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Quarterly briefing

June 2016

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Q2

June 2016

On the front cover this quarter:
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In this issue

Abbreviations

AA: Annual allowance
AVC: Additional voluntary contribution
CETV: Cash equivalent transfer value
CJEU: Court of Justice of the European Union
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ECWG: Employer Covenant Working Group
EIOPA: European Insurance and Occupational Pensions Authority
EU: European Union
FAMR: Financial Advice Market Review
FAS: Financial Assistance Scheme
FCA: Financial Conduct Authority
FP16: Fixed Protection 2016
GDPR: General Data Protection Regulation
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
HMT: HM Treasury
IP16: Individual Protection 2016
ISA: Individual Savings Account
LLP: Limited Liability Partnership
LTA: Lifetime allowance
NIC: National Insurance Contribution
PO: Pensions Ombudsman
PPF: Pension Protection Fund
PSC: Persons with significant control
SPA: State pension age
TPR: The Pensions Regulator
TPS: Teachers' Pension Scheme

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Current legal agenda

EU Referendum

On 23 June 2016, eligible voters will decide the question "Should the United Kingdom remain a member of the European Union or leave the European Union?"[1] Whilst the economic and political ramifications in the event of a vote for "Brexit" can be expected to be far reaching, in the short-term at least, the legislative impact is likely to be limited.

Limited legislative change?

In the event of a vote to leave the EU, areas of legislation affecting pension schemes which could find themselves an early target for review include GMP equalisation and survivor benefits.

The longer-term impact for pension funds would depend on the terms negotiated by the UK Government during a transitional period which could last up to two years – or significantly longer.

DC matters

Issues for DC schemes are explored on page 6

Sponsors and trustees of DC pension schemes continue to have their hands full. Building on new governance standards introduced in 2015, 6 April 2016 saw the introduction of a requirement for trustees to provide generic risk warnings, as well as a ban on member-borne commissions and active member discounts in schemes which are used as qualifying schemes for automatic enrolment.

Trustees will be able to turn to TPR's new DC code and six accompanying "how to" guides for assistance. These are due to come into force in July 2016.

Persons with significant control and corporate trustees

For more on the PSC requirements, see page 9

A new regime was introduced from 6 April 2016 which requires companies, including trustee companies, to identify and record the people or legal entities that own or control them.

This means that corporate trustees are now required to have a PSC register. Information from the register has to be provided to Companies House as part of an annual "confirmation statement", which will replace the annual return from 30 June 2016.

Abolition of contracting-out – deadline for informing members

6 April 2016 saw the demise of contracting-out for DB schemes. Trustees and employers of affected schemes should now be in the final stages of dealing with the consequences of its abolition.

Final disclosure deadline!

In particular, by 6 July 2016, trustees need to inform affected members that their scheme has ceased to be contracted-out.

1 See our Alert: Brexit? How the referendum could affect UK pensions (5 May 2016)

Pensions reform

Budget 2016

Whilst the Chancellor, George Osborne, confirmed there would be no changes to pensions tax relief in the 2016 Budget, pensions did not escape the news entirely.[2]

The Lifetime ISA

From April 2017, individuals between the ages of 18 and 40 will be able to open a "Lifetime ISA" account, to which they will be able to contribute £4,000 in each tax year. A Government bonus of 25% will then be paid at the end of the tax year, up to the age of 50. Contributions to the Lifetime ISA will sit within the overall £20,000 ISA limit for the tax year 2017/18 (up from £15,240 in 2016/17).

New lifetime savings vehicle

Subject to certain conditions, individuals will be able to use their tax-free funds, including the Government bonus, to purchase their first home or, from age 60 (or on diagnosis of terminal ill-health), withdraw all the savings tax-free. It will be possible to withdraw money before age 60, but doing so will result in the loss of the Government bonus (and any interest or growth on this) and attract a 5% charge.

Financial advice

The Government has committed to implementing all the recommendations of the Financial Advice Market Review's final report[3] and plans to:

Consultation awaited

- consult on a "single, clear definition of financial advice"
- increase the existing £150 income tax and NIC relief for employer-arranged pension advice
- consult on a new "pensions advice allowance", which would allow individuals to withdraw up to £500 tax-free from their DC pension to redeem against the cost of financial advice.

