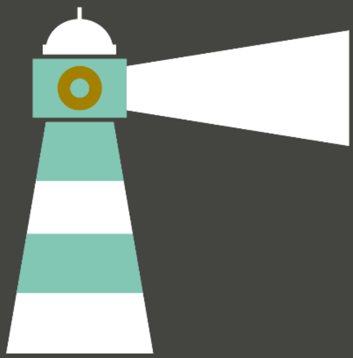
BRIEFING

TRAVERS SMITH

# What's Happening in Pensions



Issue 104 – August 2023

Travers Smith Pensions Sector Group

Linkedin

**In this issue:**

**'Mansion House reforms':** Chancellor of the Exchequer Jeremy Hunt's 'Mansion House reforms' include multiple proposals for enlisting DB and DC pension schemes in the push for economic growth whilst also maintaining security and improving outcomes for pension savers. The detail was announced in various calls for evidence, consultations and responses published the morning after the Chancellor's speech. We note developments in various areas affecting DB and DC pension schemes.

**Finance (No.2) Act 2023:** The Finance (No.2) Bill has become law. It includes legislation implementing the Spring Budget 2023 measures regarding the abolition of the lifetime allowance charge and annual allowance increases.

**Finance Bill clauses – lifetime allowance abolition etc.:** HMRC has published draft legislation for next year's Finance Bill. The significant pensions content relates to abolition of the lifetime allowance from 6 April 2024 and its replacement with two new maximum tax-free lump sum allowances. As drafted, there would be very significant consequences for the form in which DB benefits can be taken. There are also changes proposed to the taxation of payments from dependants' drawdown funds and annuities secured after a member's death.

**Pensions dashboards:** Amending regulations set a new single scheme connection deadline of 31 October 2026 but trustees will be required to have regard to forthcoming guidance setting out earlier expected connection dates. The FCA has made corresponding changes to its rules and the Pensions Regulator has updated its guidance. The Government has updated its guidance on applications to defer the connection deadline.

**BBC amendment power case:** The High Court has held that a proviso in the BBC Pension Scheme amendment power, which protects the "interests" of active members, restricts changes to future service benefits as well as to accrued benefits.

**Trustee application to wind up employer approved:** The High Court has approved the provisional decision of the trustee of a DB pension scheme to issue petitions to wind up the scheme's distressed employers. Doing this would cause job losses but would enable the trustee to trigger a winding-up of the struggling scheme under the terms of its trust deed, following which the scheme is expected to enter the PPF.

**Contribution notice upheld:** The Upper Tribunal has upheld the Pensions Regulator's decision to impose a £1.87 million contribution notice on an individual, the former owner of a scheme's sponsoring employer. This involved consideration of the material detriment test under the pre-Pension Schemes Act 2021 anti-avoidance legislation and the basis for calculating the amount of a contribution notice in these circumstances.

**TPR investment guidance:** A Pensions Regulator blog post indicates forthcoming updates to its investment guidance.

**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. A new issue is due later this month.

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

## 'Mansion House reforms'

In his Mansion House speech, Chancellor of the Exchequer Jeremy Hunt announced what he called the 'Mansion House reforms'. These include multiple proposals for enlisting pension schemes in the push for economic growth whilst also maintaining security and improving outcomes for pension savers. The following day, a raft of consultations, calls for evidence and responses were published. The content is summarised below.

**The speech**

The Chancellor noted that less than 1% of UK DC pension scheme assets is invested in unlisted equity. To increase this, nine providers representing two-thirds of the DC market and holding more than £4 billion in assets (mostly personal pension providers but also including Nest and other master trust providers) have agreed the 'Mansion House Compact', under which they will work towards an objective of having at least 5% of default fund assets invested in unlisted equities by 2030. More providers and schemes are expected to follow suit.

