C L I F F O R D

C H A N C E

UK: PENSIONS UPDATE – JUNE 2020

1. PENSION SCHEMES BILL 2019-21 – PROGRESS UPDATE

1.1 While progress of the Pension Schemes Bill 2019-21 was delayed as Parliament passed urgent legislation in response to the Coronavirus, the Bill is scheduled to move to the report stage in the House of Lords on 30 June 2020. The timetable of the Bill through the House of Commons is uncertain given the competing priorities on parliamentary time over the summer, but we understand it remains a priority for the Department for Work and Pensions (**DWP**).

1.2 We understand that there may be an intention for the Pensions Regulator (**TPR**) to consult on and publish specific guidance on its approach to prosecuting the new offences prior to commencement of the legislation, but what that guidance will say remains to be seen and industry stakeholders continue to be very concerned by the breadth of the new criminal offences for conduct harming pension schemes contained in the Bill.[1]

1.3 Concerns have also been raised regarding the draft amendments to the Pensions Act 2004 which impose a new duty on trustees of defined benefit schemes to determine and keep under review a "funding and investment strategy" to which the employer's agreement is required. As currently drafted, the new funding requirements appear to give the employer more say in investment decisions than under the current regime. However, it seems to us unlikely that it is the Government's intention to alter the balance between trustees and sponsoring employers in this way, and the proposed legislation would not have the effect of requiring the trustees to have the agreement of the employer before changing their scheme's investment strategy.

Key issues

1. Pension Schemes Bill 2019-21 – Progress Update
2. Hughes v PPF
3. Interim Regime for Pension Superfunds Published
4. TPRs Defined Benefit Funding Code Update
5. TPRs Annual Funding Statement 2020
6. Expansion of TPR's Investigatory Powers
7. Corporate Insolvency and Governance Act 2020 Receives Royal Assent
8. FCA Value for Money Review / Consultation
9. FCA Defined Benefit Transfer Guidance / Consultation
10. Consultation on Central Clearing Obligations for PSAs
11. AG Issues Opinion on VAT Exemptions
12. HMRC v Sippchoice Limited
13. RPI Case Update
14. TPRs COVID-19 Guidance Update
15. On the horizon

2. HUGHES V PPF

2.1 On 22 June, the High Court handed down its judgment in *The Queen on the Hughes and others vs. The Board of the PPF and the Secretary of State for Work and Pensions,*[2] (**Hughes**) which considers several issues relating to the Pension Protection Funds (**PPF's**) implementation of the CJEU's ruling in *Hampshire,*[3] which broadly requires member states to ensure that on the insolvency of an employer, employees receive benefits corresponding to at least 50 per cent of the value of an employees accrued pension entitlement from the Member State's pension lifeboat arrangement.

[1] See our previous briefings for further background: UK Pensions Update: Special Edition October 2019 and UK Pensions Update: January 2020 Edition.

[2] [2020] EWHC 1598

[3] *Hampshire v Board of the Pension Protection Fund* [2019] ICR 327

2.2 The method by which the PPF has implemented Hampshire and which was the subject of the challenge in Hughes was, broadly, as follows:

2.2.1 A one-off calculation to assess the total actuarial value of the member's scheme benefits payable from the insolvency date, using their original scheme benefit structure (e.g. not subject to the PPF cap and using the original revaluation and indexation rates) and comparing it against the total actuarial value of their PPF benefits (from the same date);

2.2.2 where this is less than 50 per cent of the total actuarial value of their original scheme benefits the PPF benefit is actuarially increased (with the result that a member may initially receive more than 50 per cent of the pension they would have received from their scheme); and

2.2.3 the benefit will not be further adjusted (upwards or downwards) in the light of subsequent events.

2.3 Of key interest from Hughes are the following points:

PPF Compensation Cap is Age Discriminatory: the judge ruled that the compensation cap applied by the PPF to the benefits of members who are under normal pension age (**NPA**) when their scheme is brought within the PPF amounts to unlawful discrimination on grounds of age and must be disapplied.
• Note that members who are below NPA also have their benefits automatically reduced to 90 per cent of their benefits (whereas members over NPA receive 100 per cent of their promised benefits) but this was not challenged in the case.
• The PPF had argued that the compensation cap was a proportionate means of achieving two legitimate aims (being broadly (i) to prevent employer's from failing in their duties towards pension schemes in reliance on the existence of the PPF as the lifeboat arrangement; and (ii) to ensure that the costs of the PPF (through the levy) were not so high as to deter employers from continuing to provide occupational pension schemes.
• The judge accepted that both aims were legitimate but that the compensation cap was disproportionate, and therefore unjustifiable on the basis that it affected only a very small group of members, but had a very significant adverse effect on those members.

