Sackers

Quarterly briefing

March 2019

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

Q1
March 2019

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In this issue

Abbreviations

CA: Court of Appeal

CJEU: Court of Justice of the European Union

CPI: Consumer Prices Index

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

EEA: European Economic Area

Exit Day: 11:00pm on 29 March 2019

FCA: Financial Conduct Authority

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

IORP II: Directive (EU) 2016/2341/EC on the activities and supervision of institutions for occupational retirement provision

LTA: Lifetime Allowance

MAS: Money Advice Service

PASA: Pension Administration Standards Association

PPF: Pension Protection Fund

QROPS: Qualifying Recognised Overseas Pension Schemes

RPI: Retail Price Index

SC: Supreme Court

SFGB: Single Financial Guidance Body

SPA: State Pension Age

TPAS: The Pensions Advisory Service

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

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Current legal agenda

1 January 2019
Single Financial Guidance Body

The SFGB (which is due to be renamed this year) has taken on the services formerly provided by TPAS, MAS and Pension Wise.

9 January 2019
Cold calling ban

Firms are restricted from making unsolicited direct marketing calls to individuals regarding pension schemes (subject to limited exceptions).

13 January 2019
IORP II

Regulations pave the way for the governance aspects of IORP II.[1] The onus is now on TPR to update various codes of practice. The revised codes are expected to come into force later this year.

A second set of regulations provides for changes to the cross-border schemes regime.

13 March 2019
Spring Statement

To be delivered by the Chancellor, Philip Hammond.

29 March 2019
Brexit

While much remains uncertain at the time of writing, TPR has issued a statement[2] noting that it does not expect Brexit to have a significant effect on the basis on which workplace pension schemes operate, or on trustees' ability to continue administering their schemes effectively. See page 4 for information, and our latest Finance & investment briefing for key issues for pension scheme investments.[3]

31 March 2019
PPF levy deadlines

The deadline for submitting scheme returns and contingent asset certificates on Exchange is midnight on 31 March 2019 (a Sunday), with hard copy documentation due (where necessary) by 5pm on 1 April 2019 (see page 6 for more details).[4]

1 April 2019
Master trust authorisation

All DC master trusts must apply for authorisation by this date, or be winding up.[5]

6 April 2019
Auto-enrolment minimum contribution increases

For DC schemes used to meet an employer's automatic enrolment requirements, both minimum employer and overall contribution rates are set to rise from 6 April 2019. This is the second successive annual increase in minimum contributions, and the last one currently scheduled to take place under legislation.[6]

6 April 2019
Pooled fund disclosure obligations

New measures on the disclosure of information on a scheme's pooled funds come into force, as part of the Government's drive to improve the transparency of costs, charges and investments in DC schemes.[7]

Summer 2019?
Pensions Bill 2019/20

The Minister for pensions and financial inclusion, Guy Opperman, has signalled his intention to deliver a wide-ranging Pensions Bill on collective DC, pensions dashboards and DB superfunds, among other things.

1 See our Alert: IORP II – green light for good governance (24 October 2018)
2 TPR statement on the UK's exit from the EU (24 January 2019)
3 See our Finance & investment briefing (March 2019)
4 PPF levy 2019/20: Key Dates
5 See our DC hot topic: Master trust authorisation (September 2018)
6 See our Alert: Auto-enrolment – minimum contribution increases from 6 April 2019 (4 September 2018)
7 See our Alert: Consultation outcome – Improving disclosure of costs, charges and investments (28 February 2018)

Spotlight on Brexit

The Pensions Regulator

Statement on Brexit

TPR has published a statement on the UK's exit from the EU,[8] aimed primarily at DB scheme trustees.

TPR notes that Brexit should not "have a significant effect in respect of the legislative basis under which schemes operate or trustees' ability to continue to administer their scheme effectively". However, it highlights some specific areas to which trustees should pay attention.

TPR's annual funding statement due in early March 2019

TPR explains that, "where relevant, trustees should undertake a review of any actions or contingency plans in the context of 'no deal', if they have not already done so". It also asks trustees to familiarise themselves with the DWP's guidance on the payment of occupational pension benefits to EU citizens in the UK[9] and UK nationals in the EU[10] in a 'no deal' scenario, and to consider cross-border issues where relevant.

The statement also notes that TPR's 2019 Annual Funding Statement is due to be published in early March, and that this will provide an update on TPR's expectations around managing risks from the perspective of DB schemes.

New legislation

Various draft regulations made under the European Union (Withdrawal) Act 2018 aim to make changes to legislation that would otherwise no longer operate effectively in the event that the UK leaves without a withdrawal agreement in place.

