PENSIONS NEWS

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INTRODUCTION

Welcome to DLA Piper's Pensions News publication in which we report on recent developments in pensions legislation, guidance and case law, as well as keeping you up to speed on what to look out for in the coming months.

This edition brings you the developments from April 2014 including the following.

- **Budget and Finance Bill:** a follow-up announcement from HM Treasury and guidance from HMRC on the tax implications of the Budget for members who have recently taken a tax free lump sum and want to take advantage of the new flexibilities; a Statement from the Regulator; and guidance from the Financial Conduct Authority.
- **Automatic enrolment:** the Regulator's first section 89 report about the exercise of its compliance powers in relation to automatic enrolment; the results of research commissioned by the DWP and, in light of the findings of the research, an update to the DWP's estimate of opt out rates; and updated guidance from the Regulator and the DWP.
- **The Pensions Regulator:** a report on research about DB pension costs; and updated regulatory guidance for DC schemes.
- **PPF:** the publication of the PPF's Strategic Plan for 2014 to 2017; and an update on UK Coal.
- **Case law:** a judgment about the employer's duty of good faith when making amendments in relation to its pension scheme; a judgment which underlines the importance of properly executing deeds of amendment; and judgment in a procedural application in relation to the Box Clever FSD.
- **Other News:** updates to HMRC's Registered Pension Schemes Manual; the passing of a Portability Directive by the European Parliament; and a consultation on further amendments to the Teachers' Pension Scheme.

If you would like to know more about any of the items featured in this edition of Pensions News or how they might affect you, please get in touch with your usual DLA Piper pensions contact or contact Cathryn Everest. Contact details can be found on page 24.

BUDGET 2014 AND FINANCE BILL

FOLLOW-UP ANNOUNCEMENTS ON TAX IMPLICATIONS

When far-reaching DC reform due to come into force in April 2015 was announced in the Budget, some schemes received requests from members who had recently drawn benefits and wanted to take action so that they would be able to take advantage of the new flexibilities.

There are two broad categories of member to consider in relation to this issue:

- those who had received a tax free lump sum, were in a "cooling-off period" for their annuity purchase and wanted to unravel their benefit decisions, repay money to the scheme and then defer drawing the benefits until April 2015; and
- those who had received only the tax free lump sum and wanted to defer drawing any further benefits until April 2015.

There has been some uncertainty about the tax position in these scenarios, but a Treasury announcement and HMRC guidance issued in April provide some clarification.

Background – the relevant tax legislation

One of the questions for trustees when faced with the scenarios described above is whether the payment of the lump sum would cease to be an authorised payment and therefore attract a 55% tax charge. This possibility arises from the fact that, under the Finance Act 2004, where members have already taken their lump sum, they must become actually entitled to their pension (be it as a scheme pension, lifetime annuity or drawdown) within six months or the lump sum will become an unauthorised payment.

Some clarification had been provided on 27 March when HM Treasury stated that the Government would be changing this provision of the Finance Act 2004. This announcement went on to state that:

- those who have recently taken a tax free lump sum from their DC pension will be given more time to decide what they wish to do with the rest of their retirement savings; and
- the Government intends to include legislation in the Finance Bill currently before Parliament to ensure that people do not lose their right to a tax free lump sum if they would rather use the new flexibility this year or next, instead of buying an annuity.

HM Treasury's Announcement

On 9 April, HM Treasury issued a follow up announcement stating that those who have recently taken a tax free lump sum will be given 18 months, rather than six months, to decide what to do with the rest of their savings, meaning they will not be put at a disadvantage should they wish to wait to access their pension savings more flexibly.

However, it should be noted that this change has not yet been made to the legislation and neither has the draft form of the amendments been published.

HMRC guidance – lump sums paid on or before 27 March 2014

Also on 9 April, HMRC issued guidance on cases where lump sums had been paid on or before 27 March 2014. The guidance provides further detail on specific scenarios but the key messages are that:

- if the payment of benefits is unravelled and the money paid back to the scheme, the original benefit crystallisation events will be treated as cancelled;
- the lump sum will remain tax free: (i) in cases where it is repaid to the scheme along with the annuity purchase price; and (ii) in cases where the annuity purchase price is repaid to the scheme but the member retains the lump sum; and
- members who retain their lump sum will be treated as having received the final value of the tax free lump sum. This means that if the fund has grown by the time the rest of the benefits are taken, no further tax free lump sum will be payable. Equally, if the fund has fallen by the time the rest of the benefits are taken, this will not affect the tax exemption for the lump sum already paid.

HMRC guidance – lump sums paid after 27 March 2014

The references in the Treasury announcement to those who have "recently taken" a tax free lump sum and in the HMRC guidance to lump sums paid on or before 27 March 2014 suggested that the extension of the six month window to 18 months was only available to a limited category of member.

However, on 24 April HMRC issued an updated version of its guidance to add reference to members who received a tax free lump sum after 27 March 2014. It is not clear whether the updates apply only to those who received a lump sum after 27 March 2014 but before 24 April 2014 (having put the payment of their benefits in train before the Budget) or whether this could suggest that the 18 month window will apply to all DC members meaning that members could choose to take a lump sum after 27 March 2014 and leave the remainder of their benefits in the scheme for a period of up to 18 months by which time the April 2015 flexibilities will have been introduced. This point is not expressly addressed in the HMRC guidance and the Treasury announcement that referred to the extension applying to those who had "recently taken" a lump sum has not been updated.

Implications for schemes

HMRC's guidance makes it clear that the options that will be available for members in these scenarios will depend on what the pension scheme in question permits.

If your scheme does wish to provide flexibility for members who want to unravel benefits or take their lump sum and defer the remainder of their benefits, the announcement and guidance provide some comfort that this will be possible without the member becoming liable for an unauthorised payments charge or the scheme facing a scheme sanction charge. However, there are a number of other issues that trustees should consider before they permit this, including the following.

- Trustees will need to check whether the course of action they are proposing to permit is possible under the scheme rules or if rule amendments are needed.
- The extension of the six month window to 18 months is not yet law, and neither is the draft legislation available to check exactly what will be permitted. This means that there is some risk that if the change does not end up being made at all (although this is arguably relatively low risk) or there is something in the detail of the drafting that means it does not in fact apply to a particular member's circumstances (which perhaps has a higher risk), tax charges could arise. If a scheme wishes to allow a member who is unravelling their benefit decisions to repay only the annuity purchase price and retain the lump sum, one possible way to deal with this risk would be to ensure that the member understands that, if the legislation has not been changed (or has not been changed in a way which covers the member's circumstances) within six months, an annuity will have to be purchased. As noted above, it is not entirely clear what the position is for members who receive a tax free lump sum after 27 March, and in particular after 24 April when HMRC issued its updated guidance, and this risk therefore seems to be greater in respect of such members.
- If trustees are allowing a member to unravel the payment of benefits and make a repayment to the scheme, they will need to consider issues such as seeking a discharge to protect the scheme from any claims should the unravelling ultimately not achieve the best outcome for the member.
- If trustees are allowing a member to unravel the payment of benefits and that member then wishes to take advantage of the new flexibilities on trivial commutation or drawdown, there are other issues that will need to be considered including the technical timing issue that arises from the fact that whilst these flexibilities have effect from 27 March, they are not yet law.