Industry concerns have been raised that the knock-on effect of this outcome may be that (i) members raise a further legal challenge to the whole principle of only paying 90 per cent compensation across the board for those under NPA; and (ii) this impacts on the overall size of the PPF levy and the levy payable by individual schemes and employers.

Implementation of Hampshire: the judge's view was that the Hampshire decision could be implemented on an aggregate basis as per the PPF's method, taking account of the overall value of benefits over time, but what must be provided is 50 per cent of the "*actual value……. not 50 per cent of the actuarially predicted value*". As such, as part of their method, the PPF would need to identify any individual members who may ultimately receive less than the 50 per cent and address this.
• The claimants had successfully argued that a one-off assessment and adjustment carries the risk that, if the actuary's assumptions are not borne out in practice – for instance, if the member lives longer than expected, the PPF compensation received will not meet the 50 per cent minimum threshold.
• As to the calculation of survivors' benefits, where the PPF compensation payable is 50 per cent of the member's pension at the date of death, the claimants also argued that the PPF's calculation basis may not provide 50 per cent of what the scheme would have paid to a survivor (e.g. where the scheme rules provide for a pension of two-thirds of the member's pension before any commutation for a lump sum). The judge agreed, reasoning that while EU law is concerned with protecting the rights of employees, it recognises specifically that those rights include survivors' benefits. Therefore, payment of less than 50% of the value of the benefits which the scheme would have paid to survivors is not sufficient.

2.4 Finally, it is worth noting that the judge held that the statutory six year limitation period applies to claims to the PPF for arrears of compensation, given they are claims under a statutory provision (the practical effect of which is that the PPF is not obliged to pay arrears in respect of any period prior to *Hampshire* – i.e. 6 September 2012).

3. INTERIM REGIME FOR PENSION SUPERFUNDS PUBLISHED

3.1 TPR has published guidance on the interim regulatory regime for defined benefit consolidation vehicles (the so-called "superfunds"), which TPR will be responsible for regulating before a legislative authorisation framework is in place (noting here that the Government's response to its December 2018 consultation on superfunds remains outstanding). The guidance is comprised of a general guide plus two bespoke guides for trustees and employers considering the use of a superfund (highlighting that the superfund route is not appropriate for schemes that are close to buy-out). TPR has also provided a response to its targeted consultation held in September 2019.

3.2 Much of the guidance is unsurprising. For example (i) there's a strong message that employers looking to transfer to a superfund will be expected to apply for clearance from TPR and provide evidence that the pension scheme and the capital buffer meet TPR's requirements; (ii) the key individuals who exert financial control and influence over the superfund's strategies are fit and proper; and (iii) the governance, systems and processes associated with the capital buffer and the scheme are adequate.

3.3 TPR regards the superfund's capital buffer to be a proxy for employer covenant. To achieve a sufficient level of member protection, superfunds must therefore comply with a range of requirements covering capital requirements, management of risk, investment requirements and extraction of value requirements (i.e. no profit should be extracted from the capital buffer or pension scheme unless scheme benefits are bought out in full with an insurer – albeit TPR has said it will review its position on this in three years).

3.4 In a written ministerial statement Guy Opperman (recognised as supporting the concept of defined benefit consolidators) made it clear that the interim regime will be kept under review and that market participants should not assume that the permanent regime will automatically replicate the interim regime. In contrast, Andrew Bailey, Governor of the Bank of England, is reported to have written to the Work and Pensions Secretary, Therese Coffey, to criticise the interim framework stating that it fails to offer adequate protection for pensioners.

3.5 In the meantime, pension schemes are continuing to be creative at finding end-game solutions for their schemes, such as the new structure being referred to as a 'capital-backed journey plan' which sees capital from a third party investor "locked in" alongside scheme assets from the outset, targeting a fixed future date for the buyout of benefits. Whilst attractive to trustees, it remains to be seen whether this model will appeal to many sponsors if the sponsor needs to top-up investor capital and ultimately remains liable for the scheme if the journey plan doesn't work-out.

