Sackers

Quarterly briefing

March 2021

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

Q1

March 2021

This quarter's front cover features some of the Sackers lawyers who appeared in our festive video

Abbreviations

BEIS: Department for Business, Energy and Industrial Strategy

CETV: Cash equivalent transfer value

CJRS: Coronavirus Job Retention Scheme

CMA: Competition & Markets Authority

CPI: Consumer Prices Index

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

EFTA: European Free Trade Association

EEA: European Economic Area

EU: European Union

FCA: Financial Conduct Authority

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

HMT: HM Treasury

ICO: Information Commissioner's Office

IORP II: the second European Pensions Directive

MAPS: Money and Pension Service

PASA: Pensions Administration Standards Association

PPF: Pension Protection Fund

PSA 21: Pension Schemes Act 2021

RPI: Retail Prices Index

TKU: Trustee Knowledge and Understanding

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

In this issue

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Current legal agenda

A busy year of pensions developments lies ahead, with many items delayed from 2020 by the pandemic:

Imminent	PSA 21	Royal Assent is expected imminently, with a raft of underlying regulations to flesh out the detail to follow (see page 4)
3 March 2021	Budget 2021	Tax changes are anticipated, to help mitigate the costs of COVID-19
31 March 2021	PPF levy deadlines	The deadline for certifying contingent assets on Exchange is midnight on 31 March 2021, with any relevant accompanying documentation to be submitted by email by 5pm on 1 April 2021 (see page 9)
"Second half" of 2021	DB funding code	Stage two of TPR's consultation is expected later in the year (see page 10)
2021	TKU code	TPR's consultation on its updated TKU material[1], originally expected by November 2020, is still awaited
2021	TPR's new single code	TPR's consultation on its new single, shorter, code of practice, reflecting the implementation of IORP II[2], is expected this year
2021	Further GMP guidance	Further items of guidance are due (see page 11)
2021	Simpler annual benefit statements	The DWP's consultation on draft regulations mandating the use of simpler annual benefit statements[3] is still awaited. A consultation on timing requirements will follow
2021	Compliance statement oversight	Regulations designed to switch the reporting requirements relating to fiduciary management and investment consultancy services from the CMA to TPR are still awaited[4]
2021	Small DC consolidation	Regulations designed to facilitate the consolidation of small DC arrangements[5] are awaited
2021	"Stronger nudge"	Draft regulations "nudging" beneficiaries to guidance when they seek to access pensions through the retirement flexibilities[6], plus related guidance from TPR, are expected

1 See our Alert: TPR publishes response on the future of trusteeship and governance (11 February 2020)
2 See our Alert: IORP II – green light for good governance (24 October 2018)
3 See 7 Days (19 October 2020)
4 See our Alert: Reminder! Changes to Investment disclosure and governance (5 June 2020)
5 See our Alert: Consultation — Improving outcomes for members of DC schemes (15 September 2020)
6 See 7 Days (2 November 2020)

Pension Schemes Act

Key provisions

Several years in the making, the Bill that will become PSA 21 still awaits Royal Assent at the time of going to press[7].

The bulk of the legislation is largely unchanged from the Bill introduced into Parliament over a year ago[8].

Key elements of the future PSA 21 include the introduction of:

- a raft of new offences, both criminal and civil, plus extended information-gathering and new interviewing powers for TPR. Criminal offences include the failure to comply with a contribution notice (punishable by an unlimited fine), avoidance of an employer debt and conduct risking accrued DB benefits (both punishable by an unlimited fine and/or up to seven years in prison)
- new events which will need to be notified to TPR relating to the sponsoring employer of a DB scheme, as well as new circumstances in which contribution notices can be imposed

Much of the detail is still to be determined by regulations

- a new requirement for trustees of DB occupational schemes to determine (with the agreement of the employer) a strategy for ensuring that pensions and other benefits under the scheme can be provided over the long term ("funding and investment strategy")
- restrictions on the right to a statutory transfer, unless prescribed conditions are met (these will include members providing trustees with information or evidence about their employment or place of residence, and evidence that they have obtained information or guidance from a prescribed person in relation the transfer)
- a framework for "collective money purchase schemes", also known as collective DC or "CDC"[9], with a regulatory regime closely resembling that put in place for master trusts[10]
- finally, provisions to enable pensions dashboards, although dashboards are not expected to be available until 2023 (see page 9).

On 11 January 2021, the Pensions Minister confirmed that the extension of TPR's powers and the new criminal sanctions are not intended to be retrospective[11]. However, concern has been generally expressed amongst the industry as to when and how TPR's new powers will be used. Following Royal Assent, TPR is expected to consult on guidance on its new powers.

