NORTON ROSE FULBRIGHT

Essential UK Pensions News

June 2021

Introduction

Essential UK Pensions News covers the key pensions developments each month.

Legislation

1. Pension Schemes Act 2021 starts to be implemented

A commencement order has brought some initial provisions of the Pension Schemes Act 2021 into force. These are mainly regulation-making powers so that the Government can make detailed laws within the wider framework set out in the Act.

In addition, the following provisions have become law from May 31, 2021:

- A requirement for the Pensions Regulator to publish a code of practice on contribution notices (see below) and
- Changes to Pension Protection Fund compensation rules in relation to fixed pension transfer credits.

A stronger Pensions Regulator

2. The Pensions Regulator consults on revisions to its contribution notices code of practice

The Pensions Regulator is consulting over updates to its code of practice 12. This explains in what circumstances it would expect to issue a "contribution notice". A contribution notice requires the recipient (which could be a company or individual) to pay a specified amount into a defined benefit (DB) pension scheme.

The code of practice is being updated because two new triggers for contribution notices (the "employer resources test" and the "employer insolvency test") are expected to be introduced from October under the Pension Schemes Act 2021. For further information please see our briefing.

The Regulator confirms that there are four circumstances in which it expects to issue a contribution notice if one or more of the tests is met and it considers it reasonable to do so:

1. Sponsor support is removed, substantially reduced or becomes nominal.
2. Weakening of the scheme's creditor position.
3. Some instances of paying a dividend or a return of capital by the sponsoring employer
4. Payments favouring other creditors of the employer over the scheme where no such sums are then due to those creditors.

The updated code also offers several examples of circumstances that would and would not result in a contribution notice, but these are short and uncontroversial.

For example, the Regulator says that the type of dividend payment that could result in a contribution notice being issued is a significant dividend paid to a parent company which:

- Is much larger than dividends paid in previous years,
- Exceeds the company's net profit generated during the same reporting period and
- Has a material impact on the "employer covenant" supporting the pension scheme.

However, it is not clear that only dividends that share some or all of these characteristics would be at risk of triggering a contribution notice. No guidance or comfort is offered about how the Pensions Regulator would view more "usual"/ordinary course dividends, or dividends which do not eradicate profit and/or which do not impact upon covenants.

The fact that dividends and returns of capital are specifically called out reinforces the point that companies with DB schemes should go through a careful decision-making process before taking such action and carefully document their rationale. Unfortunately the draft code does not really help companies to identify the line between "reasonable" dividends and "unreasonable" dividends.

More generally, it is worth being aware that no further clarification is offered on the most ambiguous parts of the new contribution notice tests, in particular what a "material reduction" means under the two new tests (see our briefings here and here). This is a significant gap.

The closing date for the consultation is July 7, 2021.

3. Annual Funding Statement 2021 outlines Pensions Regulator's expectations

The Pensions Regulator has published its annual funding statement for 2021. Although aimed primarily at DB schemes currently undertaking valuations, as in previous years the statement also contains key messages which are of more general relevance to trustees and employers.

The main context this year is again the uncertainty caused by the pandemic, with the Regulator recognising that, *"COVID-19 continues to have a profound impact on the economy, which is challenging employers and the pensions industry."*

The Regulator's expectations are consistent with last year's annual funding statement and again focus on covenant and risk management. The Regulator strongly encourages trustees to understand the impact that COVID-19 and Brexit have had on the employer covenant and to continue undertaking frequent and detailed covenant reviews where the impact has been material and the outlook remains uncertain. Corporate transactions should be scrutinised and mitigation robustly negotiated where appropriate.

Covenant leakage, in particular dividend payments, should be minimised if the employer's prospects are uncertain and paused altogether if the employer is looking to reduce or suspend deficit repair contributions.

Employers are encouraged to work collaboratively with trustees, for example by providing the detailed financial information they need to assess covenant, agreeing appropriate triggers and actions for scheme contingency plans, and – looking ahead to the new DB funding regime – agreeing a long term funding target and journey plan.

The 2021 statement again includes detailed tables, which set out specific expected behaviours which differ depending on the scheme's and sponsor's specific characteristics. These are broadly the same as last year's tables.