In light of the issues set out above, we suggest that trustees consider seeking advice before allowing any members to unravel benefits and repay them to the scheme, or take a tax free lump sum and defer the remainder of their benefits.

OTHER GUIDANCE AND UPDATES

Statement from the Pensions Regulator

In April the Pensions Regulator issued a short statement which provides an overview of the changes announced in the Budget and also states that:

- trustees and those involved with the administration of DC schemes should consider with their advisers how the changes and proposed changes might apply to their scheme;
- this will help trustees consider how to respond to member queries and plan what communications to send on the Budget; and
- as well as thinking about future communications, trustees should consider how recent member communications might be affected by the Budget changes.

Guidance from the FCA

On 9 April, the Financial Conduct Authority (FCA) published guidance on the Budget reforms which is relevant for pension providers, annuity providers, income drawdown providers, financial advisers providing retirement income advice and intermediaries selling annuities and income drawdown products on a non-advised basis.

The guidance covers the interim period between the Budget announcements and the new flexibilities for DC savings coming into force in April 2015. The focus of the guidance is on communications, with the FCA stating that it wants to ensure that customers are making informed decisions about their retirement in light of the Budget changes. The guidance therefore looks at what firms should consider in communications with different customer groups including those: who applied for an annuity shortly before the Budget announcements who are still in the cancellation period; currently considering their retirement options; approaching retirement; who applied for income drawdown shortly before the Budget; and using income drawdown who are still in the cancellation period.

Update from the ABI

Also on 9 April the Association of British Insurers (ABI) issued a press release in relation to the Budget. The ABI states that it welcomes the HMRC and FCA guidance and, to coincide with that guidance, confirms that its members are continuing to extend annuity cancellation periods until at least 17 April 2014 or are contacting customers (either directly or via an adviser) to confirm whether they want to go ahead with their chosen annuity.

HMRC Pension Schemes Newsletter

HMRC published its latest Pension Schemes Newsletter (Number 61) in April which focuses on the Finance Bill. As well as a brief summary of the Budget changes on trivial commutation, drawdown and pension liberation included in the current Finance Bill, the Newsletter has a section about a later Finance Bill.

It will be this later Finance Bill that will introduce the complete flexibility from April 2015 for members after age 55 in relation to DC savings. The section on the later Finance Bill also refers to the following issues reported in the Budget.

- The review of the Dependants' pension rules – HMRC states that it will be continuing its consultations with stakeholders on an informal basis to develop options to simplify the tax rules and to reduce administrative burdens.
- The Government will explore with interested parties whether the tax rules preventing those aged 75 and over from claiming tax relief on pension contributions should be amended or abolished.

The newsletter does not refer to the HM Treasury announcement and HMRC guidance of 9 April about tax free lump sums.

AUTOMATIC ENROLMENT

COMPLIANCE ACTIVITY – SECTION 89 REPORT

Background

In recent months the Pensions Regulator has published several responses to Freedom of Information requests about compliance activity and the automatic enrolment reforms. Information revealed by these responses has included that between 1 October 2012 and 11 March 2014, 209 breaches of automatic enrolment duties were recorded by the Regulator and the action taken in respect of these breaches was: 31 instances of ensuring compliance through informal action; 168 warning letters; 9 Compliance Notices; and 1 Unpaid Contributions Notice.

These responses demonstrate that the Regulator is willing to use its enforcement powers where appropriate to ensure compliance with the duties. Further details on one particular case were published on 24 April in the Regulator's first section 89 report about automatic enrolment. (By way of background, under section 89 of the Pensions Act 2004, the Regulator can publish reports on the considerations it has given to the exercise of its functions in a particular case.)

The facts of the case and the action taken

The report relates to Dunelm Soft Furnishings Limited (Dunelm) and information in the report includes the following.

- Dunelm had not registered information with the Regulator (as required by the automatic enrolment legislation) within the specified deadline and, despite being given a number of opportunities to complete registration or notify the Regulator of any outstanding issues, Dunelm did not do so. The Regulator therefore issued a Compliance Notice directing Dunelm to complete registration.
- Registration was subsequently completed but, shortly after this, the Regulator received further information which led it to be of the view that Dunelm may not have completed its automatic enrolment duties. A statutory inspection took place under section 74 of the Pensions Act 2004.
- It was found that Dunelm had failed to enrol members on time and, as a result, had not paid a significant level of contributions across to the pension provider. It was evident to the Regulator that these issues existed and were known prior to registration meaning data submitted was inaccurate and that the internal governance for ensuring proper completion of this process had failed.
- Dunelm had explained to the Regulator that factors contributing to the failings were: design flaws in the bespoke payroll solution; key members of staff involved in the automatic enrolment project ceasing employment with Dunelm just prior to the staging date and just after registration; and data quality issues which prevented active membership of the scheme being achieved.
- The Regulator actively engaged with Dunelm and its third party partners who supplied payroll and pension services, which enabled the Regulator to assist in resolving the difficulties and ensure that Dunelm became compliant as soon as practicable. Throughout this period, Dunelm was stated to have been open, forthcoming and fully co-operative with the Regulator.
- Due to the significant amount of pension contributions which were outstanding and to protect member benefits, the Regulator served an Unpaid Contributions Notice.
- Following close work between Dunelm, the pension provider and the Regulator, Dunelm is now fully compliant with its automatic enrolment duties and all outstanding contributions have been paid.

Key lessons from this case

The Regulator notes the following key lessons from this case.

- Employers experiencing challenges meeting their duties should contact the Regulator to discuss the situation.
- Sound corporate governance is essential to ensure registration is completed accurately and on time.

- Payroll systems should be tested well in advance of the staging date to ensure they are able to fulfil the requirements of automatic enrolment.
- In the event of key staff changes, smooth handover and consistency should be maintained.

PENSION PROVISION SURVEY AND OPT OUT RATES

Pension provision survey

On 9 April the DWP published the preliminary findings of the 2013 Employers' Pension Provision Survey. This is the tenth in a series of biennial surveys which dates back to 1994, with the 2013 survey including a substantial module regarding the automatic enrolment reforms.