4. TPR'S DEFINED BENEFIT FUNDING CODE UPDATE

4.1 On 3 March 2020, TPR issued the first of its two consultations regarding the revision of its Defined Benefit Code of Practice (**DB Code**)[4]. While recent events have caused commentators to call into question the continued appropriateness of the proposed new DB Code, TPR is progressing with consultation although TPR has extended the deadline for responses to the consultation to 2 September 2020 and has said that it doesn't expect the new DB Code to come into force until late 2021 at the earliest.

4.2 Some stakeholders have concerns that the proposed revised DB Code represents a move away from the scheme-specific funding regime back towards more objective funding standards. TPR currently has various statutory powers to set funding of defined benefit schemes, for example where the trustees and employer have failed to agree a valuation within the statutory 15 month period, or where they have agreed a valuation but it does not comply with the legislation. However, while the Pension Schemes Bill does include new requirements around the proposed funding and investment strategy statement which TPR will have jurisdiction to ensure compliance with, the legislation is not otherwise changing so as to cause any strengthening of TPR's powers in this area.

4.3 However, there may well be a number of statutory instruments made under the Pension Schemes Bill (and which have not yet been published) and so trustees and employers will need to keep a close eye on the practical implications of any changes that are proposed.

[4] See our January briefing for further information: UK Pensions Update: January 2020 Edition.

5. TPR'S ANNUAL FUNDING STATEMENT 2020

5.1 TPR issued its Annual Funding Statement (AFS) for trustees and sponsoring employers of occupational defined benefit pension schemes on 30 April 2020. As TPR notes, the AFS is particularly relevant to schemes with valuation dates between 22 September 2019 and 21 September 2020 as well as schemes undergoing significant changes that require a review of their funding and risk strategies. TPR has said that it will consider issuing further guidance in the autumn as the duration/impact of the current economic uncertainty evolves. The areas covered by the AFS and some key points to note have been included as an appendix to this briefing.

6. EXPANSION OF TPR'S INVESTIGATORY POWERS

6.1 On 21 April 2020, the draft Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020 were laid before Parliament which amend the Investigatory Powers Act 2016 and grant communications data powers to relevant public authorities, including TPR.

6.2 Broadly, the regulations grant data-gathering powers to TPR to prevent or detect serious crime and to prevent disorder. In urgent cases, TPR can itself authorise its staff to obtain the data when satisfied that the request is necessary, urgent and proportionate for the 'applicable crime purpose', but in non-urgent cases authorisation should be sought from the Investigatory Powers Commissioner.

6.3 Once authorisation has been granted, TPR will be able to obtain the communications data itself from any person or telecommunication system, ask any person it believes to be in possession of or able to obtain data, to obtain and disclose data, and require a telecommunications operator who it believes to be in possession of or able to obtain data, to obtain and disclose data.

6.4 These proposed powers are in addition to TPRs existing armoury of investigatory powers (e.g. its power to issue section 72 notices and require compulsory interviews) and perhaps indicates a desire for TPR to be able to put its full weight behind its own enforcement powers rather than having to rely on other government agencies for investigatory assistance.

7. CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020 RECEIVES ROYAL ASSENT

7.1 The new Corporate Insolvency and Governance Act 2020 (**CIGA**) received royal assent on 25 June 2020 and came into force on 26 June 2020. Following lobbying from various industry stakeholders, amendments were made to the CIGA as it passed through Parliament which go some way to addressing concerns that the introduction of protective measures under the CIGB which are intended to help companies manage the damage to their businesses caused by COVID-19 may have had unintended consequences for both the PPF and defined benefit occupational pension schemes.

7.2 Concerns were raised that the introduction of a moratorium for entities that may otherwise be in real financial distress may result in companies having payment holidays from their obligations to make deficit repair contributions or pay debts triggered under Section 75 of the Pensions Act 1995 or in respect of liabilities imposed by the Pensions Regulator under its moral hazard powers. Where a company subsequently goes into liquidation, the entities in respect of whom a payment holiday had not applied would also be given "super priority" over other creditors (including the pension scheme which is often a material creditor).

7.3 In addition, there was no apparent role for the PPF in the new process of a restricting plan meaning the PPF would not be able to stand in the place of the trustees in creditor negotiations. Finally, it also appeared that only pension contributions in respect of future pensionable service of active members to occupational (and not personal) pension schemes would continue to be payable while the moratorium is in place.

