Issue 76 July 2019

What's Happening in Pensions

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- **PPF insolvency guidance:** The PPF has published "Contingency planning for employer insolvency", a guide to help DB scheme trustees to understand the problems and issues they may face when there is an increased risk of the sponsoring employer becoming insolvent. It has also published new guidance setting out its approach to proposals for restructurings involving a new or successor scheme.

- **Box Clever FSD case:** The Court of Appeal has upheld the Pensions Regulator's decision to impose financial support directions on ITV companies in relation to the failed joint venture between Granada and Thorn.

- **Burgess v BIC UK Limited:** The Pensions Ombudsman's office has published a 'factsheet', "Recoupment in overpayment cases: the Pensions Ombudsman is a 'competent court'", concerning comments made in this case. The Court of Appeal has overturned the High Court decision concerning the validity of a purported amendment introducing pension increases.

- **Anti-money laundering:** The government has consulted on the transposition of the EU's Fifth Money Laundering Directive into UK law. The Directive includes new measures affecting trusts regarding registration and to promote greater transparency.

- **Setting an ill-health early retirement date:** The Deputy Pensions Ombudsman has ordered an employer to compensate the widower of a member of the Local Government Pension Scheme who died between being granted an ill health early retirement pension and the retirement date set by the employer.

- **Age discrimination bridging pension exemption:** The government has responded to its consultation on regulations to exempt schemes that pay bridging pensions (or that have similar arrangements) from the age discrimination legislation if the bridging pension ends (or the scheme pension is otherwise reduced) at any age between 60 and the member's state pension age. It has also laid final regulations.

- **Pensions dashboard:** The government has published its response to its pensions dashboard consultation. It seems that nearly all occupational pension schemes, as well as personal pension providers, will be required to submit data.

- **British Airways case:** British Airways and the trustee of the Airways Pension Scheme have agreed a settlement of the appeal in the pension increase case.

- **PPF strategic plan and business plan:** The PPF has published its Strategic Plan for 2019 to 2022 and Business Plan for 2019/20.

- **EMIR clearing exemption:** The long-awaited EU extension to the exemption for pension schemes from the EU's OTC derivatives clearing requirement under EMIR has been granted.

- **SFTR reporting:** The securities financing transactions (SFT) reporting regulations have been published in the EU Official Journal. The obligation to report SFTs to a trade repository will be in force from 11 April 2020.

- **PPF compensation:** The European Court's Advocate General has recommended that the Court reconsider the level of pension protection required following an employer insolvency.

- **Pension scams:** The Pension Scams Industry Group has updated its code of good practice on Combating Pension Scams.

- **Civil partnerships for opposite sex couples:** The Secretary of State is required to amend the Civil Partnership Act 2004 so that opposite sex couples are eligible to form a civil partnership in England and Wales by the end of the year.

- **CMA report on audit market:** The Competition and Markets Authority has published its final report on competition in the statutory audit market.

DB scheme funding

David Fairs, executive director for regulatory policy of the Pensions Regulator, has written a **blog post** on what we can broadly expect in the Regulator's forthcoming consultations on:

- options for a clearer framework for DB funding (expected this summer but this may depend on when a Pensions Bill can be introduced); and
- the draft code of practice (expected in 2020, when the Regulator says there should be more clarity on the content of primary and secondary legislation).

Mr Fairs says that the concept of a long-term objective (LTO) for a DB pension scheme and how trustees should achieve the statutory funding objective in that context will be at the heart of the revised code of practice. The Regulator will consult on what it sees as a suitable LTO:

- "For closed schemes, this will include ideas on how they should seek to progressively reduce their reliance on the employer covenant over time and reach a position of low dependency by the time they are significantly mature."
- For open schemes: "We are mindful to ensure the funding framework does not unduly increase the cost of future accruals and lead to unnecessary scheme closures. We will consult on a range of solutions for open schemes which take these factors into consideration while ensuring that members' past service is protected to the same degree as in closed schemes."

Other points of interest are as follows:

- "We will consult on our proposals for clearer guidelines on acceptable lengths of recovery plans for different covenant strengths and on how this could work in practice. In particular, we will seek views on whether, all other things being equal, stronger employers should be required to fund TP [technical provisions] deficits in a shorter period (particularly where they have the benefit of proportionately lower deficits)."
- "We will also set out our ideas for how contingent support could remain a central part of funding solutions, for instance to support long recovery plans (particularly where shorter ones are unaffordable) or risk-taking in the TPs and be made more accessible to all schemes."
- "We will outline proposals for how trustees could demonstrate whether the risk in their investment strategy is supported, for instance through a simple stress test."

