Sackers

Quarterly briefing

March 2024

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

Q1
March 2024

On the front cover this quarter:
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Abbreviations

CDC: Collective DC
CMA: Competition and Markets Authority
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ESOG: Effective system of governance
F&I: Funding and investment
FCA: Financial Conduct Authority
HMRC: HM Revenue & Customs
ICO: Information Commissioner's Office
LDI: Liability-driven investment
LSA: Lump sum allowance
LSDBA: Lump sum and death benefit allowance
LTA: Lifetime allowance
MaPS: Money and Pension Service
ORA: Own risk assessment
PCELS: Pension commencement excess lump sum
PCLS: Pension commencement lump sum
PDP: Pensions Dashboards Programme
PPF: Pension Protection Fund
PSA21: Pension Schemes Act 2021
TKU: Trustee knowledge and understanding
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator
UFPLS: Uncrystallised funds pension lump sum
VFM: Value for money

In this issue

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Current legal agenda

Topic	Summary	Timing
General code[1]	Updated code published 10 January 2024	Currently expected to come into force on 27 March 2024 (see pages 4 and 5)
Removing the LTA[2]	The LTA is on course to be abolished from 6 April 2024	Legislation going through Parliament (see page 7)
DB scheme funding[3]	Revised regulations on new funding and investment strategy published 29 January 2024 TPR's consultation on draft funding code closed in March 2023	Expected to apply to valuations with effective dates on or after 22 September 2024 (see page 6)
VFM[4]	Joint response to consultation on VFM was published July 2023	FCA expected to consult on rules for VFM framework for contract-based schemes in spring 2024
Mansion House reforms[5]	The Chancellor announced measures in the Autumn Statement, building on the consultations in summer 2023	See page 8 for the latest news
Pensions dashboards	Connection deadline 31 October 2026, with staging timeline to be set out in guidance	Staging timeline guidance expected in 2024
Pensions transfers	Possible changes to the incentives and overseas investment flags following the DWP's review of the transfer conditions	Amending regulations expected
Notifiable events[6]	Consultation on changes to the regime back in 2021. Response to consultation and final regulations are outstanding	Unknown

1 See our Alert: The General Code (11 January 2024)
2 See our Alert: Autumn Statement 2023 – it's a bumper pensions crop (23 November 2023) and our Alert: Pensions tax changes – the revised allowances and removing the LTA (20 July 2023)
3 See our Alert: DWP publishes revised DB funding regulations (30 January 2024) and our Alert: TPR consults on its new DB funding code (19 December 2022)
4 See our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
5 See our Alert: Autumn Statement 2023 – it's a bumper pensions crop (23 November 2023) our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
6 See our Hot Topic: New reporting requirements (January 2022)

General code

Code expected to come into force 27 March 2024

TPR published its long-awaited new general code of practice (the "Code") and consultation response in January 2024. The Code is expected to come into force on 27 March 2024. It brings together 10 of TPR's 16 current codes of practice into new "modules", which are intended to be clearer and more accessible. For the most part, the standards it sets out are not new.

Previously known as the "single code", a draft version of the Code was consulted on in early 2021, with an interim response from TPR following later that year. TPR received over 100 formal responses to the consultation and has reflected many of the suggestions and comments received in the final Code.

In producing the Code, TPR aims (among other matters) to provide all types of governing bodies with "consistent expectations, regardless of scheme type and so far as legislation permits". This is hoped to lead to improved awareness of its expectations and to better governance.

Key changes to the Code

Following consultation, TPR has made a number of changes. Most of these are designed to achieve greater clarity, but in some places its expectations have been revised. For example:

- TPR no longer expects a scheme's remuneration policy to be published. The Code also makes clear that the policy should only cover those costs that the governing body is directly responsible for, and that it does not have to set out the levels of remuneration actually paid
- recognising that its original expectation relating to unregulated investments "could negatively impact well governed schemes that hold such assets as part of well-managed investment strategies", TPR now just refers to a requirement to invest "mainly" in regulated markets.

In addition, some modules have been amended to reflect changes in the law up to October 2022.

ESOG

Code sets out how trustees should operate an ESOG

In 2019, regulations to implement parts of the second European Pensions Directive (better known as "IORP II") introduced the requirement for trustees to establish and operate an ESOG, which must be proportionate to the size, nature, scale and complexity of the scheme. The Code explains that an ESOG should include processes and procedures to ensure compliance with a list of specified modules which relate to:

- management of activities
- organisational structure
- investment matters
- communications and disclosure.

