

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

**Case No. 078/2019**

**CK ('the Complainant')**

**vs**

**STM Malta Trust and Company  
Management Limited as substituted by  
STM Malta Pension Services Limited  
(C51028) ('STM Malta' or 'the Service  
Provider')**

### **Sitting of the 6 April 2021**

**The Arbiter,**

#### **PRELIMINARY**

The Office of the Arbiter for Financial Services ('OAFS') has discovered, through its own research, that in the year 2020, STM Malta Trust and Company Management Ltd changed its name to STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider'). This results from the records filed with the Malta Business Registry (MBR) in June 2020 relating to the change in name.<sup>1</sup>

The Service Provider confirmed such a change in name and confirmed that the MBR issued the change in name certificate on 13 July 2020. For all intents and purposes the records of this case have been accordingly updated to reflect the change in name of the Service Provider.

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<sup>1</sup> As per the documents filed on 22 June 2020 with the Malta Business Registry - [https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC\\_51028\\_D50\\_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=](https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC_51028_D50_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=)

## **The Case in question**

**The Complaint** relates to the STM Malta Retirement Plan ('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 STM Malta Trust and Company Management Ltd now renamed as STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider'), as its Trustee and Retirement Scheme Administrator.

The Complainant claimed that STM Malta failed to carry out appropriate due diligence before accepting the fund transfer and that STM Malta failed in its responsibilities as trustee of the Retirement Scheme.

The Complainant explained that there was a:

a) *Lack of Due diligence*

The Complainant explained that STM Malta confirmed that they accepted '*ownership/responsibility*' from Stephen Ward of Premier Pension Solutions ('PPS') who claimed to be an authorised agent of AES Financial Services Ltd and authorised to conduct investment and insurance business. It was claimed that PPS were, however, never licensed to carry out pension transfers and that STM Malta should have been aware of this and declined the pension transfer into the Scheme.

b) *Unlicensed status of Continental Wealth Management ('CWM')*

The Complainant also stated that CWM (her investment adviser) was in reality unregulated, and that their claim to be covered by a '*passported licence*' from Inter-Alliance Worldnet Cyprus was illegal.

The Complainant claimed that part of an article '*of an International Advisers*' in 2011 quoted that:

*'IWA has been in trouble with the regulators before. In August last year (2010) it gave an undertaking to the UK's FSA that it would cease advising on UK pension business after accepting that its authorisation through the EU Insurance Mediation Directive (IMD) did NOT permit such activity.*

*We understand that any appropriate checks would have highlighted that the FSA would – “recommends enquiring for further information” since they are passported EEA firms’.*<sup>2</sup>

c) *Placement into unnecessary insurance wrapper*

The Complainant claimed that she has now been advised that CWM placed her entire fund into a wholly unnecessary insurance wrapper with Generali, which she is still paying fees based on her original transfer-in value.

It was further claimed by the Complainant that such insurance wrappers *‘have never been legal in Spain’*, and that this was confirmed by a recent test case ruling upheld by the DGS.<sup>3</sup>

The Complainant submitted that despite the illegality of such a *‘wrapper’*, STM Malta still failed to ensure that CWM had provided her with the appropriate comparative information to ensure that she had made an *‘informed choice’* and been allowed a 30 day *‘cooling off period’*.

The Complainant claimed that all of the above clearly proved that STM Malta failed to carry out appropriate, if any, due diligence before accepting her fund transfer.

The Complainant further explained that she was advised by CWM to invest her Aon Minet Pension Fund into the Scheme.

It was also noted that the Scheme commenced with an opening balance of GBP277,978.94 on 2 August 2012 which value had diminished substantially over the years to a surrender value of GBP44,427.16 by 12 September 2019.<sup>4</sup> The Complainant submitted that at no point during the catastrophic collapse in the value of her pension fund did STM Malta make any effort to raise any concerns in respect of these losses as she would have reasonably expected from a Trustee.

It was further explained that when the Complainant raised concerns with her independent financial adviser, CWM consistently claimed these values were just *‘paper losses/secondary market values’*,<sup>5</sup> and not a true reflection of the funds

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<sup>2</sup> A fol. 7

<sup>3</sup> Ibid.

<sup>4</sup> A fol. 4 & 9

<sup>5</sup> A fol. 8

actual value. The Complainant claimed that as she had no experience, or information to the contrary from her trustee for a long period, she accepted these lies.

The Complainant further submitted that she was unaware that STM had repeatedly allowed CWM to invest all of her funds into totally unsuitable high risk structured notes for professional investors only. It was claimed that she had no experience at all of stocks and shares and should have therefore been classified as a retail investor.

The Complainant further submitted that STM Malta failed to safeguard her pension scheme in view of the following:

- a) all investments were high risk when her confirmed attitude to risk was low/medium;
- b) all the portfolio was invested into structured notes and, thus, there was failure to ensure diversity;
- c) the insurance wrapper was unnecessary for a QROPS which is already tax efficient;
- d) STM Malta failed in its own due diligence before agreeing terms of business with CWM/Inter-Alliance Worldnet, where she claimed that both companies were unqualified and unlicensed to carry out any investment/ pension activities in Spain or UK;
- e) STM Malta failed to communicate concerns despite the continued collapse of her fund;
- f) STM Malta failed to ensure the investments were in the best interests of the fund;
- g) STM Malta failed to accept any responsibility for their role in the almost total loss of her entire life savings.

The Complainant also submitted that she was unsure of all of the costs/fees deducted from her scheme so far.

Moreover, since her funds were transferred to STM Malta in August 2012, she had received in total GBP51,300.

### *Requests made by the Complainant*

The Complainant requested appropriate compensation to return her pension fund to its inception level, plus, an approved level of growth per year, less agreed costs and pension payments received over the period. The Complainant stated that she is seeking GBP175,501.78, which is her original investment less payments received and surrender value of the pension scheme.<sup>6</sup>

### **In its reply, STM Malta essentially submitted the following:<sup>7</sup>**

That before considering the detail of the Complaint, the Service Provider wanted to emphasise that whilst it has every sympathy for the Complainant given the apparent reduction in the worth of her pension fund, STM Malta has no liability for this.

STM Malta explained that the Complainant completed an application form, (referred to as the STM Application attached as '*DOC STM01*' to its reply),<sup>8</sup> for the transfer of her AON Minet Pension Scheme ('Minet Pension') in the amount of £310,708.79, to the STM Malta Retirement Plan on the 24 April 2012. It was noted that out of these funds, STM Malta received the sum of £277,978.94 from Skandia Life Assurance which was invested into the *Generali Personal Professional Portfolio* in accordance with instructions received from the Complainant and her chosen advisers.

STM Malta further explained that the Complainant transferred her Minet Pension to the Scheme following advice which the Complainant received from Premier Pension Solutions CL (via Stephen Ward) as indicated in Section 3 of the STM Application.

STM Malta submitted that the Complainant's investment was carried out in line with the advice given by the adviser which the Complainant had chosen at the time, namely, CWM (via Neil Hathaway) as indicated in Section 9 of the STM Application.

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<sup>6</sup> A fol. 4, 8 & 9

<sup>7</sup> A fol. 251-257

<sup>8</sup> A fol. 258

Moreover, the aforementioned advisers and persons were not agents or employees of STM Malta but were independent entities or persons appointed or chosen by the Complainant herself in order to advise her on the transfer of her Minet Pension and the subsequent investments to be undertaken on her behalf by the Scheme.

