

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

**Case No. 096/2018**

**OQ ('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 15 December 2020**

**The Arbiter,**

### **PRELIMINARY**

The Office of the Arbiter for Financial Services ('OAFS') has discovered, through its own research, that STM Malta Trust and Company Management Ltd changed its name to STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider') in June 2020. This results from the records filed with the Malta Business Registry relating to the change in name which was effective from 22 June 2020.<sup>1</sup>

No notification was made by the Service Provider to the OAFS regarding such material development, but after a communication from the OAFS of the 10 September 2020, the Service Provider confirmed such a change in name and confirmed that the MBR issued the change of name certificate on 13 July 2020.

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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=)

For all intents and purposes the records of this case have been accordingly updated to reflect the change in the name of the Service Provider.

### **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 submitted that her Retirement Scheme '*made catastrophic losses*'<sup>2</sup> and explained that she felt that STM Malta '*have not acted accordingly in their role as Trustee and administer of my pension fund,*' stating further that STM Malta has let her down as she felt that they have not acted in her '*best interests*', nor '*acted prudently or responsibly*' when they should have acted in the best interests of the scheme and its beneficiaries.<sup>3</sup>

The Complainant explained *inter alia* that in 2012 her '*final salary pension from HBOS and another pension fund from Prudential*' were transferred into the Retirement Scheme and that this was '*initially instigated through a company called Continental Wealth Management (CWM)*'.<sup>4</sup> It was further explained that CWM ceased trading in September 2017.

The Complainant noted that when she queried the continual losses on her pension scheme, she was told by CWM that these were only paper losses and she was assured that her fund would be better when the investments mature.<sup>5</sup>

The Complainant alleged that STM Malta accepted dealing instructions that had been repeatedly copied using her signature alleging that STM Malta '*have acted with negligent lack of due diligence*'.<sup>6</sup>

It was noted that whilst the Complainant understood that STM Malta cannot give investment advice, she argued that in its role as Trustee and to protect her

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<sup>2</sup> A fol. 21

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

interests, STM Malta should have contacted her long ago to inform her that there was a problem.

The Complainant noted that she had requested STM Malta to provide copies of all the dealing instructions since inception in 2012, but the Service Provider could only provide her with dealing instructions from 2014 onwards and told her that they do not have any dealing instructions on file before then.<sup>7</sup>

The Complainant alleged that the Service Provider's *'lack of duty of care has had disastrous consequences on [her] pension'*.<sup>8</sup>

It was submitted that her risk profile is low-medium, and her funds were put into high-risk professional investor only structured notes which should have never been the case for her pension fund. The Complainant further submitted that these investments were made without her knowledge or consent and were accepted from an unlicensed advisory firm using unqualified advisers who received large commissions.<sup>9</sup>

The Complainant requested that her pension is restored to its original value and requested all fees and commissions to be refunded, exit penalties waived and also compensation for the lack of growth.<sup>10</sup>

**In its reply, STM Malta essentially submitted the following:**<sup>11</sup>

1. That it does not agree with the allegations made by the Complainant towards STM Malta.
2. That Continental Wealth Management Limited, who had advised the Complainant to transfer both of her pensions into an STM Malta QROPS, is an independent entity of the Service Provider and is not its agent or an employee of the firm.
3. That Continental Wealth Management Limited was selected by the Complainant directly prior to her being introduced to STM Malta, and at such point, the advisers at Continental Wealth could have selected other

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<sup>7</sup> A fol. 22

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> A fol. 157-158

trustee providers to transfer her pensions to a Qualified Recognised Overseas Pension Scheme.

4. That STM Malta is not responsible for the Complainant's selection of the investment adviser, with whom the Complainant is now dissatisfied, and to whom the Complainant's complaint should properly be addressed.
5. That STM Malta notes that the fact find completed by the Complainant's advisers clearly states that her intent was to invest in structured products to gain the varying levels of protection. That STM Malta assumes that prior to signing the fact find the Complainant had been advised, at least in general terms of the features of such products. It was further submitted that the investments that were selected (structured notes) were consistent with the fact find and that the Service Provider therefore cannot agree that the investments selected did not match the Complainant's stated risk profile.
6. That structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices. The Service Provider further submitted that any statement that these are all high-risk products is not consistent with this feature. It was explained that STM Malta has taken the view and continues to hold the view that structured notes may be a suitable investment to be included in pension schemes, albeit, members must obtain advice from their financial adviser to confirm whether such product would be suitable and in line with their risk attitude.

The Service Provider noted that the MFSA, in its recent draft revised regulations has recognised explicitly that structured notes may be held in pension schemes. It was also noted that the UK FCA describes them as retail investments requiring advice.

