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What's Happening in Pensions

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- **Pimlico Plumbers case:** The Supreme Court decision in *Pimlico Plumbers v Smith*, that Mr Smith was a worker and so was entitled to workers' rights, has implications for Pimlico Plumbers and other firms with similar practices as regards their automatic enrolment duties.
- **Box Clever - Upper Tribunal decision:** The Upper Tribunal has confirmed the Pensions Regulator's Determinations Panel's decision to issue financial support directions to five ITV target companies in relation to the Box Clever Group Pension Scheme.
- **Financial Guidance and Claims Act 2018:** The Financial Guidance and Claims Act 2018 has received Royal Assent. Its provisions include new requirements to refer members to guidance; a power to make regulations prohibiting pensions "cold-calling"; and provision for the establishment of the new single financial guidance body.
- **HMRC – genuine errors and IFAS:** HMRC has clarified the extent to which its guidance on correcting genuine errors applies where an independent financial adviser or other agent engaged by a member makes an error and the scheme acts on it.
- **Anti-money laundering:** HMRC has issued new guidance for pension schemes on the registration and record-keeping requirements of the 2017 money laundering regulations. The EU's Fifth Money Laundering Directive will in due course impose new obligations regarding disclosure of beneficiary details and registration.
- **Master trusts:** The Pensions Regulator's code of practice on the authorisation and supervision of master trusts has been finalised.

PPF-compliant guarantees and security arrangements

The PPF rules are changing for pension schemes that have a pre-18 January 2018 guarantee in place that includes a fixed sum (ie, £x) liability cap. Trustees will not be able to certify or recertify such guarantees for the 2019/2020 levy year. If schemes want to be able to certify or recertify, and qualify for the levy reduction, they will have to replace the guarantee with a new guarantee using the PPF's revised standard form and then certify that new guarantee.

The PPF's revised standard form still allows a fixed cap but it includes new drafting on options for caps on pre- and post-insolvency demands that must be adopted.

The PPF has been contacting the trustees of schemes that have certified contingent assets to communicate this message.

The deadline for certification for the 2019/2020 levy year will be at the end of March 2019. However, the process of replacing existing fixed sum cap guarantees could in some cases prove to be contentious and time-consuming (perhaps unexpectedly so). We therefore strongly recommend that trustees and employers engage as soon as possible so that they do not find themselves running out of time next year.

See **our briefing note** for more information.

Proposed new Pensions Regulator powers

Following the recent White Paper on protecting DB pension schemes (see **our briefing note**), the government **is consulting** on its proposals to give the Pensions Regulator greater powers in relation to corporate activity and to help the Regulator to learn about a wider range of significant events than at present, and at an earlier stage.

The consultation closes on 21 August 2018. A statute will be needed for many of the changes. No draft legislation has been published at this stage and the proposals are short on detail.

This is only one strand of the White Paper proposals. Future consultations are expected on DB scheme funding and DB scheme consolidation. There is also a BEIS insolvency and corporate governance consultation (see below), the consultation period for which closed on 11 June 2018, which is considering concerns around dividend payments.

New penalties and offences: The government proposes:

- Power for the Regulator to impose a civil penalty of up to £1 million "to deter behaviours which are more serious in nature and have resulted in actual harm to the pension scheme or have the potential to do so if left unchallenged".

- New criminal offences of: wilful or grossly reckless behaviour in relation to a DB pension scheme; non-compliance with a contribution notice; and failure to comply with the notifiable events framework.

Contribution notices: The government proposes to strengthen the contribution notice (CN) regime by (among other things):

- amending the reasonableness test for issuing a CN so that there is a stronger focus on the loss or risk caused to a scheme, as opposed to the benefit received by the target, when assessing the amount to be demanded; and

- adding an additional limb to the "material detriment" test, concerning the weakening of the employer rather than the prospect of scheme benefits being paid.

Financial support directions: The government proposes to strengthen the financial support direction (FSD) regime by (among other things):

- allowing FSDs to be issued to a broader range of individuals associated with or connected to the sponsoring employer;

- giving the Regulator power to impose a CN on any person associated or connected with the recipient of an FSD; and

- exploring how and whether the "look-back" period could be increased beyond two years.

Notifiable events: The government proposes to add new items to the list of notifiable events (ie, events that can trigger an obligation on employers or trustees to notify the Regulator) including (among others):

- sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities;

- granting of security for a debt to give it priority over debt to the scheme;

- the sponsoring employer taking independent pre-appointment insolvency/restructuring advice; and

- amendment of a banking covenant or waiver of a breach.

