient data available from the official statements provided |  |           |

The total realised losses (inclusive of interest) as emerging from Table B reflect and match the respective figures of realised loss/profit provided by the Service Provider.<sup>38</sup>

According to Table B above, the total realised loss amounts in total to –GBP 14,734.86. The said figure is however exclusive of the performance of the ‘*EFG Multi Barrier Autocallable*’ and ‘*Investec 6Y 90% Cap Protected Growth Note DEC 15*’, which could not be verified from the official statements presented during the case.

It is noted however, that the Service Provider indicated that these two investments ultimately yielded an overall total realised profit of GBP 301.88 and GBP 110.58 respectively.<sup>39</sup> The Service Provider indeed calculated the total realised loss on the contested portfolio as amounting to – GBP 14,322.40.<sup>40</sup> The said total realised loss on the disputed portfolio amounts to 36.24% of the initial premium invested.<sup>41</sup>

**From the above information, it clearly emerges that (at the time of CWM’s appointment as professional adviser till September 2017), the investment portfolio held within the Complainant’s Retirement Scheme account indeed comprised solely of structured note (‘SN’) investments with such portfolio containing material investment positions into single investment instruments**

<sup>38</sup> P. 271

<sup>39</sup> The said total realised profits on the said two investments were not contested by the Complainant during the proceedings of the case.

<sup>40</sup> *Ibid.*

<sup>41</sup> GBP 14,322.40 of GBP 39,525.94

(such as a 31.51% of the initial investible premium into the *Commerzbank* note and 32.89% of the initial investible premium into the *Leonteq 1.5Y MB Exp Cert on Herbalife* note),<sup>42</sup> apart from material exposures to the same issuers (such as to the various *Leonteq* notes).

## Observations and Conclusions

### *Background and application of aspects raised in similar cases*

The Arbiter has previously exhaustively considered multiple complaints against the Service Provider similar to that raised by the Complainant.

The Arbiter would like to, in particular, refer to the single decision issued to over thirty complainants on 28 July 2020,<sup>43</sup> as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.<sup>44</sup> The said decisions were also all confirmed by the Court of Appeal (Inferior Jurisdiction) with numbers 39/2020 LM, 37/2021 LM, 38/2021 LM, 39/2021 LM and 124/2021 LM respectively.

For the sake of streamlining the decision, avoiding repetition, and deciding the case in an expeditious manner as he is obliged to do in terms of Chapter 555, the Arbiter shall not reproduce here details of the same or similarly applicable background and analysis, namely, with respect to the following aspects already extensively covered in the said decisions as follows:

- the legal framework as explained in the section titled '*The Legal Framework*' of the said decisions;

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<sup>42</sup> GBP 12,455.8 of GBP 39,525.94; GBP 13,000 of GBP 39,525.94

<sup>43</sup> <https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

<sup>44</sup> <https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

<https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

<https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20070-2019%20-%20GA%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

<https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20074-2020%20-%20EP%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>



- responsibilities of MPM as explained in the section titled the '*Responsibilities of the Service Provider*';
- the observations on structured notes as outlined in the '*Preliminary observations*' for '*Investment into Structured Notes*' as applicable.

For all intents and purposes, these same sections are, in essence, considered relevant and applicable also to the case in question with the exception of pertinent details specifically applicable to each case (such as the extent of loss, the particular underlying life assurance policy and the exact investments forming part of the investment portfolio of each complainant).

Other observations and comments below however also refer in respect of the disputed investments in the case under consideration.

#### *The nature of the disputed investments*

As part of her submissions, the Complainant produced various dealing instruction forms and statements in respect of the structured note investments featuring within her investment portfolio. The ISIN of a number of structured notes emerged from the said information as follows:<sup>45</sup>

- for *Leonteq November COSI Blue 1* (ISIN No. CH0266684593);
- for *Commerzbank 1Y6M AC Phoenix Worst AKS Invn UBNT* (ISIN No. XS1123280767);
- for *Leonteq 1.5Y MB Exp Cert on Herbalife & Invensense* (ISIN No. CH0259241278);
- for *Leonteq 7.20% Multi Barrier Reverse Convertible* (ISIN No. CH0266684593);
- for *Leonteq November COSI Blue 2* (ISIN No. CH0256091650);
- for *EFG Multi Barrier Autocallable* (ISIN No. CH0279919994);
- for *Investec 6Y 90% Cap Protected Growth Note DEC 15* (ISIN No. XS1315181617).

