Sackers

Quarterly briefing

December 2023

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Q4
December 2023

On the front cover this quarter:
Kirsty Pake (partner) and
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Abbreviations

AE: Automatic enrolment

CDC: Collective DC

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ESG: Environmental, social and corporate governance

EU: European Union

FCA: Financial Conduct Authority

FSCS: Financial Services Compensation Scheme

GMP: Guaranteed minimum pension

HMRC: HM Revenue & Customs

HMT: HM Treasury

ICO: Information Commisioner's Office

IGC: Independent Governance Committee

LTA: Lifetime allowance

MaPS: Money and Pension Service

PLSA: Pensions and Lifetime Savings Association

PMI: Pensions Management Institute

PPF: Pension Protection Fund

SIP: Statement of investment principles

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

VFM: Value for money

In this issue

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Current legal agenda

Topic	Summary	Timing
DB scheme funding[1]	TPR's consultation on draft code closed in March 2023 DWP consultation on draft regulations on new funding and investment strategy closed in October 2022	New regime currently expected to come into force in April 2024
Mansion House reforms[2]	The Chancellor announced a raft of consultations in July – see page 4 for the latest news	Consultations and calls for evidence closed in September 2023
Removal of LTA[3]	The LTA is expected to be abolished from 6 April 2024 Consultation on the draft legislation closed 12 September 2023	Awaiting final legislation and transitional provisions
General code[4]	Draft code consulted on in 2021	Final code was expected in autumn 2023
Pensions dashboards	Regulations came into force 12 December 2022. Connection deadline 31 October 2026, with expected staging timeline to be set out in guidance	DWP to work with the pensions industry on the staging timeline "this year"
Pensions transfers	Possible changes to the incentives and overseas investment flags following the DWP's review of the transfer conditions	Regulations possibly later this year
Notifiable events[5]	Consultation on changes to the regime back in 2021. Response to consultation and final regulations are outstanding	Unknown

1 See our Alert: DWP consults on DB funding and investment strategy (27 July 2022) and our Alert: TPR consults on its new funding code (19 December 2022)
2 See our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
3 See our Alert: Pensions tax changes – the revised allowances and removing the LTA (20 July 2023) and our consultation response (12 September 2023)
4 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
5 See our Hot Topic: New reporting requirements (January 2022)

Mansion House reforms

Value for Money

VFM common assessment framework to be introduced, with trustees and managers of DC occupational pension schemes, as well as the providers and IGCs of workplace personal pension schemes, needing to disclose, assess and compare the VFM of their schemes. Legislation and new FCA rules needed before this can come into force.

Deferred small DC pots

DWP consultation on a framework to enable multiple default consolidators, with a small number of schemes authorised to act as automated consolidators. A "clearing house" to act as a central point to store and manage data and inform schemes where to transfer.

Trustees' skills, capability and culture

HMT and DWP call for evidence focusing on trustees' skills and capabilities, the role of advice and other barriers to trustee effectiveness.

DC decumulation

Government consultation on a policy framework to support individuals using their pensions savings in decumulation. Proposed duty on trustees to offer decumulation services suitable for their members, either in-house or by partnering with another supplier. DWP and TPR working on guidance for trustees on offering decumulation products in the meantime.

DB scheme options

DWP call for evidence looked at how DB schemes could use their assets more flexibly, including the use of surplus, while maintaining appropriate member benefit security and not undermining trustees' fiduciary duties.

CDC

DWP to extend the CDC legal framework to allow unconnected multi-employer CDC schemes and CDC decumulation-only products. Consultation on draft regulations to enable unconnected multi-employer CDC schemes planned for the autumn, with legislation for decumulation-only products some way off.

Timing

In his Mansion House speech, the Chancellor committed to making all final decisions "ahead of the Autumn Statement", which is expected on 22 November 2023.

