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Brexit update - Pensions Regulator issues statement and update on various "no deal" regulations

The Pensions Regulator (Regulator) has issued a [statement](#) on the UK's exit from the European Union. The statement is aimed primarily at trustees of UK occupational defined benefit (DB) schemes and confirms that the Regulator does *"not expect the UK's departure from the European Union (EU) to have a significant effect in respect of the legislative basis under which schemes operate or trustees' ability to continue to administer their scheme effectively."* The Regulator considers that is the case in both a deal and no deal scenario.

In terms of the steps trustees should be taking to prepare for a no deal scenario, the statement recommends that trustees should, if they have not done so already, review any actions and contingency plans which have been identified in a no deal scenario. The Regulator also stresses the importance of maintaining continuity in respect of the payment of benefits in a no deal scenario. It recommends that trustees familiarise themselves with DWP's guidance on the payment of occupational pension benefits to [EU citizens in the UK](#) and [UK nationals in the EU](#) - broadly, this confirms the DWP's view that there is nothing in UK pensions legislation which would prevent trustees of occupational pension schemes from continuing to make payments to UK

nationals in the EU in a no deal scenario.

In other Brexit related developments, a number of regulations have been made to ensure that UK legislation continues to operate effectively after Brexit, including a number of provisions intended to come into force in the event of a no deal and which are also potentially relevant in a pensions context. These are in addition to regulations addressing issues specific to pension schemes and cross border insolvency scenarios, which we reported on in our [December 2018 Update](#).

- The Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 – these aim to ensure that the regime established by the MiFID II Directive and Regulation can continue to function effectively after Brexit.
- Value Added Tax (Finance) (EU Exit) Order 2019 – this includes provisions which aim to ensure the VAT fund management exemption that currently applies to defined contribution schemes will continue to apply after Brexit.
- The draft Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 – these aim to ensure that the UK data protection regime functions correctly after the UK's exit from the EU. The regulations maintain current data protection standards that exist under the GDPR and the Data Protection Act 2018, and also introduce a single regime for general processing activities, to be known as the "UK GDPR" after the date of EU exit. Further detail on how a no deal Brexit will affect data protection can be found [here](#).

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GMP equalisation - implementing the Lloyds Banking Group case decision

Trustees and sponsoring employers are continuing to grapple with how to implement the recent decision in the Lloyds banking case. ***We have produced a summary of the key issues and some suggested approaches, which can be viewed by clicking [here](#).***

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Single Financial Guidance Body launches

The new Single Financial Guidance Body ("SFGB") has launched. The SFGB brings together the Pensions Advisory Service ("TPAS"), Pension Wise and the Money Advice Service.

You can find more detail on the new SFGB in our [October 2018 Update](#).

According to the SFGB's [website](#), all staff from these three organisations have now transferred to the SFGB. As 2019 progresses, a new name will be sought for the SFGB; until that happens - and until the SFGB provides guidance on how information in relation to the new body is to be given to members - we suggest that trustees should defer updating member booklets and other communications.

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DWP consults on changes to the Pensions Ombudsman's jurisdiction

As we mentioned in our 2019 [New Year Planner](#), the Department for Work and Pensions ("DWP") has consulted on possible changes to the Pensions Ombudsman's jurisdiction to include a new early resolution function which would allow it to resolve disputes before they proceed to formal determination.

The DWP is also seeking views on a proposal to allow employers to make a complaint or refer a dispute to the Pensions Ombudsman where it chooses a group personal pension ("GPP") arrangement for its employees.

The consultation closed on 18 January, and it is possible that any legislative amendments required to bring in the changes to the Pensions Ombudsman's jurisdiction would be introduced in the private pensions bill scheduled to be included in the Queen's Speech this Summer.

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Ban on cold calling introduced on 9 January 2019

As we reported in our 2019 [New Year Planner](#), the ban on cold calling in relation to occupational and personal pension schemes came into force on 9 January 2019.

The relevant [Regulations](#) have the effect of prohibiting pensions cold calling except where the caller is a trustee (or manager) of a pension scheme or a firm authorised by the Financial Conduct Authority ("FCA"), and either: (i) the recipient has consented to receiving calls from the organisation making the call; or (ii) the recipient has an existing client relationship with the organisation and would expect to receive calls.

The ban will be enforced by the Information Commissioner's Office ("ICO"), whose powers include issuing a fine of up to £500,000. The ICO has updated its general guidance on the application of the Privacy and Electronic Communications Regulations and telephone marketing to take account of the cold calling ban, which can be viewed [here](#).

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Information Commissioner publishes guidance on controllers and processors

The ICO has published additional [guidance](#) aimed at helping organisations identify who is acting as a data controller and data processor. There is also new separate detailed [guidance](#) to help controllers and processors understand what needs to be included in a contract between them. The new guidance forms part of the suite of guidance which the ICO said it would publish to support implementation of the General Data Protection Regulation ("GDPR") in the UK and contains some helpful practical examples and checklists.

Determining whether third parties are acting as controllers or processors is key to determining what their respective obligations are and also what documentation should be put in place. ***This can be a difficult area for trustees in practice, so the new guidance is welcome, albeit the timing will be frustrating for the many trustees who have already been grappling with these issues in the run up to the GDPR coming into force.***

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PPF publishes update on its approach to PPF compensation

The Pension Protection Fund ("PPF") has published an [update](#) on its approach to calculating compensation following the CJEU's ruling in *Hampshire* that pension scheme members should receive at least 50% of the value of their accrued benefits if their employer becomes insolvent.

The PPF issued a statement in November 2018 setting out its interim approach to calculating any increases due to affected members and providing some illustrative examples of what it might mean in practice for affected members, which we covered in our [November 2018 Update](#).

