MAYER | BROWN

July 2023

The Pensions Brief

At a glance...

Issues affecting all schemes

▲ **DATA PROTECTION**
ICO decision on privacy notices

▲ **MIDLIFE MOTS**
Signposting members

MANSION HOUSE REFORMS
Pensions aspects

▲ **TRUSTEE SKILLS**
Consultation

▲ **PENSIONS TAX**
Annual and lifetime allowance changes

PENSIONS DASHBOARDS
Updated guidance

Issues affecting DB schemes

▲ **AMENDMENTS**
Court interpretation of amendment power proviso

▲ **CONTRACTED-OUT RIGHTS**
Appeal of court decision on validity of amendments

▲ **DB SUPERFUNDS**
Regulatory regime

▲ **PRODUCTIVE FINANCE**
Consultation

CONTRIBUTION NOTICES
Court decision on contribution notice quantum

Issues affecting DC schemes

▲ **VALUE FOR MEMBERS**
New framework

▲ **DECUMULATION**
Consultation

▲ **SMALL POTS**
Consultation

COLLECTIVE DC SCHEMES
Regime extension

▲ Action required
▲ Monitor development

Dates to note over the next 12 months

1 October 2023

- New DC default arrangement illiquid investment disclosure requirements come into force
- New DC default arrangement asset allocation disclosure requirements come into force

31 January 2024

Deadline for schemes to send annual event report to HMRC (2022/23 tax year)

6 April 2024

- Abolition of lifetime allowance expected to come into effect
- New DB statutory funding regime expected to come into force

Key:

Important dates to note

For information

Issues affecting all schemes

Data protection – guidance on privacy notices

The Information Commissioner's Office (ICO) has fined a social media company £12.7 million for a number of breaches of UK data protection law, including failing to meet the requirements of the UK General Data Protection Regulation (UK GDPR) in respect of children's personal data.

Alongside its enforcement notice, the ICO published an annex which considers the specific wording of the company's privacy notices between August 2018 and July 2020 and sets out why the ICO concluded that the wording did not meet the requirements of the UK GDPR. The ICO found that many of the general statements often seen in privacy notices about lawful processing bases, recipients of personal data, international data transfers and data retention were insufficiently detailed to satisfy the requirements of the UK GDPR.

For more information, please see our legal update.

Action

Trustees should factor the ICO's comments into their next scheduled review of their privacy notices and update their notice as appropriate.

Midlife MOTs – signposting

The Pensions Regulator (TPR) has published a blog post urging trustees to signpost members to the new digital Midlife MOT that was recently launched by the government. TPR suggests that schemes:

- Particularly target those in the 45 to 65 age range.
- Fully integrate the Midlife MOT into the support they already offer their members.
- Provide this link to the Midlife MOT in their signposting, so that the DWP can capture where visitors are being referred from.

Action

Trustees should consider the extent to which, if at all, they wish to signpost members to the Midlife MOT.

Mansion House Reforms – pensions aspects

The government has announced a package of reforms designed to improve the functioning of capital markets in the UK. They build on the Edinburgh Reforms announced last year and cover three main areas: pensions, company listings and regulation. The specific pensions-related announcements were as follows:

- Aviva, Scottish Widows, L&G, Aegon, Phoenix, Nest, Smart Pension, M&G and Mercer have signed the "Mansion House Compact" under which they commit to the objective of allocating at least 5% of their default funds to unlisted equities by 2030.
- The government will facilitate a programme of DC consolidation. A new value for money (VFM) framework will be introduced and the government will set out a roadmap to encourage the establishment of collective DC schemes.
- The British Business Bank will explore the case

for the government to play a greater role in establishing DC investment vehicles.

- The government will introduce a statutory authorisation and supervision regime for DB superfunds.
- The government will investigate the possible role of the Pension Protection Fund, and the part that DB schemes could play, in productive investment.
- The government will explore how trustee skills and capability and decision-making could be improved.

For more information, please see our legal update.