For more information on the key messages in the statement, please see our briefing.

4. Sanofi and Pensions Regulator agree support package for Sanofi DB schemes

The Pensions Regulator has confirmed in a regulatory report that it agreed an improved package of support for the Sanofi Pension Scheme with the trustee and Sanofi SA, avoiding the need to use its financial support direction (FSD) power to require financial support to be put in place for the scheme. The report sheds further light on the Regulator's view of when it will be reasonable to issue an FSD.

Background

The Sanofi DB scheme had an ongoing funding deficit of £279 million and an estimated buyout deficit of approximately £1.7 billion. Its UK employers were part of a profitable pharmaceuticals group with a French parent company, Sanofi SA.

The direct employer covenant had been gradually eroded through group restructures following M&A activity. The scheme's statutory employers had changed and parts of their business had been moved to other parts of the group, significant dividends had been paid by the employers to other group companies and the employers were now reliant to *"a significant degree"* on monies owed to them by other group companies which were not readily accessible.

Although some mitigation had been provided to the scheme, including some guarantee support and a non-legally binding dividend matching policy, the Regulator considered there was inadequate formal support from the wider group to compensate for this covenant weakening.

Regulator involvement

The report suggests that the Regulator had been engaged with the scheme for some time and had encouraged the trustees and employers to agree adequate mitigation through two actuarial valuations. However, when the 2018 valuation failed to resolve the matter to the Regulator's satisfaction it investigated whether to seek FSDs from other entities within the group, including Sanofi SA.

Focussing on the relationship between the Sanofi targets and the employers, and the benefits received by Sanofi from the employers over approximately 10 years, the Regulator concluded it had a strong case for an FSD.

Settlement

Ultimately the Regulator did not need to use its FSD power. Sanofi SA engaged with the Regulator and Trustee to agree enhanced financial support, including:

- A new guarantee package for the scheme from Sanofi SA,
- An upfront payment into the scheme of £37 million and
- A legally binding dividend matching agreement (100% matching).

Comment

This report is a useful reminder that even a profitable corporate group can become the focus of Regulator action if the direct covenant supporting the scheme is weakened by "covenant leakage" to the wider group, without adequate mitigation being provided to the scheme.

A recurring theme of Regulator publications in recent years has been that when paying dividends, the scheme needs to be treated fairly. It will be interesting to see whether pound for pound dividend-matching agreements of the kind agreed here will become a regular feature of future financial support packages negotiated with the Regulator's involvement.

It is also interesting to note that the Regulator had been planning to include non-UK companies within its FSD, despite the potentially greater difficulties of enforcement.

5. Pensions Regulator to recommence supervisory activity

The Regulator has issued an update on its activities during COVID-19 to say that it will now recommence its relationship supervision programme which was effectively paused during the pandemic.

It will contact schemes already involved in the programme to agree next steps. It will also be contacting additional schemes *"where we can make a difference to the outcome for savers"* to start a supervision process.

Governance

6. PMI accreditation to be introduced for non-professional trustees

Last year the Pensions Management Institute (PMI) launched an accreditation regime for professional trustees. This year it is launching an equivalent for lay trustees.

Lay trustees seeking accreditation will need to complete the Pensions Regulator's trustee toolkit and both parts of the PMI's certificate of pension trusteeship as well as undertaking at least 15 hours of continuing professional development each year.

While this accreditation is not compulsory, the Regulator has already expressed its support and accreditation seems to be becoming the norm for trustees. The Regulator already expects professional trustees to gain accreditation.

7. EU to UK transfers of personal data

The European Commission has formally adopted a UK adequacy decision. This will allow personal data to continue to be transferred from the EU/EEA to the UK after the temporary, post-Brexit "data bridge" expires at the end of this month, without the need for alternative transfer safeguards such as standard contractual clauses.

For more information, see our blogpost.

Transfers and scams

8. Pensions Ombudsman says schemes should implement revised scams guidance within one month

In a recent decision, the Pensions Ombudsman has revised his view about how urgently pension schemes need to comply with revised scams guidance, shortening the timescale for compliance to one month.

