



October 2018

## Pensions Radar

Pensions Radar is a quarterly listing of expected future changes in UK law affecting work-based pension schemes. Please speak to your usual Travers Smith contact if you would like to know more about any topics.

### LEGISLATIVE AND REGULATORY DEVELOPMENTS

The following are expected developments with known dates:

#### KEY DATE

#### **European Markets Infrastructure Regulation (EMIR): mandatory clearing of over the counter (OTC) derivatives transactions**

16 August 2018 (but exemption is to be extended)

The current exemption for pension schemes from the mandatory central clearing requirements of EMIR expired on 16 August 2018. The exemption applied to certain OTC derivatives transactions used to reduce investment risks and liabilities. A new exemption, that will come into force later this year, will apply until at least 2021. The FCA has said that pension schemes do not need to take any action during the gap between the current exemption expiring and the new exemption coming into force but it continues to encourage all market participants, including pension schemes, to prepare for mandatory central clearing as early as practicable. See our briefing note **EMIR reporting: are you ready?** and **WHIP Issues 62** and **71**. (See also see note 1 on page 5: *Effect of Brexit.*)

#### **DC investment disclosure**

Information on DC investment charges and transaction costs must be disclosed by trustees in the annual chair's governance statement and on a public website, to which benefit statements must refer. Trustees must comply within seven months after the first scheme year end date falling on or after 6 April 2018.

By 6 November 2018 onwards

Trustees must also provide to DC members on request a statement containing, in relation to any pooled fund (ie, collective investment scheme or unit-linked contract), the name and international securities identification number (ISIN) of each underlying collective investment scheme (at the top level only). Annual benefit statements must say how a member can request the statement.

From 6 April 2019

See **WHIP Issue 70**.

## Collective DC schemes

Autumn 2018

The government will consult on legislation to facilitate the operation of "collective defined contribution" schemes, under which defined benefits are targeted but not promised and the scheme pays pensions.

## DB scheme consolidation

Autumn 2018

The government will consult on legislation governing DB consolidator schemes which are intended to operate as an alternative to buy-out.

## Combatting pension scams: restriction of statutory transfer right

Late 2018/early 2019(?)

The government proposes to limit the schemes to which a statutory cash equivalent transfer value can be taken. There will only be a statutory right to transfer to: a personal pension operated by an FCA authorised firm; an occupational pension scheme where there is evidence of genuine earnings from an employment to which the scheme relates; or an authorised master trust. See **WHiP Issue 66**.

## State pension ages raised

2018 to 2046 or perhaps 2039 (with implications already for schemes with bridging pensions or state pension offsets)

Women's state pension age will be 65 by November 2018 and state pension age for men and women will thereafter start to increase, currently up to age 68 by 2046. The increase from 66 to 67 has been brought forward by eight years, to take place between 2026 and 2028. The government proposes that the increase from 67 to 68 now be made between 2037 and 2039. See our briefing note **Bridging pensions – state pension age issues**, on the issues that rising state pension ages can cause for schemes that attempt to integrate with the state pension.

## Single financial guidance body

January 2019

The single financial guidance body will take over the roles currently performed by the Money Advice Service, the Pensions Advisory Service and Pension Wise.

## IORP II directive

13 January 2019

The IORP II directive must be implemented by 13 January 2019. Whilst it contains no new scheme funding requirements, and relaxes the funding requirements for cross-border schemes, it does include provisions on scheme governance that require new UK legislation. See **WHiP Issue 62** and the next issue. (See also note 2 on page 5: *Effect of Brexit*.)

## Securities Financing Transactions (SFT) Regulation

Early 2019

This EU Regulation relates to SFTs such as repo/reverse repo and securities lending transactions. Record-keeping obligations are already in force. There will also be requirements around collateral reuse and reporting. Trustees are required to issue prescribed risk warnings to their counterparties. See **WHiP Issue 57**. (See also note 1 on page 5: *Effect of Brexit*.)

## Brexit

29 March 2019 (unless all EU member states agree an extension)

The UK's notice under Article 50 of the Treaty on European Union started a two year period for the UK and EU to agree exit terms and their post-Brexit relationship, before the UK leaves the EU. See our briefing note **Leaving the EU: the legal implications** for an outline of the potential impact in various areas.

## Investment consultancy and fiduciary management markets

13 March 2019 deadline (but expected late 2018)

The Competition and Markets Authority will issue its final report and announce remedies in decision in its investigation into the investment consultancy and fiduciary management markets. See **WHiP Issue 72**.