The Regulator says that "The new code will provide a more straightforward, fast track route to demonstrating compliance with requirements but there will be scope for schemes to choose a more bespoke approach subject to further evidence being provided and greater regulatory scrutiny".

Review of the Pensions Regulator

The government has published a **tailored review of the Pensions Regulator**, led by Jamey Johnson, Chief Officer for Pension Wise.

The report is broadly supportive of how the Regulator currently operates. The most notable recommendation for change is that the government should consider allowing the Regulator to make its own rules in specific circumstances. This would put it on a similar footing to the FCA and allow it to be more proactive. Any such power should be subject to government oversight and industry input.

The review also says that the Regulator should be doing more to help schemes prepare for Brexit.

Suggestions of a merger with the FCA, PPF and/or Pensions Ombudsman were not supported.

Pensions Regulator Corporate Plan

The Pensions Regulator **has published** its **Corporate Plan for 2019 to 2022**. Points of interest include the following:

- Communications are being sent to more than a thousand schemes this year to monitor how members are being treated when it comes to matters such as dividend payments to shareholders, length of recovery plans and efficient record-keeping.
- The Regulator is developing a consolidation plan for DC schemes that fail to meet expected standards.
- There will be a second phase of the "21st Century Trustee" programme, focusing on the make-up of trustee boards and the impact of industry-developed competency standards and accreditation for professional trustees. The Regulator has also expressed particular interest in diversity and inclusion on trustee boards. You can find our thoughts on this subject **here**.

Investment and disclosure duties

Amending regulations

The **Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019** have been laid. They will increase the disclosure requirements for pension scheme trustees, in relation to stewardship and arrangements with investment managers.

Trustees will have to include new information on these matters in their statement of investment principles and the scheme annual report. There will also be new requirements for disclosure on a publicly accessible website, including DB schemes' statements of investment principles.

The new legislation is being introduced in order to implement requirements of the **2017 EU directive on long-term shareholder engagement**. Although the regulations generally come into force from 1 October 2019, transitional provisions mean that the onerous requirements start to apply to existing schemes from 1 October 2020.

The Pensions Regulator is said to be updating its guidance. In the meantime, there is a short **statement** on its website.

We will report in more detail shortly.

In connection with this, the FCA **has introduced** new Conduct of Business Sourcebook rules designed to improve shareholder engagement and increase transparency around stewardship. The requirements came into effect on 10 June 2019, the deadline for implementing the directive referred to above.

FCA-regulated asset managers and life insurers will need to disclose and make publicly available their policies on how they engage with the companies in which they invest, and (for pension scheme clients) how their strategies create medium to long term value. The new rules are in Annex C to the FCA's **Policy Statement PS19/13**.

Pensions Regulator guidance

The Pensions Regulator has updated its DC investment governance guidance. The **new guidance**, which is twice the length of the previous version, reflects the coming changes in relation to statements of investment principles and annual reports. It includes greatly expanded content on matters including ESG and climate change factors, stewardship and the engagement of fiduciary management service providers.

Equal survivors' pensions

The Pensions Minister has announced in a **written statement** what the government will be doing to give equal survivors' pensions to same sex spouses and civil partners in the public service pension schemes, following the Supreme Court's July 2017 judgment in *Walker v Innospec Limited* (see our briefing note **Supreme Court rules in favour of full equality for same sex spouses and civil partners**). It will not, however, be taking steps to give equal pensions to widowers of female members in respect of pre-April 1988 service and will not be legislating with regard to private sector schemes.

In the *Walker* case, the Supreme Court held that a provision in the Equality Act 2010 limiting equal pensions for same sex spouses and civil partners to benefits accrued by service since 5 December 2005 (plus contracted-out minimum benefits from 6 April 1988) was incompatible with fundamental EU law and had to be disapplied. It ruled that overriding EU law requires a full equal survivor's pension to be provided to Mr Walker's same sex spouse on Mr Walker's death, since this will be after 4 December 2005.

Having considered the judgment, the government has announced that it will grant full survivors' pensions to same sex spouses and civil partners in the public service pension schemes, irrespective of their sex.