7. The Service Provider referred to the claim made by the Complainant that STM Malta accepted dealing instructions that had *'been repeatedly copied using my signature'*<sup>12</sup> and noted that this may be the case but the most likely explanation was however that at some point the Complainant had

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<sup>12</sup> A fol. 158

given Mr Hathaway (an official of CWM), a blank signed dealing instruction. STM Malta submitted that if this is the case it must have been the Complainant's understanding that Mr Hathaway would overwrite copies of the form and submit instructions without the need to trouble her. It was further submitted that it would not be possible for STM Malta to identify such behaviour since each instruction so submitted would carry a facsimile of the Complainant's true signature.

8. STM Malta noted that whilst they are sympathetic to the Complainant's position, they did not accept that STM Malta is liable. The Service Provider submitted that Continental Wealth Management is not the agent of STM Malta, the investments selected are within the parameters outlined in the fact find, and STM Malta cannot be made to account for the Complainant's signing blank forms before leaving them with the adviser.

**Having heard the parties,**

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

**Further Considers:**

*Basis of the complaint*

The Arbiter notes that in her additional submissions the Complainant highlighted new aspects which were not raised in the original complaint filed with the Office of the Arbiter for Financial Services. The Complainant cannot change the basis of her complaint and the Arbiter will accordingly only consider the complaint as originally filed.

*Joinder request by the Service Provider*

In a written statement sent by the Service Provider,<sup>13</sup> STM Malta requested the joinder of Continental Wealth Management in Spain ('CWM') and Generali Worldwide Insurance Company Limited in Guernsey, Channel Islands ('Generali')

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<sup>13</sup> A fol. 167

as parties to the Complaint on the basis of the definition of '*parties*' in Article 2 of the Arbitrator for Financial Services Act, Chapter 555.<sup>14</sup>

STM Malta noted that besides the Complainant and the financial service provider against whom the Complaint is made, the definition of '*parties*' in the said Article also makes reference to '*and any other person who in the opinion of the Arbitrator should be treated as a party to the complaint*'.<sup>15</sup>

The Service Provider argued that, as was immediately evident in the Complaint, the Complainant's membership into the plan was instigated through or by CWM which the Complainant selected and appointed as her investment advisor and portfolio manager in connection with the Generali Bond.<sup>16</sup> In this regard, STM Malta further noted that as stated in the Complainant's email of the 1 November 2017, dealing instructions were forged and investments were made without her knowledge or consent.

The Service Provider also remarked that in February 2018, the Complainant had submitted a formal complaint to Generali International Limited which it noted was now Generali Worldwide Insurance Company Limited ('Generali'), where the Complainant claimed *inter alia* that Generali was negligent and facilitated the '*financial crime*' perpetrated by CWM.<sup>17</sup>

The Service Provider accordingly argued that it is apparent that the Complaint is also directed towards CWM and Generali.

STM Malta further submitted that:

*'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice CWM and Generali Worldwide Insurance Company Limited should answer for themselves in these proceedings in respect of the fraud which the Complainant is attributing to them. It would not be fair and equitable on the*

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<sup>14</sup> A fol. 171

<sup>15</sup> *Ibid.*

<sup>16</sup> The Generali Bond was an underlying insurance policy acquired by the Retirement Scheme through which a portfolio of investments was held, as shall be explained further in this decision.

<sup>17</sup> A fol. 171

*Respondent to have any responsibility imputable to it if this results from the fraud of a third party'.<sup>18</sup>*

This issue was raised by the Service Provider in a written statement which was sent following the hearing of the 12 November 2018, during which the Arbiter granted the Service Provider a period of time to file the affidavits.<sup>19</sup> The request for a joinder should have accordingly been raised in the reply and not in the said written statement. In the same way that the Arbiter did not admit additions to the complaint, he does not consider it fair to admit additions to the reply especially when the complainant had already closed its proofs.

Moreover, the Complainant identified STM Malta as the financial services provider against whom the Complaint is being made in relation to the Retirement Scheme. It is further noted that, as clearly emerged during the proceedings of the case, the Complaint made by the Complainant in essence relates to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Scheme.

Having considered the particularities and nature of this complaint, in the Arbiter's opinion, the entities indicated by the Service Provider should not be treated as a party to the Complaint presented before the Arbiter and, accordingly, the Service Provider's request in this regard cannot be upheld.

### **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>20</sup>**

### **The Complainant**

The Complainant was born on 24 January 1961 and resided in Spain.<sup>21</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> *A fol.* 166

<sup>20</sup> Cap. 555, Art. 19(3)(b)

<sup>21</sup> *A fol.* 138 & 187

In the Application Form issued by STM Malta for membership into the Retirement Scheme ('the Application Form for Membership'), the Complainant's marital status was indicated as '*Widowed*' and her wealth was indicated as accumulated through '*Pension & Work Income from Rental*'.<sup>22</sup>

Her job description was marked as '*Not Working/Semi Retired*', in a fact find dated 8/6/12 completed by her financial advisors, CWM.<sup>23</sup> As to work experience, the Complainant stated, during the sitting of 11 February 2019, that '*At the time of this investment, I used to work in a bank and my position was an Accounts Analyst for 14 years*'.<sup>24</sup>