Background

The case concerned a pension transfer made by Aegon on behalf of Mr R, two days after the 2013 "Scorpion" anti-scams guidance was issued by the Pensions Regulator. That guidance was significantly stricter in terms of the Regulator's expectations for transferring scheme due diligence than the previous guidance.

Mr R subsequently complained that Aegon's due diligence had been inadequate because it had not complied with the stricter Scorpion guidance.

Decision

The Ombudsman agreed with Mr R that since no lead-in time was given for the Scorpion guidance and scams were a known problem, urgent compliance was expected. However, recognising that the updates needed to transfer processes and member communications were substantial, he considered approximately one month was the appropriate timescale for starting to comply with revised guidance.

Mr R's complaint was not upheld.

In reaching his decision the Ombudsman reviewed previous determinations in which he had indicated that a more lenient timescale of three months was acceptable for updating transfer processes after a change in guidance. He concluded it was appropriate to tighten this timing in the light of the evolving regulatory landscape.

He also suggested that if providers cannot meet this timescale they should consider suspending transfers while they update their processes or contacting the Regulator to request an extension to the transfer deadlines.

Comment

In the light of this decision, schemes should make sure they keep a watching brief for future guidance updates and ensure they are able to adapt their processes within the one-month timescale, or seek advice where this is not possible.

There is currently no lead time proposed for introducing the further conditions which are expected to apply under the (draft) statutory transfer regulations (e.g. red and amber flags). Schemes will need to plan for the new requirements in advance to ensure they are able to operate them immediately after they come into force. Trustees and administrators should also consider what to do about any transfers that are already underway at the point that the new regime comes into force.

Finally, schemes should also be aware that this decision may encourage further member claims in relation to past transfers that took place shortly after the Scorpion guidance was introduced.

Investment

9. Consultation response on DC consolidation and performance fees published

The Department for Work and Pensions (DWP) has published a response to two of its consultations:

- "Improving outcomes for members of defined contribution pension schemes" and
- "Incorporating performance fees within the charge cap".

It has also published final regulations, statutory guidance and a call for evidence about what best value for savers looks like and how greater scale in the DC market can be achieved.

The Government has confirmed its intention to bring the new regulations into force in October 2021. These will:

- Require smaller occupational DC schemes (with total assets of less than £100 million) to demonstrate that they offer value for members or otherwise wind up and move their members elsewhere and
- Require all occupational DC schemes (regardless of size) to publish net investment returns in their chair's statement.

Net investment returns will need to be published in the chair's statement for the first scheme year ending after October 1, 2021. However, the implementation date for the value for members assessment will be pushed back from October to "the end of this year", which means the first assessment will apply for the first scheme year ending after December 31, 2021.

The response also clarifies that hybrid schemes, where the total assets (DC and DB) are together below £100 million, are in scope but it is then only the DC element of the scheme that is subject to the assessment.

Amendments to existing regulations will from October 1, 2021 allow the smoothing of performance fees over 5 years so as to come within the charge cap.

The DWP has also flagged that it will do further work on whether and how "look-through" requirements should apply to investments in illiquid assets.

Comment

Now that final DC consolidation regulations have been published (subject to parliamentary approval), and given the reasonably short timeframes, occupational DC and hybrid schemes should consider whether they are within scope and plan for the necessary information gathering, assessments and reporting. Schemes that consider there is a risk the value assessment will not be met should start to consider options for their DC members.

10. Further consultation on charges for DC default funds

Following the DWP's decision at the start of 2021 to ban flat fees for default funds worth £100 or less, it is now consulting about what charging structures should be allowed for DC schemes that are used for auto-enrolment.

The DWP proposes that:

- The £100 "de minimis" threshold, below which flat fees cannot be charged, would come into force in April 2022 and apply to active and deferred members,
- If a member has multiple pots within the same provider's default arrangement, the assessment of whether a flat fee can be charged will be based on the combined value of those pots and
- A "universal" charging structure should be adopted, so as to help members compare different offerings. This would allow charging of a single percentage annual management charge, based on the value of the member's pot within the default fund. Combination charging would no longer be permitted.

