Sackers

Quarterly briefing

September 2021

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

Q3

September 2021

On the front cover this quarter: David Saunders (our new Senior Partner), and Pauline Sibbit (Managing Partner)

In this issue

Abbreviations

AE: Automatic enrolment

CDC: Collective DC

CJEU: Court of Justice of the European Union

CN: Contribution notice

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

EEA: European Economic Area

ESG: Environmental, social and corporate governance

EU: European Union

FCA: Financial Conduct Authority

GDPR: General Data Protection Regulation

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

ICO: Information Commissioner's Office

MAS: Money Advice Service

NMPA: normal minimum pension age

PASA: Pensions Administration Standards Association

PDP: Pensions Dashboards Programme

PPF: Pension Protection Fund

PSIG: Pension Scams Industry Group

PSA21: Pension Schemes Act 2021

TCFD: Taskforce on Climate-related Financial Disclosures

TPAS: The Pensions Advisory Service

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

VfM: Value for Member

WPC: Work and Pensions Select Committee

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Hot topic: Pension Schemes Act 2021

Timetable at a glance

Topic	Expected timing of consultation / regulations	Expected in force
Climate change Improved governance and reporting (see below)	DWP regulations are in place, and draft DWP and TPR guidance has been published	1 October 2021
TPR's criminal and civil powers New and improved (see below for notifiable events)	Draft regulations, and consultations on TPR's code of practice and policy changes, have been published (see page 4)	October 2021
Notifiable events New events and duty to give notices and statements	Consultation on draft regulations due "later this year"	2022
DB scheme funding	Consultations on draft regulations and TPR's revised funding code are due later this year	Late 2022 "at the earliest"
Statutory transfers New restrictions	Draft regulations have been published (see page 5)	"Early autumn 2021"
Collective money purchase schemes or "CDC" Further detail on page 5	Consultation on draft regulations published in July 2021	TBC
Dashboards Further detail on page 5	Consultation on proposed regulations is due "later this year", to be laid before Parliament in 2022	Delivery remains on track for 2023

Climate change

There have been a number of climate change publications over the last quarter. Please see our ESG guide (which is being updated) for further detail, but in brief:

Schemes should be well underway with their preparations

- in June, the DWP published its response[1] on improving climate change risk governance and reporting, together with draft regulations and statutory guidance. The final regulations[2] are due to be phased in from 1 October 2021, and will require trustees to meet climate change governance requirements which underpin TCFD recommendations. This includes producing and publishing (on a publicly available website, accessible free of charge) a report on how they have done so. Schemes whose net assets (excluding bulk and individual annuity contracts) are £5bn or more must comply from 1 October 2021 and produce their report within 7 months of their scheme year end date, with schemes with £1 billion or more of assets in scope from the following year

1 See Alert: Government response to consultation on climate change regulations and guidance (8 June 2021)
2 See 7 Days (19 July 2021)
3 See 7 Days (28 June 2021)

- the FCA launched a consultation[3] in June on proposals to introduce climate-related financial disclosure rules and guidance for those bodies it regulates, to take effect for accounting periods beginning on or after 1 January 2022. Guidance will follow
- on 5 July 2021, TPR published a consultation[4] seeking views on guidance and changes to its monetary penalty policy, outlining its approach to the climate-related governance and reporting requirements. The guidance sets out non-exhaustive "example steps" TPR expects schemes to take and report on, and discusses related trustee knowledge and understanding requirements. Fines for non-compliance run up to £5,000 for individuals or £50,000 for corporates.

TPR's powers

TPR's new powers include the introduction of a new criminal offence of failure to comply with a CN or, in the alternative, a civil penalty of up to £1 million.

Two new snapshot tests for imposing a CN (under which TPR can require payment to be made into a scheme with DB benefits) focus on "employer insolvency" and "employer resources". In May, TPR published a consultation[5] on draft changes to code of practice 12 and the accompanying code-related guidance, addressing the two new tests. TPR has also taken the opportunity to update and clarify the code and corresponding examples in its guidance based on its experience of using its CN powers to date. The updated code will be presented in the new "single code" modular format[6] when it is finalised later in the year.

See our blog[8] on how schemes invited to interview should take advice

Regulations covering its new powers to issue CNs and to gather information were published on 29 June. Amongst other things, they set out the fixed and escalating penalty rates for non-compliance with information-gathering requests.

TPR is considering whether to produce further guidance on the new tests and its CN power more generally, as well as information on its experience of considering and using its CN powers. In addition, it will produce policy guidance on how and when it will use its information-gathering powers, including its powers to investigate criminal offences. Its approach to the new civil penalties of up to £1 million will be covered in further policies to be published in due course.