Retirement flexibilities

Facilitating access

In its response to consultation on pension transfers and early exit charges, HMT announced that it plans to address possible barriers to people switching their pensions in order to access the new retirement freedoms. These include:[4]

- a new duty on the FCA to limit early exit charges, alongside similar requirements for trust-based schemes
- new TPR guidance for scheme trustees to help ensure that transfers are processed promptly and accurately
- a new reporting regime for transfers from trust-based schemes
- guidance on the transfer process to be developed by Pension Wise.

2 See our Alert: Budget 2016 (16 March 2016)
3 Financial Advice Market Review: final report (FCA/HMT, 14 March 2016)
4 See our Alert: Pension transfers and early exit charges: consultation response (15 February 2016)

Secondary annuity market

Implementing the proposals

In the March 2015 Budget, the Government announced its intention to create a secondary annuity market for consumers, to extend the new retirement freedoms and flexibilities to people who retired before 6 April 2015 and bought an annuity under the old rules.

Secondary market for annuities due to take effect from 6 April 2017

Under the proposals, an individual will be able to assign or surrender their annuity income payable to them in respect of either DB or DC arrangements. Where the assignment is to a third party, the provider would then continue to hold the underlying assets and pay the annuity income to the third party for the lifetime of the original annuitant.

HMRC, HMT and the FCA are all consulting on aspects of the proposed secondary market for annuities, which is due to come into effect from 6 April 2017.[5] These include:

- details of the proposed tax framework
- FCA rules and guidance, designed to provide appropriate consumer protection and promote effective competition
- new regulated activities for those operating in the new market, including advisers and brokers.

State pensions

Review of state pension age

The DWP has set out terms of reference for an independent review of the SPA by John Cridland CBE.[6]

Further changes to state pension age?

A review of the SPA is required during each Parliament, to consider changes in life expectancy, wider changes in society and to help ensure that the state pension remains sustainable for generations to come. The report must be submitted to the Secretary of State by January 2017, with the Government's final report (considering the recommendations from the review) due before 7 May 2017.

The review will not cover the arrangements already in place, under which SPA is set to rise to 66 between December 2018 and October 2020 and from 66 to 67 between 6 April 2026 to 5 April 2028.[7]

5 See our Alert: Creating a secondary annuity market (27 April 2016)
6 The terms of reference for the SPA review were published on 1 March 2016
7 You can check your SPA using the DWP's state pension age calculator

DC matters

Changes in force from 6 April 2016[8]

Ban on member-borne commissions

Existing arrangements which are varied or renewed will also be subject to the ban

Subject to certain exceptions, there is now a ban which prevents service providers[9] from levying a charge on members of workplace pension schemes which provide DC benefits and are used for automatic enrolment (known as "relevant schemes") to recover the costs of commission payments made to advisers for certain advice or services. The ban also applies to AVCs where these are used to provide money purchase benefits in relevant schemes.

The ban primarily applies to commission arrangements entered into on or after 6 April 2016. However, the Government intends to consult later in 2016 in respect of pre-6 April 2016 arrangements, but such arrangements will be caught if they are varied or renewed on or after that date.[10] The DWP has published guidance to help trustees and pension managers understand how the ban operates.[11]

Ban on active member discounts

It is also now unlawful for trustees to impose, or permit to be imposed, a higher rate or amount of charges on a deferred member of a relevant scheme than would have been the case had they been an active member.

The ban applies to members of relevant schemes who have contributed to the scheme on or after 6 April 2016.

Employers can still pay or subsidise charges for their current employees, provided that the total level of charges imposed is the same for active and deferred members.

Governance

Changes to the scheme return

TPR has produced a checklist to help trustees

Schemes will be required to provide information about how they comply with the requirements brought in by legislation in 2015, including charge controls and scheme governance. To help trustees with the changes, TPR has produced a checklist guide about the new scheme return.[12]

TPR has called on trustees to get ready to deal with changes in the DC scheme return or risk being fined for failing to comply with the law.[13]

Guidance to accompany the DC code

Final DC code and guides awaited

TPR has been consulting on a series of new guides aimed at helping trustees know "how to" implement the revised DC code for occupational trust-based schemes, which is due to come into force in July 2016.[14]

The six separate guides set out ways in which trustees can show they are complying with the law. They cover a range of issues, including the role of the trustee, scheme management, investment governance and value for members.