7.4 However, amendments tabled by Lord Callanan (Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy) during its passage through the House of Lords give TPR and the PPF more information and participation rights in relation to both the new moratorium and the new compromise procedure, which will, in appropriate circumstances, allow for greater engagement at an early stage where the rescue of the business and any rescue proposals has the potential to affect entitlements. These rights are to co-exist with the responsibilities and participation of the pension scheme trustees. However, industry concerns about exactly how

pension entitlements are treated in (and after) a moratorium have not been addressed. In particular, the Act is not fully clear as to whether pension deficit contributions are payable during a moratorium, how employer contributions to personal pensions are treated, and what pension rights get super priority in a subsequent process.

8. FCA VALUE FOR MONEY REVIEW / CONSULTATION

> "*If it is easier to compare the VfM that firms offer, it will be easier to identify the lowest performers. This should encourage competition in the market and drive better VfM for scheme members.*" - FCA

8.1 Following the results of a review by the Financial Conduct Authority (**FCA**) published on 24 June 2020 which has highlighted concerns it has with the independence of some Independent Governance Committees (**IGCs**) and a lack of consistency in the way IGCs and Governance Advisory Arrangements (**GAAs**) operate, the FCA has announced it is launching a consultation on driving value for money in pensions.

8.2 The consultation (which has a deadline for responses of 24 September 2020), includes proposals to specify a simple framework for the annual IGC and GAA value for money assessment process, including a definition of value for money and three key elements of value for IGCs to use when conducting their assessments (being (i) charges and costs; (ii) investment performance; and (iii) services provided (including member communications)). The FCA is also inviting views on whether pension providers themselves should have a direct responsibility for value for money, alongside the IGC.

9. FCA DEFINED BENEFIT TRANSFER GUIDANCE / CONSULTATION

9.1 On 5 June 2020, the Financial Conduct Authority (**FCA**) published a package of measures designed to drive up standards of advice in relation to the defined benefit pension transfer market.

> "*The proportion of customers who have been advised to transfer out of their DB pension is unacceptably high*" - Christopher Woolard, FCA

9.2 From 1 October 2020, advisers will not be allowed to use contingent fee arrangements (under which advisers are not paid unless a client goes ahead with a transfer of their retirement savings out of defined benefit schemes and into defined contribution plans), except in certain limited circumstances. Guidance on triage services and estimated transfer values, which came into force on 15 June 2020.

9.3 The FCA also reports on its findings in its recent assessment of firms' advice on pension transfers. While the FCA has observed that standards of advice are improving, they are still well below the ideal level, and the FCA sets out its next steps for tackling this, including a further data request to all firms with the pension transfer permission, which will help to inform where the FCA targets its assessments.

9.4 The FCA has also published a consultation on guidance on what it expects from firms when advising on pension transfers and conversions, particularly from defined benefit schemes to defined contribution schemes, through best practice and case study examples of suitable and unsuitable advice. The deadline for responses is 4 September 2020.

10. CONSULTATION ON CENTRAL CLEARING OBLIGATIONS FOR PSAs

10.1 On 2 April 2020, the European Securities and Markets Authority (**ESMA**) published a consultation on potential central clearing solutions for pension scheme arrangements (**PSAs**). As we reported in our UK Pensions Update: June 2019 Edition, an amendment was introduced to EMIR by way of regulation that further extended the exemption from the clearing obligation for PSAs (**Refit Regulation**), the extension was introduced because of challenges that PSAs would face to provide cash for the variation margin calls related to their derivative contracts.

10.2 This extension is intended to support the objective of also ensuring that progress is made by the relevant stakeholders in addressing these challenges and for PSAs to clear their contracts. As part of this objective, the Refit Regulation requires the EU Commission to prepare a report assessing whether viable technical solutions have been developed for the transfer by PSAs of cash and non-cash collateral as the variation margin and the need for any measures to facilitate those viable technical solutions.

10.3 In order to provide input for the report, ESMA is required to produce, in cooperation with other European regulators, a report documenting the progress made towards clearing solutions for PSAs within six months from the entry into force of Refit Regulation. However, such deadline was too short to allow for all regulators to input and so the consultation is only a preliminary report on which ESMA is publicly consulting in order to provide for the second phase more comprehensive input to the EU Commission.