Climate change

Climate change reporting

Fine for failing to publish climate change report

TPR has issued its first fine, of £5,000, against a pension scheme for failing to publish a report on the trustee's management and governance of climate-related risks and opportunities by the relevant deadline. Whilst there is a minimum mandatory penalty of at least £2,500 for failure to publish a report, TPR applied an amount above the minimum as the trustee was a corporate body and to "reflect the nature of the breach".

What are trustees' climate reporting obligations?

New climate reporting obligations have been phased in over the last couple of years, with larger schemes whose relevant assets are £5 billion or more, CDC schemes and authorised master trusts in scope from 1 October 2021, and schemes with £1 billion or more in relevant assets in scope from 1 October 2022.

Trustees of in-scope schemes must:

- ✓ put in place appropriate governance arrangements to manage climate-related risks during the scheme year
- ✓ produce and publish a report on how they have complied with the requirements within seven months of their scheme year end date.[6]

Failing to comply carries a mandatory penalty, subject to a minimum of £2,500 and a maximum of £5,000 (individual trustees) or £50,000 (corporate trustees).

Climate scenario analysis

TPR has published a blog on how trustees can help make climate scenario analysis "decision-useful". This follows its review of climate-related disclosures and its campaign to make sure trustees are meeting their ESG duties, as well as some recent wider industry reports highlighting the current limitations of climate scenario analysis.

Trustees should do more on climate scenario analysis

TPR's view is that the climate reporting requirements provide "a consistent framework to disclose against" but climate scenario analysis has "tended to downplay the full scope of the risks and uncertainties". It expects trustees to:

- have an appropriate level of knowledge and understanding of climate issues and undertake regular training
- be able to understand the narratives underlying their climate scenarios, the limitations of those scenarios and the assumptions made in their construction, and
- consider undertaking more scenario analysis in years where they are not formally required to do so.

Ahead of the DWP's expected review of the current climate change governance and reporting requirements later this year, TPR is looking "to encourage more debate" in this area.

6 See our Hot Topic: £1bn plus schemes – are you ready? (June 2022)

TPR update

DWP review

The DWP has published the outcome of its review of TPR. The report concludes that TPR is "broadly well-run and well regarded" and has a "strong relationship with the DWP". Notable successes include the AE implementation. Against this "positive backdrop", 17 recommendations for improvement are made across risk and growth, compliance and enforcement, digital transformation and VFM.

It is worth noting that the report was finalised before the Chancellor's Mansion House speech (see page 4), announcing a series of pensions measures aimed at boosting saver outcomes and increasing investment in productive assets.

TPR builds relationships with administrators

TPR to promote best admin practice

TPR is changing its regulatory approach to work more closely with administrators, noting that they have a "crucial role to play" alongside trustees. TPR's "Administrator Relationships" function, a team dedicated to engaging directly with third party administrators, was established in January 2022. Following a pilot programme, TPR is now working with third party administrators on a voluntary basis, focusing on issues such as systems and processes, data quality and pensions dashboard readiness.

TPR hopes the work will help them to understand how trustees interact with administrators, promote best practice (or identify areas where guidance would support standards) and learn more about the "core challenges and issues" that administrators face.

Disclose and explain policies on illiquid investments

TPR has updated various publications, including its guidance on DC investment governance and communicating and reporting for DC schemes, to reflect new requirements intended to broaden DC investment opportunities in illiquid assets.[7]

What are the new disclose and explain requirements for DC trustees?

Most occupational schemes providing DC benefits need to:

- ✓ disclose and explain their policies on illiquid investments in the default SIP (or the main SIP for CDC schemes) from the first time it is revised after 1 October 2023, or by 1 October 2024 at the latest, and
- ✓ publicly disclose and explain in the chair's statement the percentage of assets in the default fund(s) (or the scheme as a whole for CDC schemes) that are allocated to certain asset classes, from the first scheme year which ends after 1 October 2023.

TPR will closely monitor the impact of these changes and the approach trustees are taking to investment "to deliver the best retirement outcomes for savers".