Fieldwork for the survey took place between 19 June and 4 November 2013 (when firms with 800 to 4,099 employees were passing their staging dates) and some 3,079 organisations completed interviews. The respondents to the survey were private sector employers. The preliminary findings of the survey include the following, with publication of the full findings to follow in the summer of 2014.

- Only 2% of private sector organisations had passed their staging date at the time of interview and, due to some organisations using postponement or all of their employees already being members of a scheme, less than 1% of organisations reported that they had already begun automatically enrolling employees. However, these organisations accounted for 26% of all private sector employees.
- Around 65% of the staged employers who had begun automatic enrolment already had a workplace pension scheme in place at the start of the reforms. In 94% of these cases, the organisation chose to retain existing members within that scheme, rather than enrolling them into a new qualifying scheme and in 92% of these cases, the organisation also chose not to alter their contribution rate for their existing members. 74% had also enrolled any new members into their existing scheme, rather than setting up a new qualifying scheme.
- The proportion of employees who had opted out or left a scheme after being automatically enrolled was between 9% and 10%. This rate was lower among occupational pension schemes (at 6%) than among non-occupational pension schemes (at 12% to 14%).

Opt out rates

On 11 April the DWP issued a press release stating that the latest evidence on opt out rates in the Employers' Pension Provision Survey has led the DWP to greatly reduce its forecast of opt out rates from a cautious initial estimate of around 30% to 15%, for the lifetime of the programme. This is said to equate to around a million more pension savers, with it now estimated that around 9 million people will save for the first time or save more due to the automatic enrolment reforms.

UPDATED GUIDANCE

April saw several changes to the automatic enrolment legislation coming into effect, including the following.

- Changes to the earnings trigger for automatic enrolment and to the qualifying earnings thresholds.
- The extension of the joining window and certain time periods for providing information to workers from one month to six weeks, as well as an extension to the time limit for registering information with the Regulator.
- Amendments to clarify that where an employer is using the money purchase part of a hybrid scheme to fulfil its duties on the basis of one of the alternative sets of quality requirements, it is possible to phase in contributions over the transitional period between the employer's staging date and October 2018.
- Amendments to the additional requirements on revaluation of benefits while in service which schemes providing average salary benefits must meet in order to be a qualifying scheme, so that, for example, schemes

which revalue by reference to the increase in earnings will be able to be qualifying schemes provided certain conditions are met.

In April the Regulator updated its detailed guidance on automatic enrolment and the DWP updated the statutory guidance on certification (of which there are three volumes – one for money purchase schemes; one for employers certifying DB and hybrid schemes and one for actuaries certifying DB and hybrid schemes) to reflect these changes where appropriate.

The following amendments were also made to reflect changes to the legislation which came into effect on 1 November 2013.

- The guidance on certification for DC schemes was updated to reflect the introduction of alternative pay reference periods for assessing scheme quality so that, in summary, this may be: (i) a one year period ending on the day before each anniversary of the staging date; (ii) a period equal in length to that by reference to which the person is paid; or (iii) the tax period used for assessing whether the worker is eligible for automatic enrolment.
- The guidance on certification for DB schemes was updated in light of: (i) changes to the test scheme standard for members of DB schemes that are not contracted-out to reflect future increases in State Pension age; and (ii) changes to the test scheme standard for lump sum DB schemes.

Employers should ensure that they are using the correct versions of the guidance. Employers may also find it useful to know that Word versions of the template certificates included in the Annexes to the certification guidance are now also available.

THE PENSIONS REGULATOR

DB PENSION COSTS

On 10 April the Regulator published the results of research it commissioned on the running costs of DB schemes. The research was undertaken between 12 September and 1 November 2013 and comprised of an online questionnaire completed by 316 private sector schemes.

The objectives of the research were to:

- understand the costs of administering a DB scheme;
- contextualise and understand scheme costs against services received; and
- compare and contrast scheme costs by size, specifically at what size scale efficiencies become apparent.

The survey explored seven scheme cost areas: administration; independent trustee fees; actuarial; legal; covenant; investment; and other external costs. Findings of the survey are reported by scheme size with large schemes defined as those with 1,000 to 4,999 members, medium schemes as those with 100 to 999 members and small schemes as those with 12 to 99 members. (Whilst the survey results also include information on very large schemes – those with 5,000 or more members – the report notes that as only 25 such schemes were included in the survey, caution should be taken when looking at these findings.) Key findings from the survey include the following.

- The mean annual running cost was: £547,877 for large schemes; £154,437 for medium schemes; and £52,126 for small schemes.
- The average cost per member of running a scheme was: £182 for a very large scheme; £281 for a large scheme; £505 for a medium scheme; and £1,054 for a small scheme.
- Scheme administration represents the greatest proportion of costs at 37% on average and investment costs represent the second largest cost at 22% on average.
- However, 23% of schemes could **not** identify all the costs and charges which they pay in relation to investments. This trend was more pronounced among small schemes (at 38%) compared to 18% for medium schemes, 4% for large schemes and 9% for very large schemes.

Alongside the research report, the Regulator published a checklist and comparison tool to help trustees assess how the costs of their scheme compare with those of a typical scheme of a similar size.

The accompanying press release states that the Regulator is not trying to tell DB schemes what their charges should be, but rather wants to encourage trustees and employers to understand what they are paying and then ascertain whether or not they are receiving value for money from their providers and advisers. The Regulator also states that it is aiming to start a discussion with the pensions industry to inform its future approach to value for money in DB schemes.

DC REGULATORY GUIDANCE

On 6 April 2014, the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 came into force. These regulations replaced the previous disclosure regulations, with the main purpose being to consolidate, harmonise and simplify the disclosure requirements for occupational and personal pension schemes into one set of regulations. Many changes made to the disclosure regulations are permissive, providing additional flexibilities for trustees, but other changes are mandatory.

In April, the Regulator updated its DC regulatory guidance (first published in November 2013 when the new DC Code of Practice came into force) to reflect the following changes to the disclosure legislation.

- A change to the timescale for the provision of information to DC members about the Open Market Option and annuities from at least six months to at least four months before the expected retirement date.

- The introduction of additional requirements to provide specified information where schemes are using lifestyling (that is, *"an investment strategy that aims progressively to reduce the potential for significant variation caused by market conditions in the value of the member's rights"*).

At the same time, amendments were made to the guidance to reflect the changes to the trivial commutation limits from 27 March 2014 which were announced in the Budget and to make reference to the consultation on DC flexibility from April 2015.

Trustees of DC schemes should ensure that they are referring to the correct version of the regulatory guidance. More generally, it is important for trustees of both DB and DC schemes to ensure that they are complying with the new requirements of the Disclosure Regulations – you can read more about the key changes to the disclosure legislation in our Pensions Alert of 18 March 2014.