There is a concern in the wider industry that these changes could make it uneconomical for providers (including potentially NEST) to run very small pots and that they could stop taking on this business.

11. Climate change disclosure requirements for schemes confirmed

The DWP has published its response to the second consultation on climate change governance and disclosure requirements for occupational pension schemes, along with updated regulations and statutory guidance.

The timetable for compliance remains the same, with the first wave of schemes needing to comply with the governance requirements from October 1, 2021 and

to publish a Taskforce on Climate-related Financial Disclosures (TCFD) report within 7 months of the next scheme year end. (For more information, see our briefing.)

The DWP has proposed some changes to the detailed requirements, following consultation feedback, for example:

- Schemes will have an extra year before they have to start reporting on so-called "scope 3 emissions" given the current lack of data,
- The threshold from which trustees have to carry out scenario analysis for DC default funds has been amended with the aim of narrowing the default funds which are in scope and
- The definition of "relevant contracts of insurance" has been amended to widen the scope of bulk annuity policies which will be excluded from the requirements.

The regulations now need to be approved by Parliament. In scope schemes should plan for how they can comply with the new requirements.

12. FCA consults on climate change disclosures for asset managers, life insurers, FCA-regulated pension providers and more listed companies

The FCA is consulting on extending climate change reporting requirements to asset managers, life insurers and FCA-regulated pension providers. This is part of the Government's roadmap to require TCFD-aligned climate risk assessment right across the UK economy by 2025. It follows on from the DWP's consultation on making climate change reporting mandatory for occupational pension schemes (see above).

The new requirements would apply to companies with £5 billion or more in relevant assets.

Companies in scope would be required to publish on their website an entity-level annual TCFD report on how they take climate-related risks and opportunities into account in managing or administering investments. They would also have to produce a set of consistent and comparable disclosures about their products and portfolios annually.

The aim is to improve the availability of climate change information and metrics along the investment chain, in particular for occupational pension schemes and master trusts. This improved information (once available) should assist trustees of such schemes with their own climate change disclosures.

The FCA is separately consulting on extending TCFD-aligned reporting to standard listed companies. This requirement already applies to premium listed companies.

The consultations close on September 10, 2021 and the FCA is expected to publish its final policy by the end of 2021.

13. Pensions Regulator blog on illiquids

David Fairs, policy director at the Pensions Regulator, has published a blogpost urging schemes to understand their liquidity requirements and to bear in mind that cashflow requirements can change rapidly with the fortunes of their sponsor and investments, particularly in times of market stress.

Fairs flags that the Regulator has *"become more interested in understanding how trustees manage their scheme liquidity risks and to ensure that trustees actively monitor and manage their scheme liquidity requirements".* The next consultation on the new DB funding code will include requirements in relation to the assessment and management of liquidity risk.

This seems like a cautionary footnote to the Government's initiatives to make it easier for schemes to invest in illiquids.

Fairs also acknowledges that the Regulator's draft single code of practice (which has just been consulted over) caused concern by setting out an expectation that *'Unless there are exceptional circumstances, governing bodies should ensure no more than a fifth of scheme investments are held in assets not traded on regulated markets.'* Fairs clarifies that this expectation was intended to be helpful as a guide but was not intended to limit the ability of schemes to invest in such assets *"once they have taken appropriate advice and understand their scheme's liquidity risks."*

Fairs indicates that this will be clarified in the next iteration of the single code.

Restructuring

14. Temporary insolvency protections extended again

Temporary, pandemic-related restrictions on the use of statutory demands and winding-up petitions against businesses have been extended once again, this time from June 30, 2021 to September 30, 20221. The restrictions were introduced by the Corporate Insolvency and Governance Act 2020 to give companies extra protection during the pandemic.

The restrictions also apply to creditors which are trustees of DB pension schemes and could make it harder for them to enforce outstanding debts, such as deficit repair contributions or "section 75" employer exit debts. These restrictions have now been in force since March 2020.

Key pensions cases

15. *Britvic* decision on pension increases

Overturning the High Court's ruling, the Court of Appeal has decided in favour of the employer in interpreting the wording of the Britvic DB pension scheme's pension increase rule.

