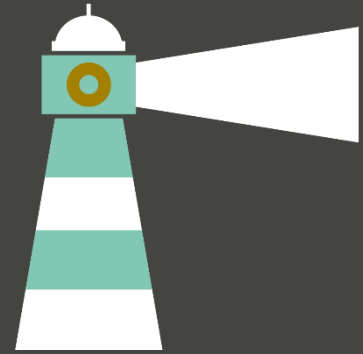


# What's Happening in Pensions



Issue 86 – January 2021

## In this issue:

**Brexit – end of transition period:** The Trade and Cooperation Agreement between the EU and the UK has little or no impact on previously identified issues for pension schemes but we note here some points of interest.

**RPI reform:** The Chancellor of the Exchequer has declined to give his consent to early reform of the Retail Prices Index, meaning that it is now expected to be aligned with CPIH by the UK Statistics Authority from February 2030.

**Pension Schemes Bill and DB scheme funding:** The Bill is very close to becoming an Act, with its final Parliamentary stage scheduled for 19 January. The Pensions Minister has commented on when new Pensions Regulator powers may take effect and confirmed that these and (more clearly) the new criminal offence prosecution powers will not be retrospective.

The Regulator has published a short interim response to its consultation on the proposed new DB scheme funding framework and David Fairs of the Regulator has sought to counter concerns about the potential impact of its proposals.

**Pensions dashboards:** The Pensions Dashboards Programme has published its first set of data standards.

**Pension protection levy:** The PPF has said that it will be publishing its 2021/22 pension protection levy documents this month. In the meantime, it has confirmed proposed measures designed to assist schemes and employers.

**General levy:** The government is consulting on proposals to change the structure of the general levy on pension schemes from April 2021, with the aim of significantly increasing the amount it collects.

**DC costs and charges:** The government has responded to its consultation on the DC default fund charge cap. The only change is that flat fees will be prohibited for pots below £100. Standardised charges disclosure will remain voluntary but use of the templates will be monitored.

**Gated DC funds:** The Pensions Regulator has added to its COVID-19 guidance for DC schemes regarding transfer requests by DC members who have investments in a gated fund.

**Taxation of interest payments:** An update to HMRC's Pensions Tax Manual seems to note a change in HMRC's position on the taxation of interest on late benefit payments. This is relevant to, among other things, the payment of GMP equalisation uplift arrears.

**Scheme returns:** The Pensions Regulator has published information about the 2021 scheme return requirements for DB and hybrid schemes. It has also published the content of the scheme return.

**DC small pots:** The Small Pots Working Group has published its recommendations to the government and pensions industry on potential ways of addressing the proliferation of small preserved DC pots.

**Stewardship – pooled funds:** The Pensions Minister has announced the launch of a working group to address the stewardship barriers faced by pension schemes that invest in pooled funds.

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**Non-cash pension contributions:** The latest HMRC pension schemes newsletter includes a section on the making of *in specie* (i.e. non-cash) pension contributions, following the *Sippchoice* case that HMRC won earlier this year.

**State pension increases:** The Secretary of State has confirmed that the state pension increase 'triple lock' will again apply in 2021.

**Corporate directors:** The government has published a consultation on implementing provisions to prohibit the use of corporate directors (i.e. a company, rather than a "natural person", being appointed as a director of another company), with exceptions.

**Corporate Insolvency and Governance Act 2020:** Regulations have extended existing restrictions on the use of statutory demands and winding-up petitions against businesses until 31 March 2021.

Peter Hughes, David James and Charlotte Feld have written an article for Practical Law: "[Negotiation in the perfect storm: COVID-19 and defined benefit pension schemes](#)". This considers the impact of COVID-19 on relations between corporate employer groups and DB pension scheme trustees, outlining the key factors that may influence negotiations regarding the employer covenant. Issues covered include the types of negotiation triggered by COVID-19, the management of information flow, directors' duties, the balance of negotiating power, forms of mitigation and the roles of the Pensions Regulator and the Pension Protection Fund.