7 See our Alert: The DC Deluge (31 January 2023)

Data protection

Subject access requests

The ICO has created a new service to help individuals make a subject access request, as well as making it "easier and more efficient" for data controllers and processors to comply with a subject access request by ensuring that all relevant information is provided at the outset.

What is a data subject access request?

- A member is entitled to be given a copy of their personal data that a pension scheme holds about them
- There are no formal requirements for a valid subject access request – they can be verbal or in writing
- Information must be provided free of charge, unless a request is "manifestly unfounded or excessive"
- A request must be complied with "without undue delay" and at the latest within a month of receipt. An extension of up to two further months is allowed in limited circumstances, eg where the request is particularly complex.

Data protection fines and penalties

The ICO has issued a consultation on new draft data protection fining guidance, which closes on 27 November 2023. It covers the circumstances in which the ICO would consider it appropriate to issue a penalty notice and how the ICO would calculate the appropriate amount of the fine. When finalised, the guidance will replace the parts of the ICO's "Regulatory Action Policy" that explain its current approach to imposing and calculating fines.

What are the potential maximum data protection fines?

- In the case of a breach of the basic principles for processing (including conditions for consent), data subjects' rights and transfers of personal data overseas – £17,500,000 or, in the case of an undertaking, 4% of its total annual worldwide turnover in the preceding year, if higher
- For other data protection breaches – £8,700,000 or, in the case of an undertaking, 2% of its total annual worldwide turnover in the preceding year, if higher.

International transfers

Transferring personal data to the US

New adequacy regulations came into force on 12 October 2023, which specify the USA as a country which provides an "adequate level of protection of personal data" for certain transfers for the purposes of UK data protection legislation. The intention is that personal data can be transferred to US entities that have signed up to the UK "Extension to the EU-US Data Privacy Framework Principles", as long as the personal data will be subject to that Extension Framework, without the data controller or processor having to put further safeguards in place.

This should make it administratively more straightforward to transfer personal data to the US. However, whilst the ICO considers it "reasonable" for the Secretary of State to conclude that the UK Extension Framework provides an adequate level of protection, it notes several areas that "could pose some risks to UK data subjects" and suggests that these areas should be closely monitored to ensure individuals' rights are not undermined.

In other news

Automatic enrolment

New AE legislation passed

The Pensions (Extension of Automatic Enrolment) Act 2023 has received Royal Assent. The Act contains regulation-making powers to:

- reduce the lower age limit for AE from 22, with the Government already announcing its intention to reduce this to age 18, and
- reduce or remove the lower limit of the band of qualifying earnings (currently £6,240 per year) on which minimum default DC contributions are calculated, so that contributions can be calculated on a larger portion of earnings.

The DWP is planning to launch a consultation on regulations to implement these measures. Laura Trott, the Pensions Minister, has previously suggested a consultation could be published in autumn 2023.

Pensions sharing on divorce

The PLSA has published updated guidance on the recommended range of charges by occupational pension schemes for providing information in relation to, and implementing, pension sharing orders. The new guidance applies from 2 January 2024, and was informed by the results of a survey carried out by the PLSA earlier in the year.

PPF levy

PPF levy expected to reduce in 24/25

The PPF has consulted on the draft 2024/25 levy rules and the final rules are expected in December. Based on its "very strong financial position", the PPF proposes to continue its policy of reducing the levy to £100m in the 2024/25 year, which it considers would result in decreases for nearly all levy payers. The PPF intends to maintain an annual levy of £100m in the longer term due to restrictions in legislation which aim to protect levy payers from sharp increases.

General levy

General levy could increase

The DWP has consulted on possible changes to the General Levy over the next three tax years. The General Levy funds the core activities of TPR, TPO and the pensions-related activities of MaPS, and is payable by trustees of registrable occupational and personal pension schemes. The DWP sought industry views on the following options for mitigating the ongoing deficit in levy funding:

- continuing with the current levy rates and structure (ie leaving the deficit to continue to grow)
- retaining the current levy structure and increasing rates by 6.5% a year
- its preferred option of increasing rates by 4% a year, plus an additional premium of £10,000 for schemes with under 10,000 members from April 2026.