Climate change risk

PSA 21 will also introduce new governance and disclosure requirements relating to climate change risk.

On 27 January 2021, the DWP published its response[12] to the 2020 consultation, "Taking action on climate risk: improving governance and reporting by Occupational Pension Schemes", together with a consultation on draft regulations and statutory guidance. Both the regulations and guidance will be brought into force under powers to be introduced by PSA 21.

7 See our forthcoming Alert for further detail
8 See our Alert: The Pension Schemes Bill returns (9 January 2020)
9 See our Alert: Collective DC Schemes get the go-ahead (20 March 2019)
10 See our Alert: Pension Schemes Act 2017 – new regulatory regime for master trusts (3 May 2017)
11 See 7 Days (18 January 2021)
12 See our Alert: Consultation on climate change regulations and guidance (27 January 2021)

Brexit

The UK left the EU on 31 January 2020 in accordance with the European Union (Withdrawal Agreement) Act, with a transition period running until 11pm on 31 December 2020.

After protracted negotiations, the EU-UK Trade and Co-operation Agreement ("the Agreement") was announced on 24 December 2020, and has been provisionally applied as of 1 January 2021. The European Union (Future Relationship) Act 2020, which gives the Agreement domestic legal effect, received Royal Assent on 30 December 2020[13].

In the short term, there are few material changes for pensions. However, schemes need to be aware of several key points:

- whilst the general transition period has ended, for data protection, a further transition period (of up to six months) was granted, allowing time for an adequacy decision to be agreed and adopted in relation to personal data transfers from the EU/EEA to UK. Trustees should consider whether any such transfers take place in relation to their scheme. If so, they should be ready to adopt one of the other methods for sharing personal data (such as standard contractual clauses) in the event that an adequacy decision is not forthcoming
- the law governing UK-EU/EEA cross-border occupational pension scheme arrangements ceased to apply from 1 January 2021. TPR intends to publish revised guidance on this issue in "early 2021"
- the Agreement has no material provisions on financial services. The aim is that a Memorandum of Understanding establishing a framework for regulatory cooperation on financial services will be put in place by March 2021[14]
- the Agreement contains stringent commitments on climate change, although the Government is already pressing ahead with various proposals here (eg under the forthcoming PSA 21, see page 4)

Whilst still possible, access to the PPF for EU schemes with non-UK sponsors is more uncertain

- schemes with overseas employers should make sure they are aware of a change to the PPF entry requirements[15]. Going forward, where an EU employer has no "establishment" in the UK, they can no longer trigger entry to the PPF, but will need the UK courts to accept jurisdiction and grant a winding up order to do so. Given the economic climate, schemes should be prepared to move fast in a potential insolvency situation
- the position on post-transition enforcement of judgments remains unclear. The UK has acceded to the Hague Convention (choice of court) but we await agreement in relation to the Lugano Convention (recognition and enforcement of judgments). The upshot is that it may be more difficult, costly, and time-consuming to enforce a UK judgment in the EU/EEA or Switzerland. Schemes intending to certify a PPF contingent asset should consider whether an updated legal opinion will be required (see page 9)
- the DWP has confirmed that residents of the EU, EEA or Switzerland can continue to claim the UK State Pension, and that it will be increased each year in line with the rate paid in the UK schemes should ensure they are aware of any impact of Brexit on scheme sponsors and employer covenant, and continue to monitor investment performance.

13 See 7 Days (4 January 2021)

14 See our December 2020 Finance & investment briefing for further detail on temporary arrangements

15 The Pension Protection Fund (Entry Rules) Regulations 2005

COVID-19

The Budget on 3 March will present "the next phase of the plan to tackle the virus and protect jobs"

CJRS extensions

The CJRS (or "Furlough" scheme) has been further extended until the end of April 2021[16]. At the time of writing, under this extended phase, employees will continue to receive 80% of their current salary for hours not worked, up to a maximum of £2,500 per month. Employers will cover National Insurance Contributions and employer pension contributions. HMRC's suite of guidance has been updated to reflect the extension.

Easements

Certain easements granted during the pandemic have now come to an end. Back in April 2020, TPR extended the period DC schemes had to report late contribution payments from 90 to 150 days, in order to give employers more time before enforcement action was taken. From 1 January 2021, DC schemes and providers have been asked to resume reporting late contributions to TPR no later than 90 days after the due date[17]. Reporting within the 90-day timeframe will become mandatory again from 1 April 2021.

