

The Pensions Brief

At a glance...

Issues affecting all schemes

▲ DWP CONSULTATION ON CLIMATE CHANGE RISKS AND GOVERNANCE

The DWP is consulting on proposals to require large occupational pension schemes and master trusts to assess and disclose climate risks

▲ ECJ RULES EU-US PRIVACY SHIELD IS INVALID

The ECJ has ruled in the Schrems II case that the EU-US Privacy Shield, which used to permit transfers of personal data from EEA-based businesses to US-based businesses, is invalid

▲ PENSIONS OMBUDSMAN DECISION ON FAILURE TO IMPLEMENT PENSION SHARING ORDER

The Pensions Ombudsman has determined that there was maladministration by a scheme administrator which failed to implement a pension sharing order on the grounds that the member's ex-spouse had not paid her share of the pension sharing charges

▲ Action required

▲ Follow development and keep under review

Issues affecting DB schemes

▲ NEW GMP EQUALISATION WORKING GROUP GUIDANCE

The cross-industry GMP Equalisation Working Group has published its latest guidance, "Guide to GMP Communications – Early Planning Stage" to support trustees in communicating with members

Issues affecting DC schemes

▲ RESPONSES TO DWP CALL FOR EVIDENCE ON DEFAULT FUND CHARGE CAP

Responses have been received from PASA and NOW: Pensions to the DWP call for evidence on default fund charge cap



Issues affecting all schemes

DWP consultation on improving governance and reporting of climate risk

The Department for Work and Pensions (DWP) published a [consultation](#), “Taking action on climate risk: improving governance and reporting by occupational pension schemes” on 26 August 2020. This consultation seeks views on proposals to require trustees of occupational pension schemes with £5 billion or more in assets, authorised master trusts and authorised collective money purchase schemes to:

- put in place effective governance, strategy, risk management, and accompanying metrics and targets for the assessment and management of climate risks and opportunities (to take effect from 1 October 2021); and
- disclose the above in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).

It is proposed that among the activities required would be calculating the ‘carbon footprint’ of pension schemes and assessing how the value of the schemes’ assets or liabilities would be affected by different temperature rise scenarios, including the ambitions on limiting the global average temperature rise set out in the Paris Agreement.

The TCFD disclosure report would need to be published on the scheme’s (or sponsoring employer’s) website and referenced in the scheme’s annual report and accounts and in member benefit statements. These requirements would have to be met within seven months of the end of the scheme year which is underway on 1 October 2021, or by 31 December 2022 if earlier.

Although the current consultation relates to schemes of £5 billion or more in assets, the DWP

is also proposing that schemes with assets of £1bn or more will be subject to the requirements from 2023 and that (after consultation) they would be extended to all occupational schemes in 2024.

The consultation follows on from amendments to the Pension Schemes Bill (see our February 2020 [Pensions Brief](#)) which allow regulations to be made imposing governance and disclosure obligations on pension scheme trustees in relation to the effects of climate change.

Action

Trustees should monitor developments in this area. Any responses to the consultation must be made by the closing date of 7 October 2020.

ECJ preliminary ruling in Schrems II case: EU-US Privacy Shield invalid

On 16 July 2020, the European Court of Justice (ECJ) gave a [ruling](#) that the use of the Privacy Shield for transfers of personal data from the EEA to the United States of America (US) is invalid.

The case was brought by Mr Schrems, who made a complaint to the Irish Data Protection Commissioner that the US does not offer sufficient protection for personal data transferred to that country. His key concern related to the transfer of his personal data to the US because of the ability of the US security agencies to require internet service providers to provide them with information.

The General Data Protection Regulation (GDPR) prohibits the transfer of personal data from the EEA to non-EEA countries unless the transfer meets specific safeguards. These include where there has been an “adequacy decision”, i.e. the

transfer is to countries recognised by the European Commission as offering an adequate degree of protection for personal data (the level of which is in line with that of the GDPR). The Privacy Shield was one of such adequacy decisions adopted by the European Commission in 2016 which used to allow personal data transfers between EEA-based businesses to US businesses in specific sectors if they had self-certified under the Privacy Shield framework.