STM Malta submitted that the Complainant appointed Premier Pension Solutions CL and chose CWM herself prior to being introduced to STM Malta as part of the advice provided to the Complainant from her adviser. It was stated that the Complainant signed the various forms confirming the investments chosen for the purposes of her Pension Plan were her choice and acknowledged STM Malta's limited role that did not include advising on investments, as clearly stated in Section 9 of the STM Application. It was further noted by STM Malta that the Complainant was fully aware that under the provisions governing the Complainant's appointment, given STM Malta's limited role, the Complainant had the benefit of various indemnities and warranties and the Service Provider would not have provided a service to the Complainant in the absence of such indemnities and warranties.

STM Malta submitted that any loss suffered by the Complainant is due entirely to the actions and investment recommendations of her investment advisers, and it is the action of the investment advisers alone that has caused her loss. STM Malta further submitted that it cannot be held responsible for the actions of a third-party adviser selected by the Complainant herself.

*Order sought from the Arbiter*

STM Malta noted that in the Complaint, the Complainant is requesting the Arbiter for Financial Services to order STM Malta to pay appropriate compensation to return her pension fund to its inception level, as well as an approved level of growth per year, less agreed costs and pension payments received over the period, totalling GBP175,501.78.

STM Malta noted that in the Addendum to the Complaint, the Complainant then raises a number of allegations against her own appointed pension adviser, Premier Pension Solutions CL ('PPS') and investment adviser for the purposes of the STM Pension Plan, Continental Wealth Management Limited ('CWM').

STM Malta submitted that the Complainant does not, however, claim that STM Malta has breached any specific provision or provisions of the applicable regulatory framework so as to allow it to raise a proper defence.

The Service Provider submitted that this notwithstanding, STM Malta refers to Paragraph B.1.5.1 of the Malta Financial Services Authority's ('MFSA') Pension Rules for Service Providers, Part B.1 - Pension Rules for Retirement Scheme Administrators which states:

*'1.5.1 The Scheme Administrator shall be liable to the Scheme, its Contributor(s), Members and Beneficiaries for any loss suffered by them resulting from its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or in part its obligations'.<sup>9</sup>*

STM Malta submitted that it refutes any responsibility for any losses that may have been suffered by the Complainant since:

- (i) STM Malta is not responsible for the selection of investment adviser and the relationship the Complainant had with her chosen adviser is governed by any agreement she may have had with such adviser;
- (ii) the chosen adviser is not affiliated with or subject to the supervision of STM Malta and the Service Provider is not in a position to comment on the discussions which took place between the Complainant and the said investment adviser;
- (iii) STM Malta does not advise on investments, and relies on the Complainant's selected adviser to recommend suitable investments;
- (iv) on the basis of objective assessment, it is not apparent that the investments chosen by the adviser at the time would not have been suitable for inclusion in a portfolio with the Complainant's risk profile.

STM Malta further noted that losses suffered by the Complainant may have been the result of market movements in the value of investments selected by the Complainant's adviser and not as a result of any fraud, wilful default, negligence

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<sup>9</sup> A fol. 253

or unjustifiable failure of and on the part of the Service Provider to perform in whole or in part any of its obligations.

The Service Provider submitted that without prejudice to its other arguments and defences, no responsibility can ever be imputable on the Service Provider in view of the failures of the advisers chosen by the Complainant and any fraud or misconduct of such advisers.

### *Complainant's Claims*

The Service Provider noted that the Complainant signed an Instrument of Adherence dated 24 April 2012 (*'the Instrument of Adherence'*, *'Doc STM02'* attached to its reply),<sup>10</sup> following advice received from her independent adviser PPS and/or CWM. The Complainant herself states, in the Addendum to the Complaint, that she was advised by CWM to invest her AON Minet Pension Fund into the Scheme. It was noted that the Complainant then claims that PPS were never licensed to carry out pension transfer, and that STM Malta should have been aware of this.

On this point, STM Malta reiterated that the Complainant's relationship with PPS pre-dates her relationship with STM Malta and that there is no legal or contractual relationship of any nature between STM Malta and PPS. It was submitted that, furthermore, STM Malta did not receive any instructions from PPS and that the instructions for the Complainant to apply to join the Scheme came from the Complainant herself, and were signed by the Complainant herself as is clear from the STM Malta Application and the Instrument of Adherence (*'Doc STM01'* and *'Doc STM02'* respectively).<sup>11</sup>

STM Malta submitted that it cannot be held responsible for the Complainant's own choice of adviser, the relationship with whom the Complainant established before the Complainant contracted with STM Malta, and no failure, fraud, wilful default or negligence in terms of applicable rules can be imputed to the Service Provider in this regard.

The Complainant further states that CWM were *'unregulated or licensed'*, and makes reference to unclear sources referring to a company by the name of 'IWA'

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<sup>10</sup> A fol. 267

<sup>11</sup> A fol. 258 & 267



being in trouble with regulators before. STM Malta pointed out that the Complainant's claim in this regard is not clearly stipulated. It was submitted that, in any event, the Complainant chose CWM as her investment advisers with respect to her Scheme herself, and STM Malta cannot be held responsible for the Complainant's choice of adviser.

STM Malta noted that the Complainant further claims that she has now been advised, implying that she was previously unaware, that CWM placed her entire fund in an unnecessary Generali wrapper. It was submitted that the Complainant was, however, well aware of the application to join the Generali International Professional Portfolio in that she herself, as life assured, signed Section 4 of the Generali International Application Form on the 10 May 2012 ('the Generali Application', 'Doc STM03' attached to its reply),<sup>12</sup> as well as applied for access to the Generali International Online Service Centre (the Generali Registration Request, 'Doc STM04', attached to its reply).<sup>13</sup>

STM Malta submitted that, in addition, the Complainant claims that such insurance wrappers '*were never legal in Spain*'.<sup>14</sup> STM Malta submitted that it is not subject to Spanish law, and is not in a position to or bound to comment on matters of Spanish law.

The Service Provider further submitted that it is clear that CWM claimed to be acting as an appointed agent of Inter-Alliance Worldnet Insurance Agents and Advisers Limited ('Doc STM05' attached to its reply),<sup>15</sup> regulated by the Insurance Companies Control services in Cyprus, and later as agent of Trafalgar International GmbH, regulated in Germany by the Deutsche Industrie Handelskammer ('Doc STM06' attached to its reply).<sup>16</sup>

STM Malta noted that the Complainant further states that STM failed to ensure that CWM provided her with appropriate comparative information to ensure she made an informed choice. The Service Provider reiterated in this regard that STM Malta had no control over CWM, who is a third party to STM Malta chosen by the Complainant herself as her investment adviser for the purposes of the Scheme.

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<sup>12</sup> A fol. 269

<sup>13</sup> A fol. 287

<sup>14</sup> A fol. 254

<sup>15</sup> A fol. 289

<sup>16</sup> A fol. 290

STM Malta submitted that it cannot confirm or answer for what may or may not have been the obligations of CWM or any other third party chosen by the Complainant.

The Service Provider noted that with respect to the investments undertaken in respect of the Complainant's Scheme, the Complainant notes that at no point did STM Malta raise concerns with respect to the losses. STM Malta noted in this regard that the Complainant's Dealing Instructions (*'Doc STM07'* attached to its reply),<sup>17</sup> in respect of the underlying investments of her Retirement Scheme, were nearly all signed by the Complainant herself as well as her chosen investment adviser.