TPR's new powers are expected to take effect from October 2021 and TPR has confirmed that they will not apply to acts taking place before then[7]. As noted in the table on page 3, consultation on regulations in relation to changes and additions to the notifiable events regime are expected later this year, with commencement due in 2022.

DB scheme funding

Under changes being made by the PSA21, DB scheme trustees will be required to produce a funding and investment strategy[9]. Draft regulations to implement this change are still pending. Helpfully, TPR's annual funding statement provided an update on the timing of its revised DB funding code[10] which will sit alongside these changes. The second consultation on the draft code is now scheduled to take place "towards the end of 2021", with the code itself not expected to come into force "until late 2022 at the earliest".

4 See 7 Days (5 July 2021)
5 See our Alert: New contribution notices under PSA21 – TPR consults on code of practice changes (28 May 2021)
6 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
7 See 7 Days (5 July 2021)
8 See our Blog: TPR's new interview powers in the Pension Schemes Bill
9 See our Alert: Pension Schemes Act 2021 – the dawn of a new regulatory era? (11 February 2021)
10 See our Alert: 2021 funding statement – the continuing impact of a global pandemic (27 May 2021)

Hot topic: Pension Schemes Act 2021 cont.

Transfers and scams

PSIG's code of best practice on combating pension scams[12] is expected to reflect planned changes

With the aim of better protecting scheme members from scams, the DWP published a consultation on draft regulations[11] in May which will introduce new conditions restricting the statutory right to transfer.

In future, trustees and managers of occupational and personal pension schemes will be required to ensure that at least one of four new conditions is met before they can act on a statutory transfer request. These include assessing whether any red or amber "flags" are present. They will also be given the power to request information in relation to the transfer to help them identify whether the member is at risk of a scam, and must ensure members have taken guidance where amber flags are identified.

The DWP has developed a set of standard questions to assist trustees and managers in making proportionate enquiries. Guidance is also due from TPR and the FCA. Schemes will need to ensure their administrators implement appropriate processes to meet the new transfer requirements. However, there may yet be further changes to the regulations[13].

Scams generally continue to be a hot topic, with transfers at an all-time high. The WPC[14] recently published the response to its report on pension scams. Although the Government rejected the recommendation that the forthcoming Online Safety Bill tackle online fraud facilitated through paid-for advertising, such as adverts for pension products on search engines, it plans to consult on online advertising regulation later in the year.

CDC

The PSA21 will introduce a framework for "collective money purchase schemes", with a regulatory regime closely resembling that already in place for master trusts. On 19 July 2021, the DWP published a consultation[15] seeking views on draft regulations setting out the underlying detail, including what CDC schemes must do to become authorised, to operate effectively in the market under regulatory supervision, and what happens if changes need to be made to their schemes.

HMRC is in the process of making the necessary changes to tax legislation, and TPR will produce guidance and a code of practice in due course.

Dashboards

Work is progressing on pensions dashboards, although they are not expected to be available publicly until at least 2023.

In May, the PDP published a call for input on proposals for the staged compulsory connection of pension providers to the dashboards ecosystem[16]. The responses will help inform policy development ahead of the legislation that will ultimately bring compulsion into effect.

Staging will take place in three waves, based on size of membership. The first wave, for the largest schemes (1000+ memberships), is currently pegged to start in April 2023.

Ahead of the launch of the dashboards system, TPR has urged schemes and providers to improve both member data and the way in which it is stored.

11 See our Alert: Pension scams – empowering trustees and protecting members (17 May 2021)
12 See 7 Days (5 April 2021)
13 See our consultation response: Pension scams – empowering trustees and protecting members (8 June 2021)
14 See 7 Days (12 July 2021)
15 See our Alert: DWP Collective Money Purchase Schemes consultation (20 July 2021)
16 See 7 Days (1 June 2021)

DC update

Simpler annual benefit statements

In May, the DWP published a consultation[17] on proposals for new requirements regarding the length and format of annual benefit statements applicable to DC workplace pension schemes used for AE purposes. Subject to accessibility considerations, the new style benefit statement must not exceed one double-sided sheet of A4 paper. An illustrative template is provided.

The requirements will apply to statements issued on or after 6 April 2022.

