

The pensions law implications of "Brexit"

On 23 June 2016, the UK voted to leave the European Union. In terms of what impact this will have on UK pensions, the extent to which current pensions law will be affected will be dictated by the precise terms of the 'Brexit', which are yet to be determined.

This briefing outlines some of the key issues and questions which will be relevant in the pensions context following the UK's vote to leave. However, it is important to be aware that there is no immediate change to pensions law as a consequence of the vote. The UK remains a member of the EU and will have at least two years to negotiate the terms of its exit.

What pensions legislation will be affected by the Brexit vote?

Much of our current pensions legislation is domestic in origination and so will be unaffected by Brexit.

However, some of it does have EU-roots. For example, parts of the Pensions Act 2004 relating to scheme funding derive from the European IORP Directive and the legislation on the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') which is now enshrined in UK law, also originally derived from Europe.

The extent to which this will be affected by the Brexit vote remains to be seen. In theory, after Brexit, it would follow that the UK would be free to depart from these aspects of pensions law if no longer bound by EU law. However, this would require the relevant UK legislation to be repealed first – something which is

perhaps unlikely, particularly given that much of this legislation provides protection for pension scheme members and has been part of the current pensions law system for some time now.

What about practices which flow from European case law?

Some of the UK's pensions practices also derive from case law coming out of the European courts. For example, the law on discrimination and equal treatment (which is also implemented to some extent in UK legislation, such as the Equality Act 2010).

Again, in theory, it's possible there could be a move away from this following Brexit if the domestic courts no longer consider themselves bound by the pre- and post- Brexit decisions of the European courts. However, this is probably unlikely, particularly in the short term, given that the principles of equal treatment and protection from

discrimination are now well established and accepted concepts in UK society.

Notwithstanding this, it is certainly possible that, over time, some aspects of UK pensions law and practices which flow from the EU could move away from the EU position. For example, the proposed requirement to equalise GMPs (which comes from the European Court of Justice case, *Barber*¹) might be dropped, as might any additional governance and disclosure requirements imposed by the revised IORP Directive, which is currently being negotiated.

What other issues are relevant?

A key issue for defined benefit ("DB") schemes following the UK's vote to leave will be the impact of Brexit on the sponsoring employer's business and therefore, the employer covenant (i.e. the sponsor's ability and

willingness to fund its pension scheme), which trustees are required to monitor. If the impact of Brexit is to significantly improve or weaken an employer's covenant, trustees will need to consider whether changes are needed to the scheme's existing security and funding arrangements.

The market volatility expected as a result of the vote to leave is likely to have the biggest immediate on pensions with any period of financial instability affecting investment returns (and also likely to have an impact on annuity rates). Trustees should be considering their scheme's investment strategy and the investment options offered to members in light of Brexit.

Further information

If you would like further details on any of the issues discussed in this briefing, please speak to your usual Clifford Chance contact. Please note that the Firm has also established a Brexit topic guide which can be accessed at

the following link:

<https://financialmarketstoolkit.cliffordchance.com/en/topic-guides/brexit.html>.

This contains information and links to a number of papers and other materials on the implications of Brexit (both generally and in relation to specific topic areas).

1 Barber Guardian Royal Exchange Assurance Group
[1991] 1 QB 344.

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