Quarterly briefing

September 2023

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

Q3

September 2023

On the front cover this quarter:
Oliver Topping (partner) and
Emily Whitelock (senior associate)

In this issue

Abbreviations

AA: Annual allowance

CDC: Collective DC

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ESG: Environmental, social and corporate governance

EU: European Union

FCA: Financial Conduct Authority

HMRC: HM Revenue & Customs

HMT: HM Treasury

IGC: Independent Governance Committee

LTA: Lifetime allowance

MNTs: Member-nominated trustees

PCLS: Pension commencement lump sum

PPF: Pension Protection Fund

SIP: Statement of investment principles

TKU: Trustee knowledge and understanding

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

UFPLS: Uncrystallised funds pension lump sum

VFM: Value for money

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Current legal agenda

Topic	Summary	Timing
General code[1]	Draft code consulted on in 2021	Final code currently expected in autumn 2023
CDC[2]	Legislation for single or connected employer schemes came into force 1 August 2022 Response to DWP consultation on multi-employer schemes and decumulation-only vehicles published July 2023	Consultation on draft regulations for unconnected multi-employer schemes expected in the autumn (see page 6)
DB scheme funding[3]	TPR's consultation on draft code closed in March 2023 DWP consultation on draft regulations on new funding and investment strategy closed in October 2022	New regime currently expected to come into force in April 2024
Pensions Dashboards	Regulations came into force 12 December 2022. Connection deadlines changed to a single deadline of 31 October 2026, with staging timeline to be set out in guidance	DWP to work with the pensions industry on the staging timeline "this year" (see page 10)
Notifiable events[4]	Consultation on changes back in 2021. Response to consultation and final regulations are outstanding	Timings unknown

1 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021) and our Hot Topic: TPR's General Code: what should trustees be doing now? (May 2023)

2 See our Alert: The DC deluge (31 January 2023)

3 See our Alerts: DWP consults on DB funding and investment strategy (27 July 2022) and TPR consults on its new DB funding code (19 December 2022)

4 See our Hot Topic: New reporting requirements (January 2022)

Mansion House reforms

The Chancellor, Jeremy Hunt, delivered his Mansion House speech in July, which was followed by several pensions-related consultations and calls for evidence.[5]

Several pensions-related consultations published

Being guided by three "golden rules", including seeking to secure the best possible outcomes for pensions savers, he announced a package of measures to enable the financial services sector to "increase returns for pensioners, improve outcomes for investors and unlock capital for our growth businesses".

Headlines

DC

- **VFM** – the Government is moving forward with its proposals on VFM, with future consultations on draft regulations and FCA rules "when parliamentary time allows"
- **Deferred small pots** – a consultation is underway on addressing the growing number of deferred small DC pots, with a system of multiple default consolidators proposed
- **Decumulation** – a consultation has been published on a policy framework to support individuals in DC decumulation
- **CDC** – the DWP intends to press ahead with proposals for expanding the availability of CDC to unconnected multi-employer schemes

Trustees

- **Pension trustee skills** – HMT and the DWP have issued a joint call for evidence on trustee skills, capability and culture

DB

- **Superfunds** – plans for introducing a "permanent superfund regulatory regime" are outlined
- **Options** – a call for evidence has been issued to explore various options for DB schemes, such as access to and the use of scheme surplus, as well as consolidation.

Value for money

New VFM framework to go ahead

Over the last couple of years, the DWP, TPR and the FCA have been working closely to establish a common assessment framework for VFM across the DC market, culminating in a joint consultation earlier this year.[6] The consultation sought views on proposals to require trustees and managers of DC occupational pension schemes, as well as the providers and IGCs of workplace personal pension schemes, to disclose, assess and compare the VFM of their schemes. They have now published a joint response to the consultation.

What is the new VFM framework?

The new framework is intended to provide a transparent, standardised process for schemes to assess VFM and to improve the value provided to savers. When analysing VFM, trustees will need to consider three areas:

- investment performance
- costs and charges, and
- quality of services.

5 See our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
6 See our Alert: The DC deluge (31 January 2023)

Mansion House reforms cont.

What will schemes have to do under the new framework?

Comparisons will need to be made against schemes of sufficient scale to deliver good outcomes	Trustees will have to follow a prescribed process, using supporting guidance, when carrying out the VFM assessment	VFM assessment reports will have to be published by the end of October each year

Underperforming schemes will be required to take immediate action to improve or to wind up and consolidate, if this is in savers' best interests. While there are no details yet, regulators will be given powers to remove persistently poor performing DC schemes from the market.