The Pensions Regulator (TPR) has published a blog post welcoming the Reforms and:

- Emphasising the need for trustees of DC schemes to shift their focus when considering VFM from low costs to value.
- Announcing that TPR will update its investment governance guidance for DB and DC schemes and will provide new guidance this autumn on investing in productive finance.
- Underlining TPR's view that where trustees do not have the scale, expertise or appetite to deliver the best outcome for members, they should consolidate.

Action

No action required.

Trustees – improving skills and decision-making

The government is calling for evidence on how trustee skills and capability could be improved and barriers to making effective investment decisions removed. The call for evidence covers:

- Trustee skills and capability – current levels and how these could be improved, including trustee registration, trustee accreditation and further requirements for professional trustees.
- The role of advice, in particular investment advice.
- Barriers to trustee effectiveness – whether the current framework and guidance on fiduciary duties is sufficient to enable trustees to make decisions in the best long-term interests of members and whether trustees have sufficient time and employer support to fulfil their duties.

The call for evidence closes on 5 September 2023. For more information, please see our legal update.

Action

Trustees should monitor the progress of the call for evidence.

Pensions tax – annual and lifetime allowance changes

The Finance (No 2) Act 2023 has received Royal Assent. Among other things, the Act:

- Removes the lifetime allowance (LTA) charge.
- Increases the standard annual allowance (AA) to £60,000 and the money purchase AA to £10,000.
- Increases the minimum level of the tapered AA to £10,000 and the adjusted income threshold for the purposes of the tapered AA to £260,000.

- Amends the LTA protection provisions to reflect the fact that, from 6 April 2023, individuals with valid enhanced or fixed protection that was applied for before 15 March 2023 are able to accrue further benefits and transfer their benefits without losing that protection. The amendments also provide for those individuals to retain a right to any higher pension commencement lump sum to which they were entitled as of 5 April 2023.

In addition, HMRC is consulting on draft legislation abolishing the LTA. Broadly speaking, the draft legislation:

- Removes the concept of the LTA from the Finance Act 2004 and related legislation.
- Sets out the tax treatment of lump sums and lump sum death benefits in the absence of the LTA. A new "lump sum allowance" of £268,275 (i.e. 25% of the current LTA) and a new "lump sum and death benefit allowance" of £1,073,000 (i.e. the current LTA) will be created. Essentially, these allowances are the maximum amount of tax-free cash that an individual can receive from registered pension schemes. Individuals will not pay tax where the non-taxable element of lump sums they receive does not take them above these levels. To the extent that the otherwise non-taxable element of a lump sum exceeds these levels, it will be taxed at the recipient's marginal rate (except where lump sum protections apply). The allowances will be personal rather than scheme limits and will not take into account the payment of regular pension income. LTA excess lump sums will be abolished and the requirement to have available LTA to take any lump sum payment will be removed.
- Makes consequential amendments to the legislation on LTA protections following the abolition of the LTA. In particular, the ability to apply for fixed protection 2016 and individual protection 2016 will be removed from 6 April 2025.
- Provides a placeholder for the transitional arrangements where members have taken some benefits whilst the LTA existed – these clauses have not been published.

The consultation closes on 12 September 2023.

Action

Trustees and administrators should monitor the progress of the consultation.

Pensions dashboards – updated guidance

The Pensions Regulator (TPR) has updated its dashboards guidance to set out how trustees will be expected to demonstrate that they have had regard to the statutory guidance setting out the revised staging timetable. The updated guidance notes that failure to have regard to the statutory guidance will be a breach of the dashboards legislation in respect of which TPR will be able to take enforcement action. The actions that TPR expects trustees to take to demonstrate that they have had regard to the statutory guidance include:

- Not making final decisions about connecting and whether to follow the staging date until they have engaged with the statutory guidance.
- Having adequate governance and processes for making such decisions.
- Having access to all the relevant information before making decisions and acting upon them.

In addition, the Pensions Administration Standards Association has updated its guidance on dashboards data accuracy.

Action

No action required.