PENSION PROTECTION FUND

STRATEGIC PLAN

On 29 April the PPF published its Strategic Plan for 2014 to 2017, which outlines its vision for 2017 and describes how, faced with a range of challenges, it will continue to develop in size, scale and complexity. Points of note in the document include the following.

- During the summer, the PPF will be consulting with its stakeholders on the move to Experian as insolvency provider and to finalise plans for the next Levy triennium of 2015 to 2018. In completing the Triennial Levy Review, the PPF will look to continue to provide predictability in individual bills while balancing affordability for eligible schemes and security for members.
- The PPF is closely monitoring the potential effects of legislative developments.
  - The PPF states that European initiatives such as the European Market Infrastructure Regulation (EMIR) may require it to flex its investment strategy in order to maintain existing levels of performance.
  - The proposed changes to the PPF compensation cap, the Regulator's new statutory objective, the Government's Defined Ambition proposals, the change to the statutory definition of money purchase benefits and the referendum on Scottish independence are also noted as developments which may have an impact on the PPF.
- The PPF intends to have fully implemented the programme of moving its member services in-house by 31 December 2014.
- The PPF's ambition is to complete 75% of scheme assessment periods in less than two years and some in less than a year.
- The PPF remains on course toward its 2030 funding target of self-sufficiency.

UK COAL

Background

In January 2013, the Pensions Regulator issued a section 89 report concerning a restructuring of the UK Coal group in respect of which it had issued clearance. However, in March 2013, a fire caused one of UK Coal's deep mines to close. Production of coal from this mine was said to represent around a third of UK Coal's revenue, with the forced closure threatening the ongoing viability of the mining business.

As a result of the issues that the fire caused for the UK Coal business, a further restructuring was announced in July 2013. This involved two UK Coal companies going into administration, with the viable mining operations restructured so that their assets would be held in individual companies owned by a new business to operate as UK Coal Production Limited. This meant that the schemes would enter the PPF in due course, with the PPF having an interest in the new company in the form of a series of debt instruments.

April 2014 developments

In April 2014, it was reported that the directors of UK Coal Production Limited had approached the Government at the end of January 2014 because of concerns that, due to a combination of an unfavourable coal price, exchange rates and other factors, the viability of the business was potentially in doubt. On 21 March, a private sector-led consortium submitted proposals to the Government for a managed closure of the operational deep mines by autumn 2015 and the sale of the surface mining business. This proposal involves a loan from the Government. It was reported that the Government intends, in principle, to participate in this private sector-led consortium created to avoid the immediate insolvency of UK Coal.

On 10 April the PPF issued a Statement welcoming the Government support of the orderly wind-down of UK Coal's activities and noting that it is unfortunate that, following various adverse events, the company has not been able to profit from the opportunity offered by the July 2013 arrangement.

The PPF goes on to state that the announcement about UK Coal does not create additional liabilities for the PPF and that it expects to make a recovery from this arrangement such that it would be no worse off than if UK Coal had passed into immediate liquidation in July 2013.

DEPARTMENT FOR WORK AND PENSIONS

CHANGE TO DEFINITION OF MONEY PURCHASE BENEFITS

Background

In October 2013 the DWP published a consultation on draft regulations (**"Transitional Regulations"**) setting out transitional, supplementary and consequential amendments to legislation in relation to a clarification of the statutory definition of money purchase benefits that had been expected to come into force in April 2014 with retrospective effect to 1 January 1997.

There may be some schemes which believed that some or all of the benefits they provided were money purchase benefits but the amendment to the definition will clarify that they are in fact defined benefits. The retrospective nature of the change to the definition could therefore mean that past actions in respect of these schemes were not correct. However, in recognition of the fact that in some cases it will not be practical or appropriate for schemes to revisit decisions, the draft Transitional Regulations proposed easements from the retrospective nature of the amendment until 27 July 2011, which is the date that the Government announced that the definition would be amended.

Statement issued in April 2014

The change to the definition of money purchase benefits and the Transitional Regulations were **not** brought into force in April 2014. However, on 3 April 2014 a Written Ministerial Statement was published.

In the Statement, the Minister for Pensions reports that he intends to lay the Transitional Regulations before Parliament in due course to come into effect in July 2014, and that the response to the October consultation will be published at the same time.

Whilst the consultation had referred to providing easements from the retrospective nature of the amendment until 27 July 2011, the Statement reports that in most cases transitional protection will be provided in respect of events occurring between 1 January 1997 and the date the Transitional Regulations come into effect in July 2014.

It goes on to state that this means that schemes will **not** need to revisit past decisions in "*almost all cases*", but the changes will also ensure that in the future members are protected if their schemes are unable to pay benefits that have been promised.

This is a complex issue and schemes which are affected by it will need to understand their obligations going forward and any requirements to revisit past decisions. In relation to the latter category, we would expect schemes affected to welcome the suggestion that there will be less past decisions to revisit than may have been thought to be the case from the October 2013 consultation.

Affected schemes should also note that the Written Ministerial Statement reports that full information about "other changes" made to the Transitional Regulations in response to the consultation will be included in the Government's formal response. Given this indication of changes to the draft Transitional Regulations, until the response and the final form of the regulations is published there remains some uncertainty for affected schemes as to what action they will need to take.

CASE LAW

EMPLOYER'S DUTY OF GOOD FAITH

Background

There is a duty of good faith on employers implied both into contracts of employment and in relation to the exercise by employers of their powers and discretions under a pension scheme. Whilst the two duties are not identical, broadly speaking, they mean that there is an obligation not to destroy or seriously damage the relationship of trust and confidence between the employer and its employees or pension scheme members. In a pensions context, this is often referred to as the *Imperial* duty after the case in which it was first formulated in relation to pensions. However, the exact formulation of the *Imperial* duty and how to test whether it has been breached has been a matter of some legal uncertainty.

The *Imperial* duty was considered in a December 2012 judgment in a case about whether IBM had a duty to co-operate in modifying its pension scheme to remove differential treatment (which was not in breach of the preservation legislation) between deferred and active members as to early retirement terms. That judgment noted the uncertainty as to what the *Imperial* duty entails and whilst it set out some principles in relation to the duty, it did not conclude definitively on the test to apply for breach.

Judgment was issued in April 2014 in a separate, but related, case concerning IBM's closure of two of its defined benefit (DB) pension schemes to future accrual. This judgment (given by the same judge as the December 2012 judgment) contains a more detailed consideration of and more definitive guidance on the scope of the employer's *Imperial* duty.