8 See our Alert: Changes coming into force on and from 6 April 2016 (23 March 2016)
9 Persons or firms providing an administration service directly to a scheme's trustees or managers
10 See our Alert: Banning member-borne commission in occupational pension schemes (28 January 2016)
11 Guidance for service providers and trustees or managers of occupational pension schemes (DWP, 8 March 2016)
12 The checklist guide and other information is available in the DC scheme return section of TPR's website
13 In a press release on 14 March 2016
14 See our Alert: TPR explains "how to" implement new DC code (18 April 2016)

Automatic enrolment

New regulations and guidance

Reducing the burden for employers

Regulations came into force on 6 April 2016 aimed at further easing the burden on employers in relation to auto-enrolment.[15] The regulations:

- simplify the processes to re-declare compliance and bring forward staging dates
- introduce exceptions from the duty to auto-enrol for company directors and members (or "genuine partners") of LLPs

Extension of exceptions to the employer duty

- clarify the current exception to the employer duty for workers who have received a "winding-up lump sum"
- introduce a transitional easement for certain schemes which ceased to contract-out on 6 April 2016 to qualify for use as auto-enrolment vehicles using the "cost of accruals" test, which is based on the cost to the scheme of the future accrual of active members' benefits (applied at benefit scale level rather than scheme level).

More regulations, to extend the current exception to the employer duty to auto-enrol individuals with tax protected status to those with FP16 and IP16, are awaited.

Hybrid schemes quality requirements rules

New rules came into force on 6 April 2016 which set out the detailed quality requirements that hybrid schemes need to satisfy before they can be used as a qualifying scheme for auto-enrolment purposes.

The rules have been revised to remove references to contracting-out, which, before 6 April 2016 enabled schemes to qualify automatically as quality schemes for auto-enrolment purposes.

Revised guidance: alternative scheme quality tests

DWP has updated its guidance

The DWP has published guidance[16] on the alternative tests of scheme quality for DB schemes and the DB elements of hybrid schemes that are used for auto-enrolment, to help in the assessment of whether a DB/hybrid scheme is of sufficient quality for use in meeting an employer's auto-enrolment duties.

15 See our Alert: Further changes to automatic enrolment (21 April 2016)

16 Automatic enrolment: guidance on the alternative quality requirements for defined benefits pension schemes and the defined benefits element of hybrid pension schemes (DWP, April 2016)

Pensions tax

Changes now in force

A number of changes to pensions tax came into effect on 6 April 2016, including:

- the planned restrictions to the AA for higher earners, by tapering the AA for individuals with adjusted income above £150,000
- the reduction of the LTA to £1 million
- transitional information requirements to cover the tax year 2015/16, which was split into two "mini tax years" (6 April 2015 – 8 July 2015 and 9 July 2015 – 5 April 2016) so as to align all "pension input periods"[17] with the tax year[18]
- tax on lump sums paid in respect of individuals who die aged 75 and over becoming payable at the recipient's marginal rate.

Applying for tax protection

In the light of the reduction of the LTA to £1 million, transitional protections (FP16 and IP16) are available for those with pension rights already at or around £1 million. While there is no deadline (as such) for applications, individuals who want to rely on either of these protections must apply to HMRC before taking any benefits on or after 6 April 2016.

HMRC's online system due to open in July 2016

Individuals will be able to use an online self-service facility to apply for the new protections and will receive a reference number from HMRC. However, as the online system is not anticipated to be available until July 2016, members wishing to take their benefits between 6 April 2016 and that date will need to write to HMRC informing it of their intention to rely on either or both of the new protections.

On the horizon

Additional changes to the pensions tax rules were announced in this year's Budget[19] and will be implemented in the Finance Act 2016.[20] These include technical changes which aim to ensure the tax rules operate as intended following the introduction of retirement flexibility in 2015.

The Government also intends to introduce a package of measures to tackle the continued promotion of so-called "disguised remuneration" schemes.[21] Provisions have been included in the Finance Bill 2016 aimed at preventing schemes which seek to exploit a particular weakness in the current legislation. Further legislation will follow in future Finance Bills, following a technical consultation in summer 2016.

If new disguised remuneration schemes are created following any of these changes, the Government will consider making the legislation retrospective to 25 November 2015 – the date of the 2015 Autumn Statement when the Government announced its intention to take action against such schemes.

