August 2018

# In Sight

a quarterly pensions publication

## This quarter's round-up



## Regular features



# Proposals for a stronger Regulator

The government has released the first of its promised consultations following the white paper on protecting defined benefit pension schemes, seeking views on proposals to strengthen the Pensions Regulator's powers.

It is hoped the proposals will enable the Regulator to be more proactive and get involved earlier when employers make changes that could affect the pension scheme, ensuring it can obtain the right information about a scheme and its sponsoring employer and gain redress for members when things go wrong.

## Notifiable events framework

The notifiable events framework requires trustees and employers to notify the Regulator if certain events occur, giving an early warning of potential problems. It is proposed that the following will be added to the range of events that require notification:

- Sale of a material proportion of a business or assets of a scheme employer that has funding responsibility for at least 20% of the scheme's liabilities.
- Granting of security on a debt to give it priority over debt to the scheme.
- Significant restructuring of the employer's board of directors and certain senior management appointments.
- The sponsoring employer taking independent pre-appointment insolvency/ restructuring advice.

In addition, the existing notifiable event for breach of banking covenant will be extended to include covenant deferral, amendment or waiver. However the existing notifiable event concerning wrongful trading of the sponsoring employer is to be removed.

At present, notifiable events need to be reported as soon as reasonably practicable after the event. It is intended that for the sale of controlling interest in a sponsoring employer, the sale of the business or assets of a sponsoring employer; and the granting of security in priority to scheme debt, this deadline will be brought forward to when heads of terms are agreed.

Continued on next page

### Declaration of intent

For the three notifiable events whose timing is to be brought forward, the employer will also need to issue a declaration of intent, setting out the implications of the transaction for the scheme and how any risks will be mitigated.

This declaration would be required after parties have completed due diligence and finalised transaction financing but before sale and purchase contract signature, although the government expects employers to engage with trustees at the earliest opportunity. The declaration is intended to form part of an enhanced early warning system, so that all parties are aware of concerns and proposed mitigations earlier than is currently the case and have a clear record of all agreements reached. It should confirm that consultation has taken place with the trustees (including their agreement or otherwise) and explain the nature of the transaction and any detriment to the scheme (and how this is to be mitigated). The requirement for a declaration may also be dependent on the level of scheme funding.

### Penalties

A more comprehensive penalty regime will allow the Regulator and/or the courts to impose the most appropriate penalty from a suite of options:

- Existing civil penalties for low-level non-compliance.
- A new power to issue civil penalties of up to £1 million for more serious breaches.
- Criminal sanctions that would allow the courts to impose appropriate penalties - unlimited fines and/or custodial sentences - for wilful or grossly reckless behaviour, non-compliance with a contribution notice and failure to comply with the notifiable events framework.

The range of potential targets includes all those who have responsibility to the pension scheme – directors, sponsoring employers and any associated or connected persons, and in some circumstances trustees.

### Anti-avoidance powers

The Regulator already has powers to issue contribution notices (CNs) and financial support directions (FSDs). It is proposed to strengthen and improve this framework including:

- Amending the reasonableness test for CNs so that there is a stronger focus on the loss or risk caused to the scheme by the event. (Currently there is a focus on the benefit the target – eg a parent – has extracted from the sponsor.) A similar change is proposed for FSDs.
- Creating an additional limb to the material detriment test for CNs, assessed by reference to the weakening of the employer rather than the prospect of benefits being paid in full.
- Exploring how and whether the lookback period for FSDs could be increased beyond two years.

An employer can apply to the Regulator on a voluntary basis for clearance (confirmation that the Regulator will not issue a CN or FSD in relation to a particular event). The Regulator will review its guidance on clearance to clarify expectations.

### Next steps

This consultation runs until 21 August. The timing of the changes is not clear; the white paper suggested that the reforms would be delivered using a phased approach. The Regulator will consult on a revised DB funding code of practice in 2019.

# Scheme funding

### Box Clever ruling in favour of the Regulator

The Upper Tribunal has ruled that the Regulator was right to use its powers to seek financial support from ITV for members of the Box Clever pension scheme. The Judges commented that, "By their choice of structure for the Joint Venture, the Shareholders extracted considerable cash from the business with no risk of recourse to their assets. They retained an ongoing interest in the merged business with the possibility of further value being generated if the business was successful, but without having to bear any responsibility if the business, whose strategy they continued to determine, subsequently failed."

