BRIEFING

TRAVERS SMITH

What's Happening in Pensions

Issue 106 – January 2024

Travers Smith Pensions Sector Group

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In this issue:

Autumn statement: Alongside the Chancellor of the Exchequer's Autumn Statement on 22 November 2023, the Government published various updates on the 'Mansion House reforms'. This included announcements of:

- proposals to encourage well-funded DB schemes to run on and invest for growth, rather than de-risk, and to help small DB schemes to consolidate, including an 'opt-in' public consolidator scheme potentially run by the PPF;
- confirmation that there will be (a) a register of trustees, to help the Pensions Regulator to regulate trustees more effectively and to communicate information and guidance to, and collect information from, trustees (to enable the targeting of trustees and schemes that require additional support) and (b) guidance to help trustees consider the full range of investment options, with the Pensions Regulator keen to improve understanding of alternative assets;
- more detail on new duties for DC trustees to offer a suite of decumulation products and services that are suitable for their members;
- a forthcoming consultation on detailed rules for the 'value for money' framework for DC workplace pensions;
- new investment vehicles aimed at pension schemes, including a 'Growth Fund';
- a 'multiple default consolidators' approach to the consolidation of small deferred DC pension pots, with a 'lifetime provider' approach perhaps to follow; and
- further pooling of LGPS (England and Wales) investments, with more investment in private equity and 'levelling-up'.

Venture Capital Investment Compact: The BVCA has launched the 'Venture Capital Investment Compact'. This agreement, signed by a number of UK venture capital and growth equity firms, is intended to support the 'Mansion House Compact' signed by pension providers, the aim of which is to increase DC pension unlisted investment to reach 5% of default fund assets by 2030.

Funding regulations and code of practice: The Pensions Regulator has indicated that the funding and investment regulations are anticipated to be introduced in the new year and in force by April 2024, effective for schemes with valuations from autumn 2024. The accompanying code of practice will be in force "for those dates".

Lifetime allowance abolition: The Government has confirmed that the Lifetime Allowance is to be abolished from 6 April 2024. The new Finance Bill includes draft legislation to do this and to manage the transition to the new regime for the taxation of lump sum benefits.

LDI inquiry – government response: The Work and Pensions Committee has published the Government's response to its recommendations as regards the use of liability-driven investment (LDI) by pension schemes, in light of the gilt markets turmoil that followed the September 2022 'mini-Budget'.

Pensions dashboards guidance: The forthcoming Government pensions dashboards guidance, which will include the staged expected connection dates, should be published in spring 2024. There is currently engagement with the industry on the proposed dates.

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Dashboards connection readiness guidance: PASA has published Pensions Dashboards Connection Readiness Guidance and a short call to action. The guidance is primarily aimed at industry providers to facilitate discussions with their clients and ensure effective planning and delivery of all key activities to support connection readiness. It can also be used by trustees "to understand better the activity involved and to initiate discussions with their providers".

TPR updated cyber security guidance: The Pensions Regulator has updated its cyber security guidance for trustees. In the new guidance, the Regulator asks to be informed of any significant cyber-related incident.

Pension protection levy 2024/25: The PPF has published its determination and accompanying documents, setting the rules for the 2024/25 pension protection levy. These confirm the consultation proposal to halve the expected levy collection to £100 million. The dates for certification and recertification of contingent assets are also confirmed.

Transfer conditions – first Ombudsman determination: The Pensions Ombudsman has issued its first determination concerning an application of the 2021 conditions for transfers regulations. It concerns a trustee applying the 'amber flag' rules in relation to a request for a transfer to a scheme under which there would arguably be overseas investments. It was held that the trustee did not act unreasonably.

Overpayments – the Pensions Ombudsman is not a 'competent court': The Court of Appeal has held that the Pensions Ombudsman is not a 'competent court' for the purposes of offsetting benefit overpayments under section 91(6) of the Pensions Act 1995. But it also held that trustees are not required to go so far as to obtain a considered county court judgment that the beneficiary owes a monetary obligation to the scheme before they can apply a disputed recoupment: an administrative formality will suffice. The Ombudsman's response explains how this will work pending legislative change.

TPR on capital backed journey plans: A Pensions Regulator blog post on "Developments in the defined benefit alternative arrangements market" discusses the Regulator's expectations in relation to capital backed journey plans and similar arrangements.

First superfund transfer: Superfund consolidator Clara-Pensions has announced its first transaction. It has agreed to take a transfer of the assets and liabilities of the Sears Retail Pension Scheme, which has 9,600 members.

FCA rules on SDR, investment labels and greenwashing: The FCA has published a policy statement containing its final rules on sustainability disclosure requirements (SDR) and investment labels, together with a consultation on proposed guidance on the anti-greenwashing rule. The rules and guidance will apply to regulated UK asset managers in respect of UK-domiciled funds.

Restatements of retained EU law: Regulations under the Retained EU Law (Revocation and Reform) Act 2023 have been made, to ensure that certain European and UK court judgments on points of EU law continue to apply after the end of 2023. These concern minimum pension protection compensation, equal survivor pensions for same sex spouses and GMP equalisation claims.

Taxation of payment for changes to pension rights: The Court of Appeal has allowed HMRC's appeal in a case concerning the tax treatment of "facilitation payments" to compensate for adverse changes to future service pension arrangements. It agreed that the payments were taxable as earnings from employment.

UK EMIR – call for evidence: The Government has issued a call for evidence on the temporary exemption for pension funds from the UK EMIR clearing obligations. It is reviewing the exemption and seeking a longer-term approach.

Corporates as company directors: The Government has given an update on its intentions as regards restrictions on corporates acting as company directors. This would include a company, for example a professional trustee firm, acting as a director of a pension scheme trustee company.

PENSIONS RADAR: You may also be interested in the latest edition of Pensions Radar, our quarterly listing of expected future changes in the UK law affecting work-based pension schemes.

SUSTAINABILITY MATERIALS: Our Sustainable finance and Investment Hub includes a section on ESG and sustainable finance issues for pension schemes and their sponsors.

Autumn Statement

Alongside the Chancellor of the Exchequer's Autumn Statement on 22 November 2023, the Government published various updates on the 'Mansion House reforms' (see WHiP Issue 104) and on the abolition of the lifetime allowance (see the separate item below).

