Snapshot

October 2023

Overview

Draft legislation on the abolition of the lifetime allowance

Draft legislation, alongside an accompanying HMRC policy paper, has been published. The legislation sets out how the Government will seek to implement the second phase of the abolition of the lifetime allowance, which is scheduled for April 2024.

Independent Review of The Pensions Regulator

The Department of Work and Pensions (the **DWP**) has undertaken a review to ensure that The Pensions Regulator (**TPR**") is fit for purpose, and to assess its necessity as a public body. Whilst the overall conclusions of the review were positive, the DWP has made seventeen recommendations for improvement.

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 have been drafted to amend two pieces of UK primary legislation in relation to pensions and codify the outcomes of *Walker v Innospec Ltd and others* and *Allonby* judgments.

The Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023

Draft Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023 have been laid before Parliament that seek to amend the Pensions Act 2004 (the '**PA 2004**') in order to retain the effects of the judgments in *Hampshire v Board of the Pension Protection Fund* and *Hughes and others v The Board of the Pension Protection Fund* regarding limits on Pensions Protection Fund (**PPF**) compensation levels.

Killik & Co LLP v HMRC [2023] UKFTT 653 (TC)

The case of *Killik & Co LLP v HMRC* confirms the position in *Revenue and Customs Commissioners v Sippchoice Ltd* (**Sippchoice 2**) which held that in specie contributions and contributions as payments in kind to a Self-Invested Personal Pension Scheme (**SIPP**) did not constitute 'pension contributions paid' and therefore did not receive tax relief under Section 188 of the Finance Act 2004 (**FA 2004**).

Pension saving boost for millions receives Royal Assent

A Private Members' Bill has been granted Royal Assent that will introduce powers to reduce the age from which automatic enrolment is triggered and will remove the lower earnings limit. This is accompanied by a statutory requirement to consult on the implementation approach and timing, along with reporting on the outcomes to Parliament.

In more detail

Draft legislation on the abolition of the lifetime allowance

The abolition of the lifetime allowance was one of the proposed changes to the pensions' taxation regime announced in the Spring 2023 Budget. A phased approach has been adopted towards this abolition, with the first phase taking place in April 2023 with the Finance (No. 2) Act 2023 legislation that prevented individuals from becoming liable to the lifetime allowance charge from that point onwards. The second phase, which will be the abolition of the lifetime allowance itself, is scheduled for April 2024. Draft legislation has recently been published on this planned abolition, setting out how the Government will implement this.

The draft legislation, alongside the accompanying HMRC policy paper, has highlighted how all references to the lifetime allowance will be removed from legislation and replaced by two new allowances. The first, the individual's lump sum and death benefit allowance, will limit the total amount of lump sums and lump sum death benefits (but not pensions) which can be taken tax free by an individual to a maximum of £1,073,100. Meanwhile, the second, the lump sum allowance, will be set at £268, 275 and provide a further limit on the total value of tax-free cash which can be taken in relation to certain specific authorised payments. However, despite the introduction of these two new allowances, those individuals with lifetime allowance protection will effectively maintain the entitlements they had prior to the abolition of the lifetime allowance relating to tax free cash.

New provisions relating to the pensions' taxation regime are also set out in the draft legislation. Pensions income shall effectively remain as being taxed at an individual's marginal rate, as will authorised lump sums and authorised lump sums death benefits, although any excess to these new allowances will be subjected to the higher special lump sum death benefit charge. Meanwhile, both benefit crystallisation events and lifetime allowance excess lump sums are set to be abolished. The HMRC Policy Paper has also gone one step further in relation to the tax treatment of unused funds paid to dependants out of uncrystallised funds, indicating that if an individual dies before age 75 leaving uncrystallised funds, that a lump sum may still be paid to a dependant out of drawdown funds, or used to buy an annuity for the dependant, but that these will be subject to income tax at the recipient's marginal rate.

Furthermore, additional pension commencement lump sum flexibility has been set out in the draft legislation, with no limit placed on the amount of authorised lump sums and lump sum death benefits which can be taken (only on the lump sum amounts which can be taken tax-free). Hence, subject to the scheme rules, individuals would not be subjected to any limit on the amount which could be taken as a pension commencement lump sum under the tax legislation, although the excess would be taxed as the individual's marginal rate.

