

Pensions Bulletin

28 September 2018 / Issue 13

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. Master trust regulations

1. Schemes will need to establish whether they fall within the statutory¹ definition of a master trust between 1st October, 2018 and 31st March, 2019, and should keep a watching brief beyond that date. The definition centres around the nature of benefits provided and the degree of connection between employers.
2. If the scheme is a master trust then an application seeking authorisation from the Pensions Regulator will need to be made by the trustees by 1st April, 2019, the success of which will depend on meeting the criteria set out in legislation.²
3. Broadly, the master trust definition catches occupational pension schemes providing money purchase benefits (apart from AVCs) if they are used, or intended to be used, only by employers which are **not** connected with each other.
4. The legislation³ sets out those circumstances in which employers are to

¹ Pension Schemes Act 2017, Section 1

² Section 3 of the Pension Schemes Act 2017 (as modified, set out in Schedule 2, paragraph 8)

be regarded as connected. The scenarios listed include, for example:

- 4.1 where one employer is, or has been, a group undertaking in relation to another employer (under section 1161(5) of the Companies Act 2006);
- 4.2 where one employer holds or controls (or has done in the previous 6 months) at least 33% of the other employer;
- 4.3 where one employer is, or has been in the previous 6 months, engaged in a joint venture with the other employer; or
- 4.4 following a transfer of active members from one employer to the other on a TUPE transfer (for non-TUPE transfers, connection will be limited to 6 months, starting from the transfer date).

II. ESG and SIPs - Government response

1. Trustees should note that a number of changes are coming up the tracks concerning their duties in relation to the

³ Section 1 of the Pension Schemes Act 2017 and regulation 3 of SI 2018/983

⁴ *Clarifying and strengthening trustees' investment duties - Government response - 11th September, 2018*

scheme Statement of Investment Principles ('SIP').

2. Trustees will need to move reasonably quickly once the Regulator's best practice guidance on the subject is available (expected by the end of November, 2018), as the Investment Regulations (SI 2005/3378) require them to obtain investment advice and consult the employer ahead of revising the SIP.
3. The DWP's [response](#)⁴ to its June 2018 consultation confirms that a number of changes will be made to the Investment and Disclosure Regulations relating to Environmental, Social and Governance ('ESG') investment considerations.
4. Under amending regulations⁵ all trustees will need to have updated their SIP by **1st October, 2019** to set out:
 - 4.1 how they take account of financially material considerations, including ESG and climate change considerations, over the length of time that the trustees consider is

⁵ [The Pension Protection Fund \(Pensionable Service\) and Occupational Pension Schemes \(Investment and Disclosure\) \(Amendment and Modification\) Regulations 2018](#)

- needed for the scheme investments to fund future benefits;
- 4.2 their policies in relation to stewardship; and
 - 4.3 the extent (if at all) to which “non-financial matters” (broadly, members’ and beneficiaries’ views, including their ethical views and views on social and environmental impact and their present and future quality of life) are taken into account.
5. The response notes *“it is our policy - and will remain our policy - that trustees have primacy in investment decisions. Whilst they should not necessarily rule out the ability to take account of members’ views, they are never obliged to do so”*.
6. Trustees of “relevant schemes” (schemes providing non-AVC money purchase benefits) will need to do the following by **1st October, 2019**:
- 6.1 publish their SIP on a public website; and
 - 6.2 update their default SIP to set out:
 - (a) how they take account of financially material considerations, including ESG/climate change, and any policy on non-financial matters, and

- (b) for schemes with 100 or more members, their policies in relation to stewardship.
7. **From 1st October, 2019** trustees’ policies on financially material considerations, non-financial matters and stewardship will need to be included in the next scheme annual report.
8. **From 1st October, 2020**, trustees of “relevant schemes” (see above) will need to:
- 8.1 include in their annual report a statement setting out how they implemented the policies set out in their SIP; and
 - 8.2 publish this on a public website and inform members of its availability.
9. According to the Government response, the Pensions Regulator is to publish “high level” guidance on various aspects of the above changes (including best practice examples) by the end of November, 2018.

III. Insolvency and corporate governance consultation - Government response

The Government has published its response to the consultation on insolvency and corporate governance. To read more about the consultation (issued in March, 2018) please see [Pensions Bulletin 18/07](#).