Public service schemes also limit pensions for male survivors of female spouses to post-April 1988 service only. The statement says that the government will not be changing that and that "the differences in survivor benefits … will work their way out of the system in time".

This means that there will be an ongoing anomaly of more favourable treatment for same sex couples than for many opposite sex couples, in that male or female same sex married couples and civil partners will now qualify for full survivors' pensions in public service pension schemes when the member dies after 4 December 2005 but male surviving spouses of female members will not qualify in respect of service before April 1988.

The government will not be legislating in respect of private sector pension schemes but the *Walker* judgment's effective amendment of the Equality Act affects them too. Those schemes that are not already giving fully equal survivors' pensions should therefore, if they have not already done so, seek advice on whether or not they comply with equality law as it now stands, including consideration of any anomalous treatment of survivors.

DC scheme interventions

The Pensions Regulator **has contacted** the trustees of hundreds of DC and hybrid schemes and asked them to confirm that they have reviewed their default investment strategy and the performance of the default arrangement.

More than 500 such schemes with between two and 999 members have been contacted as part of a pilot exercise. Trustees have been asked to review guidance which outlines the Regulator's expectations. They are then asked to confirm if the strategy and performance of their scheme's default arrangement have recently been reviewed and remain suitable, by completing an online declaration form.

If a scheme's default strategy has not been recently reviewed, trustees are being taken through simple steps to comply with the law including reviewing the current strategy, taking members' needs into account and the performance of the default arrangement.

GMP equalisation

Industry working group update

The GMP equalisation working group chaired by Geraldine Brassett of PASA **has published** information about what it is doing and who is in the group and sub-groups. This includes our Head of Pensions, Daniel Gerring, who is on the main group and also chairs the tax sub-group.

The sub-groups and brief details of what will be covered in forthcoming good practice guidance are:

- 'Methodology' - Explain the different methodologies and implementation considerations
- 'Impacted Transactions' - Considerations for progressing 'inflight' transactions such as transfers out and trivial commutations
- 'Data' - Identification of data gaps and suggestions of good practice for rectification
- 'Tax' - Explain the tax implications which arise from GMP equalisation
- 'Reconciliation and Rectification' - consider the interaction between the projects and suggested ways forward

On timing, the group says:

> "We expect to produce more than one version of the guidance as industry thinking develops and we receive clarity in certain areas. In terms of timescales, there is an immediate need to provide some initial information on data issues, impacted transactions and suggested approaches to GMP reconciliation and rectification exercises. We are aiming to produce this by the end of June 2019. First versions of some of the good practice guidance are targeted for the end of September 2019."

A **"call to action"** document (which is the initial information referred to above) had just been published as we went to press: we will report on this in the next issue.

Conversion guidance

The government has published **"Guidance on the use of the Guaranteed Minimum Pensions (GMP) conversion legislation"**. This was prepared with the assistance of the GMP conversion industry working group and focuses on GMP conversion as an option for addressing GMP-related inequalities.

GMP conversion means converting a benefit that includes a GMP into a benefit without a GMP. It involves putting an actuarial value on the benefits that include a GMP and converting that value back into reshaped scheme benefits. GMP equalisation can be achieved using GMP conversion in a one-off exercise, by equalising the actuarial value before it is converted back into scheme benefits. Employer consent is required to any GMP conversion and trustees need to consider not only whether GMP conversion is the preferred equalisation method but also whether reshaping benefits is appropriate.

In the guidance, the government confirms that it remains its intention, as soon as a suitable opportunity presents itself, to introduce changes to the Equality Act 2010 to remove the need under UK law for a claimant to point to a real comparator when bringing a GMP equalisation claim.

The government also says that it is considering changes to the GMP conversion legislation to clarify certain issues but does not go into any detail.

The guidance outlines a ten stage process for trustees to resolve GMP-related inequalities through GMP conversion, if this is the equalisation route they choose. This is based on the GMP conversion industry working group document published in November 2016 (see **WHiP Issue 61**). The ten stages are:

1. **Reach agreement with the employer:** This will include agreement to the terms on which benefits are to be converted. The guidance notes that employers will wish to understand, among other things, the implications for their pensions accounting.

   It also says: "Where the participating employers have changed over the years, legal advice should be taken as to how (or whether) the consent requirement applies". This is a question to which there will often be no certain answer: changes to the legislation would be helpful.