In order to prepare for the implementation of this second phase, trustees should take steps to familiarise themselves with the proposed changes and consider what actions may be needed for their particular scheme. It may be the case that scheme rules and associated member communications will require updating in areas such as the recommencement of benefit accrual or where other benefit arrangements interplay with the lifetime allowance, such as cash in lieu of pension arrangements and excepted group life policies.

Independent Review of The Pensions Regulator

The DWP has undertaken a review to ensure that TPR is fit for purpose, and to assess its necessity as a public body. The review was published on 18 September 2023, and factors given consideration within it included:

- whether TPR is well set up to do its job within the wider systems of pensions and financial regulation;
- whether TPR is well set up to adapt and respond to future challenges;
- whether TPR is well governed, efficiently run and appropriately funded;
- how well TPR is managing relationships with its key stakeholders; and
- opportunities to undertake activities in a more efficient manner.

The review has concluded that TPR is generally well-managed, and that public reception has remained positive towards it. The coherent and well-focused strategy of TPR was praised, as was its accountability and its past successes such as the implementation of automatic enrolment.

However, seventeen recommendations for improvement were made, centred around themes of risk and growth, digital transformation and value for money, and compliance and enforcement. TPR has been encouraged to take on an authoritative role in policy discussions regarding the investment of UK pension funds, take tougher enforcement action where necessary, and to discharge its existing functions efficiently and effectively *"to avoid inexorable growth as its remit expands"* and minimise the significant risk of *"spending scarce budget badly".*

The review does not set out a definitive timeframe for implementing these recommendations but does indicate that the majority could be implemented within the coming year.

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 are due to come into force "immediately before the end of 2023".

Amongst other things, the Regulations will codify the right to non-discrimination on grounds of sexual orientation as regards to employment and occupation. This will be achieved by amending the Equality Act 2010 so that the benefits payable to same-sex surviving spouses and civil partners should be calculated on the same basis as for opposite-sex spouses and civil partners. This amendment shall accord with the principle established in *Walker v Innospec Ltd and others*, which held that the 5 December 2005 cut-off breached EU equality requirements in relation to survivors' pensions.

The Regulations shall further provide for the codification of the judgment in *Allonby v (1) Accrington & Rossendale College and others (European Court of Justice) (13 January 2004)* by providing for a notional opposite sex comparator to be used to establish the existence of discrimination caused by legislation, rather than an actual one. However, the use of this notional comparator is restricted to being in connection with pensionable service on and after 17 May 1990, to assess whether there is sex-based discrimination resulting from the GMP legislation. Such codification has proved necessary as, after 31 December 2023, retained EU law will cease to have effect in domestic law. Hence, the Government is seeking to provide certainty, by

restating the outcome of these judgments in legislation. Such restatement maintains the status quo so should not increase costs or administrative requirements for Schemes.

The Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023

The draft Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023 have been laid before Parliament. These regulations seek to amend Schedule 7 of the PA 2004 which contains provisions relating to the payment of compensation from the PPF in circumstances where an occupational pension scheme is unable to meet its obligations to provide benefits to members. The amendment is designed to ensure that the compensation payable to members by the PPF is not less than 50% of the benefits that the member would have been entitled to under the rules of the original scheme before the PPF assumed responsibility for it.

In practice, this does not represent a significant change from the existing state of play. The method of calculating PPF compensation contained in the existing version of Schedule 7 PA 2004 was successfully challenged in the European Court of Justice *in Hampshire v Board of the Pension Protection Fund,* in which the Court ruled that former employees should receive at least 50% of their accrued pension benefits in the event of their employer's insolvency. In the case of *Hughes and others v The Board of the Pension Protection Fund*, the High Court disapplied the cap on PPF compensation that previously applied to members below their scheme's normal pension age on the date of their employer's insolvency, noting that the cap amounted to unlawful age discrimination.

However, the Retained EU Law (Revocation and Reform) Act 2023 provides that after 31 December 2023 principles of EU law, including principles derived from EU case law, will cease to have effect. Notwithstanding this, the UK Government wishes to retain the effects of the aforementioned judgments after this date. The purpose of these Regulations is therefore to codify the effect of these cases by ensuring that Schedule 7 PA 2004 provides for a 50% minimum level of PPF compensation and remove references to a cap on PPF compensation, making consequential amendments to the PA 2004, the Pensions Act 2008, the Pensions Act 2011 and the Pensions Act 2014. The draft Regulations are due to come into force before the end of 2023.