The PPF's update is consistent with the November statement in terms of the interim approach which the PPF is intending to follow (until such time as new legislation to bring the UK legislation in line with the CJEU's ruling comes into force or there are further rulings by the courts), but also provides some further details of timings and the order in which it will be addressing affected members' benefits.

The PPF has confirmed that it will publish its methodology for calculating increases for PPF pensioners "as soon as it can" and that it will publish further information on how it will be dealing with other affected members who are not subject to either the long service or standard compensation cap "*in due course*".

The update will be particularly relevant to members who are already in the PPF or trustees of schemes in a PPF assessment period. It will also potentially be relevant to trustees who are winding up or otherwise seeking to secure benefits by reference to PPF level benefits (for example as part of a buy-out).

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PPF updates insolvency guidance

The PPF has updated its general guidance on insolvency and assessment periods, as well as its more specific guidance notes. The general guidance and the more specific notes can be accessed [here](#).

The PPF has also updated its guidance on its approach to employer restructurings, which is designed to assist employers, trustees and their advisors in formulating proposals and managing expectations of possible outcomes in this area. To view the guidance, please click [here](#).

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Pensions Disputes News

Supreme Court considers possible discriminatory treatment in ill-health pension case

In *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another* [2018] UKSC 65, the Supreme Court dismissed an appeal relating to an ill-health retirement case and the effect of the Equality Act 2010.

As we reported in our [August 2017 Update](#), Mr Williams was employed by Swansea University from 12 June 2000 until he retired for ill-health reasons on 30 June 2013 at the age of 38. He was employed by the university for 13 years. For the first 10 years, he worked full-time and then, for the final three years, he worked between 17.5 and 26 hours per week when he was fit to do so. The reduction in working hours arose from his disabilities. As well as his ill-health pension, Mr Williams was entitled to an enhancement and Mr Williams contended that the formula used to calculate the enhancement constituted discrimination, as it was based on his final *part-time* salary, rather than his *full-time* salary. He said this was unfavourable treatment because of something arising in consequence of his disabilities, namely his inability to work full-time. The central issue for the Supreme Court was whether Mr Williams had been treated "*unfavourably*", for the purposes of Section 15 of the Equality Act 2010,

when this calculation was carried out.

The Supreme Court dismissed the appeal, rejecting what it regarded as an attempt to make an artificial separation between the method of calculation and the award of the pension itself; the "treatment" complained of was actually the award of a pension (in relation to which no "unfavourable" treatment could be found). Further, the Court noted that the only basis on which Mr Williams was even entitled to an award was by reason of his disabilities; if he had been able to work full-time, he would have had no right to an ill-health pension.

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Court of Appeal rules that transitional provisions in judges' and firefighters' pension schemes are discriminatory

The Court of Appeal has ruled that transitional provisions in two public sector schemes are discriminatory on the grounds of age. A number of other discrimination claims, including equal pay, race and sex were also upheld.

The exact details of transitional provisions differed in both schemes but, broadly, both provided that members within ten years of normal retirement date were allowed to remain in the old (defined benefit) scheme and continue accruing benefits. Members who were outside of the ten year protected period were to join the new career average scheme immediately (but keep accrued benefits in the old scheme). The Government sought to argue that the difference in treatment was objectively justified on a number of grounds, including that those closest to retirement had less time to rearrange their affairs before retirement and so needed additional protection from the changes. The Court of Appeal rejected this (as well as other arguments), ruling that the Government had not put forward any objective evidence to support its argument that it was pursuing a legitimate aim.

It is possible the ruling will have a direct impact on other public sector schemes, where similar transitional protection has been implemented. Although much of the case has turned on arguments which were specific to public sector schemes, it provides a general reminder (including in a private occupational pension scheme context) of the importance of being able to put forward objective evidence when asserting that an employer has a legitimate aim in discriminating as part of an objective justification defence.

The Court of Appeal has refused leave to appeal to the Supreme Court. We understand that the Government is intending to apply for leave to appeal directly to the Supreme Court, although it is not yet clear at the time of writing whether the Supreme Court will agree to hear the appeal.

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High Court hears appeal from the Pensions Ombudsman on pension increases and effect of A-Day

In the *Coats UK Pension Scheme Trustees Limited* case, the High Court has found that former Inland Revenue limits were validly introduced into a pension scheme's rules following 6 April 2006 ("A-Day").

The case related to the right to a pension which the rules stated should increase at the fixed rate of 5% per annum. However, under the pre A-Day regime, Inland Revenue requirements imposed a limit of the greater of the Retail Prices Index ("RPI") and 5% per annum. The question at issue related to the post-A-Day position as, during a transitional period, the scheme's rules were amended in 2008 to impose the RPI restriction within the scheme's own benefit structure. The purpose was to preserve the RPI limit from A-Day onwards by amending the scheme's rules, as that limit had not appeared expressly in the rules before that date and would otherwise have fallen away.

The High Court ruled that this pension increase limit was capable of being properly introduced by the rule amendment in 2008, as a result of Section 68 of the Pensions Act 1995. Section 68 permits, in certain circumstances, trustees to modify scheme rules by resolution, and consequently permits trustees to make amendments (in those specified circumstances) even if a scheme's own power of amendment would prohibit the changes (as would have been the case here). In this case, the judge found that extending the effect of the former pre-2006 A-Day Inland Revenue pension increase limit

was within the permitted circumstances in which Section 68 could be used.

The full judgment can be read [here](#).

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If you wish to discuss any of these issues further, please contact your usual Baker McKenzie lawyer.

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