2. **Select the members for conversion and agree which benefits are to be converted and the form of the new benefits:** The guidance notes that "It is not necessary to convert benefits for all members, nor to convert at the same time." But it points out that "for a selected member, all of their GMP and the benefit which accrued alongside this GMP need to take part in the conversion process, not just that relating to 17 May 1990 to 5 April 1997 accrual". Survivors can be included.

   The guidance says that "Trustees may wish to take advice in relation to members for whom the estimated cost of calculating and implementing equalisation is the same as or greater than the projected additional benefits to which the member would be entitled as a result of equalisation". This is a question that was raised but not answered in the *Lloyds* case.

   GMP conversion allows the benefits being converted to be reshaped. The most obvious way in which reshaping benefits can help is as regards pension increases. The guidance says that "Trustees will need to take advice on the proposed structure of the new benefits. If the benefits will be materially different in shape and form, the trustees may wish to consider giving the members options and if they do this, they may wish to consider if aspects of the Code of Practice for Incentive Exercises may be relevant". It also reminds trustees to consider their fiduciary duties towards scheme beneficiaries.

3. **Set the conversion date:** This is to be done with the agreement of the employer.

4. **Pre-conversion consultation:** Consultation with selected members can be at a high level, informing them that more personalised information will be made available once calculations have been concluded and benefits adjusted.

   This consultation requirement is separate from the Pensions Act 2004 "listed changes" consultation obligation. (Listed changes include a decision to change the rate at which (i) pensions in payment under the scheme are increased or (ii) pensions or other benefits payable under the scheme are revalued, if that change would be, or would be likely to be, less generous to members or members of a particular description.) Two consultation processes may therefore be required, though in practice they can be run alongside each other.

5. **Valuation:** The valuation of the benefits to be converted is of the whole DB benefit for the GMP accrual period, not just the GMP.

   The legislation does not specify what assumptions should be chosen but trustees are required to obtain and consider advice from the scheme actuary. The guidance suggests using the cash equivalent transfer basis as a starting point. It steers trustees toward using unisex factors (though this is not necessarily required) and notes that "it may well be necessary for the trustees to review the existing basis having taken actuarial advice to ensure that it is appropriate, given that such a basis might have been set having regard to those most likely to transfer, rather than all members with GMPs (which will include pensioners)".

Regarding active members, the guidance says:

> "If active members are to be converted the trustees will need to decide whether to have their benefits valued as either continuing in service, immediately leaving (at the conversion date), or a more complex calculation involving a scale of assumed probabilities of withdrawal at different ages.
>
> It will also be necessary to decide what retirement date to assume, as again this can have a material impact.
>
> For these purposes the trustees may wish to seek actuarial advice. The trustees may choose not to convert such members until they are no longer in pensionable service (similar issues arise for those no longer in pensionable service but who retain a salary link until such time as they cease to be in employment to which the scheme relates)."

Regarding pensioners, the guidance says "Given the likelihood that current records in respect of many pensioners will not be detailed enough to establish their benefits directly on leaving pensionable service, pensioners will need to be converted through a more complex mechanism that takes as its starting point the pension currently in payment." Trustees also need to consider how to calculate arrears. The guidance suggests using method C2 (the default method from the Lloyds case) for that purpose but notes that there is a complex interaction with equalised future payments.

6. **Equalisation:** This involves a comparison of the actuarial value of the member's benefits with the value of those benefits if the member was the opposite sex, with the higher amount being used for the next stage (Conversion).

7. **Conversion:** The same actuarial basis as used for stage 5 (Valuation) should be used to convert the actuarial value into reshaped benefits.

   Pensions in payment cannot be reduced, so this restricts the benefit reshaping options for pensioners and survivors. It is also necessary to provide for a 50% spouse's or civil partner's pension (only for service from 6 April 1988 in respect of female members - but discrimination issues need to be considered if limiting survivors' pensions in this way).

8. **Certification:** The actuary must give a certificate of actuarial equivalence to the trustees within three months of the calculations having been completed.

9. **Modification of scheme to effect conversion:** This can be done by trustee resolution or under the scheme amendment power. Section 67 Pensions Act 1995, which generally restricts the amendment of subsisting rights, does not apply.

10. **Post-conversion notifications:** Conversion notifications to members and survivors should be made before the conversion date or as soon as reasonably practicable thereafter. HMRC has to be notified on or before the conversion date.

