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Current issues

September 2021

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GMP equalisation working group transfer guidance

The Pensions Administration Standards Association (PASA) working group dealing with guaranteed minimum pensions (GMP) equalisation has published *Supplemental Guidance on Transfer Payments*.[1] It offers suggestions for how schemes might deal with GMP equalisation in connection with transfers that they have paid to, or received from, other schemes.

The working group produced the guidance on transfers following the 2020 judgment in the *Lloyds Banking Group* litigation.[2] It supplements guidance on GMP equalisation methodology produced in 2019.[3] It looks at the issues encountered in three areas: individual transfers paid by schemes, individual transfers received by schemes, and bulk transfers covering groups of members. For future transfers-out it is recommended that schemes seek actuarial advice and adopt transfer value factors that produce transfers that are calculated in a way that eliminates GMP inequalities.

The guidance notes that, despite the *Lloyds* judgment, there remain unresolved issues that may never be determined by the courts, and that schemes will need to address such issues with their advisers.

In *Lloyds*, the judge ruled that in respect of unequalised individual transfer values paid from a scheme, top-up payments will be required to bring the transfer payment to the level that would have been paid if an opposite sex comparator had been used. The guidance recommends that, when making the comparison, the transfer valuation assumptions originally used for the member should be applied, and the original calculation methodology should be taken into consideration. Interest should be paid on the top-up: unless the transferring scheme's rules prescribe a particular rate, the approach taken in the Lloyds case (one per cent simple interest over the bank base rate) should be used.

There is no statutory limitation period for claims based on outward transfers, and in *Lloyds* the court ruled that the scheme's forfeiture provisions and member discharges did not apply. The PASA guidance notes accordingly that '*all past individual transfers out covering periods of pensionable service in the equalisation period are potentially in scope for a top-up payment*'.

The *Lloyds* ruling indicates that the trustees should be proactive in addressing historical transfer values where an adjustment is needed. The guidance also suggests that trustees are permitted to think about costs and other practicalities

[1] <www.pasa-uk.com/wp-content/uploads/2021/08/GMPE-Transfers-Guidance-FINAL.pdf>.
[2] *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc and other [2020] EWHC 3135 (Ch).*
[3] <www.pasa-uk.com/wp-content/uploads/2019/10/Equalising-for-the-Effects-of-GMPS-September-2019-FINAL.pdf>.

when determining how to implement a correction process. The various practical issues that trustees could encounter, and how they might affect decisions about whether a top-up payment can be made, are discussed.

The guidance says that the legal obligations on receiving schemes are uncertain. It suggests that defined benefit receiving schemes are expected to apply GMP equality to benefits awarded in respect of transfers-in as part of their wider GMP-equality exercises, and that once an exercise has been completed and communicated to members there may be reluctance to accept subsequent top-up payments from transferring schemes if that would entail additional work and costs. The working group thinks that defined contribution receiving schemes are likely to be willing to accept top-up payments if they are offered, subject to member consent and (perhaps) *de minimis* amounts.

On the subject of bulk transfers, the guidance notes that a receiving scheme's trustees will often agree to grant benefits to members based on their accrued rights in the transferring scheme, regardless of the value of the assets transferred. That was the case with the bulk transfers discussed in *Lloyds,* which were said to have resulted in '*mirror-image benefits*'. The judge concluded that there was no obligation on the transferring scheme to consider top-up payments, and that responsibility for GMP equalisation rested with the receiving scheme. For bulk transfers that do not provide transferred members with '*mirror image benefits*' (e.g. those providing service credits) the guidance recommends that specific advice should be sought. The PASA guidance suggests that trustees should examine any legal agreements entered into as part of a bulk transfer, especially where GMP-inequality indemnities might have been given.

The guidance provides a useful summary of the issues facing both transferring and receiving schemes when it comes to the equalisation of benefits for the effects of GMPs. Trustees will need to decide how to deal with such issues as part of their GMP equalisation projects.