STM Malta noted that, in addition, the Complainant had full visibility of the value of her portfolio and was provided with regular portfolio valuation statements.

It was further noted that to the extent that the Complainant chose to invest in specific investments giving dealing instructions accordingly, and to retain such investments in line with the advice she may have received from her chosen investment adviser, the Complainant cannot now place blame on STM Malta for the said investment having performed badly or not as expected.

STM Malta noted that the Complainant further states that when she raised concerns with her independent financial adviser, they consistently claimed that the values of her investments were paper losses or secondary market values, and that she accepted these lies.

It was further noted that at no point did the Complainant raise her concerns with the Service Provider before filing her complaints. STM Malta submitted that, once again, whether her independent financial adviser lied to the Complainant or otherwise, is not for STM Malta to comment on or defend. It was submitted that STM Malta cannot, however, be held responsible for third party lies or fraud.

It was noted that the Complainant also states that she had no experience at all of stocks and shares and that she is therefore a retail investor. STM Malta stated, however, that in Section 10 of the STM Application signed by the Complainant herself, (*'Doc STM01'* attached to STM's reply), the Complainant declares that she

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<sup>17</sup> A fol. 292

considers herself as an informed investor and that she has previously made direct investments in company shares.

STM Malta also noted that the Complainant further alleges that the investments undertaken by her Retirement Scheme were high risk investments. It was noted that, in this respect, as STM Malta previously noted, the investments constituting the Complainant's Retirement Scheme consisted of investments recommended by the Complainant's investment adviser, with STM Malta acting upon dealing instructions to purchase the same bearing her signature.

The Service Provider submitted that, furthermore, the investments were in line and within the limits of the applicable regulations for pension schemes such as the Complainant's.

*Application Documents signed by the Complainant to join the Retirement Scheme*

STM Malta submitted that the Complainant makes absolutely no reference whatsoever to the Application Documents she signed on the 24 April 2012, seeking membership of the Plan, being the STM Application and the Instrument of Adherence ('Doc STM01' and 'Doc STM02' respectively attached to its reply, referred to together as '*the Application Documents*').

In its reply to the Arbiter, the Service Provider made reference in full to the said Application Documents which, it noted, clearly set out the information provided and include declarations made and warranties and indemnities given by the Complainant on the basis of which the Complainant was allowed to join the Plan as a Member.

The Service Provider pointed out that the Application Documents signed by the Complainant confirm, amongst others, that:

- a. STM Malta had recommended to the Complainant that she seeks financial, legal and tax advice, and that she had taken independent pension transfer, financial, legal and tax advice with regard to the suitability of the Plan for her individual circumstances and the implications to her of entering into the Plan;
- b. the Complainant acknowledges that STM Malta has not provided and cannot provide such advice and cannot be held responsible for the advice obtained

or not sought by the Complainant or any related persons/party to the affairs of the Plan;

- c. the STM Master Trust Instrument and Rules (*'the Trust Rules'*), to which the Complainant adhered on her becoming a Member of the Plan, will be made available to her on request and agreed to be bound by the said Trust Rules;
- d. the Complainant was provided with written information of all fees, expenses and running costs of her membership in the Plan and that the Service Provider was authorised to automatically collect fees from her account; and
- e. the Service Provider would not incur any liability in connection with the Retirement Scheme investments except where this arises as a result of the Service Provider's fraud, wilful misconduct or gross negligence.

STM Malta further submitted that, without prejudice to the foregoing, the Complainant has presented no proof of any fraud, wilful misconduct or negligence that can be equitably attributed to the Service Provider.

The Service Provider refuted any responsibility which the Complainant attributes to STM Malta in her claim and denies any liability towards the Complainant to reinstate her pension fund to its value at inception. STM Malta submitted that it is not responsible for investment losses suffered by the Complainant's Retirement Scheme in respect of investments decisions instructed by the Complainant herself or her chosen investment adviser.

STM Malta also submitted that it is not, and never claimed to be, an investment adviser. The Service Provider claimed that any redress in respect of the fraud or misconduct or negligence of the Complainant's chosen advisers should be sought by the Complainant against the said advisers or their principals she chose and appointed and not against STM Malta who is an unrelated third party to such advisers with no knowledge or involvement in their alleged fraud or misconduct.

**Having heard the parties and seen all the documents and submissions made,**

**Further Considers:**

**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>18</sup>**

The Arbiter is considering all the parts of the complaint and all the 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>19</sup> which stipulates that he should deal with complaints in *'an economical and expeditious manner'*.

### **The Complainant**

The Complainant, born on February 1957, was indicated in the Service Provider's Application Form to join the Retirement Scheme as residing in Spain.<sup>20</sup>

The occupation of the Complainant was indicated as *'Housewife'*.<sup>21</sup> Her attitude to risk in the Application Form for Membership, was indicated as the lowest category of risk, this being *'Cautious'* where such category was described as *'providing an annual income whilst protecting the capital'*.<sup>22</sup>

The other available options, which were not selected by the Complainant were of *'Balanced - moderate risk investments within a balanced and diversified portfolio'* and *'Aggressive - high risk investments aimed at achieving superior returns'*.<sup>23</sup>

### **The Service Provider**

STM Malta is licensed as a Retirement Scheme Administrator<sup>24</sup> by the Malta Financial Services Authority and acts as the Retirement Scheme Administrator and Trustee of the Scheme.<sup>25</sup>

### **Investment Adviser**

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<sup>18</sup> Cap. 555, Article 19(3)(b)

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

<sup>20</sup> A fol. 259

<sup>21</sup> A fol. 259/260

<sup>22</sup> A fol. 263

<sup>23</sup> *Ibid.*

<sup>24</sup> <https://www.mfsa.mt/financial-services-registry/result/?id=204>

<sup>25</sup> A fol. 266

The Application Form for membership into the Scheme indicates that the Investment Adviser was Continental Wealth Management ('CWM'), an entity based in Spain with Neil Hathaway indicated as contact person.<sup>26</sup> The application form in respect of the underlying policy held by the Scheme, the '*General International Professional Portfolio*', indicates '*Continental Wealth Management/Interalliance Worldnet*' as financial adviser.<sup>27</sup> CWM ceased its business in September 2017 as per the notification dated 29 September 2017 sent by CWM to the Complainant.<sup>28</sup>

## **Particularities of the Case**

### ***The Product in respect of which the Complaint is being made and other background information***

The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta and authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Scheme.<sup>29</sup> The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta).<sup>30</sup> The scope of the Scheme is to provide for retirement benefits where it was '*established to provide a life-time income to its members*'.<sup>31</sup>

The assets held into the Complainant's Retirement Scheme account were used to purchase a life insurance contract, the '*Generali International Professional Portfolio*' ('the Generali Plan') issued by Generali International Limited in Guernsey.<sup>32</sup>

The type of policy selected in respect of the Complainant was the '*Personal Professional Portfolio*' which, in Generali International's application form, was described as '*The Personal Professional Portfolio consists of a life assurance contract, which can invest its capital in listed equities, bonds, collectives,*

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<sup>26</sup> A fol. 262

<sup>27</sup> A fol. 270

<sup>28</sup> A fol. 117

<sup>29</sup> <https://www.mfsa.mt/financial-services-register/result/?id=209>

<sup>30</sup> This being the regulatory framework applicable in Malta for personal retirement schemes at the time of the Complainant's Application for Membership into the Retirement Scheme in 2012.