Reporting would be expected earlier than at present, for example at the stage of agreeing heads of terms for a corporate transaction. The duties may be extended to new parties, for example the directors of a sponsoring employer's parent company that is planning a transaction.

Dividend payments are a notable but deliberate omission: these will be considered by BEIS as part of its corporate governance consultation (see **WHiP Issue 70**). They will also doubtless crop up in the forthcoming consultation on scheme funding.

Declarations of intent: For some notifiable event transactions, the employer will need to issue to trustees, and share with the Pensions Regulator, a "declaration of intent" setting out the implications of the transaction for the scheme and how any risks will be mitigated. This will be at a later point in a transaction than a notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme. It is currently envisaged that this requirement will apply according to risk-based criteria (eg, scheme funding level).

BA Court of Appeal decision

British Airways has won its appeal against the High Court decision (see **WHiP Issue 65**) about the validity of decisions by the Airways Pension Scheme trustees:

- to exercise their unilateral power of amendment to give themselves a power to award discretionary revaluation and indexation increases above those required by the scheme rules (which had automatically followed the government's switch from RPI to CPI for public service pension schemes); and

- to exercise that power to give a 0.2% additional annual increase (which was approximately half the difference between the CPI and RPI increases).

The High Court held that these decisions were valid. The Court of Appeal ruled by a two to one majority that the trustees had purported to use their powers for an improper purpose and so their decisions were invalid.

One of BA's arguments was that the additional increases were "benevolent or compassionate payments", which were (unusually) expressly prohibited by the scheme's trust deed. But that argument was unanimously rejected by the Court of Appeal.

Instead, Lewison LJ and Peter Jackson LJ attached particular importance to a statement in the scheme's trust deed that the trustees "shall manage and administer the scheme and shall have power to perform all acts incidental or conducive to such management and administration", finding that the trustees had exceeded their role by (in the words of Peter Jackson LJ) "effectively [adding] the role of paymaster to their existing responsibilities as managers and administrators". Lewison LJ put it differently: "I would draw from this that the function of the trustees is to manage and administer the scheme; not to design it".

Peter Jackson LJ did not, however, agree with a BA argument that the fundamental purpose of any occupational pension scheme is to deliver the benefits that the employer is willing to fund. He said that the purpose of a scheme is to be ascertained from the contents of its governing documentation, an analysis of their effect, and an understanding of the business context.

The trustees have been given permission to appeal to the Supreme Court.

Investment disclosure

The government **is consulting** on **draft regulations** concerning the disclosure of information by pension scheme trustees about environmental, social and governance (ESG) factors and stewardship in relation to investments. It is concerned that statements of investment principles (SIPs) are often treated as a compliance exercise, prepared by investment consultants with little trustee input, and not used by trustees or advisers when making investment decisions.

The government is proposing the following changes.

- **Financially material considerations:** Rather than specifying the trustees' policy in relation to "the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments" (the current requirement), a SIP would have to state the trustees' policies in relation to "financially material considerations, including how those considerations are taken into account". This "includes (but is not limited to) environmental, social and governance considerations (including climate change)".

  The changes reflect the government's view that trustees should be taking financially material ESG considerations into account and that climate change is of relevance for more than just ESG reasons (ie, it may affect the profitability of certain industries).

  This change would apply to every scheme's SIP. It would also affect the required content of a *relevant scheme's* default arrangement SIP. (A "*relevant scheme*" is very broadly a scheme that provides money purchase benefits other than just in relation to AVCs - but with exceptions, including some schemes with 12 or fewer members.)

- **Statement about members' views**: All schemes that are required to produce a SIP would have to prepare a separate statement explaining "the extent to which the views which, in the reasonable opinion of the trustees, members of the scheme hold (including the views they hold on non-financial matters) will be taken into account in preparing or revising the [SIP]". For this purpose, non-financial matters "includes (but is not limited to) ethical matters, social impact matters and present and future quality of life of members matters" (sic).

  The government stresses that trustees retain responsibility for investment decisions.

- **Stewardship**: The government proposes to require trustees to state in their SIP (if they are required to have one) their policy on stewardship, including on voting, engagement and monitoring. Currently, trustees are only required to report their policy (if any) in relation to the exercise of rights, including voting rights, attaching to investments. The new requirement would cover direct engagement as well as indirect engagement via, for example, fund managers or other agents.