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<sup>45</sup> P. 18; 20; 40; 159; 161

Neither the Complainant nor the Service Provider produced any Fact Sheets in respect of the structured notes in question as part of their submissions. From general searches over the internet, the OAFS did not manage to trace the fact sheets, although found that one of the above-mentioned ISIN. numbers featured in another similar case considered by the Arbitrator.<sup>46</sup>

Given the above, the extent of the losses emerging on various of the structured notes on the Complainant's portfolio, as well as the events occurring at the time involving the same period and parties (particularly the same adviser CWM), the Arbitrator has no reason to believe that the nature of the structured notes allowed within the Complainant's portfolio did not have overall the same or similar features of the notes (which led to the same material losses) as described in the 'Preliminary observations' for 'Investment into Structured Notes' extensively considered in other cases as referred to above.

It is sufficiently evident that MPM had permitted structured products that were complex products by their nature and hence not compatible with the Complainant's profile as a retail investor - a housewife with no financial background as indicated above.

No evidence has indeed emerged, nor been produced by the Service Provider, that the structured notes that were allowed to be invested into within her Scheme were retail products nor that they reflected her risk attitude of low-medium risk. The high risk emerging on the said products is indeed reflected in the material losses ultimately experienced on such products.

*Excessive exposures resulting in the disputed investment portfolio and lack of compliance with applicable investment guidelines/rules*

As clearly emerging from Tables A and B above, the respective portfolios **contained exclusive exposure to structured note investments as well as material investment positions into single structured note investments, apart from material exposures to the same issuers.**

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<sup>46</sup> Case ASF 035-2018 in respect of the note with ISIN No. CH0266684593. The fact sheet for the note with ISIN No. CH0266684593 was indeed considered as per pages 49, 50 and 61 of Case ASF 035-2018 posted on the OAFS's website - <https://financiarbitrator.org.mt/sites/default/files/oafs-decisions/ASF%20035-2018.pdf>

**The Arbiter considers it reasonable to conclude that such high and unjustifiable exposures that were allowed to occur by MPM within the Complainant's Retirement Scheme, did not reflect in any way the requirement for her pension fund to be *'invested in a prudent manner and in the best interests of the member'* as MPM, in its capacity as Trustee and RSA of the Scheme, was bound to ensure as specified in section 8 titled *'Investment Guidelines'* of MPM's own Application Form for Membership.<sup>47</sup>**

**The permitted allocation is, furthermore, also considered as not being either reflective of, and in conformity with, MPM own's Investment Guidelines<sup>48</sup> and the MFSA's rules applicable at the time - as similarly analysed and concluded in the section titled *'The permitted portfolio composition'* in the Arbiter's afore-mentioned previous decisions.<sup>49</sup>**

#### *Other matters*

Whilst the Arbiter has taken into consideration the other aspects raised by the Complainant in her Complaint, particular focus has been placed on the key determining aspect of the investment portfolio as amply considered in this decision.

With reference to her allegation that MPM accepted dealing instructions for investments which featured her signature being copied and pasted without her permission, the Arbiter points out that this is a serious allegation which had to be specifically proven by specific facts. In the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant making this allegation did not provide enough evidence to the Arbiter to accept her allegation.

#### *Additional observations*

It is noted that as part of its submissions, the Service Provider has, in this case, also filed copies of two legal opinions drafted for MPM dated 30 March 2022

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<sup>47</sup> P. 129

<sup>48</sup> *Ibid.*

<sup>49</sup> That is, for example, in the single case decided by the Arbiter on 28 July 2020 and the other OAFS cases with numbers ASF 073/2019, 076/2019, 070/2019 and 074/2020.

and 19 December 2019 in respect of the application and interpretation of the investment restrictions under the regulatory framework.<sup>50</sup>

The Arbiter notes that such legal opinions make, *inter alia*, much emphasis on the point that at the time of the disputed investments, the investment restrictions were not applicable and were not to be interpreted as applicable at the member's account but had to be applied generally on the Scheme.

