

GMP equalisation – a new approach?

To recap, occupational pension schemes which were contracted-out on a defined benefits basis before 6 April 1997 are required by law to provide guaranteed minimum pensions (“GMPs”) as a replacement for one element of the state pension. Like the state pension that they replaced, GMPs for men and women differed in many respects.

The Government has published a consultation on a proposed method by which it believes schemes could convert GMPs into ordinary scheme benefits and simultaneously satisfy any duties they may have to treat men and women equally in relation to GMPs built up from 17 May 1990 onwards.

The consultation also proposes a number of other changes to contracting-out legislation.

Background

Starting with *Barber* in 1990, a series of European Court of Justice (“ECJ”) decisions have established the broad principle that occupational pensions – but not state pensions – earned from 17 May 1990¹ must be equal for men and women. There are various exceptions to this broad principle, for example in relation to transfer values and bridging pensions.

However, the ECJ has never clarified whether (let alone how) this equal treatment principle should apply to GMPs. There is an argument that the ECJ would have made GMPs another exception to the broad principle, perhaps on the basis that GMPs are essentially just part of the state pension (which is outside the scope of *Barber*) that private sector schemes have agreed to pay on the state’s behalf.

But without a decision from the ECJ on the point, it is also quite possible that the broad equal treatment principle does apply to GMPs. If it does apply, the complexity of GMP legislation means that there is no simple answer to whether GMP rules are more generous to men or to women. It is even possible that they are more favourable to a woman up to one age, and more favourable to comparable men thereafter.

In 2012, the Government consulted on legislative changes which would have required schemes to equalise GMPs accrued in the period between 17 May 1990 and 5 April 1997², whether or not there was an opposite sex comparator with the higher benefit. The Government’s view was that the proposed amendments clarified UK law in line with pension schemes’ existing obligations as opposed to imposing a new equalisation requirement.

The Government also proposed an equalisation methodology involving, among other things, an annual comparison of the amount payable under the scheme rules and legislation to the member and the amount which would be payable if the member was of the opposite sex, with the member receiving whichever was the higher amount.

The proposed methodology was largely rejected by the pensions industry since it would have resulted in members effectively receiving “the best of both worlds”, i.e. higher benefits than either a man or woman would ordinarily be entitled to. It would also have resulted in schemes incurring significant implementation costs. The Government therefore decided not to proceed with the proposed methodology. The proposed legislative changes were also not brought into force.

¹ The date of the *Barber* decision.

² The date on which GMPs ceased to accrue.

The new equalisation/conversion methodology

The new methodology proposed by the Government has been produced by an industry working group. In essence, it involves:

1. converting the member's accrued benefits into different benefits that do not include GMPs, on the basis that the post-conversion benefits must have the same actuarial value as the pre-conversion benefits that are being replaced;
2. *except that*, when valuing the member's pre-conversion benefits for service between 17 May 1990 and 5 April 1997, the actuary must do a double calculation, comparing the value of the member's benefits with what the value would have been for a member of the opposite sex, and then use the higher figure.

The methodology proposes that the value used for comparison is the cash equivalent transfer value of the benefits, but with no adjustment being made based on the scheme's funding level. A full explanation of the proposed methodology, including examples, is available [here](#).

Proposed legislative changes

The consultation also proposes a number of legislative changes including:

- changes to the GMP conversion legislation to make this legislation work better – the current legislation contains a number of issues which make it very hard for schemes to convert GMPs in practice; and
- changes to the legislation governing schemes with contracted-out benefits to make the post-abolition of contracting-out regime work better – for example, giving HMRC a discretion to accept late notification of liability to pay, and late payment of, contributions equivalent premiums where these arise in connection with GMP reconciliation, and adjustments to the rules governing alterations to s9(2B) rights.

Comment

The new equalisation/conversion methodology seems more user-friendly than the methodology that the Government proposed in 2012. It is simpler (and therefore less expensive) to administer, and avoids an outcome where members would get higher benefits than members of either sex would have had before. However, whilst the Government states that it *believes* the new methodology would meet EU equalisation requirements for GMPs, it does not guarantee that this is the case, nor does it say that it is the only way that equalisation can be achieved.

The draft methodology paper also notes a number of issues that arise in connection with the methodology. These include whether schemes will have the necessary data in all cases to carry out the required calculations, and how aspects such as the exercise of certain member options and the payment of discretionary increases are to be factored into the calculations.

The new methodology also has the additional benefits of industry support and the fact that it includes the conversion of GMPs into ordinary scheme benefits, thereby freeing schemes from many of the restrictions that apply to GMPs. However, although the Government has proposed a number of changes to make the GMP conversion legislation work better, it has still not put forward legislation to address all of the flaws in current conversion legislation, particularly uncertainty about what survivors' pensions should be provided post-conversion. The Government is still considering this issue.

If the problems identified above can be ironed out, however, the new methodology offers schemes a relatively clear way of both equalising GMPs and converting them into ordinary scheme benefits. Some of the problems will need to be resolved by schemes, such as those relating to the GMP data they hold. For the others, namely those relating to the GMP conversion legislation, it is to be hoped that the Government can resolve these.

The consultation also notes that a number of issues relating to the legislation governing schemes with contracted-out benefits remain unresolved. These include the fact that a bulk transfer of benefits that include contracted-out rights can only be made without member consent to a scheme that also holds contracted-out benefits. It is likewise to be hoped that the Government can find a solution for these issues.

If you have any questions on the issues raised in this update or require further advice, please contact your usual Mayer Brown contact.

Ian Wright

Partner, Pensions

T: +44 20 3130 3417

E: iwright@mayerbrown.com

Jonathan Moody

Consultant, Pensions

T: +44 20 3130 3042

E: jmoody@mayerbrown.com

Americas | Asia | Europe | Middle East | www.mayerbrown.com

MAYER • BROWN

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2017 The Mayer Brown Practices. All rights reserved.

Attorney advertising. Prior results do not guarantee a similar outcome.