Issues affecting DB schemes

Contracted-out rights – validity of amendments

In June 2023, the High Court held that amendments to certain post-April 1997 contracted-out rights (section 9(2B) rights) that were not accompanied by the actuarial confirmation required under legislation (a section 37 confirmation) are void. The Court has now granted permission for the employer to appeal the Court's decision on the following points:

- An amendment to section 9(2B) rights made without a section 37 confirmation is void.
- Prior to April 2013, the requirement to obtain a section 37 confirmation applied to amendments to section 9(2B) rights in respect of both past and future service.

A date for the appeal hearing has not yet been scheduled. For more information, please see our legal update.

Action

Trustees of schemes that hold section 9(2B) rights should monitor the progress of the appeal.

Amendment powers – interpretation of proviso

The High Court has decided the meaning of the word "interests" in a proviso to a scheme's amendment power. The proviso stated that no alteration or modification would take effect as regards active members "*whose interests are certified by the Actuary to be affected thereby*" unless certain criteria were fulfilled. The Court held that "interests" refers to (a) any linkage of the value of past service rights to final salary, (b) the ability of members to accrue future service benefits on the same terms as provided for under the scheme immediately prior to the amendment, and (c) the ability of members to accrue any future service benefits under the scheme.

The Court was also asked to decide whether a decision by the scheme trustee to exercise the amendment power to engage in benefit redesign to reduce the scheme's liabilities would be an exercise of that power for an improper purpose. The representative beneficiary argued that benefit design was a matter for the employer not the trustee (whose role was simply to manage and administer the scheme), and that there were established procedures governing how the employer could make changes to employee benefits. (These procedures were specific to this particular employer.) If the trustee were to make an amendment without those procedures being followed, it would be exercising the amendment power for an improper purpose – namely to redesign the scheme rather than to manage and administer it. The Court held that exercise by the trustee of the amendment power to make changes to future service benefits would not of itself be an exercise of the power for an improper purpose, irrespective of whether the established benefit change procedures had been followed.

It is not yet known whether the Court's decision will be appealed.

Action

Trustees and employers of DB schemes with similar provisos to their amendment power should consider the implications of the decision for their scheme. They may need to take advice from their legal advisers in this regard.

DB superfunds – regulatory regime

The government has confirmed that it will introduce a statutory regime for the authorisation and supervision by The Pensions Regulator (TPR) of DB superfunds. The regime will be introduced as soon as parliamentary time allows. In the meantime, superfunds will continue to need to meet the requirements of TPR's interim non-statutory regime.

Action

Trustees and employers of DB schemes that are interested in transferring to a DB superfund should monitor the implementation of the new regime.

Productive finance – investment by DB schemes

The government is calling for evidence on how investment by DB schemes in productive finance could be increased while maintaining benefit security for members. The call for evidence covers the following areas:

- Underinvestment in productive finance – whether it exists and what changes might incentivise greater investment in productive finance whilst maintaining appropriate benefit security and meeting trustee fiduciary duties.
- Building surpluses – what changes could be made to the treatment of surplus that might encourage greater investment in productive finance.
- Consolidators – possible options for taking DB schemes off employer balance sheets (other than buy-out and superfunds), including a public sector consolidator run by the Pension Protection Fund.

The call for evidence closes on 5 September 2023. For more information, please see our legal update.

Action

Trustees of DB schemes should monitor the progress of the call for evidence.

Contribution notices – quantum

In a decision upholding the issuing of a contribution notice for £1.8 million, the Upper Tribunal has held that there is nothing in the current wording of the legislation governing contribution notices or the purpose behind that legislation which suggests that the quantum of a contribution notice should be based on some form of compensatory analysis of what the loss to the scheme has been as a result of the act or failure to act giving rise to the contribution notice.

Action

No action required.

Issues affecting DC schemes

Value for money – new framework

The government, the Financial Conduct Authority and The Pensions Regulator (TPR) have confirmed that a new value for money (VFM) framework for DC schemes will be introduced. Under the framework, schemes will be required disclose standardised metrics across three areas:

- Investment performance.
- Costs and charges.
- Quality of services.