There is also some guidance on how trustees might approach difficulties caused by data insufficiencies and a very brief section on tax issues that HMRC is considering.

Investment consultancy and fiduciary management

The Competition and Markets Authority (CMA) **has made** its final order in the investment consultancy and fiduciary management investigation. This implements its previously published decisions (see **WHiP Issues 74** and **75**), which include the following:

- Fiduciary management: In broad terms, the CMA order requires pension scheme trustees who wish to delegate investment decisions for more than 20% of their scheme assets to a fiduciary manager to run a competitive tender with at least three firms. Trustees who have appointed a fiduciary manager without a tender must put the service out to tender within five years. The Pensions Regulator is understood to be preparing guidance on this topic.

- Investment consultancy: The CMA order requires trustees to set strategic objectives for their investment consultants, which will be closely linked to the scheme's investment objectives in most cases. This applies both when engaging new consultants and for existing appointments.

- Trustees will have to submit annual compliance statements to the CMA in respect of both of the matters outlined above. The first is required by January 2021. The CMA has power to demand information for the purposes of monitoring compliance.

- Investment consultants and fiduciary management service providers have to give certain information to trustees, including about fees and performance.

The parts of the order relating to certain performance information provision and CMA monitoring and compliance came into effect on 10 June 2019. The other parts will come into force after six months (ie, 10 December 2019).

Trusteeship and governance

The Pensions Regulator has published a **consultation** on the future of trusteeship and governance. This may lead to revisions of the Regulator's code of practice on trustee knowledge and understanding and a new legal requirement for trustees to demonstrate knowledge and understanding and ongoing learning. Looking further into the future, the Regulator asks for views on introducing a requirement for schemes to have a professional trustee.

The consultation closes on 24 September 2019.

PPF insolvency guidance

Guidance for trustees on planning for insolvency

The PPF **has published** "Contingency planning for employer insolvency", a guide to help DB scheme trustees to understand the problems and issues they may face when there is an increased risk of the employer becoming insolvent.

The PPF worked closely with the Pensions Regulator on the guide. It includes the following sections:

- **Planning when times are good:** It is essential that trustees regularly review the strength of the employer covenant and the appropriateness of the scheme's risk appetite.

- **Are you prepared?:** The PPF advocates contingency planning and having articulated procedures and responses to issues in advance. Advisers should be able to help and the PPF is happy to be involved.

- **What happens when a scheme's employer becomes insolvent:** Evidence shows that if trustees have thought about what it means to enter a PPF assessment period, and have undertaken some contingency planning, it is more likely that there will be a consistent member experience and assets will be safeguarded.

  The PPF has seen in-house pensioner payrolls put at risk because the employer was made insolvent without warning and access to the employer's premises was lost along with the IT and the finance, payroll and banking functions. Sometimes the bank freezes the account from which the payroll is made. The PPF says it has had to step in on over 10% of cases in recent years to make sure that the pensioners are paid.

- **Contingency planning steps:** On page 4 (with more detail on pages 5 and 6), there is a chart indicating specific contingency planning steps that schemes with varying employer covenant strengths might take – including planning sessions with the PPF, reviewing the steps needed to realise security, and reviewing scheme employers.

The PPF also suggests that trustees consider working on a media strategy, at a relevant time, with the PPF and the Pensions Regulator.

There has been a clear message at presentations on this guidance by the Pensions Regulator and the PPF that they are keen to be "on-hand" to offer assistance to trustees with all this.

PPF approach to restructuring proposals

Short new **guidance** sets out the PPF's approach to proposals for restructurings involving a new or successor scheme.

This is to be read in conjunction with the PPF's December 2018 **Guidance on the PPF's approach to Employer Restructuring**. It notes particular issues to be addressed in this scenario, which typically involves members being offered, as an alternative to PPF compensation, a transfer to a scheme providing benefits that are less generous but above PPF levels.

These issues include the terms for valuing liabilities for the purposes of splitting and transferring assets and liabilities, how to split the assets, the costs to be borne by the company, the provision of information and advice to members, and the viability of a substantive ongoing sponsoring employer.