## Brexit – end of transition period

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The post-Brexit '[Trade and Cooperation Agreement](#)' (TCA) between the EU and the UK came into force on 1 January 2021 (on a provisional basis, pending approval of the European Parliament). The TCA has little or no impact on the post-Brexit issues identified in our November 2020 [briefing note](#), except as follows:

- **Employer covenant**

The TCA provides for tariff-free and quota-free trade in goods. The avoidance of a 'no deal' Brexit in this regard will have been a great relief to businesses involved in the export and/or import of goods, including components. The UK leaving the single market and customs union does, however, mean that there are new bureaucracies to be navigated on both sides of the channel (and also for shipments to the Republic of Ireland and even Northern Ireland). EU businesses to which UK firms supply goods or components might choose to avoid these by dealing instead with EU-based parties. Note too that the UK has not rolled over all of the bilateral trade agreements with non-EU countries to which it was a party by virtue of EU membership (though further progress in this regard is expected). On the other hand, the lower value of Sterling since the Brexit referendum has made it easier for UK businesses to compete and the government is looking to agree favourable trade deals with new countries. There will of course be other factors in particular circumstances.

There is little in the TCA for businesses that provide services rather than goods but there were no expectations in that regard.

Trustees still, therefore, need to consider and monitor the effect on their employer covenant, including that of any guarantor. COVID-19 issues are also, of course, an ongoing concern for many businesses.

There is more information for businesses on Brexit matters on our [Brexit site](#).

- **Transfers of personal data between the UK and EU/EEA**

Following the EU's General Data Protection Regulation (GDPR), the transfer of personal data to another country is permitted but subject to, among other things, regulatory decisions in the country from which the data is being transferred on the adequacy of protections in the country to which it is being transferred.

The UK's Information Commissioner's Office had already confirmed that EU and EEA countries' personal data protections would be considered adequate. There is therefore no change to the rules on the transfer of personal data from the UK to an EU or other EEA country.

As regards transfers of personal data from an EU or other EEA country to the UK:

- The EU has not (yet) recognised the UK's protections as adequate. Under the TCA, however, transfers of personal data from the EU to the UK can continue without further action on the part of EU based controllers on their UK based counterparts for at least four months, with a possible extension by a further two months (i.e. until the end of April or June 2021). This is designed to give the European Commission sufficient time to reach a decision on whether the UK regulatory framework is adequate. If it declines to do so, then action will be needed.

This 'data bridge' is conditional on the UK not amending its data protection legislation or exercising certain designated powers (relating to data transfers) during this period, and any action which the UK would want to take during this period would require the approval of the new EU/UK Partnership Council. Notably, UK amendments for the purpose of aligning rules with EU standards are permitted without prior approval, which paves the way for the UK to adopt, if it so wishes, the same clauses as the European Commission draft standard contractual clauses for data transfers, as and when these are approved by the European Commission (expected to happen early this year).

- As regards personal data transfers from the non-EU EEA countries to the UK, the position is as above and for the same period but may be subject to express written acceptance of this being notified by the relevant EEA country to the EU and UK. Local laws might therefore operate to restrict personal data transfers to the UK.

(Note: The EEA comprises all 27 EU member states plus Iceland, Liechtenstein and Norway.)

- **Financial services**

As expected, UK banks, insurers, investment managers and other financial services firms no longer have 'passporting rights' access to the EU single market. They can therefore only operate in the EU/EEA where they operate through an appropriately authorised local entity or where the country in question otherwise allows – which is likely to be on a limited and/or temporary basis. Temporary UK regimes and limited equivalence decisions allow some activity by EU/EEA firms in the UK.

There has, however, been a [declaration](#) including a commitment by both sides to publish a memorandum of understanding within 12 weeks on a framework for regulatory cooperation. That may lead to equivalence or other decisions that, sometime in the future, help with identified issues but this is uncertain.