Schemes will then be required to compare their data against a sample of other schemes in the market using a mandatory step-by-step approach. Schemes must conclude whether they (a) offer VFM (a green rating), (b) do not offer VFM, but have identified improvements to deliver VFM (an amber rating) or (c) do not deliver VFM (a red rating). TPR will be given powers to require schemes with a red rating or that have had an amber rating for two consecutive years to consolidate and wind up.

The framework will be implemented in phases with it initially applying to default arrangements in workplace schemes in accumulation. The framework will require primary legislation and the government will consult on draft regulations setting out the detailed requirements.

For more information, please see our legal update.

Action

Trustees of DC schemes should monitor the implementation of the new framework.

Decumulation – new framework

The government is consulting on a policy framework for supporting DC members in their decumulation choices. Under the proposed framework, trustees would be required to offer a decumulation solution, or set of solutions, which are suitable for their members in general and consistent with the pensions freedoms. When they come to access their benefits, members would have the option to either choose the (or one of the) default solution(s) offered by the scheme or to access their benefits in one of the other manners permitted under the pension freedoms by transferring to another scheme. Trustees would either need to offer their chosen solution(s) in-house, or partner with another supplier who could provide them. The consultation closes on 5 September 2023. For more information, please see our legal update.

Action

Trustees of DC schemes should monitor the progress of the consultation.

Small deferred pots – proposed solution

The government is consulting on proposals for the introduction of a default consolidator solution for dealing with small deferred DC pots. Under the proposals, schemes would be required to transfer DC pots of £1,000 or less which had been deferred for at least 12 months into one of multiple default consolidator schemes. A central clearing house would notify the scheme of the consolidator to which the transfer should be made. The consultation closes on 5 September 2023.

Action

Trustees of DC schemes should monitor the progress of the consultation.

Collective DC schemes – extension of regime

The government has confirmed that it:

- Will extend the collective DC (CDC) regime to allow the establishment of non-associated multi-employer CDC schemes.
- Is committed to extending the CDC regime to allow decumulation-only schemes and will continue to explore how these schemes might operate.

Action

No action required.

Mayer Brown news

Upcoming events

For more information or to book a place, please contact Katherine Carter.

- **Trustee Foundation Course**

  6 September 2023
  6 December 2023
- **Trustee Building Blocks Classes**

  8 November 2023 – Pensions dashboards
- **Quarterly webinars**

  27 September 2023 – topic TBC
  13 December 2023 – topic TBC

Mayer Brown media comment

- Mayer Brown has been nominated for two awards at the Pensions Management Institute's 2023 Pinnacle Awards:

  - Team of the Year

  - Impact on Society

In addition, Dian Smith, one of our secretaries, has been nominated for the "Frontline Hero of the Year" award.

Recent Mayer Brown work

- In 2023, Mayer Brown has advised on a wide range of buy-ins of deferred and pensioner liabilities ranging in value from just under £300 million to over £1 billion.

Mayer Brown legal updates

- The government's Mansion House Reforms – pensions aspects
- Value for money in DC pension schemes – new framework
- Decumulation in DC pension schemes – proposed new trustee duties
- DB pension schemes – investment in productive finance
- Pension scheme trustees – improving skills and decision-making
- Changes to contracted-out rights – appeal of High Court decision
- Pension scheme data privacy notices - updates likely to be required

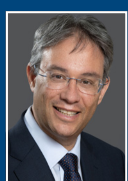
Our legal updates from the last three months are available here.

Please speak to your usual contact in the Pensions Group if you have any questions on any of the issues in this Brief.

For more information about the Pensions Group, please contact:

Jay Doraisamy

Co-Head of Pensions, London
E: jdoraisamy@mayerbrown.com
T: +44 20 3130 3031



Andrew Block

Co-Head of Pensions, London
E: ablock@mayerbrown.com
T: +44 20 3130 3366