This is a useful judgment for employers in understanding the scope of their duties and for trustees who, when asked to implement scheme changes by the employer, will be mindful of whether the changes can be made or whether they could face challenge on the basis of breach of the *Imperial* duty. (Indeed, in this particular case, it was the trustee's concern as to the lawfulness of the changes that led to the case being referred to the court).

At over 400 pages, the judgment is very detailed, and in this article we provide a summary of some of the key points.

The changes in question

The case involved two IBM schemes – the Main Plan and the I Plan. The changes in relation to the Plans that were under consideration in this case were collectively known as "Project Waltz" and included the following.

- The closure of the Plans to future accrual from 6 April 2011 which was implemented by IBM exercising powers within the Plans' rules (introduced in 1990 in the case of the Main Plan and in place since inception in the case of the I Plan) to direct that specified classes of persons shall not be eligible to be members or shall cease to be members (**"Exclusion Powers"**).
- Procuring that members of the Plans entered into non-pensionability agreements in 2009 by which any future salary increases would not be pensionable as long as the employee remained in a DB plan.
- The introduction of a new early retirement policy on 6 April 2010 whereby IBM would only consent to early retirement on terms more favourable than cost-neutral in exceptional circumstances, such as compassionate and/or medical grounds, contrary to previous practice.
- Opening an early retirement window in November to December 2009, during which time members could seek IBM's consent to retire on the then existing basis which was more generous (and therefore more expensive) than cost-neutral early retirement.

The way in which IBM consulted on the changes is also considered in the case as to whether alleged failures properly to consult also amounted to a breach of duty.

Historic changes to the Plans

Prior to Project Waltz, there had been two previous rounds of amendments which, in summary, were:

- changes in 2005 (known as Project Ocean) which principally involved changes to employee contribution rates; and
- changes in 2006 (known as Project Soto) whereby DB members were given the option of: (i) staying in the DB plans subject to a partial non-pensionability

agreement; or (ii) transferring to enhanced DC membership but retaining full final salary linkage for accrued past DB service.

Both of these sets of changes involved a number of communications being issued by IBM to the members and, as will be seen, these communications are relevant to the question of whether IBM breached its duty with the Project Waltz changes.

Can a scheme be closed to accrual by use of the Exclusion Powers?

The court first had to consider whether the Exclusion Powers could be used to close the Plans to future accrual, which was largely a question of interpreting the wording of the specific powers.

In the case of the Main Plan, there was an additional issue in that the Exclusion Power was introduced in 1990 but the plan amendment power contained restrictions which would have prevented a closure to future accrual by way of rule amendment without retaining a link to final salary. The court concluded that this also meant that if the Exclusion Power was used to close the Main Plan to future accrual, a link to final salary would have to be maintained.

Subject to the implied restriction about the link to final salary in the Main Plan, the court concluded that it was within the scope of the Exclusion Powers to use them to close the Plans to future accrual. The wording of the Exclusion Powers did not restrict their use to individual members but rather permitted their application to a class of member and this class of member could comprise the whole membership. It was also concluded that this did not constitute using the Exclusion Powers for an improper purpose.

However, this was not the end of the court's considerations of the closure because it also needed to establish whether it was contrary to the *Imperial* duty.

The two 'good faith' duties and how each is relevant

The duty of good faith as it applies in relation to contracts of employment is relevant to the non-pensionability agreements and also the way in which IBM consulted on the changes, because those were matters relating to the employment relationship. In relation to the closure to future accrual and the changes to early retirement policy, the employer is exercising powers and discretions under a pension scheme and therefore it is the *Imperial* duty which is relevant.

The conclusions of the court as to the nature of these different duties are summarised below which shows the tests are not identical. However, the court also stated that, in practice, there may be no significant difference in the application of the two tests to a set of closely related facts.

The contractual duty

This duty requires the employer to treat its employees fairly in its conduct of business, to act responsibly and in good faith in its treatment of employees, and to act with due regard to trust and confidence.

The Imperial duty

Features of the duty

The following points apply to the duty: a genuine and rational, as opposed to empty or irrational, exercise of the discretion is required; the correct test is not one of fairness, because what is fair to one person may seem unfair to another; whatever the test is, it is a "severe" one; and whatever the test is, it is objective. These four factors had previously been identified in the December 2012 judgment and the judge had not changed his view on them.

However, added to this list was that the employer is entitled to take account of its own financial and other interests (subject to any constraint imposed by Reasonable Expectations) and to prefer its own economic interests to those of its employees. Whilst this may cause problems with employee relations, in order for there to be a breach of the *Imperial* duty, there has to be something more substantial than a decision which the employees consider to be unreasonable.

Other elements of the duty that were noted include that:

- there is no limit to the type of conduct which is capable of being destructive of the relationship of trust and confidence and thus capable of breaching the *Imperial* duty; and

- it does not matter that the conduct in question falls literally within the employer's powers, although it is for the employee to show that an exercise which on its face is compliant with the power, gives rise to a breach of the *Imperial* duty. The nature of the power and the absence of any express fetters are said to be factors to take into account when assessing if there has been a breach. It was also stated that if there are express fetters on a power, it may be harder to argue that there has been a breach of the *Imperial* duty than in cases where there are no express fetters – this is because the existence of the express fetters may indicate that these were the only restrictions intended to apply.

Irrationality and perversity

The test of whether the *Imperial* duty has been breached is one of irrationality and perversity (concepts developed in the context of public law) which means that the question is whether the employer has acted in a way that no reasonable employer would act. An absence of good faith can be seen as the presence of irrationality or perversity because an employer could not, in good faith, act in a way in which no reasonable employer would act.

When assessing whether or not there has been a breach, a "*multifactorial approach*" is taken whereby all facts and circumstances must be weighed in the balance.

Reasonable Expectations

If the employer has acted contrary to any "Reasonable Expectations" of the members, this is a relevant factor and, in some cases, may be the critical factor. Even if there is a rational and bona fide business reason for an action, this will not necessarily mean that there is no breach of the *Imperial* duty – the conduct could disappoint Reasonable Expectations which could mean in a particular case that there has been a breach of the duty.

In this context, a "Reasonable Expectation" is an expectation as to what will happen in future that has been engendered by the employer's actions (as opposed to a "mere expectation" based on the employee's own assumptions or expectations) which gives employees a positive reason to believe that things *will* take a certain course. Whether such "Reasonable Expectations" have been engendered is to be judged objectively, with the hypothetical reasonable member being a person who is concerned to inform himself about the content of communications about pensions and the impact on him for the future.

The significance of a parent company

The *Imperial* duty is owed by the scheme employer, but the actions of a parent company (which is not a scheme employer) can lead to a breach of duty by the scheme employer.

