Quarterly briefing

March 2017

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

Q1

March 2017

On the front cover this quarter: Carly Rees, Associate, Emily Forrest, Partner and Andrew Worthington, Associate

Abbreviations

AA: Annual Allowance

ABI: Association of British Insurers

ABC: Asset Backed Contribution

CJEU: Court of Justice of the European Union

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ESG: Environmental, Social and Governance

EU: European Union

FCA: Financial Conduct Authority

FRS: Financial Reporting Standard

GMP: Guaranteed Minimum Pension

HMT: HM Treasury

ICAEW: Institute of Chartered Accountants in England and Wales

IORP II: Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision

IRM: Integrated Risk Management

ISA: Individual Savings Account

LTA: Lifetime Allowance

MAS: Money Advice Service

NIC: National Insurance Contribution

PPF: Pension Protection Fund

QOPS: Qualifying overseas pension scheme

QROPS: Qualifying recognised overseas pension scheme

TPAS: The Pensions Advisory Service

TPR: The Pensions Regulator

In this issue

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Current legal agenda

Spring Budget 2017

The Government's next Budget will be delivered on 8 March 2017. As announced at the Autumn Statement 2016,[1] following this year's spring Budget, future Budgets will be delivered annually in the autumn.

PPF deadlines

See page 9 for full list of PPF levy deadlines for 2017/18

Midnight on 31 March 2017 is the deadline for submitting scheme returns on Exchange, as well as certificates relating to contingent assets, ABCs and mortgage exclusions.

Reduction of the Money Purchase Annual Allowance

The money purchase AA of £10,000 (which applies to individuals who have flexibly accessed their pension savings) is set to be reduced to £4,000 with effect from 6 April 2017.[2] This move is intended to limit the extent to which pension savings can be recycled to take advantage of tax reliefs.

Pensions advice allowance

Also from 6 April 2017, individuals will be able to use up to £1,500 in total from their DC pension pots tax-free to pay for regulated retirement advice. This money can be used on up to three separate occasions (but only once in any tax year), in chunks of up to £500.

At the same time, a new income tax exemption will be introduced to cover the first £500 worth of employer arranged pensions advice provided to an employee in a tax year. This will allow advice on general financial and tax issues relating to pensions, as well as general pensions advice. Previously, the exemption was limited solely to pensions advice and capped at £150.

Early exit charges

See page 4 for details

The FCA's rules on capping early exit charges in contract-based schemes are due to come into force from 31 March 2017, while the DWP rules for occupational and personal pension schemes are expected to apply from 1 October 2017.

Also on the horizon: A DB green paper

A Government green paper looking at options to improve the sustainability of DB schemes is expected in the first part of this year.

Potential impact of Brexit

March 2017 is earmarked for the Government to trigger the start of the UK's exit from the EU. The Government's formal notice under Article 50 will kick-start the two-year process during which the UK's exit terms are negotiated. But before the two-year period is up, the Government will need to take action to deal with the General Data Protection Regulation and the new Pensions Directive.[3]

1 See our Alert: Autumn Statement 2016 (23 November 2016)
2 An HMT consultation on this proposal closed on 15 February 2017. The Government's response is awaited
3 See our Alert: IORP II – the new Pensions Directive (24 January 2017)

Retirement savings reforms

GMP equalisation

DWP proposes new methodology

The Government's responses to these consultations are awaited

The DWP has been consulting on a new methodology for equalising pensions for the effect of inequalities caused by GMPs in private pension schemes.[4] The DWP's proposed new methodology seeks to achieve equal benefits in private sector pension schemes using a one-off calculation followed by GMP conversion. Alongside the consultation, the DWP published a "ten-stage possible process for resolving the GMP inequalities issue".

Meanwhile, HMT consulted separately on how best to treat GMPs for affected members of public service pension schemes. HMT is considering various options as it seeks to achieve equal benefits and honour the commitment by successive governments to fully index public service pensions, including the GMP.

DC schemes

DC bulk transfers without consent

Call for evidence closes 21 February 2017

The DWP is looking at how provisions on DC bulk transfers without member consent could be improved.[5] Among other things, its call for evidence asks how the current process could be simplified, while ensuring that members are adequately protected. The Government is particularly interested in:

- transfers from occupational pension schemes, including views on the role of the actuarial certificate and the relationship between the transferring and receiving schemes
- transfers from stakeholder pension schemes.

Early exit charges

The Government is due to introduce, from October 2017, a cap on early exit charges imposed by trustees, managers and/or providers of occupational and personal pension schemes when a member leaves the scheme early in order to access their benefits flexibly. The cap will be 1% for existing members of occupational pension schemes, and 0% for new members, to align with the FCA's approach in relation to contract-based pensions.[6]

The FCA's rules for contract-based pension schemes are due to be brought into force from 31 March 2017.

