Sackers

Quarterly briefing

December 2020

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

Q4

December 2020

On the front cover this quarter:
Arshad Khan (Senior Counsel),
Sarah Henderson (Senior Associate),
Georgina Jones (Partner)

Abbreviations

BCE: Benefit Crystallisation Event
CJEU: Court of Justice of the European Union
CJRS: Coronavirus Job Retention Scheme
CMA: Competition and Markets Authority
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
EDPB: European Data Protection Board
EEA: European Economic Area
EU: European Union
FCA: Financial Conduct Authority
GDPR: General Data Protection Regulation
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
HMT: HM Treasury
ICO: Information Commissioner's Office
LGPS: Local Government Pension Scheme
NICs: National Insurance Contributions
NMPA: Normal Minimum Pension Age
PAC: Public Accounts Committee
PPF: Pension Protection Fund
QROPS: Qualifying recognised overseas pension scheme
TCFD: Taskforce on Climate-related Financial Disclosures
TKU: Trustee Knowledge and Understanding
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator
VAT: Value Added Tax
WPC: Work and Pensions Select Committee

In this issue

Electronic format

You can access electronic copies of all our publications at:

www.sackers.com/knowledge/publications

Environment

In line with our approach to corporate social responsibility (CSR), we monitor closely the number of copies printed of this publication. The paper and print manufacturing has been done in compliance with ISO14001 environmental management standards. Our paper, Revive 100% silk is derived from 100% pre and post-consumer waste, which is certified for FSC® chain of custody.

For more information on our CSR policy, please visit our website at www.sackers.com/about/csr

Current legal agenda

Unknown
GMP equalisation

We await the judgment from the follow-up hearing to the *Lloyds* case[1], covering past transfers. First held in May 2020, a further hearing took place at the end of October, as additional questions had been raised by the judge

Imminent
TPR's single code

Originally anticipated in the first half of this year, TPR is "planning to launch a formal consultation in late 2020 or early 2021". TPR will also consult on the standards of its updated TKU material

Unknown
DB funding code

TPR's first consultation on its new DB funding framework[2] closed on 2 September 2020. A response is awaited. Further consultation on the code itself is to follow in 2021

1 December 2020
Insolvency changes

Changes to insolvency legislation to give the recovery of certain taxes priority in insolvency proceedings[3], under the Finance Act 2020, come into force

December 2020
Pensions dashboards

An initial version of the proposed dashboard data standards is due in December, with consumer dashboards likely only to become available in 2023[4]

31 December 2020
Brexit

End of Brexit transition period. For the latest developments, see our recent 7 Days[5]

By end of 2020?
Pension Schemes Bill

Royal Assent is expected by the end of the year. The Committee stage, where the Bill will be scrutinised line by line, is expected to finish on 5 November 2020

7 January 2021
CMA

Deadline by which trustees must submit Compliance Statements to the CMA. (Regulations designed to switch the reporting requirement to TPR via the scheme return are now due Q1 2021)[6]

January 2021
PPF contingent assets

PPF to publish final rules for 2021/22 levy year (slightly later than the usual December date) (see page 7)

1 See our Alert: The High Court decides – how to solve a problem like GMP equalisation (26 October 2018)
2 See our Alert: TPR publishes first part of consultation on revised code for scheme funding (3 March 2020)
3 See 7 Days (22 July 2019)
4 See 7 Days (2 November 2020)
5 See 7 Days (19 October 2020)
6 See our forthcoming FIG Briefing for further detail generally and, in particular, on the reporting period

Hot topics

Superfunds

Schemes contemplating a transfer should take appropriate advice and engage with TPR "at an early stage"

Following on from the launch of an interim regulatory regime for DB consolidators or "superfunds" (pending the establishment of a full legislative framework), TPR has published guidance[7] for trustees and employers contemplating a transfer to such a vehicle.

The guidance sets out TPR's approach to regulating these transfers, and its expectations of trustees and employers considering whether to transact. Schemes must be able to demonstrate why they believe the transfer would be in the best interest of members, and how three "gateway principles" are met. TPR generally expects transferring employers to apply for clearance and trustees to show they have undertaken appropriate due diligence.