Announcing the various consultations etc. reported below, the Chancellor set out three "golden rules" for taking the proposals forward:

- *"Firstly everything we do we will seek to secure the best possible outcomes for pension savers, with any changes to investment structures putting their needs first and foremost.*
- *Secondly we will always prioritise a strong and diversified gilt market. It will be an evolutionary not revolutionary change to our pensions market. Those who invest in our gilts are helping to fund vital public services and any changes must recognise the important role they play.*
- *The third golden rule is that the decisions we take must always strengthen the UK's competitive position as a leading financial centre able to fund, through the wealth it creates, our precious public services."*

Most of the announcements are to encourage:

- **DB schemes** to invest more adventurously (ideally in the UK) in order to help grow the economy. That means reducing investment in gilts – though not too much because the Government needs that investment - and increasing investment in 'productive assets' such as private equity and infrastructure. This is against a backdrop of many DB schemes having moved significantly (and increasingly) out of equities and into gilts, corporate bonds and other liability-aligned strategies in recent years, for a variety of reasons. These include increases in interest rates which mean that many DB schemes are now in surplus, resulting in a desire for investment strategies that protect the funding position. The use of leveraged LDI has had a similar effect. Additionally, many schemes have secured liabilities with insurers or are now able to do so.
- **DC schemes** to allocate more of pension savers' default fund assets to 'productive investments'. Recent changes to the charges cap have facilitated more investment in illiquid assets such as private equity and infrastructure, provided certain criteria are met. Continually putting pressure on small schemes, which are less likely to have good governance and which rarely invest in illiquid assets, to consolidate into master trusts should also make a difference, but the scale is small. The agreement with major personal pension and master trust providers to target 5% default fund asset allocation by 2030 should have the greatest impact.

This is all to be done through a variety of measures but not compulsion.

The consultations and calls for evidence outlined below close on 5 September 2023, except where otherwise noted. Final decisions, where still needed, are to be taken ahead of the Autumn Statement, the date for which has not yet been announced but it is typically in late October or November. Primary legislation, and so Parliamentary time, is needed for many of the proposals.

As regards suitable investment vehicles, the Chancellor said:

> *"We have launched the LIFTS competition, and will consider closely the bids that have already started to come in for up to £250 million of government support.*
>
> *Alongside that, we will explore the case for government to play a greater role in establishing investment vehicles, building on the skills and expertise of the British Business Bank's commercial arm which has helped to mobilise £15bn of capital into over 20,000 companies.*

*Ahead of Autumn Statement, we will test options to open those investment opportunities in high-growth companies to pension funds as a way of crowding in more investment."*

See also the item below on the broadening of access to Long-Term Asset Funds.

Links:

- The speech
- HMT press release summarising the speech
- Mansion House reforms web page

**Defined benefit schemes**

- **Options for DB schemes – call for evidence** – link

  The Government wants DB schemes to invest more in productive asset classes. But it seeks solutions that:

  – maintain security for benefits;

  – do not undermine trustees' fiduciary duties; and

  – maintain the stability of the gilts market.

  This is a call for evidence, rather than a consultation, and is short. There are therefore no proposals put forward. But there are questions around:

  – how to rectify underinvestment in productive assets compared with international comparators;

  – how to make surplus easier to access for employers, so as not to penalise unintended overfunding; and

  – the role of consolidator schemes, including the possibility of a public sector consolidator – perhaps the Pension Protection Fund (with questions then about suitable criteria for accessing the PPF in this way).

  The eventual outcome of this call for evidence could be very significant but it will clearly take time for proposals to be formulated.

- **DB consolidation - consultation response** - link

  There will be legislation put forward as soon as Parliamentary time allows for a new compulsory framework applicable to 'superfunds' and other relevant models for DB scheme consolidation. Further details will be in regulations.

  The content on the rules around schemes accessing consolidators says that there will be 'gateway' criteria set out in legislation as follows:

  – Schemes able to buyout are excluded.

  – As are those assessed as able to buy out in the "foreseeable future" (perhaps five years).

  – Schemes can access a consolidator if it increases the likelihood of full benefits being received. (This will mean a comparison of employer covenant with a consolidator's capital buffer.)

  – It may be possible to transfer to a consolidator as part of PPF assessment exit arrangements, though matters such as benefit reductions will need to be considered.

  Precise parameters will be developed based on the Pensions Regulator's currently applicable regime and guidance (see WHiP Issue 85), which has just been updated. Additionally, the existing bulk transfer legislation will apply.

  The Pensions Regulator will be the supervisory authority and will need to approve transfers to consolidators. Trustees will be required to seek an independent expert recommendation or (generally for smaller schemes) demonstrate that the cost of doing so would be disproportionate. Legal advice will be required. Submissions to the Regulator will need to append the advice. The Regulator will take a risk-based approach to deciding on applications to transfer.