Automatic enrolment

Automatic enrolment thresholds

The DWP has confirmed the automatic enrolment thresholds for the tax year 2017/18:[7]

- the earnings trigger (for establishing eligibility) will remain at £10,000
- the qualifying earnings band (for calculating contributions) will continue to be aligned with NIC rates – £5,876 for the lower limit of the qualifying earnings band and £45,000 for the upper limit.

4 See our Alert: GMP equalisation (1 December 2016)
5 See our Alert: Call for evidence – Bulk transfers of DC pensions without member consent (5 January 2017)
6 See our Alert: Capping early exit charges: government response (16 November 2016)
7 Automatic Enrolment Review Scope and Annual Thresholds Review: Written statement (12 December 2016)

Automatic enrolment review

The DWP is to review automatic enrolment with the aim of encouraging more people to save into a workplace pension.[8]

Terms of reference for review to be announced

The review will be supported by an external group chaired by and made up of experts from within the pensions industry, and representatives of member and employer interests. It will consider the success of automatic enrolment to date, and explore ways that the policy can be further developed.

It aims to gather evidence on groups such as people with multiple jobs who do not qualify for automatic enrolment in any one job, and consider how the growing numbers of self-employed people can be helped to save for their retirement. The review will also examine the automatic enrolment thresholds for triggering saving and the age criteria for when people will start to be automatically enrolled.

Master trusts

Master trust regulation

The Pension Schemes Bill 2016/17, which is set to provide for the closer regulation of master trusts, is currently undergoing scrutiny in the House of Commons.[9] We understand that the Bill is due to receive Royal Assent around April 2017.

Much of the detail relating to the new authorisation and approval regime for master trusts will be included in regulations made once the Bill has been passed as an Act.

Master Trusts: ICAEW updated assurance framework

The ICAEW has published its revised master trust supplement, bringing the voluntary assurance framework up-to-date with current legislation and TPR's DC guidance and code of practice, and providing greater trustee responsibility for control processes related to governance.[10]

The revised framework allows trustees to assess their governance systems and processes and to prepare for the changes announced in the Pension Schemes Bill.

International

Overseas pensions

Transfers of pension savings that have had UK tax relief can be made free of UK tax (up to the LTA) to schemes that meet the conditions to be a QOPS or QROPS. Draft regulations[11] provide for a number of changes to the conditions, by:

Regulations due in force 6 April 2017

- replacing the "70% rule", which requires at least 70% of UK tax-relieved funds to be used to provide a member with an income for life, with a requirement for those providing non-occupational pension schemes to be regulated in the country where the scheme is established, if the scheme itself is not regulated
- amending the "pension age test", which requires that benefits paid out of UK tax-relieved funds can generally be paid no earlier than age 55, so that in the alternative, payments made before age 55 can be made where it would be an authorised payment if paid by a registered pension scheme, for example, a refund of excess contributions lump sum.

8 Review of automatic enrolment to build on success (DWP, 12 December 2016)
9 See our Alert: Pension Schemes Bill (21 October 2016)
10 Assurance reporting on Master Trusts (Master Trust Supplement to ACAEW AAF 02/07) (30 November 2016)
11 The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) (Amendments) Regulations 2017 (draft regulations)

IORP II – the new Pensions Directive

A new EU Pensions Directive has been finalised and must be implemented by Member States within two years.[12] With a focus on governance and transparency, many of IORP II's measures are aimed at better protecting the benefits of members and beneficiaries. New provisions include:

Member States must introduce provisions into national law by 13 January 2019

- a requirement for a Pension Benefit Statement containing standard key information to be given to each member
- an obligation on Member States to allow IORPs to take into account the potential long-term impact of investment decisions on ESG factors
- the ability for schemes operating cross-border to have a deficit and put a recovery plan in place for a limited period, subject to regulatory supervision.

With the implementation period running slightly ahead of, but largely in parallel to, the UK's Brexit negotiations, it is not yet clear how (if at all) the Directive's provisions will be introduced into UK law.

Lifetime ISAs

Legislation in force

Lifetime ISAs are set to become available to investors from 6 April 2017.

The Savings (Government Contributions) Act 2017[13] received Royal Assent on 16 January 2017. The Act provides for government bonuses to be paid into a Lifetime ISA equal to 25% of the individual's contributions, up to a maximum of £1,000 per tax year. Further details, including entry criteria, and the conditions, processes and evidence required for withdrawing funds without triggering a charge, will be set out in regulations.