Scams and transfers update

With COVID-19 leading to financial vulnerability, various pensions bodies have warned of the increased risk of pension scams. TPR has stated that it hopes[8] to build on the success of previous campaigns, "providing pension savers with the knowledge and tools to avoid pension scams and getting the industry to do all they can to protect savers".

New restrictions on transfers are set out in the Pension Schemes Bill, in order to help fight scams

The WPC is investigating pension scams[9] in the first strand of a three-part inquiry looking at "how people are protected as they move from saving for retirement to using their pension savings". It has already published evidence submitted by TPR to the inquiry, alongside correspondence[10] between it and the Government prior to the second reading of the Pension Schemes Bill.

Under changes proposed by the Bill, trustees will be prevented from making a statutory transfer of a member's benefits unless prescribed conditions are met. These conditions will be set out in regulations, but the Bill makes clear that they will include providing trustees "with information or evidence about the member's employment or place of residence". Crucially, the member may also be required to provide evidence that they have obtained information or guidance from a prescribed person.

In addition, the Government also recently confirmed[11] that "new information requirements" will be introduced from age fifty for those with DC savings "that will inform them in more simplified terms, about their retirement options and the availability of guidance to help with their decisions". It plans to commence relevant sections of the Financial Guidance and Claims Act 2018, which ensure members have either taken guidance or actively opted out of it, "at the earliest opportunity". A consultation on draft regulations is expected imminently.

Climate change proposals

Final TCFD guidance is also expected "at the end of 2020"

In August, the DWP published a consultation on pension schemes' governance and reporting on climate change[12]. The proposals would require schemes to assess and manage climate risks and opportunities, and to publish a climate change report annually (in line with recommendations by the TCFD). Compliance would be reported to TPR through the annual scheme return.

7 See our Alert: TPR issues superfund guidance for prospective ceding trustees and employers (22 October 2020)
8 See 7 Days (17 August 2020)
9 See 7 Days (3 August 2020)
10 See 7 Days (12 October 2020)
11 See Written Question for Department for Work and Pensions (1 October 2020) and 7 Days (2 November 2020)
12 See our Alert: Consultation: taking action on climate risk (28 August 2020)

TPR's blog[13] considers the challenge of climate change, and the actions schemes should be prepared to take when the Bill becomes law

Initially, the proposed changes will be targeted at larger schemes (schemes with £5 billion or more in assets, authorised master trusts and collective money purchase schemes). Such schemes would need to have arrangements in place on climate change governance, strategy, risk management and targets from October 2021, and be required to publish an annual report by the end of 2022. The requirements would then be rolled out to schemes with £1 billion or more in assets the following year, with their application to smaller schemes reviewed in 2024.

The proposed requirements would be enacted under amendments to the Pension Schemes Bill, though this is yet to be passed. A further consultation on regulations will follow "in late 2020 or early 2021". The Government "is minded" to consult "in the near future" on requirements to report on alignment with the Paris Agreement or the "implied temperature rise" of scheme portfolios.

The FCA also intends to consult[14] on implementing disclosures in line with TCFD recommendations for asset managers and contract-based pension schemes in the first half of 2021, to run in tandem with the timings for occupational schemes.

Improving outcomes for members of DC schemes

The DWP has published[15] its response to the February 2019 consultation on "Investment Innovation and Future Consolidation". The response includes a further consultation on changes to regulations and statutory guidance which are intended to improve DC pension scheme governance, promote the diversification of investment portfolios, and to signal the Government's commitment to transparent disclosure to scheme members.

Subject to certain exceptions and easements, trustees of DC and hybrid schemes with less than £100 million in DC assets will be required to undertake a "more holistic" annual value assessment and to report on it in their chair's statement and scheme return. Unless improvements can be made rapidly and cost-effectively, schemes which do not demonstrate value for members will be expected to be wound up and consolidated.