The focus remains on the contribution of pension schemes to economic growth, including by much greater consolidation of DC scheme assets, which the Government believes will also improve member outcomes.

A web page and letters to the Pensions Regulator and the FCA summarise the Government's policy aims, including:

> *"At Autumn Statement the government has announced a comprehensive package of pension reform that will provide better outcomes for savers, drive a more consolidated pensions market and enable pension funds to invest in a diverse portfolio. These measures represent the next steps of the Chancellor's Mansion House reforms and meet the 3 golden rules:*
>
> 1. *to secure the best possible outcomes for pension savers*
> 2. *to prioritise a strong and diversified gilt market*
> 3. *to strengthen the UK's competitive position as a leading financial centre*
>
> *The package sits alongside the government's comprehensive capital market reforms, to boost the attractiveness of markets, and make the UK the best place to start, grow and list a company."*

Key points from the various papers affecting pension schemes are as follows:

Options for defined benefit schemes

A short outcome report on the call for evidence on Options for defined benefit schemes announced the Government's next steps as regards:

- easing the rules and reducing the tax charge on surplus repayments, to encourage well-funded DB schemes to run on rather than de-risk and, in doing so, invest more in productive assets that support economic growth; and
- helping small DB schemes to consolidate and thereby similarly improve the investment opportunities.

There will be public consultation this winter to consider the detail of these measures.

The specific announcements were as follows:

- The free-standing 35% tax charge on authorised surplus payments to employers will be reduced. The new figure is not stated in the call for evidence outcome paper but the Chancellor's Autumn Statement paper says that the reduction will be to 25%. Alongside this, measures will be introduced to ensure that members are safeguarded and surplus can be shared with them. Funding levels and covenant strength are cited as factors that will be included in the safeguards.
- The revised funding and investment regulations will *"will make clearer what prudent funding plans look like, make explicit that there is headroom for more productive investment, and require schemes to be clear about their long-term strategy to provide member benefits"*.
- The Government intends to establish a public sector consolidator by 2026, to focus on DB schemes that are unattractive to commercial providers. (It does not explain what exactly it means by this.) It states that the Pension Protection Fund has the skills and experience to run this new consolidator. There will be no compulsion on any schemes to consolidate. The consultation will ask questions about design of the scheme and eligibility for it. The Chancellor's speech referred to this proposal, perhaps misleadingly, as *"opening the PPF as an investment vehicle for smaller DB pension schemes"*.
- Consideration will be given to a proposal for schemes, subject to eligibility criteria, to pay a higher pension protection levy to secure 100% PPF protection for member benefits in the event of employer insolvency.

There was no update on the forthcoming legislation for DB consolidator 'superfunds'.

Trustee skills, capability and culture

An outcome report on the call for evidence on Pension trustee skills, capability and culture included the following announcements:

- The Government will support the Pensions Regulator to develop and take forward a register of trustees. This will improve the Regulator's ability to communicate with trustees and collect information, and enable the targeting of trustees and schemes that need additional support or regulation.

- The Government strongly encourages all professional trustees to seek accreditation. In the future, if required, legislation may mandate this. A sentence left in square brackets (so perhaps unconfirmed) says*: "[TPR's new General Code, once laid, will set accreditation for professional trustees as an expectation.]"*.
- In relation to alternative assets, the Regulator is working on guidance in relation to investment decisions. The Government encourages those who provide training to trustees to consider *"expanding their provision of material to ensure it thoroughly covers the full range of assets which trustees are able to invest in"*.
- The Regulator's Trustee Toolkit is currently being reviewed, to align with the latest codes of practice and guidance.
- The Government will work with the Regulator to produce information to help employers select a scheme based on value, not just cost.

The call for evidence had also asked questions about the roles of investment consultants and legal advisers. Whilst some respondents' comments in these areas are noted, there is no Government response.

Helping savers understand their pension choices

A consultation outcome on Helping savers understand their pension choices (i.e. DC decumulation) confirms the Government's intention to impose duties on trustees to offer decumulation options to DC members. The new duties will involve trustees offering a range, or "suite", of decumulation products and services that are "suitable" for their members, with 'pension freedoms' remaining as an alternative option where the scheme options do not appeal to a particular member.

The choice of options will be left to trustees, with the Government relying on them acting in line with their fiduciary duties. Schemes will also be required to develop a generic default solution: this would apply if a member accesses their DC pot but does not make an active choice about what to do with it. It is not clear how this scenario would commonly arise: the example given in the consultation outcome is taking the tax-free lump sum only and leaving the rest in cash.

Schemes of all sizes will be allowed to partner with external providers but those without the scale or expertise to offer what will be required are encouraged to consolidate. The Government recognises that there are issues to consider concerning decumulation choices for members with multiple pots across various arrangements. It also notes that clear communications and guidance will be essential and is considering introducing a 'cooling-off' period after a choice is made. It will consider with the FCA how to ensure that communications do not amount to financial promotions or advice.

The Government sees collective DC as a decumulation option that would commonly be offered and so continues to explore how to establish a collective DC decumulation model.

The Government states that a duty will be placed on Nest *"to offer a range of decumulation products to its members at the point of access"*. It believes that Nest should be able to expand on the products it offers at the decumulation stage. In considering Nest's decumulation offer, however, the Government notes that it needs to consider wider market impacts.

The new duties will be introduced "at the earliest opportunity". In the meantime, schemes are encouraged to take voluntary steps in this direction. The Pensions Regulator will produce interim guidance *"to show how the objectives of these policies can be met without legislation, and to encourage innovation"*.

Value for money

The FCA will consult ("next spring", says the Government) on detailed rules for a new value for money framework for DC workplace pensions.

This follows earlier joint papers with the Government and The Pensions Regulator on such a framework. As previously announced, the new 'VFM Framework' will cover investment performance, costs and charges, and quality of services. Schemes will be required to report metrics and comparisons with alternative schemes. Schemes not offering good value will be under pressure to consolidate.