The Regulator has said that the ruling sends a clear message to companies linked with DB pension schemes that it will not hesitate to use its anti-avoidance powers where it believes it is reasonable for them to provide financial support.

We understand that ITV has been granted permission to appeal to the Court of Appeal.

### DB funding analysis

The Regulator has published its analysis of the expected funding positions of DB schemes with valuation dates between 22 September 2017 and 21 September 2018. This backs up the comments in its annual funding statement which was published in April (as reported in the May edition of In Sight).

The analysis shows that, at an aggregate level, schemes undertaking valuations at 31 March 2018 will have marginally improved funding levels and deficits compared with those reported three years ago. However, deficits will not have improved to the extent that would have been anticipated, so the Regulator expects deficit reduction contributions will need to be increased. The analysis also shows that there has been a significant increase in dividends paid by employers over the last six years, but there has not been a similar increase in deficit contributions.

# A new regulatory culture

## Carillion inquiry

The final report on the Carillion inquiry has been jointly delivered by the Work and Pensions and Business, Energy & Industrial Strategy (BEIS) committees. The inquiry covered a broad range of issues related to the collapse of Carillion, including pensions. The committees comment that the Pensions Regulator clearly failed in its statutory objectives to reduce the risk of schemes ending up in the Pension Protection Fund and to protect members' benefits. They note that the Regulator had concerns about the schemes for many years without taking action, even when Carillion's trustees repeatedly asked it to intervene.

## Corporate plan

The Regulator has published its corporate plan for 2018-2021, setting out its priorities for the next three years. Its Chairman Mark Boyle said: "The pensions landscape has been changing significantly. We are meeting this challenge by embedding a new regulatory culture and reinforcing our regulatory teams on the frontline. In the coming year, you can expect to see us being more vocal about our expectations of those we regulate and intervening quickly and decisively through our wide-ranging regulatory activity and enforcement powers so that workplace pension schemes are run properly and people can save safely for retirement."

Following publication, the chairs of the Work and Pensions and BEIS committees wrote to the Regulator expressing disappointment with its plan and suggesting that it should be setting more stretching targets. The letter stated that the Regulator "will require substantial cultural change in an organisation where a tentative and apologetic approach is ingrained" and that the chairs are far from convinced that the Regulator's current leadership is equipped to effect that change.

It was subsequently announced that the Regulator's Chief Executive, Lesley Titcomb, has decided to leave her post at the end of her contract, in February 2019.

## Regulator tightens enforcement

Even before its powers are extended (see page 1), the Regulator has been making it clearer what it expects from trustees, to drive up compliance with basic requirements. It has publicised a tougher approach to enforcing legislation and has highlighted a number of recent examples:

- The trustees of one scheme have been fined £25,000 in respect of late valuations due in 2013 and 2016, neither of which had been completed by the end of 2017. Warning notices have been issued to nine schemes for late valuations.
- Criminal convictions have been secured against those who failed to comply with a section 72 notice that requests information and documents. Most recently, the Regulator announced that it is to prosecute Samuel Smith Old Brewery (Tadcaster) and its chairman for failing to provide details of the company's finances in order that the funding position of some of its pension schemes could be examined.
- Officers will be appointed to enforce court orders, if necessary by seizing assets, against employers that have failed to comply with their auto-enrolment duties and have refused to pay the resulting fines. The Regulator will consider whether to prosecute employers that continue to fail to comply. It will also make use of these officers to recover levies or other fines. However it regards this action as a last resort.
- A professional trustee has been fined for failing to keep a scheme's registrable information up to date (trustees are required to notify changes to registrable information as soon as reasonably practicable).
- For the first time, the Regulator has used its powers against pension scammers.

## Governance expectations

New instalments have been added to the 21st century trustee area of the Regulator's website. Topics covered so far are the importance of good governance, clear roles and responsibilities, clear purpose and strategy, trustee training, skills and experience, advisers and service providers and managing risk. The latest instalment looks at managing conflicts of interest. The material highlights various guides and tools that are available to help trustees manage their scheme. The campaign will also cover meetings and decision-making, and value for members.