Our Financial Services and Markets colleagues have published a [New Year Briefing](#) with a section on Brexit matters.

UK legislation states that EU law as at 31 December 2020 forms part of UK law as "retained EU law", unless and until the UK law is changed. Future decisions of the Court of Justice of the European Union are not binding in the UK; past decisions form part of the retained EU law but can now be overturned by the UK courts at Court of Appeal or higher level.

## RPI reform

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The Chancellor of the Exchequer [has declined](#) to give his consent to reform of the Retail Prices Index (RPI), i.e. aligning it with CPIH, as proposed by the UK statistics Authority (UKSA) (see [WHIP Issue 81](#)). It is therefore expected to happen in February 2030, when the UKSA can do it unilaterally. There will be no compensation for index-linked gilt holders.

CPIH increases are typically lower than RPI increases. DB scheme members whose pension increases are linked to RPI will lose out from 2030 from the reform of RPI. Their schemes will see their liabilities reduce but any scheme that has hedged with index-linked gilts (which are RPI-linked: CPI-linked gilts have never been made available) will see its asset values reduce, to the extent that the change is not already priced-in. Schemes with CPI increase rules that are heavily hedged with index-linked gilts will be particularly affected. The PPF's liabilities are reportedly expected to increase by around £1 billion.

Trustees may wish to review, for example, their transfer value assumptions, commutation factors and the terms of at-retirement pension increase exchange options.

## Pension Schemes Bill and DB scheme funding

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The [Pension Schemes Bill](#) is scheduled to have its final Parliamentary stage on 19 January 2021. This involves consideration by the House of Lords (where the Bill started) of the Commons' amendments, with any remaining

differences between the two Houses then being resolved. This stage should be quickly followed by Royal Assent. None of the substantive provisions of the Bill takes effect on Royal Assent: commencement orders are needed and there will be consultations and regulations on several aspects. We plan to publish a briefing note when Royal Assent has been given.

In the meantime, Pensions Minister Guy Opperman [has responded](#) to a Parliamentary question on the timetable for introducing the new criminal offences and Pensions Regulator powers, and on retrospectivity, as follows:

*"The Pensions Regulator will be producing guidance on the use of the new criminal sanction powers and it plans to undertake a consultation first with industry to ensure these vital views are captured. There are also other powers in Part 3 of the Bill that require implementing regulations and the aim is for these powers to be available to the Pensions Regulator by autumn 2021. None of the provisions in Part 3 of the Bill will be retrospective and the new criminal sanctions and information gathering powers will apply to all schemes where the act occurs, or in the case of a series of acts commences, after the powers come into force."*

The Pensions Regulator has published a short [interim response](#) to its DB funding framework consultation, to update respondents on progress. The consultation on the draft new code of practice is now expected in the second half of 2021 and will include the full response to the first consultation.

David Fairs of the Regulator had earlier written a [blog post](#) in an attempt to counter concerns expressed publicly about the potential impact of its funding regime proposals on open DB schemes (this point also featured prominently in the Pension Schemes Bill Parliamentary debates) and speculation about the potential cost to DB schemes generally. See our briefing note '[DB pension scheme funding – Pensions Regulator consultation](#)' for details of the Regulator's proposals.

## Pensions dashboards

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The Pensions Dashboards Programme [has published](#) the first set of data standards for initial pension dashboards. This covers the "find" and "view" data elements that schemes will have to (a) use to identify and match members and (b) supply for use by dashboards.

A [data standards guide](#) includes all the information. There is also a short [overview](#) and [animation](#).

There is no formal timescale for action by schemes but they now have a better idea of what will be expected of them, which they can use to begin preparing.