The Arbiter has already considered such an aspect in previous decisions – as outlined, for example, under the section titled '*Context of entire portfolio and substance of MPM's Investment Guidelines*' in case OAFS ASF 076/2019 – and had outrightly refuted such notion.<sup>51</sup>

The Arbiter also makes reference to his recent comments and observations in Case ASF 021/2022 (involving the same Scheme and Service Provider) where it was noted that in the covering letter of April 2011 to the Scheme's Certificate of Registration, which formed part of the registration conditions of the Scheme, the MFSA had itself stipulated that:

'... *The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties issued under the SFA will apply separately to each member's individual fund...*'<sup>52</sup>

Once the Scheme had individual member accounts which operated in the same or similar manner to member-directed schemes, where the individual member account had his/her own tailored individual and distinct investment portfolio as selected by the respective member and the appointed adviser, then it should have been clear that the same standards and safeguards were to apply for such members. Indeed, **any other interpretation would have defeated the safeguards that the regulatory requirements were intended to achieve for the protection of the members in respect of investments and applicable diversification requirements.**

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<sup>50</sup> P. 199 - 202 & 203 - 215

<sup>51</sup> <https://financiarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

<sup>52</sup> Quote under the section titled '*Additional Observations*' of OAFS Case ASF 021/2022 xxx vs Momentum Pensions Malta Ltd of October 2023.

The said legal opinions do not change the Arbiter's position and the Arbiter accordingly stands by the position taken as outlined in this decision and relevant previous decisions as referred to above.

### ***Final Remarks***

As highlighted in other decisions, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others. It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with, the Complainant's profile, attitude to risk and investment objectives, nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's own documentation.

**The Complainant ultimately relied on MPM as the Trustee and Retirement Scheme Administrator of the Scheme, as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard her pension.**

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

**For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the oversight functions with respect to the Scheme and the investment portfolio structure.**

**It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias*.<sup>53</sup>**

**The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'<sup>54</sup> of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.**

## **Conclusion**

**For the reasons stated earlier on in this decision, the Arbiter considers the Complaint to be fair, equitable, and reasonable in the particular circumstances and substantive merits of the case and is accepting it in so far as it is compatible with this decision.**

**Cognizance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers**

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<sup>53</sup> Cap. 331 of the Laws of Malta, Art. 21(1)

<sup>54</sup> Cap. 555, Article 19(3)(c)

**that the Service Provider is to be partially held responsible for the losses incurred.**

### **Compensation**

**Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and, in a way, contributed in part to the losses experienced on the Complainant's Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced on her pension portfolio.**

**In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited to be held responsible for seventy per cent of the sum of the Net Realised Loss incurred by the Complainant within her whole disputed investment portfolio.<sup>55</sup>**

**In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Momentum Pensions Malta Limited to pay to the Complainant the sum of GBP 10,025.68 (ten thousand and twenty-five pounds sterling and sixty-eight pence).**

**Whilst the Arbiter is not accepting the Complainant's request for MPM to refund costs of other parties, however, taking into consideration the small initial pension pot of the Complainant, the extent of material losses suffered on her Scheme and the nature of the deficiencies identified on the part of the Service Provider as indicated above, the Arbiter is awarding additional compensation in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, also directing the Service Provider to:**

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<sup>55</sup> 70% of the Total Realised Loss of GBP 14,322.40, as referred to above in this decision.

- a. **waive or refund MPM's own exit fee applicable to the Retirement Scheme,<sup>56</sup> and**
- b. **waive MPM's own annual fee/s going forward from date of this decision till the date of surrender of the Complainant's Scheme (in the case of no new investments).**

**With interest at the rate of 5.25% p.a.<sup>57</sup> from the date of this decision till the date of payment.<sup>58</sup>**

**The costs of these proceedings are to be borne by the Service Provider.**

**Alfred Mifsud  
Arbiter for Financial Services**

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<sup>56</sup> As indicated in an email of 28 March 2022, regarding a surrender quote, MPM had already agreed that *'Out of goodwill and to ease the process, I would be happy to waive the advertised exit fee from Momentum of GBP 1500 should you wish to proceed along the encashment route'* (P. 26).

<sup>57</sup> Equivalent to the current Bank of England Bank Rate.

<sup>58</sup> It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.