Regulation of providers

The FCA proposes to regulate Lifetime ISAs in the same way as other ISA products, with additional protections to reflect their dual purpose (helping individuals save either for a deposit for their first home or for their retirement) and restrictions on accessing funds.[14]

The FCA proposes that firms will be required, among other things, to:

Consultation response awaited

- give specific risk warnings at the point of sale which include reminding consumers of the importance of ensuring an appropriate mix of assets is held in the Lifetime ISA
- remind consumers of the early withdrawal charge and any other charges
- note the risk of potentially losing employer contributions to a workplace pension for which consumers may be eligible and, where the individual chooses to open a Lifetime ISA, offer a 30 day cancellation period after sale.

12 See our Alert: IORP II - the new Pensions Directive (24 January 2017)
13 See our Alert: Government publishes draft legislation to introduce Lifetime ISAs (9 September 2016)
14 Handbook changes to reflect the introduction of the Lifetime ISA: CP 16/32 (16 November 2016)

Regulatory

Association of British Insurers

The ABI, together with seven leading investment and pension trade associations, has been consulting[15] on ways to improve the process of transferring pension and investment assets. This work has been undertaken in consultation with the FCA, DWP and TPR.

Recommendations due in spring 2017

The consultation sought feedback on proposals to improve processes for the transfer and re-registration of investment and pension assets, including the creation of clear service expectations for transfers and re-registrations, the development of common industry standards and good practice guidelines for the retail investment and pensions industry, and the establishment of an independent governance and oversight body to oversee the implementation of the final proposals.

Department for Work and Pensions and HM Treasury

Consultation on measures to address pension scams

HMT and the DWP are jointly consulting on a package of measures aimed at tackling three different areas of pension scams:[16]

- a ban on cold calling
- limiting pension scheme members' statutory right to transfer in certain circumstances, with a view to protecting individuals' savings
- making it a requirement that only active companies can register a pension scheme, to discourage inappropriate use of single-member occupational pension schemes.

The Government's response is awaited

In relation to statutory transfers, it is proposed that the right will only exist where the receiving scheme is a personal pension scheme operated by an FCA authorised firm, a genuine employment link to the receiving occupational pension scheme can be demonstrated, or the receiving occupational pension scheme is an authorised master trust.

New financial guidance body

The DWP and HMT are consulting on the creation of a single financial guidance body to replace MAS, TPAS and Pension Wise.[17]

New body to be created "no earlier than autumn 2018"

The consultation sets out a plan for how publicly funded debt advice, money guidance and pensions information and guidance will be brought within the remit of one body. The Government also expects the new body to take on a strategic role, working with the charity and financial services sectors to understand and meet consumer need "in a value for money way".

It is intended that MAS, TPAS and Pension Wise will operate as normal until the new body is introduced.

15 Improving pension and investment transfers and re-registrations (5 December 2016)
16 See our Alert: Government consults on measures to combat pension scams (8 December 2016)
17 Public financial guidance review: consultation on a single body (19 December 2016)

Financial Conduct Authority

The FCA's expectations on pension transfers

The FCA has issued an alert outlining its expectations in relation to financial advice on pension transfers involving DB or other schemes with safeguarded benefits.[18] The FCA expects firms "to consider the assets in which the client's funds will be invested as well as the specific receiving scheme" and notes that it is the responsibility of the firm advising on the transfer to take into account the characteristics of these assets.

FCA rules set out what a firm must do in preparing and providing a transfer analysis. In particular, they require a comparison between the benefits likely (on reasonable assumptions) to be paid under a DB scheme and the benefits afforded by a personal pension scheme, stakeholder scheme or other pension scheme with flexible benefits. Among other things, the alert goes on to explain that only firms with the relevant FCA permission may advise on pension transfers; how to deal with insistent clients; and how overseas pension transfers should be approached.

Asset Management Market Study

The FCA's research to assess whether institutional and retail investors get good value for money when purchasing asset management services, suggests that there is weak price competition in a number of areas of the asset management industry.[19]

The FCA's findings include:

- there is limited price competition for actively managed funds, meaning that investors often pay high charges. On average, these costs are not justified by higher returns
- fund objectives are not always clear, and performance is not always reported against an appropriate benchmark
- investment consultants undertake valuable due diligence for pension funds but are not effective at identifying outperforming fund managers.

Consultation closes 20 February 2017

The FCA has proposed a "significant package of remedies" that seek to "make competition work better", and to protect those least able to engage actively with their asset manager. This will include requiring increased transparency and standardisation of costs and charges information for institutional investors, and exploring the potential benefits of greater pooling of pension scheme assets.