10.4 The consultation sets out the issues PSAs face in clearing their contracts, studies the rationale for the use of derivatives by PSAs and explores the different solutions already envisaged to facilitate PSAs to centrally clear their OTC trades.

10.5 The consultation closed 15 June 2020 and ESMA expects to submit a second report to the Commission before the end of 2020.

11. AG ISSUES OPINION ON VAT EXEMPTIONS

11.1 On 14 May 2020, Advocate General Pikamäe (**AG**) gave his opinion on a case concerning the VAT treatment of the investment management services supplied to a company for the purposes of the administration of its pension scheme.

11.2 Until 1 April 2019, pension fund management services were treated by HMRC as exempt supplies when provided by insurers, but as standard rated supplies when provided by non-insurers. From 1 April 2019, HMRC created parity between insurers and non-insurers (following legislative changes a few years before), and the supply of all pension fund management services became standard rated.

11.3 In United Biscuits[5], the Court of Appeal sought a preliminary ruling on whether investment management services supplied to an occupational scheme between 1 January 1978 and 30 September 2013 could be classified as an "*insurance transaction*" within the meaning of certain EU Directives and so be exempt from VAT. The AG concluded that investment management services could *not* be so classified on the basis that:

- The investment management services of the company did not include all of the required elements specified by the EU Directives (e.g. risk, a premium, and the provision of a guarantee in the event of the materialisation of the risk). Here for example, there was no provision of a guarantee against the materialisation of the risk.
- Although investment management services are described under the EU Directives as a "class of insurance", this did not mean that they generally constitute a life assurance activity within the meaning of the EU rules on insurance.
- Finally, the purpose behind the VAT exemptions is to avoid variations in the VAT systems of member states and therefore it would be contrary to this principal to allow the VAT exemptions to be extended to services ancillary to insurance services in this case.

12. HMRC V SIPPCHOICE LIMITED

12.1 The Upper Tribunal for the Tax and Chancery Chamber (**UT**) has handed down its judgment in *HMRC v Sippchoice Limited*[6]. The case concerned a claim for relief from income tax at source (**RAS**) in relation to contributions to a self-invested personal pension scheme (**SIPP**).

12.2 HMRC had appealed to the UT against the decision by the First-tier Tribunal that the transfer of shares made by members to companies of the SIPP were to be considered "*contributions paid*" by those members within the meaning of section 188(1) of the Finance Act 2004 (**FA 2004**) and therefore conferred an entitlement to relief from income tax. The UT accepted HMRC's appeal, on the following basis:

- The expression "*contributions paid*" in section 188(1) FA 2004 should be restricted to contributions of money (whether in cash or other forms) – read in the context of other sections of the FA 2004, it was clear that the

[5] C-235/19
[6] [2020] UKUT 0149 (TCC)

term "*paid*" should mean "*paid in money*". Section 161(2), for example, specifically references "*payment*" as including any transfer of money's worth.
• Transfers of non-cash assets which are made in satisfaction of a pre-existing money debt do not fall within section 188(1) FA 2004 – if the phrase "*contributions paid*" means paid in money, then it cannot include settlement by transfer of non-monetary assets even if the transfer is made in satisfaction of an earlier obligation to contribute money.
• The UT noted that there was a conflict between HMRC's pensions tax manual and the provisions of the FA 2004 on this point, given HMRC's manual suggested that HMRC did not see any objection to a promise to make a monetary contribution to a pension scheme being satisfied by a transfer of an asset or assets where the member and scheme administrator both agreed to it. However, HMRC's manuals did not carry the force of law and so the UT had to give effect to the FA 2004.
• There was no contractual obligation for the members to pay money to Sippchoice because the statement in the Contribution Form, where the members declared their proposed contributions, lacked the elements to create a legally binding contract – i.e. that there be an offer, an acceptance, consideration and the intention to create legal relations.

13. RPI CASE UPDATE

13.1 The caravan of cases on switching from RPI to an alternative index have continued with *Carr v Thales Pension Trustees Ltd and Thales UK Ltd*[7] (**Thales**) and *Ove Arup & Partners International Ltd v Trustees of the Arup UK Pension Scheme*[8] (**Arup**).

