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If you have packed away the Christmas decorations for another year, you must be thinking about planning for the pensions year ahead? Here to assist you is our 2019 Pensions Legal Planner. As ever, this covers forthcoming legislative and regulatory changes and cases to watch out for in the courts. We expect it to be a busy year! We wish you happy reading and, above all, a healthy and prosperous New Year.

GMP EQUALISATION - IMPLEMENTING THE LLOYDS DECISION

As reported in our [October 2018](#) and [December 2018](#) Updates, the High Court has found that pensions schemes are legally obliged to equalise benefits for the current unequal effect of GMPs. Many of our employer and trustee clients are already beginning to react to the decision. In the short-term, considerations such as processing transfer values will be key. In the longer-term, work to agree equalisation methodologies, back payment strategies and communications with members will continue into 2019 and beyond.

In 2019, we are also expecting a further High Court hearing, probably in the Summer, which we understand will address the issues of "de minimis" payments owed to members and the treatment of historic transfer payments. We are also expecting a Government announcement, as well as, potentially, some statutory changes or new guidance to address possible adverse tax consequences resulting from benefit changes. The possibility of converting GMPs into non-GMP benefits is likely to be an attractive option for some schemes. It now seems very unlikely that the parties in this case will appeal the High Court's findings to the Court of Appeal.

Addressing and implementing the many aspects of GMP equalisation will remain a key item on employers' and trustees' agendas for 2019. If they are not already, trustees should be liaising with their employers and professional advisers in relation to next steps.

A NEW PRIVATE PENSIONS BILL IN 2019 - COVERING THE DB WHITE PAPER AND MORE...?

The Defined Benefit ("DB") White Paper, published in March 2018 and summarised in our [March 2018 Update](#), and subsequent Government consultations, mean that there is plenty of primary legislation required to bring in the Government's proposed changes. We understand that the Government is aiming to introduce a Pensions Bill in the Queen's Speech in 2019. It is likely that any Pensions Bill would cover the following main areas, although it isn't yet clear exactly which items would make it into a Bill this year:

DB Consolidation

The Government published its consultation on the proposed regulatory framework for DB consolidation in December 2018, as reported in our [December 2018 Update](#). The consultation covered matters such as the authorisation and ongoing supervision of so-called "superfunds" by the Pensions Regulator (the "Regulator"), the relevant financial and funding tests that will apply to DB consolidators and PPF eligibility.

The Government's consultation closes on 1 February, and the Regulator has also produced guidance for superfunds and trustees for the period before the authorisation regime is put in place. Assuming that a Pensions Bill is introduced in 2019, we understand that legislation would be introduced in 2020 and any regulations in 2021.

Tougher Pensions Regulator powers

Following the proposals set out in the DB White Paper to strengthen the Regulator's existing Financial Support Direction ("FSD") and Contribution Notice ("CN") powers, and to introduce new powers for the Regulator, we are expecting the Pensions Bill to contain many of the required amendments to implement the new proposed regulatory regime. The Government has not yet responded to the June 2018 consultation covering the proposed changes to the Regulator's powers, and so the shape of the new regulatory framework is not yet clear. No doubt the new Regulator, Charles Counsell, who replaces Lesley Titcomb with effect from April 2019, will be very keen to have a say in the process.

Funding changes

We talk further below about the new proposed DB Funding Code of Practice, but the DB White Paper makes it clear that the Government would also want to legislate to require trustees and employers to comply with the clarified funding standards and to ensure that the Regulator can bring enforcement action in the event of non-compliance.

Other matters

- **Regulatory framework for "CDC" schemes**

The Government's consultation on the delivery of collective defined contribution ("CDC") schemes closes on 16 January (please see our [November 2018 Update](#) for more information). We are expecting the Government's response to the consultation in the Spring, and for the Pensions Bill to include relevant enabling legislation.