  This consultation response has been long awaited but the legislation is still some way off. See WHiP Issue 74 for details of the 2018 consultation to which this is the Government's response.

- **Local Government Pension Schemes (England and Wales) investment – consultation** - link

  In his speech, the Chancellor said:

  > *"And finally, government must lead by example, so we will consult on accelerating the consolidation of Local Government Pension Scheme assets, with a deadline of March 2025 for all LGPS funds to transfer their assets into local government pension pools and ensure greater transparency on investments.*
  >
  > *To make sure we are delivering the maximum benefits of scale, we will invite views on barriers to achieving better investment returns across the LGPS as well as setting a direction that each asset pool should exceed £50 billion of assets.*
  >
  > *We will also consult on an ambition to double the existing local government pension scheme allocations in private equity to 10%, which could unlock a further £25 billion by 2030."*

  The last point was previously announced at the 2023 Spring Budget.

  The consultation summarises the proposals as follows:

  > *"First, the government sets out proposals to accelerate and expand pooling, with administering authorities confirming how they are investing their funds and why. While pooling has delivered substantial benefits so far, we believe that the pace of transition should accelerate to deliver further benefits which include improved net returns, more effective governance, increased savings and access to more asset classes. We propose a deadline for asset transition by March 2025, noting we will consider action if progress is not seen, including making use of existing powers to direct funds. Going forward, we want to see a transition towards fewer pools to maximise benefits of scale.*
  >
  > *Second, the government proposes to require funds to have a plan to invest up to 5% of assets to support levelling up in the UK, as announced in the Levelling Up White Paper (LUWP). This consultation sets out in more detail how the Government proposes to implement this requirement and seeks views on its plans.*
  >
  > *Third, the government is proposing an ambition to increase investment into high growth companies via unlisted equity, including venture capital and growth equity. The government believes there are real opportunities in this area for institutional investors with a long-term outlook, such as the LGPS.*
  >
  > *Fourth, the government is seeking views about proposed amendments to the LGPS's regulations to implement requirements on pension funds that use investment consultants. These amendments are needed to implement the requirements of an order made by the Competition and Markets Authority (CMA) in respect of the LGPS.*
  >
  > *Finally, the government is proposing to make a technical change to the definition of investments within LGPS regulations."*

  This consultation runs until 2 October 2023.

**DC & collective DC**

- **Value for money – joint DWP/FCA/TPR consultation response** - link

  The recent proposals on requirements for schemes to conduct value for money assessments on a prescribed basis and to report in relation to them (see WHiP Issue 100) will be implemented but with tweaks in some areas.

  There will be a new 'VFM Framework' covering investment performance, costs and charges, and quality of services. Schemes will be required to report metrics and comparisons with alternative schemes. They will not have to report against benchmarks.

  This will replace the current value assessment required of small schemes (i.e. those less than £100 million assets under management) and the requirement for all schemes to assess the value of costs and charges. It will apply to workplace scheme default arrangements first and then almost everything else later, perhaps on a staged basis (but not including SIPPs or EPPs).

  On investment performance, the Government has revised the proposals so that gross returns (i.e. ignoring charges) are to be reported (for at least the last one, three and five years), with costs and charges disclosed separately. Net returns are only to be reported for the most recent year. There are no other changes to the proposals on costs and charges, so it is confirmed that schemes will have to ignore any employer subsidy. The Government is still working on the difficult matter of developing metrics for assessing quality of services.

Schemes will be required to publish data in Q1 and their comparisons against alternative schemes by 31 October. Some schemes may need to change their scheme year in order to avoid doing work twice. There will be a standardised disclosure template (an example is included in the consultation response) but initially no central register.

Employers will need to be told if the scheme is assessed as not offering value for money. The Pensions Regulator will be given greater powers but these have not been spelled out.

The chair's statement requirement to report on costs and charges may be able to be abolished after the VFM Framework is introduced. First, it will be "managed down".

These new requirements will need primary legislation. A consultation is promised on detailed requirements to be set out in regulations and (for personal pensions) FCA rules. No timeline is given but in the consultation it was noted that the introduction of value for money rules for all schemes is a few years away. The Government would first like to see the existing requirements for small schemes result in a reduction in the number of such schemes.

