ALLEN & OVERY

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Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

PPF 2020/21 levy documents | Protecting pensions on employer insolvency: *Bauer* | TPR calls for early engagement and cooperation | Time limits for part-timer pension claims: *Miller* | TPR: new leverage and liquidity research | FCA: IGCs, ESG and value for money | Discrimination: *McCloud* update | DB/Hybrid scheme return | Reminder: changes to survivor benefits

PPF 2020/21 levy documents

The Pension Protection Fund (PPF) has published its final levy determination for 2020/21 together with the associated guidance and policy statement. The key deadlines are available here. The levy estimate is confirmed at £620 million, and the levy scaling factor and scheme-based levy multiplier will remain unchanged. The PPF did not propose major changes to the rules this year, but some points to note include:

- **Contingent assets**: the PPF has made changes around guarantor strength – this includes its new guidance on the content of a guarantor strength report (which has been amended in response to consultation feedback). The PPF has also made changes in respect of guarantor-employers and service companies.
- **GMP equalisation**: the PPF will now allow employers to request an adjustment to the insolvency risk calculation where: a specific amount that relates to a GMP equalisation adjustment can be identified in accounts used to calculate monthly scores; and allowing the adjustment would result in a) the company being viewed as reporting a pre-tax profit rather than a loss, and b) a change of Mean Score to a levy band with a lower levy rate. The PPF will produce a simple form and guidance; requests should be made within 28 days of Mean Scores being published (expected to be in early July 2020).

  The PPF has also updated its information note for actuaries preparing section 179 valuations: section 1 has been updated to clarify that the PPF expects valuations to include an interim allowance for GMP equalisation where that valuation has an effective date after the *Lloyds* judgment; and section 9 has been updated to refer to block transfer certification wording. It now states that this certification wording will not be amended, and that actuaries submitting both section 179 and block transfer valuations may rely on this note.

The PPF has a new online portal and will shortly be sending out registration emails to trustees and other registered users of the Experian portal. It encourages schemes and employers to engage with their scores, to check that any difference in scores does not reflect incorrect information. The PPF has not been able to migrate information (such as accounts data) for employers who self-submit this to Experian – those affected will need to submit data ready to be used in scoring from April 2020.

The PPF has also launched a consultation on changes to its insolvency risk scoring methodology from levy year 2021/22. This is open until 11 February 2020 (press release available here). The PPF currently estimates that 20% of schemes would see increased levies on the proposed basis, particularly those with employers on scorecard 1 (Non-Subsidiaries £30m+ and Large Subsidiaries). Further consultations on the levy framework and rules for 2021/22 will follow.

Protecting pensions on employer insolvency: *Bauer*

The Court of Justice of the European Union has ruled that although the Insolvency Directive does not require rights to be guaranteed in full (that is, in the case of the UK, the Pension Protection Fund does not have to provide 100% of an individual's expected scheme benefits), a reduction in benefits cannot be 'manifestly disproportionate'. The court considered that a reduction is manifestly disproportionate where, even though the individual is in receipt of at least 50% of their acquired rights, as a result of the reduction the individual is living, or would have to live, below the at-risk of poverty threshold for that member state (as published by Eurostat): *Bauer*.

The PPF has announced that it is discussing the decision with the government; in the meantime it will continue to make payments at existing levels, and to assess and increase payments to those affected by the *Hampshire* ruling.

TPR calls for early engagement and cooperation

The Pensions Regulator (TPR) has used its latest compliance and enforcement bulletin to call for trustees to engage early with TPR on corporate transactions. The press release is available here. The enforcement section of the bulletin highlights that as well as issuing 18 formal 'section 72' information gathering notices during the quarter, TPR prosecuted two individuals for failing to respond to a section 72 notice. TPR has urged trustees and employers to respond to its enquiries rather than waiting for a formal notice.

TPR also reports on auto-enrolment inspections of some of the UK's largest employers to monitor ongoing compliance, assess risks, and understand operational capabilities.

Time limits for part-timer pension claims: *Miller*

The Supreme Court has unanimously held that pension claims by part-time judges under the Part-time Workers' Directive, as applied by regulations (the PWTR), were not made out of time: *Miller*.