## Action

Trustees are likely to find the 21st century trustee material helpful in managing their pension scheme.

# Clarifying trustees' investment duties

The DWP has consulted on changes to the investment regulations, including production of the statement of investment principles (SIP), following the Law Commission's report on pension funds and social investment.

In recent years, there has been growing interest in social investment for pension funds and in environmental, social and governance (ESG) considerations. Various consultations and reports have been released, including a report by the Law Commission which concluded that there are no legal or regulatory barriers to pension schemes making social investments. Most recently, in June, the following were published:

- The House of Commons' Environmental Audit Committee's report on Greening Finance, which calls for mandatory climate change risk reporting by 2022 and for the government to clarify in law that pension schemes have a duty to protect long-term value and should be considering environmental risks in light of this. The report also calls for fiduciaries such as trustees to actively seek the views of their beneficiaries when producing their SIP, giving pension savers greater opportunities to engage with decisions about where their money is invested.
- The government's response to an industry-led report on social impact investment funds – it has committed to working with the investment and savings industry to support the launch of such funds, to help make it easier for people to invest their money in the issues they care about.

Draft regulations were published for consultation, to clarify and strengthen trustees' investment duties. The proposals are intended to help dispel trustee confusion and to give institutional investors renewed confidence, if they so choose, to begin or increase the allocation of capital to investment opportunities such as unlisted firms, green finance and social impact investment.

The draft regulations are intended to reassure trustees that they can (and should):

- Take account of financially material risks, which include but are not limited to ESG considerations including climate change.
- Fulfil the responsibilities associated with holding the investments in members' best interests.
- Have an agreed approach on the extent, if at all, to which they will take account of members' concerns, not only about financially material risks but the scheme's investment strategy as a whole.
- Use the SIP as a real, effective and regularly-reviewed guide to investment strategy.

## New duties for all schemes

By 1 October 2019, all schemes that are required to produce a SIP will need to expand it to set out how they take account of financially material risks, including climate change. In addition, it must explain their policies in relation to the stewardship of investments, including engagement, monitoring and exercising voting rights associated with investments.

From that date, when trustees next prepare or update their SIP, they will need to prepare a separate statement on members' views, setting out how they will take account of the views that, in their opinion, members hold (including those on non-financial matters).

The new statement must be included in the annual report, available on request to members.

## Additional duties for money purchase schemes

Additional requirements will apply to schemes that offer money purchase benefits (other than just AVCs) that are required to produce a SIP:

- From October 2019, they will need to prepare or update their default strategy, to set out how they take account of financially material considerations.
- From 1 October 2020, trustees will also have to produce an implementation report for the year, setting out how they acted on the principles within the SIP and on the statement on members' views.

Trustees of money purchase schemes will have to publish the SIP, the statement on members' views and the implementation report (once this is prepared) on a website, so that it can be found by both scheme members and interested members of the public. Scheme members will need to be informed of the online availability of this information in their annual benefit statement. This approach is similar to that recently adopted for the disclosure of costs and charges for these schemes.

## Next steps

The DWP intends to give trustees a year to comply with the new requirements; the above timings assume that the regulations being consulted on are laid before Parliament this autumn.

The Regulator's existing Investment guidance for DB schemes and its DC guide to investment governance include references to ESG factors, including climate change. Once the regulations are made, the Pensions Regulator intends to update existing codes and guidance and will consider what additional guidance may be helpful for trustees in understanding their duties.

## Action

Trustees may wish to review their existing policy on ESG considerations and consider whether there are opportunities to improve their policies and procedures.

## New rules for Independent Governance Committees (IGCs)

The Financial Conduct Authority intends to consult in the first quarter of 2019 on a range of rule changes and guidance for IGCs, to deliver investment reforms similar to those outlined above, for contract-based schemes.