Pension Schemes Act powers prospective-only, as promised

The *Pension Schemes Act 2021 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2021* bring a motley selection of PSA '21 provisions into force with effect from 1 October 2021.[4] They cover additional grounds for the imposition of contribution notices, the creation of new criminal offences and civil penalties, changes to the notifiable events regime (but not the extended notification obligations related to corporate activity), and amendments to the Pensions Regulator's information-gathering powers. Perhaps most noteworthy are transitional provisions to the effect that the new powers bestowed upon the Regulator will generally not apply to events occurring prior to 1 October.

New criminal sanctions, civil penalties & boosted information-gathering powers

The Act introduces new criminal offences for deliberate avoidance of employer debt and conduct risking accrued scheme benefits. It also paves the way for civil penalties of up to £1 million for serious breaches such as failure to comply with a contribution notice or the 'notifiable events' rules, and for knowingly or recklessly providing false or misleading information to the Pensions Regulator or trustees. Under powers stemming from the Act, Regulations have been laid before Parliament specifying the mandatory contents of the notice that the Regulator will be able to give to oblige a person of interest to submit to an interview.[5] They also set out the fixed and escalating penalties that will apply on failure to comply with such information-gathering powers (the fixed penalty is £400 and the escalating penalties are £200 a day for an individual and can climb to £10,000 a day for a corporate entity).

The *Pension Schemes Act 2021 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2021* confirm that the new offences, penalties and powers will come into force on 1 October 2021. Importantly, the Regulations' transitional provisions will mean that the powers cannot be used retrospectively. So, for example, the criminal offences will not apply to conduct occurring (or, in the case of a series of acts or a continuing failure, *first* occurring) before that date. Saving provisions preserve some parts of the pensions legislation in their pre-1-October-2021 states in certain circumstances, such as when a duty under the notifiable events rules arises before 1 October (as a consequence, the new £1m civil penalty will not apply).

[4] SI 2021 No. 950 <www.legislation.gov.uk/uksi/2021/950/made>.

[5] The *Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021* (SI 2021 No. 754).

New grounds for contribution notices

The Act also established two new grounds on which the Regulator can issue contribution notices: when either an 'employer solvency test' or an 'employer resources test' are met. This means that in future the Regulator will be able to require additional scheme funding from a scheme sponsor (or person connected to a sponsor) if an act or omission reduces the debt recoverable by the pension scheme on a hypothetical insolvency, or if it materially reduces the employer's resources relative to any employer debt which might be triggered under pensions legislation.

The *Pensions Regulator (Employer Resources Test) Regulations 2021*, which have been laid before Parliament for approval and are set to come into force on 1 October 2021, specify how a sponsoring employer's resources, and the effects of corporate activity thereon, would be quantified for the purposes of the second of the new tests. In broad terms, they say that 'profits before tax' is the relevant measure of the scheme sponsor's resources (in the case of charities and other organisations not trading for profit, references to '*profits*' are interpreted as meaning '*net income*').

The *Commencement No. 3 and Transitional and Saving Provisions Regulations* provide for the new grounds for contribution notices to become effective on 1 October 2021. As with the new criminal sanctions, etcetera, discussed above, transitional provisions will prevent their application to events occurring before that date.

Despite numerous reassurances from the Regulator and the Government that the new powers are intended only to punish serious intentional or reckless conduct, and should not therefore interfere with ordinary corporate activity, only time will tell how this will play out. In the meantime, the legal codification of governmental promises of non-retrospection should be of some comfort.

Regulator issues holding update on single Code project

The Pensions Regulator has published an 'interim response' to comments about its draft combined Code of Practice. It recounts receipt of *'several well-argued direct challenges to aspects of* [its] *work*', and plans to take time to give them due consideration.

Background

The Regulator announced in 2019 that it intended to review its fifteen Codes of Practice, with the expectation that they would be combined into a single, shorter Code that would make information '*quicker to find, use and update*'. A consultation exercise for the initial phase of the project, with draft content covering ten of the existing Codes, took place from 17 March to 26 May 2021.

