100 HYMANS # ROBERTSON

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Consultation on details of collective money purchase system

The Department for Work and Pensions (DWP) has released draft versions of the secondary legislation necessary to establish an authorization and supervision regime for collective money purchase schemes.[1]

What's collective money purchase?

Collective money purchase (CMP), also known as collective defined contribution (CDC), schemes are seen as a potential way of providing better member outcomes than traditional money purchase schemes, by pooling risks during the pre- and post-retirement stages, whilst being less risky for sponsors than defined benefit (DB) schemes.

As with an ordinary money purchase scheme, the employer has certainty over future contributions. The scheme aims to provide its members with a certain level of pension, but they have no legal entitlement to particular rates or amounts of benefits—they may fluctuate. Instead of making the sponsor liable for the balance of the cost of financing defined benefits, members' pensions are subject to periodic actuarial adjustment to maintain the balance with the available assets.

Primary legislation

The *Pension Schemes Act 2021* contains provisions intended to accommodate CMP within the UK's pensions system. The primary goal of the legislation is to enable the creation of a CMP scheme designed by Royal Mail Group and the Communication Workers Union, but the Government hopes that others will follow their example.

Initially, the CMP option will be available only to individual employers or groups of connected employers. Once the experiences of the CMP pioneers have been assessed, however, the Government is prepared to permit a wider variety of structures, such as industry-wide schemes, commercially operated master trusts, and decumulation-only arrangements.

Regulatory oversight

Many features of the system for oversight of CMP schemes will be familiar to those acquainted with the rules established in 2017 and 2018 for DC master trusts. So, for example, CMP schemes can only commence operations with the Pensions Regulator's say-so; and in order to obtain that authorization will need to demonstrate that those involved are '*fit and proper persons*', and that the scheme is financially sustainable, has sufficiently effective systems and processes, and has a continuity strategy adequate to protect members' interests in certain circumstances (e.g. withdrawal of authorization or commencement of winding up).

[1] https://www.gov.uk/government/consultations/the-occupational-pension-schemes-collective-money-purchase-schemes-regulations-2021.

Other authorization criteria are particular to CMP. For instance, the main concern expressed by commentators of all stripes is that CMP scheme members be under no illusions about the nature of the benefits that they stand to receive—particularly, the implications of the (mandatory) mechanism for adjusting benefits from time to time to ensure that there is no under- (or over-) funding. Accordingly, the Regulator will have to be satisfied that the scheme has adequate systems and processes for providing beneficiaries with information that is accurate, and not misleading.

Actuarial valuations and advice will be required annually to support the calculation of benefits, for which the trustees will have to use '*central estimate*' assumptions: ones that are neither optimistic nor pessimistic, and do not incorporate margins for prudence or adjustments design to reflect the desired outcome. If benefit adjustments prove necessary, they must be applied to all members, '*without variation*'. It will, though, be possible to spread the effect of any required reduction over up to three years (the draft Regulations permit equal or decreasing reductions in each year of a multi-annual reduction, but not a reduction schedule that is weighted toward the later years). Trustees will need to report any failure to implement a benefit adjustment in accordance with the scheme rules and valuation results, and the Regulator will have powers to direct them to take action.

Regulatory oversight will continue throughout the scheme's lifetime, by way of supervisory returns and a broadly applied duty to report the occurrence of a wide variety of '*significant events*'. The supervisory return will, notably, have to provide details of how the trustees are maintaining their knowledge and understanding. The Regulator will have power to issue a 'risk notice' if it becomes concerned that a breach of the authorization criteria is likely, and the trustees will be required to submit and implement a plan for resolving the issue.

Consequential amendments

The DWP proposes a medley of (often quite elaborate) amendments to existing legislation to adapt it to the special characteristics of CMP schemes.

Disclosure

Unlike with ordinary money purchase arrangements, the trustees of a CMP scheme will not be required to volunteer information about the member's options for accessing flexible benefits, but it will be available on request. There will be separate provisions for CMP annual benefit statements, and the trustees will be obliged to notify members about benefit adjustments (or when the required adjustment has not been made). They will have to make the scheme rules, an explanation of its design, and information about the latest actuarial valuation freely and publicly available on a website.