17 The period over which pension savings are measured for the purposes of testing against the AA
18 HMRC has published guidance on the transitional provisions for aligning pension input periods
19 See our Alert: Budget 2016 (16 March 2016)
20 See our Alert: Finance (No.2) Bill 2016 (29 March 2016)
21 See our Alert: Budget 2016 (16 March 2016) for an explanation of what constitutes disguised remuneration

Regulatory

The Pensions Regulator

DC compliance and enforcement

TPR consulted on an updated draft DC compliance and enforcement policy. This will be relevant to trustees, scheme managers and those who could be subject to TPR's statutory powers of investigation and enforcement, such as service providers, employers and professional advisers.[22]

TPR updating its policy

Among other things, the revised draft policy includes proposals to broaden TPR's proactive approach, a new procedure for exercising powers in relation to the new charges and governance requirements, and a new mechanism for calculating mandatory penalties for a breach of the requirement to produce a chair's annual statement.

Employer Covenant Working Group

Formal launch and guide to covenant assessment

The ECWG, a forum for employer covenant advisers, announced its formal launch when it published a practical guide for trustees, sponsors and advisers of DB schemes. The guide covers the principles of covenant assessment for scheme valuations and aims to provide guidance on some leading practice principles that underpin independent covenant assessments.[23]

Pension Protection Fund

Financial Assistance Scheme to close to new members

From 1 September 2016, the FAS will be closed to new members.

No new FAS members from 1 September 2016

Trustees, advisers, former trustees and/or former advisers of any pension scheme believed to be a qualifying scheme not yet notified to FAS are encouraged to notify as soon as possible.

The PPF notes that members currently receiving, or with a deferred entitlement to receive, assistance payments from the FAS will not to be affected by this announcement.

Persons with significant control

Requirements for corporate trustees

Since 6 April 2016, companies (including trustee companies), have been required to identify and record the people or legal entities that own or control them and to maintain a PSC register. The aim of the register is to increase transparency over who owns and controls UK companies, with a view to helping inform investors and support law enforcement agencies in money laundering.[24]

Failure to comply is a criminal offence

A PSC is an individual who meets certain conditions relating to ownership and control of the company. Trustees must take reasonable steps to determine whether any individual or legal entity must be recorded in the PSC register. The information in the register, which must be kept up-to-date at all times, must be provided to Companies House as part of the annual "confirmation statement", which will replace the annual return from 30 June 2016.

22 Draft DC compliance and enforcement policy consultation (closed 3 May 2016)
23 Principles of covenant assessment for scheme valuations (March 2016)
24 See our Alert: Persons with significant control regime & corporate trustees (4 March 2016)

EU developments

Pensions news

EU pensions directive

The draft for a new pensions Directive is in the final stages of negotiation between the EU Commission, Parliament and Council, and is expected to be finalised in the coming weeks.[25]

EIOPA halts work on pensions solvency requirements

"Holistic balance sheet" funding proposals shelved

EIOPA has published its opinion[26] on a "common framework for risk assessment and transparency for institutions for occupational retirement provision". It is not currently recommending the harmonisation of capital or funding requirements for pension schemes based on its "holistic balance sheet" approach (a measure for valuing pension schemes which would have required liabilities to be balanced by a mixture of assets, contingent assets, sponsor support and possible access to compensation schemes). However, EIOPA does recommend the introduction of a new reporting regime which could run alongside existing funding requirements. It will be for the EU Commission, together with the Parliament and Council, to decide whether to develop such a framework.

Single market for personal pension products

EIOPA has been consulting on the development of an EU single market for personal pension products. The consultation paper contains EIOPA's final advice on the attractiveness and feasibility of a Pan-European Personal Pension Product.

New consultation due in June 2016

Meanwhile, Lord Hill, the commissioner for Financial Stability, Financial Services and Capital Markets Union, has said[27] that the EU Commission will launch a consultation in June 2016. The aim of the consultation will be to map out what can be done to support the development of an EU private pensions market, aimed at complementing, rather than replacing state and occupational pensions.

Data protection

General Data Protection Regulation

A new regulation and directive have been published to replace the Data Protection Directive.[28] The rules aim to give citizens back control of their personal data and create a uniform level of data protection across the EU which is fit for the digital era. The regulation will apply from 25 May 2018, while member states have until 6 May 2018 to implement the provisions of the directive in national legislation.