Brexit and pensions EU law

Regulations before Parliament will preserve the effects of certain cases based on EU law after the relevant provisions of the Retained EU Law (Revocation and Reform) Act 2023 come into force at the end of 2023, by restating that:

- members should receive no less than 50% of their accrued pension benefits from the PPF in the event of employer insolvency, and removing the cap on PPF compensation that previously applied to members below their scheme's normal pension age on the date of their employer's insolvency
- members do not need to identify an opposite-sex comparator to show there is discrimination because of GMP legislation, and
- the benefits payable to same-sex surviving spouses and civil partners should be calculated on the same basis as for opposite-sex spouses and civil partners.

Insurers in financial distress

Under new measures introduced in August 2023, the courts can agree to a "write-down order", reducing the value of an insurer's liabilities when the insurer is facing financial difficulties, provided certain conditions are met. In such cases, the FSCS would pay sums to the insurer to cover the difference between the amount it is required to pay following a write-down and the full original sum due under the policy. The insurer then uses this top-up funding to provide full value to the policyholder.

Legislation has been passed to ensure that a "write-down" of annuity contracts, and any associated FSCS top-up payments, are not classed as unauthorised payments for tax purposes.

Advice / guidance boundary

The FCA has published guidance to clarify the existing framework of the advice / guidance boundary for FCA-authorised persons. For FCA-authorised persons, the relevant boundary is giving a personal recommendation, since generally an FCA-authorised firm "only gives investment advice if the advice amounts to a personal recommendation". The clarification includes examples of where communications would not be classed as a personal recommendation, and examples of good practice which complies with the consumer duty.

Meanwhile, the FCA and HMT are continuing with their joint review of the advice / guidance boundary, with an update expected in the autumn.

HMRC publishes McCloud guidance

The McCloud remedy, which is intended to remove the effect of past discrimination in affected public service pension schemes, was implemented on 1 October 2023.[8]

HMRC has published various materials to help affected public service schemes and their members with the tax implications of the remedy, including:

- "interactive guidance", to check if they are affected
- "calculate your public service pension adjustment service" for members if they need to correct their tax position as a result of the remedy
- comprehensive guidance for members and scheme administrators.

8 See our case summary: The Lord Chancellor and Secretary of State and another v McCloud and Mostyn and others and Sargeant v London Fire and Emergency Planning Authority and others (Court of Appeal, 20 December 2018) (2 January 2019)

Case law – Courts

The Pensions Ombudsman v CMG Pension Trustees Limited and CGI IT UK Limited (Court of Appeal, 1 November 2023)

The Court of Appeal has found that TPO is not a "competent court" for the purposes of recouping overpayments.[9]

The legislation permits trustees to recoup overpayments provided certain conditions are met including, where there is a dispute as to the amount, the deduction must not be made unless the obligation "has become enforceable under an order of a competent court". Where TPO has determined a dispute about an overpayment, the Court decided that TPO is not a "competent court" and that a County Court order is needed to enforce TPO's decision.

Comment

This case adds a layer of complexity to the process for recouping overpayments, with the party wishing to enforce TPO's determination or direction having to deliver a certified copy to the County Court, which the County Court would then enforce as if it had made the determination or direction itself. However, it does give a clear route for trustees to get a binding decision.

Brass Trustees Limited v Goldstone and the PPF (High Court, 31 July 2023)

The High Court has approved a trustee decision to issue petitions to wind up the sponsoring employers of an occupational pension scheme, after they had failed to meet their funding obligations for several years.[10]

In reaching their decision, the trustees took into account:

- the information they had about the sponsors' financial position
- professional advice, including actuarial and legal advice and advice on the estimated outcomes of the sponsors' insolvency
- their duties to administer the scheme in accordance with the trust deed and rules, and
- their duties to protect the scheme's assets and the interests of members.

