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pensions law group

Snapshot

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Overview

- Numerous consultations as part of making pensions fairer

  A number of pension consultations have been issued to try and address the pension inequality gap between those with defined benefit pension schemes and those with defined contribution pension schemes. These include:

  - Government response to consultation on investments in illiquid assets and scheme charge cap reforms

    Subject to Parliamentary approval, draft legislation will require trustees of occupational defined contribution schemes to:

    - disclose their asset allocation in their chair's statement in respect of the assets in their default funds for the first scheme year which ends after **1 October 2023**; and
    - state their policy in relation to illiquid assts in their default SIP the first time it is revised after **1 October 2023 and at the latest 1 October 2024**.

  - DWP launches consultation on consolidation solutions for deferred small pots

    The DWP has launched this consultation with the purpose of gathering evidence to support the development of policy options for large-scale automated consolidation solutions for deferred small pots in the automatic enrolment workplace. It also seeks views on two large-scale automated consolidation solutions. The aim is to improve efficiency and reduce the risk of members' losing track of their pension pots.

  - Consultation on value for money framework

    Since the value for money (**VFM)** regime came into force, the DWP has expressed concern that the existing pensions market can make it difficult for DC schemes to assess the VFM that members receive and wants to redress this by the reporting of data around investment performance, costs and charges and the quality of services. The DWP is seeking views from the industry as to how the VFM framework is performing and how it interacts with the wider policy framework.

  - Consultation on extending collective defined contribution schemes

    The DWP has issued a consultation seeking views on a policy framework for extending collective defined contribution (**CDC**) schemes. The consultation seeks views on:

    - a whole-life CDC scheme catering for multi-employer schemes; and
    - decumulation-only arrangements

- Green v Commissioner of Police of the Metropolis

  Provisions in the Police Pension Scheme which provide that a widow/widower/civil partners survivor's pension would terminate if they remarried or began cohabiting was held not to be incompatible with the right to marry under the European Convention of Human Rights.

In more detail

Government response to consultation on investments in illiquid assets and scheme charge cap reforms

Back in October 2022, the government consulted on broadening the investment opportunities of occupational defined contribution schemes. Proposed draft regulations were consulted upon (now known as the Occupational Pension Schemes (Administration, Investment, Charges and Governance) and Pension Dashboards (Amendment) Regulations 2023 (**Draft Regulations**) which would:

- require schemes to disclose and explain their policies on illiquid investment and their full asset allocations; and
- introduce an exemption for performance-based fees from the charge cap calculations.

The intention behind this is to help stimulate growth in investments in illiquid assets by occupational defined contribution schemes and improve outcomes for pension scheme members.

The government has now published its response to this consultation.

Disclose and explain

Under the 'disclose and explain' proposals, trustees will need to:

- disclose their asset allocation in their chair's statement in respect of the assets in their default funds. If a scheme has more than one default arrangement, trustees should look to disclose the asset allocation for each default arrangement where members are still invested in that fund at the end of the scheme year. Subject to Parliamentary approval, this will need to be included in the chair's statement for the first scheme year which ends after 1 October 2023;
- state their policy in relation to illiquid assets in their default SIP. Subject to Parliamentary approval, this will need to be included in the SIP the first time it is revised after 1 October 2023 and at the latest 1 October 2024.

Performance based fee exemption

The Draft Regulations set out a proposed definition of 'specific performance-based fees' which includes a set of criteria that must be met before a performance-based fee can be excluded from the charge cap calculations. This includes that a performance fee must relate to a fee paid when returns from investments exceed a specific rate, benchmark or a specific amount. The terms must also be agreed between the trustees and the fund manager prior to investing.

The response makes clear that the change places no obligation on schemes to enter into investments with performance fees if this is not in line with their investment strategies or it is not in members' best interests.

The government are looking to bring this change into force in April 2023, subject to Parliamentary approval.