- The court rejected an argument that, if it was the parent company which had knowingly made misleading statements, the scheme employer would not be in breach of its *Imperial* duty simply because it did not know the statements were misleading.
- It is not possible for the scheme employer to simply state that its actions which form the alleged breach were taken in order to comply with targets it had been set by its parent company unless, in turn, a business case can be demonstrated justifying the targets. It is necessary to go behind the targets to see why they have been imposed.

Were the duties breached in this case?

The court's overall conclusion was that no reasonable employer in the position of IBM in 2009 would have adopted the Project Waltz proposals in the form that they took and, viewed as a whole, the Project Waltz changes gave rise to a breach of the *Imperial* duty and the contractual duty of trust and confidence.

Reasonable Expectations

A crucial factor was that the communications members had received in connection with Project Soto had given them a Reasonable Expectation that benefit accrual would continue in the future albeit that a significant change in financial and economic circumstances might cause IBM to make further changes to the Plans. These Reasonable Expectations had arisen because there had been many

representations about the Soto changes being long-term and producing sustainability and statements that volatility and cost had been addressed. There had also been a promise from a senior member of IBM that he would "push back" if anyone sought to revisit the UK pension issues. Whilst this promise was not known by the members, it still engendered a Reasonable Expectation because it gave the Trustee reassurance which was reflected in the message it gave to the members.

It was also concluded that the members had a Reasonable Expectation that the more generous early retirement policy would continue to apply until 2014, at least for service up to the time of the Project Ocean changes unless there was a justification for a change in policy. Evidence of this included that IBM knew the perception was widely held that consent to early retirement would ordinarily not be refused and DB members' benefit statements contained tables showing the pension available at each year from age 50 or 55.

The breaches

The court's reasoning for concluding that there had been a breach included the following.

- Project Waltz was clearly inconsistent with the Reasonable Expectations and the disappointment of those Reasonable Expectations was a very serious matter that went to the heart of the relationship between IBM and its employees.
- The principal driver for the changes was the target set for the UK company by the US parent. Had the US parent recognised the need for the UK company to act, so far as possible, consistently with the Reasonable Expectations, it should have given consideration to proposals which both: (i) allowed it to meet its objectives in relation to improving earnings per share; and (ii) allowed effect to be given to the Reasonable Expectations, but this was not done.
- It is relevant and works against IBM that some of the statements made in relation to Project Soto which engendered the Reasonable Expectations were disingenuous and misleading.
- The change in early retirement policy was a breach of a Reasonable Expectation. The early retirement window was unreasonably short – expecting members to make such an important decision under the sort of pressure which was put on them did not accord with the duties of good faith.
- IBM acted contrary to its contractual duty of trust and confidence in indicating that there would be *no* salary increase at all in future for those who did not sign the 2009 non-pensionability agreements. Whilst this statement was later modified so that it only applied until 2011 when the position would be reviewed, members who had already made their decision may have a claim for breach of duty. However, in relation to those who entered into the 2009 non-pensionability agreements after this statement was modified, the conduct was not such as to breach the implied duty. (Some further non-pensionability agreements had also been entered into in 2011 but the judge did not consider that he had been provided with sufficient information and argument to reach a conclusion as to those agreements.)

Consultation

The way in which the employer consulted the members about the changes amounted to a breach of the implied duty of trust and confidence with factors relevant to this conclusion including the following:

- The consultation was not carried out in a manner which was open and transparent.
- There was a failure to provide information as to the real reason for the changes, which was the parent company's plan to make savings to deliver a "roadmap" of increases in earnings per share. The court rejected IBM's argument that the members were aware of this justification and stated that the failure to provide the information in the face of clear requests was "*simply not good enough*".
- IBM did not consult with a receptive mind. In particular, it was noted that it did not develop or model some proposals advanced by members.

The court rejected arguments made by IBM that because the regulations which impose the statutory requirement to consult on listed changes to pension schemes set out a specific remedy for breach (a financial penalty of up to £50,000), that a claim cannot also be brought based on breach of the contractual duty.

What is the remedy for the breach?

The judgment does not include a decision as to the appropriate remedy, although it does state that the finding of breach "*does not necessarily mean that the Project Waltz changes are swept away*". A further hearing will take place to consider the issue of remedies.

The judgment reports that, pending the decision in this case, the Trustee had (under protest) agreed to implement the Project Waltz changes on an interim basis. The Trustee has issued an update stating that, in the meantime, it will continue to administer the Plans on this interim basis.

Appeal

IBM has stated that it intends to appeal.

If you would like to discuss the implications of the case in relation to a specific project for your scheme or more generally, please get in touch with your usual DLA Piper pensions contact.

INVALIDITY OF DEEDS OF AMENDMENT

Judgment was issued in April in a case which underlines the importance of ensuring that the correct formalities are adhered to when executing deeds. The judgment also considered a number of points of interpretation which may be useful in other cases.

The flaw with the execution of the documents and the possible impact

The scheme in question was for employees of partnerships and companies within the Gleeds group (**"Scheme"**). Legislative requirements introduced in 1990 meant that a document intended to take effect as a deed that was being executed by partners in Gleeds, needed each partner's signature to be witnessed. However, this was not done in relation to some 30 documents concerning matters such as equalisation, the introduction of money purchase sections, the introduction of member contributions, a reduction in the accrual rate and a cut to the rate of increases for final salary members and the closure of the final salary section to future accrual.

If the documents are ineffective, the Scheme's deficit on an ongoing basis could be increased by some £45 million.

The court considered whether, even if the documents were not effective, the members could be bound by the changes contained in them either by virtue of estoppel or extrinsic contracts.

Estoppel

The argument made by Gleeds in relation to estoppel was that the members of the Scheme are estopped (i.e. prevented) from denying that the defective deeds were validly executed because: (i) by supplying the draft deeds, the trustees' advisers (who were providing pension administration and other services) impliedly represented to Gleeds that the law was such that execution in the manner indicated (i.e without a witness) would suffice and Gleeds relied on the representations to their detriment; and (ii) the advisers were acting on instructions from the trustees and so the representations should be attributed to the trustees.

Whilst the court was satisfied that the law has developed such that it is no longer impossible for an estoppel by representation to be based on a representation of law, Gleeds nevertheless failed in its estoppel argument. The court gave several reasons for the failure of the claim which included that: it was not possible to use estoppel in a case such as this where the documents do not even appear to have been executed in accordance with the legislation; and the advisers had not been shown to be solely acting for the trustees of the Scheme (with evidence that they also acted for Gleeds), so they cannot be said to have made representations on the trustees' behalf to Gleeds.