<sup>31</sup> A fol. 258

<sup>32</sup> A fol. 269 & 287

*currencies and some structured products, subject to the agreement of Generali International Limited'.<sup>33</sup>*

The Application Form in respect of the Generali Plan indicates that a total of GBP275,000 was to be invested in the said plan.<sup>34</sup>

The value of the Complainant's account with the Retirement Scheme is linked to the value of the underlying Generali Plan which is, in turn, linked to the performance of the respective portfolio of underlying investments held within the said policy.

### ***Statements and dealing forms presented***

As part of her complaint form, the Complainant attached a voluminous pack of extracts of various official statements, namely:

- a) extracts of '*Investment Fund or Portfolio Valuation*' statements and '*Quarterly Valuation Statement Summary*' in respect of various years and at different time periods (typically as at end February, May, August and November over the years 2012 to 2018);<sup>35 36</sup>

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<sup>33</sup> A fol. 271

<sup>34</sup> A fol. 275

<sup>35</sup> Extracts of the '*Investment Fund or Portfolio Valuation*' statements were submitted in this order indicating the position as at: 31/05/19; 28/02/19; 30/11/18; 31/08/18; 31/05/18; 28/02/18; 30/11/17; 31/08/17; 31/05/17; 28/02/17; 30/11/16; 31/08/16; 31/05/16; 29/02/16; 30/11/12; 31/08/12; 30/11/15; 31/08/15; 31/05/15; 28/02/15; 30/11/14; 31/08/14; 31/05/14; 28/02/14; 30/11/13; 31/08/13; 31/05/13 and as at 28/02/13.

<sup>36</sup> The '*Quarterly Valuation Statement Summary*' indicated *inter alia* the '*Total Contributions*', the '*Total encashments*' and '*Indicative Surrender Value*' apart from total valuation. Extracts of the '*Quarterly Valuation Statement Summary*' presented by the Complainant indicated, in this order, the position as at: 31/05/19; 28/02/19; 30/11/18; 31/08/18; 31/05/18; 28/02/18; 30/11/17; 31/08/17; 31/05/17; 28/02/17; 30/11/16; 31/08/16; 31/05/16; 29/02/16; 30/11/15; 31/08/15; 31/05/15; 28/02/15; 30/11/14; 31/08/14; 31/05/14; 28/02/14; 30/11/13; 31/08/13; 31/05/13; 28/02/13; 30/11/12 and as at 31/08/12.

b) extracts of the '*Cash Account Transaction Report*',<sup>37</sup> '*Trading Statement - Disposals*'<sup>38</sup> and '*Trading Statement - Acquisitions*'<sup>39</sup> over the years.

During the proceedings of the case a number of dealing instruction notes relating to the sale/purchase orders in respect of some (but not all) of the investments undertaken during the tenure of CWM were also presented by the Complainant and Service Provider.<sup>40</sup>

### ***Underlying Investments***

Whilst neither the Complainant nor the Service Provider have presented any table summarising the investments undertaken during the contested period of CWM, the Arbitrator as part of the investigatory powers granted under Cap. 555, was able to extract details of the underlying investment portfolio from the statements submitted during the case as mentioned in the preceding section.

Table A below includes an overview of the investments' transactions undertaken within the underlying policy as per the information resulting from the various '*Cash Account Transaction Reports*' presented by the Complainant:

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<sup>37</sup> The Complainant presented various extracts of the '*Cash Account Transaction Reports*' issued by Generali International, in this order, as follows, from: 01/03/19 to 31/05/19; 01/12/18 to 28/02/19; 01/09/18 to 30/11/18; 01/06/18 to 31/08/18; 01/03/18 to 31/05/18; 01/12/17 to 28/02/18; 01/06/17 to 31/08/17; 01/09/17 to 30/11/17; 01/03/17 to 31/05/17; 01/12/16 to 28/02/17; 01/09/16 to 30/11/16; 01/06/16 to 31/08/16; f 01/03/16 to 31/05/16; 01/12/15 to 29/02/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/09/14 to 30/11/14; 01/06/14 to 31/08/14; 01/03/14 to 31/05/14; 01/12/13 to 28/02/14; 01/09/13 to 30/11/13; 01/06/13 to 31/08/13; 01/03/13 to 31/05/13; 01/12/12 to 28/02/13; 01/09/12 to 30/11/12 and from 01/06/12 to 31/08/12.

<sup>38</sup> Extracts of '*Trading Statement - Disposals*' statements were from: 01/03/19 to 31/05/19; 01/12/18 to 28/02/19; 01/12/17 to 28/02/18; 01/06/17 to 31/08/17; 01/03/17 to 31/05/17; 01/12/16 to 28/02/17; 01/09/16 to 30/11/16; 01/03/16 to 31/05/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/03/14 to 31/05/14; 01/12/13 to 28/02/14; 01/03/13 to 31/05/13 and from 01/12/12 to 28/02/13.

<sup>39</sup> Extracts from the '*Trading Statement - Acquisitions*' statements were from: 01/09/16 to 30/11/16; 01/03/16 to 31/05/16; 01/12/15 to 29/02/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/09/14 to 30/11/14; 01/03/14 to 31/05/14; 01/12/13 to 28/02/14; 01/09/13 to 30/11/13; 01/03/13 to 31/05/13; 01/12/12 to 28/02/13 and from 01/06/12 to 31/08/12.

<sup>40</sup> A fol. 20-24 & 292-309



**Table A - Overall Portfolio**

Investment Name (as indicated in the 'Cash Account Transaction Report')	Date bought	Units purchased	CCY	Purchase amount	Date sold/matured	Units Sold	CCY	Maturity / Sale price	Capital Loss/ Profit (excl. div.)	% of Capital loss/ profit (excl. div) on capital invested
RBC Capital Markets Precious	08 Aug 12	920	GBP	92,000	21 Feb 13	920	GBP	84,953	<b>-7,047</b>	-7.66
Commerzbank AG 1yr	17 Aug 12	1750	GBP	175,000	19 Mar 13	1750	GBP	173,250	<b>-1,750</b>	-1.00
RBC Capital Markets	18 Mar 13	920	GBP	92,000	10 Dec 13	460	GBP	46,000	<b>0</b>	0
					18 Mar 14	460	GBP	46,000		
RBC Capital Markets 1 yr	11 Apr 13	1000	GBP	100,000	25 Sep 13	510	GBP	50,490	<b>-510</b>	-1
					11 Apr 14	490	GBP	49,000		
Nomura International 5 yr	15 Apr 13	680	GBP	67,320	15 Oct 13	680	GBP	72,080	<b>4,760</b>	7.07
RBC Capital Markets 2yr	03 Oct 13	500	GBP	50,000	07 Mar 14	500	GBP	49,500	<b>-500</b>	-1
RBC Capital Markets 2yr	31 Oct 13	360	GBP	36,000	02 Nov 15	360	GBP	12,982	<b>-23,018</b>	-64
Commerzbank AG 1 yr	15 Nov 13	350	GBP	35,000	13 Nov 14	350	GBP	15,603	<b>-19,397</b>	-55
Commerzbank AG	18 Dec 13	460	GBP	46,000	18 Jun 15	460	GBP	3,786	<b>-42,214</b>	-92
Commerzbank AG	21 Mar 14	250	GBP	25,000	23 Mar 15	250	GBP	25,000	<b>0</b>	0
RBC Capital Markets 2 Yr	17 Apr 14	250	GBP	25,000	18 Apr 16	350	GBP	87.89	<b>-34,912</b>	-99.75
	17 Apr 14	100	GBP	10,000						
Nomura	29 Apr 14	360	GBP	36,000	29 Apr 15	360	GBP	36,000	<b>0</b>	0