In the fact find, the Complainant was indicated as having investments in fixed bonds of Alliance & Leicester and Lloyds Bank in the UK with interest of 3.8% and 4.0% respectively.<sup>25</sup> She was further indicated in the same document as having no '*Unitised Investments/Mutual Funds /Equities /Saving Plans*'.<sup>26</sup>

The Complainant's financial planning priorities in the fact find were indicated as '*Capital Growth/Income in Future*'; '*Protection*'; '*Tax Efficiency*'; and '*Lump Sum Investment from QROPS*'.<sup>27</sup>

The fact find also indicates *inter alia* that the Complainant has decided to transfer her pensions '*to a Generali International Professional Portfolio Bond for Investment*', and that '*The Bond is to provide protection and she wishes this to house structured products with different levels of capital protection to provide growth/income later*'.<sup>28</sup>

The attitude to risk of the Complainant was indicated as '*Low to Medium*'.<sup>29</sup>

In reply to the question asking how well she understood the risks of investing in financial markets, (section 10 titled '*Attitude to Risk /Investment Objectives/ Financial Position*' of STM Malta's Application Form for Membership), the

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<sup>22</sup> A fol. 187

<sup>23</sup> A fol. 138

<sup>24</sup> A fol. 184

<sup>25</sup> A fol. 139

<sup>26</sup> *Ibid.*

<sup>27</sup> A fol. 140

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*



Complainant's reply was *'Not well - I consider myself an inexperienced investor'*.<sup>30</sup>

In the same section of the Application Form, her experience in *'direct investments in financial markets'* was indicated just as *'bank bonds'*.<sup>31</sup> In reply to the question in the same section of the Application Form for Membership, which asked *'How would you best describe the approach that should be taken when investing your Plan assets?'*, the Complainant's reply was indicated as *'Cautious - providing an annual income whilst protecting the capital'*.<sup>32</sup>

The main reason for establishing the retirement plan given in the Application Form for Membership was indicated as *'Tax Efficiency and Flexibility'*.<sup>33</sup>

### **The Service Provider**

The Retirement Scheme was established by STM Malta.<sup>34</sup> STM Malta is licensed as a Retirement Scheme Administrator<sup>35</sup> and acts as the **Retirement Scheme Administrator and Trustee of the Scheme**.

### **Investment Adviser**

The Application Form for membership into the Scheme signed by the Complainant<sup>36</sup> and dated 8/6/12 specifies that the Investment Adviser of the Complainant was Continental Wealth Management, with this entity featuring an address in Spain.<sup>37</sup>

### **Particularities of the Case**

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

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<sup>30</sup> A fol. 191

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> A fol. 187

<sup>34</sup> A fol. 186

<sup>35</sup> <https://www.mfsa.mt/financial-services-register/result/?id=204>

<sup>36</sup> A fol. 193

<sup>37</sup> A fol. 190

The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Plan.<sup>38</sup> The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta).<sup>39</sup>

The Retirement Scheme was established by STM Malta, which is in turn licensed by the MFSA as a Retirement Scheme Administrator.<sup>40</sup> STM Malta acts as the **Retirement Scheme Administrator and Trustee of the Scheme.**<sup>41</sup>

The Application form for membership of the Retirement Scheme specifies *inter alia* that '*The Plan has been established to provide a life-time income to its members*'.<sup>42</sup>

The Complainant became a member of the Retirement Scheme on the 8 June 2012.<sup>43</sup> A transfer value of GBP99,858.33 and GBP24,265.17, which together amount to GBP124,123.50, was made into the Scheme on the 13 July 2012 and 7 November 2012 respectively from HBOS and Prudential as indicated in the Scheme's Schedule issued by STM Malta.<sup>44</sup>

The assets held into the Retirement Scheme were used to purchase a contract of insurance issued by Generali International Limited ('the Generali Plan'), indicated as the '*Professional Portfolio Plan*'/'*Portfolio Bond*', with '*Plan Number PF791428*'.

The Generali Plan was described by the Service Provider as:

*'a life policy investment wrapper holding underlying financial instruments such as mutual funds and structured notes, in each case selected by the Complainant and or her appointed investment advisor/s ...'*<sup>45</sup>

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<sup>38</sup> <https://www.mfsa.mt/financial-services-register/result/?id=209>

<sup>39</sup> A fol. 194

<sup>40</sup> <https://www.mfsa.com.mt/financial-services-register/result/?id=204>

<sup>41</sup> A fol. 25, 29 & 186

<sup>42</sup> A fol. 186

<sup>43</sup> A fol. 27 & 29

<sup>44</sup> A fol. 27

<sup>45</sup> A fol. 169

The Generali Plan in respect of the Complainant commenced on the 9 November 2012.<sup>46</sup> The amount invested into the Generali Plan amounted to GBP119,434.60 this being the '*initial premium contribution*' to the plan.<sup>47</sup>

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

### ***Underlying Investments***

The Complainant presented various '*Portfolio Bond Dealing Instruction*' forms,<sup>48</sup> contract notes<sup>49</sup> as well as a '*Cash Account Transaction Report*' statement issued by Generali covering the period from '*01/11/12 to 13/11/17*' in respect of the investment portfolio underlying the Generali Plan.<sup>50</sup>

Since the commencement of the Generali Plan in November 2012, the portfolio underlying the said plan constituted various purchases of structured notes which were the only investments undertaken over the period October 2012 till July 2015.