Interim response

The Regulator reports that it received 103 submissions in response to its consultation draft, amounting to around 10,000 separate answers to its questions. The main concerns raised were that—

- respondents were sometimes unsure whether particular modules were meant to apply to them (the Regulator says that it will address the issue in the final online design of the Code);
- use of the catch-all phrase 'governing body' is problematic in some public-sector contexts (suggested fixes are being considered);
- the Regulator overstepped when it decided that 'predominantly' should mean 'at least 80 per cent' in the context of the obligation to focus mainly on investment in regulated markets (it has abandoned the expectation, but continues to explore ways to protect members who might otherwise find that their schemes are invested in poor-quality or inappropriate assets); and
- the Regulator's expectations about how trustees should approach the new 'own-risk assessment' governance task, and how frequently the ORA should be refreshed, may be too onerous (for example, the Regulator had suggested that the ORA ought to be reviewed annually, even though the relevant legislation allows a three-year gap between reviews).

Timing

The interim response does not make any commitments about the timing of the next steps in the production of the new single Code. However, the Regulator indicates that it is unlikely to come into effect before the summer of 2022. As a consolation, it suggests that the delay might allow it to cover material related to the *Pension Schemes Act 2021* (perhaps the new climate-change governance and reporting obligations for larger schemes) in the first edition of the Code.

As anticipated, the new own-risk assessment (ORA) seems to have attracted most of respondents' attention. Legislation dictates that the first such assessment must be documented by private-sector trustees by the end of the first full scheme year after the publication of the Code, or if later by the deadline for the next actuarial valuation or annual governance ('Chair's') statement. The Regulator takes the view that this is a maximum period, and that best practice points to quicker production.

It is less clear when trustees will be expected to demonstrate compliance with other 'new' obligations, such as the operation of an 'effective system of governance', for which the legal requirement is already in force. The Regulator has previously suggested that they might need to conform as soon as the new Code is in force or shortly thereafter. Trustees should therefore add the subject to their agendas at the earliest opportunity.

Ombudsman anticipates rise in complaints

The Pensions Ombudsman has publicized his plans for the next three years.[6] He forecasts increasing caseloads (including a lockdown-induced bump) and announces a pilot scheme to investigate more trustee-fraud allegations, whilst aiming to resolve complaints more quickly by increasing his office's productivity.

After an initial fall in complaint numbers as the country went into its first lockdown, levels reverted to fit the upward trend of recent years. The Ombudsman thinks that complaint levels will continue to climb over the next three years, and indeed that pandemic-prompted economic disruption will generate its own slew of cases. He is also seeing an uptick in cases involving allegations of trustee dishonesty and will, following his determinations in cases concerned with Norton Motorcycles[7], begin to investigate more of them on a test basis, with the Department for Work and Pensions' blessing. (In related news, the former owner of Norton will be prosecuted by the Pensions Regulator on charges of illegal investment of pension funds into the business.[8])

The Ombudsman has prioritized reduction of the time taken to conclude cases. As a related goal, he would like to see improvements in scheme's internal dispute resolution procedures—for example, his organization encourages a move toward single-stage IDRPs.

The plan indicates that the goals will have to be achieved through efficiency improvements rather than increased funding. Indeed, the Chair of the Ombudsman's organization says that it '*will need to do more with less*'.

[6] *Corporate Plan 2021 – 2024* (August 2021) <www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Corporate%20Plan%202021-24.pdf>.
[7] See especially Determination CAS-30918-M4P3 <www.pensions-ombudsman.org.uk/sites/default/files/decisions/CAS-30918-M4P3_0.pdf>.
[8] *Former Norton Motorcycles owner to be prosecuted for pensions breaches* (August 2021) <www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2021-press-releases/former-norton-motorcycles-owner-to-be-prosecuted-for-pensions-breaches>.