Although the FCA does not regulate occupational pension schemes, the Pensions Regulator is encouraging trust-based schemes to engage with the FCA consultation when it appears, noting that the Pensions Regulator is working with the

FCA *"to develop their rules in anticipation of legislation for trust-based schemes"*. It is not clear what the intention is as regards the application of the same or similar rules to occupational pension schemes.

Investment vehicles

The day before the Autumn Statement, an HM Treasury press release announced a *"£320 million plan to usher innovation and deliver Mansion House Reforms"*, involving new investment vehicles to help pension schemes invest in high growth companies.

It said:

> *"£250 million will be committed to two successful bidders under the Long-term Investment for Technology and Science (LIFTS) initiative, subject to contract. This will provide over a billion pounds of investment from pension funds and other sources into UK science and technology companies.*
>
> *To complement private investment vehicles, a new Growth Fund will be established within the British Business Bank. The Growth Fund will draw on the BBB's strong track record and a permanent capital base of over £7 billion to give pension schemes access to opportunities in the UK's most promising businesses. This has been welcomed by 8 pension schemes and fund managers as a potentially valuable addition to the market."*

The other £70 million will not be of direct benefit to pension schemes:

> *"The Chancellor is to inject £20 million to foster more 'spin-out' companies, firms created using research done in universities. He is also providing at least £50m additional funding for the British Business Bank's successful 'Future Fund: Breakthrough' programme – that will provide direct investment to support these innovative companies to scale up."*

Master trust review

The Government has published a review on Evolving the regulatory approach to Master Trusts, five years after the master trust regulations came into force. The review looks at market segmentation, costs, charges, consolidation, increasing scale, competition and the relationship with the Mansion House Compact (see WHiP Issue 104) and other Government policies and proposals.

The report describes ways in which the Pensions Regulator is responding to the evolving market and areas where the master trust authorisation and supervision regime may need to be updated, with a particular focus on investment governance and working more closely with schemes as they grow.

Small pots solutions

A consultation outcome on Ending the proliferation of deferred small pots is accompanied (in part 2 of the same document) by a call for evidence on "Greater member security and rebalancing risk". Part 1 reaffirms the Government's decision to go ahead with the 'multiple default consolidator' approach to dealing with deferred small DC pots; Part 2 asks for views on later introducing a 'lifetime provider' model.

<u>Multiple default consolidators</u>

The multiple default consolidator model involves providers applying (voluntarily) for authorisation as a default consolidator. A member with a deferred small pot would be transferred, unless they opt out, to a scheme that has been authorised as a default consolidator. If the member is already a member of one of those, that would be the scheme to which the transfer is made. Otherwise, a 'carousel' approach would apply. If the member has pots with more than one of the default consolidators, the transfer would be to the one that holds the member's largest pot.

A central clearing house, unconnected with the pensions dashboards ecosystem, will be set up to enable this information to be checked confidentially.

As previously proposed, a pot will be considered small if it is worth less than £1,000 and deferred if no contributions have been paid for 12 months. The £1,000 figure will be regularly reviewed. A pot will only be eligible for automatic consolidation if it was created since the introduction of automatic enrolment.

In order to be authorised, a consolidator would have to (among other things): be an automatic enrolment qualifying scheme; operate consolidation of pots for the same member within their scheme; demonstrate good value for money; offer decumulation services (including a default); and have sufficient scale.

A new industry delivery group is being established to help with implementation: terms of reference are included in the consultation outcome paper. The group will be examining certain elements of the framework. It is expected to provide proposals to Ministers by late 2024 for consideration and decisions. There will be legislation when Parliamentary time allows.

Lifetime provider

The lifetime provider (or 'pot for life') model on which the Government is seeking input would be designed to halt the creation of multiple new pots in the first place. Employers would pay contributions to a scheme of which the worker is already a member but an exemption would apply if the employer provides a better pension offering, for example a DB scheme, a scheme under which the member has a protected pension age, or DC contributions significantly higher than required by law.

The same clearing house as referred to above could be used by employers to find out where they will need to pay contributions.

The final part of the paper discusses growing the collective DC market to reduce the need for individuals to engage and make complex financial decisions. There is even the suggestion of ultimately requiring schemes to offer collective DC as a decumulation option. The Government suggests that it likes the idea of 'lifetime provider' combined with collective DC.

The Government expects the first collective DC scheme (presumably meaning Royal Mail's) to go live in early 2024. Regulations to allow schemes for unconnected employers are expected later in 2024.

The call for evidence closes on 24 January 2024.

LGPS (England and Wales) investment

The Government has confirmed its proposals for Next steps on investments, including private equity investment allocation and pooling of Local Government Pension Scheme (England and Wales) assets.

LGPS guidance will be revised to increase private equity allocation "ambitions" to 10%. In the Autumn Statement, this is estimated to unlock £30 billion by 2030.

The Government will also amend regulations to require LGPS funds to set a plan to invest up to 5% of assets in levelling-up the UK, and to report annually on progress against the plan.

In addition, the deadline for consolidation of LGPS assets has been accelerated to 31 March 2025. The Government believes the existing pooling exercise, resulting in eight LGPS asset pools which have been operational for a number of years, has delivered substantial benefits and cost savings. But it wants to go further in two key respects which are accelerated consolidation of assets, and even fewer pools. Across LGPS as of March 2022, 39% of assets have been transferred to the pools, with the percentage varying by pool from under 30% (LGPS Central) to over 80% (LPP). The Government wants to encourage transition and noted in its consultation that this has mostly been done through guidance thus far, but that given the inconsistency of progress across schemes and the benefits of pooling, a fixed timetable is appropriate. It was suggested in the consultation that the timeframe would apply to liquid assets, but that transition of all assets should also be considered in this timeframe.

Once the consolidation of assets is complete, the Government had predicted that five of the eight pools would be around £50 billion or higher, and the remaining three pools would be in the £25 billion to £40 billion range. In the Autumn Statement, it was affirmed that the Government wants to set a direction towards fewer pools, each exceeding £50 billion of assets under management, in order to access even greater benefits of scale.

State pensions

The Chancellor confirmed that the 'triple lock' will apply to 2024 state pension increases. This means an 8.5% increase from April 2024, this being the relevant rate of earnings inflation which is higher than the September CPI annual increase and 2.5%.