Background

The Britvic scheme's rules said that pension increases should be applied by reference to capped RPI *"or any other rate decided by the Principal Employer".*

In 2020 the High Court decided that the words "or any other rate" had to mean "any higher rate". The judge decided that the deed introducing these words intended only to allow increases to the capped RPI rate and that using the word "other" (instead of "higher") was a drafting error. In reaching this decision, the judge had considered background materials including member communications.

Court of Appeal decision

The Court of Appeal decided that the words "or any other rate" did allow the employer to decide a lower rate of increase as well as a higher rate.

When construing a deed, the starting point is the actual language used. If the wording is clear, the court must apply it. A court can only correct the wording if there is an obvious mistake and it is clear from the document itself or other admissible evidence what the correction should be.

In this case the wording was unambiguous. It was not clear there had been a mistake in the drafting nor what the cure for the mistake would be. The fact that the drafting had been carried out by skilled professionals was also relevant.

Comment

While RPI/CPI cases such as this one will always be very fact- and rule-specific, this case helpfully confirms that the natural meaning of the words in scheme rules should be applied. The court will only interpret the rule differently if there is an obvious mistake on the face of the document and an obvious solution.

16. *Axminster Carpets* decision: arrears claims for underpaid benefits are not time-barred but could potentially be forfeited

The High Court has decided in *Punter Southall Governance Services Limited v Jonathan Hazlett (as representative defendant)* that arrears claims in respect of past underpayments of pension benefits are not time-barred under the Limitation Act. The underpaid benefits can potentially be forfeited but that will depend on the wording of the particular scheme rules.

Background

In 2013, a newly appointed trustee of the Axminster Carpets Group Retirement Plan (the Plan) identified that members had been underpaid pension increases for a number of years. The following questions arose:

- Could or should the arrears in respect of those past underpayments be forfeited under the Plan's rules
- Were claims for arrears in any event time-barred under the Limitation Act 1980?

Decision: Limitation

A claim for arrears of an underpaid pension benefit can be classified as *"an action by a beneficiary under a trust ... to recover from the trustee trust property ... in the possession of the trustee".* This means that no limitation period applies under the Limitation Act.

Decision: Forfeiture

The Plan had a forfeiture rule that specified that, *"If a Beneficiary fails to claim a benefit within six years of its becoming due, it shall be forfeited…"* unless the Trustee exercised a discretion effectively to disregard the forfeiture.

Among other things, Mr Justice Morgan held that the fact that most members could not be expected to know they had been underpaid did not prevent the benefit from being forfeited. However, where – as here – the trustee has a discretion in relation to forfeiture that fact could be relevant to how the discretion is exercised. The steer from the judge was that where the underpayments were not the fault of the member and the member could not reasonably have been expected to claim for them, the trustee should aim to use its discretion in the members' favour.

That said, the judge recognised that administrative difficulties in paying past benefits were a potentially relevant factor and advocated a proportionate response.

Comment

Mr Justice Morgan was the judge who decided the *Lloyds* GMP equalisation cases and his judgment builds on the conclusions he had reached on forfeiture clauses in that case.

It is clear that the question of whether past underpayments are forfeited will depend on the facts of each case and the wording of the particular pension scheme's forfeiture rule. The judge's comments on adopting a proportionate approach where administrative difficulties arise are likely to be welcomed by trustees in underpayment cases.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
Launch of MoneyHelper to consolidate the MaPS legacy brands (Money Advice Service, The Pensions Advisory Service and Pension Wise)	June 30, 2021	References to legacy brands in member communications should be updated following the re-brand.
Deadline for requesting final GMP data cuts from HMRC	July 31, 2021	Contact HMRC asap if final data cut not yet received.
Climate change risk governance and disclosure requirements start to apply	October 1, 2021 for first wave of schemes (assets of £5BN and above and all master trusts) October 1, 2022 for second wave of schemes (assets of £1BN and above) Requirements may be extended to smaller schemes (assets under £1BN) from late 2024 or early 2025 – TBC	Final regulations now available (subject to parliamentary approval). Develop project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis.