Killik & Co LLP v HMRC [2023] UKFTT 653 (TC) (25 July 2023)

Historically, it has been common for contributions into a SIPP to be made in specie by way of contributions of shares or other non-cash assets, on the understanding that such contributions would constitute 'pension contributions paid' for the purposes of Section 188 of the FA 2004, and consequently that tax relief could be claimed in respect of such contributions under Regulation 14 of the Registered Pension Scheme (Relief at Source) Regulations 2005 (**'RASR'**). Additionally, HMRC guidance that has been in place since 2009 states that in specie contributions structured as a payment in satisfaction of a debt to a SIPP would also constitute 'pension contributions paid' for the purposes of Section 188 FA 2004.

This position was upended by the Upper Tax Tribunal decision in Sippchoice 2, which held that such in specie contributions and contributions as payments in kind did not constitute 'pension contributions paid' for the purposes of tax relief under Section 188 FA 2004.

The present case confirms the decision in Sippchoice 2, that payments in kind are not 'pension contributions paid'. As in Sippchoice 2, HMRC had refused an application for relief under Section 188 FA 2004 in respect of in specie contributions structured as a payment in satisfaction of a debt owed to the SIPP.

The appellant, Killik & Co LLP, was a provider of SIPPs into which in specie contributions had been made.

The Tribunal considered the following points:

1. whether the term 'pension contributions paid' was broad enough to encompass in specie contributions as well as payments by way of bank transfer;
2. whether 'contributions paid' can encompass in specie contributions made in order to discharge a monetary obligation; and
3. whether a claim for relief under Regulation 14 RASR constitutes a 'return' for the purposes of Section 29(2) Taxes Management Act 1970 (**TMA 1970**), and consequently whether the taxpayer was entitled to rely on the protections in that section to prevent HMRC bringing an assessment against them on the grounds that the return was made in accordance with a practice generally prevailing at the time (the **PGP**).

On points 1 and 2, the Tribunal was bound in any event to follow the decision of the Upper Tribunal in Sippchoice 2. Nevertheless, in respect of point 2 the Tribunal noted that the documentation in this case was insufficient to create a legally enforceable debt. Therefore, even if Sippchoice 2 had been wrongly decided as regards the admissibility of in specie contributions in satisfaction of a debt, Killik & Co LLP would still have failed to succeed on this point on factual grounds.

On point 3, the Tribunal held that a claim for relief under Regulation 14 RASR was incapable of constituting a 'return' under Section 29(2) TMA 1970, and therefore no protection was available to prevent HMRC from bringing an assessment against the taxpayer. It held that RASR contained its own provisions governing assessment mechanisms which meant that there was no need for recourse to Section 29(2) TMA 1970. The Tribunal noted that any PGP must be adopted by both taxpayers and HMRC. However, it did not rule definitively on whether the practice of granting relief in respect of in specie contributions paid in satisfaction of a debt could constitute a PGP, on the basis that the appellant would not be within the scope of such a PGP in any event given that no debt obligation existed on the facts. The Tribunal held that there was no PGP to allow a relief to be claimed in respect of an in specie contribution following an agreement to pay a monetary amount where no debt was created.

There is prospect for the case to be appealed and so it will be worth following further developments on this. In the meantime, it remains inadvisable to make in specie contributions into a SIPP, given the considerable risk that tax relief will not be able to be claimed in respect of such contributions.

Pension saving boost for millions receives Royal Assent

A Private Members' Bill has received Royal Assent and will help millions of people save more into their pension by introducing powers to reduce the age for being automatically enrolled and to enable pension saving from the first pound earned by scraping the lower earnings limit. The Bill

also includes a statutory requirement to consult on the implementation approach and timing, along with reporting on the outcomes to Parliament.

The Department for Work and Pensions will launch a consultation on implementing the new measures.

It is predicted that this amendment, combined with the Mansion House Reforms, could see the average earner's pension increase by nearly 50% if saving across their entire career, while a minimum wage earner could see their pension pot increase by over 85%. Automatic enrolment has already contributed to a rise in eligible employees saving into a workplace pension, from 55% in 2012 to 88% in 2021, with an additional £33 billion saved in real terms in 2021 compared to 2012. Automatic enrolment has particularly benefitted women, young people and lower earners, with the proportion of eligible women in a workplace pension having increased from 59% in 2012 to 89% in 2021, while the proportion of eligible 22 to 29-year-olds has more than doubled - from 35% in 2012 to 86% in 2021.

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