The full new state pension will therefore increase from £203.85 to £221.20 per week. The full old basic state pension will increase from £156.20 to £169.50 per week.

Earlier in the year, the Government had been considering excluding bonuses from the average earnings calculation, which would have meant an increase of 7.8% rather than 8.5%, which the Government suggested would have saved the Treasury an estimated £900 million over the 2024/2025 financial year.

Implications for salary sacrifice arrangements

The Autumn Statement also included some announcements which have implications for pensions (and other) salary sacrifice arrangements:

- The **National Living Wage**, currently applicable to those age 23 and over, is being raised from £10.42 per hour to £11.44 from 1 April 2024 (a 9.8% increase) and is being extended to 21 and 22 year olds. **National Minimum Wage** rates, which are lower rates applicable to younger workers, are also increasing. As well as increasing the cost of automatic enrolment minimum pension contributions to employers, employers will need to ensure that any salary sacrifice arrangements do not reduce wages to below the new relevant level for any worker, since it can be illegal to pay a worker less than the National Living Wage or National Minimum Wage (as applicable).
- **Employee Class 1 National Insurance contribution rates** will be reduced from 12% to 10% from 6 January 2024. This means that salary sacrifice arrangements will give a slightly smaller benefit to employees (but the same benefit to employers, whose NICs are not being reduced).

Venture Capital Investment Compact

The BVCA has launched the 'Venture Capital Investment Compact'. This agreement, signed by 20 UK venture capital and growth equity firms and with Government support, is intended to support the 'Mansion House Compact' signed by pension providers, the aim of which is to increase DC pension unlisted investment to reach 5% of default fund assets by 2030 (see WHiP Issue 104). The Chair of the BVCA's Venture Capital Committee is quoted as saying that, according to the City of London Corporation, only 0.5% of UK DC pension assets are currently invested in unlisted UK equities.

The BVCA says that the 20 initial signatories invest in more than 1800 companies and have over £25 billion of assets under management. Other firms are welcome to join. The signatories will work with pension providers over the next 12 months to progress the delivery of the proposals.

The Compact includes the following specific commitments:

> *"Specifically, alongside the supporting actions of Government and acting in the best interest of our investors, signatories commit to:*
>
> - *Attracting UK pension funds as limited partners into the funds they manage or advise.*
> - *Partner with pension investors to consider how they can produce effective investment structures to suit their needs to allow allocations to funds in the interest of savers.*
> - *Share best practice/rules of engagement for working in private markets with DC schemes, particularly trustees and their consultants/advisers.*
>
> *Signatories encourage peers to commit to this Compact, thus demonstrating that the industry is committed to partner with pension schemes to accommodate their needs when allocating to this asset class.*
>
> *Separately, the British Private Equity and Venture Capital Association ('the BVCA') agrees to undertake the following actions to ensure that significant progress is made within 12 months of the signing of this Compact:*
>
> - *To work with the wider industry to establish a Pensions & Private Capital Expert Panel to develop effective investment structures and share market best practice and produce guides/reports.*
> - *To develop events to connect pensions investors with private capital fund managers and highlight potential investment opportunities.*
> - *To work with the pensions industry to create training programmes and best practice documents to develop greater understanding of the private capital industry.*
> - *To report against progress from BVCA members in attracting UK pensions capital into their funds."*

Funding regulations and code of practice

Louise Davey of the Pensions Regulator said at a hearing of Parliament's Work and Pensions Committee that the funding and investment regulations are anticipated to be introduced in the new year and in force by April 2024, effective for schemes with valuations from autumn 2024. She added that the code of practice will be in force "for those dates".

In a speech to the private Mansion House Pensions Summit on 25 October 2023, Pensions Regulator Chief Executive Nausicaa Delfas mentioned that the code of practice will *"clarify that there are no limitations on what constitutes suitable assets in which to invest, and all schemes can invest in growth assets, with much greater flexibility for open schemes and those further away from their end game"*. In due course, the Regulator will be updating its existing DB and DC investment guidance.

Lifetime allowance abolition

The Government has confirmed that the Lifetime Allowance is to be abolished from 6 April 2024. A tax information and impact note (TIIN) provides new and amended detail.

The Finance (No.2) Act 2023 removed the Lifetime Allowance Charge from 6 April 2023 (see WHiP Issues 101 and 104). The new Finance Bill, which includes more than 100 pages of text on this, will remove the lifetime allowance itself and all references to it with effect from 6 April 2024.

We are reviewing the draft legislation but some notable announced changes to the original proposals (see WHiP Issue 104) are as follows:

- *"Following consultation, the government can confirm that the tax-free element of a TCLS, WULS and small lump sums will not be deducted from the new thresholds. However, an individual must have available thresholds to be able to take those lump sums."*

  (Under the original proposals, payment of a partly tax-free trivial commutation lump sum or winding up lump sum would have eaten into the allowances.)

- *"The LTAELS will be removed in the absence of the LTA. Following consultation on a revised approach to the PCLS, the government will instead include provision to take a Pension Commencement Excess Lump Sum (PCELS). Payment of a PCELS will be taxed at an individual's marginal rate."*

  (It was not initially clear how this would have a different impact from the original proposals, under which it appeared that members would suddenly, under many schemes' rules, become entitled to full (or very much higher) commutation, albeit with the excess over the PCLS being taxable at their marginal income tax rate. The Finance Bill does, however, make it clear that there will not be new 'pension freedoms' under DB schemes.)

- There were previously going to be new income tax charges for those who inherit a drawdown pot when a member dies under age 75 and who withdraw funds in regular or irregular instalments (i.e. following current benefit crystallisation event 5C or 5D). Currently, such beneficiaries can leave the money invested in a drawdown account and withdraw money free of income tax as they wish.

  This change will no longer be introduced, so that will now remain the position.

- *"To account for benefits taken before 6 April 2024 a transitional calculation is provided so that individuals can calculate their available lump sum allowance and lump sum and death benefit allowance.*

  Where an individual has previously used 100% of their LTA, they will have exhausted their allowances and the transitional calculation will not apply.

  A new method is provided to calculate an individual's remaining available allowances where they had an actual, but not a prospective, right to an existing pension on 5 April 2006.