Chair's statement

For now, the chair's statement will remain. However, the new framework will increasingly duplicate the statement's requirements so the DWP, TPR and the FCA will consider how the statement requirements could be managed down and ultimately phased out.

New Pensions Act on the horizon

Next steps

The framework will be implemented in phases, starting with default arrangements. A new Pensions Act will be needed to cater for some elements of the proposals. We can also expect consultations on draft regulations and FCA rules addressing the detailed requirements before the framework can come into force.

DC deferred small pots

The DWP has published a single document combining a response to its January call for evidence[7] and a new consultation taking forward proposals for a framework to enable multiple default consolidators.

Multiple default consolidators proposed as solution to small pots

Under the proposals, a small number of schemes would be authorised to act as automated consolidators for deferred small DC pots, with a "clearing house" acting as a central point to store and manage data and inform schemes where to transfer. Pots of up to £1,000 would become eligible for automatic consolidation 12 months after the last contribution is made, with the Secretary of State required to review the pot size limit at regular intervals.

To reduce the risk of detriment to members whose pots are automatically transferred, consolidator schemes would need to meet certain authorisation criteria and members would be able to choose their designated consolidator or opt out if they wished.

The consultation closes on 5 September 2023.

7 See our Alert: The DC deluge (31 January 2023)

Mansion House reforms cont.

Supporting individuals in DC decumulation

The Government has published a consultation on a policy framework to support individuals using their pensions savings in decumulation, which includes its response to the product and services element of its 2022 call for evidence on helping savers understand their pension choices.[8]

Trustee duty to offer DC decumulation services proposed

It is consulting on a proposal to place a duty on trustees to offer decumulation services which are suitable for their members. Trustees would need to offer these services either in-house or by partnering with another supplier. The consultation closes on 5 September 2023.

In the meantime, the DWP will work with TPR to issue guidance for trustees on offering decumulation products.

Expanding the availability of CDC

Responding to its January consultation on expanding opportunities for CDC schemes,[9] the DWP intends to proceed with proposals to extend the legislative framework to allow unconnected multi-employer CDC schemes and CDC decumulation-only products.

CDC regime to be expanded to unconnected multi-employer schemes

A consultation on draft regulations to enable unconnected multi-employer CDC schemes is planned for the autumn, after further consideration by the DWP on some key areas such as regulation of marketing materials and whether to mandate MNTs in such schemes.

Legislating for CDC decumulation-only products remains some way off, although the DWP is "committed to moving forward" with this policy by exploring how it could operate in the best interests of members and "without unwarranted impacts on other aspects of the pensions framework".

Trustees' skills, capability and culture

Against the backdrop of an "evolving and more complex regulatory environment", a new call for evidence launched by HMT and the DWP focuses on three key areas:

- trustee skills and capability
- the role of advice
- other barriers to trustee effectiveness.

In addition to posing some general questions around TKU standards, the call for evidence looks at whether there are barriers to improving trustee capability, including whether trustee liability puts potential candidates off coming forward in the first place.

Master trusts and professional trustees

The call for evidence asks if there should be a certain proportion of accredited trustees on trustee boards, in particular whether master trusts should have a greater proportion of accredited trustees than other schemes. Similarly, "more rigorous requirements" for those acting as professional trustees are discussed.

Investment knowledge and fiduciary duties

The Government is interested in whether trustees have the right knowledge and skills to consider "the full breadth of investment opportunities" and, if not, what can be done to improve this. There is concern that there may be a risk averse culture or "even a perception that fiduciary duty means capital preservation at all costs". Views are therefore sought on whether the way in which fiduciary duties are interpreted or exercised could be holding schemes back from exploring a broader range of investments, including in less liquid assets.

The call for evidence closes on 5 September 2023.

8 See our Alert: Call for evidence – Helping savers understand their pension choices (16 June 2022)

9 See our Alert: The DC deluge (31 January 2023)

Mansion House reforms cont.

DB superfunds

Government to set up a statutory framework for DB superfunds

The Government has published its response to the 2018/19 consultation on a new legislative framework for authorising and regulating DB "superfund" consolidation schemes.[10] Since the original consultation was published, TPR has set up an interim regulatory regime for DB superfunds,[11] with one superfund already authorised. Keen to learn from TPR's interim regime, the Government's aim is for superfunds to be a viable option for schemes that cannot yet afford or access a buy-out with an insurer but are "suitably funded" to avoid introducing too much risk to the superfund itself.