In the Schrems case, the ECJ decided to overturn the adequacy decision for the Privacy Shield on the grounds that it fails to protect unnecessary and disproportionate access to EU personal data by US intelligence agencies.

The ECJ also considered whether the use of standard contractual clauses (SCCs) continued to be a valid means of transferring personal data to non-EEA countries. SCCs act as an enforceable contract between the data exporter and the data importer imposing prescriptive obligations on the parties and offering data subjects direct recourse against the data exporter and data importer in case their personal data is not adequately protected.

In the Schrems case, the ECJ ruled that SCCs can be a valid mechanism for the transfer of personal data from the EEA to non-EEA countries. However, the judgment suggests that data exporters and data importers should carefully consider whether the SCCs might be in conflict with local laws and whether it is possible to continue with the proposed data transfer to a

third country in light of the wording of the SCCs and any applicable local laws, especially relating to any access by public authorities (including intelligence agencies) of that third country to the personal data transferred.

Further details are in the [briefing](#) from our Cybersecurity and Data Privacy practice.

Action

Some pension scheme service providers transfer members' personal data to the US and so Trustees should be aware of this development.

Pensions Ombudsman Determination – delay in implementing pension sharing order

The Pensions Ombudsman has partially upheld a complaint by a member of the Police Pension Scheme that there had been maladministration in relation to his pension sharing order. The scheme administrator delayed implementing the pension sharing order because the member's ex-spouse had not paid her share of the pension sharing charges.

As a result of the pension sharing order not being implemented at the correct time, Mr Y was overpaid around £36,000 by Devon & Cornwall Police. The pension sharing order should have reduced his pension by 41% with effect from the later of (i) the date the decree absolute was granted, or (ii) 28 days from the date of the pension sharing order. In this case, it was implemented over 4 years after it should have taken effect.

The scheme administrator had relied on a provision allowing for the implementation of the pension sharing order to be delayed until all outstanding administrative charges had been paid. Although Mr Y paid his half of the administration charge, his ex-spouse failed to do so. The Pensions Ombudsman recognised that the administrator had

acted lawfully, but noted that legislation provides for other ways of recovering administrative charges, such as deduction from the pension credit (which was eventually done). There was no reason this could not have been done at a much earlier date, and failure to do this amounted to maladministration.

Mr Y claimed to have a change of position defence, which meant he should not have to repay the overpayment. Broadly, this required him to show that on the balance of probabilities, that because of the overpayment, which was received in good faith, he had detrimentally changed his position. Mr Y had followed up on the implementation of the pension sharing order a number of times, and said the administrator had told him that he was entitled to his full pension until such time as his ex-wife paid the outstanding fee. He said he had relied in good faith on the incorrect information from the administrator, and had spent the overpayment on day-to-day living. However, the Adjudicator and the Pensions Ombudsman found that the change of position defence was not available to him. The Adjudicator said Mr Y could have done more to find out when the pension sharing order would come into force, for example, through taking advice from his solicitor. The good faith requirement not only concerns instances where the applicant might have known of the error, but also where they ought to have known of or could have discovered the error by making additional enquiries. Furthermore, there was nothing indicating that he had acted to his detriment, as he spent the money on purchases he would make in any event.

In the alternative, Mr Y raised the defence of estoppel by representation. Mr Y considered there had been an unequivocal statement from the administrator that the pension sharing order would not be implemented until his ex-wife had paid the administration charge. However, the Adjudicator's view was that the pension sharing order provided the unequivocal representation of Mr Y's entitlement, not the information from the administrator, therefore this defence failed.