- **PPF compensation cap**

Following the judgment of the CJEU in September 2018 in the case of *Grenville Hampshire v the Board of the Pension Protection Fund*, the Pension Protection Fund ("PPF") stated in October that it was working with the Government to agree the changes that will be required to the legislation to implement the judgment. It is possible that the relevant legislative amendments will be included in the next Pensions Bill, as the PPF has commented that it wishes to make the changes "*as quickly as possible*". Our [September 2018 Update](#) provides further background on the *Hampshire* judgment.

We will keep you updated on all of the items mentioned above through our monthly legal updates.

NEW DB FUNDING CODE OF PRACTICE

Following the proposals set out in the White Paper in relation to "clarifying" funding standards in DB schemes and ensuring that trustees take a long-term perspective when setting their Statutory Funding Objective, trustees and employers should keep an eye out for a Government consultation. We understand that a first consultation will be published in the Spring of this year, followed by another consultation in late 2019 and a new DB Funding Code of Practice by Spring 2020. Our [March 2018 Update](#) contains further background on the Government's

proposals.

BREXIT - WHAT TO EXPECT IN 2019 (AT LEAST FROM A PENSIONS PERSPECTIVE...)

Whilst pensions-related legislation is likely to be relatively low on the Government's Brexit agenda, there are at least two sets of pensions regulations that may be enacted, depending on the outcome of current Brexit negotiations.

The draft Occupational and Personal Pension Schemes (Amendment etc.) (EU Exit) Regulations 2018 are intended to come into force on "exit day" (29 March 2019) if the UK leaves the EU without a negotiated "deal". The draft regulations propose to make minor and technical changes to UK legislation to ensure that retained EU law in the area of UK pensions continues to operate effectively, and to address other "deficiencies" in legislation arising from the UK's withdrawal from the EU. Please see our [October 2018 Update](#) for more details, and for our [December 2018 Update](#) in relation to some corrections that were made to the draft regulations.

In addition, the draft Insolvency (Amendment) (EU Exit) Regulations 2018 amend legislation in the area of cross-border insolvency regulation. Again, these regulations will only come into force if the UK fails to reach an agreement prior to exiting the EU. Our [October 2018 Update](#) contains more information.

More generally, Brexit may have a wider significance for trustees and employers, for example, in areas such as employer covenant support, investments and cross-border insolvencies. It may also affect the legislative timetable and, consequently, some of the applicable dates anticipated in this planner. Please contact your usual Baker McKenzie lawyer for any advice that you require in these areas.

PPF LEVY MANAGEMENT - KEY DATES REMINDER

Key actions and dates for trustees and employers are:

Action	Key dates*
Monthly Experian Scores	Between 30 April 2018 and 31 March 2019
Deadline for submission of data to Experian to impact on PPF-specific Monthly Scores	One calendar month prior to the Score Measurement Date
Submit scheme returns on Exchange	By midnight on 31 March 2019
Reference period over which funding is smoothed	5 year period to 31 March 2019
Guarantor Strength Reports (where relevant) to be completed and Contingent Asset Certificates to be submitted on Exchange	By midnight on 31 March 2019
Contingent Asset hard copy documents (including Guarantor Strength Reports) to be posted/delivered to the PPF at: Pension Protection Fund Renaissance 12 Dingwall Road Croydon Surrey CRO 2NA	By 5 pm on 1 April 2019
Asset Backed Contribution Certificates to be sent to PPF by email	By midnight on 31 March 2019
Mortgage Exclusion ('Officers') Certificates and supporting evidence to be sent to Experian by email	By midnight on 31 March 2019
Accounting Standard Change certificate to be sent to Experian by email	By midnight on 31 March 2019
Special category employer applications (and confirmation of no change) to be sent to PPF by email	By midnight on 31 March 2019
Deficit Reduction Contributions Certificates to be submitted on Exchange	By 5 pm on 30 April 2019
Exempt transfer applications with supporting evidence to be sent to PPF by email	By 5 pm on 30 April 2019
Certification of full block transfers to be completed	By 5 pm on 28 June 2019

on Exchange or sent to PPF (in limited circumstances)	
Invoicing starts	Autumn 2019

*Source: PPF Website

The PPF will take into account information submitted on Exchange by these deadlines and in the correct format when calculating a scheme's PPF levy. Please note that some deadlines are 5 pm on the relevant date whilst others are midnight.