A. Dividends

1. There will not be an automatic bar on companies paying dividends where a pension scheme is in significant deficit. However, the Government plans to consider *“ways in which directors could provide stronger reassurances for shareholders and stakeholders that proposed dividends will not undermine the affordability of any deficit reduction payments agreed with pension fund trustees”*.
2. The Government wants more companies to disclose, and explain the rationale for, how they are allocating surplus revenue between shareholders, DB pension schemes and other demands. The Government plans to legislate if investor pressure and recently approved company reporting requirements do not deliver ‘sufficient progress’.

Comment (1): The Pensions Regulator’s 2018 Annual Funding Statement focuses on trustees negotiating *‘robustly to secure a fair deal’* when assessing affordable contributions in light of distributions to shareholders (please see [Pensions Bulletin 18/06](#)).

Comment (2): In its 2017 Annual Funding Statement (please see [Pensions Bulletin 17/10](#)) the Regulator expressed concerns about employers paying dividends in excess of deficit reduction contributions, promising

that it would consider opening an investigation unless the recovery plan was ‘relatively short’ and underpinned by an investment strategy which was not excessively reliant on investment performance.

B. Stewardship

1. The Government plans to establish how investment mandates given to asset managers can, as a matter of good practice, make explicit reference to stewardship.
2. It also plans to examine whether a new mechanism could be established through which institutional investors can escalate their concerns about a company or its directors.

C. Phoenixing

1. The Government intends to amend the Company Director Disqualification Act 1986 ‘when legislative time allows’ to introduce powers to investigate directors of dissolved companies where they are suspected of having acted in breach of their legal obligations.

2. The intention is that this should counteract the problems arising from ‘phoenixing’, where a company is dissolved and another is created soon after, often in a bid to avoid liabilities.

Insolvency and corporate governance - 26th August, 2018

IV. Written statement on dashboard, Superfunds and CDC

A *Written statement - HCWS933* (4th September, 2018) made by Guy Opperman⁶ confirms that:

1. there will be an ‘*an industry-led dashboard, facilitated by government*’;

Comment (1): The dashboard(s) project is likely to raise many issues. It is not yet clear who would regulate such a project once it is up and running.

Comment (2): Any dashboard initiative will require the mass communication of data from schemes to one or more dashboards. This would presumably have implications for GDPR privacy notices which have already been issued, and possibly provide scope for cyber security problems.

Comment (3): There is also likely to be at least some measure of confusion for members (for example, if member has several different types of benefit with different assumptions built in). In that event, members are likely to go back to the scheme with queries.

2. the Government is ‘investigating how to facilitate consolidation of DB schemes, including looking at the establishment of ‘superfunds’ - a consultation is planned for Autumn, 2018; and
3. the Government intends to launch a formal consultation on Collective Defined Contribution Schemes in Autumn, 2018.

V. PPF compensation cap : U-turn on aggregating benefits for actives and deferreds

1. The Government has decided that it will not enable the PPF to continue applying the PPF compensation cap in a way which aggregates (for active and deferred members) ‘relevant fixed pension’⁷ transferred-in from another scheme with pension accrued under the scheme entering the PPF. As a consequence, 2 separate caps will apply to people affected.

Comment: The Government issued a consultation in July 2018 because of a

⁶ Parliamentary Under Secretary of State for Pensions & Financial Inclusion

⁷ broadly, where the pension transferred-in is not converted into added years

High Court ruling (*Beaton*, which is subject to appeal) which concluded that the PPF should not aggregate benefits in that way. To read about the consultation and *Beaton*, please see [Pensions Bulletin 18/12](#) and [Pensions Bulletin 17/18](#).

2. The PPF will be allowed to continue aggregating ‘relevant fixed pensions’ for other purposes, however (such as the payment of survivor benefits, revaluation and post-payment increases). Regulations⁸ on the point have been made and will come into force on 2nd October, 2018.
3. The Government U-turn has arisen because of the recent CJEU ruling⁹ that PPF compensation must equal at least 50% of each recipient’s benefit. The Government is concerned that aggregating benefits when applying the PPF compensation cap could have resulted in some individuals receiving compensation below that 50% threshold.