Occupational and personal pension schemes[11]

Draft regulations for occupational and personal pension schemes make minor and technical changes to correct elements of the UK's pensions legislation that would not otherwise work effectively after Brexit. This includes where distinctions have been made between EU or EEA Member States and overseas entities that will no longer apply, where the UK is referred to as an EU or EEA Member State, or where the UK is obliged to share data with EU agencies or Member States under reciprocal arrangements that will no longer apply.

"No deal" regulations would come into force on Exit Day

As the UK will no longer be a member of the EU or EEA after Brexit, UK occupational pension schemes will no longer need to obtain authorisation from TPR for cross-border activities. The regulations therefore remove this requirement.

Employer insolvency[12]

Draft regulations on cross-border insolvency seek to replace cross-references to current EU regulations with alternative provisions in the Pension Protection Fund (Entry Rules) Regulations 2005 (and equivalent Northern Ireland legislation) and the Pension Schemes Act 1993.

However, these provisions are complex and, as currently drafted, are unclear as to the full ramifications for PPF entry for schemes with EU-based employers. The DWP has been made aware of the potential issues for these schemes.

8 Statement on the UK's exit from the EU (TPR, 24 January 2019)
9 EU citizens in the UK: benefits and pensions in a 'no deal' scenario (DWP, updated 20 December 2018)
10 UK nationals in the EU: benefits and pensions in a 'no deal' scenario (DWP, updated 20 December 2018)
11 The draft Occupational and Personal Pension Schemes (Amendment etc.) EU Exit Regulations 2018
12 The draft Insolvency (Amendment) (EU Exit) Regulations 2018

Regulatory

Department for Work and Pensions

Automatic enrolment thresholds for 2019/20

The DWP has confirmed the automatic enrolment thresholds for the tax year 2019/20:[13]

New thresholds in force from 6 April 2019

- the earnings trigger (for establishing eligibility) will remain at £10,000 (it has been at this level since the tax year 2014/15)
- the qualifying earnings band (for calculating contributions) will continue to be aligned with National Insurance contribution rates, ie £6,136 for the lower level of qualifying earnings and £50,000 for the upper limit.

HM Revenue & Customs

Guidance on members' contracted-out rights

HMRC has published guidance to help trustees deal with rights in schemes that were formerly contracted-out on a DB basis:

- **Transfer your scheme member's contracted-out pension rights**, which explains the types of schemes to which GMP and post-1997 contracted-out salary related rights can be transferred, and surrounding issues on transfers[14]
- **How to calculate your scheme member's Guaranteed Minimum Pension**, on how to use the revaluation of earnings factors, including sample calculations[15]
- **Provide a pension for your scheme member**, which explains how to provide the minimum level of pension that must be paid, depending on accrued benefits, and according to anti-franking legislation.[16]

Flexible access: guidance on individuals' allowances

HMRC has also published guidance to help individuals who have flexibly accessed their DC benefits to work out:

- when the money purchase annual allowance applies
- what their allowances are, and
- whether they need to pay tax on pension savings.[17]

13 Automatic Enrolment: review of the earnings trigger and qualifying earnings band for 2019/20 (DWP, 4 December 2018)
14 Transfer your scheme member's contracted-out pension rights (HMRC, 19 December 2018)
15 How to calculate your scheme member's Guaranteed Minimum Pension (HMRC, 19 December 2018)
16 Provide a pension for your scheme member (HMRC, 19 December 2018)
17 HMRC guidance: Work out your allowance if you've flexibly accessed your pension (updated 25 January 2019)

Pension Protection Fund

Levy determination for 2019/20

The PPF has published its final levy rules for 2019/20.[18] Following a consultation on the draft rules, the PPF has:

- refined its proposals for a methodology for calculating an appropriate levy for commercial DB consolidators
- determined that there will be no adjustment to the calculation of insolvency risk scores to mitigate the impact of the *Lloyds* decision on GMP equalisation[19]
- confirmed that Existing Type A (parental guarantee) and Type B (security over an asset) contingent assets that include a fixed cap must be re-executed on the PPF's current standard forms (if this has not been done already) and certified in accordance with PPF requirements to be recognised for the 2019/20 levy year.

Start the process to put in place or retain contingent assets as soon as possible

Ahead of invoicing for 2019/20, the PPF will review and publish the criteria it plans to use to assess whether a payment plan should be agreed to and the factors which may allow it to decide to waive interest on payments within a payment plan. In doing so, it aims to reassure schemes facing genuine difficulties in paying their levy.

