

# Pensions Bulletin

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Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Bridget Murphy](#)

## New law

### I. EMIR - extension of pensions exemption confirmed, with further extensions possible

1. Trustees should note the European Parliament's [announcement](#) (on 12<sup>th</sup> June, 2018) that :*“temporary derogation from the mandatory clearing of derivatives should be extended to apply for a further two years for a large majority of PSAs [pension scheme arrangements] (which could be extended by one further year) and for three years for small PSAs (which could be extended by two further years), as those do not present the same risks as the larger ones”*.
2. A provisional edition of [amendments](#) adopted by the European Parliament on 12<sup>th</sup> June, 2018 (amending Regulation [\(EU\) No 648/2012](#)) includes provisions on pensions designed to achieve this.
3. The amendments provide that if the Regulation enters into force after 16<sup>th</sup> August, 2018 then the exemption will apply retroactively.

**Comment (1):** The current transitional relief for pension schemes from the central clearing requirement is due to end on 16<sup>th</sup> August, 2018 (please see [Pensions Bulletin 17/01](#)). The relief applies to “OTC derivative

contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements” (Article 89 of Regulation [\(EU\) No 648/2012](#)).

**Comment (2):** The pensions exemption was introduced because pension schemes typically minimise their allocation to cash, holding higher yielding investments such as bonds or shares, in part to try to match more closely to the way their liabilities are valued and, in part, to try to reduce the cost of funding the scheme’s benefits.

**Comment (3):** Requiring pension schemes to clear OTC derivative contracts centrally would therefore lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of central counterparties, with a consequential increase in cost.

### II. PPF guidance on CVAs

1. Employers should note that the PPF has [published](#) (12<sup>th</sup> June, 2018) [guidance](#) on the approach to be taken when presenting a company voluntary arrangement proposal to the PPF.
2. The guidance notes that when a CVA proposal is lodged in court a PPF assessment period starts and the PPF

acquires the trustees’ voting right, under Section 137 of the Pensions Act 2004.

3. Where the pension scheme is likely to enter the PPF, the guidance summarises the key principles with which employers must comply if the PPF is to vote in favour of a CVA proposal, as set out in the PPF’s 2016 [guidance on employer restructuring](#). For example, the proposal should provide a significantly better return than an administration or liquidation.
4. The guidance on CVAs states that, where the pension scheme is to be rescued, the PPF will consider the likely post-CVA positions of other creditors *“and will require equitable treatment for the scheme”*.
5. For rescued pension schemes the PPF expects employers and their advisers to show, ahead of any PPF vote in favour of the CVA, how they have addressed numerous questions listed in the guidance.
6. The questions relate to each of the following areas:
  - the restructuring plan
  - the management team

- working capital and restructuring finance
- bank financing
- deficit reduction contributions
- employer dividends
- PPF drift
- PPF levy
- pension scheme de-risking
- exit route protection for the pension scheme
- preservation of contributions prior to the scheme rescue notice

### III. Climate change risk - Committee recommends mandatory reporting by 2022

1. Trustees should note that a Select Committee looking at environmental risk has made a range of recommendations which would impact on pension schemes, including a recommendation that mandatory climate risk reporting be introduced by 2022.
2. The Environmental Audit Committee has published a report<sup>1</sup> recommending that climate risk reporting should apply to

pension funds and their investment managers, as well as to listed companies, in order to ensure that trustees and investment managers actively engage with companies on the issue.

3. The report recommends that such reporting, on a comply or explain basis, be made mandatory by 2022 ‘for all large asset owners’.
4. The report also recommends that the Government should clarify in law that pension schemes and company directors have a duty to protect long-term value and should be considering environmental risks in light of this.
5. The report goes on to recommend that pension savers be given greater opportunities to engage with decisions about where their money is invested.
6. The Committee suggests that the DWP should propose that pension fund fiduciaries be required to seek beneficiaries’ views ‘actively’ when producing their statement of investment principles or investment strategy statements. The Committee also calls for the DWP to issue guidance on how to gather those views ‘robustly’.

## Tax

### IV. Finance (No.3) Bill

According to a [Written Statement](#) by Mel Stride (Financial Secretary to the Treasury), given on 11<sup>th</sup> June, 2018, the publication date for the draft Finance (No.3) Bill and accompanying draft supporting documents is expected to be 6<sup>th</sup> July, 2018.

## Cases

### V. Restrictions in LGPS investment guidance allowed

Public sector schemes may be interested in a Court of Appeal decision that the Secretary of State was acting within the scope of his powers when issuing guidance which included restrictions on Local Government Pension Scheme (‘LGPS’) investments.

#### A. Facts

1. The Secretary of State for Communities and Local Government had issued guidance on the LGPS’s investment strategy, stating that administering authorities must not:

*“.... [use] pension policies to pursue boycotts, divestment and sanctions [“BDS”] against foreign nations and UK defence*

<sup>1</sup> ‘Greening Finance: embedding sustainability in financial decision making’ - 4th June, 2018

*industries...other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government” nor “pursue policies that are contrary to UK foreign policy or UK defence policy”.*

2. This restriction operated even if an investment strategy with an element of boycott, divestment and sanction would not involve significant financial risk to the scheme and irrespective of member support.
3. Judicial review proceedings were brought, during which the High Court concluded that the Secretary of State had not acted for a pensions purpose when issuing the guidance and the guidance therefore fell outside of the proper scope of his statutory powers.
4. To read about the High Court ruling please see [Pensions Bulletin 17/13](#).