Government announces expansion of Dormant Assets Scheme

It is estimated that the expanded scheme could "unlock" over £800 million

Under the Dormant Assets Scheme, assets (eg such as bank accounts) classified as dormant can be distributed towards social and environmental initiatives across the UK. Following consultation, the Government has announced an expansion to the scheme[18], so that dormant assets from sectors including pensions may be made available to support the UK as it recovers from the COVID-19 pandemic. Pensions will be included only in "specific and tightly prescribed circumstances", with careful thought given to products that overlap with automatic enrolment vehicles, and the situation reassessed as the pensions landscape evolves.

TPR updates gated funds transfers guidance

In January, TPR updated its COVID-19 DC scheme management and investment guidance to include a section on transfer requests where a member's pension savings are held in a "gated" (temporarily closed) fund[19]. TPR acknowledges that payment of a CETV is likely to be "problematic" in such cases, but notes that it does not have the power to grant extensions to the statutory timeframe. TPR may fine trustees who fail to take all reasonable steps to pay a CETV by the statutory deadline. The guidance sets out what "reasonable steps" might include.

Keeping contact details up-to-date

TPR has updated its guidance for employers on automatic enrolment and DC pension contributions to include information on nominating contacts[20]. As a result of the pandemic, businesses may have restructured and personnel may have changed or moved on. TPR reminds schemes that it is vital that it has the right contact details, otherwise compliance may be at risk.

16 See 7 Days (21 December 2020), and 7 Days (1 February 2021)
17 See 7 Days (21 September 2020)
18 See 7 Days (11 January 2021)
19 See 7 Days (18 January 2021)
20 See 7 Days (14 December 2020)

Regulatory

DWP

DWP response to review of default charge cap

On 13 January 2021, the DWP published its response to the review of the default fund charge cap and standardised cost disclosure, together with the results of the Pension Charges Survey 2020[21].

The DWP has decided not to reduce the current charge cap of 0.75% "at this time", after evidence from the survey found the average charge across schemes is lower than this (at 0.48%). It has also decided not to extend the scope of the charge cap to include transaction costs after evidence showed it could "stifle innovation and diversification and the ability to manage volatility risks".

The survey found increased monitoring of transaction costs by trustee boards for the purpose of the annual governance statement

The Government will introduce a de minimis pot size, initially set at £100, below which flat fees cannot be charged in default funds. If a member has multiple pots within the same scheme, the de minimis would apply across all the pots being charged. The Government will keep this de minimis level under review.

Feedback to the call for evidence showed support for improving disclosure and increasing the uptake of the Cost Transparency Initiative's standardised cost disclosure templates[22]. The Government will closely monitor the voluntary adoption of these, and will look to introduce legislation in the future if it does not see satisfactory take-up levels.

Report on small pension pots published

Published in December 2020, the cross-sector working group's report on small pots[23] makes recommendations on how to tackle the growth in the number of deferred members with small pension pots. It covers the challenges posed by deferred small pots, and analyses potential solutions and administrative processes required to support solutions.

The report recommends that further work between the DWP and pensions industry is undertaken during 2021 to assess the potential solutions, including models such as default consolidator schemes and "pot follows member".

Increase to general levy proposed

On 16 December 2020, the DWP launched a consultation proposing changes to the structure and rates of the general levy from April 2021, 2022 and 2023[24]. The levy on occupational and personal pension schemes recovers the funding provided by the DWP in respect of the core activities of TPR and TPO, and part of the activities of MAPS.

The Government had taken steps to increase the levy rates by 10% from April 2020 to begin to address a levy deficit, but ultimately decided not to go ahead with the changes last year due to the pandemic.

The new consultation closed at the end of January, with regulations to follow before the 1 April 2021 date for change.

21 See 7 Days (18 January 2021)
22 See 7 Days (27 May 2019)
23 See 7 Days (21 December 2020); see also our DC Hot topic: Solutions for small pots
24 See 7 Days (21 December 2020)

Regulatory cont.

BEIS

Consultation on implementing the ban on corporate directors

In December, BEIS published a consultation on implementing the prohibition on corporate directors[25] under the Small Business, Enterprise and Employment Act 2015. This prohibition was originally due to be implemented in October 2016, but was delayed by other priorities. The consultation closed on 3 February 2021.

Important news for independent trustees

A November 2014 consultation had proposed carve outs for specific types of company, including for "trustee companies of pension funds", but this was deemed "unwieldy and…complicated", so was not taken forward. Instead, the latest consultation proposes that regulations be made to provide for "principles-based exceptions" to the prohibition (as per the Government's suggestions in 2015). Under these, a company may be appointed as a director provided that both:

- all of its directors are, in turn, natural persons
- those natural person directors are, prior to the corporate director appointment, subject to the Companies House identity verification process. Proposals for a mandatory identity verification process for company directors were announced in September 2020.