## **Pension protection levy: contingent assets**

Late March 2019

Contingent assets, including guarantees, need to be certified to the PPF by late March 2019 if they are to be recognised for a 2019/20 levy reduction. This year all guarantees that include a fixed sum (ie, £x) liability cap must be in the PPF's new standard form to be accepted by the PPF. Existing guarantees may need to be amended or replaced, which will require negotiations between trustees and guarantors. See our briefing note **Does your PPF guarantee include a fixed sum liability cap? If so, the clock is ticking**.

## **Master trust authorisation regime**

31 March 2019

The Pension Schemes Act 2017 includes provisions for the authorisation and regulation of master trusts. Trustees of existing master trusts have six months from 1 October 2018 to apply for authorisation or to decide to wind up the scheme. See **WHiP Issues 64, 68, 70, 71 and 72**.

## **Discontinuation of legal opinions covering the 1995 GMRA**

April 2019

The International Capital Markets Association (ICMA) will no longer publish legal opinions that cover the 1995 version of the Global Master Repurchase Agreement (GMRA). The GMRA, in its various versions, is the market-standard trading documentation for use in sale and repurchase (repo) transactions. Schemes with 1995 GMRAs in place should start making arrangements to update their documentation to the newer 2000 or 2011 versions of the GMRA.

## **Investment disclosure**

1 October 2019 and  
1 October 2020

The government has consulted on draft regulations that would impose new obligations on trustees concerning the disclosure of information about investment matters, including as to environmental, social and governance (ESG) factors and stewardship. See **WHiP Issue 71**.

## **EU Fifth Money Laundering Directive**

10 January 2020

The EU's Fifth Money Laundering Directive will impose more onerous obligations on trustees than the current directive regarding disclosure of beneficiary details and registration. See **WHiP Issue 71**. (See also note 2 on page 5: *Effect of Brexit*.)

## **DC scheme charges**

2020

The government will again review the DC charges cap. For more details, see our briefing note **DC charges and governance** and **WHiP Issue 68**.

## **Expiry of statutory power to amend contracted-out DB scheme rules**

5 April 2021

The unilateral employer power to amend formerly contracted-out scheme rules to reduce future benefit accrual and/or increase member contributions will expire. See our briefing note **State pension reform and the end of contracting-out**.

## **Automatic enrolment changes**

Mid-2020s

The government has proposed significant changes to the scope of the automatic enrolment duties, including extending automatic enrolment to 18 to 21 year olds and removal of the lower pensionable pay threshold, subject to finding ways to make these changes affordable. See **WHiP Issue 68**.

## **Normal minimum pension age to be raised to 57**

From 2026 to 2028

The government intends to raise normal minimum pension age from 55 to 57 and thereafter to maintain a ten year gap with state pension age.

## Automatic re-enrolment

Every three years

Every three years, an employer must carry out an exercise to re-enrol, into an automatic enrolment scheme, eligible jobholders who opted out after they were automatically enrolled. This duty first arises three years from the employer's staging date, when automatic enrolment was first required, and there is a six month window around that anniversary during which the exercise must be carried out. It must then be repeated every three years. See our briefing note **Automatic re-enrolment**.

## PENDING CASES

The following pending cases may result in judgments that affect schemes other than just those involved:

### Switching from RPI to CPI: *Barnardo's*

The Supreme Court's judgment in the *Barnardo's* case is awaited. The Court of Appeal held that a DB scheme's definition of "Retail Prices Index" (RPI), which includes "*any replacement adopted by the Trustees without prejudicing [pre-2006 Tax] Approval*", does not permit the trustees to switch to the Consumer Prices Index (CPI) while RPI remains an officially published index. (See **WHiP Issue 61**.)

The Court of Appeal also (but without setting a binding precedent because it did not need to be decided) confirmed the decisions in *Danks v QinetiQ* and *Arcadia* (see **WHiP Issues 33** and **48** respectively). In those cases, the High Court held that, where under scheme rules the trustees have a choice of index, until that choice is made it is not possible to say that a member has a subsisting right to an increase based on any particular index. Accordingly, section 67 of the Pensions Act 1995 – which restricts amendments that affect or could affect subsisting rights - would not prohibit the switch.

### Discrimination against part-time workers

In *O'Brien v Ministry of Justice*, the European Court will decide on the retrospective effect or otherwise of the European law requirement introduced in 2000 to provide pro rata pensions for part-time workers. See **WHiP Issue 65**.