# Financial Guidance and Claims Act

The Financial Guidance and Claims Act 2018 received Royal Assent on 10 May. The Act sets the framework for the new single financial guidance body, includes obligations for trustees to direct members towards pensions guidance in some circumstances; and introduces a ban on cold calling in relation to pensions. Regulations are needed to set out the detailed provisions, for which timescales are not yet known.

## Single financial guidance body

The Act establishes the single financial guidance body (SFGB), by merging the Money Advice Service, the Pensions Advisory Service (TPAS) and Pension Wise. The new public body will be responsible for the co-ordination of the provision of debt advice, money guidance and pension guidance. Sir Hector Sants, former Chief Executive of the Financial Services Authority, has been named as Chair of the SFGB, from 3 October 2018.

## Directing members towards pensions guidance

There will be a new requirement for trustees and personal pension providers to recommend that members with flexible benefits (ie broadly money purchase or cash balance benefits) obtain guidance. Where such a member applies to transfer or start receiving their benefits, the trustees or provider will have to refer them to appropriate pensions guidance and explain the nature of such guidance. Before proceeding with the application, the trustees or provider will have to check that the member has either received, or opted out of, the guidance. The details of the new requirements will be set out in regulations.

## Ban on pensions cold calling

The Act lays the groundwork to introduce a ban on pension cold calling or other unsolicited direct marketing in relation to pensions. The Treasury has subsequently confirmed that the ban will not be extended to in-person approaches, stating that cold calling is by far the most common method used to initiate pension fraud. In July the government began consulting on draft regulations, to ensure the new provisions meet policy objectives.

## Updated code on pension scams

The renamed Pension Scams Industry Group has published a second version of its code of practice on combating pension scams. The code is voluntary and does not have a statutory basis, but it is supported by the various industry organisations. It aims to share good practice and help reduce the risk of successful scams, setting out key steps that trustees and administrators should take to identify possible scams.

The original code was published in 2015, and this has now been updated to reflect the changing nature of pension scams, the introduction of pension flexibilities and the clarification in law of the statutory right to transfer.

# On the horizon

Here are some key future developments likely to affect pensions.

### October 2018

- New master authorisation and supervision trust regime comes into force

### November 2018

- State pension age reaches 65 for women

### January 2019

- EU pensions directive to be incorporated into law by member states

### March 2019

- The UK is due to withdraw from the EU

### April 2019

- Auto-enrolment minimum DC contributions increase to 8%

### September 2020

- State pension age reaches 66 for men and women

# DC news

## Government responds on pension flexibilities

The government has responded to the Work and Pensions Committee's (WPC) recommendations on the pensions flexibilities introduced in 2015.

The WPC called for a package of measures intended to create better informed, more engaged pension savers, in the final report of its inquiry into the extent to which the so-called pension freedoms are achieving their objectives. Amongst other things, it recommended that pension providers should be required to offer a default drawdown product.

Generally, the government response notes initiatives that are already underway rather than making new policy announcements. However, the government is not convinced at this stage of the merits of offering a default drawdown product.

The WPC also recommended that there should be a single pensions dashboard, publicly hosted by the forthcoming single financial guidance body (see page 5), rather than multiple dashboards hosted by pension providers. The government notes that the idea of multiple dashboards confuses users; however, there are indications that some people might trust a dashboard service if it were offered by their own bank. The government is considering this further and will set out its conclusions in its pensions dashboard feasibility report, to be published in due course.

## FCA retirement outcomes review

The FCA is consulting on a package of proposed remedies to address the concerns identified in its retirement outcomes review. The review looked at how the retirement income market has changed since the introduction of the flexibilities, with a focus on those who do not take regulated advice.

The FCA aims to protect members from poor outcomes and improve their engagement with retirement decisions, while promoting competition by making the costs of drawdown clearer and comparisons easier. Among other things, it proposes that:

- Wake-up packs are sent to members from age 50, including a single-page summary (sometimes called a pensions passport) and risk warnings; these packs should be sent every five years until the member's pot has been fully taken.
- Providers should develop ready-made drawdown investment solutions (which it calls investment pathways) to help confused customers. Also, the key features illustration they give to DC savers should include a one-year charge figure in pounds and pence.