13.2 In Thales, the High Court agreed with a determination by the Pensions Ombudsman that the trustee had been wrong to switch to CPI. In Thales, broadly the rule in question stated that pensions in payment would be increased by RPI capped at 5%, as per the order made under the Pension Schemes Act 1993. Following the Government's move to CPI for such orders in 2010, there was a clear conflict between the two limbs of the rule but, following receipt of legal advice, the trustee moved to CPI.

13.3 The Ombudsman first and then the High Court found that the natural and ordinary meaning of the rule gave primacy to the first part of the rule which was determinative (i.e. that pensions would increase by RPI capped at 5%) and that, in grammatical terms, the latter half of the rule (being the reference to the statutory orders) was of descriptive assistance only.

13.4 In Arup, the principal employer made a Part 8 claim seeking to establish that the trustees were obliged/had the power to switch from RPI to CPI or CPIH, or failing that, to make 'adjustments' to calculations using RPI that would achieve the same effect. Broadly, the rule in question provided that a change could be made where the composition of RPI changes or RPI is replaced by another similar index.

13.5 The judge concluded that a switch wasn't permitted. The judge held that replacement of the index was an act to be done by the producer of the index and not its user, and that as RPI continued to be published there was no replacement of it either. As to whether the trustees were obliged to make 'adjustments' to any calculations using RPI, the judge held that this did not mean that RPI could be departed from but, instead, the trustees could counteract any changes to its composition in a fair and reasonable way when uprating scheme benefits.

13.6 As ever with RPI/CPI cases, although of some general interest, Thales and Arup highlight that when it comes to considering a switch from RPI to CPI it is the particular rule wording of the scheme in question which will be determinative (with the judge in Arup noting that previous cases on RPI/CPI were not particularly useful).

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7 [2020] EWHC 949 (Ch)
8 [2020] EWHC 1064 (Ch)

14. TPR'S COVID-19 GUIDANCE UPDATE

14.1 TPR has continued to update and refine its guidance in response to the issues for trustees, employers and administrators presented by COVID-19. Despite repeating its mantra that TPR will take a "pragmatic approach" TPR has taken some surprising stances. For example, where trustees need to re-direct member contributions to a fund that has not been self-selected by members as a result of gating of funds by investment providers in response to COVID-19, TPR has said that in its view, the fund to which the contributions are temporarily directed will be a "default fund" (which would place an increased administrative burden on trustees) unless *prior* consent of the member has been obtained. In many cases, we suspect obtaining member consent prior to re-directing funds will not have been possible in practice and we would highlight that TPR also states that trustees should seek legal advice as to how the issue will impact any particular scheme.

"*we will take a reasonable, pragmatic and proportionate approach to our regulatory work during this time*" - TPR

14.2 Some other key points to note include:

Reporting	• The reporting requirements that were paused in response to COVID-19 will now resume from 1 July (although TPR says it will take a practical approach to late reporting breaches caused by COVID-19 issues, provided reported within 3 months). • Providers will continue to have 150 days to report late payments of contributions (other than DRCs), instead of the usual 90 days. This easement will be re-considered at the end of September 2020.
Requests to suspend or reduce DRCs	• DRC suspensions/reductions may continue to remain appropriate but trustees should undertake due diligence on the employer's financial position before agreeing to a new suspension or reduction, rather than unquestionably extending their original suspension arrangements on a three-month rolling basis.
Valuations	• TPR cannot waive the obligation for trustees to provide a copy of the recovery plan within 15 months of the valuation date, but will continue to take a reasonable approach to late submission caused by COVID-19 issues.

14.3 Separately, the Pensions Ombudsman has confirmed it will take into account TPR's latest guidance on COVID-19 issues if it receives complaints about delays caused by COVID-19 circumstances.

15. ON THE HORIZON

GMP Equalisation – further HMRC guidance awaited

As reported in our UK: Pensions Update – March 2020 Edition, on 20 February 2020, HMRC published its long-awaited guidance on some of the pensions tax issues arising when equalising benefits for the effect of guaranteed minimum pensions (GMPs). However, the guidance had gaps (notably it did not cover some trickier points such as lump sum and death benefit payments) but HMRC promised further guidance "*as soon as possible*". HMRC also stated that it would "*continue to explore the tax implications for schemes choosing to use the conversion methodology*", but to date no additional guidance has been forthcoming and there continues to be a lack of clarity in this area.