As reported in our [October 2018 Update](#), trustees and employers with a type A contingent asset (parent company guarantee) with a fixed cap must re-execute the contingent asset on the new standard form and re-certify it by 31 March 2019 if it is to be recognised for the PPF Levy.

AUTO-ENROLMENT - MINIMUM CONTRIBUTION RATES TO BE FULLY PHASED-IN ON 6 APRIL 2019

On and from 6 April 2019, the employer minimum contribution increases to 3% of qualifying earnings, and the employee contribution increase to 5%.

Where a scheme or group personal pension ("GPP") provides for minimum statutory contributions only to be paid, employers should ensure that payroll systems will be set up in time to ensure that the increased contributions will be deducted from 6 April.

Employers should also have checked the rules of the scheme (or their communications with members if they pay into a GPP) and, where applicable, employment contracts, to check that they align with the 6 April increase date or whether action needs to be taken to implement it. Where a scheme's rules simply provide that contribution rates will increase as required under the automatic enrolment legislation from time to time, there should be no issue with the increase. However, where a scheme's rules expressly set out contribution rates, it may be necessary for employers to consult or for employment law advice to be taken.

Employers need to check their scheme or GPP rules to ensure that they are prepared for the 6 April contribution increase.

TRUSTEES' INVESTMENT AND DISCLOSURE DUTIES - REFORMS BEING INTRODUCED FROM OCTOBER 2019

Trustees will be under new investment and disclosure duties from October 2019. As we reported in our [June 2018 Update](#), from 1 October 2019, trustees will be required to set out in their Statement of Investment Principles (SIP) how they take into account "*financially material considerations*", including those arising from environmental, social and governance considerations (including but not limited to climate change) and stewardship. Also from 1 October 2019, trustees of defined contribution (DC) schemes will have to make sure that their scheme's SIP is made available, free of charge, on a website.

Trustees should liaise with their investment advisers and administrators to ensure that they are well prepared to change their scheme documentation (in particular, their SIP) and other relevant processes to

reflect the new requirements being introduced from 1 October 2019.

IMPLEMENTATION OF CMA'S REMEDIES IN THE INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT SERVICES INDUSTRIES

The Competition and Markets Authority (CMA) published its final report on the supply and acquisition of investment consultancy and fiduciary management services in the UK in December 2018 (our [December 2018 Update](#) contains more information on the contents of the final report).

In 2019, we can expect to see the Regulator's guidance to assist trustees with the new processes (including tendering for fiduciary management services). The CMA has also indicated that it will publish draft legislation in "early 2019" and the new requirements will be expected to begin later in 2019.

Any trustees who are considering appointing or re-appointing fiduciary managers in early 2019 should consider, as good practice, following the CMA's requirements, particularly in relation to tender processes, if the appointment is take effect before the final implementation of the CMA's remedies.

PENSION SCAMS - THE BAN ON COLD CALLING

The final version of the Regulations implementing the ban on cold calling was published in October 2018. The Regulations, which essentially ban direct marketing, have been approved by Parliament and will come into force on 9 January 2019.

OTHER THINGS TO WATCH OUT FOR

Pensions Dashboard

As reported in our [December 2018 Update](#), the Government is consulting on the introduction of pensions dashboards, which would allow consumers to access all their state and private pensions information in one place. Subject to the outcome of the consultation (which closes on 28 January 2019), the Government expects some schemes (such as master trusts) to be providing information for the dashboards voluntarily by 2019/2020, and the majority of pension schemes to be incorporated into a compulsory framework, where information is provided to a single "pension finder service", within 3 to 4 years of the first pensions dashboards being introduced.