A superfund is an occupational pension scheme set up for the purposes of consolidating DB schemes' liabilities. The link to the sponsoring employer is severed or "substantially altered" following the transfer of a scheme to the superfund, with the "covenant" replaced by a capital buffer provided through external investment.

Key principles underpinning the new superfunds regime

- ✓ Authorised and supervised by TPR
- ✓ Systems and processes in place to ensure effective governance
- ✓ Trigger system for interventions (ie when TPR can intervene), profit taking and winding up
- ✓ Long-term objective, although that would not have to be tied to targeting buy-out with an insurer
- ✓ Requirements around financial sustainability and capital adequacy.

The proposed regime will require primary legislation, with the Government looking to introduce this "as soon as parliamentary time allows". The intention is for the primary legislation to provide for a new compulsory framework for superfunds as well as other "relevant models" of consolidation.

In the meantime, following a review, TPR has updated its regulatory guidance for DB superfunds and for prospective transferring trustees and employers. The changes are intended to "ease the way for schemes transferring to a superfund" and to give more clarity on the assessment process. A further update on the ability to extract profits from superfunds may follow, after TPR engages further "with the industry on how this will work".

Options for DB schemes

As part of the Government's "drive to promote economic growth", the DWP has launched a call for evidence on options for DB schemes, to support the development of "innovative policy options". This looks at how DB schemes could use their assets more flexibly, while maintaining appropriate security of members' benefits and not undermining trustees' fiduciary duties.

The call for evidence explores:

- access to and the use of surpluses
- the potential benefits and drawbacks of a public sector consolidator, and
- the role of the PPF as the public sector consolidator.

The call for evidence closes on 5 September 2023.

10 See our Alert: DWP consults on DB consolidation vehicles (10 December 2018)

11 See our Alert: New interim regulatory regime for Superfunds (22 June 2020)

Pensions tax changes

The Chancellor announced a raft of radical changes to the pensions tax system in this year's Budget. Many of these were brought into force retrospectively by the Finance (No.2) Act 2023, which received Royal Assent in July 2023.[12] From 6 April 2023:

AA has increased

- the standard AA, which limits the total tax-relieved pension savings an individual can make each tax year across all registered pension schemes, increased from £40,000 to £60,000
- the money purchase AA, which applies to any subsequent DC savings by individuals who flexibly access their DC benefits, increased from £4,000 to £10,000
- the minimum tapered AA, which works by reducing the AA by £1 for every £2 of income over the taper threshold, increased from £4,000 to £10,000, and the taper threshold increased from £240,000 to £260,000

LTA charge removed from April 2023

- the LTA charge was removed, with benefits exceeding the LTA now taxed at an individual's marginal rate
- the maximum tax-free PCLS an individual can take is frozen at £268,275, being 25% of the 2022/23 LTA. However, members with certain LTA protections will retain their entitlement to a higher PCLS
- certain other lump sums which were previously subject to an LTA charge of 55% are now taxed at the recipient's marginal rate.

Removal of the LTA and the new lump sum allowances

The plan is to abolish the LTA altogether from 6 April 2024. Draft clauses for the next Finance Bill to deal with this were published in July 2023.[13]

LTA to be removed altogether from 6 April 2024

It is proposed that a tax-free PCLS will continue to be calculated using the same formula as now, with the standard maximum PCLS being limited to the lower of £268,275 or 25% of the value of benefits being crystallised. Tax-free elements of certain other lump sums, such as an UFPLS and trivial commutation and winding-up lump sums, will also count for the purposes of this new "lump sum allowance".

New allowances to be introduced

A new overall "lump sum and death benefit allowance" of £1,073,100 is also being introduced, designed to limit the total amount of tax-free lump sums payable to or in respect of an individual across all registered pension schemes. As well as capturing the PCLS and tax-free elements of certain other lump sums, certain death benefits which are payable tax-free will also count towards the lump sum and death benefit allowance.

Individuals holding a valid LTA protection will retain their rights to a higher level of tax-free cash, as well as to higher tax-free parts of other lump sums and lump sum death benefits.

What happens now?