- **Decumulation help - consultation and partial consultation response** - link

  There will be a new duty on schemes to offer decumulation services that meet the needs of a generality of their members, involving a product or suite of products. The consultation document is not very specific about what this might look like. It is, however, clear that the options will not be the same for every scheme. The options will include collective DC.

  Members will be able to take up the scheme's default service or exercise their 'pension freedoms'. This is designed to avoid members effectively having to choose between annuities and drawdown.

  Master trusts may be subject to this requirement first. Nest might be allowed to offer a full range of retirement income solutions, which is restricted under current legislation.

- **Small pots - summary of responses and consultation** - link

  The Government has settled on the 'multiple default consolidator' model for deferred small pots rather than 'pot follows member'. Under this model, a small number of authorised schemes will act as consolidators. When a saver with a small pot has stopped contributing and has more than one pension pot, there would be an automatic transfer of the small pot to one of their providers or to another one altogether (this is yet to be decided), unless the member chooses a different provider or opts out of the consolidation.

  A deferred small pot will be considered deferred when there have been no contributions for 12 months and small if its value is less than £1,000 (with that figure to be regularly reviewed). There will be no minimum value.

  DC master trusts will be required to apply to be default consolidators. (We take this to mean not that DC master trusts have to become default consolidators but that there will be an application process.) The FCA will be asked to consider how this system can work for contract-based pension providers.

  A central clearing house will be needed so that providers can check on savers' other entitlements. (The pensions dashboards ecosystem is not considered suitable for this purpose.)

  Providers will not be required to combine pots where they hold more than one account for the same individual.

  Primary legislation will be put forward, again when Parliamentary time allows, with detail in regulations on which there will be a formal consultation. A new delivery group will be formed to take this forward.

  In the longer term, there could be a 'lifetime provider' model, under which an individual has only one provider for their whole career to which any new employer must contribute, unless the member decides to switch. This would avoid the ongoing creation of small pots.

  See WHiP Issue 100 for more detail on the various options.

- **Collective DC - consultation response** - link

  This was a very technical consultation (see WHiP Issue 100) and the response therefore mainly includes comments on technical aspects. The key development, however, is that the Government is proceeding with proposals to allow collective money purchase schemes to be operated for unconnected employers, either as a 'whole life' scheme or 'decumulation only'.

There will be a consultation this autumn on draft regulations to extend collective DC to whole-life multi-employer schemes, including master trusts. A good deal more work still needs to be done as regards decumulation only schemes: this is to be progressed separately over a longer, unspecified timescale.

- **Analysis impact** - link

  This estimates the impact on member outcomes of the above DC proposals and the 2017 automatic enrolment review reforms (i.e. extending the automatic enrolment requirement to apply to younger workers and removing the qualifying earnings band lower threshold). A bill to provide the statutory framework for those automatic enrolment reforms is currently before Parliament but no timescale for implementation has been confirmed.

**General**

- **Trustee skills - call for evidence** - link

  This call for evidence, though framed more widely, also focuses on investment and the productive asset agenda. It looks at:

  - trustee skills and capability;
  - the role of advice; and
  - barriers to trustee effectiveness.

  The Government wants to know if trustees understand the full range of investment options open to them. It also asks if there should be a trustee registration requirement and/or accreditation framework and if they have enough time and support to carry out their role.

  The Government does not propose mandating professional trustees at this time (because there are not enough of them for the number of schemes that currently operate) but asks if there should be more rigorous requirements and/or mandatory accreditation. It also asks how to define 'professional trustee'.

  The call for evidence also asks about investment consultants' knowledge about alternative investments and what legal advice is given on risk tolerance: is there a culture of 'risk aversion'?

## Finance (No.2) Act 2023

The Finance (No.2) Bill has received Royal Assent and is now the Finance (No.2) Act 2023.