While there are some new expectations under the Code, such as the remuneration policy, TPR expects the ESOG to be "predominately a rebadging of things that the governing bodies of well-run schemes should be doing already".

The ORA

Certain schemes must carry out an ORA

Schemes with 100 or more members which are required to operate an ESOG must carry out and document an ORA. The ORA is an assessment of how well the ESOG is working and the way potential risks are managed.

Timings

TPR initially proposed that schemes should complete an ORA every 12 months. But, in response to feedback, it has reconsidered the timing requirements. In line with the legislation, schemes in scope should now prepare their first ORA within 12 months after the end of the first scheme year that begins after the Code comes into force, or, if later:

- within 15 months beginning with the date on which the trustees are next required to obtain an actuarial valuation, or
- by the date on which the trustees are next required to prepare a chair's annual governance statement (ie a DC chair's statement).

ORAs to be carried out every three years

Subsequent ORAs should be carried out at least every three years. New assessments should be carried out where elements of the ESOG, or risk management processes, are new or updated and whenever there is a material change in the ESOG or risks facing the scheme.

Carrying out the ORA

It is not necessary for all elements forming the ORA to be assessed at the same time, and schemes do not need to replicate work already carried out as part of existing risk assessment processes. Materials can be reused for the ORA where they were produced within the relevant timeframe.

TPR considers that the ORA should be a "straightforward project" for well-run schemes, and the focus of governance activities should be on maintaining the ESOG.

ORAs should be tailored to your scheme

By its nature, the ORA will need to be "highly tailored to the circumstances of each scheme". For this reason, TPR does not intend to produce a standard template or guidance on its completion. However, it will "monitor the situation" and reconsider whether guidance is needed if it sees a "genuine demand".

Trustee actions

The action to be taken will depend where your scheme is on its governance journey.[7]

- ✓ For those who are yet to get started, have a training session on the new Code and prepare a project plan, working with advisers to understand what is appropriate for your scheme
- ✓ Carry out a gap analysis to work out which policies listed in the Code are already in place and where there are gaps
- ✓ Assess existing policies and procedures to see whether the content needs to be updated
- ✓ Start to think about what the ESOG will look like in practice. TPR is not prescriptive and different schemes will naturally take different approaches.

7 See our Hot Topic: TPR's General Code: what should trustees be doing now? (11 May 2023)

DB scheme funding

Regulations revised following feedback

Designed to implement new requirements set out in the PSA21 for DB schemes to have an F&I strategy, and to submit a written statement of that strategy to TPR, revised regulations have been published by the DWP, alongside the response to its 2022 consultation.[8]

Key changes to the regulations

The changes are intended to address the following areas of concern:

- **flexibility and stability in long-term planning** – the DWP has sought to make clearer the flexibilities that were originally intended
- **risk aversion** – the consultation response provides assurance that the investment in the sustainable growth of sponsoring employers' businesses is a matter to consider alongside the affordability principle
- **open schemes** – it is now explicit that open schemes can take account of new entrants and future accrual when determining when the scheme will reach significant maturity
- **administrative burden** – long-term planning and implementation is made easier and "unnecessary administrative burden" is avoided, eg by giving TPR the flexibility to ask for less detailed information in some cases.

F&I strategy

As was the case with the draft regulations, the key principle underpinning the F&I strategy will be a requirement for schemes, as a minimum, to be "in a state of low dependency on their sponsoring employer by the time they are significantly mature". In summary:

- the duration at which a scheme reaches "significant maturity" will be set out in TPR's DB funding code, and
- a scheme has low dependency on its employer when its assets are invested in such a way that the value of assets relative to the value of the of liabilities is "highly resilient" to short-term adverse changes in market conditions, so that further employer contributions are not expected to be required.

F&I statement

Part one of the statement is the F&I strategy itself. Part two provides an assessment of whether the F&I strategy is being successfully implemented (including any remedial action the trustees intend to take) and sets out the key risks and mitigations for implementation, and the trustees' reflections on any key decisions and lessons learned.

Statement must be submitted to TPR

The regulations specify what must be covered in the statement and changes have been made to the level of detail needed, with a view to practicality. The statement must be submitted to TPR "as soon as reasonably practicable" after it has been prepared or revised.