### Retrospective equalisation of pension ages

In *Safeway v Newton*, the European Court will consider whether European law prevented a scheme's retrospective amendment power from being used to 'level down' benefits accrued in a *Barber* window period. See **WHiP Issue 67**.

## EXPECTED DEVELOPMENTS WITH NO CONFIRMED DATE

The following are expected legislative and regulatory developments for which there is no confirmed date:

### GMPs and sex discrimination

The government has stated its intention to legislate in this area, to remove the need for a claimant to point to a comparator of the other sex in order to establish unlawful discrimination. Such a change would be expected to increase the pressure on trustees to address GMP-related inequalities in benefits accrued between 17 May 1990 (the *Barber v GRE* judgment) and 5 April 1997 (when GMPs stopped accruing). Implementation has been delayed, pending (a) consideration of whether a combined value-equalisation and GMP-conversion process can be used to eliminate inequalities and (b) the *Lloyds Banking Group* litigation. See our **Equalisation of benefits that include GMPs** briefing note, **WHiP Issues 32, 38, 61** and **63** and our briefing note **GMP equalisation: court ruling**.

### PPF compensation levels

In *Hampshire v Board of the Pension Protection Fund*, the European Court ruled that the PPF does not provide adequate protection in cases such as Mr Hampshire's. See **WHiP Issue 72**. The government is considering how to implement the judgment. In the meantime, the PPF is increasing compensation for those affected. (See also note 2 on page 5: *Effect of Brexit*.)

## **Pensions Regulator powers**

In its March 2018 white paper, the government proposed to extend the Pensions Regulator's powers to allow it to penalise those who deliberately put a pension scheme at risk. The government also proposes a criminal offence and civil penalties for directors or connected persons found to have committed wilful or grossly reckless behaviour in relation to a pension scheme. The "notifiable events" framework will be improved and the Regulator's information gathering powers will be extended.

There will be a requirement that employers or parent companies produce a "declaration of intent" in advance of the riskiest transactions (including sales and takeovers of employers), having consulted trustees on the assessment of detriment and mitigation. Clearance will continue to be voluntary but the Regulator's guidance will be reviewed.

The consultation response is expected towards the end of 2018.

See our briefing note **Protection of DB pension schemes: government plans** and **WHiP Issue 71**.

## **DB scheme funding**

As noted in the March 2018 white paper, the Pensions Regulator plans to develop a new Code of Practice on Funding Defined Benefits (with new accompanying guidance), to define "prudent" (in relation to technical provisions) and "appropriate" (in relation to recovery plans) and to ensure that long-term objectives for the scheme are considered when setting funding objectives. A consultation is expected in early 2019. The government intends to make compliance with at least part of the new Code a statutory requirement.

DB schemes will be required to have chairs, who must produce statements on key funding decisions (as well as consideration of key risks, value for money and long-term plans for the scheme). These are to be submitted to the Regulator with triennial valuations, with power for the Regulator to request an out-of-cycle statement.

See our briefing note **Protection of DB pension schemes: government plans**.

## **Survivors' pensions for same sex spouses, civil partners and widowers**

The Supreme Court's decision in *Walker v Innospec Limited* (see **WHiP Issue 65**) requires pensions for surviving same sex spouses and civil partners to be provided on the same basis as for opposite sex spouses. It also raises difficult questions, not considered by the Supreme Court, about survivors' GMPs and benefits for widowers in respect of pre-April 1988 service. The government is reviewing the position.

## **Civil partnerships**

The government has announced that it intends to allow opposite sex couples to enter into civil partnerships. See the next issue of WHiP.

## **Shared parental leave for grandparents**

The government might extend rights to shared parental leave and pay to working grandparents.

**Effect of Brexit Note 1:** *EU regulations (as distinct from directives) apply in member states without the need for domestic implementing legislation. Under the European Union (Withdrawal) Bill, they will continue to apply in the UK until domestic law changes to give effect to Brexit.*

**Effect of Brexit Note 2:** *Strictly speaking, obligations on the UK to implement EU directives by applicable deadlines that pre-date the UK leaving the EU should be complied with. It remains to be seen whether this will occur in practice. Some Brexit models would require the UK to continue to implement many directive requirements.*

# TRIVERS SMITH

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Pensions Radar is not a substitute for proper legal advice. If you wish to discuss any topics, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Susie Daykin, Daniel Gerring, David James, Dan Naylor and Paul Stannard.

Please see **our website** for briefing notes and issues of our regular newsletter, "What's Happening in Pensions".

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