- **Implementation report:** Trustees of *relevant schemes* that are required to produce a SIP would have to include in their investment report (part of the annual report, available to members on request):

  - a statement setting out how, and the extent to which, in the trustees' opinion, the SIP has been followed and details of any review of the SIP, identifying and explaining any changes made to it (or if there has been no review then saying when the last review was done);

  - the trustees' policies on taking into account "financially material considerations" (see above) and stewardship (see above); and

  - the trustees' statement about taking members' views into account (see above).

- **Public disclosure:** Trustees of *relevant schemes* that are required to have a SIP would be required to publish their SIP, implementation report and statement about members' views on a publicly accessible website. The government hopes that wide dissemination of these documents will encourage trustees to share best practice and reduce the amount of “boilerplate” text included in a SIP.

- **Annual benefit statements:** Trustees of *relevant schemes* would be required to inform members about the published documents mentioned above in annual benefit statements.

The last two disclosure requirements are designed to tie in with the recently introduced DC costs and charges disclosure requirements (see **WHiP Issue 70**). The government's statutory guidance on reporting such information (see **WHiP Issue 70**) will be updated to cover the new duties. A **revised draft** has been published.

The government intends that new requirements concerning the contents of SIPs (and the requirement to publish SIPs and members' views statements) should come into effect from 1 October 2019. The implementation report requirements would be brought into force from 1 October 2020. The consultation notes that these dates may slip to 6 April 2020 and 6 April 2021 (respectively) if the legislation is delayed.

EMIR clearing obligation

The European Securities and Markets Authority (ESMA) has issued a **communication** in connection with the expiry of the current temporary exemption for pension scheme arrangements (PSAs) from the EMIR clearing obligation.

The exemption will expire on 17 August 2018, before an expected new exemption takes effect. ESMA is suggesting that regulators should "not prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner".

The FCA confirmed in a 4 July 2018 email announcement that:

> "We support ESMA's statement. Accordingly, we will not require PSAs and their counterparties to start putting processes in place to clear derivatives for which they are currently exempt from clearing under EMIR during such timing gap. This approach is subject to any further statements that may be issued by ESMA or the FCA.
>
> We, in any event, continue to recognise that the clearing of derivatives is a prudent risk management tool."

See our briefing note "**EMIR reporting: are you ready?**" and **WHiP Issue 62** for background.

Pension scams code of practice

The Pension Scams Industry Group has updated its voluntary **code of practice**. The code is intended to help share good practice and reduce the risk of successful scams. The new version of the code includes a bigger range of template letters, stronger member discharge wording, and real life case studies.

DC schemes' chair's statement

The Pensions Regulator has issued an updated **quick guide** to the annual DC scheme chair's statement, with a new **technical appendix**.

Ongoing final salary link

In *G4S plc v G4S Trustees Ltd* (currently unreported), the High Court held that a multi-employer DB scheme that was closed to future accrual, but with deferred members benefiting from an ongoing final salary link while they remained in service, did not have members in pensionable service for the purposes of the employer debt legislation. Rather, the scheme was a "frozen scheme", meaning that there would be no "employment-cessation

event" triggering a statutory debt just because an employer ceases to employ any members who still have a salary link.

PPF compensation and fixed pension transfer credits

The government **is consulting** until 24 July 2018 on amending regulations designed to reverse the effect of the High Court's decision in *Beaton v Board of the Pension Protection Fund*.

In that decision (which is being appealed), the High Court held that a member who transferred benefits to a DB scheme and was given a fixed pension transfer credit was entitled to have the PPF compensation cap applied separately to his two pension entitlements (see **WHiP Issue 68**). The government says that this does not reflect the policy intent.

Pimlico Plumbers case

The Supreme Court decision in ***Pimlico Plumbers v Smith***, that Mr Smith was a worker and so was entitled to workers' rights, has implications for Pimlico Plumbers and other firms with similar practices as regards their automatic enrolment duties under the Pensions Act 2008.

This is because the automatic enrolment legislation uses a very similar definition of "worker" to define who is a "jobholder" entitled to automatic enrolment or the opt-in right.

Mr Smith's contract was terminated after he asked to work a three day week after suffering a heart attack. This was a claim for unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay, unlawful deductions from wages, and disability discrimination. Pension rights are not mentioned in the judgment but it seems that Mr Smith will have been a "jobholder" for automatic enrolment purposes.