What's next?

DB funding code expected later in year

The expectation is that the regulations will come into force on 6 April 2024 and will apply to valuations with effective dates **on and after 22 September 2024**. TPR's updated DB funding code, which will give schemes more practical guidance on how to comply with the new requirements, is due later in the year.[9]

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

Removing the LTA

LTA to be removed from 6 April 2024

The Finance Bill 2023-24, currently making its way through Parliament, paves the way for the LTA's demise from 6 April 2024. HMRC has already published various pieces of guidance to help the industry prepare, and will continue to do so, but at this stage some key aspects of the changes require further clarification.

Key points

Although the Bill is still subject to change, the main headlines are:

- the LTA regime will be removed and replaced by two new tax-free lump sum allowances: the LSA and the LSDBA
- the new allowances apply per person across all registered pension schemes, not per scheme, with lump sums exceeding either allowance taxed at an individual's marginal rate
- individuals holding a valid LTA protection will retain their rights to a higher level of tax-free lump sum, as well as to higher tax-free parts of lump sums and lump sum death benefits
- tax-free elements of trivial commutation and winding-up lump sums will not count towards the two new allowances, although an individual must have available headroom against them to take such lump sums, mirroring the current requirement to have available LTA
- the LTA excess lump sum will be removed in the absence of the LTA. There will instead be a new authorised payment, the PCELS. As currently drafted, this will be available in connection with a pension coming into payment, but only where an individual has exhausted their LSA and has benefits in excess of their available LSDBA. However, HMRC is considering how to address unintended consequences of the current drafting for members with benefits in multiple schemes, including possible amendments to the legislation.

What are the new lump sum allowances?

- **LSA** – the standard LSA will be **£268,275**, being 25% of the current standard LTA. An individual's maximum tax-free PCLS will be limited by reference to their available LSA, as will tax-free elements of certain other lump sums, such as an UFPLS
- **LSDBA** – based on the current standard LTA, a standard LSDBA will be **£1,073,100**. The PCLS, tax-free elements of certain other lump sums, and certain death benefits which are payable tax-free will count towards this new allowance.

Transitioning to the new allowances

Where individuals have taken benefits before the new regime comes into force, generally the two lump sum allowances will be reduced by 25% of any LTA used up before 6 April 2024. Existing requirements to provide benefit crystallisation event statements should help show this information.

Transitional arrangements will apply

However, where a member hasn't taken their maximum 25% tax-free cash when accessing benefits before 6 April 2024, they will be able to provide records of previously received tax-free amounts to their scheme for an alternative calculation.

Where an individual has already used up 100% of their LTA, they will have exhausted their two new allowances.

Trustee actions

- ✓ Check your scheme administrator is getting ready to update their processes and record keeping to accommodate these changes
- ✓ Update member communications to reflect the changes being made
- ✓ Check your scheme rules to see if these changes will cut across scheme benefit design (eg because benefits are limited by reference to the LTA).

Mansion House reforms

In his Autumn Statement, the Chancellor of the Exchequer, Jeremy Hunt, announced a "comprehensive package of pension reform".[10] These measures represent the next steps of the Chancellor's Mansion House reforms that were originally announced in July 2023.[11]

DC consolidation

Multiple default consolidators to help consolidate small pots

The Government will introduce multiple default consolidators to support the consolidation of deferred, small DC pots. Initially applying to DC pots of £1,000 or less, this threshold will be kept under review. Under the proposals, a "clearing house" will act as a central point to match deferred pots and will lead on communication with members and schemes. The Government intends to legislate for this approach when Parliamentary time allows. It is also looking into a "lifetime provider model" to reduce the number of individuals holding multiple DC pots in the first place. A call for evidence seeking views on this closed in January 2024.[12]

DC decumulation

New DC trustee duty to offer decumulation services

The Government has published its response to consultation on a policy framework to support individuals using their pensions savings in decumulation. It will legislate "at the earliest opportunity" to introduce a duty on all DC trustees to offer a range of decumulation services and products to members at an appropriate quality and price, either within the scheme or through a partnership arrangement. Members that do not make an active choice will be placed into a default decumulation solution by their scheme. In the meantime, schemes will be encouraged to develop a voluntary decumulation offering or to enhance their existing provision, with TPR planning to publish interim guidance on DC decumulation this year.

