NORTON ROSE FULBRIGHT

Essential UK Pensions News

April 2021

Introduction

Essential UK Pensions News covers the key pensions developments each month.

Governance

1. Increased data protection requirements for overseas transfers of data

Requirements for protecting personal data transferred outside the UK and EEA are becoming more onerous, following a key 2020 decision of the Court of Justice of the European Union, known as "Schrems II". Trustees whose scheme data is transferred outside the UK and EEA to countries not recognised as having adequate data protection safeguards may need to update their legal agreements which govern data transfers in the light of these changes.

In addition, schemes reliant on data flows from the EU/EEA need to keep a watching brief for the European Commission's decision about the adequacy of UK data protection laws.

Transfers outside the UK and EEA
The EU Data Protection Board (EDPB) is due to issue final guidance in the coming months clarifying the steps that organisations transferring personal data outside the UK and EEA will need to take to protect their data, to comply with the requirements of the "Schrems II" judgment.

In addition to the existing requirement to ensure such transfers are covered by an export mechanism (usually the EU-Commission approved "standard contractual clauses"), the EDPB's final guidance is expected also to require such organisations to assess the destination country's data protection practices as against EEA/UK standards of data protection, in particular any laws that allow access of EEA/UK personal data by public authorities within the destination country.

This is to ensure that adequate mechanisms are in place to protect the data. Where risks are identified, further protections (e.g. strong encryption, use of pseudonymised/anonymised data, robust reporting requirements, etc.) will need to be put in place in addition to the "standard contractual clauses" and relevant agreements will need to be updated.

Trustees will need to:

- Make sure they know where their data is being transferred.
- Understand what protections are currently in place for any transfers of their data outside the UK and EEA.
- Carry out country-specific risk assessments if necessary, and
- Add further protections as needed.

The EDPB has also issued revised versions of the "standard contractual clauses" which many organisations rely on to ensure data is protected when transferred. Once finalised (possibly as soon as next month), trustees may need to update agreements with their administrators and suppliers to replace the existing "standard contractual clauses" with the revised "standard contractual clauses".

For more information, please read our recent blog posts: Schrems II landmark ruling: our recommendations; and European data export bonanza: revised SCCs and EDPB Schrems II guidance published.

Transfers of data from the EU to the UK
Meanwhile, we continue to await formal confirmation from the European Commission that the UK's data protection laws are adequate, following a draft decision to that effect. If this is confirmed, personal data will be able to continue to flow from the EU to the UK uninterrupted (see our recent blog for more information).

For advice on these issues, please contact the Norton Rose Fulbright pensions team.

Transfers and scams

2. FCA and TPR finalise guidance on DB to DC transfers

The FCA and TPR have jointly published a finalised, updated version of a guide which covers, among other things, what kind of information and support employers and trustees can provide to members relevant to DB to DC transfers without straying into regulated advice territory.

An FCA consultation on draft guidance last summer had caused concern in the industry because it appeared to call into question whether it is acceptable to provide unsolicited transfer values to members. It also suggested that it could constitute regulated advice to compare a member's benefits within the DB scheme with what they could be after transfer to a DC environment.

The finalised guidance has been significantly updated in this respect.

The guide now makes clear that trustees and employers can provide an unsolicited transfer value to members. However, trustees and employers are urged to consider if this is likely to result in good outcomes for members.

The FCA and TPR do consider that giving members illustrative figures that compare their benefits in the DB scheme and after a transfer-out could constitute regulated advice, if this involves making assumptions about DC outcomes. There are limited circumstances in which trustees and employers can provide comparisons, namely where only "factual" information is provided about post-transfer benefits. For example, the FCA would not consider it to be regulated advice if trustees or employers were to inform a member who has already reached minimum retirement age about the level of income that would be provided by a lifetime annuity currently available on the open market using their transfer value.

Trustees and employers should as soon as possible review relevant member communications in the light of this guidance and revise them as necessary.

The FCA has also finalised guidance for IFAs who advise on DB to DC transfers. It contains, in an annex, information which DB schemes should provide automatically with a transfer quotation. It is an extensive list.

Trustees should check with their administrators that they are reviewing and updating their transfer processes and standard responses accordingly.

3. Work and Pensions Committee urges Government to ban online fraud

The Work and Pensions Committee has published a report calling on the Government to legislate against online investment fraud.