According to the contracts notes and the cash account transaction report, the said investments into structured notes include the following:

- an investment of GBP20,000 into the *Nomura International 5yr Qtly Phoenix Autocall Note GBP* in October 2012;<sup>51</sup>
- an investment of GBP80,000 into the *RBC Capital Markets 1yr Reverse Convertible Nt GBP* during November/December 2012;<sup>52</sup>
- an investment of GBP17,000 into the *Commerzbank AG 5yr Accumulator Auto Indices GBP* during December 2012/January 2013;<sup>53</sup>

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<sup>46</sup> A fol. 32 & 35

<sup>47</sup> A fol. 27, 32 & 35

<sup>48</sup> A fol. 39-56

<sup>49</sup> A fol. 57-93

<sup>50</sup> A fol. 100-136

<sup>51</sup> A fol. 57, 114

<sup>52</sup> A fol. 58, 115

<sup>53</sup> A fol. 59, 115

- an investment of GBP80,000 into the *Commerzbank 1yr 6m Reverse Convertible Bond GBP* during May/June 2013;<sup>54</sup>
- an investment of GBP19,000 into the *Commerzbank AG 1yr Autocall Note GBP* in November 2013;<sup>55</sup>
- an investment of GBP20,000 into the *RBC Capital Markets 2yr Reverse Convertible Note GBP* in November 2013 and a further investment of GBP21,000 into the same instrument in January 2014;<sup>56</sup>
- an investment of GBP20,000 into the *Commerzbank AG 1.5yr Reverse Convert Bond GBP* during November/December 2013;<sup>57</sup>
- an investment of GBP20,000 into the *RBC Capital Markets 4yr Phoenix Autocall Notes GBP* in January 2014;<sup>58</sup>
- an investment of GBP9,800 into the *Nomura International 1yr Rev Convert Notes GBP* in July 2014 and a further investment of GBP10,000 into the same instrument in August 2014;<sup>59</sup>
- an investment of GBP3,000 into the *EFG Financial Products 1.5yr Multi Barrier RC 15/4/2016 GBP* in October 2014;<sup>60</sup>
- an investment of EUR10,000 into the *RBC Capital Markets 2yr Autocall note EUR14/11/16* in November 2014;<sup>61</sup>
- an investment of EUR10,820 into the *EFG Financial Products 2yr Multi Barrier EUR17/05/16* during November 2014;<sup>62</sup>
- an investment of EUR5,000 into the *EFG Financial Products 2yr Express Cert 28/11/16 EUR* during November/December 2014;<sup>63</sup>

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<sup>54</sup> A fol. 60, 117

<sup>55</sup> A fol. 63, 118

<sup>56</sup> A fol. 65, 68, 118 & 119

<sup>57</sup> A fol. 67, 119

<sup>58</sup> A fol. 69, 119

<sup>59</sup> A fol. 72, 73, 122

<sup>60</sup> A fol. 76, 123

<sup>61</sup> A fol. 80, 100

<sup>62</sup> A fol. 81, 82 & 100

<sup>63</sup> A fol. 83, 101

- an investment of EUR5,000 into the *EFG Financial Products 2yr Discount Cert 28/11/16 EUR* during November/December 2014;<sup>64</sup>
- an investment of GBP3,000 into the *Commerzbank AG 2yr Autocall Note GBP 31/03/17* in March 2015.<sup>65</sup>

Some of the structured products indicated above were sold during the period of the *Cash Account Transaction Report* mentioned above (that is, from 2013 till November 2017).

The portfolio also constituted investments into collective investment schemes from August 2015 onwards. A sum of GBP32,000, which equates to 26.79% of the initial premium contribution into the Generali Plan,<sup>66</sup> was invested into collective investment schemes in total over the period from August 2015 to October 2016.

The investments into collective investment schemes constituted the following:

- an investment of GBP7,000 into the *Marlborough Intl Mngt Ltd High Yield Fixed Int F GBP* in August 2015;<sup>67</sup>
- an investment of GBP4,000 into the *Marlborough Intl Mngt Ltd Multi-Cap Income Cell CI F GBP* in September 2015;<sup>68</sup>
- an investment of GBP6,000 into the *Vam Fund (Lux) Close Brothers Balanced Fd GBP* in October 2016;<sup>69</sup>
- an investment of GBP9,000 into the *Gemini Investment Funds Principal Asset Allocat C GBP* in October 2016;<sup>70</sup>
- an investment of GBP6,000 into the *IFSL Brooks MacDonald Balanced Fund CI D Acc GBP* in October 2016.<sup>71</sup>

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<sup>64</sup> A fol. 84, 101

<sup>65</sup> A fol. 125

<sup>66</sup> GBP32,000 of GBP119,434.60

<sup>67</sup> A fol. 52, 87, 126

<sup>68</sup> A fol. 53, 88, 127

<sup>69</sup> A fol. 56, 92 & 131

<sup>70</sup> A fol. 93, 131

<sup>71</sup> A fol. 56, 91 & 131

## The Legal 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>72</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*

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<sup>72</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/>

*further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.*

Moreover, the TTA provides that:

*'21(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.'*

### **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>73</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 ...'***

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***

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<sup>73</sup> Emphasis added by the Arbitrator.