The PPF is also considering a range of other customer service improvements, particularly with a view to better supporting small and medium-sized enterprises, and intends to investigate the possibility of introducing electronic invoices and a wider range of payment methods.

Levy deadlines

The following dates and deadlines have been confirmed for the 2019/20 levy year:

31 March 2019 (midnight) (a Sunday)

- Asset-backed contribution certificates to be sent by email to the PPF.
- Scheme returns to be submitted to TPR on Exchange.
- Guarantor strength reports (where relevant) to be completed and contingent asset certificates to be submitted on Exchange.

1 April 2019 (5pm)

Contingent asset hard copy documents (including guarantor strength reports) to be delivered to the PPF.

30 April 2019 (5pm)

Deficit reduction contributions certificates to be submitted on Exchange.

28 June 2019 (5pm)

Certification of full block transfers to be completed on Exchange or sent to the PPF (in limited circumstances).

See our website for a full list of the PPF's 2019/20 deadlines

18 See our Alert: The 2019/20 PPF levy determination (9 January 2019)
19 See our Alert: The High Court decides – how to solve a problem like GMP equalisation (26 October 2018)

PPF compensation following the Hampshire case

The PPF has published an update[20] on its plans for implementing the effects of the ruling by the CJEU in the case of *Grenville Hampshire v the Board of the PPF*,[21] requiring all individuals to be guaranteed compensation of at least 50% of their accrued entitlement.

PPF to publish further information in due course

The update confirms that the PPF is continuing to work on its methodology for calculating increases for PPF pensioners. It will then confirm its approach for other categories of member. The PPF will publish statements on how it will handle any missing data, and on future inflation and mortality assumptions. The PPF's approach will remain on an interim basis until new legislation comes into force, or until there are further rulings by the courts.

The PPF believes that "the vast majority of members receive considerably more than 50% of the value of their original scheme benefits" and its approach is to prioritise those who are affected most (ie by the long service cap) first. It hopes to conclude payments for this category by the end of April 2019, providing it has received all necessary information.

PPF updates its insolvency guidance

The PPF has published updated guidance on a range of insolvency issues, including:[22]

- the PPF's legal standing and approach to the governance of insolvency proceedings
- pre-packaged administrations
- potential legal actions contemplated by insolvency practitioners (including how the PPF will view a defence to legal action)
- how "PPF drift" arises and how it should be addressed
- the appointment of independent trustees.

The Pensions Ombudsman

DWP consults on TPO's dispute resolution function and jurisdiction

Following the move, in early 2018, of the TPAS dispute resolution function to TPO, the DWP has been consulting on measures to:

Proposals for the early resolution of disputes

- make new provision for dispute resolution by TPO, in particular a function for the early resolution of disputes before a determination
- allow an employer to make a complaint or to refer a dispute to TPO where it chooses a group personal pension arrangement for its employees, and
- make provision in relation to associated "signposting" requirements.

Subject to the consultation outcome, the DWP intends to legislate to implement these proposals when parliamentary time allows.

20 Update on the European Court of Justice ruling (21 December 2018)
21 See our case summary: Grenville Hampshire v the Board of the PPF (CJEU, 10 September 2018)
22 PPF insolvency guidance and support

The Pensions Regulator

Master trusts have until 31 March 2019 to apply for authorisation or exit the market and wind up

Is your scheme a master trust?

Schemes providing DC benefits where there are multiple and unconnected employers may be master trusts.

TPR has issued a warning to schemes to check whether they fall under the master trust legislation[23] and has published a step-by-step guide[24] to help them do so. TPR explains that it is important for trustees to use its guide and to seek legal advice if they think their scheme falls within the definition.

If a master trust does not apply for authorisation by the deadline, it will be forced to wind up. There is no appeal process, nor another opportunity to file an application.

Master trusts: guidance on triggering event duties

With the new authorisation regime for master trusts now live,[25] TPR has published the latest in its series of guides to help those who run DC master trusts. "Triggering event duties" explains the circumstances which may indicate that a scheme cannot continue to operate.[26]

Early intervention protocol

TPR, the FCA, and the SFGB (in its former TPAS guise) have published a joint protocol aimed at ensuring the bodies work in a co-ordinated way to support pension scheme members. This work includes providing letters for trustees to send to members, alerting them to the risks of transferring out of DB pension schemes, and giving practical information.[27]

The protocol addresses some of the concerns raised by an independent review into the communications and support provided to members of the British Steel Pension Scheme during the 2017/18 restructuring exercise,[28] including the need for "early intervention" and intelligence sharing between the public bodies, and for clear communication materials for trustees in future scheme restructurings. As the protocol was drafted before the review's report was released, it was not able to take account of it fully, but the bodies note that they will consider those recommendations that are not immediately addressed.