## Pension protection levy

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The Pension Protection Fund [has said](#) that it will be publishing its 2021/22 pension protection levy policy statement, determination and accompanying documents this month. In the meantime, it has confirmed proposed measures designed to assist schemes and employers. It will:

- *"implement the small scheme adjustment, which halves levies for schemes with less than £20 million in liabilities and tapers levies for schemes with between £20 million and £50 million of liabilities*
- *implement the reduction in the risk-based levy cap to 0.25 per cent of liabilities from 0.5 per cent*
- *continue to measure insolvency risk on the basis in use since April, using credit ratings and the PPF specific insolvency risk model operated by Dun & Bradstreet"*

It has confirmed the levy estimate of £520 million and retention of the levy scaling factor of 0.48.

See [WHiP Issue 84](#) for details of the consultation.

## General levy

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The government [is consulting](#) on proposals to change the structure of the general levy on pension schemes from April 2021, having cancelled the previously decided across-the-board 10% increase following the COVID-19 pandemic outbreak (see [WHiP Issue 81](#)). Its overall aim is to increase levy receipts to reduce an accrued and increasing deficit.

The proposed options are:

- Increase rates and introduce separate levy rates for DB, DC, master trusts and personal pensions (this is the government's preferred option): for 2021/22 the increases would be 5% for master trusts and personal pensions and 10% for other schemes; for 2022/23 and 2023/24, there would be higher increases based on membership numbers (set out in a table in Annex 1). These later increases will be significantly bigger for DB schemes (as much as 120% by 2024) than for DC schemes.
- Increase rates as above but with DC and DB schemes subject to the same increases and a separate, lower set of levy rates for master trusts and personal pensions (numbers are set out in a table in Annex 1).
- Retain existing levy structure and increase the rates (no detail is given: this is not a preferred option for the government).

The levy helps fund the Pensions Regulator, the Pensions Ombudsman and the Money and Pensions Service. It also funds part of the development costs for the pensions dashboard. There are currently different levy scales for occupational and personal pension schemes.

The consultation closes on 27 January 2021.

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## DC costs and charges

The government [has published](#) its response to its June 2020 call for evidence on the DC default fund charge cap (see [WHiP Issue 83](#)). Key conclusions are as follows:

- There will be no change to the 0.75% charge cap.
- Transaction costs will not be included.
- Flat fees will be prohibited for pots below £100 (which figure may be raised in the future).
- Standardised disclosure of costs and charges using the previously published Cost Transparency Initiative templates will remain voluntary but uptake will be monitored and there may be future mandating.

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## Gated DC funds

The Pensions Regulator has added to its [COVID-19 DC guidance for trustees](#) concerning transfer requests by DC members who have investments in gated funds (i.e. funds that temporarily cannot be accessed - mainly property funds). The new text is as follows:

*"We appreciate that payment of a cash equivalent transfer value (CETV) is likely to be problematic where all or part of the member's investment is held in a gated fund. However, we do not believe that the law permits us to grant an extension to the statutory timeframe for payment of a CETV in these circumstances.*

*It is important that you prioritise these requests as you would any other transfer, and we would expect you to do everything you can to process them promptly – we may fine you if you fail to take all reasonable steps to pay a transfer value within six months of the application date.*

*If only part of the investment is in a gated fund, reasonable steps might include exploring with the receiving scheme whether the monies from the gated section could follow once the fund has re-opened and, if so, offering the member a partial transfer as an interim measure.*

*You should continue to report any significant failures to pay transfer values within the statutory period, outlining the reasons why and the steps you have taken towards compliance. See our [code of practice on reporting breaches of the law](#) for more information about reporting."*

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## Taxation of interest payments

An update to HMRC's Pensions Tax Manual (page [PTM143100](#)) seems to note a change in HMRC's position on the

taxation of interest on late benefit payments. This is relevant to, among other things, the payment of GMP equalisation uplift arrears.