## Guidance on bulk DC transfers without consent

From 6 April 2018, new rules apply to bulk transfers without member consent for pure defined contribution (DC) rights that do not include underlying guarantees or promises. As reported in the May edition of In Sight, it is now possible to transfer such DC benefits from one scheme to another, without the need for actuarial certification. Instead, trustees need to consult with an appropriate adviser who is independent from the receiving scheme.

The DWP has published high-level guidance for trustees on issues to consider when making the decision to transfer, which is designed to be used alongside the Pensions Regulator's DC code and associated guidance. The new guidance covers matters such as choosing an appropriate adviser, what the advice should cover, how to assess a receiving scheme, charge cap protection, communications with members and other good practice issues.

### Action

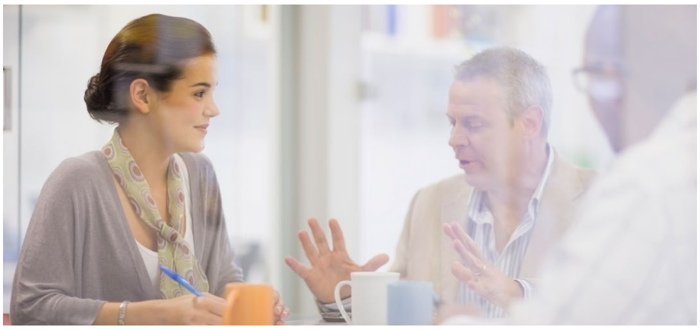
Trustees considering a bulk transfer of DC benefits without member consent should familiarise themselves with the guidance.

## Revised chair's statement guidance

The Regulator has published revised guidance on the chair's statement, which is designed to be read alongside the DC code of practice and its accompanying guides. The Regulator has updated the guidance to ensure it is being as clear as possible about what it expects in terms of chair's statements.

### Action

Trustees should familiarise themselves with the guidance when preparing their chair's statement.



# CDC report published

The WPC has published a report calling for the government to legislate for collective defined contribution (CDC) schemes as it believes that this would open up the possibility of more diverse and ambitious provision of collective pensions. CDC is a type of defined ambition scheme that targets - but does not guarantee - a level of income in retirement. The targeted benefits may be adjusted if circumstances require.

Risks and costs are shared between members, rather than each member having their own pot. The WPC has made its recommendations following its inquiry into the merits of CDC schemes.

# New data protection regime

The EU General Data Protection Regulation (GDPR) came into force on 25 May 2018. As well as tighter requirements for obtaining consent to process personal data, there is greater emphasis on the documentation that organisations must keep to demonstrate their accountability, policies, registers and controls, together with stronger sanctions for breaches.

On the same date, the main provisions in the Data Protection Act 2018 came into force. The Act repeals and replaces the Data Protection Act 1998, aiming to keep the UK's existing data protection laws up to date for the digital age and setting new standards for protecting personal data. The new Act also helps prepare the UK for a future outside the EU. While the UK remains a member of the EU, it must comply directly with the GDPR. When the UK leaves the EU, the GDPR will be incorporated into UK legislation under the EU (Withdrawal) Act.

### Action

If they have not already done so, trustees need to ensure that their scheme complies with the new data protection regime.

## Guide to cyber security

The Pensions Regulator has published cyber security guidance for trustees on the steps they can take to protect scheme members and assets. The guidance sets out good practice in addressing cyber risk and building cyber resilience – the ability to assess and minimise the risk of a cyber incident occurring, but also to recover when an incident takes place.