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>74</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>75</sup>

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

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<sup>74</sup> Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, p. 174.

<sup>75</sup>*Op. cit.* p. 178

***'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 pater familias in the performance of his obligations'.<sup>76</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.

**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.**

*Other relevant aspects*

One other important duty relevant to the case in question relates to the oversight and monitoring function of the Service Provider with respect to the Scheme and its investments.

**Whilst STM Malta's duties did not involve the provision of investment advice, however, it had oversight and monitoring duties in relation to the Scheme in its role of Retirement Scheme Administrator and Trustee of the Scheme.**

The **review function** in respect of investments, was also indicated in STM's Statement of Investment Principles such as that attached to the email issued by the Service provider dated 12/6/2016 which provided *inter alia* that:

*'Diversification, liquidity and quality of the investment are important factors for the Company to consider when reviewing investments in view of the risk profile of the member. As a result, the Company has put together parameters to ensure, as much as possible, that investment recommendations provide good levels of diversification and liquidity appropriate for a pension scheme.*

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<sup>76</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.

*It is important to note that in no way is the Company deemed to be giving investment advice, but merely taking precautionary measures with the aim of providing the best service to our members'.<sup>77</sup>*

Although the Statement of Investment Principles presented is the amended one issued in June 2016, effective as from 1 January 2017,<sup>78</sup> **the review of investments with reference to general principles of diversification and prudence** at the very least, was an aspect which still applied in previous years being part of the duties of the Retirement Scheme Administrator and Trustee of the Scheme.

### **Other Observations and Conclusions**

#### *Claims relating to the signature on the dealing instructions*

The Complainant claimed that STM Malta accepted dealing instructions that had been repeatedly copied using her signature on the dealing instructions.<sup>79</sup>

During the hearing of 11 February 2019, the Complainant *inter alia* stated that

*'Being asked if what I am saying is that someone put a photocopied signature on things that I did not agree to, I say yes. Being asked if what I am saying amounts to forgery, I say yes'.<sup>80</sup>*

However, it is noted that in her final submissions, it was pointed out that the Complainant *'is not complaining of forgery in these proceedings'.<sup>81</sup>*

**The claim of a forged signature is a serious allegation which had to be specifically proven by specific facts and, 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 for the Arbiter to accept her allegation which, in any case, she later withdrew.**

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<sup>77</sup> A fol. 143 - Emphasis added by the Arbiter.

<sup>78</sup> A fol. 141

<sup>79</sup> A fol. 21

<sup>80</sup> A fol. 183

<sup>81</sup> A fol. 203

The Arbiter will next consider the remaining principal alleged failures.

**Key considerations relating to the principal alleged failures**

As emerging during this case, 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 in line with the applicable regulations and requirements.

Two principal alleged failures made against the Retirement Scheme Administrator are that:

(i) it had allowed the appointment of an unregulated investment adviser to provide recommendations in respect of the underlying investments of the member-directed scheme, and

(ii) it allowed the creation of a portfolio of underlying investments within the Scheme which, according to the Complainant, was not in line with her low-medium risk profile; with the portfolio constituting high risk professional investor of only structured notes that should have never been made in her pension fund.

**General observations**

On a general note, it is clear that STM Malta did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment advisor was the duty of other parties, such as CWM.

**This would reflect on the extent of responsibility that the financial advisor 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 financial instruments, **STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.**

**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.

(i) **Regulatory status of the investment advisor**

The Retirement Scheme Administrator, from its part, allowed and/or accepted the investment advisor to provide investment advice to the Complainant *within the structure of the Retirement Scheme*.

The Complainant explained *inter alia* that investments '*were accepted from an unlicensed advisory firm using unqualified advisors who received large commissions*'.<sup>82</sup> The Complainant also pointed out in her complaint that CWM ceased trading in September 2017.<sup>83</sup>

As to the regulatory status of CWM, during the hearing of the 11 February 2019, the official of the Service Provider under cross examination stated *inter alia* that:

*'at one point in time, Continental Wealth was registered with one particular authority in Spain. However, I don't know the exact criteria of their licensing activities. As far as I know, it was with the insurance authority in Spain'*.<sup>84</sup>

However, the Arbiter has knowledge that CWM was not a regulated entity and, in this respect, makes reference to cases numbers 140/2018, 127/2018, 149/2018, 055/2018 and 094/2018 decided by him on the 28 July 2020.<sup>85</sup>

The Arbiter also notes that the Service Provider stated that:

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<sup>82</sup> A fol. 22

<sup>83</sup> A fol. 21

<sup>84</sup> A fol. 179

<sup>85</sup> The Arbiter has the power to investigate as one of his main objectives as clearly stated in Chapter 555 of the Laws of Malta.