#### **B. Decision**

1. The Court of Appeal allowed the Secretary of State’s appeal.
2. The power<sup>2</sup> to give guidance must be exercised so as to promote the policy and objects of the legislation. But the discretion conferred was

wide, as was the range of considerations that may in principle be taken into account in its exercise.

3. The legislation clearly allowed an authority’s investment strategy to make provision for non-financial considerations and it was equally plainly within the scope of the legislation for the Secretary of State’s guidance to cover the extent to which such non-financial considerations may be taken into account by an authority.
4. There was nothing objectionable in the Secretary of State having regard to considerations of wider public interest, including foreign policy and defence policy, in formulating the guidance. It must be possible to have regard to the wider public interest when formulating the investment strategy for central government schemes.
5. The High Court had sought to establish whether the Secretary of State had acted for a ‘pensions purpose’. The Court of Appeal took a different approach but noted that, in any event, the fact that foreign policy and defence policy were considered when drawing up the

guidance did not mean that the guidance had been issued for a non-pensions purpose.

6. The Court of Appeal also rejected the respondents’ argument that the guidance was contrary to Article 18 of Directive 2003/41/EC (**‘the IORP Directive’**). The court confined its ruling to the current IORP Directive and not its replacement version, which refers to environmental, social and governance factors and has a transposition deadline of 12<sup>th</sup> January, 2019.
7. Article 18 of the IORP Directive did not prohibit interference by Member States with the freedom of institutions to take into account non-financial considerations.
8. The court also agreed with the High Court’s view that Article 18(4) prohibits Member States from subjecting investment decisions to any kind of prior approval or systematic notification requirements, but the giving of guidance was very different.

*The Queen on the application of Palestine Solidarity Campaign v Secretary of State for Communities and Local Government - Davis LJ, Hickinbottom LJ and Sir Stephen Richards*

<sup>2</sup> under the Public Service Pensions Act 2013

## Points in practice

### VI. HMRC new digital platform - newsletter

1. Pension scheme administrators should note the contents of HMRC’s latest [Manage and Register Pension Schemes service newsletter - 4 June 2018](#), which explains how the new digital platform for pension schemes is being phased in.
2. Those who are registering as a pension scheme administrator for the first time or who are applying to register a new pension scheme will now need to do so via the Manage and Register Pension Schemes service.
3. HMRC intends to migrate existing pension schemes and scheme administrators as part of phase 2 of the new digital platform’s introduction.
4. HMRC’S April edition of its newsletter anticipated phase 2 taking place in 2019 (please see [Pensions Bulletin 18/07](#)).

## Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Put in place register of	6 <sup>th</sup> April, 2016 and	<a href="#">Pensions Bulletin 16/03</a>

No.	Topic	Deadline	Further information/action
	persons with significant control (“PSC”) for trustee company where trustee is a corporate	ongoing requirement	
2.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 <sup>th</sup> July, 2016 at the latest and ongoing requirement	Trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes and some or all of the benefits are money purchase. <a href="#">Pensions Bulletin 16/04</a> .
3.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact.
4.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 <sup>th</sup> April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	Retroactive effect from 6 <sup>th</sup> April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.
5.	GMP equalisation		
5.1	Part 8 action brought by female staff, trustee and	15 <sup>th</sup> May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes

No.	Topic	Deadline	Further information/action
	Lloyds Trade Union		with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
		Trial window	Between 1 <sup>st</sup> June, 2018 and 31 <sup>st</sup> October, 2018
5.2	Government response to consultation on GMP equalisation published	13 <sup>th</sup> March, 2017	<a href="#">Pensions Bulletin 17/7</a>
6.	HMRC’s existing practice on VAT and pension schemes to continue indefinitely		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. <a href="#">Pensions Bulletin 17/18</a>
7.	DC bulk transfers without member consent: introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 17/18</a> <a href="#">Pensions Bulletin 18/05</a> <a href="#">Pensions Bulletin 18/08</a>
8.	Bulk transfers of contracted-out rights without consent: introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/01</a> <a href="#">Pensions Bulletin 18/05</a>
9.	Deferred debt arrangements become available	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/05</a>
10.	Disclosure of costs, charges and investments - new requirements	Mostly in force 6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/05</a>

No.	Topic	Deadline	Further information/action
11.	Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%)	6 <sup>th</sup> April, 2018 to 5 <sup>th</sup> April, 2019	
12.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6 <sup>th</sup> April, 2019 onwards	
13.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6 <sup>th</sup> April, 2016 contracts where payment	1 <sup>st</sup> May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.

No.	Topic	Deadline	Further information/action
	made on or after 1 <sup>st</sup> October, 2017. Applies where scheme used as “qualifying scheme” for auto-enrolment purposes and some or all of benefits are money purchase.		
14.	Data protection: New Regulation: EU General Data Protection Regulation in force	25 <sup>th</sup> May, 2018	<a href="#">Pensions Bulletin 16/05</a> <a href="#">Employment Bulletin 16/15</a> As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.  A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
15.	Existing EMIR exemption extension for pension scheme arrangements ends	16 <sup>th</sup> August, 2018	<a href="#">Pensions Bulletin 17/01</a>

No.	Topic	Deadline	Further information/action
	EU Parliament confirms further extension of pensions exemption, with further extensions possible	12 <sup>th</sup> June, 2018	See item I above
16.	IORP II transposition deadline	12 <sup>th</sup> January, 2019	<a href="#">Pensions Bulletin 16/11</a>
17.	Brexit	By 29 <sup>th</sup> March, 2019, unless extended	UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:  (a) European Council and UK unanimously decide to extend period, or  (b) UK withdraws, if able to do so, its Article 50 notice before 29 <sup>th</sup> March, 2019.

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](#) or your usual Slaughter and May adviser.

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