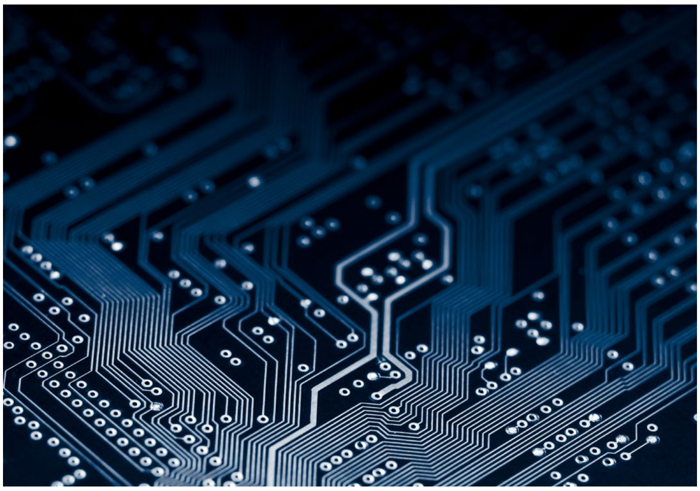
The Regulator broadly defines cyber risk as the risk of loss, disruption or damage to a scheme or its members as a result of the failure of its IT systems and processes. It includes risks to information (data security) as well as assets, and both internal risks (eg from staff) and external risks (such as hacking). The guide sets out good practice when dealing with cyber risk, saying that trustees should work with all relevant parties (including in-house functions, third party service providers and employers) to define their approach to managing this risk.

Amongst other things, the Regulator expects that roles and responsibilities should be clearly defined, assigned and understood; and trustees should have access to the required skills and expertise to understand and manage cyber risk. Cyber risk should be on the scheme's risk register and there should be sufficient controls in place. Trustees are also expected to have an incident response plan in place, to deal with incidents and enable the scheme to swiftly and safely resume operations.

The Regulator's managing risk page on its 21st century trustee website (see page 3) includes lack of planning for a cyber incident among its case study examples.

### Action

Many schemes have already started addressing cyber security issues as part of their preparations for the GDPR. All trustees should review the guidance and consider whether they need to make changes to their arrangements.



# Master trusts

Regulations have been finalised that provide detail on the new authorisation and supervisory regime for master trust schemes.

The Pension Schemes Act 2017 defines a master trust as, broadly, an occupational pension scheme that provides money purchase benefits and is used, or intended to be used, by two or more employers (that are not connected with each other). There are exclusions, including where the only money purchase benefits relate to AVCs or transfers-in. Schemes that fall within this definition will have six months from 1 October 2018 to apply for authorisation by the Pensions Regulator, or to decide to wind up.

Following consultation, the Regulator has published code of practice 15 on the authorisation and supervision of master trusts. The code outlines what is expected of master trusts applying for authorisation, as well as the matters that will be taken into account in deciding whether a master trust should continue to be able to operate in the market. Separate guidance will accompany this code; the Regulator also intends to produce a policy on supervision and enforcement, and other supporting material.

### Action

Existing and proposed master trust schemes will need to apply for authorisation.

# News round-up

## Government to review pensions taxation

The government is set to take a close look at the current pension tax relief system. It intends to "examine the processes for payment of pensions tax relief for individuals to explore the current difference in treatment to ensure that we can make the most of any new opportunities that emerge, balancing simplicity, fairness and practicality". This is in the context of the significant difference in treatment between relief at source and net pay arrangements for non-tax payers. However, press coverage has suggested that wider changes may also be considered.

## Transfer of Equitable life business

Equitable Life has entered into an agreement to transfer the Society and all of its policies to Reliance Life, part of Life Company Consolidation Group, a European life assurance group that specialises in managing funds as an insurer winds down. Equitable Life believes that this will enable it to uplift pay-outs to with-profit members when the deal goes through.

Trustees and remaining with-profit policyholders will have a vote on whether to accept the deal, which is likely to take place in mid-2019, before it is put before a High Court judge for approval. The transfer is targeted to be completed by the end of 2019.

### Action

Trustees should let affected members know about the proposal. Any members making decisions in the near future about taking these benefits, or transferring them away to another arrangement, should seek independent financial advice.

## Corporate governance

The Financial Reporting Council has published a new UK corporate governance code that applies to accounting periods beginning on or after 1 January 2019. The provisions state that only basic salary should be pensionable, that pension contribution rates for executive directors should be aligned with those available to the workforce, and that pension consequences of remuneration changes should be carefully considered, particularly for directors close to retirement, when compared to the workforce.

Separately, the government has been consulting on various proposals regarding how it might improve corporate governance in companies that are in or approaching insolvency. In particular, the government considers that holding company directors should be held to account if they conduct a sale that harms the interests of a subsidiary's stakeholders (including its pension scheme), where that harm could have been reasonably foreseen at the time of the sale.