*'At the time, when the whole local pension regime fell under the Special Funds Act, Retirement Scheme Administrators were not obliged to make certain regulatory checks on the financial advisors'.<sup>86</sup>*

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee and their duty of care and professional diligence. This goes beyond the mere legalistic approach of shedding off responsibility by interpreting regulatory rules which are, in the first place, intended to establish *the minimum standards* expected of a licensed operator in such a way as to avoid responsibility.

**The Arbiter wants to underscore that the compliance with regulatory rules does not substitute the further obligations that an RSA and Trustee of a retirement scheme have towards the members of the scheme. As amply stated earlier in this decision under the section titled *The legal framework*, a Trustee must act diligently and professionally in the same way as a bonus paterfamilias. A bonus paterfamilias does not abdicate from his responsibilities to suit his interests.**

**In this respect, the appointment of an unregulated entity to act as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.**

In the scenario where an unregulated advisor was allowed to provide investment advice to the member of a member-directed scheme, **one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party.**

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<sup>86</sup> A fol. 179/180

**This is even more so, when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits.**

**It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances. This aspect shall be taken into account in this decision.**

**(ii) The permitted portfolio composition**

Claimed Losses

Whilst neither the Complainant nor the Service Provider provided a table of the investment instruments and details of the respective position including capital gains and losses for each, the OAFS was able to construct such table with respect to the positions taken in the Complainant's portfolio. The said table, which is included in Annex 1 to this decision, is based on information extracted from the contract notes<sup>87</sup> and the '*Cash Account Transaction Report*'<sup>88</sup> issued by Generali and presented by the Complainant during the proceedings of this case.

It clearly emerges that the Complainant suffered capital losses on most of the structured note investments comprising her portfolio. With respect to the investments into collective investment schemes, which as indicated in the section titled '*Underlying Investments*' above, comprised only a much lower portion of the portfolio, no realised nor paper losses have overall transpired from the statements or valuations provided.

Indeed, the '*Investment Fund Valuation*' report dated 31/01/18 indicates that the said funds had, as at the date of the report, an overall market value of GBP32,805 in total in comparison to the overall book value of GBP32,000

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<sup>87</sup> A fol. 57 to 93

<sup>88</sup> A fol. 100-136

invested into the said funds.<sup>89</sup> The investment position for all of the investments undertaken into collective investment schemes was still open as at the date of the said valuation.

Hence, the losses claimed by the Complainant in relation to her Retirement Scheme are indeed primarily the result of the structured note investments.

#### *Details regarding the underlying investments*

The Complainant has not submitted any factsheets herself in respect of the contested underlying investments. Details of the investments comprising the portfolio were however provided through the various dealing instruction forms, contract notes and Cash Account Transaction Report.

A general search over the internet on the underlying investments yielded fact sheets for the RBC Capital Markets 2yr Reverse Convertible Note GBP (the RBC Biotechnology Income Note),<sup>90</sup> the RBC Capital Markets 2yr Reverse Convertible Note GBP (the RBC Festive Income Note),<sup>91</sup> and the RBC Capital Markets 2yr Autocall Note EUR (the RBC E-Commerce Income Autocallable Notes).<sup>92</sup>

The fact sheets for the said notes indicate the products as being linked to a number of underlying stocks, such as '*biotechnology stocks*' in case of the RBC Biotechnology Income Note or '*entertainment and retail stocks*' in case of the RBC Festive Income Note or stocks of e-commerce companies in the case of

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<sup>89</sup> A fol. 98 - As at 31/01/18 the market value was indicated as follows: GBP6,660 for '*Marlborough Intl Mngt Ltd High Yield Fixed Int F GBP*', GBP6,340 for the '*Vam Fund (Lux) Close Brothers Balanced Fd GBP*'; GBP6,760 for the '*IFSL Brooks MacDonald Balanced Fund Cl D Acc GBP*'; GBP9,049 in respect of the '*GemCap Inv Fd Irl Plc Principal Asset Allocat C GBP*'; GBP3,996 in respect of the '*Marlborough Intl Mngt Ltd Multi-Cap Income Cell Cl F GBP*'.