IORP II regulations coming into force in January 2019

As we mentioned in last year's 2018 New Year Planner, the second EU Directive on Institutions for Occupational Retirement Provision ("IORP") focuses on scheme governance and member communications. IORP II must be incorporated into national law by January 2019 (i.e., before the UK's withdrawal from the EU in March).

Our [October 2018 Update](#) contains further information, but the Government has published two sets of regulations that will transpose requirements from IORP into UK law and will come into force on 13 January 2019.

Trustees should also expect to see a Regulator consultation on the new guidance that will replace the existing Code of Practice No. 9 (to address the more detailed requirements of IORP II) later in 2019 and for the new code to be issued by the end of the year. It is then expected that trustees will be given at least a year to implement changes. We also understand that any new requirements will be coordinated with other proposed related changes (for example, the Regulator's 21st Century Trusteeship campaign and the possible introduction of a DB Chair's Statement requirement).

Master Trusts - Registration deadline of 31 March 2019

As we have reported in various of our monthly updates, the deadline for master trusts to register with the Regulator is 31 March 2019. In our [October 2018 Update](#), we mentioned the risks of certain schemes "accidentally" triggering the master trust requirements.

In December 2018, the Regulator warned schemes to check whether they could constitute master trusts under the relevant regulations, and also warned about possible breaches of the law in this area. The Regulator has launched a step-by-step guide for schemes to check if they are a master trust, which can be viewed [here](#).

Well in advance of the March 2019 deadline, trustees and employers of multi-employer DC schemes should check whether they could accidentally trigger the master trust requirements, and then take steps if necessary to rectify the position.

New single financial guidance body to be launched shortly

As reported in our [October 2018 Update](#), a new Single Financial Guidance Body ("SFGB") has been created in place of The Money Advice Service, The Pensions Advisory Service and Pensions Wise. The SFGB will take on its functions to provide free and impartial financial guidance to consumers from this month.

Changes at the Pensions Ombudsman?

A Government consultation is currently taking place on proposed changes to the Pensions Ombudsman's jurisdiction to include a new early resolution service, which would allow the Ombudsman to resolve disputes before they proceed to formal determination. The dispute resolution functions that were previously held by the Pensions Advisory Service were transferred to the Ombudsman from April 2018.

The [consultation](#) closes on 18 January, and any changes could be introduced during the course of 2019. Trustees should look out for amendments to the Ombudsman's current systems, as they could have an impact on schemes' own dispute resolution procedures.

WHAT'S IN COURT

Supreme Court to decide on payment of discretionary increases in *BA* case

As we reported in our [July 2018 Update](#), by a majority decision, in the case of *British Airways plc v Airways*

Pension Scheme Trustee Ltd, the Court of Appeal overturned the High Court's decision, and ruled that the introduction of a discretionary increase power by amendment and its subsequent exercise to award relevant increases were, in fact, an improper exercise of the powers conferred on the Trustees under the BA Scheme rules. The majority opinions of the Court of Appeal judges noted that the way in which the Trustees had exercised their powers was improper because it strayed into the realms of benefit design, which was a matter for the employer.

The Scheme Trustees were granted permission to appeal the Court of Appeal's decision to the Supreme Court, primarily, we understand, on the "proper purpose" point. The hearing of the appeal by the Supreme Court is provisionally listed for **early July 2019**.

Court of Appeal to consider historic amendments

As we reported in our **May 2018** Update, in the case of *Burgess v BIC UK Ltd*, the High Court considered some interesting questions on historic amendments made to the BIC UK Pension Scheme and the limitation periods that may apply where trustees seek to recover overpayments from members under the equitable doctrine of recoupment (that is, by recovering overpayments from future instalments of pension).