Permitted charges

Changes aimed at increasing member understanding of charges and engagement

The DWP also published a consultation[18] in May on moving to a single charging structure for use within DC schemes used for AE purposes, to help "protect individuals… from high and unfair charges and from the risk of erosion to their pension". It sought views on the implementation of a de minimis pot size (initially set at £100) below which flat fees cannot be charged in default funds. The proposed legislation is anticipated to come into force in April 2022.

The consultation also asked for views on the "broader direction" the DWP should take on the future structure of charges that are permitted within the charge cap.

VfM, and incentivising consolidation

In June, the DWP issued its response to two consultations, alongside a new call for evidence[19], regarding "a series of measures to prepare the DC occupational pensions market for the challenges and opportunities ahead".

The response addressed its March 2021 consultation on incorporating performance fees within the charge cap. Regulations[20] and guidance on delivering better VfM for DC members, performance fee smoothing, and on the issue of look-through will now come into force on 1 October 2021. Subject to certain exceptions, trustees of DC or hybrid schemes with less than £100 million in total assets will be required to undertake a "more holistic" annual VfM assessment, and to report on it in their chair's statement and scheme return. To give schemes time to access the necessary data, the new style VfM assessment will apply in the first scheme year ending after 31 December 2021.

The response[21] also addressed the DWP's September 2020 consultation on proposals to drive consolidation of the DC market. The fresh call for evidence seeks views on how to accelerate the pace of consolidation for schemes with assets under £100 million, but also looks ahead to the "second phase of consolidation for medium to large schemes" (ie schemes with assets between £100 million and £5 billion).

DWP consultation on "nudge" to pensions guidance

It remains to be seen how this will sit with the scams changes to refer members to guidance

On 9 July 2021, the DWP launched a consultation[22] on proposed regulations requiring trustees and scheme managers to make sure an individual has either received, or opted out of receiving, Pension Wise guidance (now rebranded as MoneyHelper, see page 10) when seeking to access the retirement flexibilities (or transferring benefits for that purpose). Schemes will also be required to offer to book a guidance appointment on the individual's behalf.

This follows the October 2020 DWP "statement of policy intent" setting out proposed measures to encourage beneficiaries to access "appropriate pensions guidance", with the aim of helping them make informed decisions and to avoid scams. This consultation, which closes on 3 September 2021, sits alongside the recent FCA proposals to increase the take-up of Pension Wise guidance[23].

17 See our Alert: Simpler annual statements - consultation on draft regulations (19 May 2021)
18 See 7 Days (24 May 2021)
19 See our Alert: Response to consultation on improving outcomes for members of DC schemes and new call for evidence (22 June 2021)
20 See 7 Days (28 June 2021)
21 See 7 Days (12 July 2021)
22 See 7 Days (12 July 2021)
23 See 7 Days (4 May 2021)

Regulatory

TPR

2021 Annual Funding Statement

Be alert to the risks of weakening covenants and remain engaged with employers

In May, TPR published its annual funding statement[24]. Primarily aimed at schemes with valuation dates between 22 September 2020 and 21 September 2021, the statement is also relevant to schemes "undergoing significant changes that require a review of their funding and risk strategies".

Unsurprisingly, the current pandemic, and its knock-on effect on covenant monitoring and contingency planning, remains a high priority. The statement also acknowledges the need for trustees and employers to continue working together to manage unexpected events, whilst retaining "a focus on the long term – most specifically around planning and risk management".

Equality, diversity and inclusion

On 24 June 2021, TPR published its Equality, Diversity and Inclusion Strategy[25] outlining "how it plans to lead by example to create a fairer and more inclusive culture across the pensions industry and work with others to address inequality among savers". TPR will create a strategy by the end of 2021 to "support and set targets for the development of more diverse and inclusive boards of trustees/managers".

Update for schemes in "relationship supervision"

Having scaled down its one-to-one supervision programme during the pandemic to focus on supporting schemes and employers experiencing financial distress, in June TPR issued updates to various documents[26]. Noting that "the pensions landscape has shifted since March 2020", TPR is now refocusing its supervisory regime and plans to restart regulatory initiatives later in 2021. But schemes with immediate concerns should still contact their supervisor.

Understanding liquidity risk

On 28 May 2021, TPR published a blog[27] highlighting the need for trustees to improve their understanding of the liquidity risks their schemes are exposed to and how those risks can be monitored and mitigated. While "investment in illiquid assets may offer trustees the opportunity to capture an illiquidity premium", and improve overall risk and outcomes for their scheme members, the extent to which trustees decide to invest in illiquid assets should be determined by their scheme characteristics.

Automatic enrolment guidance updated

In July, TPR updated its suite of guidance on AE[28], removing out-of-date content and making general updates, including in relation to cross-border and non-UK pension schemes post Brexit.