International										
Commerzbank AG	13 May 14	450	GBP	45,000	13 May 15	450	GBP	45,000	<b>0</b>	0
RBC Capital Markets 2 Yr	13 May 14	60	GBP	6,000	13 May 15	60	GBP	6,000	<b>0</b>	0
EFG Financial Products 1.5yr	23 Oct 14	30	GBP	3,000	29 Jan 15	30	GBP	3,000	<b>0</b>	0
EFG Financial Products	01 Dec 14	90	EUR	9,000	01 Dec 16	90	EUR	803.13	<b>-8,197</b>	-91
EFG Financial Products	01 Dec 14	180	EUR	9,000	05 Oct 16	180	EUR	17,420	<b>8,420</b>	94
Commerzbank AG 2yr Autocall Note GBP 31/03/17	27 Mar 15	30	GBP	3,000	31 Mar 17	110	GBP	3,438	<b>-7,562</b>	-68.75
	09 Apr 15	80	GBP	8,000						
EFG Financial Products 2 Yr Multi Barrier GBP 20/03	10 Apr 15	90	GBP	9,000	20 Mar 17	90	GBP	551	<b>-8,449</b>	-93.87
EFG Financial Products 2 Yr Multi Barrier 16/03/17	17 Apr 15	80	GBP	8,000	17 Apr 17	80	GBP	8,000	<b>0</b>	0
EFG Financial Products	09 Jun 15	230	GBP	23,000	05 Jun 17	230	GBP	1,004	<b>-21,996</b>	-96.63
EFG Financial Products	30 Jun 15	220	GBP	22,000	30 Jun 17	220	GBP	7,307	<b>-14,693</b>	-66.79
Leonteq Securities 1.5 yr	13 Jul 15	180	GBP	18,000	29 Apr 16	180	GBP	2,286	<b>-15,714</b>	-87.30

*Marlborough Intl Mngt Ltd	28 Jul 15	5061	GBP	5,000	**					
*Rudolf Wolf Income Fd Ltd	03 Jul 15	5.007	GBP	5,000	**					
*Vam Managed Funds (Lux)	03 Aug 15	35.71	GBP	7,000	**					
*Vam Fund (Lux)	19 Feb 16	101.1	GBP	10,000	06 Mar 17**	54	GBP	6,077		
*Rudolf Wolf Income Fd Ltd	01 Mar 16	11.06	GBP	10,000	**					
*IFSL Brooks MacDonald	01 Nov 16	5296	GBP	6,000	**					
*Gemini Investment Funds	02 Nov 16	182.3	GBP	17,000	**					
<b>Total capital loss (excl. of dividends) on GBP &amp; EUR denominated structured note investments</b>									<b>(-GBP176,991) &amp; EUR223</b>	

\*These products are collective investment schemes. All other products listed in the table are structured notes.

\*\*Open positions by the time of CWM's cessation of business in September 2017.

It is accordingly clear that the investment portfolio, at times, constituted solely or predominantly of structured notes. Material investments into structured notes still featured in the later years of the investment portfolio including in 2016 and up until early/mid-2017 when the last remaining structured notes matured or were sold.

The above table further indicates substantial capital losses (exclusive of dividends) arising from such investments. It is also noted that, as indicated in Table B below, even when taking into consideration the dividends received (which result from the information in the various 'Cash Account Transaction Reports') substantial realised losses still arise on the overall portfolio of structured notes.

**Table B - Performance of Structured Note investments (inclusive of dividends)**

<b>Investment Name</b> <i>(as indicated in the 'Cash Account Transaction Report')</i>	<b>CCY</b>	<b>Capital Loss/ Profit</b> <b>(excl. div.)</b>	<b>Total Dividends Received</b>	<b>Total Loss/Profit</b> <b>(inclusive of dividends)</b>	<b>% of Total loss/ profit (incl. of div) on capital invested</b>
RBC Capital Markets Precious	GBP	-7,047	5,060	<b>-1,987</b>	-2.16
Commerzbank AG 1yr	GBP	-1,750	7,875	<b>6,125</b>	3.50
RBC Capital Markets	GBP	0	6,900	<b>6,900</b>	7.50
RBC Capital Markets 1 yr	GBP	-510	6,175	<b>5,665</b>	5.67
Nomura International 5 yr	GBP	4,760	-	<b>4,760</b>	7.07
RBC Capital Markets 2yr	GBP	-500	1,100	<b>600</b>	1.20
RBC Capital Markets 2yr	GBP	-23,018	6,120	<b>-16,898</b>	-46.94
Commerzbank AG 1 yr	GBP	-19,397	3,500	<b>-15,897</b>	-45.42
Commerzbank AG	GBP	-42,214	6,210	<b>-36,004</b>	-78.27
Commerzbank AG	GBP	0	2,500	<b>2,500</b>	10
RBC Capital Markets 2 Yr	GBP	-34,912	7,000	<b>-27,912</b>	-79.75
Nomura International	GBP	0	3,240	<b>3,240</b>	9.00
Commerzbank AG	GBP	0	4,050	<b>4,050</b>	9.00
RBC Capital Markets 2 Yr	GBP	0	480	<b>480</b>	8.00
EFG Financial Products 1.5yr	GBP	0	75	<b>75</b>	2.49
EFG Financial Products	EUR	-8,197	1,800	<b>-6,397</b>	-71.08
EFG Financial Products	EUR	8,420	0	<b>8,420</b>	93.56
Commerzbank AG 2yr Autocall Note 31/03/17	GBP	-7,562	1,760	<b>-5,802</b>	-52.75
EFG Financial Products 2 Yr Multi Barrier GBP 20/03	GBP	-8,449	1,613	<b>-6,836</b>	-75.95
EFG Financial Products 2 Yr Multi Barrier 16/03/17	GBP	0	1,370	<b>1,370</b>	17.12

EFG Financial Products	GBP	-21,996	0.00	<b>-21,996</b>	-95.63
EFG Financial Products	GBP	-14,693	0.00	<b>-14,693</b>	-66.79
Leonteq Securities 1.5 yr	GBP	-15,714	1,258	<b>-14,456</b>	-80.31
<b>Total capital loss/profit (incl. div.) on GBP &amp; EUR denominated structured note investments</b>				<b>(-GBP126,716) &amp; EUR2,023</b>	

According to the statements provided, the Complainant is actually calculated to have experienced a material total realised capital loss (inclusive of dividends) of (GBP126,716) on the portfolio of GBP denominated structured note investments. On the two EUR denominated structured notes, a realised total profit (inclusive of dividends) of EUR2,023 was calculated. It is clear, that the Complainant has accordingly experienced a material loss overall on her portfolio of structured notes which, as indicated above, formed a substantial part of her investment portfolio.