As we noted in our Update last year, the judge in the case found that valid amendments *had* been made to the pension scheme to provide certain pension increases, and that no limitation period applied under the recoupment doctrine when recovering past overpayments made to members. Of note was that the judge also commented that, where a member opposes repayment, trustees would need a County Court order to enforce their rights under Section 91 of the Pensions Act 1995, on the basis that a Pensions Ombudsman determination order would not be sufficient. BIC UK appealed the High Court's ruling.

It is currently anticipated that the Court of Appeal will hear the appeal in **early February 2019**.

The outcome of this case will be of interest to trustees, particularly in the area of overpayment recoupment. Further commentary may also be provided (by the Pensions Ombudsman or otherwise) in relation to the judge's comments regarding the lack of jurisdiction for the Pensions Ombudsman under Section 91 of the Pensions Act 1995.

The *Box Clever* litigation to continue with Court of Appeal hearing

After long-running litigation, as we noted in our **May 2018** Update, the Upper Tribunal decided that the Regulator was correct to use its FSD powers against the five ITV group company targets. ITV appealed the decision to the Court of Appeal and a hearing has been fixed for **13 May 2019**.

Supreme Court to give final judgment on part-time pension rights

As reported in our **November 2018** Update, the CJEU ruled last year in the *O'Brien* case that periods of service completed prior to the deadline for transposing the Equal Treatment Directive, which would have been taken into account when calculating the pension of a *full-time* worker, also have to be taken into account when calculating

the pension entitlement of a comparable *part-time* worker.

The case has been remitted to the Supreme Court for a final judgment, although we understand that no hearing date has yet been set.

Court of Appeal to examine VAT exemption on investment management services

The Court of Appeal will clearly be busy with pensions-related cases this year, as it will also be hearing, on **19 February 2019**, an appeal brought by the Trustees of the United Biscuits Pension Fund against the High Court ruling that, as a matter of EU law, the pension fund management services provided by non-insurers were not exempt from VAT.

As noted in the *United Biscuits* case, currently, there is a distinction between insurers and non-insurers in the provision of pension fund management services, as insurers' supplies are VAT exempt. **However, from 1 April 2019, this distinction will be removed, meaning that VAT will be charged on all investment management fees.**

CJEU to rule on discrimination aspect of equalisation case

Finally in this section, we are expecting a CJEU judgment later in 2019 in the case of *Safeway v Newton*, following the Court of Appeal's decision in October 2017 (see our [October 2017 Update](#)) and a reference from the Court of Appeal on 5 March 2018.

Broadly, the question that has been referred to the CJEU relates to the extent to which European law prevents the retrospective levelling up of pension ages in order to equalise normal pension ages, even where the pension scheme's power of amendment expressly allows changes to be made retrospectively as a matter of UK law. The Court of Appeal held that the law in this area was not sufficiently clear for it to rule on.

The extent to which the UK courts will be bound by any CJEU decision in this case will depend on when the decision is handed down, and whether the UK enters into a Withdrawal Agreement prior to the CJEU reaching a decision. Under the November 2018 Withdrawal Agreement, it is clear that the UK would be bound by any CJEU judgment that is handed down before the end of any transition period.

OUR ANNUAL SEMINAR - THURSDAY 17 JANUARY 2019

Many of the above topics and more will be considered in our **Annual Pensions Seminar** on **Thursday, 17 January 2019**. The seminar will cover:

- DB and DC consolidation - commercial consolidators and authorised master trusts;
- the future of regulating pensions - A panel discussion with Jonathan Sharp, Fred Berry of the Pensions Regulator and more;
- Creative Funding - Challenges and Opportunities for scheme sponsors and the modern trustee; and
- a case law and Pensions Ombudsman update.

We look forward to seeing those of you who have already registered and please get in touch with your usual

Baker McKenzie lawyer if you would like to attend.

FURTHER INFORMATION

If you would like more information about any of the items in our Planner, please get in touch with your usual Baker McKenzie contact.

****** WE WISH YOU A VERY HAPPY AND HEALTHY 2019 ******

Contact us

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