- HMRC is running a technical consultation until 12 September to check the draft legislation works as intended, and regulations are still needed to fill in some of the details, including transitional provisions. The 6 April 2024 timeframe is therefore beginning to look a little on the tight side
- In the meantime, trustees and administrators should be thinking about their administration processes and record keeping, and how these will need to be updated for the new allowances.

12 See our Alert: Finance (No.2) Bill 2023 (23 March 2023)

13 See our Alert: Pension tax changes – the revised allowances and removing the LTA (20 July 2023)

TPR update

Trustee diversity and inclusion survey

TPR's first trustee D&I survey

In July 2023, TPR carried out an anonymous online survey of occupational pension scheme trustees to gather diversity and inclusion data about their scheme's trustee board. The survey included questions related to trustees' protected characteristics, academic and socio-economic backgrounds and work experience, and actions trustees are already taking to ensure diversity and inclusion.

TPR intends to use the survey data to build a picture of trustees' diversity to help measure progress in promoting diversity and inclusion.

Signpost members to a "Midlife MOT"

TPR has published a blog on the Government's new online Midlife MOT intended to support people with work, health and money. The money section of the Midlife MOT offers digital tools to help educate users on pensions, including how to find lost pension pots and establish ideal retirement income. TPR sees the Midlife MOT as an "essential part of the pensions journey" and encourages trustees to signpost it to their members, particularly targeting members aged 45 to 65.

ESG compliance review

TPR has published a blog on why trustees should consider ESG factors and wider sustainability issues. The blog reminds trustees of TPR's forthcoming regulatory initiative in relation to SIPs and implementation statements. There are two phases to the initiative:

TPR to check sample of SIPs and implementation statements

- the first phase of the initiative involves checking all trustees have published their SIPs and implementation statements where required, and that these documents have been made publicly available
- the second phase involves a "qualitative review" of a "cross-section" of SIPs and implementation statements, in relation to the climate, ESG and wider sustainability related provisions in those documents.

Concerned that some schemes are producing "relatively vague and generic" disclosures, TPR wants to see a change to that practice. The review will focus on the extent to which the DWP's guidance has been adopted.[14] TPR now expects to start its review in the autumn.

Protect DC members from economic volatility

TPR has published a blog reminding trustees that they must support members during this period of economic volatility. Key messages include:

- trustees should ensure their default pre-retirement strategy is targeting the "right outcome" and is fit for purpose in the current market environment
- TPR is particularly concerned that signs of recovery may not be fully reflected in annual benefit statements sent to members in the coming months. It is, therefore, "vital" that trustees provide more up-to-date context in annual statements and useful "supporting materials" to "guard against the risks of savers making knee-jerk decisions", particularly those who are approaching retirement
- TPR also expects trustees to signpost members to sources of appropriate financial advice and guidance in their benefit statements.

14 See our guide: ESG and climate change for pension funds in 2023 (April 2023)

In other news

Dashboards delay

Following the dashboards "reset" announcement earlier this year, Laura Trott, the Pensions Minister, announced a revised deadline of 31 October 2026 for all schemes to connect to pensions dashboards, which has since been brought into force by amending legislation.

New single dashboard connection deadline of 31 October 2026

A revised staging timetable will be set out in guidance which the Government will publish following collaboration "with industry this year", and trustees will need to "have regard" to the guidance when connecting to the dashboards ecosystem.

TPR has updated its dashboards guidance, and is considering what, if any, changes need to be made to its compliance and enforcement policy, which was consulted on in late 2022.

The FCA has made corresponding changes to the dashboard rules for FCA-regulated pension providers.

Pension transfers

The DWP has issued a report on its review of the transfer conditions regulations that came into force in November 2021.[15] The review was carried out with the aim of ensuring that the regulations are "working effectively and giving the maximum protection for pension savers".

The report's findings include:

- feedback suggests that certain provisions in the regulations, namely the incentives and overseas investments flags, are causing delays
- to date, TPO has received a relatively small number of complaints about the transfer conditions, mostly concerning transfers blocked due to a red flag.

DWP considering whether to amend transfer legislation

As feedback suggests the incentives and overseas investments flags are causing issues in practice, the DWP is carrying out further work with the pensions industry and TPR "to consider if changes could be implemented to the regulations to improve the pension transfer experience, without undermining the policy intent".