The WPC's inquiry suggested that pension scammers have increasingly moved online and that tech firms such as Google are being paid by fraudsters to advertise scams while also receiving payments from regulators to publish warnings. The WPC wants new laws to require online publishers to ensure financial promotions are approved by an authorised person, in line with the rules that apply to traditional media.

The report also calls for Project Bloom, the multi-agency task force, to be strengthened and suggests that the scale of pension scams is commonly underestimated.

4. Industry code on pension scams updated

The Pension Scams Industry Group (PSIG) has published an updated version of its "Code of Good Practice on Combating Pension Scams". Trustees should check with their administrators that they have reviewed the updated guide and whether their pre-transfer due diligence processes are in line with it.

5. PPF announces rise in fraud levy

The Pension Protection Fund (PPF) has confirmed that it will raise a levy of 75p per member, or 30p per member for master trusts, for the 2021/2022 levy year to fund the Fraud Compensation Fund (FCF) of the PPF. This is the maximum levy currently allowed under the legislation.

These additional funds are needed as a result of a court ruling in November, which clarified that occupational pension schemes which were used as scam vehicles were eligible to claim from the FCF in certain circumstances. This would help the victims of those scams, but needs to be funded.

The PPF has since received a number of claims from such schemes, with a total value of over £40m, and expects to receive more claims soon.

6. Court of Appeal allows appeal against SIPP provider in Adams case

Summary

The Court of Appeal has overturned the High Court's decision in a case about a member who made a speculative and unsuccessful investment through a self-invested pension plan (SIPP) on the suggestion of an unregulated introducer. In *Adams v Options UK Personal Pensions LLP*, the Court of Appeal has found in favour of the member and against the SIPP provider.

Background

In 2012, Mr Adams transferred over £50,000 from his Friends Life personal pension into a SIPP operated by Carey Pensions UK LLP (now known as Options UK Personal Pensions LLP), in order for it to be invested in UK storage pods. An unregulated broker based in Spain, known as CLP Brokers Sociedad Limitada (CLP), acted as introducer for the investment which it said would generate rental income payable into the SIPP.

The Carey SIPP made clear to Mr Adams before the investment that it was not advising him on the investment and recommended that he take his own financial and tax advice. The investment was unsuccessful and Mr Adams was left with substantial investment losses and an HMRC bill for unauthorised payments.

Mr Adams claimed damages from the Carey SIPP. In particular he argued that:

i. The Carey SIPP had breached a requirement of the FCA's code of conduct (the "COBS rules") to act honestly, fairly and professionally, for example by accepting the investment and not advising him that it was manifestly unsuitable for him, and

ii. Under financial services laws, the agreement between Mr Adams and the Carey SIPP was unenforceable. This was because Carey, an FCA-authorised person, had entered into an agreement with Mr Adams as a consequence of something said or done by an unauthorised person (CLP) who was illegally carrying out a regulated activity.

He lost on both counts at first instance. The High Court found that Carey had made sufficiently clear to Mr Adams that he was responsible for his own investment decisions and refuted that CLP had advised him to enter into the SIPP.

Court of Appeal's decision

The Court of Appeal did not overturn the High Court's decision on the COBS rules but it found in Mr Adams' favour on the second point. It held that CLP had in effect given Mr Adams investment advice and had arranged the investment in breach of financial services laws, and that this meant the agreement was unenforceable.

The Court declined to exercise its discretion under financial services laws to enforce the agreement, citing the need for consumer protection. This was despite finding that Carey did not know that CLP was undertaking regulated activities without authorisation.

The financial implications of this decision were left open, with the respective barristers being instructed to agree an appropriate order between themselves.

Comment

This is a member-friendly decision by the Court of Appeal which appears to have acted to protect a member (and future members in similar circumstances) from the consequences of his own poor investment decisions.

The decision does not stop SIPP providers from accepting business from unregulated providers, but they may want to consider the implications of this case carefully before dealing with them in the future.

7. TPO decision in Mr Y (PO-24361): refusing overseas transfer was maladministration

Summary

The Pensions Ombudsman found that refusing a transfer to an overseas pension scheme on the basis that HMRC would not guarantee that the scheme was a "Qualifying Recognised Overseas Pension Scheme" (QROPS) was maladministration on the part of the Trustee.

Background

Mr Y, a deferred member of the Simon Group Pension Fund (the Fund) requested a statutory transfer to a Jersey-based pension scheme on the basis of a transfer value quotation issued in December 2017.