With respect to the remaining investments, comprising the indicated collective investment schemes, it is noted that the investment position for the said funds was still open according to the '*Investment Fund Valuation*' dated 31/05/19 with the market value of the remaining investments as at that date being in total GBP49,726 as compared to a total book cost of GBP51,284 and thus signifying a slight drop of -3.04% overall on such remaining investments as at that date.

Hence, it has clearly emerged that the Complainant did indeed experience substantial capital losses on her investment portfolio, with such material losses attributed to the structured note investments as indicated above.

### **The Legal Framework**

As part of the consideration of this Complaint, it is pertinent to refer to the legal framework applicable to STM Malta and the Retirement Scheme and the responsibilities, duties and obligations emerging under such framework.

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.<sup>41</sup>

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by the MFSA under the RPA.

**The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider as per Article 1(2) and Article 43(6)(c) of the TTA, in light of STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.**

Article 1(2) of the TTA provides that:

*'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',*

with Article 43(6)(c) in turn providing that:

*'A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.*

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<sup>41</sup> Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

## **Responsibilities of the Service Provider**

STM Malta is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator **and** Trustee of the Scheme.

### *Obligations under the SFA, RPA and directives/rules issued thereunder*

The obligations of STM Malta as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the applicable conditions that at the time were outlined in the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* ('the Directives').

Following the repeal of the SFA and eventual registration under the RPA, STM Malta became subject to the provisions relating to the services of a retirement scheme administrator under the RPA. As a Retirement Scheme Administrator under the RPA, STM Malta became subject to the conditions outlined in the *'Pension Rules for Service Providers issued under the Retirement Pensions Act'* ('the Pension Rules for Service Providers') and the *'Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act'* ('the Pension Rules for Personal Retirement Schemes').

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to *'act in the best interests of the scheme'* as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to STM Malta in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles:<sup>42</sup>

- a) Rule 2.6.2 of Part B.2.6 titled *'General Conduct of Business Rules applicable to the Scheme Administrator'* of the Directives issued under the SFA, which applied to STM Malta as a Scheme Administrator under the SFA, provided that ***'The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...'***

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<sup>42</sup> Emphasis added by the Arbitrator.

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, and which applied to STM Malta as a Scheme Administrator under the RPA, provided that:

*'The Service Provider shall act with due skill, care and diligence ...'*

- b) Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to STM Malta as a Scheme Administrator under the SFA, provided that:

*'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...'*

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

*'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document'*

## **Duties as a Trustee**

As highlighted above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for STM Malta considering its capacity as Trustee of the Scheme.

Article 21 (1) of the TTA which deals with the '*Duties of trustees*', stipulates that:

*'(1) Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'*

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

*'Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure*



***that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage ...'***

In its role as Trustee, STM Malta was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*.<sup>43</sup>

As has been authoritatively stated:

*'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'*.<sup>44</sup>

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

***'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations'***.<sup>45</sup>

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

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<sup>43</sup> Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, p. 174.

<sup>44</sup> *Op. cit.* p. 178

<sup>45</sup> Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

**The above are considered to be crucial aspects which should have guided STM Malta in its actions and which shall accordingly be considered in this decision.**

## **Observations and Conclusions**

### **Key consideration**

The Complaint, in essence, revolves around the claim that the Complainant experienced a loss on her Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme with the Complainant raising various aspects.<sup>46</sup>

In the particular circumstances of this case and on the basis of the evidence resulting in this case, the Arbiter considers that he is in a position to consider a principal alleged failure made by the Complainant against STM Malta.

This principal alleged failure relates to the claim that STM Malta failed to ensure that the investments were: in line with her risk profile; diversified; and in her best interest as she claimed her capital was all invested in totally unsuitable high risk structured notes aimed for professional investors only. The Arbiter shall consider this aspect based on the information resulting from this case.

### **General observation**

On a general note, it is clear that STM Malta did not provide itself investment advice in relation to the underlying investments of the Retirement Scheme. The role of the investment adviser was the duty of other parties, such as, CWM.

**This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen in this decision.**

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested investment portfolio, **STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.**

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<sup>46</sup> A fol. 7-8

**The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect directly, or indirectly, its performance.**

Consideration thus needs to be made as to whether STM Malta failed in any relevant obligations and duties and, if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting loss for the Complainant.

*Permitted portfolio composition*

**The Arbiter refers to the composition of the permitted investment portfolio and the realised losses as indicated in the section titled '*Underlying Investments*' above and notes that the Complainant's portfolio had been allowed to comprise substantial exposure to structured notes investments with considerable exposure to individual structured note products also prevailing in multiple instances.**

The portfolio of investments indeed commenced with over 95% of the Complainant's portfolio being allowed to be invested into just two structured notes at the time.<sup>47</sup> The Complainant's underlying investment portfolio continued to remain substantially exposed (albeit on a reducing basis) to structured notes investments in subsequent years as can be seen, for example, in the '*Portfolio Valuation*' statement dated 30/11/15,<sup>48</sup> the '*Portfolio Valuation*' statement dated 30/11/16,<sup>49</sup> and the '*Investment Fund Valuation*' statement dated 31/05/17,<sup>50</sup> that were provided by the Complainant as attachments to her complaint form.

The said '*Investment Fund/Portfolio Valuation*' statements indicate *inter alia* that:

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<sup>47</sup> A fol. 60/61 & a fol. 58/59 - A material investment of GBP175,000 into one single product, the *Commerzbank AG 1 yr Inc Nt Energy Companies T2 GBP*, and another substantial investment of GBP92,000 into the *RBC Capital Markets Precious Commodities Phoenix Nt 3 GBP*, together amounting to GBP267,000 and constituting at the time 96.13% of *Total Portfolio Valuation* as at 31/08/12 of GBP277,758.

<sup>48</sup> A fol. 62-63

<sup>49</sup> A fol. 47-48

<sup>50</sup> A fol. 41-43

- as at 30/11/15 there was a total book cost of GBP140,250 exposed to structured notes<sup>51</sup> as compared to a total book cost of GBP17,000 in collective investment schemes;
- as at 30/11/16 there was a total book cost of GBP80,124 exposed to structured notes<sup>52</sup> as compared to a total book cost of GBP60,000 in collective investment schemes;
- as at 31/05/17 there was a total book cost of GBP45,000 exposed to structured notes<sup>53</sup> as compared to a total book cost of GBP54,654 in collective investment schemes.

The official statements provided by the Complainant indicate that apart from the overall high exposure to investments into structure notes across the years, the said statements also indicate that there were even various instances of high exposures to single structured note investments as well as high exposure to single issuers (such as RBC, Commerzbank and EFG) where in the case of high exposures to single issuers this occurred at the time of purchase of the respective product and/or through cumulative purchases of structured notes issued by the same issuer.

**The said exposures to structured products, both overall and individually, that were allowed to prevail by the Service Provider in the Complainant's portfolio do not provide any comfort regarding the prudence that was required to be achieved with respect to the investment portfolio, nor comfort regarding an adequate level of diversification being ensured or that such a portfolio**

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<sup>51</sup> A fol. 62 - Original investment of GBP11,000 into 'Commerzbank AG 2yr Autocall Note GBP 31/03/17'; GBP,7124 into 'EFG Financial Products 2yr Express Cert 28/11/16 EUR'; GBP7,126 into 'EFG Financial Products 2yr Discount Cert 28/11/16 EUR'; GBP9,000 into 'EFG Financial Products 2 yr Multi Barrier GBP 20/03/17'; GBP8,000 into 'EFG Financial Products 2yr Multi Barrier 16/03/17 GBP'; GBP22,000 into 'EFG Financial Products 2yr Express Cert GBP 01/06/17'; GBP23,000 into 'EFG Financial Products 2yr Express Cert GBP 05/06/17'; GBP18,000 into 'Leonteq Securities 1.5yr Multi Barrier GBP 29/12/16'; GBP35,000 into 'RBC Capital Markets 2 Yr GBP Reverse Con Note'.