24 See our Alert: 2021 funding statement – the continuing impact of a global pandemic (27 May 2021)

25 See 7 Days (28 June 2021)

26 See 7 Days (14 June 2021)

27 See 7 Days (1 June 2021)

28 See 7 Days (12 July 2021)

Data protection

UK adequacy decisions adopted

A temporary bridge, enabling the continued free flow of personal data from within the EU/EEA to the UK whilst an adequacy decision was pending, had been due to fall away on 30 June. However, the EU Commission announced on 28 June that it has adopted two UK adequacy decisions[29].

A so-called "sunset clause" means that the adequacy decisions will automatically expire after four years

The ICO has welcomed the decisions, noting that "approved adequacy means that businesses can continue to receive data from the EU without having to make any changes to their data protection practices."

Data flows in the opposite direction (ie from the UK outwards to the EU/EEA, and to any countries covered by an EU adequacy decision as at 31 December 2020) are not affected by this decision. Movement of data in that direction is already allowed, although this will be kept under review by the UK Government which now has power to make its own adequacy decisions.

Supplementary measures adopted for data transfers to third countries

On 18 June 2021, the European Data Protection Board adopted measures following the CJEU's ruling in *Schrems II*[30]. These aim to help data exporters under the EU GDPR to assess third countries and to identify appropriate supplementary measures where needed.

Data sharing code of practice

The ICO's new data sharing code of practice was laid before Parliament on 18 May 2021 and, in the absence of any objections, should come into force imminently[31]. The code aims to guide businesses and organisations through the practical steps they need to take to share data lawfully and to give them "the confidence to share data in a fair, safe and transparent way". Resources and tools for sharing data are available on the ICO's "information hub".

29 See 7 Days (28 June 2021)
30 See 7 Days (28 June 2021)
31 See 7 Days (24 May 2021)

In other news

Finance Act 2021 receives Royal Assent

This Act received Royal Assent on 10 June 2021[32]. Among other things, it fixes the Lifetime Allowance at its current level of £1,073,100 until April 2026[33] and ensures that CDC schemes (see page 5) can operate as registered pension schemes for tax purposes.

Finance Bill 2021-22 published

On 20 July 2021, the Government published a consultation on draft clauses for the Finance Bill 2021-22[34]. These cover the tax implications of upcoming increases in NMPA.

Schemes should check whether the rise in NMPA will feed through automatically into their rules

NMPA will rise from age 55 to 57 from 6 April 2028. However, pensions may be paid from an earlier age because of ill-health or if a member has a "protected pension age", and a new protection regime will therefore be introduced. Members of schemes with a protected pension age of less than 50 or 55 will see no change in respect of their current protected pension ages.

All members of the armed forces, police and fire public service pension schemes will be exempt from the change.

GMP conversion and equalisation update

PASA conversion guidance

On 9 July 2021, PASA published its eagerly awaited guidance on GMP conversion[35]. This provides examples of how GMP conversion is being used, explains the issues faced by early adopters, how they have been addressed in practice, and how simplification can be achieved in many cases without "a significant impact on members". Recognising that many schemes will wish to go down the GMP conversion route, the guidance aims to "show how they might do so in a proportionate and pragmatic way" in the absence of further guidance or legislation from the DWP or HMRC.

See our new GMP equalisation checklist covering key questions trustees need to ask[37]

Separately, PASA announced[36] the formation of a further GMP equalisation sub-group focusing on administration to provide support to those involved in such projects.

Further PASA guidance is also expected on GMP equalisation and historic transfers, anti-franking and communications. Administration Q&As will also be published. Other events in the pipeline include "GMP equalisation week" in the autumn.

Axminster case – High Court

Mr Justice Morgan's recent judgment in *Axminster Carpets*[38] (the same judge as in *Lloyds No.1*) helps to clarify the arrears and limitations aspects of that earlier case. The trustee applied to the Court for directions over some uncertainties in the scheme's documentation, including historically underpaid increases, and whether claims were forfeit or time barred.

32 See 7 Days (14 June 2021)
33 See our Alert: Budget day 2021 (3 March 2021)
34 See our Alert: Increasing the NMPA (21 July 2021)
35 See our Alert: PASA's GMP Conversion Guidance (12 July 2021)
36 See 7 Days (12 July 2021)
37 GMP equalisation: Essential planning – the questions trustees need to ask (July 2021)
38 See our Alert: Arrears and limitation – a follow-up to Lloyds (21 June 2021)

As ever, the precise wording of the rules will be key to assessing whether a scheme allows forfeiture of unclaimed benefit instalments after six years (as permitted by legislation). Mr Justice Morgan considered some of the factors which might apply where trustees have a discretion whether or not to forfeit. These include lack of awareness and absence of fault on the beneficiary's part, as well as possible administrative difficulties.