Box Clever - Upper Tribunal decision

In ***ITV plc and others v The Pensions Regulator***, the Upper Tribunal confirmed the Pensions Regulator's Determinations Panel's decision to issue financial support directions (FSDs) to five ITV target companies in relation to the Box Clever Group Pension Scheme. The scheme relates to the leveraged television rental joint venture between ITV (then Granada) and Thorn in 2000. Box Clever group companies went into administrative receivership in 2003.

The Regulator's case is very broadly as follows. The ITV target companies received valuable financial benefits from the June 2000 creation and structure of the joint venture. The joint venture took over the running of the two groups' television rental businesses and there were transfers to a new DB pension scheme. A highly leveraged structure was used, leaving the scheme sponsoring employers in a weak position and effectively extracting value from the television rental businesses of the two groups. The ITV group received cash proceeds of approximately £500 million, paid from total debt of £860 million. The borrowing was secured on all the assets of the joint venture and the other sponsoring employers of the scheme, but not the ITV (Granada) or Thorn group companies, thereby insulating them from any downside but allowing them to benefit from any profits. The burden of servicing this debt was a major factor in the insolvency of the joint venture (including the scheme's sponsoring employers) and the 2003 appointment of administrative receivers.

The Box Clever scheme reportedly has a £115 million deficit, with members' benefits currently restricted to PPF compensation levels.

The Tribunal unanimously held as follows:

- **Connected/associated**: The target companies were connected with or associates of the scheme employer at the two year "look-back" date of 31 December 2009. ITV had argued that the targets were by then no longer connected or associated with Box Clever, due to control having become vested in the administrative receivers. The Tribunal, however, concluded that, under the terms of the borrowing agreement, the targets remained in control of the voting rights in the joint venture employer companies until they were given notice by the administrative receivers, which had not been done.

- **Retrospectivity**: The FSD provisions of the Pensions Act 2004 can be applied to events all of which occurred before the legislation came into force on 6 April 2005.

- **Discriminatory treatment**: It was lawful for the Regulator to target ITV companies but not any Thorn companies. The Regulator had told Carmelite (Thorn's successor) in a February 2009 comfort letter that it could not issue an FSD to it. This was based on the Regulator's then view that there needed to be a connection or association after the Pensions Act 2004 came into force in April 2005 and that the connection or association had been broken in 2003 by the appointment of administrative receivers. The Regulator had changed its mind by the time Granada requested a similar letter and clearance.

  Whilst there is a general rule of law that public bodies should treat like cases alike, they can apply different treatment if it is objectively justifiable. The Tribunal decided that the need to correct a mistake was an objective reason for differing treatment and it was not in the public interest to burden the PPF with additional liabilities as a result of the Regulator's mistake.

- **Moral hazard**: It is not necessary for there to be any moral hazard, or fault found, in order for the Regulator to impose an FSD.

- **Reasonableness**: In determining whether or not it is reasonable to issue an FSD, the Tribunal has to stand in the shoes of the Determinations Panel and take the decision afresh itself. The Determination's Panel concluded that it was reasonable to impose FSDs on the targets, while stressing that no criticism should be attached to Granada's and Thorn's actions.

- **"Gaming" the PPF?**: The trustee had kept the scheme going after the administrative receivership began until after the relevant provisions of the Pensions Act 2004 came into force so that the scheme would become eligible for the PPF and the Pensions Regulator would be able to use its moral hazard powers. The Tribunal held that this was not an obstacle to the issuing of FSDs: there had been no "gaming" of the PPF and *Independent Trustee Services v Hope (2010)* (see **WHiP Issue 15**) did not establish a general principle of relevance to this case.

This is the first FSD case heard in full by the Upper Tribunal. ITV has been given permission to appeal to the Court of Appeal. There has not yet been any public legal argument about the amounts that might be required under any FSDs ultimately imposed, so even after six and a half years the conclusion of these proceedings seems a long way off.

Financial Guidance and Claims Act 2018

The **Financial Guidance and Claims Act 2018** has received Royal Assent. Its provisions include:

- **New requirements to refer members to guidance**: Regulations will require trustees to refer individuals with flexible (ie, broadly DC) benefits to "appropriate pensions guidance" (to be defined in regulations) when those individuals request a transfer or are to start receiving benefits. Before proceeding, trustees must ensure that the individual has either received such guidance or has opted out of receiving it. There are similar provisions relating to personal pensions. No timescale has been specified.