  Members with complete and accurate records of the previous tax-free amounts they have received will have opportunity to provide these records to their scheme for an alternative transitional calculation."

  (This appears to be designed to tackle issues with schemes not knowing how much a member has already taken in tax-free cash, since there was previously no need for schemes to keep a record of that. Schemes will effectively estimate allowances but members can rebut the estimate with evidence.)

To facilitate the transition to the new allowances, HM Treasury will be given temporary powers to make additional changes to primary legislation via statutory instrument.

A new HMRC 'Lifetime allowance guidance newsletter' explains and, in at least one aspect, corrects some of the content of the Finance Bill.

- The correction is to say that scheme administrators will not have to make a report to HMRC about every lump sum benefit they pay: it seems that they will only need to report when a lump sum benefit exceeds the new allowances (the lump sum allowance or lump sum and death benefit allowance) or would have exceeded the allowance had the member not been relying on a protection or enhancement factor. The Finance Bill will be amended accordingly.
- The newsletter also confirms that, following the payment of a lump sum death benefit, to expedite the assessment of the beneficiary's income tax liability, HMRC will expect a deceased member's legal personal representative to provide additional information to HMRC in respect of the lump sum death benefit charge. This continues the current position and the corresponding position before 6 April 2023 (although HMRC state that the process will be updated from 6 April 2025, with new guidance and a form for completion by personal representatives). It had previously appeared that responsibility for reporting would pass to trustees.

LDI inquiry – government response

The Work and Pensions Committee has published the Government's response to its recommendations as regards the use of liability-driven investment (LDI) by pension schemes, in light of the gilt markets turmoil that followed the September 2022 'mini-Budget'. (See WHiP Issue 103 for details of the Committee's report and recommendations.)

Points of interest from the Government's response are as follows:

- The Government continues to work with the Pensions Regulator to understand the impact on pension schemes of the 'LDI episode'. The Regulator is conducting further analysis on scheme assets, liabilities and funding changes over 2022, to consider fully the causes. Going forward, more data will be available than is available from 2022. The response said that the Regulator was working to produce this report by the end of 2023.
- The annual scheme return form will include new questions, to help improve the Regulator's oversight of asset liquidity outside LDI mandates, so that the Regulator can monitor the adequacy of buffers. The Regulator will also be surveying investment consultants and schemes to check that governance and operational procedures are being operated in line with its guidance. There is evidence that processes have been significantly improved but poor practices will be followed up.
- The Government is still considering whether or not to bring investment consultants within the FCA's regulatory perimeter. It will take the Committee's (and others') views into account.
- The Pensions Regulator *"is committed to becoming data-led and digitally enabled"*. It will set out its vision in a data and digital strategy by the end of the financial year. Key objectives for this strategy will include ensuring that it has timely and relevant data, and the automation of processes to drive greater efficiency and consistency.
- The Government will consider whether changes to disclosure of information requirements are appropriate in light of the findings in the Regulator's report.
- The Government accepts the Financial Policy Committee's recommendation that the Pensions Regulator should incorporate financial stability considerations in its decision making and balance them with its objectives as a pensions regulator. The Regulator is looking to set up protocols with the Bank of England to ensure it is working cohesively with the wider financial regulatory system. The Regulator's work noted above includes expanding its work to consider not only risks to savers and their strategy, but also the risk that the operation of the pension system destabilises the financial system: *"TPR is currently researching non-LDI trends within pensions (and especially within the gilt and insurance markets) that might lead to concentration risk and have wider financial stability risk implications. TPR are in conjunction with DWP also exploring what additional skills and capabilities they may require to embed the consideration of financial stability in their work."*.
- The new funding regulations (see above) will address the potential impact on financial stability and on open DB schemes. A full impact assessment will consider the interaction of the regulations with the wider macroeconomic environment and the Government will publish a report at least every five years.

Pensions dashboards guidance

At a joint industry forum on pensions dashboards, attendees were informed that the forthcoming Government guidance, which will include the staged expected connection dates, should be published in spring 2024. There is currently engagement with the industry on the proposed dates.

Dashboards connection readiness guidance

PASA has published Pensions Dashboards Connection Readiness Guidance and a short call to action.

The guidance is primarily aimed at industry providers to facilitate discussions with their clients and ensure effective planning and delivery of all key activities to support connection readiness. It can also be used by trustees to understand better the activity involved and to initiate discussions with their providers.

Focusing on five key pillars (governance, matching, pensions values, technology, administration), it sets out briefly for each what will be required in order to be ready, and why, and includes links to other guidance and cross-references to items on the Pensions Regulator's checklist. It also includes an example 18 month timeline for a single scheme.

The call to action stresses the need to plan now, bearing in mind that there is finite industry capacity to perform the work that is required. It notes five high level action points for schemes and administrators.

TPR updated cyber security guidance

The Pensions Regulator has updated its cyber security guidance for trustees. The new version is designed to help trustees to meet the Regulator's expectations in the general code of practice (which is not yet in force – indeed the final version has not been published).

In the new guidance, the Regulator asks to be informed of any significant cyber-related incident. This is in addition to reporting requirements under the data protection legislation and requirements for trustees and others to report breaches of the law. Even where there is no legal requirement to report a breach to the Regulator, reporting helps it to understand the cyber risks facing the industry and scheme members.

Otherwise, the new guidance addresses the same matters as before but with added attention paid to the risks of incidents affecting third parties engaged by trustees and greater expectations of trustees in that regard.

Pension protection levy 2024/25

The Pension Protection Fund has published its determination and accompanying documents, setting the rules for the 2024/25 pension protection levy. As usual, a policy statement outlines the key decisions and changes from last year.

The PPF has confirmed its consultation proposal to halve the expected levy collection next year (see WHiP Issue 105). Due to a very favourable funding position, it considers that it does not currently need any further funding from levy payers. Current legislation, however, requires the PPF to charge a levy and each year's levy estimate cannot be more than 25% higher than the previous year. Reducing the total levy estimate to close to zero would, as the law stands, effectively rule out any significant future levy collection. The PPF has been discussing this with the Government and it seems that the legislation will be amended to enable the PPF to charge a very small, or even zero, levy - but only "when Parliamentary time allows".