FCA

DB transfers

Since the retirement flexibilities were introduced in 2015, the FCA has regularly assessed the suitability of advice given by firms advising on pension transfers and has consistently found that levels of unsuitable advice are too high. On 15 January 2021, the FCA published a press release announcing the launch of its DB Advice Assessment Tool ("DBAAT")[26]. The tool sets out the key factors to consider when checking the suitability of advice and disclosure, enabling firms to understand how the FCA assesses DB transfer advice and what is expected. This will be updated in the coming months, to incorporate rule changes that came into force on 1 October 2020.

HMT

Response to RPI methodology consultation published

On 25 November 2020, HMT and the UK Statistics Authority published their response to the consultation on the reform of RPI[27], alongside the Spending Review 2020. The response confirmed that RPI is to be aligned with CPI including owner occupiers' housing costs ("CPIH"), in order to address the statistical shortcomings of RPI.

Having considered the impact on index-linked gilts, the Chancellor has exercised his power to postpone implementation of this change, meaning the earliest date it can be brought in is February 2030. However, no definitive date for implementation has yet been specified.

25 See 7 Days (14 December 2020)
26 See 7 Days (18 January 2021)
27 See our Alert: Reform of RPI (25 November 2020)

ICO

ICO publishes Code of Practice on responsible data sharing methods

Schemes should consider the Code when reviewing their data sharing arrangements

On 17 December 2020, the ICO published its Data Sharing Code of Practice[28]. The Code, and a suite of new resources, provide practical advice on how to carry out responsible data sharing, and aim to promote good practice and dispel myths and misconceptions.

Alongside this, the ICO launched a data sharing information hub with targeted support and resources, including case studies and data sharing FAQs and checklists. The ICO takes the Code into account when considering whether bodies have complied with their obligations.

Pensions Dashboards Programme

Dashboard data standards

The Pensions Dashboards Programme has published key data standards which are intended to underpin the initial dashboard technology, and allow individuals to view their pensions through their chosen dashboard[29]. UK pension providers will be required to ensure that the data they hold is consistent with the data standards so that consumers can access this information.

The data standards guide contains detailed information on the elements required for initial dashboards. It includes definitions of the overall process, the high-level data elements and a technical breakdown of each, plus examples of how the data elements should work. Whilst dashboards are only likely to be available to consumers from 2023, schemes should "get dashboard data ready" ahead of compulsion under PSA 21.

PPF

PPF publishes 2021/22 Levy Determination

On 26 January 2021, the PPF published its final levy rules for the 2021/22 levy year[30]. The PPF confirmed that it will implement:

- the "small scheme adjustment", halving levies for schemes with less than £20 million in liabilities, with the reduction tapering for schemes with between £20 and £50 million of liabilities
- the reduction in the risk-based levy cap to 0.25% of liabilities (from 0.5%).

Schemes should seek advice and progress their contingent assets as soon as possible

A few minor changes are made to the PPF's rules and guidance which are intended to clarify, amongst other things, their operation post Brexit, and in light of changes introduced by The Corporate Insolvency and Governance Act 2020. Relevant contingent asset documentation is required to be submitted by email, rather than in hard copy, from this year.

Schemes intending to certify a guarantee where the guarantor is based in an EU or EFTA state (Switzerland, Iceland, Norway, and Liechtenstein) should consider whether an updated legal opinion will be required (see page 5 as to possible concerns about potential obstacles post-Brexit to enforcing judgments).

The PPF notes that it will continue monitoring the impacts of COVID-19 on schemes and sponsors, and "respond flexibly" to issues that arise. Levies are expected to rise in 2022/23 as the effect of COVID-19 more fully hits company accounts.

28 See 7 Days (21 December 2020)
29 See 7 Days (21 December 2020)
30 See our Alert: The 2021/22 PPF Levy Determination (2 February 2021)

TPR

TPR interim response on DB funding code of practice consultation

On 14 January 2021, TPR published an interim response[31] to its first consultation on the new DB funding code of practice. Whilst there was "general support" for the principles and regulatory approach proposed, some concerns had been voiced on how the principles would be applied in practice through the proposed twin-track regime, including:

- risks associated with where "Fast Track" guidelines would be set (such as schemes "levelling down" and possible increases in costs of DB pension provision)
- potential loss of flexibility
- an increased evidential burden when submitting a "Bespoke" valuation
- the "Bespoke" route being perceived as second best
- what a greater trustee focus on covenant visibility will mean for schemes' ability to rely on covenant beyond the medium term.