Development	Expected timing	Suggested action*
Requirement for trustees to publish an implementation statement online	For DB schemes: October 1, 2021 For DC and hybrid schemes (100+ members): As soon as accounts have been signed after October 1, 2020 (and no later than October 1, 2021)	Liaise with investment consultants and managers to gather relevant information to begin preparation of implementation statement and plan website publication.
New stronger powers for the Pensions Regulator (under the Pension Schemes Act 2021), including new criminal offences, come into force	October 1, 2021	Employers and trustees to carefully consider pension scheme ramifications of any corporate activity from point of view of new powers. Carefully document decisions. Review governance structures and policies/protocols to minimise risk of breaches.
Requirement for trustees of smaller DC schemes (assets of less than £100 million) annually to assess the value provided to their members and, where they conclude value not provided, to consider winding up	October 2021 (for scheme years ending after December 31, 2021)	Trustees to consider whether their DC scheme is in scope for the new requirements (final regulations now available, subject to parliamentary approval). Prepare for value assessment (if relevant) and for reporting in chair's statement and scheme return to the Pensions Regulator. If value assessment unlikely to be met, consider options for DC members.
Trustees of all DC schemes to report on net investment returns in the chair's statement	October 2021 (for scheme years ending after October 1, 2021)	Gather relevant information and prepare for reporting (final regulations now available, subject to parliamentary approval).
Statutory transfers: additional requirements	Autumn 2021	Review processes and assess trustee legal risk, in the light of the draft regulations, published for consultation May 14, 2021.
Compliance report for Competition and Markets Authority (CMA) regarding objective-setting for investment consultants and tendering of fiduciary manager appointments	January 7, 2022	Prepare the necessary documentation in good time and ensure it is submitted to the CMA before the deadline. In future, compliance may need to be confirmed to the Pensions Regulator, instead of to the CMA, through the annual scheme return. However, the regulations required to make this change have been delayed, probably to the first half of 2022.

Development	Expected timing	Suggested action*
New simpler annual benefit statements for DC schemes used for auto-enrolment	April 6, 2022	Keep watch for final rules and prepare new form of statement in time for April 2022 (if applicable). Consultation running from May 17 to June 29, 2021.
Reporting non-taxable pension death payments to HMRC using Real Time	April 6, 2022	Check scheme administrators are aware of and prepared for this new requirement.
Introduction of the £100 "de minimis" threshold, below which flat fees cannot be charged for DC auto-enrolment schemes	April 2022?	This is still TBC.
Notifiable events: changes to current regime	Spring 2022? Consultation on detailed regulations expected "later in 2021".	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	2022? Consultation ended May 26, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.
Climate change risk governance and disclosure requirements start to apply for: • asset managers, life insurers, FCA-regulated pension schemes • standard listed companies	2022 Consultations published June 22, 2021; final rules expected Q4 2021.	For noting only. Information from asset managers and investee companies may become more readily available which would help trustees with their own disclosures.
DB scheme funding: changes to requirements	Late 2022/2023	Consider scheme's long term objective and journey plan and discuss with employers. Look out for second consultation, expected late 2021, and consider implications with advisers.
Legislative framework for superfunds	2022/23	Look out for draft regulations and a consultation in due course.
Statutory framework for Collective DC schemes	2022? 2023? Consultation expected summer 2021	Target timing for regulations to come into force TBC

Development	Expected timing	Suggested action*
Pension Dashboards	From April 2023 Compulsory staged on-boarding of schemes, starting with the largest schemes with 1,000+ members	Look out for consultation, expected late 2021. Develop action plan for getting data ready for dashboard.
Rise in normal minimum pension age from 55 to 57	April 6, 2028	Look out for draft legislation (expected summer 2021). Take advice on which members benefit from the new protected pension age (of 55). Update member communications.
RPI reform and switch to CPIH	2030	Take advice on implications for DB schemes and necessary actions.

*** This table sets out some indicative action points that trustees and employers may wish to consider but should not be read as a comprehensive plan of action or client-specific advice. Should you wish to discuss these issues further, please contact the Norton Rose Fulbright LLP pension team who will be happy to assist.**

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