New EU-US data flow framework

New data flow arrangement under negotiation

In February 2016, the EU Commission reached agreement with the US on a framework for facilitating transatlantic data flows – the "EU-US Privacy Shield". This is due to replace the former "Safe Harbor" and is intended to provide stronger obligations on companies in the US to protect the personal data of Europeans and stronger monitoring and enforcement by the US Department of Commerce and Federal Trade Commission through increased cooperation with European Data Protection Authorities. However, the EU's Commission's data protection working party has raised some concerns and recommended further negotiation on the proposal.[29]

25 See our Alert: Pensions back on the EU agenda (1 April 2014)
26 Opinion to EU Institutions on a Common Framework for Risk Assessment and Transparency for IORPs (14 April 2016)
27 In a speech to the Joint ECB-European Commission Conference on 25 April 2016
28 The Regulation and Directive were published in the Official Journal of the EU on 4 May 2016
29 Opinion 01/2016 on the EU-U.S. Privacy Shield draft adequacy decision (adopted 13 April 2016)

Cases

High Court

Hughes v the Royal London Mutual Insurance Society Limited

The position for trustees and administrators has been clarified

The High Court has overturned a decision of the PO which had allowed a scheme's trustees to decline a member's transfer request where there were concerns about the possibility of a pension scam. The court disagreed with the PO's interpretation of the relevant legislation.

The decision clarifies the position of trustees and administrators on the parameters for paying a CETV and was welcomed by the PO for the instruction it provides. The important thing for trustees and administrators remains the duty to carry out appropriate due diligence and to communicate any concerns to the individual who has requested the transfer.[30]

Pensions Ombudsman

Mather v Teachers' Pension Scheme

The Deputy PO held that, in this case, it was reasonable for the member to have relied upon the incorrect retirement benefit quotations provided to her.[31]

Schemes should take care over wording of disclaimers

Mrs Mather had two periods of service with the TPS. In respect of the first, she received a refund of her contributions. However, this was not reflected in her record when she rejoined the TPS some eight years later. The annual statements she subsequently received were based on the incorrect record. The statements included the wording "every effort has been made to ensure accuracy", which the Deputy PO found not to be the case. The mistake only came to light 17 years later.

The Deputy PO was satisfied that Mrs Mather was unaware of the mistake and had relied on the incorrectly quoted figures, making significant and irreversible financial decisions. The TPS was ordered to pay the amount of pension due in respect of the refunded period, plus interest, less the actual amount of the refund made in 1979 (plus interest on that amount).

Webber v Department for Education

The basic rule is that the time limit for recovery of overpayments is six years. Where the overpayment is based on a mistake, time does not start to run until the mistake has been discovered or could with reasonable diligence have been discovered.[32]

How far back can a scheme look for recovery?

Mr Webber also had two periods of service with the TPS. Under TPS rules, his pension should have been reduced on returning to service, when his salary exceeded a certain threshold. As this did not happen, his pension was overpaid.

The PO was required to determine the cut-off date from which the TPS could reclaim the overpaid pension. In this case, it was the date when the TPS demanded recovery of the overpaid pension, rather than the date when Mr Webber's complaint was accepted for investigation. The PO found that to decide otherwise would mean that members could delay bringing a complaint in order to limit a scheme's ability to recover overpayments.

30 See our March 2016 Pensions & investment litigation briefing for more detailed analysis
31 See our summary: Mather v Teachers' Pension Scheme
32 See our summary: Webber v Department for Education

Upcoming seminars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on particular topics.

Pensions & investment litigation seminar: trustee protections	17/05/16	Lunchtime seminar (12:30pm-2:00pm) An interactive discussion on trustee protections, designed to share practical advice and tips on different forms of trustee protection
Pensions & investment litigation seminar: trustee protections	19/05/16	Breakfast seminar (09:00am-10:30am) An interactive discussion on trustee protections, designed to share practical advice and tips on different forms of trustee protection
Pension Managers' Forum	14/07/16	Lunchtime seminar (11:30am-1:30pm) Forum for pension managers to ask questions and share experience on a range of topics and issues
Quarterly legal update	28/07/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	10/11/16	Breakfast seminar (09:00am-10:30am) The latest legal and regulatory developments in the pensions world

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Recent publications

See our latest pensions & investment litigation briefing for a detailed look at recent case law, and the practical lessons for trustees and employers.

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