<sup>90</sup> A fol. 40 & 71 - ISIN XS0979786620 - <https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf>

<sup>91</sup> A fol. 45 & 79 - ISIN XS1000868247 - <https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf>

<sup>92</sup> A fol. 46 & 80 - ISIN XS1116370088 - [https://www.portman-associates.com/wp-content/uploads/2014/10/RBC-8pa-E\\_Commerce-Fixed-Income\\_Autocallable-FACTSHEET.pdf](https://www.portman-associates.com/wp-content/uploads/2014/10/RBC-8pa-E_Commerce-Fixed-Income_Autocallable-FACTSHEET.pdf)



the RBC E-Commerce Income Autocallable Notes.<sup>93</sup> The fact sheets for the said products indicate a fixed income return of 8.5% p.a. for the RBC Biotechnology Income Note and RBC Festive Income Note respectively and a fixed return of 8%p.a. in case of the RBC E-Commerce Income Autocallable Notes.

The fact sheets of the indicated three notes all specify, in the '*Key features*' section, that the target audience for these products were '*Professional Investors Only*'.<sup>94</sup>

**The high rate of returns indicated on these products in themselves reflect the high level of risk 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.<sup>95</sup>

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 all included a warning that:

*'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>96</sup>

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<sup>93</sup> <https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf>

<https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf>

[https://www.portman-associates.com/wp-content/uploads/2014/10/RBC-8pa-E\\_Commerce-Fixed-Income\\_Autocallable-FACTSHEET.pdf](https://www.portman-associates.com/wp-content/uploads/2014/10/RBC-8pa-E_Commerce-Fixed-Income_Autocallable-FACTSHEET.pdf)

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

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.

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 (as outlined in the section of this decision titled '*Responsibilities of the Service Provider*' above).

Such investments also did not reflect the '*low to medium*' risk attitude of the Complainant nor the objective '*to provide protection*' referred to in CWM's fact find.<sup>97</sup> Neither did such investments reflect, the '*cautious*' attitude to risk and level of understanding of investment risks of the Complainant reflected in the Application Form for Membership of STM Malta, nor her previous experience in investment instruments which were only limited to bank bonds as indicated in the section titled '*The Complainant*' above.<sup>98</sup>

It is noted that the Service Provider, argued *inter alia* in its reply that '*structured notes may be a suitable investment to be included in pension schemes*' noting that '*Structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices*'.<sup>99</sup>

Nevertheless, STM Malta has not shown nor provided any details itself on what basis the structured notes which were extensively and at times exclusively invested into, were considered suitable within the Complainant's pension scheme. Nor has the Service Provider demonstrated that the structured notes constituting the Complainant's portfolio carried less volatility or were not of high risk as it implied in its submissions.

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<sup>97</sup> A fol. 140

<sup>98</sup> A fol. 191

<sup>99</sup> A fol. 158

The features of the structured notes outlined in the fact sheets sourced as described above, cannot be considered to have less volatility or not being of high risk in view of their particular features as outlined above. In the circumstances of this case, it has clearly transpired that the portfolio actually included investments which cannot be considered to reflect the arguments brought forward by the Service Provider in its reply as justification for the investment into structured notes.

In its reply, the Service Provider furthermore noted that the MFSA had recognised the possible inclusion of structured notes in the portfolio of pensions schemes noting *inter alia* that, '*... the MFSA, in its recent draft revised regulations has recognised explicitly that structured notes may be held in pension schemes*'.<sup>100</sup>

Whilst the current pension rules issued by the MFSA indeed do allow a limited exposure to structured notes, it is nevertheless important to keep in mind and consider other relevant and appropriate aspects mentioned in the same MFSA rules. Indeed, the current Pension Rules for Personal Retirement Schemes also provide *inter alia* for the requirement to ensure that in case of a retail member the chosen investments are of a retail nature as per Standard Licence Condition 9.5(d)(ii)(bb) of the said rules.<sup>101</sup>

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 has been clearly established that the Complainant's portfolio included investments not suitable for a retail member. The information found on the said products are indeed indicative of high risks being taken in the Complainant's portfolio and of investments not reflective of the profile, attitude to risk and neither consistent with the details and objectives included in the fact find and Application Form for Membership, and this being in stark contrast to what was claimed by the Service Provider in its reply including that

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<sup>100</sup> *Ibid.*

<sup>101</sup> The said condition provides the following: '*(bb) unless a Member requests to be classified as a professional member, a Member may only invest in investments which can be classified as suitable for a retail member: Provided that the responsibility of the Retirement Scheme Administrator in assessing the investments chosen shall be limited to carrying out due diligence on the proposed investment, following which the Retirement Scheme Administrator is satisfied on reasonable grounds that the investment can be classified as suitable for a retail member*'.