The PPF is therefore looking to collect an estimated total levy for 2024/25 of £100 million, which is half the £200 million estimate for 2023/24 (which itself was almost half the £390 million estimate for 2022/23), though the actual 2023/24 collection is expected to be around £170 million. Invoicing is in the autumn.

Some minor methodology changes are being made in order to achieve this. The PPF estimates that 99% of schemes will see a levy reduction, with the other 1% comprising schemes with a significantly worsened insolvency score.

Contingent asset certification and recertification needs to be done by midnight on 31 March 2024 (which is Easter Day), with any accompanying documentation to be submitted by 5pm on 2 April 2024.

The PPF intends to maintain a £100 million estimated levy collection for 2025/26 and beyond, unless the law is changed or there is a significant change in the risks the PPF faces, which would necessitate consideration as to how the £100 million total levy is split between schemes. That will require more significant methodology changes because of the expected reduction in the number of levy-paying schemes. The policy statement discusses comments received on possible changes but decisions will be made at a later date.

Transfer conditions – first Ombudsman determination

The Pensions Ombudsman has issued its first determination concerning an application of the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 which came into force on 30 November 2021 (see WHiP Issue 93). It concerns a trustee applying the 'amber flag' rules in relation to a request for a transfer to a scheme under which there would arguably be overseas investments. The trustees' decision was upheld.

A member of the Western Power Distribution Pension Fund complained that he lost out financially when a transfer out was delayed, after the trustee applied the 'amber flag' rules and told him that he was required to take safeguarding guidance from MoneyHelper (which, after his financial adviser initially disputed the requirement, he did). The member intended to invest in global funds under a personal pension plan offered by a subsidiary of M&G Investment Management, which on advice the trustee decided included "overseas investments".

The Ombudsman considered industry practices, the Pensions Regulator guidance (see WHiP Issue 93), the joint Government/Pensions Regulator statement (see WHiP Issue 96) and the Pension Scams Industry Group interim guide (see WHiP Issue 101) and concluded that the trustee did not act unreasonably in applying the amber flag rules.

The Ombudsman noted that the decision whether or not there are overseas investments is one for the trustees to make and that *"it appears that the wording of Transfer Regulations and intended practical application may not be aligned"*. In light of the information provided to the trustee by the member and the advice it received, it was entitled to decide that there were overseas investments in the receiving scheme and its literal interpretation of the regulations was not unreasonable. Accordingly, the trustee's actions did not equate to maladministration.

This decision will be of comfort to trustees. It will be interesting to see if the Ombudsman takes a similar approach where trustees decide in similar circumstances that they do not need to make the reference to MoneyHelper.

Overpayments – the Pensions Ombudsman is not a 'competent court'

Court of Appeal decision

In *The Pensions Ombudsman v CMG Pension Trustees Limited*, the Court of Appeal has held that the Pensions Ombudsman is not a 'competent court' for the purposes of offsetting benefit overpayments under section 91(6) of the Pensions Act 1995. But it also held that trustees are not required to go so far as to obtain a considered county court judgment that the beneficiary owes a monetary obligation to the scheme before they can apply a disputed recoupment: a court formality will suffice.

Section 91(6) is in play when trustees are seeking to recoup overpaid benefits by offsetting them against future instalments of pension. Where the beneficiary disputes that course of action, or the amount, a right to offset *"must not be exercised unless the obligation in question has become enforceable under an order of a competent court …"*.

The High Court had held that the Pensions Ombudsman was not a 'competent court' for these purposes (see WHiP Issue 97), agreeing with a very short passage in the earlier High Court judgment in *Burgess v BIC UK Limited* (see WHiP Issue 70). The Pensions Ombudsman intervened to appeal.

The Court of Appeal (Asplin LJ giving the reasoned judgment) upheld the High Court's decision. She noted that, unlike a court, the Ombudsman can consider questions of maladministration. Further, the Ombudsman cannot generally consider claims by scheme trustees against scheme beneficiaries and so its jurisdiction – again unlike that of a court - was one-sided. And the Ombudsman has no power to declare an obligation to the scheme enforceable. Other aspects of the

Pension Schemes Act 1993 legislation on the Ombudsman's jurisdiction also suggested that the Parliamentary draughtsperson had not considered the Ombudsman to be a court.

Asplin LJ added, however, that the trustees are not required to seek a judicial decision from the County Court that the beneficiary owes a particular monetary obligation to the scheme before they can offset. The Ombudsman's decision rejecting the beneficiary's complaint, so effectively saying that trustees can recoup on the basis that money is owed to the scheme by the beneficiary, can be produced by the trustees to the County Court. A court officer, as a matter of administrative procedure, can then render the obligation enforceable *"as if the determination or direction had emanated from the County Court itself"*. This is an administrative formality and no commencement of action or judicial consideration of the merits of the case is required. (We note, however, that the relevant procedure was not designed for applications such as this and some adaptation will be required: we can help if the need arises.)

Pensions Ombudsman response

The Pensions Ombudsman has issued a statement and replacement factsheet in relation to the case. He expresses disappointment with the requirement for trustees to apply to a County Court to have the Ombudsman's determination endorsed for enforcement.

There is no mention of any appeal. Rather, the Ombudsman says that *"DWP is supporting legislative changes to formally empower TPO to bring an outstanding overpayment dispute to an end without the need for a County Court order"*.

In the meantime, to facilitate applications to the County Court, determinations in cases of this kind will in future set out a schedule of the amount and rate of recoupment. This approach is demonstrated in a new determination.

The factsheet (which will accompany overpayment determinations) adds:

> *"When issuing the Determination, the Ombudsman will also provide a certified copy of the Determination for the County Court. Civil Procedure Rule 70.5 and Practice Direction 70A set out in detail the procedure that must followed. The court form (currently N322A) needs to be completed, with attached fee, referencing s151 Pension Schemes Act 1993 (the provision under which enforcement is being sought). The County Court will deal with the matter on the papers."*

TPR on capital backed journey plans

Mike Birch, Director of Supervision at the Pensions Regulator, has written a blog post on "Developments in the defined benefit alternative arrangements market", which refers to capital backed journey plans (CBJPs) and similar arrangements.