As previously reported, it contains legislation - all with effect from 6 April 2023 - to implement the following Spring Budget 2023 announcements:

- The abolition of the lifetime allowance charge.
- Measures regarding the operation of lifetime allowance protections.
- The freezing of the maximum tax-free pension commencement lump sum at £268,275 (except where a relevant protection applies).
- Taxation of certain other lump sums at the taxpayer's marginal rate of income tax.
- The increase of the annual allowance from £40,000 to £60,000.
- The increase of the money purchase annual allowance from £4,000 to £10,000.
- The raising of the fully tapered annual allowance from £4,000 to £10,000, with the 'adjusted income' threshold increased from £240,000 to £260,000. The full taper now applies to those with adjusted income above £360,000.

See WHiP Issue 101 for more detail and below for the proposals regarding the abolition of the lifetime allowance from April 2024.

The Act also provides for a payment to be made to individuals in pension arrangements which operate 'net pay' for tax relief (generally occupational pension schemes, including some master trusts) who do not pay income tax because their income does not exceed the personal allowance. They miss out on a tax relief contribution that would be made if they were in a 'relief at source' scheme. This will apply for the 2024/25 tax year but payments will not be made before April

2025. (See WHiP Issue 83 for an explanation of the issue.)

## Finance Bill clauses – lifetime allowance abolition etc.

HMRC has published draft legislation for next year's Finance Bill. The key pensions content relates to the abolition of the lifetime allowance from 6 April 2024. It includes significant changes to how benefits can be taken and will be taxed, though the most significant change may have been unintended. Comments are requested by 12 September 2023.

The other draft pensions legislation is for amendments to the relief at source legislation to provide for digitisation of claims from April 2025.

**Lifetime allowance abolition**

The HMRC proposals for abolition of the lifetime allowance involve the creation of two new allowances for an individual's maximum entitlement to tax-free benefits from registered pension schemes:

- the **'lump sum allowance' (LSA)** for certain lump sums paid to members (including pension commencement lump sums, trivial commutation lump sums, winding-up lump sums and uncrystallised funds pension lump sums, but not serious ill-health lump sums): the standard tax-free allowance for such lump sums will be fixed at £268,275, which is 25% of the current lifetime allowance; and
- the **'lump sum and death benefit allowance' (LSDBA)** for all lump sums paid to members and/or to others following their death before age 75: the standard allowance for such lump sums will be fixed at £1,073,100, which is the same as the current lifetime allowance.

Modifications increase these allowances for members with certain tax protections (such as members with lifetime allowance protections or other pre A-day transitional protections). The draft legislation provides for the ability to apply for fixed protection 2016 and individual protection 2016 to end on 5 April 2025.

There is no mechanism in the draft legislation for these figures to rise. Indeed, they are not expected to be increased.

There will no longer be the concept of a lifetime allowance excess lump sum. Broadly, marginal rate income tax will be payable when the total of the tax-free lump sums paid to or in respect of a member exceeds either of these allowances. So:

- Lump sum member benefits that must be tested against the LSA will all be subject to income tax once the LSA has been exceeded. (Note that this is in addition to separate restrictions that will apply to how much of any individual lump sum can be paid tax-free, e.g. in relation to a pension commencement lump sum or an UFPLS.)
- Lump sum death benefits and serious ill-health lump sums that must be tested against the LSDBA will be subject to the marginal rate income tax charge once the LSDBA is exceeded.

The new allowances only relate to lump sum payments: pension, annuity and drawdown payments will not count towards either allowance (but see 'Issue 3' below).

Under the proposals, most (but not all) benefit crystallisation events (BCEs) will be abolished. But schemes will need to make a check against the new allowances whenever making a lump sum payment and ensure that the correct tax is deducted if the relevant allowance has been exceeded. As drafted, this would include taking account of any tax-free lump sum previously paid to the member including as part of small lump sum payments (i.e. trivial / *de minimis* commutation lump sums, 'relevant accretion' lump sums and winding-up lump sums), for which no lifetime allowance check is currently needed. Requirements for reporting to HMRC and providing information to members have not yet been announced.

Provisions in the legislation referring to the member needing to have available lifetime allowance before certain authorised lump sum payments can be made would be removed.

These proposals are, of course, very different from both the old lifetime allowance regime and the 2023/24 transitional regime (see WHiP Issue 101).

Taxable death benefit payments above either allowance would not count as income for the purposes of the tapered annual allowance. (It seems that taxable lump sum payments made to a living member would count but this is probably not intended.)