Retained EU Law Bill receives Royal Assent

The Retained EU Law (Revocation and Reform) Act 2023 has received Royal Assent. Before being finalised, the draft legislation was amended to delete a provision which could have resulted in a large volume of EU-derived UK law being removed at the end of 2023. Instead, the Act lists specific secondary legislation which will be revoked at the end of 2023, as well as making various changes to retained EU law, including as to how EU-derived case law is treated by UK courts.

The list of legislation to be revoked does not include any pensions-specific law. We understand the Government is currently considering what effects of EU-derived case law, including pensions case law, it intends to preserve.

Sackers receives industry recognition for quality advice and client service
2023 has been a bumper year for Sackers, winning the top three pensions legal awards – Pensions Law Firm of the Year at the Pensions Age Awards 2023, Pensions Lawyers of the Year at the Professional Pensions UK Pensions Awards 2023 and Best Pensions Law Firm at the Corporate Adviser 2023 Awards. Winning these awards is testament to the hard work and commitment of everyone at Sackers over the past year and we are delighted to have been recognised by the pensions industry with these awards.

15 See our Hot Topic: Are you ready? The new statutory transfer regime (November 2021)

Failure to obtain a section 37 confirmation

In *Virgin Media v NTL Pension Trustees II Limited (and others)*, the High Court ruled on the correct interpretation of historic legislation governing the amendment of contracted-out DB schemes.[16]

Background

From 6 April 1997 until contracting-out on a DB basis ended on 5 April 2016, contracted-out schemes had to satisfy an overall quality test known as the "reference scheme test" in relation to contracted-out rights known as "section 9(2B) rights". The rules of contracted-out schemes could not be altered in relation to section 9(2B) rights unless:

- the trustees had "informed the actuary in writing of the proposed alteration"
- the actuary had "considered the proposed alteration and had confirmed to the trustees in writing" that they were satisfied that the scheme would continue to satisfy the relevant statutory standard if the alteration were made ("a Section 37 Confirmation"), and
- the alteration did not otherwise prevent the scheme from satisfying the requirements for a contracted-out scheme.

Decision

The case concerned the validity of a trust deed and rules of a contracted-out DB scheme. As the Section 37 Confirmation was missing for that trust deed and rules, and the case was determined on the assumption that it was not obtained, the judge found that:

- amendments to the rules of a contracted-out scheme which related to section 9(2B) rights were void and ineffective to the extent that the amendment was introduced without the Section 37 Confirmation
- the words "section 9(2B) rights" included both past service rights and future service rights
- there was nothing in the legislation to limit the effect of section 37 to alterations that would or might have an "adverse" effect. It applied to all changes, including beneficial ones.

Amendments introduced without section 37 confirmations are void

What does this mean for schemes that used to be contracted-out?

- ✓ Overall, our view is the decision doesn't expose any new risks for pension schemes. The requirement for a Section 37 Confirmation for amendments relating to section 9(2B) rights was well known, and decisions should have been taken at the time changes were being made as to whether or not it was triggered
- ✓ The legislation did not require a Section 37 Confirmation to be given in any particular form, so it could have been wrapped up as part of advice given around the relevant time. A deed making specific reference to a Section 37 Confirmation (or not as the case may be) will not necessarily be conclusive either way
- ✓ Whether or not a Section 37 Confirmation was given is part of the wider question of whether all the necessary formalities (eg execution requirements, section 67 certificate) were satisfied when a scheme amendment was made
- ✓ Unless a particular query or concern prompts a general review of scheme amendments, we do not believe trustees are obliged to look into this issue as a matter of course
- ✓ The decision is being appealed.

16 See our Alert: High Court decision on failure to obtain a s37 confirmation (23 June 2023)

Sackers

Upcoming webinars and seminars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars and webinars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on topics.

DC strategic priorities for 2024	18/09/2023	Online webinar This session, held in partnership with Independent Governance Group, we will look ahead to 2024 and focus on the issues of most importance. Our experts will give both the legal and the trustee perspective, providing practical tips and guidance about what you can be doing now to get ahead of the curve.
New Trustee training	31/10/2023	In person seminar Our free and interactive seminar is a full day session, where we focus on the key legal issues for new trustees of DB, DC and hybrid schemes (as well as those who would like to refresh their knowledge).
Quarterly legal update	09/11/2023	Online webinar This session 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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Recent publications

The Finance & investment briefing – September 2023 takes a look at current issues of interest to pension scheme investors.

The Pensions litigation briefing – June 2023 reviews recent case law and examines the practical lessons for trustees and employers.

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