⁸ [The Pension Protection Fund \(Pensionable Service\) and Occupational Pension Schemes \(Investment and Disclosure\) \(Amendment and Modification\) Regulations 2018 \(SI 2018/988\)](#)

Cases

VI. CJEU rules that PPF compensation must equal at least 50% of each recipient’s benefit

The CJEU has decided¹⁰ that PPF compensation must equal at least 50% of each recipient’s benefit under the scheme.

People who have been involved in running a DB pension scheme may find themselves revisiting calculations, and consequent decisions or exercises (such as scheme buy-outs or wind-ups), which were based around what had been understood to be PPF compensation levels. The precise scope of legislative changes that will need to be made as a result of this decision will be key.

The PPF has issued a [press release](#) about the implications for PPF and FAS members, stating that it ‘*will work to implement the judgment as quickly as possible. We now need to consider the ruling carefully to understand what action we can take prior to legislative change and / or the conclusion of UK court proceedings.*’

⁹ *Hampshire v The Board of the Pension Protection Fund - please see item VI below*

A. Facts

1. Mr Hampshire was 58 years old when his employer (T&N) became insolvent. Normal pension age under the scheme was 62 and his pension was reduced by 67%.
2. Article 8 of the Insolvency Directive¹¹ requires Member States to ensure that when an employer enters insolvency its employees’, and former employees’, occupational pension scheme rights are protected. The rights in question are to immediate or prospective entitlement to old-age benefits, including survivors’ benefits.
3. Mr Hampshire argued that Article 8, as interpreted in the cases of *Robins* and *Hogan*, meant that each employee should be guaranteed at least half of their benefits under the occupational pension scheme. The PPF argued that Article 8 simply required compensation of at least 50% of the value of employees’ benefits on average.
4. Obstacles to reaching a 50% level of provision for every individual under

¹⁰ *Hampshire v The Board of the Pension Protection Fund - Case C-17/17 - 6th September, 2018*

¹¹ (2008/94/EC)

the PPF compensation rules were identified as:

- 4.1 the cap on compensation for individuals under normal pension age when the employer becomes insolvent; and
 - 4.2 restricted indexation provision.
5. The Court of Appeal asked the EU Court of Justice ('CJEU') to decide whether Article 8 requires that each employee must receive at least 50% of the value of their accrued rights. The Court of Appeal's preliminary view, and the Opinion of the Advocate General, was that it does.

Comment: To read about the Court of Appeal ruling and about *Robins* and *Hogan*, please see [Pensions Bulletin 16/11](#). To read about the Advocate General's Opinion, please see [Pensions Bulletin 18/08](#).

B. Decision

1. Article 8 requires Member States to guarantee compensation for each individual employee of at least 50% of the value of their accrued entitlement under an occupational

pension scheme in the event of the employer's insolvency.

2. That compensation must take into account the envisaged growth in the pension throughout the entire period of payment, so that the amount guaranteed does not fall below 50% of the initial value accrued for one pension year.
3. The CJEU also concluded that employees may invoke Article 8 directly against the Board of the PPF.

VII. PPF - Swiss legal opinion did not limit guarantee

DB scheme trustees, employers and guarantors may be interested in a High Court decision¹² which concluded that the guarantor's obligation under a Type A guarantee was not limited to '*the freely disposable shareholder equity*' of the guarantor, despite an Opinion to that effect given by a Swiss law firm.

A. Facts

1. A deed of guarantee was executed in favour of the trustee of the Caribonum Pension Scheme ('**the Scheme**'), so as to reduce the employer's PPF levy. The guarantee related to the employer's liability to

make payments to the Scheme, capped at £12.6million. The employer was registered in England and the guarantor was registered in Switzerland - their parent was registered in Malaysia.

2. The Scheme closed to future accrual in 2012 and entered a PPF assessment period in January, 2018, following the employer's administration. The employer went into liquidation and, as part of a pre-pack arrangement, its assets were assigned to the Scheme trustee, in part settlement of debts owed to it by the employer. The PPF lodged a proof of debt in the employer's liquidation for the £35.5million Section 75 debt.
3. The trustee claimed £4.3million from the employer under the guarantee.
4. The deed of guarantee included a representation given by the guarantor to the trustee, stating that the deed was legally binding, valid and enforceable subject to:

"Any other reservations or qualifications of law contained in any legal opinion delivered to the [employer], the [trustee] or

¹² *Caribonum Pension Trustee Ltd v Pelikan Hardcopy Production AG* - 6th September, 2018

the [guarantor] in respect of this Deed.”