It remains to be seen how DB pension input will be valued for annual allowance purposes in the final year of accrual: the legislation is altered to accommodate the fact that there will not be a BCE and the outcome here now depends on future regulations.

Some of the key issues arising from the proposals are:

**Issue 1 – DB pension freedoms?**

There is a major relaxation under the draft legislation to the form in which DB benefits can be paid as authorised payments from 6 April 2024, with the possibility of a very much larger lump sum being available at retirement. This is because the draft legislation removes any limit on the amount of pension commencement lump sum (PCLS) that can be paid as an authorised payment (from either a DB or DC scheme) and instead imposes the previous restriction as a limit on the amount that can be paid tax-free.

It would seem that DB schemes with rules that allow a member to commute pension up to the maximum amount allowed as an authorised payment (which is common) would automatically permit almost full commutation. (Or there might be trustee consent required, which may put trustees in a difficult position in determining whether or not to consent.) DC scheme rules may also suddenly permit a much larger PCLS, whether or not the scheme has chosen to offer an UFPLS, depending on how the rules are written.

Note, however, that a PCLS would still have to be paid alongside a pension, annuity or drawdown, so at least a nominal pension must still be paid or a nominal sum put into drawdown (which could then be withdrawn). Note too that GMP cannot be commuted unless first converted (but section 9(2B) rights for post-1997 contracted-out service can be).

DB members can, of course, already access 'pension freedoms' by transferring out but there are safeguards that then apply. These include the recently introduced statutory transfer conditions, designed to help stop scams, and the need for appropriate independent advice where the benefits are worth more than £30,000. Underfunded schemes are also protected from members withdrawing all benefits as a one-off sum as a result of provisions allowing transfer payments to be reduced with actuarial certification: there are no equivalent protections in relation to commutation lump sums.

This apparent (but limited and complicated) DB pension freedom was not publicised but did initially seem to have been intended: the policy paper accompanying the draft legislation said: *"Furthermore, this tax-free threshold will no longer restrict the overall value that can be taken as a relevant lump sum, and lump sum benefits which exceed this monetary cap will be taxed an individual's or beneficiaries' marginal rate."*. A comment in the explanatory notes (see paragraph 60) also supported that reading. It now appears, however, that HMRC is open to moving on this: HMRC Pension Schemes Newsletter 152 calls for help from the industry in finalising the approach, including for *"excess pension commencement lump sums, designed to accommodate the absence of the lifetime allowance excess lump sum and specifically whether restrictions may be necessary to prevent any unforeseen impact — it is not the government's intention to significantly expand pension freedoms"*.

**Issue 2 – Insufficient records**

Some members will, of course, have crystallised some benefits before 6 April 2024 and then crystallise others after that, in either the same scheme or different schemes.

Under the pre-2024 regimes, schemes (and insurers and the PPF) did not and do not need to keep records for more than six years of lump sums paid tax-free, or to report them to HMRC or members. And in many cases, schemes will in any event be reliant on receiving the relevant information from the member about the tax-free lump sum amounts the member has received. The issues may be even more acute when trying to assess how much of a member's LSDBA remains when making a lump sum payment following their death. There are therefore material practical issues in how schemes paying lump sums after 6 April 2024 will be able to perform the necessary checks to establish and deduct the right amount of tax.

**Issue 3 – Taxation of dependants' drawdown and annuity payments after member's death before age 75**

The policy paper indicates that there will be new income tax charges applicable to those who receive benefits in certain ways following the death of a member under age 75. The draft legislation published so far does not, however, cover this. The scenarios in question are those under current benefit crystallisation events 5C and 5D. These are where the member's death was before age 75 and:

- uncrystallised funds are designated to drawdown for a beneficiary;
- the member died with funds in a drawdown account and these are nominated to a beneficiary, also for drawdown; or

- uncrystallised funds are used to purchase an annuity.

Currently, such beneficiaries can leave the money invested in a drawdown fund and withdraw money free of income tax as they wish. If an annuity is secured, the income is currently tax-free. (This was all part of the 'pension freedoms' introduced in 2015.) It appears that from April 2024 income tax will be payable on such drawdown and annuity payments (which would make the position the same as for when the member dies aged 75 or over). The new income tax charge would not apply if the money were to be paid out as one lump sum without first having been designated as drawdown funds (assuming that the LSDBA is not exceeded). In those circumstances, however, the beneficiary would pay tax on future investment returns because the withdrawn money no longer benefits from the pensions tax laws. It would also, as the beneficiary's property, form part of their estate for inheritance tax purposes.