Work continues on the potential for establishing a CDC decumulation model.

Trustee skills, capability and culture

New trustee register to be established

The response to a call for evidence on TKU standards, accreditation and a trustee register, found that the majority of trustees are regarded as "well-supported, knowledgeable, and hard-working". However, the Government believes there is "space for action" and will:

- support TPR in taking forward a trustee register
- "strongly encourage" professional trustee accreditation, with TPR's new general code identifying this as an expectation. The Government will also keep the possibility of mandatory accreditation under review
- work with TPR in engaging with employers on pension scheme selection.

DB scheme options

Consultation expected this "winter"

As part of its call for evidence on DB options, the Government explored how DB schemes could use their assets more flexibly, while maintaining appropriate member security and not undermining trustees' fiduciary duties. In its response, the Government acknowledges a lack of consensus as to the path forward, but confirms it will issue a further consultation this "winter" addressing:

- measures to make surplus "extraction" easier. In the meantime, the tax rate on an authorised surplus repayment will be reduced from 35% to 25% from 6 April 2024
- establishing a public sector consolidator by 2026, aimed at schemes which are unattractive to commercial providers
- whether having access to higher PPF guarantees might result in greater investment in productive finance.

10 See our Alert: Autumn Statement 2023 – it's a bumper pensions crop (23 November 2023)
11 See our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
12 See our response to the call for evidence (25 January 2024)

TPR update

DB and hybrid scheme returns

TPR has published information about the 2024 scheme return process for DB and hybrid schemes. Changes for 2024 include new questions on:

- fiduciary managers and investment consultancy providers, reflecting former CMA requirements which were brought under TPR oversight in 2022[13]
- liquidity and leverage, and the controls schemes have in place. TPR will use this information to assess whether its LDI guidance is effective and to identify areas where stronger controls may be required.

Scheme returns must be submitted by 31 March 2024.

Alternative DB funding arrangements

TPR has published a blog on alternative DB funding arrangements, focusing on capital backed journey plans (or capital backed journey arrangements), where TPR is seeing "significant activity". Such arrangements generally involve a third party providing additional capital to support a scheme's investment in higher risk assets with higher expected returns.

Guidance on alternative arrangements expected later in the year

Where a scheme's sponsor is financially distressed, TPR may support capital backed journey arrangements if they can help members get benefits above PPF levels "on appropriate terms". In these types of circumstances, elements of TPR's DB superfund guidance are applicable and TPR expects to assess proposals against the guidance.

The blog sets out actions TPR expects trustees to take if considering a capital backed journey arrangement, including engaging proactively with the employer and TPR, and the PPF if applicable. TPR plans to publish new guidance for DB trustees and employers on alternative arrangements in 2024.

Corporate transactions

TPR has published a speech by Nausicaa Delfas, Chief Executive of TPR, on TPR's supervisory expectations and approach during merger and acquisition transactions. The speech sets out how companies should approach such activity, including by:

- engaging with trustees from the outset (with trustees expected to reach out to TPR in respect of such activity)
- treating the scheme fairly with other creditors
- keeping TPR updated as detail of the deal emerges
- staying "true to their word" and, if an arrangement is "watered down" after the transaction has taken place, warning that TPR could take further action.

TPR will assess transactions to ensure any material detriment to the scheme is appropriately mitigated with the aim of resolving risks consensually, with use of its powers a last resort.

Reporting cyber incidents

TPR has updated its cyber security guidance. The updated guidance asks trustees to report significant cyber incidents to TPR on a voluntary basis in addition to any other reports (eg to Action Fraud or the ICO), to help it build a better picture of cyber risk.

Trustees should report cyber incidents to TPR

A significant cyber incident is one likely to result in a significant loss of member data, major disruption to member services, or a negative impact on a number of other pension schemes or pension service providers.

13 See our Alert: 1 October – what's changing? (28 September 2022)

In other news

Pensions Minister

In November 2023, Laura Trott was promoted to Chief Secretary to the Treasury and Paul Maynard replaced her as Pensions Minister. Paul Maynard has been the MP for Blackpool North and Cleveleys since 2010.

PPF levy

The PPF has published its policy statement and formal levy rules for 2024/25.[14] The levy estimate is a historic low of £100 million, down from £200 million in 2023/24. This should result in a reduction for most levy paying schemes.