The relevant section said and still says:

*"Changes were made in Finance Act 2013 concerning interest that is payable to an individual in respect of compensation. Section 874(5) Income Tax Act 2007 states such interest must be treated as a payment of yearly interest, meaning the person paying the interest will be required to deduct income tax at source. Further guidance can be found at [SAIM9115](#)."*

The change comes in the example that follows it. This previously said (with emphasis added):

*"Huw received a benefit payment later than he was entitled to receive it and the scheme administrator has paid interest in respect of the delay, on top of the benefit payment.*

*This interest is paid to Huw in respect of compensation and the scheme administrator should deduct tax at source on this amount. Huw will then receive the net amount from the administrator."*

It now says (with emphasis added):

*"Huw receives an annual pension benefit of £5,200, paid on a monthly basis (£433.33 per month). One of the monthly instalments is paid to Huw later than he was entitled to receive it and the scheme administrator has paid interest in respect of the delay, on top of the benefit payment. The interest payment is £12.50, reflecting (for the purpose of this example) an interest rate of 3% p.a.*

*The payment of £12.50 is interest but it is not interest relating to a compensation payment. The scheme administrator has merely paid interest on the late payment, and the normal rules for determining whether the interest is 'yearly' or 'short' will apply. In this case, there is no doubt that the interest is short, and there is no requirement for the scheme administrator to deduct income tax from it."*

HMRC guidance on "yearly" and "short" interest is on [this web page](#) and subsequent pages.

This is all the information we currently have but it may mean that schemes should not be deducting PAYE income tax on most interest payments.

## Scheme returns

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The Pensions Regulator has published [information](#) about the 2021 scheme return requirements for DB and hybrid schemes. It has also published [the content of the scheme return](#).

The Regulator has alerted trustees to the likely need to provide a web address for their statement of investment principles and to specify their assessment of the employer covenant grade. (Whether or not trustees will actually be asked to do this seems to depend on whether a systems upgrade is completed in time.)

## DC small pots

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The Small Pots Working Group [has published](#) its recommendations for the government and pensions industry. There is a lot more investigation to do, with no policy decisions at this stage.

The Group was set up to consider how consolidation of small DC pots might be achievable, in order to address a proliferation of them. Its report suggests that schemes and providers should do what they can already do within existing legislation, for example combining a member's two or more pots in the same scheme or with the same provider, where rules or contractual terms allow. Where this cannot be done, the pots could be presented in a "single consumer facing view" rather than as separate accounts.

As regards consolidation options involving transfers, the Group recommends that the industry should establish "operational focussed groups" covering the following areas:

- developing and testing data that would provide sufficient matching capability to verify identities;
- developing and adopting common data standards; and

- identifying requirements for a low-cost bulk transfer process.

There is clear overlap here with pensions dashboards work (see above).

It also recommends "member-exchange proof of concept trials" within master trust schemes, starting with a feasibility report in summer 2021. This would involve master trusts swapping members' small value pots, in order to consolidate them in one or the other of the master trusts.

It further recommends that the government, working with the industry, starts to develop an initial costs/benefit analysis in the latter half of 2021 to assess, more than it has done itself, models for default consolidation scheme options and automatic pot-follows-member.

## Stewardship – pooled funds

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Pensions Minister Guy Opperman [has announced](#) the launch of a working group to address the stewardship barriers faced by pension schemes that invest in pooled funds.

The working group will be chaired by Simon Howard, the former Chief Executive of the UK Sustainable Investment and Finance Association. Sarah Wilson, CEO of Minerva Analytics, will be the vice-chair. Further membership details and the group's terms of reference will follow in due course.

The press release says that the working group will be tasked with:

- *"Helping drive solutions to voting system issues, with specific reference to addressing present obstacles;*
- *Increasing the number of asset managers who are prepared to engage with their clients' preferences;*
- *Recommending regulatory and non-regulatory measures to ensure the convergence of asset managers' approaches to voting policy, and execution with trustees' policies."*

This was a recommendation of a recent report by the Association of Member Nominated Trustees.