***'the investments selected are within the parameters outlined in the fact find', something which the Service Provider never substantiated during the proceedings of this case.***

*Excessive exposure to structured notes and single issuers*

During the hearing of the 11 February 2019, the Service Provider stated that:

*'Being asked what the percentage of the allocation in the structured notes was, I say that the percentage of the allocation in the structured notes was quite high, at around 70%'.<sup>102</sup>*

**The Arbiter notes that the allocation in structured notes was not only high but the allocation of the whole portfolio of investments was actually exclusively into structured notes for nearly three years during the period October 2012 till July 2015.<sup>103</sup>**

It is also noted that the portfolio comprised at times excessive exposures to not only single issuers, like RBC and Commerzbank, but also to single products<sup>104</sup> where at times there were even investments of GBP80,000 (equivalent to approximately 67% of the original amount transferred into the Scheme of GBP119,434.60) into just one single product.<sup>105</sup>

The Complainant had claimed *'severe'* and *'catastrophic'* losses on her Retirement Scheme.<sup>106</sup> In her formal complaint to the Service Provider she stated that she suffered *'severe losses'* indicating her original transfer value into the Generali Plan of GBP119,434.60 dropping to an *'Approximate Current Value'* of GBP40,021.32 as at 2 October 2017 leading to a *'Total Known Loss to Date'* of GBP79,413.28.<sup>107</sup>

In a document attached to the Complaint Form filed with the OAFS, she stated that her *'fund has made catastrophic losses and as at 31/1/18 totalled*

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<sup>102</sup> A fol. 181

<sup>103</sup> As indicated in the section titled *'Underlying Investments'* above.

<sup>104</sup> Cf: the section of this decision titled *'Underlying Investments'* above.

<sup>105</sup> A fol. 27

<sup>106</sup> A fol. 6 & 21

<sup>107</sup> A fol. 6

GBP43,493'. The latter figure seems to relate to the current value of the Generali Plan as at 31/1/18.

The Arbiter notes that whilst the current value of the Scheme/Generali Plan would reflect both realised as well as unrealised gains/losses, the Complainant is ultimately claiming losses which are equivalent to more than 60% of the total amount invested under her Scheme.<sup>108</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 Scheme's primary objective 'to provide a life-time income to the Member',<sup>109</sup> and in ensuring adequate diversification and avoidance of excessive exposures in the underlying portfolio of investments. Otherwise, such material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.**

**It is clear that STM Malta permitted investments that cannot be construed as reflecting the principle of prudence or in acting in the best interests of the Complainant as was required in terms of the law as amply explained above.**

### ***Other observations***

STM Malta did not help its case by not providing information on the underlying investments and not presenting other documentation relating to the Scheme, such as the Trust Instrument and Investment Rules applicable at the time.

The Service Provider did not only fail to present any details on the investment portfolio, including charges, valuations and performance, but it did not even submit copies of other documentation relating to the Scheme, opting instead to discretionally select and quote parts of the Trust Rules in its written statement,

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<sup>108</sup> (GBP79,413.28 of GBP119,434.60=66.5%); [GBP119,434.60-GBP43,593=GBP75,841.60], GBP75,841.60 of GBP119,434.60=63.5%.

<sup>109</sup> A fol. 194

namely, indicating various disclaimers and warranties relating to the Scheme, **without actually presenting the actual and full document referred to.**<sup>110</sup>

### **Causal link**

**The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the alleged ‘fraud’ by the investment advisor, as argued by the Service Provider in its submissions, and/or losses of market movements in the value of the investments selected by the advisor.**<sup>111</sup>

**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 evidently clear that such deficiencies prevented the losses from being minimised and, in a way, contributed in part to the losses experienced. The 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**

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<sup>110</sup> *A fol. 171-172*

<sup>111</sup> *A fol. 168*

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 advisor 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 are 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. The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established by allowing a portfolio of investments which reflected the objective of the Scheme.**

**The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA')<sup>112</sup> and the Retirement Pensions Act ('RPA').<sup>113</sup>**

**It is considered that, had there been a careful consideration of the contested structured products, the Service Provider should have intervened and raised concerns at the very least on certain investments into structured notes**

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<sup>112</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>113</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*'.

forming part of the Complainant's portfolio. It should have not allowed risky investments as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

Apart from being its duties as a Retirement Scheme Administrator, the Service Provider was also the Trustee who had to act as a *bonus paterfamilias* and in the best interests of its client.

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.

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 portfolio structure.

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'<sup>114</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 above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive

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<sup>114</sup> Cap. 555, Art. 19(3)(c)



merits of the case and is accepting it in so far as it is compatible with this decision.<sup>115</sup>

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 advisor 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, 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 and the extent of deficiencies determined, 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.

The Arbiter notes that the latest valuation and '*Cash Account Transaction Report*' is not current and during the proceedings no full details emerged of the *realised losses* (inclusive of dividends) on all investments.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as advisor, compensation shall be provided solely on the investment

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<sup>115</sup> Cap. 555, Art. 19(3)(b)

**portfolio constituted under Continental Wealth Management and allowed by the Service Provider.**

**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, as at the date of this decision.**

- (iii) In case of any remaining investments which were constituted at the time of CWM and are still held within the Scheme's portfolio of underlying investments as at, or after, the date of this decision, such investment/s shall not be subject of the compensation stipulated above. This is without prejudice to any legal remedies**

**the Complainant might have in the future with respect to such investment/s.**

**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.**

**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.**

**Due to the innovative facts of this case, each party is to bear its own costs of these proceedings.**

**Dr Reno Borg  
Arbiter for Financial Services**