## Pensions dashboards

### Amending regulations

The Pensions Dashboards (Amendment) Regulations 2023 have been made. As previously reported, the staged scheme connection deadlines set by the original regulations are all revoked and there will be a single statutory connection deadline of 31 October 2026. But as yet unpublished Government guidance will include expected staged connection dates. Under the legislation, trustees will be required to "have regard to" this guidance: see below for the Pensions Regulator's interpretation of this requirement.

In-scope schemes are still all those with 100 or more non-pensioner members but this is now to be measured as at the end of the scheme year falling between 1 April 2023 and 31 March 2024.

There is a 12 month period from 9 August 2023 (the date the amending regulations came into force) in which applications to defer the scheme's connection deadline (now 31 October 2026 for all) can be made. This means any such application now needs to be made by 8 August 2024. The same strict criteria for the Secretary of State to grant a deferral will apply. The Government's guidance and application form for seeking approval for a deferral have been updated.

See our updated article '10 actions for getting to grips with pensions dashboards' for more on this topic.

### TPR guidance

The Pensions Regulator has updated the 'Failing to comply with pensions dashboards duties' section of its online pensions dashboards guidance to reflect the amending regulations. It includes the following new content:

> *"… You must have regard to the [DWP] guidance on staging timelines, and not doing so will also be a breach.*
>
> *You will be expected to demonstrate how you have had regard to the guidance. This means, but is not limited to, that:*
>
> - *You should not make final decisions about connecting and whether to follow the connection date until you have engaged with the guidance.*
> - *You must be able to demonstrate that you have adequate governance and processes for making such decisions. The reasoning for your decisions should be clearly considered and documented, as well as how relevant risks are identified, evaluated and managed.*
> - *You should make sure that you have access to all the relevant information before making decisions and acting upon them. Keep clear and accurate audit trails to demonstrate the decisions made, the reasons for them and the actions taken."*

### FCA rules

The Financial Conduct Authority has updated its rules to align with the regime for occupational pension schemes referred to above. FCA-regulated firms will also be required to have regard to the forthcoming guidance.

## BBC amendment power case

The High Court has held that a proviso in the BBC Pension Scheme amendment power, which protects the "interests" of active members, restricts changes to future service benefits as well as to accrued benefits.

The BBC is experiencing a very large pension cost differential as between its DC member employees and DB member employees. This is notwithstanding the ability to cap the pensionable element of pay rises for DB members or declare them non-pensionable, as confirmed by the Court of Appeal in 2017 in *Bradbury v BBC* (see WHiP Issue 66). The BBC therefore wished to explore options for reducing future service DB benefit provision or terminating it and replacing it with a different arrangement. The BBC stressed that it has not yet formulated any specific proposals.

First, the BBC needed to establish what can be done within the terms of the scheme's trust deed. The amendment power allows the trustee, with the BBC's consent, to alter benefits but a key proviso says that:

> *"no such alteration or modification shall … take effect as regards the Active Members whose interests are certified by the Actuary to be affected thereby unless –*
>
> *(a) the Actuary certifies that the alteration or modification does not substantially prejudice the interests of such Members; or*
>
> *(b) the Actuary certifies that to the extent to which the interests of such Members are so prejudiced, substantially equivalent benefits are provided or paid for by the BBC or the Trustees or provided under any legislation; or*
>
> *(c) the alteration or modification is approved by resolution adopted at a meeting of such Members convened by the Trustees"*

The question before the court was what the word "interests" protects. In particular, does it include:

> *"(a) the rights earned by past service up to the date of any amendment;*
>
> *(b) any linkage of the value of those past service rights to final salary;*
>
> *(c) the ability of members to accrue future service benefits under the Scheme on the same terms as provided for under the Scheme immediately before the amendment;*
>
> *(d) the ability of members to accrue any future service benefits under the Scheme; and/or*
>
> *(e) those members' interests in some other (and if so what) right or benefit."*

The judge, Adam Johnson J, held that it included all of (a) to (d) above and decided that it was not necessary for him to go further. Subject to any appeal, therefore, the BBC is not able to make any of the changes it might have wished to make, at least not by use of the scheme amendment power.