## Non-cash pension contributions

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The latest [HMRC pension schemes newsletter](#) includes a section on *in specie* (i.e. non-cash) pension contributions, following the *Sippchoice* case that HMRC won earlier this year (see [WHiP Issue 82](#)). That case related to members transferring non-cash assets to a self-invested personal pension (SIPP) but the legislation on employers' contributions is materially the same and the fact that the scheme in that case was a SIPP was not material to the decision.

The newsletter item reads as follows:

*"We're clarifying HMRC's position following the decision of the Upper Tribunal (UT) in HMRC v Sippchoice Limited [2020] UKUT 0149 (TCC), a long running 'in-specie' contribution case.*

*The decision confirmed HMRC's view that tax relief is not available in respect of contributions made by in-specie transfer (except as provided in section 195 Finance Act 2004) and provided clarification that the expression 'contributions paid' in section 188(1) of Finance Act 2004 (section 188(1)) does not include settlement by transfer of non-monetary assets, even if the transfer is made in satisfaction of an earlier obligation to contribute money.*

*Notwithstanding this important clarification of the legal scope of section 188(1), we're aware that the UT's interpretation of guidance in HMRC's Pensions Tax Manual (PTM) has created some uncertainty. In particular, whilst acknowledging the guidance was not directly relevant to its construction of section 188(1), the UT interpreted the section "Giving effect to cash contributions" at PTM042100 in a way that was contrary to its intended meaning.*

*The paragraphs in the "Giving effect to cash contributions" section of the PTM guidance were intended to be read together rather than in isolation. They describe a situation where the pension scheme trustees agree to purchase an asset from a person who has a separate obligation to make a monetary pension contribution, and the payment of the pension contribution is then effected pursuant to a contractual offset agreement. The guidance acknowledges that, in certain circumstances, it's possible for the offset agreement to give effect to the pension contribution as a monetary contribution.*



*In light of the UT's comments, we've clarified the "Giving effect to cash contributions" guidance at [PTM042100](#) to try to help customers better understand HMRC's long-standing approach to pension contributions made pursuant to a contractual offset agreement. This is a clarification and HMRC's position remains unchanged. We've also amended the guidance at [PTM043310](#) regarding asset-backed contribution arrangements.*

*Following the UT decision, we're continuing to review in-specie cases and consider what it means for those who've already claimed and received relief. Any contribution that has been paid pursuant to an effective contractual offset agreement in the circumstances described at PTM042100 or where HMRC clearance has been obtained in relation to an asset-backed contribution arrangement (and the information provided remains accurate and complete), will be unaffected."*

## State pension increases

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The Secretary of State [has confirmed](#) that the state pension increase 'triple lock' will again apply in 2021. The 2.5% underpin will be the relevant figure for the increase because the national average earnings and CPI increases were below that level. The full single-tier state pension will accordingly be £179.60 per week.

## Corporate directors

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The government has published a [consultation](#) on implementing provisions in the Small Business, Enterprise and Employment Act 2015 to prohibit the use of corporate directors (i.e. a company, rather than a "natural person", being appointed as a director of another company), with exceptions.

It is proposed that there will be a principles-based exception to the prohibition. Under those principles, a company may be appointed as a company director provided that both:

- all of the directors of the company being appointed as a director are natural persons; and
- those natural person directors are, prior to the corporate director appointment, subject to the Companies House identity verification process.

The consultation notes that respondents to the previous consultation were strongly in favour of an exemption for pension scheme trustee companies. There is no specific exemption proposed, however, so it appears that the principles-based proposal is intended to work for such companies.

The consultation closes on 3 February 2021.

## Corporate Insolvency and Governance Act 2020

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[Regulations](#) extend the existing restrictions in the Corporate Insolvency and Governance Act 2020 on the use of statutory demands and winding-up petitions until 31 March 2021. They had been due to expire at the end of 2020. These are intended to protect businesses during the COVID-19 pandemic by preventing creditors, including DB pension scheme trustees, from bringing about an employer insolvency event.



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