Small pots

Consolidation, mentioned in the above consultation, remains a hot topic generally[16].

In September, Guy Opperman, Minister for Pensions and Financial Inclusion, announced the launch of a cross-sector Working Group[17] to assess and make recommendations "as an interim step" on ways to tackle small deferred pension pots. Following its separate call for input, the WPC has written[18] to Guy Opperman sharing views that it has gathered to date on possible "workable solutions" to the proliferation of small pots. Consolidation is just one possible option here.

13 See 7 Days (5 October 2020)
14 See 7 Days (5 October 2020)
15 See our Alert: Consultation – Improving outcomes for members of DC schemes (15 September 2020)
16 For further detail, see our DC Briefing – October 2020 and recent blog
17 See 7 Days (28 September 2020)
18 See 7 Days (12 October 2020)

Regulatory

DWP

The Government will consider consulting on a similar approach for other schemes in due course

Simpler annual benefit statements

The DWP has published the response to its consultation on simpler annual benefit statements for workplace pensions[19]. It plans to consult "later this year" on a mandatory approach to simpler statement templates for DC schemes used for auto-enrolment, taking the two-page template included in its consultation document as the starting point. It will work with industry on the detail of the design.

Automatic enrolment alternative quality requirement consultation

The DWP has published a call for evidence[20] inviting views on the alternative quality requirement test for DB and hybrid schemes. This was originally introduced to allow for simpler alternative tests to be used so that a scheme can demonstrate that it is of sufficient quality for automatic enrolment purposes.

The DWP asks whether the policy intentions in this area continue to be achieved, how the simplifications and flexibilities introduced under the test work in practice, and whether any new issues have arisen since the last triennial review (reviews are required at three-yearly intervals).

HMRC

HMRC easements update

HMRC's Pension Schemes Newsletter 124 announced the extension of certain temporary changes made in light of the pandemic[21] until 31 March 2021. These include easements relating to pension scheme returns, transfers to QROPS, BCE1 valuations (on designating funds to a drawdown facility) and other scheme valuations.

HMRC published a later update to the newsletter[22] confirming that the COVID-19 related protected pension age easement (which allowed former medical professionals to return to work) would not be extended beyond 1 November 2020.

HMT

Further "fiscal events" may be expected as the effects of the pandemic are felt

Budget postponed

On 23 September 2020, it was announced that there would be no Budget this year (originally it had been due to be held in November), owing to the challenges posed by COVID-19. Chancellor Rishi Sunak delivered a Winter Economic Plan on 24 September 2020, at which the Job Support Scheme (see page 7) was launched.

19 See 7 Days (19 October 2020)
20 See 7 Days (28 September 2020)
21 See 7 Days (5 October 2020)
22 See 7 Days (12 October 2020)

CJRS extended, and Job Support Scheme announced

The CJRS was originally due to come to an end on 31 October 2020, with its replacement, the Job Support Scheme[23], running from 1 November for six months.

On 31 October, the Government announced a new period of lockdown, from 5 November until 2 December 2020, and that the CJRS (or "Furlough" scheme) would therefore be extended in line with this[24]. (It has since been extended to 31 March 2021, with a review of the policy due in January.)

The extended scheme marks a return to the August level of grant: at the time of writing, employers can claim for 80% of a furloughed employee's usual monthly wage or salary, up to a maximum of £2,500 a month, but remain liable for Class 1 employer NICs and pension contributions.

Tax review ruled out

The Government has ruled out an immediate review into the impact of pensions tax relief[25] (which had been recommended by the PAC). Noting that it has undertaken several major consultations on aspects of pensions tax relief over the last few years and found "no clear consensus for reform", the Government states that it "will continue to engage with stakeholders" but does not think it is the right time for a formal evaluation. However, HMRC will be asked to "assess the groups and sectors benefiting from all significant reliefs" and to report the results by December 2021.

A general call for evidence[26] on the operation of both the main methods of administering pensions tax relief, as well as what improvements might be made, closed in October.

PPF

PPF publishes levy consultation

The PPF has published a consultation on its levy rules for 2021/22[27].