Levy estimate for 2024/25 is £100 million

The PPF is considering how it might divide up liability for the risk-based levy in future years, as the number of schemes paying the levy reduces. It has also been working with the DWP on its thinking regarding the development of the levy and the DWP expects to legislate "as soon as Parliamentary time allows". The PPF hopes this will reassure stakeholders "that any action needed to maintain a minimum levy is likely only to be for the short term".

A simplified recertification procedure may be used for contingent assets where certification / recertification occurred not more than five years previously and the trustees can confirm that the underlying agreement remains in place. If you have a contingent asset which you have not recertified in the last four levy years, consider whether it would be worth doing so this year.

The deadline for certification / re-certification on Exchange is midnight on 31 March 2024. Any documents that need to be submitted, such as a guarantor strength report, must also be emailed to the PPF by 5pm on 2 April 2024.

Pensions dashboards

Work continues on the regulatory framework for pensions dashboards:

- regulations were made to bring the Pensions Dashboards (Prohibition of Indemnification) Act 2023 into force on 1 January 2024. The Act prohibits trustees and managers from being reimbursed out of scheme assets in respect of penalties imposed under pensions dashboards regulations, in line with the position for other areas of pensions legislation
- a draft Order was published to make operating a commercial pensions dashboard service which connects to the MaPS architecture an FCA-regulated activity. The draft Order suggests that it will come into force on 11 March 2024. The FCA has already consulted on a proposed regulatory framework for the new pensions dashboard service market and a response is awaited
- the PDP will be launching a user testing and planning group "early" in the year, to help plan and co-ordinate user testing activity that will inform when dashboards may become publicly available.

The staging timeline guidance, which will set out when schemes are expected to connect to the dashboard architecture, is due this year.

14 See our Alert: The 2024/25 PPF levy determination (16 January 2024)

Case law

Harber v HMRC (First-tier Tribunal)

In an appeal against an HMRC penalty, it was found that the legal authorities provided to support one of the parties' case were not genuine judgments but had been generated by an artificial intelligence system ("AI").[15] The fictitious cases were "plausible but incorrect" because each case had similarities to real cases (eg same surname, similar facts or similar wording).

The judge discusses the harms of citing invented judgments, including causing the Tribunal and HMRC to "waste time and public money". The case also emphasises the danger of relying on AI to substantiate a legal position.

Lendlease Construction (Europe) Ltd v Aecom Limited (High Court)

The High Court has considered the effect of an agreement which was stated to be executed as a deed but had not been validly executed on behalf of the company (for example, by two statutory directors).[16] However, the company's signatories were represented as being able to execute a deed on its behalf, and the other party relied on that. The Court found that, in the specific circumstances, the agreement should take effect as a deed.

High Court considers effect of invalidly executed deed

While not a pensions case, the judge's conclusions on the application of "estoppel by representation" may potentially be relevant in the pensions context. Put simply, an estoppel by representation involves one person making a representation regarding a fact or the law to another with the intention of inducing the other person to rely upon it.

That said, this case's relevance will be very fact specific. Perhaps the bigger lesson to take from it is that there are strict requirements for the valid execution of deeds, and there may be very significant consequences if they are not complied with.

TPO competent court factsheet

TPO has published a factsheet explaining the effect of the Court of Appeal's *CMG* judgment on cases where a pension scheme looks to recover an overpayment by making deductions from future pension instalments.

In CMG, the Court of Appeal found that, where an overpayment is disputed by the member, a TPO determination alone is not sufficient for a pension scheme to recoup the overpayment and the trustees must apply to the County Court to enforce the determination.[17]

The factsheet comments that the DWP intends to introduce legislation to formally empower TPO to bring an overpayment dispute to an end without the need for a County Court order. It sets out guidance on managing overpayment disputes in the meantime, including summarising the process that trustees should follow to apply to the County Court.

15 See our case summary: Harber v HMRC (First-tier Tribunal) (4 December 2023)
16 See our case summary: Lendlease Construction (Europe) Ltd v Aecom Limited (High Court) (1 November 2023)
17 See our case summary: The Pensions Ombudsman v CMG Pension Trustees Limited and CGI IT UK Limited (Court of Appeal) (1 November 2023)

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Upcoming webinars and seminars

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Quarterly legal update	02/05/2024	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

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Recent publications

The Finance & investment briefing – March 2024 takes a look at current issues of interest to pension scheme investors.

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

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