He summarises such arrangements as follows: *"In general, they involve a third party providing additional capital to support the risks in the scheme with the scheme's assets being invested in a higher expected return portfolio. This is done on terms agreed between the trustees and the third-party funder."*.

He says that the Regulator is currently seeing CBJPs considered when an employer is financially distressed. They assess proposals in light of the superfund guidance but can "turn on or off" aspects to suit the circumstances. No assessments have been completed so far. Where a proposal has been assessed as meeting the relevant expectations from the guidance, the Regulator would expect to publicise such an assessment.

The Regulator plans to publish new guidance in the new year to help trustees (and employers) who are considering such arrangements. In the meantime, Mr Birch identifies some issues that they expect trustees to consider:

- *"Proactively engage as early as possible with the employer and TPR, and PPF if applicable. Depending on the complexity of the arrangements our assessment will take two to six months.*
- *Any additional investment risk taken needs to be balanced against the level of capital put in place and the trustee should have ultimate say over the appropriate level of risk taken.*
- *Trustee boards need to have sufficient collective knowledge and skill to navigate the pros and cons facing the scheme as a result of the arrangement and not be conflicted in the proposed arrangements. They should consult their advisers where appropriate."*

The Regulator states it *"can see a useful role for CBJPs in this market where they have saver protection as their focus"*.

First superfund transfer

Superfund consolidator Clara-Pensions has announced its first transaction. It has agreed to take a transfer of the assets and liabilities of the Sears Retail Pension Scheme, which has 9,600 members. The Pensions Regulator gave clearance to the transaction. Isio will remain in the role of administrator.

Clara's backers have provided an additional £30 million in ring-fenced capital to support the scheme. Clara operates a 'bridge to buyout' model: the intention is for these liabilities to be bought out with an insurer in five to ten years' time. Only then can such capital funds be returned to investors.

Until specific legislation is in place, transactions such as this are agreed in the context of an interim supervisory regime operated by the Pensions Regulator, which was recently revised (see WHiP Issue 104).

FCA rules on SDR, investment labels and greenwashing

The FCA has published a policy statement containing its final rules on sustainability disclosure requirements (SDR) and investment labels, together with a consultation on proposed guidance on the anti-greenwashing rule (which closes on 26 January 2024). At the outset, the rules and guidance will, subject to specific scoping provisions, apply to regulated UK asset managers in respect of UK-domiciled funds.

The FCA intends that this will result in improved transparency, leading to better informed decision making by investors. Whilst the proposals are largely designed for the protection of retail customers, products for institutional investors including pension schemes are also partly affected.

The new rules include a regime for standardised sustainability labelling of financial products, with four labels to be permitted (sustainability impact, sustainability focus, sustainability improvers and sustainability mixed goals) and detailed disclosure requirements in respect of products and entities. There will also be an anti-greenwashing rule applicable to all FCA-authorised firms and (for retail products only) rules on the naming and marketing of investment products.

The anti-greenwashing rule will apply from 31 May 2024. The investment labels (assuming the product satisfies various conditions) can be used from 31 July 2024. The naming and marketing rules will be in force from 2 December 2024.

For the time being, pension products are not in scope. The FCA says, however: *"In the medium term, we will consider extending the regime to pension products, as we recognise that the potential harms we are seeking to address with this regime may also arise with these products."*.

Our Financial Services and Markets team has published a briefing on these developments.

Restatements of retained EU law

Regulations under the Retained EU Law (Revocation and Reform) Act 2023 (see WHiP Issue 103) have been made.

Regulations restating *Hampshire* and *Hughes*

The Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023 are intended to restate the decisions in the *Hampshire* and *Hughes* cases, regarding EU law minimum requirements for employer insolvency pension protection, so that this 'retained EU law' will continue to apply indefinitely in UK law. This means that:

- the PPF compensation cap is removed; and
- there will continue to be a minimum compensation requirement of 50% of the value of the benefits in respect of each member under the original scheme (though this will be an issue less often following removal of the cap). PPF guidance spells out more detail on how the 50% minimum guarantee will work.

This all applies only to schemes with a PPF assessment date falling on or after 1 January 2024. Until then, the 'retained EU law' continues to apply, so the intention is that the *status quo* is preserved.

As noted in WHiP Issues 72 and 90 (respectively):

- In *Hampshire*, the European Court ruled that the insolvency protection required under EU law is an individual minimum guarantee that the affected employee or former employee will receive at least 50% of their accrued pension entitlement.
- In *Hughes*, the UK Court of Appeal held that: (1) this can be assessed on an actuarial value basis, with ongoing checks not required; and (2) applying the PPF compensation cap (to those who had reached normal pension age) unlawfully discriminates on grounds of age and the legislative provisions are disapplied.

'Bauer' rights are conspicuously not restated by the regulations. In *Bauer*, the European Court ruled that circumstances in which less than 100% protection is inadequate also include where, as a result of the reduction of benefits, the individual is living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the relevant country (see WHiP Issue 80). It seems that this aspect of protection will fall away in respect of insolvency events after the end of 2023.

Regulations restating *Walker* and *Allonby*

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 are intended to restate the decisions in the *Walker v Innospec Limited* case and (in relation to GMP equalisation) the *Allonby* case. This means that:

- the 5 December 2005 accrual cut-off in the Equality Act 2010 for equal survivor pensions for same sex spouses and civil partners is removed; and
- any requirement under the Equality Act 2010 for anyone claiming GMP equalisation to identify an actual comparator of the opposite sex is removed.

This takes effect immediately before the end of 2023, though until then the 'retained EU law' that the regulations are intended to restate continues to apply.

Background:

- In *Walker v Innospec Limited*, the UK Supreme Court declared that paragraph 18 of schedule 9 of the Equality Act 2010, which purports to allow schemes to restrict equality in spouses' pensions for same sex spouses and civil partners to post-5 December 2005 service, is contrary to EU law and must be disregarded (see WHiP Issue 65).
- In *Allonby v Accrington & Rossendale College*, a case about equal pensions access for non-contracted workers (who were predominantly women) to a public sector statutory scheme, the European Court ruled that *"Where state legislation is at issue, the applicability [of the requirement that men and women are treated equally] vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex…"*. The Government takes this to apply to all GMP equalisation claims too, since inequalities caused by GMPs are the result of statutory provisions, but this has never been decided by the courts. This is a particular issue for single sex schemes.