## Preliminary ruling on PPF compensation levels

The Advocate General of the Court of Justice of the European Union (CJEU) has given a preliminary opinion that could result in changes to Pension Protection Fund (PPF) compensation levels (including the compensation cap).

In a case brought against the PPF, Mr Hampshire challenged the level of compensation he received after his previous employer became insolvent. The Court of Appeal referred several questions to the CJEU.

The Advocate General's opinion is that the EU Insolvency Directive should be interpreted to the effect that the PPF is required to provide compensation of at least 50% of the value of every individual's accrued rights in a pension scheme in the event of the insolvency of the scheme's employer. In particular, it is not compatible with the Directive for the PPF to provide at least 50% of benefits for a scheme overall (ie where some members would get more than 50% but others may get less than 50%), nor for the 50% to be assessed on the basis of the annual pension at a particular date (as this would ignore the potential future erosion of value due to PPF pension increases and revaluation being lower than the original scheme would have provided).

The Advocate General's opinion is not binding; the CJEU is expected to give its formal ruling soon. If the CJEU were to agree with this opinion, we would expect UK legislation to be amended, possibly with retrospective effect, so that PPF compensation levels meet the requirements of the Directive. Any changes would then follow through to Section 179 valuations and PPF levies.

## Online platform to manage and register pension schemes

HMRC has launched the first phase of its new online service – Manage and Register Pension Schemes – that will eventually replace Pensions Schemes Online. At present the service is just open for applications to register new pension schemes, so there is no immediate change for existing schemes. From April 2019, the new service will be used for scheme reporting and management, issuing penalties and notices, and existing services currently available through Pension Schemes Online will be migrated; practitioner access will also become available.

HMRC has updated its guidance on GOV.UK to reflect when the new service should be used and the information that will be required in order to use it.

## Mature schemes paper

The Institute and Faculty of Actuaries' Running Off Mature Schemes Working Party has published a paper on the issues faced by mature DB schemes and how they might be tackled. The paper is lengthy and many of the recommendations are for the industry in general or for government consideration. However, some of the recommendations relate directly to schemes. These include:

- Schemes should develop comprehensive journey plans mapping out their intended run-off approach.
- Most mature schemes would benefit from having a professional trustee appointed.
- Schemes should focus resources to lock down their benefits (ie carry out data and benefit cleansing) even if they are not planning to secure benefits for some time.
- Reserving for future expenses should be the norm for mature schemes.

The paper is intended to stimulate debate and further research in this area and, ultimately, to improve how mature schemes are run off.

# Cases

## Recovery of overpayments

The High Court case of *Burgess and others v BIC UK Limited* considered whether a rule amendment for increases to pensions in payment was valid and, if not, whether and how the trustees could seek recovery of pension overpayments. The Court held that the increases had been properly paid, meaning that there was no issue of overpayments. Nevertheless the judge went on to consider the extent to which the trustees could have recovered past overpayments out of future amounts payable. As they did not form part of the decision, these comments are not binding, but they give an indication of how the Court might approach this issue in the future.

The judge commented that had the increases been invalid, the trustees would have had a duty to exercise their equitable right of recoupment (ie the recovery of overpayments by adjustment of future pension payments). The judge took the view that this would not be subject to the six-year limitation period that applies when seeking to recover overpayments by way of a one-off repayment.

If the member disputes the amount, the set-off cannot be exercised without the order of a competent court to enforce the payment; the judge held that a determination by the Pensions Ombudsman is not sufficient for this purpose, so trustees may need to apply to the County Court in these cases.

### Action

Trustees considering how to recover overpayments by reducing future pension payments will need to determine on a member-by-member basis whether it is equitable to do so; and they should seek legal advice.

## Supreme Court rules on worker status

In *Pimlico Plumbers v Smith* the Supreme Court has agreed with the Court of Appeal that a plumber should have been classed as a worker for the purposes of employment law, not an independent, self-employed contractor. Workers are eligible for certain employment rights; and while not addressed specifically in the case, it appears that this would extend to the right to be auto-enrolled into a workplace pension scheme.