Charges

Restrictions on member charges will be broadly aligned with those that apply to other money purchase schemes. So, CMP schemes that are used as auto-enrolment qualifying schemes will be similarly subject to a 0.75 per cent per annum charge cap. However, the restrictions will continue to apply if the scheme ceases to be used for auto-enrolment purposes.

Transfers

Members (other than pensioners) will have a right to transfer. Unusually, following receipt of a transfer application, the trustees will have to provide the member with a note of the transfer value, and will be unable to proceed during the subsequent three-week 'cooling-off period' without the member's written consent. The draft DWP amendments say that the cash equivalent is to be the '*realizable value of the member's share… of the collective assets*', calculated on a '*best estimate*' actuarial basis.

Responses to the consultation proposals should be submitted by 31 August 2021.

Finance Bill 2021/22 pensions clauses

The Treasury and Her Majesty's Revenue and Customs (HRMC) have published draft clauses for the next Finance Bill (*Finance Bill 2021/22*—which should eventually become the *Finance Act 2022*).[2] They include provisions to implement the planned increase to the normal minimum pension age (NMPA) in 2028[3] (the Government has also announced the outcome of the February to April 2021 consultation exercise on the subject[4]) and proposed changes to 'scheme pays' deadlines to allow members to use the process when their annual allowance pensions input amount for a tax year is retrospectively amended[5].

NMPA increase

The NMPA is the earliest age within the pensions tax legislation at which members in good health can access their benefits. It is currently age 55, having risen from age 50 in April 2010. In September 2020, the Government announced that it planned to increase the NMPA to age 57, in 2028, in recognition of increases to State pensionable age; and in February 2021 it published a consultation document with details of its proposals. The draft Finance Bill clauses would implement the increase from 6 April 2028 and put in place transitional protections for those entitled to an earlier NMPA before 5 April 2023.

The NMPA increase will not apply to members of the armed forces, police and firefighters' pension schemes.

When the NMPA was increased from age 50 to 55 in April 2010, those with the right to take registered pension scheme benefits before age 55 had that right protected, subject to several quite restrictive conditions. Similar transitional protection will apply for those with rights (as at 11 February 2021) to draw benefits before attaining the age of 57. The new protection will come with far fewer conditions than the existing protected pension ages for those able to retire before age 55 (whilst those original protected pension ages will remain in place, unchanged). The new form of protection will apply to all of a member's benefits under the relevant scheme, not just those built up before 2028. To allow flexible access, it will be possible to take benefits whilst continuing to work for the scheme employer, and to take some benefits whilst leaving the remainder uncrystallized; neither is possible under the 2010 transitional provisions.

The draft provisions provide that members will be able to retain a protected pension age following either a block (bulk) or individual transfer to another registered pension scheme. This is a change from the initial proposals, which would only have preserved protection during block transfers, in which the rights of two or more members are transferred in a single transaction. Both block and individual transfers would be unconstrained by any condition about the duration of the transferee's membership of the receiving scheme (for the 2010 protections the person cannot generally have been a member of the receiving scheme for more than a year).

In the case of an individual transfer, protection would apply only to the rights associated with the transferred sums and assets, and not to other rights accrued or otherwise held within the receiving scheme. By implication, therefore, transferred-in rights carrying a protected pension age will need to remain separately identifiable by the scheme administrator.

The Treasury's consultation response confirms the intention that the 2028 protections will apply only if the member had an '*unqualified*' right to draw benefits before age 57. Its explanation suggests that the scheme rules, as they stood on 11 February 2021, must expressly state that benefits can be taken from an earlier age (most likely age 55); and that it will not be sufficient for them to refer simply to the NMPA or its legislation. However, it also says that the draft legislation will create an opportunity for members to join, by 5 April 2023, pension schemes with 11 February 2021 rules that conferred unqualified rights to take pension benefits below age 57. Her Majesty's Revenue and Customs is to provide further guidance and examples in its Pensions Tax Manual.

The decision to simplify the terms of the 2028 transitional protections is most welcome, even if there are some wrinkles to iron out of the current drafting.