DWP launches consultation on consolidation solutions for deferred small pots

The DWP has launched a consultation on "*Addressing the challenge of deferred small pots*", with the purpose of gathering evidence to support the development of policy options for large-scale automated consolidation solutions for deferred small pots in the automatic enrolment workplace (**DSPs**). In particular, the DWP is looking to deepen the evidence base around the scale and characteristics of the growth in the number of DSPs.

In her ministerial foreword to the consultation, the Minister for Pensions, Laura Trott, states:

"*The growth of small pots means there is undue cost and inefficiency in the pension system. It creates a risk that deferred members lose track of their workplace pension savings - acting as a disincentive to member engagement. And it creates a cross subsidy risk for members with larger pots, which may impact their retirement outcomes. The additional administrative cost for providers managing deferred small pots reduces the value they can deliver for members, while also resulting in potential financial sustainability issues. It is vital that we find the right large-scale solution to tackle this problem so that automatic consolidation of small pots becomes integral to the operation of the automatic enrolment market* "

The consultation also cites data and research which suggests that there are over 2.2 million deferred pots under £1,000 currently held within contract-based schemes and that the value of lost pension pots has grown from £19.4 billion in 2018 to £26.6 billion in 2022.

The DWP acknowledges that enabling more member engagement can help mitigate the growth in the number of DSPs and asks for views on how to increase member-initiated consolidation. However, the DWP recognises that this alone will not significantly change the trend in the growth of DSPs and that there is a need for an automated consolidation system. The consultation therefore also seeks views on two large-scale automated consolidation solutions:

- ***default consolidator model*** - DSPs which meet the chosen eligibility criteria for automatic consolidation would transfer automatically to a small pot consolidator (with members being given an opportunity to opt-out if they want to); and

- ***pot follows member*** - when an employee moves jobs, their deferred pension pot in their former employer's scheme would automatically move with them to their new employer's scheme, if it meets the chosen eligibility criteria for automatic consolidation. Individuals would have the opportunity to opt-out and leave any / all deferred pots where they are.

The DWP confirms that it will consider these solutions against five key criteria:

- delivery of overall net benefits for members through improved value for money outcomes, achieving a meaningful impact on the number of existing, and flow of new, deferred pots;
- complements member engagement on their savings journey/retirement planning;
- supports a competitive, sustainable and more efficient workplace pensions market (trust and contract-based schemes);
- minimising complexity and administrative burdens for employers; and
- commands confidence in the system for savers and tax-payers.

The responses to this call for evidence and other stakeholder engagement will inform DWP's development of its policy position on an approach to DSPs, on which it will consult "*in due course*". On the face of it, this move to tackle the DSP problem is to be welcomed and applauded. However, this is not a new problem and one which legislation has previously sought to address; the Pensions Act 2014 provided for a pot follows member solution and some nine years later we are no further along. It is therefore to be hoped that, this time, the DWP means business!

The consultation will end of 27 March 2023.

Consultation on value for money framework

The DWP has launched a consultation seeking views on the VFM framework, which will close on 27 March 2023.

The consultation seeks to obtain industry feedback on policy proposals to disclose, assess and compare the VFM of workplace pension schemes. In October 2021, the Pensions Regulator introduced the framework to encourage a greater drive around ensuring that schemes with less than £100 million in assets were on top of charges and costs for members.

Since the regulatory regime came into force, the DWP has expressed concern that the existing pensions market can make it difficult for DC schemes to assess VFM that pension savers receive and wants to redress this by the reporting of data around investment performance, costs and charges and the quality of services. The DWP is seeking views from the industry as to how the VFM framework is performing and how it interacts with the wider policy framework.

Consultation on extending collective defined contribution schemes

The DWP has issued a consultation seeking views on a policy framework for extending CDC schemes beyond single or connected employer schemes to accommodate multi-employer schemes. This would also include Master Trust schemes.