Mr Y did have a partial defence under the Limitation Act 1980, against some of the overpayments that were paid more than six years prior to the date the Pensions Ombudsman received Devon & Cornwall Police's response to Mr Y's complaint. However, the Pensions Ombudsman ordered that the remainder of the overpayment should be repaid by Mr Y. Given the circumstances of the case, the Pensions Ombudsman considered that serious non-financial injustice had been suffered and so ordered a payment of £2,000 to Mr Y in respect of this.

Action

None required, but it may be sensible to check with the administrator that processes are in place to ensure that implementation of pension sharing orders are not unnecessarily held up by non-payment of administrative charges.

Issues affecting DB schemes

GMP equalisation – PASA publishes further guidance

The cross-industry GMP Equalisation Working Group set up by PASA published its latest guidance, “Guide to GMP Communications – Early Planning Stage” in August 2020. It is intended that a further guidance note on communicating at the implementation stage will be published at a later date.

The aim of the guidance is to help schemes in their approach to explaining the changes to members in a clear and reassuring way. It is also hoped that, by issuing the guidance, it will drive consistency in communication across the industry. This will be particularly important where individuals have periods of membership in different schemes and so might be receiving communications on the same issue from several different sources.

The guidance is divided into sections, covering the broad principles for planning communications, examples of the most likely questions and answers schemes may want to provide to members, a checklist of various member communications and other documents which may need to be changed in the light of GMP equalisation, and a “jargon buster” to help schemes avoid using words and phrases members may find confusing.

Action

Trustees and administrators will find the guidance helpful when planning how to communicate with members about their GMP equalisation exercise.

Issues affecting DC schemes

Responses to DWP call for evidence on default fund charge cap

We reported in our [Pensions Brief for June 2020](#) that the DWP published a call for evidence on the “Review of the Default Fund Charge Cap and Standardised Cost Disclosure”. Responses were invited by 20 August 2020. The DWP is due to issue its findings on the responses by the end of 2020.

Among the responses received were submissions from the [PLSA](#) and NOW: Pensions. The PLSA does not support a reduction in the charges cap, commenting that lowering the cap is likely to reduce sophistication and dampen innovation in default investment strategies. The PLSA is also concerned about the impact of charges on small deferred pots and invites the government to consider how the proliferation of small pots can be reduced or managed. The PLSA notes that any fee structure will erode small pots over time and restricting certain charging structures cannot address this inevitable problem. Their view is that the government should therefore seek to either minimise the creation of small pots, or facilitate consolidation with other pots.

The NOW: Pensions response agreed that small deferred pension pots could be significantly eroded by charges. They propose that members with multiple pension pots in one scheme should only be charged once for administration, and that deferred pension pots valued at less than £50 should not bear any charges at all.

More broadly, NOW: Pensions has called for a Small Pots Taskforce to be created. In order to ensure the degree of consensus necessary to address the proliferation of small pension pots, they propose that this should be composed of representatives from government, regulators, industry and consumer groups.

Also published in July 2020 was a research [report](#) by the Public Policy Institute, sponsored by NOW: Pensions, which explores a range of policy options for dealing with the growing number of deferred members with small pots. These include the use of dashboards, and various forms of consolidation, for example, arrangements where deferred pots are reassigned to the member’s current scheme, or all the member’s pots are transferred to third party consolidator, or where the member remains with same provider throughout their working life. NOW: Pensions consider that some form of consolidation is more likely to provide a better long-term solution than simply reducing charges but as all policies have potential benefits and drawbacks, a combination of policies may be helpful.

Action

For noting.

Mayer Brown news

Upcoming events

- **Trustee Foundation Course**
15 September 2020
8 December 2020
- **Trustee Building Blocks Classes**
17 November 2020 – DB funding and investment
- **Annual Pensions Conference**
Autumn 2020 (dates to be confirmed) – a series of one-hour webinars to cover topics including:
 - » Pension scheme investments
 - » Investment disclosure and climate change
 - » Trustee board effectiveness
 - » GMP equalisation

Due to the COVID-19 restrictions, our events will be hosted via telephone/video conference until further notice. We will provide further details nearer the time of each event.

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