<sup>52</sup> A fol. 47 - Original investment of GBP11,000 into 'Commerzbank AG 2yr Autocall Note GBP 31/03/17'; GBP,7124 into 'EFG Financial Products 2yr Express Cert 28/11/16 EUR'; GBP9,000 into 'EFG Financial Products 2 yr Multi Barrier GBP 20/03/17'; GBP8,000 into 'EFG Financial Products 2yr Multi Barrier 16/03/17 GBP'; GBP22,000 into 'EFG Financial Products 2yr Express Cert GBP 01/06/17'; GBP23,000 into 'EFG Financial Products 2yr Express Cert GBP 05/06/17'.

<sup>53</sup> A fol. 41 - Original investment of GBP22,000 into 'EFG Financial Products 2yr Express Cert GBP 01/06/17'; GBP23,000 into 'EFG Financial Products 2yr Express Cert GBP 05/06/17'.

composition was reflective of and compatible to a portfolio of a retirement scheme whose scope was to provide for retirement benefits.

The underlying portfolio composition did indeed also not really reflect the description of the *'Personal Professional Portfolio'* which was selected in respect of the underlying policy. The said *'Personal Professional Portfolio'* was described in Generali's form as consisting of *'a life assurance contract, which can invest its capital in listed equities, bonds, collectives, currencies and some structured products'*.<sup>54</sup> As inferred in such description, investments in structured products, if any, were to be ancillary to investments in other main asset classes, such as listed equities, bonds and collective investment schemes. Not only was the capital of the underlying policy of the Retirement Scheme not invested in *'listed equities, bonds, collectives'* for a number of years but exposure to structured notes was the predominant, if not, the sole type of investment product invested into as indicated in the section titled *'Underlying Investments'* above.

As trustee and Retirement Scheme Administrator of the Scheme, STM Malta should have indeed intervened and not allow such portfolio composition. Whilst STM Malta was not the investment adviser, however, in its capacity of Trustee of the Scheme and Retirement Scheme Administrator, it had the power and authority, besides the duty, not to permit such portfolio composition to be undertaken within its Scheme, given that the portfolio was not reflective of the requirement which it had to ensure that assets were to be invested in a prudent manner nor was the portfolio reflective of the scope for which the scheme was created, that is, to provide for retirement benefits and thus not as a speculative investment vehicle.

The Service Provider itself chose not to demonstrate and submit any proof whatsoever that the investments allowed within the Retirement Scheme were done in a prudent manner and reflective of the rules to which it was subject as mentioned in the section titled *'Responsibilities of the Service Provider'* above.

In its reply and submissions, the Service Provider chose to omit and not delve into any details and breakdowns of the actual investment portfolio and neither did it submit any justifications and explanations of how the investment

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<sup>54</sup> A fol. 271 - Emphasis added by the Arbiter.

**portfolio of the Complainant was in line with the applicable requirements. This despite the material nature of the claim made by the Complainant including that the investments were outside of her risk profile.**

**Another important aspect relevant to the determination of the inadequacy of the portfolio composition which has been considered by the Arbiter in arriving to the above conclusions, is also the nature, as well as the features of the type of structured note investments, that were being allowed to be invested into within the Scheme as described hereunder.**

### Fact sheets

The Complainant did not submit any fact sheets herself in respect of the contested underlying investments, nor were any fact sheets presented by the Service Provider. Details of the investments comprising the investment portfolio, however, emerged from the various statements and the dealing instructions notes as indicated in the section above titled *'Statements and dealing forms presented'*.

As part of its investigatory powers, the Arbiter undertook general searches over the internet on the underlying investments in respect of which the respective ISIN numbers emerged from the dealing instruction notes.

The search yielded fact sheets in respect of the following structured notes which were listed in the same dealing notes:

- the *'RBC Autos Income Note'* bearing ISIN - XS0964863590;<sup>55 56</sup>
- the *'Comm 10% Pharma'* bearing ISIN - XS1035007969;<sup>57 58</sup>
- the *'RBC 10% Energy Income'* bearing ISIN - XS1015499921;<sup>59 60</sup>

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<sup>55</sup> A fol. 292

<sup>56</sup> <https://www.portman-associates.com/wp-content/uploads/2013/09/RBC-Motors-Income-Note-Fact-Sheet.pdf>

<sup>57</sup> A fol. 293

<sup>58</sup> <https://www.portman-associates.com/wp-content/uploads/2014/03/Commerzbank-10-Fixed-Global-Pharma-Income-Note-2-FACTSHEET.pdf>

<sup>59</sup> A fol. 294

<sup>60</sup> <https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-10-Fixed-Income-Energy-Note.pdf>

- the '*Nomura 9% US Tech*' bearing ISIN - XS1048446188;<sup>61 62</sup>
- the '*Commerzbank 9% Future Pioneers*' bearing ISIN - XS1057776392;<sup>63 64</sup>
- the '*RBC Automotive*' bearing ISIN - XS1027492278.<sup>65 66</sup>

The fact sheets for the said notes indicated the products as being linked to a number of underlying stocks. Fixed income returns ranging from 8%-10%p.a. were indicated in the said fact sheets.

**It is noted that the high rate of returns indicated on these products in themselves reflect the high level of risk being taken as per the risk-return trade-off. The fact sheets of the said structured notes also highlighted a number of risks in respect of the capital invested into these products.**

**Apart from *inter alia* the credit risk of the issuer and the liquidity risk, the indicated fact sheets also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.**

**A particular feature emerging in the indicated structured notes, involved the application of capital buffers and barriers. In this regard, the fact sheets described and included warnings that the invested capital was at risk in case of a particular event occurring.**

**Such event comprised a fall, observed on a specific date of more than a percentage (specified in the respective fact sheet), in the value of any underlying asset to which the structured note was linked.**

The said fact sheets also included a warning on the lines that:

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<sup>61</sup> A fol. 294

<sup>62</sup> <https://www.portman-associates.com/wp-content/uploads/2014/03/Nomura-9-1Y-US-Technology-Income-FACTSHEET.pdf>

<sup>63</sup> A fol. 295

<sup>64</sup> <https://www.portman-associates.com/wp-content/uploads/2014/05/Commerzbank-9-Fixed-Future-Pioneers-FACT-SHEET.pdf>

<sup>65</sup> A fol. 295

<sup>66</sup> <https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-8Automotive-IncomeAutocallableFactSheet.pdf>

*'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost'.<sup>67</sup>*

It is clear that there were material consequences if just one asset, out of a basket of assets to which the said structured notes were linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted, even more so when high individual exposures to single structured notes were being taken.

Whilst the fact sheets of other structured notes invested into were not presented or not traced, it is nevertheless clear that the portfolio of the Complainant indeed included structured notes which carried certain risks not reflective of a prudent approach as one would expect in a pension portfolio and as ultimately required in terms of the rules outlined in the section titled *'Responsibilities of the Service Provider'* above. Such investments also did not reflect the low/cautious risk attitude of the Complainant.