Box Clever FSD case

The Court of appeal has given **its judgment** in the long-running Box Clever case. It upheld the Upper Tribunal's confirmation (see **WHiP Issue 71** for details of the findings) of the Pensions Regulator's Determinations Panel's 2011 decision to issue financial support directions to five ITV companies in relation to the Box Clever Group Pension Scheme. This relates to a leveraged joint venture with Thorn which went insolvent in 2003, which was before the moral hazard legislation was in force.

ITV reportedly intends to ask the Supreme Court for permission to appeal.

Burgess v BIC UK Limited

The Pensions Ombudsman as a "competent court"

The Pensions Ombudsman's office **has published** a 'factsheet', **"Recoupment in overpayment cases: the Pensions Ombudsman is a 'competent court'"**.

This is in response to Arnold J's comments in the High Court in *Burgess v BIC UK Ltd* (see **WHiP Issue 70**). It sets out the Pensions Ombudsman's view that the Pensions Ombudsman is a "competent court" under section 91(6) Pensions Act 1995 for the purpose of entitling trustees to offset a beneficiary's debt to the scheme against future benefit payments.

Section 91(6) says that "*where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court …*". Arnold J had expressed the view, but without deciding the question, that the Pensions Ombudsman service is not a "competent court" because it is not a court.

This question typically arises where trustees seek to recoup overpaid benefits from future instalments of pension (ie, setting off the overpayments against future payments). If the member complains about that course of action, trustees cannot proceed without there being an order of a competent court about the money owed to them. The question is: if the member complains to the Ombudsman and the Ombudsman does not uphold the complaint, is that an order of a competent court that there is an enforceable debt from the member to the scheme?

The factsheet focuses on the word "court" and does not consider the meaning of "competent". In particular, it does not address the argument that, whether or not the Ombudsman is a court, he is not competent to make an order that a person owes money to a pension scheme (and indeed does not do so), because that is not within his statutory powers.

Court of Appeal decision

The **Court of Appeal** later overturned the High Court decision in *Burgess v BIC UK Limited* but without any implications for the matters discussed above.

The appeal concerned whether pension increases had been introduced with effect from 1992. The Court of Appeal held that it was rewriting history to an impermissible extent to conclude that a 1993 deed of amendment that retrospectively conferred powers to make the necessary amendment and/or award the increases should be treated as having resulted in the increases having been granted, in the absence of any actual and valid exercise of a power to that effect.

Despite the outcome, which means that questions arise around the recoupment of wrongly paid pension increases, there is no consideration of how recoupment from future instalments of pension fits with the rules on applying set-off in section 91(6) Pensions Act 1995, including whether the Pensions Ombudsman is a "competent court" for these purposes (see above).

Anti-money laundering

The government **has consulted** on the transposition of the EU's Fifth Money Laundering Directive into UK law. The Directive includes new measures affecting trusts regarding registration and to promote greater transparency. The implications for pension schemes are not yet clear.

The directive has to be implemented by member states by 10 January 2020. The implications of this in the UK depend on what happens with Brexit.

The directive includes new requirements applicable to trusts regarding disclosure of beneficiary details and registration that go further than the Fourth Directive and current UK law. The relevant expanded directive requirements are very broadly as follows:

- The current requirement for a central register to be kept (by HMRC in the UK) "when the trust generates tax consequences" will be removed, meaning that all trusts will have to register. (Currently only trusts that are liable to pay certain taxes are required to register.)

- Beneficial ownership information must be accessible by any member of the public who can demonstrate a legitimate interest (except in very limited exceptional circumstances, which will not normally apply except as regards beneficiaries who are minors or otherwise incapable).

The consultation does not focus on pension schemes so the implications for them are not yet clear. As regards registration, the government is considering whether existing registration services can suffice. As regards beneficial ownership information, the government proposes that there should be considered to be a legitimate purpose where the person seeking the information is actively involved in anti-money laundering or counter-terrorist financing and has (with supporting evidence) reason to believe that such an activity is occurring.

An HMRC technical consultation is expected later this year.

Setting an ill-health early retirement date

The Deputy Pensions Ombudsman **has ordered** an employer to compensate the widower of a member of the Local Government Pension Scheme who died between being granted an ill health early retirement pension and the retirement date set by the employer.

The employer agreed to the ill health retirement but set the retirement date for a day later the same month. The member died the day before that date. The member's widower complained that if the retirement had taken place earlier, the death benefits would have been significantly larger. This was because the benefits payable to him on his wife's death in service were lower than if she had died in retirement.