5. An Opinion provided by a Swiss law firm, addressed to the trustee, was annexed to the guarantee. The Opinion concluded that the guarantee’s enforcement was ‘limited to the freely disposable shareholder equity’ of the guarantor.
6. The trustee accepted that the claimant had no real prospect of showing that it had distributable reserves.

B. Decision

1. Summary judgment was granted in the trustee’s favour. There was no basis for departing from the clear words of the guarantee, which were unambiguous and entirely unqualified.
2. The reservation expressed in the legal Opinion was limited to the question of enforceability in Switzerland. The guarantee expressly provided that it was governed by English law and the guarantor’s liability under the guarantee was unaffected by its position under Swiss law.

3. Any inability to enforce judgment in the trustee’s favour did not render the claim an abuse of process. Similarly, any commercial pressure on the guarantor’s parent to step in and satisfy the judgment would not amount to an improper collateral advantage sought by the trustee.
4. The PPF’s claim in the employer’s liquidation for the Section 75 debt was irrelevant to the question of whether the trustee was entitled to judgment by reference to the guarantee.

Points in practice

VIII. Master trusts - Pensions Regulator publications

The Pensions Regulator has published the following documents regarding the new master trust authorisation and supervision regime which will come into operation on 1st October, 2018¹³:

1. guidance on its [decision-making procedure](#), to be followed when a master trust applies for authorisation, setting out when an oral hearing or decision meeting will be held;
2. a publication on its recent dummy run exercise for master trust authorisation

applications - [Readiness review: lessons learned](#); and

3. [authorisation forms and guidance](#).

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 persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016 and ongoing requirement	Pensions Bulletin 16/03
2.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th 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. Pensions Bulletin 16/04 .
3.	Cyclical re-enrolment	Within 6 month window by	For example employers with a 1st July, 2015 staging date must complete cyclical re-

¹³ The Pension Schemes Act 2017 (Commencement No 2) Regulations 2018 (SI 2018/965)

No.	Topic	Deadline	Further information/action
		reference to third anniversary of employer's staging date	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 6th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	Retroactive effect from 6th 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 Lloyds Trade Union	15th May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
		Trial commenced	5th July, 2018
5.2	Government response to consultation on GMP equalisation published	13th March, 2017	Pensions Bulletin 17/7
6.	HMRC's existing practice on VAT and pension schemes to		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Pensions Bulletin 17/18

No.	Topic	Deadline	Further information/action
			continue indefinitely
7.	DC bulk transfers without member consent: introduction of easements	6th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05 Pensions Bulletin 18/08
8.	Bulk transfers of contracted-out rights without consent: introduction of easements	6th April, 2018	Pensions Bulletin 18/01 Pensions Bulletin 18/05
9.	Deferred debt arrangements become available	6th April, 2018	Pensions Bulletin 18/05
10.	Disclosure of costs, charges and investments - new requirements	Mostly in force 6th April, 2018	Pensions Bulletin 18/05
11.	Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%)	6th April, 2018 to 5th April, 2019	
12.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6th April, 2019 onwards	

No.	Topic	Deadline	Further information/action
13.	Data protection: New Regulation: EU General Data Protection Regulation in force	25th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15 As data controllers, trustees need to ensure that compliance with the EU General Data Protection Regulation is achieved. A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
14.	Existing EMIR exemption extension for pension scheme arrangements ends	16th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 18/12
	EU Parliament confirms further extension of pensions exemption, with further extensions possible	12th June, 2018	Pensions Bulletin 18/10
15.	Master trusts new authorisation and supervision regime starts	1st October, 2018	Pensions Bulletin 18/12
16.	IORP II transposition deadline	12th January, 2019	Pensions Bulletin 16/11

No.	Topic	Deadline	Further information/action
17.	Brexit	By 29th March, 2019, unless extended	UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless: <ul style="list-style-type: none">(a) European Council and UK unanimously decide to extend period, or(b) UK withdraws, if able to do so, its Article 50 notice before 29th 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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