The case is the latest development in long-running litigation over pensions for part-time judges. The appellants had each held one or more appointments as a fee-paid part-time judge, and illustrated various combinations of part-time and full-time appointments over a judicial career. In November 2018, the Court of Justice of the European Union handed down its decision, in the related case of *O'Brien*, about the periods of service to be taken into account when calculating the pension (WNTW, 12 November 2018). Following this decision, the government argued these claims were out of time because they had been lodged more than three months after the end of a part-time appointment.

The PTWR provide that the time limit for a complaint is three months 'beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them'. The Supreme Court agreed with the appellants that less favourable treatment took place (or would take place) at the point of retirement – a complaint could be made about the failure to provide a pension both during the period of service and at the point of retirement. The government's statement in response to the decision is available here.

TPR: new leverage and liquidity research

TPR has published new research on investments by some of the largest UK DB schemes. The leverage and liquidity survey was designed to assess the potential for systemic risks arising from the use of leverage in DB pension schemes, and includes a number of statistics on the funding and investment allocation of these schemes which may be of interest to trustees of other schemes.

According to the survey, there has been a significant increase in the number of schemes developing strategies to match scheme cashflows, often with reliance on contractual cashflows and/or an expected illiquidity premium. Almost half of schemes had increased their use of leverage in the last five years. TPR has commented that although many schemes are well-diversified and are actively monitoring potential risks, some are seeking higher investment returns through riskier investment strategies, which could be damaging in the event of adverse economic shocks. Risk may be concentrated within individual schemes, and TPR will be considering further how best to address these issues. Trustees should note that TPR continues to take a cautious approach to illiquid investments, commenting that some longer-term illiquid investments may not adequately allow for climate change-related risks.

FCA: IGCs, ESG and value for money

The Financial Conduct Authority (FCA) has published changes to the remit of Independent Governance Committees (IGCs) that provide independent oversight of personal pension schemes (including Governance Advisory Arrangements which apply as a proportionate alternative for firms in some circumstances). The changes include a new duty to consider and report on their firm's policies on environmental, social and governance (ESG) issues, 'non-financial matters' (including clients' ethical concerns on ESG) and stewardship; and a new duty to oversee the value for money of investment pathway solutions for drawdown. The changes come into force on 6 April 2020 (subject to some transitional provisions).

The FCA's policy statement notes that it does not expect IGCs to consider and report on every policy of the firm on financially material considerations, but to exercise their judgement and prioritise issues based on the risk of harm to consumers. The FCA expects IGCs to have sufficient collective expertise to form judgements on the firm's policies and to raise concerns where appropriate – it recognises that IGCs may need to be 'upskilled' through training of existing members, recruitment of new members with expertise, and use of external experts at meetings.

The FCA has also provided an update on other work, including its report on the effectiveness of IGCs (expected in Q2 2020), its work with TPR on common principles and standards for the assessment of value for money (ongoing), and its policy statement on transaction cost disclosure (WNTW, 4 March 2019) and consultation on climate-related disclosures (both expected in early 2020).

Discrimination: *McCloud* update

The Fire Brigades Union (FBU) has published an update on the remedy for firefighters in this long-running litigation. The Court of Appeal had earlier ruled that transitional scheme closure arrangements in relation to the Judicial Pension Scheme and the Firefighters' Pension Scheme were unlawfully discriminatory, and the government had confirmed that it intended to remedy the difference in treatment across public service schemes. According to the FBU, the tribunal has made an interim declaration that certain claimants are entitled to be treated as members of the closed scheme – this is to cover circumstances such as retirement on the grounds of ill-health. More details are available here; the final declaration is expected in summer 2020.

DB/Hybrid scheme return

TPR has published its example scheme return form for DB and hybrid schemes for 2020. There are no significant changes from the previous year. An updated version of the checklist for schemes has not yet been published.

Reminder: changes to survivor benefits

Opposite-sex civil partnerships are now taking place in England and Wales, and new regulations for opposite-sex civil partnerships and same-sex marriage in Northern Ireland come into force on 13 January 2020. Legislation to permit opposite-sex civil partnerships in Scotland is in progress.

Trustees should check whether scheme rules and literature need to be updated (and should verify the coverage of any buy-in policies, if applicable).

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