Guidance on measuring common and conditional data

TPR issues updated scheme data guide

TPR has updated its guide on measuring pension scheme data,[29] which was first issued following the changes to the scheme return information requirements from 2017/18 onwards.

The guide outlines what data is required, how it should be measured, and how "common" and scheme-specific ("conditional") data scores should be calculated.

23 Schemes warned to check they are master trusts or risk breaking the law (TPR, 13 December 2018)
24 Check if your scheme is a master trust (TPR, 13 December 2018)
25 See our DC hot topic: Master trust authorisation (September 2018)
26 Triggering event duties for master trusts (TPR, November 2018)
27 FCA-TPR-TPAS joint protocol (22 January 2019)
28 Independent review of communications and support given to British Steel Pension Scheme members (22 January 2019)
29 A quick guide to measuring your data (TPR, January 2019)

Pensions tax

Finance (No.3) Bill 2017-19

New measures to take effect from 1 April 2019

Government to "modernise" tax exemptions[30]

The Finance Bill[31] under consideration in the House of Commons includes provisions to widen the tax relief on premiums paid by employers into life assurance arrangements to allow named beneficiaries to be any individual or a registered charity. Currently, premiums only attract tax relief if the named beneficiary is an employee or a member of their family or household.

Contributions to QROPS will also fall within the exemption.

Overseas transfer charge

Regulations due in force 24 April 2019

Consultation on draft regulations

Since 9 March 2017, a 25% overseas transfer charge is deductible from transfers of UK pension savings to QROPS, except in set circumstances.

HMRC has issued two sets of draft regulations for technical consultation to which its response is awaited:[32]

1. The first deals with the conditions and the process for claiming a repayment of the overseas transfer charge, where the charge was either paid in error or a change in the individual's circumstances now means that the original transfer was exempt from the charge.

2. The second seeks to align the existing information requirements with those detailed in the draft Repayment of Overseas Transfer Charge regulations, by clarifying the information now required under the repayment claims process.

Lifetime Allowance

LTA increases in line with CPI

LTA increase confirmed

Regulations have been made which confirm the increase in the standard LTA, from £1,030,000 to £1,055,000, with effect from the start of the 2019/20 tax year.[33]

The increase is in line with the rise in CPI for the 12 months to the end of September 2018. The LTA is currently set to continue to rise in future years in line with annual CPI increases, with the figure to be confirmed each year in regulations.

30 HMRC policy paper: Reform of employer contributions into life assurance and overseas pension schemes (Updated 9 November 2018)

31 Finance (No.3) Bill 2017-19

32 Draft legislation: repayment of the overseas transfer charge

33 The Finance Act 2004 (Standard Lifetime Allowance) Regulations 2019 (10 January 2019)

In other news

Defined benefit pension scheme consolidation

DWP consults on the consolidation of DB schemes into "superfund" entities

The DWP has set out its proposals for authorising and regulating DB superfund consolidation vehicles.[34] A basic superfund structure includes a corporate entity, a statutory employer, a DB pension scheme, a capital buffer and, potentially, in-house service providers. Individual models differ, but the DWP considers the main characteristics to be that:

Voluntary clearance from TPR is required for any transfer into a superfund until the new regime is in place

- the superfund is, or contains, an occupational pension scheme set up for the purposes of effecting consolidation of DB pension schemes' liabilities
- a transferring scheme's link to the sponsoring employer(s) is severed on transfer to the superfund
- the "covenant" is a capital buffer provided through external investment that sits within the superfund structure, and
- there is a mechanism to enable returns to be payable to persons other than members or service providers.

The DWP aims to create a regulatory regime which gives superfund members equally effective protections as other DB scheme members, and in which specific risks are proactively regulated.

GMP equalisation

Pensions industry working group

A new pensions industry group has been formed to help schemes following the High Court's ruling on equalising benefits for the effect of GMPs in the *Lloyds* case.[35] The group, headed by PASA, aims to help develop and promote best practice on issues arising from the ruling.

HMRC guidance on GMP conversion and equalisation

HMRC has published a brief guidance note on GMP conversion and equalisation.[36] This confirms that "conversion can be used as part of a process by which schemes can remove any inequality between men and women resulting from the GMP rules". It also draws attention to the methodology[37] proposed by the Government in 2017 for achieving this, while noting that this "is not the only method available". HMRC advises schemes considering equalisation to take legal advice.