The Deputy Ombudsman decided that the employer, being aware that the member was terminally ill, should not have risked loss by delaying bringing the ill health pension into payment. It should have set the retirement date as the day on which the pension was approved.

The Ombudsman accepted that the scheme administering authority could only pay benefits based on the actual retirement date. The Ombudsman's ruling was therefore against the employer rather than the scheme. The employer was ordered to pay the difference between (a) death in retirement benefits and (b) the death in service benefits paid plus the employment income received by the member in respect of the period of delay. Any tax charge payable on this further lump sum death benefit should also be paid by the employer.

Age discrimination bridging pension exemption

The government **has responded** to its consultation (see **WHiP Issue 74**) on regulations to exempt schemes that pay bridging pensions (or that have similar arrangements) from the age discrimination legislation if the bridging pension ends (or the scheme pension is otherwise reduced) at any age between 60 and the member's state pension age. It has also laid **final regulations**, effective from 15 May 2019, which are the same as the consultation draft.

Currently, the step-down of the pension must occur between ages 60 and 65 in order to fall within the exemption. With state pension ages now rising above age 65, the exemption needed to be extended. The government is extending it such that the bridging pension can end at any time between the member reaching age 60 and reaching his or her state pension age.

Another amendment allows the reduction to be of an amount up to 200% of the full single tier state pension at the relevant time.

There was already legislation in place disapplying sex discrimination legislation in respect of similar pension reductions.

Pensions dashboard

The government **has published** its response to its pensions dashboard consultation. It could be clearer, especially about DB schemes, but it seems that nearly all occupational pension schemes, as well as personal pension providers, will be required to submit data. This will be staged within a three to four year timeframe, with large DC schemes affected first. It is unclear, however, when we will have final details and legislation.

British Airways case

British Airways and the trustee of the Airways Pension Scheme **have agreed** a settlement of the appeal in the pension increase case. The settlement is subject to court approval and includes an agreement on funding.

The Court of Appeal had decided that the trustee exercised its unilateral power of amendment for an improper purpose when it amended the scheme rules to include a new pension increase power and later awarded pension increases under that power (see **WHiP Issue 71**). That decision was due to have been appealed by the trustee to the Supreme Court.

The High Court is being asked to approve a settlement under which the trustee will be permitted, subject to some affordability tests in a "discretionary increase protocol" and by simple majority (rather than the 2/3rds majority required under the rule the trustee introduced), to award discretionary increases so that pensions are increased up to the annual RPI increase from 2021, with interim catch-up increases in the meantime. The settlement also includes an agreement on funding.

It will not be compulsory for members to receive a discretionary increase if they would lose enhanced protection or fixed protection against the lifetime allowance charge.

PPF strategic plan and business plan

The PPF **has published** its **Strategic Plan for 2019 to 2022** and **Business Plan for 2019/20**.

The PPF's strategic priorities for the next three years are:

- "Sustainable funding in volatile times
- Built for innovation
- Brilliant service for our members and schemes
- The best of the financial and public service cultures

- Clear value for money"

The business plan includes the following key actions:

- "Developing innovative digital services that, as our membership grows, allows us to stay agile, efficient, productive and cost effective
- Increasing the use of member communications via our existing social media channels and introduce new online services including web chat and co-browsing to encourage members to engage with us using their preferred device
- Remaining prudent and maintaining our current funding strategy and low risk investment approach. This will make sure we have sufficient revenue and reserves to take on large schemes with significant deficits without risk to members
- Continuing to work closely with our levy payers to develop services that make it easier for them to comply with their levy obligations
- Drawing on the best of the financial and public sectors, including the standards they are held to, and attracting, recruiting and retaining a diverse employee population"

On funding and levies, the PPF says in the press release:

"Despite market volatility we're on track to meet our long-term funding target – to be 100 per cent funded by our funding horizon, which is currently assessed as being 2030. Our levy estimate for 2019/20 was reduced to £500 million and we predict this continuing to go down in the long-term."

The Business Plan says that the levy portal will be rebuilt with Dun & Bradstreet (replacing Experian) by 31 March 2020 in preparation for the 2021/22 levy year.

EMIR clearing exemption

The long-awaited EU extension to the exemption for pension schemes from the EU's OTC derivatives clearing requirement under EMIR has been granted. The **amending regulation** came into force on 17 June 2019.