The question also arose whether the rule amendment made in 2000 to introduce the provision allowing the BBC to cap the pensionable element of pay rises or declare them non-pensionable, as considered in the *Bradbury* case, could have been validly made under the terms of the amendment power. An actuary's certificate under the terms of the amendment power had been given in respect of that amendment. The judge in the present case decided that there was nothing in the judgments of the High Court or Court of Appeal in *Bradbury* that prevented him from reaching his conclusions: essentially, he decided that the two cases concerned different questions.

The judge also ruled that the amendment power would not be being exercised for an improper purpose if it were used, subject to its terms, to change benefits without agreement to the changes having been reached between the BBC and affected members (whether by consent or collective bargaining).

## Trustee application to wind up employer approved

The High Court has approved the provisional decision of the trustee of the Biwater Retirement and Security Scheme to issue petitions to wind up the scheme's distressed sponsoring employers, which are active companies with employees who would, according to the judgment, likely lose their jobs. Members would also see reductions to their benefit entitlements if, as expected, the scheme were to enter the Pension Protection Fund.

Under the scheme trust deed, the trustee has power to wind up the scheme if the principal employer is in insolvency (as defined for the purposes of the clause) but not otherwise. The employers have failed to pay contributions under the scheme's schedule of contributions and separate agreements, some involving contribution deferrals, and were now considered unlikely to be able to do so. The trustee had taken a conservative approach to investment, in light of the circumstances, meaning that investment returns are not likely to improve the scheme's funding position. The trustee wished to bring about the insolvency of the employers so that it can trigger the scheme winding-up, following which it would expect the scheme to enter the PPF.

The judgment notes that the scheme is in 'scheme drift' (i.e. with increasingly less money to pay future benefit entitlements as full benefits are paid out and expenses are settled, meaning that members receiving benefits now are being treated more favourably than those who are due to be paid in the future) but also 'PPF drift' (i.e. members reaching normal pension age (or dying), leading to higher expected PPF compensation entitlements the longer it takes the scheme to enter the PPF).

The PPF participated in the case but the employers did not. The representative beneficiary appointed to represent the interests of members had concluded that there were no credible grounds to oppose the application.

The judge was satisfied that the trustee would be acting properly, including in disregarding the existence of the PPF and the 'PPF drift' factor when considering the best way forward, and approved its decision to petition for the employers to be wound-up.

## Contribution notice upheld

The Upper Tribunal has upheld the Pensions Regulator's decision to impose a £1.87 million contribution notice on an individual, Mr Anantkumar Shah, the former owner of the sponsoring employer of the Meghraj Group Pension Scheme. This involved consideration of the 'material detriment' test under the pre-Pension Schemes Act 2021 anti-avoidance legislation and the method for calculating the amount that can be demanded under a contribution notice.

The claim related to dividend and other payments made by the employer to its parent company, after disposal of its shares in a joint venture company, before entering a creditors' voluntary liquidation. As noted in the Regulator's press release, the Upper Tribunal ruled that the amount of a contribution notice in these circumstances is not limited to any loss suffered by the scheme – i.e. contribution notices in 'material detriment' cases are more than just compensatory.

The contribution notice was originally issued on a joint and several basis against Mr Shah and his nephew, Rohin Shah, for £3.69 million. Both appealed that decision but Rohin Shah's appeal was settled before the hearing. Mr Anantkumar Shah was not represented before the Tribunal.

## TPR investment guidance

A blog post by the Pensions Regulator's chief executive Nausicaa Delfas includes the following update on future investment guidance:

> *"Productive finance of course has a part to play in a diversified portfolio and new ways to access these opportunities are becoming available to trustees, such as Long Term Asset Funds.*
>
> *That is why we will soon update our DC guidance to reflect new duties on trustees to report on their policy on illiquid investments and to support trustees to make well-informed decisions. In the autumn, we will provide new guidance on investing in productive finance and update our existing investment guidance for DB and DC schemes. Our new DB funding code will also clarify where DB schemes are able to accommodate investment in growth assets, particularly for open and immature schemes."*

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