Bridging pensions

Technical change for schemes operating State scheme integration

In January 2019, the DWP consulted on a draft Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2019.[38]

DWP to make changes as soon as parliamentary time allows

The Order is aimed at schemes operating "State scheme integration" by way of a reduction in the rate of pension payable. With SPA increasing beyond age 65, it is designed to allow schemes to continue to apply a reduction to pensions at an age between age 60 and SPA (rather than age 65 as currently), whilst benefiting from an express age discrimination exemption.

34 See our Alert: DWP consults on DB consolidation vehicles (10 December 2018)
35 See our Alert: The High Court decides – how to solve a problem like GMP equalisation (26 October 2018)
36 Guaranteed Minimum Pension (GMP) conversion and equalisation (HMRC, 23 January 2019)
37 Occupational pensions: draft regulations, legislative review and Guaranteed Minimum pensions equalisation methodology (updated 13 March 2017)
38 The draft Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2019 (DWP, 16 January 2019)

Cases

Supreme Court

Barnardo's v Buckinghamshire[39]

The SC concluded that the trustees in this case did not have power under their scheme rules to switch from RPI to CPI as the measure for increasing pensions in payment and in deferment.

RPI remains an official measure of inflation

The rules defined RPI as "the General Index of Retail Prices published by the Department of Employment or any replacement adopted by the Trustees without prejudicing Approval". The SC (as the CA had done before it) found this to be a two-stage test, under which RPI would need to be replaced by the official body responsible for its publication, and then its replacement adopted by the trustees for indexation and revaluation purposes.

The judgment notes that while many now see CPI "as a more reliable index for the cost of living" than RPI, courts must construe scheme rules without any preconception as to whether a construction should favour the sponsoring employer or the members.

Court of Appeal

BT PLC v BT Pension Scheme Trustees Limited & Bruce-Watt[40]

The CA was guided by Barnardo's in a further case on switching from RPI to CPI, and rejected an appeal by BT against a High Court ruling that RPI had not become "inappropriate" as a measure for increasing pensions in payment.

Scheme rules are crucial in determining whether a switch from RPI to CPI can be made

The BT scheme rule provided for pensions in payment to be increased in line with RPI, subject to the proviso that if RPI "ceases to be published or becomes inappropriate" the company (in consultation with the trustees) could choose a different index.

The CA found that the rules did not confer a power on the company to determine whether RPI had become inappropriate. Instead, whether or not RPI had ceased to be published, or had become inappropriate, were questions of "objective fact".

The Lord Chancellor and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others[41]

Transitional provisions that were part of reforms to the Judicial and Firefighters' pension schemes were found to amount to unlawful direct age discrimination. In both cases, when new arrangements were introduced to manage costs, those closest to normal pension age were given full or tapering protection to minimise the effect of the reforms.

Keep records of evidence used to establish objective justification

The CA found this practice could not be objectively justified, as the Government had not shown any legitimate aim for treating older members more favourably. Supporting evidence was required to substantiate the legitimacy of the Government's aims. It was not sufficient simply to assert a claimed belief that it "felt right" to protect older firefighters or older judges.

39 See our summary: Barnardo's v Buckinghamshire (7 November 2018)

40 See our summary: British Telecommunications PLC v BT Pension Scheme Trustees Limited & Bruce-Watt (4 December 2018)

41 See our summary: The Lord Chancellor and Secretary of State and another v McCloud and Mostyn and others and Sargeant v London Fire and Emergency Planning Authority and others (20 December 2018)

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.

Trustee decision-making: TPO developments and determinations, and what they mean for you (seminar)	09/04/19	Breakfast seminar (9:00am-10:30am) An interactive session covering some key recent themes and decisions from the Pensions Ombudsman, with a focus on how these impact on trustees' day-to-day decisions
Trustee decision-making: TPO developments and determinations, and what they mean for you (webinar)	11/04/19	Lunch time webinar (12:30pm-1:15pm) An interactive session covering some key recent themes and decisions from the Pensions Ombudsman, with a focus on how these impact on trustees' day-to-day decisions
Quarterly legal update	09/05/19	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	18/07/19	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	07/11/19	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world

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Recent publications

Our Finance and investment group have been working on a number of guides for 2019. In addition to our Q1 2019 Finance & investment briefing, look out for our guides to:

- Environmental, social and governance investment
- Buy-ins, buy-outs and longevity.

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