An alternative claim on the basis of estoppel by convention also failed because this would have required Gleeds and the relevant members to have been proceeding on the basis of a shared underlying assumption. However, this was not

the case, with the members having done no more than passively accept that changes to the scheme were taking place. It was also not established that Gleeds relied on any shared assumptions with the members, rather Gleeds relied on the advisers.

Extrinsic contracts

Gleeds argued that extrinsic contracts existed such that members had contractually agreed to be bound by the amendments set out in three of the documents even if those documents did not validly amend the Scheme.

This argument failed in relation to two of the documents, with a key issue being that the members' actions, such as completing application forms to join a new section of the Scheme, can be understood as them exercising rights that they believed they already had under the Scheme, rather than entering into contracts.

However, the court did find that 103 members had agreed by extrinsic contracts to the closure of the final salary section of the Scheme to future accrual. Differences in these cases leading to the success of this argument for Gleeds were that: (i) by virtue of signing and returning a letter – which referred to acceptance of the changes – the affected members received a one off salary increase; and (ii) the members' behaviour here is not wholly explicable by reference to pre-existing rights as no one can have thought that the relevant members were already entitled to the salary increases.

Other points of note

The court also considered a number of other questions on the interpretation of provisions of both the 1979 Definitive Deed and a 1993 Definitive Deed, albeit recognising that questions concerning the 1993 Deed may not matter if it is wholly ineffective. In the course of this discussion, the following points arose that are of particular note.

- An amendment power that referred to amendments being made by deed and then stated that "*The Principal Employer and the Trustees shall forthwith declare such alteration or addition in writing and the Deed and/or Rules shall stand amended accordingly*", required a declaration in addition to a deed rather than permitted a declaration as an alternative way to make amendments. However, the court concluded that a failure to make a declaration would not invalidate an amendment in this case. This conclusion was justified in light of a 2006 case in which it was held that a failure to notify members in accordance with an amendment power cannot prejudice the legal effect of the amendment but may afford members who have been prejudiced by the failure to communicate with a possible basis for a claim for compensation.
- Even if the introduction by deed of an entitlement to 4% minimum pension increases was not effective, the decision to grant the increases (made some years prior to the attempt to execute the deed) could take effect as an exercise of the augmentation power, even though it had not been expressly stated to be an exercise of this power. The court relied on an established principle that means that, in certain circumstances, an intention to exercise a power can be imputed to the trustees even if they have not referred to that power.
- An amendment power which contains a proviso that "*no such alteration cancellation modification or addition shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time*" meant that a final salary link had to be maintained if the scheme was closed to future accrual. This conclusion was based on a consideration of authorities from the Canadian courts as to the meaning of the word "*accrued*". It was also based on the fact that established English case law (the *Courage* case) has held that a proviso that benefits already "*secured*" by past contributions could not be varied or affected meant the salary link could not be broken. The court could not see a compelling reason for taking "*accrued*" to have a narrower meaning than "*secured*".

The court's overall conclusion

The court's overall conclusion was that none of the deeds that were meant to establish money purchase sections, to require members to make contributions, to reduce the rate of accrual, to cut the rate of pension increases and to close the final salary section of the Scheme to future accrual

will take effect as intended, and the extrinsic contract arguments only succeeded in relation to the closure of the Scheme to future accrual for 103 members.

This case underlines how important it is to ensure that where an amendment power requires a deed to be executed that the legal formalities for a deed are complied with, as the courts may not be able to assist with retrospectively validating the amendments, despite the serious consequences for the Scheme employers and members. In this case, the court acknowledged that its conclusions would have serious implications with some employees not in fact having become members of the scheme and other members standing to receive a windfall because the money purchase sections were not in fact established. However, the court stated that unfortunate consequences are unsurprising when so many documents have not been validly executed. Before making amendments to a scheme, we would therefore suggest that employers and trustees consider taking legal advice as to whether all formalities for a valid amendment are met.

BOX CLEVER FSD

Background

In December 2011 the Determinations Panel of the Pensions Regulator made a determination that five companies from the ITV group (**"Targets"**) should be the subject of a Financial Support Direction (FSD) in respect of the Box Clever Pension Scheme.

The Targets made a reference to the Tribunal in respect of that determination asking the Tribunal to consider whether an FSD should be issued for the reasons given by the Determinations Panel. In December 2013 the Upper Tribunal issued a judgment in respect of applications for procedural directions involving that reference. One of the procedural issues involved the Targets seeking disclosure from the Regulator of documents relating to its consideration of whether to bring regulatory proceedings against the other party to the Box Clever Joint Venture (previously called Thorn and now called Carmelite) and an explanation of why the Regulator decided not to pursue Carmelite for an FSD. That application for disclosure was refused in December 2013.

The application in the current case

In light of the dismissal of the disclosure application, the Regulator made an application for a direction barring the Targets from pursuing their contention that the Regulator ought to have concluded that it was unfair and thus unreasonable to issue an FSD to the Targets given that Carmelite had not been pursued for an FSD.

The Regulator argued that the December 2013 decision prevented the Targets from pursuing this contention because the question has already been decided. The Regulator also noted in particular that the issue should not be re-litigated given the Tribunal's conclusion that the question of whether Carmelite should have been pursued or not is irrelevant as to whether, in relation to the facts and circumstances that relate specifically to the Targets, it is reasonable to impose an FSD on them.

The Tribunal's conclusions

This application was heard by the same judge as heard the disclosure application in December 2013.

The Tribunal refused the Regulator's application on the basis that the purpose of the December 2013 hearing on this point had been to look at the question of disclosure, and had not involved the extensive arguments and consideration of the issues that would have been necessary to deal with a strike out application. The question of whether to strike out the Targets' pleadings on the underlying issue had not therefore been specifically litigated.

The judge noted the Regulator's arguments in relation to his conclusion that the question of whether Carmelite should have been pursued or not is irrelevant. However, he stated that this conclusion was not necessary to dismiss the disclosure application, with the first reason given (therefore indicating that it was at the forefront of the judge's mind) being that it would be invidious to ask the Tribunal in effect to conduct an enquiry into the regulatory judgment of the Regulator, which it was not equipped to do. This was also stated to show that the focus in December 2013 was on whether it was appropriate to order disclosure rather than specifically on the merits of the issue itself.

The Tribunal will therefore consider this issue on the basis of whatever evidence is available within the scope of the disclosures already made, subject to any witness evidence, which the judge stated he suspected will largely refer to the material already filed. It was also concluded that it should be open, for example, for the Targets to argue that the fact that the Regulator did not pursue Carmelite is a factor the Tribunal should be able to consider in the overall mix.

OTHER NEWS

UPDATES TO HMRC'S REGISTERED PENSION SCHEMES MANUAL

On 3 April HMRC published updates to its Registered Pension Schemes Manual, with changes made including the following.