As the PPF remains in a strong financial position, it suggests a reduction in the overall levy collected and minimal changes for this year. It proposes "two developments … that better reflect the risk posed to [it] by small schemes, and help with the cost of the levy":

- the levy for schemes with less than £20 million in liabilities will be halved. This reduction will be tapered (with only schemes with £50 million or more in liabilities being charged in full)
- the cap on the amount of levy paid by any individual scheme will be cut from 0.5% of that scheme's liabilities to 0.25%.

Schemes will have less time than usual between the PPF's consultation response and the deadline for submitting contingent assets

This consultation was due to propose changes for the next triennium. However, the PPF has decided against this owing to the ongoing economic uncertainty. To give it increased flexibility, the PPF will move instead to a yearly basis for setting levy policy for the next few years.

The deadline for responses to the consultation is 24 November 2020. The PPF expects to publish its response to this consultation and its final levy rules for 2021/22 slightly later than normal, in January 2021. The usual date for submission of contingent assets, of 31 March 2021, will still apply.

23 See 7 Days (19 October 2020) and 7 Days (26 October 2020)
24 See 7 Days (2 November 2020)
25 See 7 Days (5 October 2020)
26 See 7 Days (27 July 2020)
27 See 7 Days (5 October 2020)

Regulatory cont.

TPR

TPR COVID-19 guidance updated

TPR will continue to take a proportionate approach to enforcement decisions, but trustees and their advisers must bear in mind the updated requirements

Before the 30 September expiry date of some of the easements granted earlier in the year, TPR updated its COVID-19 guidance[28] to set out what it now expects of schemes.

From "as soon as possible after" 1 January 2021, DC schemes and providers should resume reporting late contribution payments no later than 90 days (rather than 150 days) after the due date. Reporting late contributions within the 90-day period will become mandatory again on 1 April 2021. This delay is intended to allow schemes extra time to make the necessary adjustments, and to work with employers to bring any outstanding contributions up to date.

Other types of enforcement returned to normal from 1 October 2020. This included the requirement for schemes to submit audited accounts and investment statement reviews, and TPR reviewing chairs' statements submitted from that date onwards.

Guidance for trustees considering employer requests for a reduction or suspension of deficit repair contributions is unchanged for now, although it remains under review and will be updated in line with the evolving situation. TPR recognises that deferrals or suspensions may continue to be appropriate in certain circumstances, subject to trustees undertaking appropriate due diligence, with TPR expecting greater insight into an employer's short-term liquidity to have developed since the pandemic began. Similar messages were relayed in TPR's "COVID-19 balancing act" blog[29], explaining what DB trustees "can expect from the regulator and how to prepare as the economic impact of the coronavirus continues to hit schemes and sponsoring employers".

This is a complex area, so affected schemes should seek advice

In October, TPR published an updated version of its DC scheme management and investment guidance[30]. This provided further guidance on when redirecting a member's contributions, following a temporary closure (or "gating") of funds, including property funds, might result in the creation of a default arrangement.

DB funding

In August, TPR published a blog[31] on some of the "key proposals" and commonly asked questions from its first consultation relating to the new DB funding code. The consultation closed on 2 September, and a response is awaited.

TPR also published a report[32] on the impact of setting the long-term funding objective in different ways under the revised funding code of practice, and the approach that schemes might take to achieve it over a suitable time period. The report should be read alongside the above consultation.

28 See 7 Days (21 September 2020)
29 See 7 Days (10 August 2020)
30 See 7 Days (19 October 2020)
31 See 7 Days (1 September 2020)
32 See 7 Days (17 August 2020)

Data Protection update

Schrems II – further information

On 10 August 2020, a joint press statement[33] was released announcing that the U.S. Department of Commerce and the European Commission have "initiated discussions to evaluate the potential for an enhanced EU-US Privacy Shield framework". This follows the recent CJEU decision in *Schrems II*[34], which held that the Privacy Shield is currently not a valid mechanism to transfer personal data from the EU to the United States.