Under a CDC scheme, an employer makes fixed contributions to the scheme. Members have a target income based, for example, on their average earnings, but this is not guaranteed. If the assets are not sufficient to meet this target, a lower level of benefits can be provided. Contributions paid by and in respect of members are all collected into a single pool of assets which is then invested. This allows investment risk to be shared between members and members to benefit from economies of scale. CDC schemes are therefore an 'in between' model of defined contribution and defined benefit. One of the key principles is that neither the employer nor the member bears all the risk in respect of the pension scheme. The intention is that they provide greater certainty for members than defined contribution schemes, but with less cost volatility for employers than defined benefit schemes

In August 2022, a legislative framework for CDC schemes came into force. This provides for single or connected employers to set up a CDC scheme.

The DWP is now looking at how the CDC framework can be extended to allow more employers of all sizes to offer CDC schemes and to allow more flexibility in design. This is a result of increased interest in other forms of CDC scheme in the last 12 months. The consultation document, in particular, considers and seeks views on an amended structure for:

- a whole-life CDC scheme catering for multi-employer schemes; and
- decumulation-only arrangements.

Recent commentary suggests there is increased interest in this area. If the framework is expanded to allow for unconnected multi-employer schemes, this may be an area of growth to watch.

Green v Commissioner of Police of the Metropolis – police pension scheme regulations not incompatible with the right to marry

This was a case on appeal from the High Court in relation the Police Pension Scheme.

In the High Court it had been held that a provision in the Police Pensions Regulations 1987 which terminated a widow/widower/civil partners survivor's pension if the widow, widower or civil partner remarried or began cohabiting with a new partner was not incompatible with Article 12 of the European

Convention of Human Rights (the right to marry). This was appealed to the Court of Appeal on the basis that the High Court judge had erred in law in reaching this finding.

The Court of Appeal found that the judge had not erred in law. It was held that the regulation in the Police Protection Regulations 1987 was not a measure which impaired or injured the essence or substance of the exercise of the right to marry enshrined in Article 12 of the European Convention of Human Rights, or which substantially interfered with or unreasonably inhibited it. There was no basis for concluding that the High Court judge had applied an incorrect test in relation to Article 12 or that his approach to the necessary evaluative judgment was flawed. Therefore the appeal was dismissed.

Our wider team – a closer look

A spotlight on…overseas pensions advice

Our overseas pensions specialists advise a wide range of clients on all matters relating to international pensions and pensions tax. We advise providers and trustees of offshore pension arrangements, as well as UK-resident individuals with overseas pension rights and non-UK resident individuals with UK-based pension savings. Our overseas pensions team comprises both pension specialists and private wealth advisers, making us ideally placed to advise in this highly technical and specialised sphere.

We regularly advise pension providers and scheme trustees in jurisdictions such as the Channel Islands, Gibraltar and Malta on all aspects of their offering, including on the establishment and operation of pension schemes and the payment of benefits from them. Our work encompasses QROPS, QNUPS, EFRBS and IPPs and our lawyers have created and advised upon many such schemes.

Many of our clients have an international workforce for whom they need to make pension provision; others have legacy offshore pension schemes for senior executives. These pension arrangements often give rise to complex challenges which we can help navigate in a way that allows our clients to best support their business and global workforce.

Our capabilities and experience of advising individuals on all aspects of international pension matters make us a unique team. We are experts at helping our clients understand the nature of their overseas pension benefits and options for using them, including with regards to drawing lifetime benefits and the options for gifting on death. We advise too on the taxation of benefits from overseas pension arrangements received by UK residents.

We can advise on the legal and tax aspects of a transfer of UK pension savings overseas and on the transfer of pension benefits between overseas arrangements. We are also experienced at advising on the taxation of benefits paid from UK pension arrangements to overseas resident individuals, including consideration of relevant double taxation agreements.

Whether advising institutions or individuals, we work closely with our clients and their other advisers, incorporating financial advice and international local law advice as appropriate, so that we can provide comprehensive, practical advice that is tailored to the individual circumstances of our clients. We pride ourselves on giving advice that enables our clients to fully explore and understand their options as well as the practical and legal implications of their actions.

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