- The inclusion of guidance on fixed protection 2014.
- Updates to reflect the reduction of the lifetime allowance to £1.25 million and the reduction of the annual allowance to £40,000 with effect from 6 April 2014, including amendments to clarify the position on carry forward.
- Updates to the information about the requirement to issue pension savings statements in certain circumstances where a member's pension input amount under a scheme for the tax year exceeds the annual allowance, including to add information on the requirement to report to HMRC that statements have been issued.
- Updates on valuing crystallised pension rights when paying a trivial commutation lump sum to reflect the position for commutation periods starting on or after 6 April 2014.
- Other changes to the Manual including some minor corrections and updates to cross-references.

PORTABILITY DIRECTIVE

In April, a Directive of the European Parliament and of the Council was adopted, the aim of which is to facilitate workers' freedom of movement between Member States by improving the acquisition and preservation of rights in occupational pension schemes. The Directive does not apply to the acquisition and preservation of rights of workers moving within a single Member State. There are also other exclusions from the Directive, for example, schemes that, on the date the Directive comes into force, are closed to new active members and remain closed to them.

The Directive makes provision in the following areas.

- Vesting periods, including that, where a vesting period or a waiting period (or both) is applied, the total combined period shall under no circumstances exceed three years for outgoing workers and, where a minimum age is stipulated for the vesting of pension rights, that age shall not exceed 21.
- Preservation of dormant rights including that the vested pension rights of outgoing workers must be treated fairly compared to the rights of active scheme members.
- Provision of information including that Member States shall ensure that active members can obtain information on how a termination of employment would affect their rights and that deferred members can obtain specified information, such as the value of their rights and the conditions governing the treatment of those rights.

Member States have until 21 May 2018 to comply with this Directive.

As at the end of April the Government had not made any announcements as to the impact of the Directive for the UK. However, given the existing requirements of UK legislation on preservation and disclosure, it seems unlikely that the passing of this Directive will result in substantial (if any) legislative change in the UK.

TEACHERS' PENSION SCHEME – FURTHER CONSULTATION

In March 2014, the Teachers' Pension Scheme Regulations 2014 were made. These are the main regulations which implement the new scheme from April 2015 in line with public service pension reform.

However, there are some areas not covered by those regulations and on 28 April, the Department for Education published a consultation on those further changes. This covers issues such as scheme valuations and the operation of the employer cost cap; member contribution structure; consequential amendments to the Teachers' Pensions Regulations 2010; and miscellaneous and technical amendments to the Teachers' Pension Scheme Regulations 2014.

The consultation closes on 18 July 2014 and the results of the consultation and the Department for Education's response are due to be published in the summer.

ON THE HORIZON

- **Employer debt.** The consultation on amendments to the "restructuring provisions" closed on 7 June 2013. The changes were originally proposed to come into force on 1 October 2013 but the final form regulations and response to consultation are awaited.
- **Exceptions to automatic enrolment duties.** A consultation was expected to be published in early 2014 but, as at the end of April, had not been issued.
- **Pension liberation.** The Pensions Ombudsman has reported that whilst the timescale is a little unpredictable, it is likely that the initial cases being considered on pension liberation will be decided in April/May.
- **PPF's insolvency risk provider.** A consultation on the new PPF-Specific Insolvency Score will be published in May 2014.
- **Valuation assumptions (section 143 and section 179).** The PPF proposes to introduce some changes to the assumptions for section 143 and section 179 valuations from 1 May 2014.
- **Pensions Bill.** The Pensions Bill has now completed the Parliamentary stages and awaits Royal Assent which is expected to be received this spring.
- **Equalisation for GMPs.** During the Parliamentary debate on the Pensions Bill, it was reported that guidance on GMP conversion (which will provide guidance on an alternative method by which schemes can equalise benefits including GMPs prior to conversion) is expected to be provided by spring 2014.
- **DC reform.** From April 2015, it is proposed that members with DC savings will have complete flexibility in the way that they access their savings. A consultation on the detail of the proposals closes for comment on 11 June 2014.
- **Fiduciary duty.** The Law Commission's consultation on fiduciary duties in relation to investments closes on 22 January 2014 and a report (containing recommendations) is expected to follow in June 2014.
- **Review of survivor benefits.** Under the Marriage (Same Sex Couples) Act 2013, the Secretary of State must arrange for a review of different treatment of survivor benefits under occupational pension schemes to be completed and publish a report by 1 July 2014.
- **Consultation on regulation of DB scheme funding.** The Regulator's consultation on an updated Code of Practice on funding defined benefits, a draft regulatory strategy and a draft funding policy closed on 7 February. It is anticipated that the new Code will be in force by July 2014.
- **Money purchase definition.** Amendments to the definition of money purchase benefits are expected to come into force in July 2014 with retrospective effect to 1 January 1997, as well as transitional regulations providing easements to the retrospective effect of the easements.
- **Scheme administrator.** From 1 September, a new requirement will be introduced for scheme administrators (for Finance Act purposes) to be fit and proper persons to carry out the role. HMRC will be able to refuse to register or to de-register schemes where this is not the case.
- **Public service schemes.** The Regulator's consultation on the draft Code of Practice and regulatory strategy for public service pension schemes and the DWP's consultation on record-keeping requirements for these schemes both closed on 17 February 2014. It is anticipated that the Code will be laid before Parliament in the autumn.

- **Defined ambition.** The DWP's consultation closed on 19 December 2013. A report summarising responses and the action that will be taken as a result will subsequently be published. The DWP aims to consult on draft legislation in this area in 2014.
- **Short service refunds.** It is intended that short service refunds will be withdrawn from money purchase schemes in 2014.
- **DC regulation.** The Regulator expects trustees of occupational pension schemes to assess the extent to which their scheme complies with the DC quality features and publish a governance statement in relation to this assessment at the end of the 2014/15 scheme year.
- **DC scheme quality and charges.** Statutory quality standards for DC schemes, a cap on charges for default funds in qualifying schemes, a ban on consultancy charges in qualifying schemes and reporting requirements in relation to charges are proposed to come into effect in April 2015. (The consultation on the scheme quality standards closes on 15 May 2014.)
- **DC charges.** From April 2016, it is proposed that member-borne commission payments and Active Member Discounts will be banned from DC qualifying schemes.
- **State Pension.** The reform of state pension which would result in the end of contracting-out is proposed to take effect in April 2016.
- **IORP II.** It is proposed that Member States would have to transpose the new IORP Directive into national law by 31 December 2016.
- **DC charges.** In 2017 it is proposed that the level of the charge cap will be reviewed, as will the question of whether any transaction costs should be included in the cap.

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