The decision turns on its own particular facts, but it demonstrates that courts will look beyond any written contractual arrangement and will evaluate the wider working relationship in order to determine an individual's employment status. We are still awaiting the government's response to its consultations that arose from the Taylor Review of Modern Working Practices. It is not clear at this stage whether the definition of a worker will change in primary legislation, or whether guidance will be issued to help clarify worker status. In the meantime, there are a growing number of tribunal claims in this area.

## BA wins appeal over discretionary increases

The Court of Appeal has found in favour of British Airways in its dispute with the trustees of one of its pension schemes over whether they were allowed to grant a discretionary pension increase to pensioners – effectively partially reinstating RPI-based increases after they had been reduced to be based on CPI. This overturns the previous High Court decision.

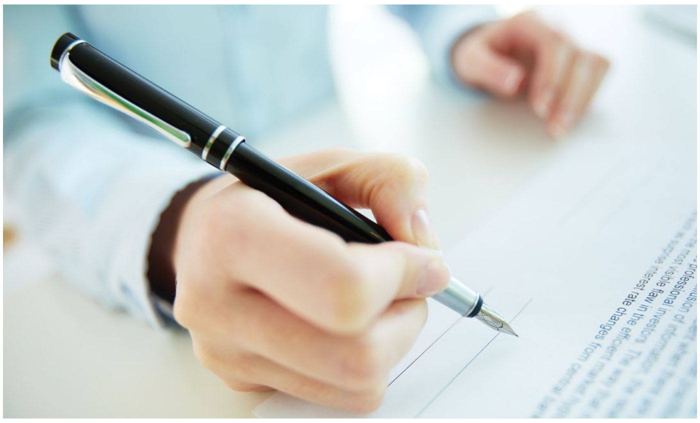
The ruling means that the discretionary increase has been blocked and the trustees' amendment to the scheme rules that gave them unilateral power to grant the increase, has been undone. The Court of Appeal held that the trustees' role was to manage and administer the scheme, not to design the scheme's benefits. It has been reported that the trustees are considering whether to appeal the decision, before the Supreme Court.

## Retaining a salary link and employer debt

The High Court has provided some clarity over the position of scheme members that have ceased accrual while maintaining a salary link, in the context of the employer debt (section 75) regulations.

The ruling in the case of *G4S Plc v G4S* trustees concludes that such members have ceased pensionable service and are no longer active members. A multi-employer scheme where all the actives ceased accrual in this way at the same date is therefore classed as a frozen scheme for the purposes of the employer debt rules. This means that a section 75 debt would not be triggered by an employer where it ceases to employ any such members of that scheme.

This clarity is likely to be welcomed by a number of schemes and employers, particularly in the context of mergers and acquisitions or the restructuring of a corporate group.



# Training and events

Dates scheduled for our pensions training seminars are set out below. Unless it says otherwise, all courses and events take place in central London.

If you would like to make a reservation, or receive a copy of the brochure or further information, please e-mail **pensionstraining.enquiries@aon.com** or telephone the Pensions Training team on: **+44 (0)1372 733 907**. You can also book online at **aon.com/pensionstraining**

| Pensions training courses | Dates |
|---|---|
| Defined Benefit — part 1 (one day) | 2018 – 4 September (Leeds), 17 October, 27 November<br>2019 – 23 January, 26 February (Leeds) |
| Defined Benefit – part 2 (one day) | 2018 – 14 November (Manchester), 11 December<br>2019 – 6 March |
| Defined Contribution (one day) | 2018 – 7 November<br>2019 – 19 March |
| Pension Governance Committee (half day) | 2018 – 25 September<br>2019 – 13 February |
| PMI Award in Pension Trusteeship (two days) | 2018 – 10/11 October (Surrey)<br>2019 – 13/14 March (Surrey) |

**Other events**

Aon participates in a variety of sector-specific conferences and exhibitions as well as holding regular seminars, webinars, conferences and events focusing on key issues of client interest.

To find out more about our events, go to: www.aon.com/unitedkingdom/events.jsp

# Contacts

If you have any questions on In Sight, please speak to your usual Aon consultant or contact:

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## About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance. For further information on our capabilities and to learn how we empower results for clients, please visit: http://aon.mediaroom.com/



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