After conducting due diligence into the receiving scheme, the trustee of the Fund (the Trustee) decided in July 2018 not to approve the transfer request. This was on the basis that it had not been able to determine whether or not the receiving scheme was a QROPS. This was not because of a lack of information from the receiving scheme, but rather because of "the fact that HMRC would not guarantee that a scheme appearing on the list of ROPS [Registered Overseas Pension Schemes] was a QROPS".

The member complained to the Ombudsman about various points including the decision to decline his transfer request, excessive delays in dealing with his transfer request and the level of service he had received.

Pensions Ombudsman's determination

The Pensions Ombudsman partly upheld Mr Y's various complaints, holding in particular that the decision to refuse the transfer request because of the lack of a guarantee from HMRC amounted to maladministration. The lack of certainty from HMRC "cannot be used to negate the member's right to transfer under overriding legislation."

The Ombudsman also found that some unreasonable delays had been caused by the scheme administrator and that the process had caused the member considerable frustration. He ordered the Trustee to:

- Pay £1,000 to Mr Y for serious distress and inconvenience, and
- Decide whether the Jersey scheme is a QROPS, but without taking into account the possibility that HMRC could withdraw QROPS status from the Jersey scheme in the future, "as this is irrelevant".

If the Trustee decided that the Jersey scheme was a QROPS, it must apply late payment interest, cover any unnecessary costs Mr Y had incurred as a result of the original decision and compensate him for any investment losses that he could show he had suffered as a result of the transfer not going ahead in July 2018.

Comment

This case suggests that trustees cannot decline a transfer request just because HMRC will not confirm the receiving scheme's status.

A QROPS is a qualifying ROPS. That means it appears on the HMRC list of ROPS and:

- The scheme manager correctly notified HMRC that the scheme is a ROPS and provided evidence to HMRC where required.

- The scheme manager had signed an undertaking to inform HMRC if the scheme ceases to be a recognised overseas pension scheme and to comply with any prescribed information requirements imposed by HMRC.
- The ROPS is not excluded by HMRC from being a qualifying recognised overseas pension scheme.

As all elements link back to HMRC, this is not something trustees can easily verify. Trustees will therefore need just to draw reasonable conclusions on each of the above based on their due diligence.

Consistent with other recent Pensions Ombudsman decisions, this case again confirms that trustees can be held liable for a member's investment losses where there is an undue delay in the transfer process.

The determination can be viewed here.

Investment

8. TPR publishes new climate change strategy

The Pensions Regulator has published its new climate change strategy outlining the Regulator's strategic response to climate change and how it can help trustees to meet the associated challenges. This includes the Regulator itself targeting net zero carbon emissions by 2030 and, by 2024, publishing its plans on how to achieve that.

The Regulator will publish guidance on how to assess, manage and prepare to report in line with the new climate change measures in the Pension Schemes Act. For defined benefit schemes, the guidance will specifically consider how to take account of the impact of climate change on sponsoring employers in integrated risk management. By 2023, the Regulator plans to be sharing best practice TCFD reports to show what is expected.

The climate change content of the Regulator's Trustee Toolkit will be updated.

The Regulator plans to examine scheme reports on scenario analysis in more detail by carrying out a thematic review on scheme resilience to climate-related scenarios.

It will also review a selection of implementation statements to see how they report on stewardship and engagement activities and publish its findings. The Regulator encourages trustees to sign up directly to the 2020 UK Stewardship Code.

9. Decision to realign RPI with CPIH to be challenged

The trustees of the BT Pension Scheme, the Ford Pension schemes and the M&S Pension Scheme have confirmed they are seeking judicial review of the government's decision to align RPI with CPIH from 2030. They argue that the government and the UK Statistics Authority (UKSA) did not fully consider the far-reaching implications of the reform for pension scheme funding and investment and pensioners' retirement income before reaching the decision.

If successful, the government's decision could be declared unlawful, in which case the UKSA would need to reconsider its proposals.

10. Pensions industry warned not to overstate members' voting rights

Independent trustee PTL has suggested that the pensions industry should be wary of giving members the impression that they have voting rights on the shares in their pension schemes. PTL points out that while pension schemes can sometimes influence the companies they invest in to properly manage ESG risk, there are challenges. Most schemes invest in pooled funds which means they rarely have ownership rights. Also, in practice only a handful of schemes are large enough to command the attention of the managers.

PTL concludes that "the ability of most schemes to influence is pretty weak" and in these circumstances it is not advisable to give members a sense that they can influence a vote. PTL's concern is that overstating members' power could give rise to member dissatisfaction and lead to opt outs.