- **Cold-calling ban**: The Secretary of State is given power to make regulations prohibiting unsolicited direct marketing relating to pensions. There is no fixed timescale but if the Secretary of State has not made regulations before the end of June in any year, he/she must publish and lay before Parliament a statement explaining why not and setting a timetable for making them. In a **letter to Frank Field MP**, Chair of the Work and Pensions Select Committee, the government has said that it does not intend to extend the ban to in-person approaches.

- **Establishment of the single financial guidance body**: This new body (yet to be named) will take on the guidance work currently carried out by the Money Advice Service, Pension Wise and The Pensions Advisory Service and is expected to be operational by the end of 2018.

HMRC – genuine errors and IFAS

In its **Pension Schemes Newsletter issue 99**, HMRC has clarified the extent to which its Pensions Tax Manual guidance on correcting genuine errors (see **PTM146000**) applies where an independent financial adviser (IFA) or other agent engaged by a member makes an error and the scheme acts on it.

HMRC says that the guidance will apply, enabling the error to be corrected without adverse tax consequences, if:

- there is clear authority for the IFA or agent to act on behalf of the member;

- there was a clear instruction from the member as to what form the transaction should take;

- as a result of a clerical error the form of the transaction is not what the member intended;

- the error is spotted and reported to the scheme immediately; and

- had the error been made by the member the scheme administrator would have applied the genuine error guidance.

Anti-money laundering

New HMRC guidance

HMRC has issued new guidance for pension schemes on the requirements of the 2017 money laundering regulations. These partly supersede previously circulated draft FAQs (see our briefing note "**New pension scheme trustee record-keeping and registration requirements**"). (The new guidance is not yet available online.)

HMRC is now saying that:

- Registered pension schemes do not now have to register under the Trust Registration Service (TRS) if they are already registered with HMRC Pension Schemes Online (PSO) (or the brand new Manage and Register Pension Schemes (MRPS) service).

- Such schemes that have already registered under the TRS do not need to update information there: updating HMRC via PSO or MRPS is enough. Schemes can have their TRS registration cancelled by calling the HMRC Trust Helpline.

HMRC's record-keeping expectations are unchanged.

HMRC Newsletter 98 includes a brief summary of the changes but does not link to the guidance.

New EU directive

The EU's **Fifth Money Laundering Directive** has been published in the EU's Official Journal and came into force on 9 July 2018. This means that EU member states must have implementing legislation in place by 10 January 2020.

The implications of this in the UK will depend on what happens with Brexit. There are requirements regarding disclosure of beneficiary details and registration that go further than the Fourth Directive (which was implemented in the UK by the regulations referred to above). The relevant expanded 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 schemes will have to register. (Currently only trusts that are liable to pay certain taxes are required to register – see our briefing note referred to above.)

- 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).

Master trusts

The Pensions Regulator's **code of practice** on the authorisation and supervision of master trusts has been finalised. It takes effect 40 days from 2 July 2018 unless either House of Parliament objects.

Master trusts will have to be authorised within six months of the regime beginning, which is expected to be in October 2018 (though notification and discontinuance funding obligations already apply). The code's purpose is to set out how an application for authorisation is made and the matters the Regulator will take into account when considering applications.

Under the Pension Schemes Act 2017 (see **WHiP Issue 64**), the Regulator must be satisfied that the scheme meets five criteria:

- Key individuals must be "fit and proper" persons.

- The scheme must be financially sustainable. It must have a sound business strategy (including a written business plan) and sufficient financial resources to meet the costs of setting up and running the scheme and to comply with the requirements that apply on discontinuance.

- The scheme's financial backer (the "scheme funder") must be a separate legal entity which carries out no other functions.

- The scheme's "systems and processes" must be adequate.

- There must be a "continuity strategy", setting out how the interests of members will be protected in the event of certain specified "triggering events", and administration charge levels.

A notable change from the consultation draft is that master trusts with fewer than 2,000 members will generally have to hold at least £150,000, rather than £75,000, in financial reserves. This is to meet the costs of dealing with a triggering event, which could mean having to wind up the scheme.

The Regulator's **consultation response** has also been published.

There will shortly be a consultation on a supervision and enforcement policy and there will be checklists for the business plan and continuity strategy requirements.

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, Dan Naylor and Paul Stannard.

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