Schemes should take steps to assess if any personal data is exported to the US

In addition, as a follow-up to the ruling, the EDPB has created a taskforce to prepare recommendations to assist controllers and processors with their duty to identify and implement appropriate measures to ensure adequate protection when transferring data to countries outside the EU and EEA.

The Government has also updated its Brexit guidance on "Using personal data in your business or other organisation after the transition period"[35] in light of the judgment.

Further guidance from the ICO is expected in due course.

Draft regulations[36], laid in October, amend legislation in order to ensure that the legal framework for data protection within the UK continues to function "correctly" after the Brexit transition period.

EDPB publishes guidelines on data processors and controllers

In September, the EDPB announced[37] that guidelines on the concepts of controller and processor in the GDPR had been adopted (subject to consultation). Since the GDPR came into force, questions have been raised as to the extent to which it brought changes to these concepts, particularly to "joint controllership" and the obligations for processors. The new guidelines explain the concepts, and give detailed guidance on their consequences.

ICO guidance

On 1 October 2020, the ICO launched a consultation on draft statutory guidance[38] "designed to ensure the rights and freedoms of individuals are protected". The guidance details how the ICO will regulate and enforce data protection legislation in the UK, setting out its powers, how they are used and how fines are calculated, whilst also seeking to reassure businesses that it will use its powers "proportionately and consistently".

The ICO has also published detailed guidance[39] for organisations on how to deal with subject access requests, following its December 2019 consultation[40]. The guidance provides clarification on when the complexity of a request allows an extended response period, when a request is "manifestly excessive", and what fees can be included when charging for excessive, unfounded or repeat requests.

33 See 7 Days (17 August 2020)
34 See our case summary: Decision in Schrems II (Data Protection Commissioner v Facebook Ireland Ltd) (European Court of Justice) (16 July 2020)
35 See 7 Days (19 October 2020)
36 See 7 Days (19 October 2020)
37 See 7 Days (21 September 2020)
38 See 7 Days (5 October 2020)
39 See Blog: Simplifying subject access requests – new detailed SARs guidance (ICO, 21 October 2020)
40 See 7 Days (9 December 2019)

Public sector and state pensions

HMT launches public sector GMP indexation consultation

The introduction of the new state pension in 2016 removed the mechanism that enabled public sector workers to have their GMPs fully price protected. An interim solution was therefore introduced, which was later extended until 5 April 2021.

The Government is now seeking views[41] on how it "proposes to continue to meet past commitments" to public sector employees. The consultation considers whether to make the current (interim) full indexation a permanent solution and, if not, the period for which the Government should extend that solution before reconsidering GMP conversion or "a feasible alternative".

Restrictions on exit payments in the public sector

Regulations[42] aimed at restricting prescribed public sector bodies from making exit payments above £95,000 came into force on 4 November 2020. A consultation on proposals to reform exit payment terms for LGPS members is also underway, with draft regulations published in October.

Social Security (Up-rating of Benefits) Bill

The Social Security (Up-rating of Benefits) Bill is currently progressing through Parliament[43]. This Bill will permit the Secretary of State to up-rate the state basic pension (and certain other benefits) in the tax year 2021/22, despite there having been no growth in earnings in the period May to July 2020. This will allow the Government to meet its commitment to the "Triple Lock" (the increase of the state pension by the higher of price inflation, earnings growth and 2.5%).

Confirmation that NMPA will rise to 57 in 2028

A long way off – but one to keep on the radar

On 3 September 2020, the Government confirmed that, in line with its previous announcement in 2014, it plans to increase the NMPA from 55 to 57 with effect from 2028[44]. (NMPA is the earliest age at which a member's pension benefits can generally be taken under a registered scheme without incurring adverse tax charges). The changes will be legislated for "in due course".