It is noted that the Service Provider, argued *inter alia* in its reply that *'on the basis of objective assessment, it is not apparent that the investments chosen by the adviser at the time would not have been suitable for inclusion in a portfolio with the Claimant's risk profile'.<sup>68</sup>*

STM Malta did not, however, provide any basis or substantiated its claims in this regard.

Indeed, the Arbiter considers that, contrary to what was claimed by the Service Provider, an objective assessment of the investment portfolio would rather indicate that the investments chosen were, in the context of a pension scheme, not even suitable for an investor with a higher attitude to risk, let alone for the Complainant, a housewife, who had the lowest risk attitude and a cautious investment profile. By its very nature, a pension scheme is not a speculative investment account/vehicle.

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<sup>67</sup> E.g. Fact sheet in respect of the RBC Autos Income Note with same or similar disclosure featuring in the other fact sheets sourced.

<sup>68</sup> A fol. 253



The Arbitrator is of the view that not only was the investment portfolio not of 'low risk', but rather one involving substantial high risks as reflected in the extent of realised losses experienced by the Complainant, where many of the structured notes invested into yielded a capital loss, some of which on nearly all or substantial parts of the capital invested as detailed in section titled '*Underlying Investments*' above.

Moreover, it is also noted that the fact sheets sourced all specify that the target audience for these products were '*Professional Investors Only*'<sup>69</sup> and, accordingly, such products were not aimed for retail investors, as the Complainant was and, accordingly, cannot be deemed to have somehow either been in her best interests - as they did not reflect her profile of a retail investor - nor a cautious attitude to risk.

#### *Other*

In its submissions, the Service Provider also argued that in her Application Form for Membership, the Complainant indicated that she considered herself an informed investor as she had previously made direct investments in company shares. Whilst the underlying assets to which the structured notes were linked involved company shares, however, one cannot reasonably construe an investor who had only invested directly in company shares to have knowledge, or be able to understand structured notes, given that the nature and particular features of such products work and are completely different to a company share.

Furthermore, as already indicated, no adequate comfort has emerged that the investments were '*suitable for inclusion in a portfolio with the Claimant's risk profile*'<sup>70</sup> as claimed by the Service Provider in its reply, something which the Service Provider never substantiated during the proceedings of this case.

Hence, the general statements made by the Service Provider do not provide any comfort whatsoever in the circumstances of this case, even more so, when it

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<sup>69</sup> Factsheets refer - For example, section titled 'Key Features' and 'Target Audience' in the factsheets issued by RBC refer.

<sup>70</sup> A fol. 253

**has been determined that the Complainant's portfolio included investments not suitable for a retail member and of a high risk.**

**The Complainant is ultimately claiming losses which are equivalent to more than 60% of the total amount invested under her Scheme.<sup>71</sup>**

**The Arbiter further notes that during the proceedings of this case, the Service Provider never contested the extensive losses claimed by the Complainant.**

**The material losses claimed are indeed in themselves indicative of the failure in achieving the Retirement Scheme's primary objective *'to provide a life-time income to its m***

***embers',<sup>72</sup> and in the failure to ensure an adequate level of diversification and assets being invested in a prudent manner. Such material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have otherwise not occurred.***

**It is clear that STM Malta permitted an investment portfolio that cannot be construed as reflecting the principle of prudence and in the best interests of the Complainant as was required in terms of the rules as amply explained above.**

### **Causal link**

The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the alleged actions/fraud by the investment adviser as argued by the Service Provider in its submissions and/or losses of market movements in the value of the investments selected by the adviser.

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies impinge on the diligence STM Malta was required and reasonably expected to exercise in such roles.

It is also sufficiently clear that such deficiencies prevented the losses from being minimised and, in a way, contributed in part to the losses experienced. The

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<sup>71</sup> (GBP175,501.78 of sum invested in the Generali Plan of GBP277,978.94 (A fol. 251) = 63%.

<sup>72</sup> A fol. 258

actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with STM Malta being one of such parties.

The losses experienced on the Retirement Scheme is, in the case in question, ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which STM Malta was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

### ***Final remarks***

**Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser was *inter alia* in line with the applicable requirements and reflected the profile and objective of the Complainant in order to ensure that the interests of the Complainant were duly safeguarded.**

**It should have also ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan, promoting in the process the scope for which the Scheme was established.**

**The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is so important that it has been**

ingrained and reflected in the primary legislation, the Special Funds (Regulation) Act ('SFA')<sup>73</sup> and the Retirement Pensions Act ('RPA'), itself.<sup>74</sup>

The Complainant ultimately relied on STM Malta 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.

Moreover, with respect to the portfolio composition, the Arbiter considers that 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 with respect to the permitted investment portfolio.

The Arbiter also considers that the Service Provider did not meet the *'reasonable and legitimate expectations'*<sup>75</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.

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<sup>73</sup> Article 2(1) of the SFA defined a 'scheme' to mean *'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits ...'*.

<sup>74</sup> Article 2 of the RPA defines a 'personal retirement scheme' as: *'a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual'*. A 'retirement scheme' is, in turn, defined under Article 2 of the RPA, as *'a scheme or arrangement as defined in article 3'*, where Article 3(1) stipulates that *'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'*. Article 2 of the RPA also defines 'retirement benefit' as meaning: *'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death'*.

<sup>75</sup> Cap. 555, Article 19(3)(c)

## **Conclusion**

**For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case<sup>76</sup> and is accepting it in so far as it is compatible with this decision.**

**However, cognisance 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 that the Service Provider is to be only partially held responsible for the losses incurred.**

## **Compensation**

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Malta Retirement Plan 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 Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses on her pension portfolio.

In the particular circumstances of this case, considering the role of STM Malta as Trustee and Retirement Scheme Administrator of the Scheme, the Arbiter considers it fair, equitable and reasonable for STM Malta to be held responsible for seventy per cent of the realised losses sustained by the Complainant on her overall investment portfolio as calculated below.

Given that there were still open positions within the investment portfolio, and since the Arbiter has no sufficient detail with respect to all the respective underlying investments comprising the portfolio including the respective amount

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<sup>76</sup> Cap 555, Article 19(3)(b)

of realised gains/losses on all the investment portfolio, he shall explain how the amount of compensation shall be calculated.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of CWM acting as adviser, compensation shall be provided solely on the investment portfolio constituted under CWM and allowed by the Service Provider.

In this regard, the amount of compensation shall be calculated on the total cumulative realised losses (after deducting any realised gains) arising on the underlying investment portfolio constituted by CWM, taking also into consideration any dividends or other income received from such investments.

The Net Realised Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

- (i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainant's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

- (ii) In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio constituted by CWM, as at the date of this decision.

In case where any currency conversion is required for the purpose of finally netting any realised profits/losses within the portfolio which remain denominated in different currencies such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of such case for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

- (iii) In case of any remaining investment which was constituted at the time of CWM and is still held within the Schemes' respective portfolio of underlying investments as at, or after, the date of this decision, such investment shall not be subject of the compensation stipulated above.

**In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the indicated amount of compensation to the Complainant.**

**A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation, as decided in this decision, shall be provided to the Complainant.**

**With legal interest from the date of this decision till the date of effective payment.**

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

**Dr Reno Borg  
Arbiter for Financial Services**