HMRC newsletters, August 2021

Managing Pension Schemes Service Newsletter

In an August 2021 edition of its *Managing Pension Schemes Service Newsletter*[9], Her Majesty's Revenue and Customs (HMRC) announces (amongst other things) that:

- administrators that need to submit an event report for a scheme registered on the service should email pensions.businessdelivery@hmrc.gov.uk, putting 'Event Report – Managing Pension Schemes' in the subject line, and confirming the events to be reported;
- from 19 October 2021, administrators will be able to view a list of the schemes that will have to be migrated to the service; and,
- if a scheme has been wound up without informing HMRC, the administrator should email migration.mps@hmrc.gov.uk, putting 'Managing pension schemes – Wound Up Schemes' in the subject line.

Pension Schemes Newsletter 132

There is not a lot of new news in *Pension Schemes Newsletter 132*.[10] It clarifies the announcement noted above, saying that the lists of schemes that HMRC is planning to publish on 19 October will only show schemes that are classed as 'open' on Pension Schemes Online, and that they will initially be read-only. It also repeats a historical request for scheme administrators of pre-A-day schemes that do not have pension scheme tax reference codes to get in touch with HMRC. They should email pensions.administration@hmrc.gov.uk, having put 'SF reference pension schemes' in the subject line, and supply the relevant superannuation fund reference numbers and scheme names.

[9] <www.gov.uk/government/publications/managing-pension-schemes-service-newsletter-august-2021/managing-pension-schemes-service-newsletter-august-2021>.
[10] <www.gov.uk/government/publications/pension-schemes-newsletter-132-august-2021/pension-schemes-newsletter-132-august-2021>.

And Finally…

Assuming that our readers don't confine their consumption of the written word to whimsical musings in pensions newsletters, *AF* thought it likely that they will have at least seen headlines referring to the Information Commissioner's 11 August 2021 consultation on a draft international data transfer agreement (IDTA).

Those who have followed the story will recognize that the mix of ingredients that went into the IDTA included, in addition to a *soupçon* of Brexit, more than a hint of *Schrems II*. For the uninitiated, that's a July 2020 decision of the European Court of Justice in which the judges concluded that the 'EU-US Privacy Shield' arrangement couldn't provide the level of protection of personal data that the European Commission had thought, given the breadth and depth of the surveillance activities of various US national security agencies. (We were about to type *'covert* surveillance activities' there, but realized that if the snooping capabilities had remained at all secret we wouldn't be talking about any of this, and *AF* wouldn't have had a phone call from a nice lady at the NSA about the misplaced semi-colon in the second line of the third paragraph of an early draft of this article.)

The eponymous source of the case name is Facebook *bête noir* Max (Maximillian) Schrems, an Austrian lawyer and privacy activist. It's a name that *AF* cannot see without thinking of Max *Schreck*, star of the classic 1922 horror movie *Nosferatu*, and—if you believe the premise of *Shadow Of The Vampire* (2000)—a real-live (real-undead?) creature of the night.[11] The central plot conceit of the later film is that Schreck's legendary portrayal of Count Orlok—Dracula, but with less-blatant intellectual property issues—was just a little bit *too* convincing for him to have been merely acting.

It struck *AF* that, if the movie's premise were true, Max ~~Schrems~~ Schreck would be less concerned about the transfer of his personal *data* overseas, and more about the transfer of his actual *person*; most probably in a pine box filled with high-quality Carpathian topsoil…

(*P.S. Whilst on this rather Gothic note, we recount a colleague's recent observation about a document drafted by* AF *being exactly 666 words long. We assured him that it was mere coincidence, and that there was no need for him to get exercised —or exorcised—over it. Then again, that's precisely what the Beast of the Apocalypse—AKA the Father of Lies*—would *say, isn't it*…)

[11] Some readers may more-readily associate the name Schreck with a large, green-skinned ogre, but we'd prefer (on this occasion) to skirt the potential trap of infinitely regressive pop-cultural references.

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