Pension Protection Fund

Levy determination for 2017/18

The PPF has confirmed its levy rules for 2017/18,[20] which will stay largely the same as for the levy year 2016/17. The most significant change is that the PPF will allow employers to certify an adjustment to the figures in their accounts where the move to new UK accounting standard FRS 102 (or FRS 101) would otherwise cause an artificial movement in their levy rating.

Consultation on levies for 2018/19-2021/22 due in spring 2017

Unusually, the levy rules have been published provisionally to allow the PPF time to consult on a potential new approach for calculating risk-based levies for schemes with no sponsoring employer. However, the PPF has confirmed that there will be no other changes and encourages employers and trustees to take immediate action.

18 Advising on pension transfers – our expectations (FCA, 24 January 2017)
19 Asset Management Market Study – interim report (MS15/2.2) (18 November 2016)
20 See our Alert: PPF levy determination for 2017/18 (4 January 2017)

Regulatory cont.

Act now to certify or recertify contingent assets or ABCs

Levy deadlines

The following dates and deadlines have been confirmed for the 2017/18 levy year:[21]

- **31 March 2017 (midnight):**
  - scheme returns to be submitted to TPR using Exchange. Information from the scheme return is used in levy calculations
  - certification of new and recertification of existing contingent assets on Exchange with hard copy documents to the PPF (as necessary)
  - ABC certificates to be submitted to the PPF
  - submission of mortgage exclusion certificates and supporting evidence to Experian
  - accounting standard change certificates with supporting evidence to be sent to Experian
- **28 April 2017 (5pm):** deficit reduction certificates to be submitted on Exchange
- **30 June 2017 (5pm):** complete certification of full block transfers on Exchange or (in limited circumstances) to the PPF.

Changes to section 143 and section 179 assumptions

The PPF has confirmed it will make changes to the actuarial assumptions used in section 179 and section 143 valuations.[22]

Section 143 valuations are used to determine whether a scheme should enter the PPF following an insolvency event. Section 179 valuations are used to calculate scheme underfunding to determine the risk-based pension protection levy that a scheme should pay. The most significant changes are:

- the use of separate discount rates for pensioners and non-pensioners post retirement
- the use of yield indices that have durations that better match average liability durations, including the introduction of a new index-linked gilt yield, and
- updated mortality assumptions.

Risk appetite statement

The PPF has published a revised "risk appetite" statement which sets out the PPF Board's attitude towards its key strategic, funding, financial and operational risks. In particular, it sets out the level of risk that the Board chooses to take in pursuit of its strategic objectives.[23]

The risk appetite is set and reviewed annually by the Board, and monitored by the Risk Audit Committee and the Investment Committee.

Purple Book

The PPF has published the eleventh edition of the Purple Book, for the year to 31 March 2016.[24] It shows that trends were stabilising after a decade of major changes in the DB universe, with scheme funding little changed over the 12-month period. However, while scheme funding remained largely stable in the year to March, there have been large swings in funding since June 2016.

21 See our Alert: PPF levy determination for 2017/18 (4 January 2017)
22 Response to the 2016 consultation on assumptions to be used for valuations under section 143 and section 179 of the Pensions Act 2004 (November 2016)
23 Board risk appetite (PPF, 5 January 2017)
24 The Purple Book 2016 (8 December 2016)

The Pensions Regulator

Record keeping – new reporting requirement

Schemes to report in annual return

TPR is to ask trustees to report on record keeping in their scheme return to help improve standards. This follows a survey by TPR which revealed "little recent improvement" in record keeping, which TPR deems essential to deliver value for money and protect member outcomes.

To help schemes meet their duties, TPR has launched a quick guide to record keeping and will be providing further educational products in 2017.[25]

Scheme returns – DB and hybrid schemes

TPR has published guidance to help those completing 2017 scheme returns for DB and hybrid occupational pension schemes.[26] Two checklists supplement the existing guidance on the scheme questions on Exchange, and a set of questions and answers specifically for DB and hybrid schemes is provided. Questions added to the 2017 scheme return form ask for:

- details of memberships, assets, contributions and scheme leavers
- confirmation, where applicable, that the chair's statement has been prepared and signed
- confirmation as to whether the scheme is an "Executive Pension Scheme".

21st Century trusteeship and governance

TPR is to undertake a "targeted education and enforcement drive" during 2017, according to the response to its 21st Century trusteeship and governance discussion paper.[27] It will seek to make its expectations clearer about what "good looks like" and use data to more effectively target its communication approach, as well as tailoring its methods to the scheme size, type and compliance history.