R (on the application of Julie Delve and Karen Glynn) v Secretary of State for Work and Pensions

The Court of Appeal has dismissed an appeal[45] in relation to changes to the state pension age for women (initiated by the campaign group Women Against State Pension Inequality). The Court unanimously dismissed claims of age discrimination, sex discrimination and lack of notice. Finding that it was "not a case where the court can interfere with the decisions taken through the Parliamentary process", it ruled that the DWP had taken adequate steps to notify those affected by the changes.

A Parliamentary Ombudsman's investigation remains ongoing.

41 See 7 Days (12 October 2020)
42 See 7 Days (2 November 2020) and 7 Days (26 October 2020)
43 See 7 Days (28 September 2020)
44 See 7 Days (7 September 2020)
45 See 7 Days (21 September 2020)

Cases

CJEU

United Biscuits v HMRC

The CJEU has followed[46] the Advocate General's earlier opinion in relation to a case regarding the VAT treatment of pension fund management services. Where such services supplied to an occupational pension scheme do not provide any indemnity from risk, they cannot be classified as "insurance transactions". As a result, they do not fall within the relevant VAT exemption.

Supreme Court

HMRC v Parry

The Supreme Court has partially upheld[47] the Court of Appeal's 2018 judgment confirming HMRC's ability to charge inheritance tax on certain death benefits.

Appeals against *Hampshire* and *Hughes*

In August, the PPF announced[48] that it will be appealing against parts of the *Hampshire*[49] judgment. In that case, the CJEU ruled that the PPF needs to provide members with compensation of "at least 50% of the value of their accrued entitlement" under an occupational pension scheme. This would mean the PPF having to amend its methodology.

In the meantime, the PPF is continuing to work on its plans for implementing the June 2020 judgment, so that it is "in a position to do so if necessary as soon as possible after…the appeal outcome".

The DWP has also lodged an appeal against the separate ruling that the use of the compensation cap constitutes unlawful age discrimination. This was decided in *Hughes*[50], a follow-up case to *Hampshire*.

TPO

Mr T

TPO has upheld a complaint[51] remitted to it by the High Court. It found that an avoidable transfer delay, constituting maladministration, led to the member suffering substantial financial loss.

The facts of the case were quite specific, involving the loss of an investment opportunity, but it provides a helpful reminder of the legal principles which the Courts will apply in such cases.

46 See our case summary: United Biscuits (Pension Trustees) Limited v HMRC (CJEU, 8 October 2020)
47 See our case summary: HMRC v Parry (Supreme Court, August 2020)
48 See 7 Days (24 August 2020)
49 See our case summary: Grenville Hampshire v the Board of the Pension Protection Fund (Judgment of the CJEU)
50 See our case summary: Hughes v PPF (High Court, 22 June 2020)
51 See our case summary: Mr T (PO – 38354) (delayed transfer led to loss of investment opportunity)

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.

In the current climate, our regular seminars are going ahead as webinars and we are also offering smaller virtual roundtables on specific topics. You are advised to check our website for all the latest information on www.sackers.com/events

Quarterly legal update	12/11/2020	Webinar (12:30pm-1:15pm) This webinar will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.
Quarterly legal update	04/02/2021	Webinar (12:30pm-1:15pm) This webinar will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

If you would like to attend any of our events, please contact our marketing team at marketing@sackers.com.
A selection of short videos, webinars and podcasts on topical pensions-related issues and aspects of our firm is available on our website: www.sackers.com/knowledge/multimedia

Sign up

Stay up to date with all the latest legal and regulatory developments affecting pensions and retirement savings by signing up to our free publications on www.sackers.com/knowledge/publications.

These include our weekly round-up, 7 Days, Alerts where topical issues are covered in depth, and Briefings which give practical commentary and perspectives on essential issues.

All publications are being sent electronically until further notice. Hard copies will be available once we are back in the office, should you need them.

Recent publications

Our October 2020 DC briefing highlights topical news on DC pensions from a legal viewpoint.

Our October 2020 Master trust briefing highlights key issues and developments for the sponsors and trustees of master trusts.

Our September 2020 Finance & investment briefing takes a look at current issues of interest to pension scheme investors.

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 20 7329 6699
E enquiries@sackers.com
www.sackers.com