A full response is to be provided through the stage two consultation document which TPR expects to publish in the second half of 2021, after the DWP has launched its consultation on the draft funding regulations (under PSA 21). The second consultation will set out the draft code, as well as TPR's proposed regulatory approach.

Scheme returns

More time allowed to complete and submit scheme returns (until 31 March 2021)

Ahead of issuing scheme return notices from mid-February 2021, TPR updated its guidance on DB and mixed benefit scheme returns, and published an example 2021 return[32].

Although TPR had initially suggested some potential additions to the questions asked in the return, in February, it confirmed that the 2021 version would remain the same as the previous year's.

Pension scam campaign

TPR has announced that its campaign urging the industry to publicly pledge to combat pension scams has seen more than 100 pledges since its launch[33], including from master trusts. Many of those have also self-certified to confirm they have adopted the stringent practices on due diligence, member warnings and reporting scams demanded by the pledge campaign.

Guidance on protecting schemes from sponsoring employer distress

In November 2020, TPR published guidance urging DB trustees to prepare for the possibility of their sponsoring employer facing difficulties[34]. The guidance makes clear that trustees should ensure they have access to relevant and up-to-date employer business and financial information. It highlights potential signs of corporate distress, outlines TPR's expectations on trustee risk management, and sets out what can be done to protect schemes. An accompanying blogpost told DB trustees how they can prepare for the "bumpy" economic road ahead and, in turn, what to expect from TPR.

31 See 7 Days (18 January 2021)
32 See 7 Days (14 December 2020)
33 See 7 Days (4 January 2021)
34 See 7 Days (16 November 2020); see also our Alert: Protecting schemes from sponsoring employer distress (16 November 2020)

Cases

High Court

Over two years on from its original decision[35], the High Court handed down its judgment in the latest instalment of the *Lloyds* saga[36] on 20 November 2020. It addressed the impact of the need to equalise for the effect of GMPs on past transfers out. As with the original judgment, the DWP was joined as an interested party.

While members are entitled to seek a Court order for a remedy, trustees should be proactive in remedying the position

Key points:

- notwithstanding a receiving scheme's liability to provide its members with equalised benefits, the transferring scheme trustees owed a duty to a member to pay a CETV which was correctly calculated, reflecting the member's right to equalised benefits
- in some cases, the transferring scheme trustees committed a breach of that duty by making an inadequate transfer payment (the breach having occurred at the time of the transfer)
- the transferring scheme is obliged to remedy an incorrectly calculated CETV by means of a top-up payment (plus interest), but alternative remedies could be agreed between the parties
- claims by a transferring member are not time barred, either under the rules (in the *Lloyds* schemes) or under relevant legislation (ie the Limitation Act 1980)
- bulk transfers and individual transfers made in accordance with legislation and under the scheme's rules may have extinguished the relevant members' rights under the scheme, but will need to be examined
- in assessing the number of transfers possibly in scope, and the actions to take, the trustees should be both proportionate and pragmatic.

No appeal has been sought, and no further hearings are expected.

Further PASA guidance

PASA is expected to publish guidance on the tax implications of GMP equalisation by the end of February 2021. Good practice guidance on communications and, later, on equalising past CETVs, is set to follow. Additionally, advice on GMP conversion, including example case studies, is due in April 2021.

Forthcoming cases

- The Court of Appeal will hear *Britvic*, another RPI/CPI case, in May 2021
- Permission to appeal is pending in relation to *Hughes v Board of the Pension Protection Fund*[37].

35 See our Alert: The High Court decides – how to solve a problem like GMP equalisation (26 October 2018)
36 See our Alert: GMP equalisation and past transfers out – the High Court decides (23 November 2020)
37 See 7 Days (24 August 2020)

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

Pension Schemes Act 2021	11/02/2021	Webinar (12:30pm-1:15pm) This webinar will focus on key elements of the new act, including TPR's increased powers, changes in relation to scheme funding, and new restrictions on statutory transfers. We will also look at the wider implications of the Act, as well as the likely regulatory road ahead in 2021.
Quarterly legal update	06/05/2021	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.

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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

The Pensions & investment litigation briefing – December 2020 reviews recent case law and examines the practical lessons for trustees and employers.

The Finance & investment briefing – December 2020 takes a look at current issues of interest to pension scheme investors.

See also our Blog, where our lawyers share their insights and perspectives on the issues affecting the pensions industry now.

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