The EMIR clearing requirement applies to certain derivatives transactions used to reduce investment risks and liabilities. The new extension is for two years more and there is provision for two further one year extensions. The regulation also makes it clear that no issues arise from the gap between the original exemption expiring (in August 2018) and this new exemption applying.

SFTR reporting

The securities financing transactions (SFT) reporting regulations have been published in the EU **Official Journal** (22 March 2019). The regulations entered into force on 11 April 2019, which means that the obligation to report SFTs to a trade repository will be in force from 11 April 2020.

SFTs include repo/reverse repo and securities lending transactions. The SFTR introduces a new requirement (modelled loosely on EMIR) for counterparties to SFTs to report the conclusion, modification or termination of an SFT to a trade repository. Details required will include the composition of the collateral, whether the collateral is available for reuse or has been reused, the substitution of collateral at the end of the day, and the haircuts applied.

PPF compensation

In ***Pensions-Sicherungs-Verein VVaG v Bauer***, the European Court's Advocate General Hogan has recommended that the Court reconsider its interpretations of the EU insolvency directive in the *Hogan* and *Hampshire* cases (see **WHiP Issues 39** and **72**) as regards the level of pension protection required following an employer insolvency.

His opinion, which the European Court may or may not choose to follow, is that there is no basis in the directive for applying a 50% protection threshold (as was done in *Hampshire*) and that, in other than *de minimis* reduction cases, the Court should consider whether the member state in question (here, Germany) has done enough to try to give full protection.

He noted that in a case decided after the *Hogan case, Webb-Samann v Seagon (2016)* and also in *Hampshire*, the European Court mentioned that, notwithstanding the 50% threshold applied by the Court, there are "other circumstances" in which a loss of more than half an individual's pension rights could be regarded as manifestly disproportionate. In the Advocate General's opinion, these other circumstances "are those in which the claimant proves that the Member State has not fulfilled its obligation to ensure that the necessary measures were taken to protect the interests of employees or of persons having already left the employer's undertaking and where the reduction in pension rights is at a level which is either not de minimis or which otherwise impairs the essence of the occupational pension entitlements which, but for the employer's insolvency, the retiree had every reason to anticipate receiving".

Pension scams

The Pension Scams Industry Group has updated its code of **good practice on Combating Pension Scams**. Changes have been made are in respect of:

- The Cold Calling ban
- TPR/FCA ScamSmart campaign and TPR Threat Assessment update
- Money And Pensions Service (MAPS) references
- TPO determinations update and implications
- The rise of claims management firms
- FCA Letter "Managing the risks of Defined Benefits to Defined Contribution transfers"
- FCA-TPR-TPAS joint protocol
- PSIG's Scams Survey Pilot 2018
- Revised Action Fraud reporting guidance
- Additional case studies

Civil partnerships for opposite sex couples

The Civil Partnerships, Marriages and Deaths (Registration etc.) Act 2019 requires the Secretary of State by regulations to amend the Civil Partnership Act 2004 "so that two persons who are not of the same sex are eligible to form a civil partnership in England and Wales (provided that they would be eligible to do so apart from the question of sex)".

Such regulations are to be in force no later than 31 December 2019. Provisions in relation to, among other things, pensions and social security may also be made.

After consultation, the Secretary of State may also make regulations to allow a marriage to be converted into a civil partnership and/or to restrict or remove the right to convert a civil partnership into a marriage. A **consultation paper** was subsequently published: the consultation closes on 20 August 2019.

CMA report on audit market

The Competition and Markets Authority (CMA) has published its **final report** on competition in the statutory audit market.

The report contains recommendations to address competition problems in the UK audit industry and takes account of the recent Kingman review, which recommended the replacement of the FRC with a new body, the Audit, Reporting and Governance Authority.

The CMA's recommendations include an operational split of audit and non-audit (including, among many other things, pensions consultancy) practices, starting with the "Big Four" firms – this will require separate management, accounts and remuneration; a separate CEO and board for the audit arm; separate financial statements for the audit practice; an end to profit-sharing between audit and consultancy; and promotions and bonuses based on the quality of the audits.

The CMA decided not to make any market investigation reference, so the ball is now in the government's court. The CMA recommends that the measures are implemented as soon as possible.

This and previous issues of WHiP can be found on our website **here**.

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If you wish to discuss any points arising from this note, 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, Andy Lewis, Dan Naylor and Paul Stannard.

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