[2] <www.gov.uk/government/collections/finance-bill-2021-22>.
[3] <www.gov.uk/government/publications/increasing-the-normal-minimum-pension-age-for-pensions-tax>.
[4] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004018/NMPA_consultation_response_July_2021.pdf>.
[5] <www.gov.uk/government/publications/pension-scheme-pays-reporting-information-and-notice-deadlines>.

'Scheme pays'

The statutory 'scheme pays' facility allows members who incur annual allowance charges (AACs) of at least £2,000 to require their scheme administrators to pay the charges for them (provided the pension input amount for the administrator's scheme exceeded the annual allowance for the year in which the charge arises). The administrator must make a corresponding reduction to the member's benefits to reflect the payment.

Under current rules, members must give notice of their intention to use scheme pays by 31 July in the year following the tax year for which the AAC arises. The scheme administrator must then account for the charge in its return for (at the latest) the quarter ending on 31 December of that following year.

The draft Finance Bill clauses will extend the deadline by which a member must give a scheme-pays notice when a scheme administrator has given information about a retrospective amendment to the pension input amount in its scheme. In such a case the member would be able to give notice by the earlier of—

- the end of the three-month period starting with the day on which the scheme administrator gives the revised information; and
- the end of the six-year period beginning with the end of the relevant tax year.

The timescale for the scheme administrator to report and pay the AAC would also be extended. Rather than being treated as though it arose in the quarter ending on 31 December in the year following that in which the relevant tax year, the tax charge would be taken to arise during the quarter following the one in which the member's notice is received.

The provisions would come into force on 6 April 2022, but have retrospective effect from 6 April 2016.

The changes to the scheme-pays timings are being made to facilitate the Government's approach to remedying the age discrimination within the public sector schemes that the Court of Appeal declared unlawful in its *McCloud* judgment.[6] Otherwise, the remedy could give rise to significant additional annual allowance charges for members who have no other means of paying them. The draft amendments are not, however, specific to membership of a public-sector scheme, so may be of use in other cases in which pension input amount calculations need to be revisited.

PPF cap still unlawful, but remedial methods appropriate

On 19 July 2021, the Court of Appeal for England and Wales issued judgments on two linked appeals in the *Hughes* litigation about the validity of the Pension Protection Fund (PPF) compensation cap.[7] It dismissed the DWP's appeal against the finding that the cap is unlawful, contrary to EU law, on grounds of age discrimination; but it allowed the PPF's appeals on its methods for correcting the compensation payable to scheme members and their survivors.

Background

Scheme members who have not attained normal pension age when the PPF takes over responsibility for their schemes are entitled to compensation equivalent to 90 per cent of their scheme pension. Before that cut is made, a compensation cap (currently £41,461.07 at age 65, without adjustment for longer periods of service) is applied. The terms for the PPF's revaluation of compensation during deferment and its indexation once in payment may also be less generous than schemes' policies.

The PPF's compensation restrictions have been subject to legal challenge. The European Court of Justice (ECJ) concluded in the *Hampshire* case that Article 8 of the EU's Insolvency Directive means that Member States must ensure that employees receive at least 50 per cent of the value of their accrued entitlements in the event of their employer's insolvency.[8] A judicial review of the PPF's response to *Hampshire* then found that the compensation cap constituted unlawful age discrimination under EU law, and that (broadly speaking) the PPF needed to ensure that each member and survivor receives at least 50 per cent, over time, of the actual value of the benefits that their scheme would have provided.[9]

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[6] *Lord Chancellor and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others* [2018] EWCA Civ 2844.
[7] *Secretary of State for Work and Pensions & Board of the PPF v Hughes & Others* [2021] EWCA Civ 1093.
[8] *Hampshire v Board of the Pension Protection Fund* (C-17/17).
[9] *Hughes v Board of the Pension Protection Fund* [2020] EWHC 1598 (Admin).

Both the PPF and the Secretary of State for Work and Pensions appealed against the judicial review findings.

Appeal ruling

The Court of Appeal said that the judge in the review case was not wrong to decide that the cap amounted to unjustifiable discrimination on the grounds of age. However, it said that the PPF can perform a one-off actuarial valuation to establish whether the value of its compensation is—as required in accordance with previous judgments— at least fifty per cent of that of members' expected scheme benefits; it need not re-evaluate the position periodically. It also said that the right of a survivor of a member who dies after the PPF takes over is to at least half of the member's *PPF compensation*, not fifty per cent of the member's scheme benefits.