Recognising the "momentous consequence" of deciding to place sponsoring employers in a liquidation process, the trustees sought the Court's approval that this was a proper exercise of their powers. The Court concluded that the trustees had taken into account relevant factors and approved their decision to issue the winding-up petitions.

Comment

While the case turned on its facts, it demonstrates the importance of trustees closely monitoring employer covenants, as well as following proper decision-making processes.

9 See our case summary: The Pensions Ombudsman v CMG Pension Trustees Limited and CGI IT UK Limited (Court of Appeal) (1 November 2023) (6 November 2023)

10 See our case summary: Brass Trustees Limited v Goldstone and the PPF (High Court) – 31 July 2023 (22 September 2023)

Case law – TPO

Mr W (23 October 2023)

TPO dismissed a complaint from a member that his transfer request had been unnecessarily delayed as a result of the trustee requiring him to seek MoneyHelper guidance.[11]

Under the transfer regulations, which came into force on 30 November 2021, certain conditions have to be satisfied before a statutory transfer can go ahead. Where an "amber flag" is present, the member must take MoneyHelper guidance before the transfer can proceed. For example, one amber flag is that there are overseas investments present in the receiving scheme. However, the wording of this amber flag is broader than intended, resulting in inconsistency in how it is applied.

The trustee had decided that the "overseas investments" amber flag was present, requiring the member to obtain guidance. The member complained that the trustee did not correctly interpret the transfer regulations, causing the transfer request to be unnecessarily delayed resulting in loss (a reduction in the transfer value), financial hardship and a delay to retirement plans.

TPO decided that the trustee had acted "reasonably" in determining that an amber flag was present but did not go so far as suggesting that a MoneyHelper appointment was required in all similar cases.

Comment

This decision is likely to make trustees more careful about permitting a transfer to proceed without raising an amber flag, even if the receiving scheme shows no sign of being a scam. It will also strengthen the calls for the legislation to be amended to better align with the policy intention behind it, which is already on the cards following a DWP review.

Mr R (28 April 2023)

TPO dismissed a complaint from a member that their inability to access an online pension account for several months prevented them from taking advantage of the investment opportunities that arose during the pandemic.[12]

In August 2020, the member contacted the scheme administrator explaining that they had attempted to sign up for an online account but were unable to do so. After three months of failed attempts to fix the online account, the member filed a formal complaint with the administrator, stating that this year presented a significant opportunity to maximise investment returns given the effects of the pandemic on the stock market. As a result of not having access to their online account, the member argued that they were unable to make investment choices which could result in the loss of "tens of thousands of pounds" by the time of their retirement.

In common law, there is a duty to mitigate, requiring an individual to take reasonable steps to prevent or minimise potential losses. Despite the member making many attempts to fix their online account, there was no evidence that they queried the use of alternative investment options or made the administrator aware that they intended to access the online account for the sole purpose of making investment changes.

TPO noted that being unable to register for an online account would have caused some inconvenience but considered that, with reasonable diligence, the member could have made their desired investment decisions known via other means. As such, the administrator's actions had not caused the member to incur a financial loss and the complaint was not upheld.

Comment

While schemes should take care to maintain the availability of their online services, this decision is a useful reminder that members must take steps to mitigate their potential losses.

11 See our case summary: Mr W (CAS-93568-H0D0): Transfer Regulations (23 October 2023) (3 November 2023)

12 See our case summary: Mr R (CAS-76499-S5N7)

Sackers

Upcoming webinars and seminars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on topics.

Admin matters: are you thinking about admin enough?	22/11/2023	Online webinar hosted by the PMI In this webinar hosted by the PMI, two Sackers' partners will be joined by two admin experts to discuss why good administration is important, covering data, member engagement and project work.
Quarterly legal update	08/02/2024	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

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Recent publications

The Finance & investment briefing – December 2023 takes a look at current issues of interest to pension scheme investors.

The DC briefing – October 2023 highlights topical news on DC pensions from a legal viewpoint.

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