The restatement of *Walker* is uncontroversial, ensuring that the *status quo* is preserved and same sex spouses and civil partners may not be discriminated against, and therefore requires no further comment.

The *Allonby* restatement is not necessarily effective: it relies on the Government's interpretation of the retained EU law being correct. That may be the case but it is not certain. As noted above, the Government has interpreted the European Court's decision in *Allonby* to say that a GMP equalisation claimant does not need to identify an actual comparator – i.e. under overriding EU law, a notional or statistical one will suffice – and that the Equality Act is overridden by that EU law. That was on the grounds that it is a discrimination claim arising from statutory provisions, which *Allonby* was too. But *Allonby* was about equal access to a statutory scheme (the Teachers' Pension Scheme), so the Government is extrapolating the decision in applying it to GMP equalisation.

We have had a consultation and draft regulations on this before, in 2012 (see WHiP Issue 32). Then, the plan was to use regulations under the European Communities Act 1972 to amend the Equality Act 2010 to remove the need under the domestic legislation for an actual comparator. But those regulations were never made. The new regulations resurrect the same drafting but use the restatement powers in the 2023 Act to make them (with the European Communities Act 1972 now having been repealed).

In 2012, respondents to the consultation pointed out that the 1972 Act could only validly be used if the Government's extrapolation of *Allonby* was correct, which had not been decided by the courts and was not clear. Respondents also said that the drafting, which is the same in the new draft regulations, could be enhancing equalisation rights above the level required by EU law (and now retained EU law) because it applies on a term-by-term basis: this also called into question the validity of using regulations under the 1972 Act.

The same comments can be made about the use of the restatement powers in the 2023 Act: a restatement can only be made if it is actually restating retained EU law and not going further. This purported restatement of *Allonby* is therefore of debateable validity. The same uncertainty therefore continues, notwithstanding these regulations, about the need or otherwise for an actual comparator for a GMP equalisation claim.

Taxation of payment for changes to pension rights

The Court of Appeal has allowed HMRC's appeal in a case concerning the tax treatment of "facilitation payments" to compensate for adverse changes to future service pension arrangements. The Court of Appeal agreed with the First Tier Tribunal (FTT) that the payments were taxable as earnings from employment.

E.ON wanted to reduce its DB pension costs. It introduced a package of measures which included pension scheme changes. The pension rights stayed the same, but the employee's contributions were increased and an option to top up benefits was removed. Each member received the facilitation payment calculated as a percentage of salary, as a result of these changes. The FTT had concluded that the facilitation payment was "from employment" because it was an inducement to provide future services on different terms, and that it could not be separated from the integrated package which changed the future relationship between E.ON and its employees.

E.ON appealed on the basis that:

- the FTT ought to have applied the 'replacement principle', that a payment made to satisfy a contingent right to a payment derived its character from the nature of the payment which it replaced, to conclude that the facilitation payment replaced tax exempt pension contributions;
- another case, *Tilley v Wales,* created a binding principle that payment for removal of pension expectation was not "from" employment; and
- the FTT had erred in its analysis of whether the facilitation payment was "from" employment, as it had considered the payment as part of the integrated package and not considered it to hold its own fiscal character.

The Upper Tribunal (Tax) had agreed with E.ON.

The Court of Appeal, however, allowed HMRC's appeal, holding that the FTT was correct to say that it was not bound by *Tilley* (as regards future pension rights). The Court also held that it was not obliged to apply the replacement principle and that there were limits to it. The FTT had been entitled to conclude that the payments formed part of an integrated package and this was relevant because the other elements of the package served to emphasise the forward-looking nature of what was agreed. The package related to the rewards and benefits of future employment with E.ON. It was an inducement to work willingly for the future and therefore taxable as earnings from employment. This also meant that the payments are subject to National Insurance Contributions.

UK EMIR – call for evidence

The Government has issued a call for evidence on the exemption for pension funds from the UK EMIR clearing obligations.

Until now, certain pension schemes have benefited from an exemption from the obligation to clear certain classes of OTC derivatives contracts under each of EMIR and UK EMIR. The Government notes that the exemption was intended as a temporary one, until a solution was found which would enable pension funds to provide cash collateral *"without having an adverse effect on the retirement benefits of pensioners"*. The Government notes that, in order to raise cash to post as collateral, pension funds may have to sell assets such as gilts which *"could have a negative impact on the stability of financial markets, particularly in a stressed market where funds need to raise cash quickly to meet increased margin calls"*.

The European Commission's EMIR exemption for EEA schemes expired on 18 June 2023. The exemption under UK EMIR has been extended to 18 June 2025.

The Government is reviewing the exemption and seeking a longer-term approach. The call for evidence closes on 5 January 2024.

Corporates as company directors

A policy paper accompanying the Economic Crime and Corporate Transparency Act 2023 includes an update of the Government's intentions as regards restrictions on corporates acting as company directors. This would include a company, for example a professional trustee firm, acting as a director of a pension scheme trustee company.

The relevant section says:

> *"**What restrictions will be imposed on the use of corporate directors?***
>
> *The government already has powers to restrict the use of corporate directors and these will be brought into force in parallel with this Bill along with regulations which will set out the more limited basis upon which companies will be permitted to retain or appoint corporate directors in the future.*
>
> *BEIS consulted in December 2020 on "principle based" exception proposals which will form the basis of the regulations.*
>
> *It will be made explicit that only corporate entities with "legal personality" will be properly appointable as corporate directors. All directors of the latter will have to be natural persons and those natural person directors must, prior to the corporate director appointment, have been subject to an appropriate identity verification process.*
>
> *Companies with corporate directors will be given 12 months to comply; within such time they must either ensure their corporate director is compliant with the conditions or resign them.*
>
> *New companies or companies appointing a corporate director must ensure they satisfy the conditions from the date this measure comes into force."*

See WHiP Issue 86 for background.

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