The judges noted, however, that their judgment does not mean that the PPF's calculation is entirely immune from challenge. In particular, they speculated that someone might take issue with the PPF's choice of actuarial assumptions.

Further appeal?

The DWP had until 30 July 2021 to lodge submissions in support of an application for permission to appeal to the Supreme Court, and to advance arguments about the effect of the Brexit legislation. The PPF issued a press release suggesting that the issue is uncertainty about the period of time over which the cap has to be disapplied.[10]

Trustees to 'nudge' members more forcefully toward MaPS guidance

The Department for Work and Pensions (DWP) has published draft Regulations that would require occupational pension scheme trustees and managers to promote the guidance available from the Money and Pensions Service (MaPS) in dealings with older members with money purchase benefits, and their survivors.[11]

The legislation would oblige trustees to refer '*relevant beneficiaries*' (members aged 50 or older and survivors) to MaPS guidance when they seek to transfer or crystallize rights to '*flexible*' (broadly, money purchase) benefits. The trustees would have to offer to book the person in for a MaPS guidance session. The beneficiaries' application would then be put on hold until they confirm either that they have received guidance or have opted out. The requirements would not apply to transfers to other occupational schemes for the sole purpose of consolidating pension entitlements, or when they provide only defined benefits.

In most cases, opting out would have to be done in a separate communication with the trustees: it could not be given alongside the application to transfer or receive benefits, or when the trustees offer to book the guidance session. Exceptions would be made when the beneficiary confirms that he or she has, during the preceding twelve months, received MaPS guidance, or obtained independent financial advice in connection with the application; or when the beneficiary intends to take a serious ill-health lump sum (an option only for those expected to die within a year).

Trustees would need to maintain records of opt-out notifications and the receipt of guidance by beneficiaries.

The consultation period ends on 3 September 2021. The legislation has been drafted so as to come into force on 6 April 2022. Analogous provisions are being made via Financial Conduct Authority (FCA) rules for the trustees or managers of personal pension schemes.

HMRC newsletters—July 2021

Countdown Bulletin 55

Her Majesty's Revenue and Customs (HMRC) has issued the 55th newsletter in its *Countdown Bulletin* series, which provides information pertaining to the abolition of contracting out.[12] It announces the phased closure of the 'eRooms' created for membership-reconciliation purposes, advising administrators to make copies of any data they might want to keep. There is a last call for requests for final data cuts by those who had not already received them; however, the deadline was 31 July 2021. Lastly, there is an advertisement for the 'GMP checker' service, and contact details for other sorts of enquiries.

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[10] https://www.ppf.co.uk/news/court-appeal-judgment-hughes-judicial-review.

[11] <www.gov.uk/government/consultations/stronger-nudge-to-pensions-guidance>.

[12] <www.gov.uk/government/publications/countdown-bulletin-55-july-2021/countdown-bulletin-55-july-2021>.

Pension Schemes Newsletter 131

The 131st edition of HMRC's regular *Pensions Schemes Newsletter* includes the following announcements:

- scheme administrators will no longer have to contact HMRC to balance their account when making an amendment that reduces the amount due, in an Accounting for Tax return, using the online Managing Pension Schemes service (MPSS);
- HMRC needs volunteers to help test new MPSS features involving the migration of schemes from the older Pension Schemes Online service;
- annual allowance pension savings statements for 2020/21 must be issued by 6 October 2021;
- administrators are encouraged to remind members who have incurred an annual allowance charge in 2020/21 to declare it in the self-assessment tax returns, by 31 January 2022, regardless of who will pay it (there is some guidance on how they should complete the return if they are using the 'scheme pays' facility); and,
- scheme administrators do not need to report charity lump sum death benefits through Real Time Information (the legislation will be suitably amended at the earliest opportunity).[13]

In other news:

- The Parliamentary and Health Service Ombudsman concluded that maladministration by the Department for Work and Pensions (DWP), grounded in its failure to live up to expectations established by various governmental codes, charters and policies, resulted in a delay of at least 28 months in writing directly to women affected by changes to State pensionable age (SPA).[14] The next stage of the investigation will consider the extent of the injustice caused.
- In its Annual Report & Accounts 2020-21 (on page 59) the DWP says that it plans to set out its '*vision*' for the regulation of defined-benefit superfunds '*in autumn/winter 2021*', and that it intends to legislate '*as soon as parliamentary time allows.*'[15]
- Her Majesty's Treasury introduced the primary legislation necessary to correct the '*McCloud*' discrimination problems in the public-service pension schemes. The *Public Service Pensions & Judicial Offices Bill* had its First Reading in the House of Lords on 19 July 2021.[16]
- The Chancellor of the Exchequer said in his Mansion House speech on 1 July 2021 that the Government would launch '*new requirements for businesses and financial products to disclose sustainability information*'.[17] A Treasury press release explained that '*new integrated Sustainability Disclosure Requirements*' affecting '*companies, pension schemes, financial services firms and their investment products*' would '*bring together and streamline existing climate reporting requirements and go further to ensure consumers and investors have the information they need to make informed investment decisions and drive positive environmental impact.*'[18] The Government's approach to green finance regulation will be set out ahead of the 'COP26' meeting (set for November 2021). The policy paper accompanying the press release added little information on what this development might mean in practice for pension schemes.[19]
- The Pension Administration Standards Association's GMP Equalisation Working Group published a *Guidance Note on GMP Conversion*.[20]
- The Office for Tax Simplification (OTS) concluded that there are potential advantages to be gained from matching third-party information to individual taxpayers.[21] It could, for example, allow higher- and additional-rate taxpayers to claim relief on their pension contributions without completing self-assessment tax returns, or at least pre-populate returns with the relevant information. The OTS thinks that HMRC should also consider two-way information sharing: making some data available to third parties where it would be helpful for taxpayers. The example given involves the annual and lifetime allowances.

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[13] <www.gov.uk/government/publications/pension-schemes-newsletter-131-july-2021/pension-schemes-newsletter-131-july-2021>.

[14] <www.ombudsman.org.uk/sites/default/files/Women%E2%80%99s_State_Pension_age_-_our_findings_on_the_Department_for_Work_and_Pensions_communication_of_changes_Final.pdf>.

[15] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002597/dwp-annual-report-and-accounts-2020-2021.pdf>.

[16] <bills.parliament.uk/bills/3032>.

[17] <www.gov.uk/government/speeches/mansion-house-speech-2021-rishi-sunak>.

[18] <www.gov.uk/government/news/chancellor-sets-out-how-uk-financial-services-can-create-prosperity-at-home-and-project-values-abroad-in-first-mansion-house-speech>.

[19] *A New Chapter for Financial Services* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999256/Mansion_House_Strategy_Document_Accessible.pdf>.

[20] <www.pasa-uk.com/wp-content/uploads/2021/07/GMPE-Conversion-Examples-FINAL.pdf>.

[21] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/997582/Third_party_data_report.pdf>.

- The Pensions Regulator published, for consultation purposes, two documents that set out its proposed approach to the new climate-risk governance and reporting requirements that will begin to apply on 1 October 2021.[22] One document gives guidance on the governance and reporting obligations, and the other is a statement of the Regulator's policy on the imposition of monetary penalties in the event of rule breaches. There is also a form that can be used for the submission of responses (which should be sent to climatechangeconsultation@tpr.gov.uk). The consultation period ends on 31 August 2021.

[22] <www.thepensionsregulator.gov.uk/en/document-library/consultations/climate-change-guidance>.

And Finally…

We feel confident that readers will share *AF*'s disappointment that the *Contracting Out (Functions in Relation to Space) Order 2021* (SI 2021 No. 815) that was made on 8 July 2021 is related to neither the guaranteed minimum pensions of operatives at our Government's secret base on the far side of the moon nor the section 9(2B) rights of the sinister MIB (Men In Black) who dissuade people (quite ineffectually, we must say, otherwise we would surely know nothing of their existence) from reporting close encounters with UFOs/UAPs. Having said that, the Order is seemingly connected with the *Space Industry Regulations 2021* (SI 2021/792), so it might be worth tipping one's tin-foil hat to a jaunty angle and investigating further. The Truth (and a lot of grainy video footage of apparently airborne blobs) Is Out There.

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