TPR to launch education drive in spring 2017

TPR plans to:

- set out clearly the higher standards it expects of a professional trustee
- define what it means by a "professional trustee"
- continue to encourage and support lay trustees through the development of the Trustee toolkit and targeted guidance and self-help tools
- seek to encourage employers to allow lay trustees time off to prepare for and attend trustee board meetings, and to provide the additional financial support needed for them to receive effective training.

Guide to integrated risk management – smaller DB schemes

TPR has also published a new quick guide to IRM which sets out how trustees of smaller schemes, who may have limited resources, can benefit from IRM and how they can get started, including understanding their scheme's sensitivity to risk and enabling them to agree a sustainable plan with the employer to help deliver promised member benefits. The new guide is designed to be used in conjunction with TPR's full IRM guidance.

25 A quick guide to record keeping (TPR, November 2016)
26 DB scheme return guidance
27 21st Century Trusteeship and Governance – discussion paper response (16 December 2016)

Cases

Court of Justice of the European Union

Parris v Trinity College Dublin and others

The CJEU found that a provision in a scheme's rules which required members to marry before the age of 60 (or before retirement, if earlier) for full survivors' benefits to be payable, did not constitute discrimination on the grounds of age or sexual orientation.[28] This was despite the fact that it was legally impossible for the claimant to enter into a civil partnership or same sex marriage before reaching that age.

No requirement to provide survivors' benefits

Dr David Parris sought to establish that his same sex partner, with whom he had lived for more than 30 years, would be entitled to receive a survivor's pension on his death. The Irish court was said to have been satisfied that Dr Parris and his partner "would have married or contracted a civil partnership many years ago had that been legally possible". It became possible for same sex couples to enter into civil partnerships in the UK on 5 December 2005, and in Ireland on 1 January 2011.

The CJEU found that Member States are free to provide or not provide for marriage for persons of the same sex or for an alternative form of legal recognition of their relationship. As the Equal Treatment Framework Directive is "without prejudice to national laws on marital status and the benefits dependent thereon", it did not require Ireland to provide for civil partnership or same sex marriage before 1 January 2011, nor to give the legislation retrospective effect.

Employment Tribunal

McCloud v Lord Chancellor and Secretary of State for Justice

The claimants in this case had all been members of the judicial pension scheme (JPS) before 1 April 2015 and were compulsorily transferred into a replacement scheme, referred to in the judgment as "the new judicial pension scheme" (NJPS). The latter provides less favourable benefits than the JPS and also creates an exception so as to allow older judges to remain members of the JPS until either retirement ("full protection members") or until the end of a period of tapered protection (a "tapered protection member"), dependent on their age.[29]

Employers must ensure they can clearly demonstrate why transitional arrangements are appropriate and necessary in the particular circumstances

The claimants alleged that the transitional provisions constituted unlawful age discrimination and, in addition, that the changes were indirectly discriminatory on grounds of sex and race following recent improvements in diversity in the judiciary.

The judge concluded that, by reason of the transitional provisions, the respondents had treated and continued to treat the claimants less favourably than their comparators because of their age, and had failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim. While the objective identified an age group to be protected, it failed to identify a wider underlying aim (ie an answer as to why that was the aim), not least because the evidence indicated that those closest to retirement were, in fact, the least adversely affected by the reforms. This meant the provisions constituted unlawful age, as well as sex and race, discrimination.

28 See our case summary: Parris v Trinity College Dublin (CJEU)
29 See our case summary: McCloud v Lord Chancellor and Secretary of State for Justice

Sackers

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 for new trustees	26/04/17	All day workshop (9:00am-3:30pm) Aimed at new trustees or those wanting a refresher on DB and DC benefits, this session will look at key legal issues for trustees
Quarterly legal update	11/05/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Pension & investment litigation seminar	23/05/17	Lunch time seminar (12:30pm-2:00pm) An interactive discussion designed to share practical advice and tips on overpayments
Pension & investment litigation seminar	25/05/17	Breakfast seminar (9:00am-10:30am) An interactive discussion designed to share practical advice and tips on overpayments
Finance and investment seminar – governance and risk	01/06/17	Evening seminar (5:00pm-7:00pm) An interactive discussion exploring the increasing obligations on trustees concerning investment governance and risk
Pension managers' forum	15/06/17	Lunch time seminar (11:30am-1:30pm) Forum for pension managers to ask questions and share experience on a range of topics and issues

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Knowledge

Pensions & investment litigation briefing

Our regular litigation briefing reviews case law and examines the practical lessons for trustees and employers. The latest edition looks at some issues that are beginning to emerge in the new world of retirement freedoms, including the case of one individual who didn't get the smooth ride they were expecting when transferring their benefits to access them flexibly.

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