Again, consistent with *Lloyds No.1*, the judge found that no limitation period applies to beneficiaries seeking to recover arrears against current trustees. However, he made "tentative comments" as to the ability of a beneficiary to claim compensation for breaches of trust against former trustees who are no longer in possession of the trust property, where the usual six-year limitation period might apply.

In addition, the case also looked at the issues of interest on arrears, and whether the introduction of the forfeiture rule had been permissible given a restriction in the scheme's amendment power.

MoneyHelper launches

On 30 June 2021, MoneyHelper, the new consumer service replacing the three legacy brands of MAS, TPAS and Pension Wise, went live[39].

Stakeholders are being asked to start the process of updating their material and signposting in line with the new brand. As relevant legislation has not yet caught up with this rebranding exercise, some schemes may prefer to update at the next opportunity. However, trustees should discuss what approach to take with their advisers as this is clearly an issue to be alive to when communicating with members.

We will provide relevant updates in 7 Days in due course.

39 See 7 Days (5 July 2021)

Cases

Court of Appeal

Britvic

The Court of Appeal has allowed an employer appeal[40] favouring their interpretation of a rule regarding DB increases. The main issue was whether the wording of the rule – specifically, the words "or any other rate" – meant "any **higher** rate" or "any other rate, whether higher or lower". The case offers further consideration and detail on how the Courts will look at issues of construction and interpretation.

Again, the precise wording of the rules will be key

The Court held that the approach indicated by case law, including *Barnardo's* was clear. If the parties had used unambiguous language, the Court must apply it. In this case, the wording was unambiguous and did "not naturally mean" or any higher rate. The Court therefore held that the "scope for importing a limitation on the words in this case" was limited, "despite the obvious advantages of doing so."

PPF v Hughes

The Court of Appeal has found in favour of the PPF's approach for increasing payments to members[41] following the CJEU's judgment in the *Hampshire* case. The PPF is entitled to use a "value test" for calculating compensation on a one-off basis, as long as this corresponds to at least 50% of a member's pre-insolvency entitlement.

However, the Court confirmed the High Court's decision that the PPF compensation cap, as set in legislation, constitutes unlawful age discrimination and must be disapplied. The period of time over which the cap can be disapplied is not yet clear.

As the judgment may be appealed, the PPF will continue to pay members their current level of benefits for the time being, and will provide more information on the implementation of the judgment in due course.

TPO

TPO has rejected a complaint[42] that appropriate due diligence was not carried out when transferring a pension. In giving its determination, TPO discussed the issue of timeframes within which schemes should reasonably be expected to institute new processes following the publication of key guidance on identifying and preventing scams.

Schemes will need react promptly to any other key changes to guidance in this area

Whilst TPO had previously held that three months to amend procedures following publication of TPR's Scorpion guidance[43] was acceptable, it is not bound by its earlier determinations. Following evaluation of earlier cases and the "evolving regulatory position", TPO now states that it considers "a period of approximately one month" to be generally sufficient for new processes to be put in place. If this timeframe cannot be met, TPO would expect a provider "to consider temporarily suspending transfers while it makes the necessary arrangements" or to contact TPR to request transfer extensions.

This case could have ramifications when it comes to the timeframe for updating processes in light of the new transfer conditions being introduced under the PSA21 (see page 5).

40 See our case summary: Britvic plc v Britvic Pensions Limited & Anr (Court of Appeal 10 June 2021)
41 See our case summary: Hughes v PPF (Court of Appeal, 19 July 2021)
42 See our case summary: Mr R (PO – 24554) (No maladministration where transfer finalised within one month of publication of Scorpion guidance)
43 Now replaced by TPR's Avoid Pension scams materials

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

Risk transfer webinar	21/09/2021	Webinar (12:30pm-1:30pm) Our Sackers experts will be sharing the latest market developments in buy-ins and risk transfer transactions.
Quarterly Legal Update	11/11/2021	Webinar (12:30pm-1:30pm) 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

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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 Master trust briefing – May 2021 looks at current and future developments affecting master trusts, setting out key items to consider for inclusion on a trustee agenda.

Our checklist, GMP equalisation: Essential planning – the questions trustees need to ask – July 2021, covers key questions and actions for trustees.

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

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