Lloyds supplementary hearing on transfers out

The supplementary hearing to resolve the outstanding GMP equalisation issues in relation to benefits that have been transferred out to other schemes following the landmark ruling in the case of *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc*[9] was heard virtually between 4 May 2020 and 13 May 2020 – judgment is awaited.

[9] [2018] EWHC 2839 (Ch)

Safeway v Newton returns to the Court of Appeal

As reported in our UK: Pensions Update – January 2020 briefing, while the CJEU confirmed that Safeway was not permitted to equalise normal retirement ages to 65 until the date the pension scheme's trust deed was actually amended on 2 May 1996, the CJEU said that retrospective equalisation may be possible in exceptional circumstances where there is an objective justification, provided that the legitimate expectations of the persons affected are respected and there is otherwise a risk of "*seriously undermining the financial balance of the pension scheme*". The case has returned to the Court of Appeal and the hearing continues to be listed for 2 July 2020 (albeit exactly which points are being argued on appeal has not yet been made public).

RPI methodology consultation deadline extended

The Government's consultation on reforming the methodology of RPI which was launched on 11 March 2020 and due to close on 22 April 2020 has been extended to 21 August 2020 (subject to coronavirus-related developments).

APPENDIX – TPR's Annual Funding Statement

Area	Key points
Post valuation experience	• Schemes close to completing their valuations are not required to take into account post-valuation experience to change their valuation assumptions, but trustees should consider it in their Recovery Plans (RPs). • Schemes with valuation dates around 31 December 2019 should consider taking account of post-valuation experience in their RPs, and this should be applied consistently taking account of both positive and negative experience.
Changing the valuation date	• TPR urges any trustees who are considering bringing forward their valuation's effective date to a date when conditions were more 'normal', to consider very carefully and TPR is likely to question such decisions.
Calculating TPs	• TPR expects schemes to proceed with as much of the preliminary valuation work as possible but notes that March and April 2020 valuations will be challenging such that trustees may wish to delay taking decisions about Technical Provisions (TP) assumptions until more clarity emerges. • Trustees may be comfortable working with a preliminary set of results which can then be refined during the valuation period.
RPs and affordability	• Trustees should plan to recover deficits with a focus on the affordability of the employer, while maintaining fair treatment and balancing the sustainable growth of the employer. • Trustees should build in incremental increases in contributions where possible (based on triggers such as free cash flow and payments to other creditors) in addition to Deficit Recovery Contributions (DRCs).
Shareholder distributions	• Employers should only restart ceased/reduced shareholder distributions where liquidity and affordability have been largely restored and this is reflected in the RP. • With respect to significantly reduced DRCs, trustees should ensure the additional liquidity is used to support the employer (or group companies but only where it benefits the employer and that contributions will commence where shareholder distributions do (or such distributions may be blocked by the trustees) and understand how deferred DRCs will be repaid.
Long-term funding targets	• Long-term funding plans should remain in place (with short-term modifications if necessary) and if trustees don't already have them, they are encouraged to prepare for them.
Covenant monitoring and contingency plans	• TPR expects trustees to increase their monitoring of employer covenant in current conditions and they should have contingency plans in place so they can react to a weakening of covenant. • The contingency plans should be drawn up with the employer where possible, with agreed trigger points that will result in specified actions e.g. for additional cash contributions to be paid if the funding level deteriorates below a certain level. • Trustees should be able to demonstrate these interactions with the employer have taken place (TPR may ask trustees to share documents with them on this).
Covenant leakage	• Trustees should be supportive of employers under financial pressures, but also vigilant of covenant leakage. Covenant leakage could include: – Paying dividends – Cash pooling and inter-company lending – Group trading arrangements

Area	Key points
	– Management fees/royalties – Transfers at an undervalue – Excessive executive remuneration • Trustees should be alive to covenant leakage where the employer is seeking a long RP because of limited affordability and seek appropriate arrangements to prevent this.
Managing risks	• TPR expects trustees to adopt an integrated risk management framework – monitoring employer support, investment risks and the scheme's funding plans. • The Statement sets out some tables to help trustees identify the key risks they should focus on in this regard depending on their scheme and employer characteristics.

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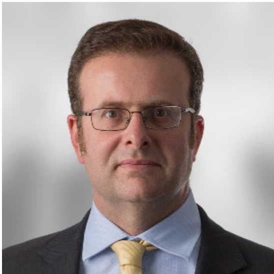

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