Industry trends

11. Industry working group established to address small pension pots

A new industry working group has been established to take forward the December recommendations of the Small Pension Pots Working Group, which was chaired by the Department for Work and Pensions. The Small Pots Co-ordination Group comprises members from across the pensions industry including the Pensions and Lifetime Savings Association (PLSA) and the Association of British Insurers (ABI).

12. TPR updates cross-border guidance for auto-enrolment

The Pensions Regulator has updated the auto-enrolment section of its guidance on cross-border pension schemes. It now says that companies may not be able to use schemes based outside the UK for auto-enrolment compliance. If currently doing so, companies should check this as a matter of urgency as they may be required to re-enrol jobholders into an alternative scheme.

13. MaPS launches Money Helper brand

The Money and Pensions Service (MaPS) has announced plans to launch a new consumer brand, MoneyHelper, which will replace the Money Advice Service, the Pensions Advisory Service and Pension Wise brands. These brands and services will be brought together in one place under the MoneyHelper umbrella, although Pensions Wise will continue as a "named service" under that umbrella.

The intention is to roll out the new brand from early June 2021. Member communications will need to be updated in due course to reflect this change.

Restructuring

14. Further extension of temporary suspension of winding up petition

Temporary, pandemic-related restrictions on the use of statutory demands and winding-up petitions against businesses have been extended again, this time from March 31, 2021 to June 30, 2021. The restrictions were introduced by the Corporate Insolvency and Governance Act 2020. They aim to give companies extra protection during the pandemic by stopping creditors from bringing about an employer insolvency event.

The restrictions also apply to creditors which are trustees of DB pension schemes and could make it harder for them to enforce outstanding debts, such as deficit repair contributions or "Section 75" employer exit debts.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
Lifetime Allowance frozen	From April 6, 2021 to at least April 2026	Update member communications and administration systems.
Deadline for tender process for fiduciary managers	June 9, 2021	This deadline will apply to certain fiduciary manager appointments which did not follow a competitive tender process. Seek advice on whether this deadline applies, conduct a tender process and certify compliance to the Competition and Markets Authority if necessary.
Deadline for requesting final GMP data cuts from HMRC	July 31, 2021	Contact HMRC ASAP if final data cut not yet received.
Climate change risk governance and disclosure requirements start to apply	October 1, 2021 for first wave of schemes (assets of £5bn and above and all master trusts) October 1, 2022 for second wave of schemes (assets of £1bn and above) Requirements may be extended to smaller schemes (assets under £1BN) from late 2024 or early 2025 – TBC	Develop project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis.
Requirement for trustees to publish an implementation statement online	For DB schemes: October 1, 2021 For DC and hybrid schemes (100+ members): As soon as accounts have been signed after October 1, 2020 (and no later than October 1, 2021)	Liaise with investment consultants and managers to gather relevant information to begin preparation of implementation statement and plan website publication.

Development	Expected timing	Suggested action*
Requirement for trustees to publish information on voting behaviour and capital structure of investee companies online	October 1, 2021	Liaise with investment consultants and managers to gather relevant information to begin preparation of information and plan website publication.
New stronger powers for the Pensions Regulator (under the Pension Schemes Act 2021), including new criminal offences, come into force	October 2021	Employers and trustees to carefully consider pension scheme ramifications of any corporate activity from point of view of new powers. Carefully document decisions. Review governance structures and policies/ protocols to minimise risk of breaches.
Statutory transfers: additional requirements	Autumn 2021	Review processes and assess trustee legal risk, once legislation available
Notifiable events: changes to current regime	Spring 2022?	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	2022? Consultation ends May 26, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.
DB scheme funding: changes to requirements	2022/2023?	Consider scheme's long term objective and journey plan and discuss with employers. Look out for second consultation, expected late 2021, and consider implications with advisers.
Pension Dashboards	2023	Look out for consultation, expected late 2021. Develop action plan for getting data ready for dashboard.
Rise in normal minimum pension age from 55 to 57	April 6, 2028	Look out for draft legislation (expected summer 2021). Take advice on which members benefit from the new protected pension age (of 55). Update member communications.
RPI reform and switch to CPIH	2030	Take advice on implications for DB schemes and necessary actions.

* This table sets out some indicative action points that trustees and employers may wish to consider but should not be read as a comprehensive plan of action or client-specific advice. Should you wish to discuss these issues further, please contact the Norton Rose Fulbright LLP pension team who will be happy to assist.

Global resources

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

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