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Coronavirus accommodations proposed for 2021/22 PPF levies

The Pension Protection Fund (PPF) has published details of the way that it intends to calculate next year's levies.[1] Although it is anticipating an eventual surge in insolvency rates, and therefore the number of claims against its resources, it expects to collect £520m in total for the 2021/22 levy year: £100m less than the estimate for 2020/21.

In less-extraordinary times the PPF would have been consulting about its approach for the next levy triennium. Owing to the SARS-CoV-2 pandemic and its repercussions, however, it wants to have the flexibility to make annual adjustments. It anticipates making a return to the multi-year approach from 2023/24.

Although the economic impacts of COVID-19 are still uncertain, the PPF is bracing itself for an increase in insolvency rates, leading to a '*significant increase in claims*'. Effects on scheme levies are not expected to be felt until the 2022/23 levy year, as it will take until then for pandemic-period accounts to be filed and picked up by the PPF's insolvency risk model. The PPF Board warns that those eventual effects '*could be substantial*', with worsening insolvency scores bringing about higher bills.

In the meantime, it is proposing to make very few amendments to the levy calculation. However, those that are planned would mean that around 90 per cent of schemes subject to risk-based levies would experience lower bills in 2021/22. If the PPF were to change nothing, the levy estimate would be £570m, which already represents a reduction from the 2020/21 estimate of £620m; the proposed changes would lower the amount that the PPF expects to collect to £520m. More specifically, the PPF is proposing to reduce the risk-based levy cap from 0.5 per cent to 0.25 per cent of scheme liabilities, and to introduce a new '*small scheme adjustment*' that would halve the uncapped calculation for schemes with liabilities of less than £20m. To avoid creating a cliff edge at the £20m mark, the adjustment would be tapered away for schemes with liabilities of £20m or more, such that it would cease to have any effect for those with £50m or more. It is not planning to recoup the cost of the adjustment from other schemes.

[1] *Changes to the levy methodology for the 2021/22 levy year* <https://www.ppf.co.uk/sites/default/files/2020-09/Consultation_doc_September_2020_0.pdf>.

Next steps

Those who wish to respond to the PPF's proposals should do so by 24 November 2020. It plans to report back on the outcome of the consultation exercise '*early in 2021.*'

The PPF is working with the Pensions Regulator to reconsider the asset-class information collected from schemes for purposes related to investment risk. They intend to conduct a joint consultation exercise. The levy document indicates that this might result in some revision of the element of the PPF's risk-based calculation that takes account of underfunding; but it is unlikely to come into force until 2022/23.

The main reason that the PPF can target a reduced total levy is because it has updated its buy-out assumptions to reflect keener pricing in the buy-in market. This has brought liabilities down considerably, especially for schemes with lots of non-pensioners. It could have made the change last year (as we pointed out in the relevant consultation response) but instead chose to keep it unchanged so as to establish a buffer.

It is worth remembering, whilst reading the PPF's warnings about possible levy increases, that its ability to collect more from schemes is not untrammelled. The most pertinent constraint is the statutory rule that prevents it from increasing its levy estimate by more than twenty-five per cent from one year to the next.

Benchmark for statutory increases in 2021 is 0.5%

The Office for National Statistics (ONS) has announced the inflation figure that will form the basis for many of next year's statutory increases.[2] The official annual rate of inflation for September 2020, using the Consumer Prices Index (CPI) measure, is 0.5 per cent.

The September-to-September increase in the CPI is used in the calculation of all sorts of inflationary adjustments that take effect in the following year. This means that the 0.5 per cent figure for September 2020 will determine the following (amongst other things) in 2021—

- minimum statutory increases to pensions in payment accrued after 5 April 1997;
- increases to 'official' (public-sector) pensions in payment;
- increases to guaranteed minimum pensions (GMPs) in payment to the extent that they were accrued after 5 April 1988;
- minimum statutory revaluation of early leavers' pensions (other than GMPs);
- increases to additional State pensions (SERPS and S2P) in payment under the old rules applying to those who reached State pensionable age before 6 April 2016;
- increases to any excess over the full amount of the new State pension to which a person who reached SPA on or since 6 April 2016 is entitled because of the transitional provisions;
- adjustments to the opening values of rights under defined benefit arrangements when calculating annual allowance pension input amounts for the 2020/21 tax year.

The basic State pension (as paid to those who reached pensionable age before 6 April 2016) and the new State pension are currently subject to a non-statutory 'triple lock' promise, which means that they are being increased by whichever of the following produces the highest increase: earnings inflation, CPI inflation, and 2.5 per cent. The *Social Security (Uprating of Benefits) Bill* that is currently before Parliament is intended to resolve a technical issue that has been exposed by the economic impact of COVID-19: the Government's power to increase those pensions is activated only if there has been an increase in the general level of earnings (the only statutorily prescribed ingredient in the triple lock recipe). If the Bill passes it will allow the Government to honour the triple lock undertaking even though inflation on the relevant earnings-based measure for the relevant period was negative.[3] Further amendments may be necessary to avoid the requirement to pay unintentionally large increases in future years when earnings growth recovers from that negative position.

Revaluation of deferred public-sector benefits was, historically, by reference to price inflation. Each of the new career-average revalued earnings (CARE) schemes has its own formula for the revaluation of past years' pensionable earnings.

[2] <www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/september2020>.
[3] <www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/averageweeklyearningsearn01>.

Notably, unlike the other mechanisms discussed in this article, it is possible for *de*valuation (reductions) to occur in times of negative inflation (deflation). Where prices are used it will be the 0.5 per cent increase over the year to September 2020 that is relevant for next year's revaluation. Some of the CARE schemes use a measure of earnings inflation, however; and the relevant statistic has yet to be published by the ONS.

The September-to-September increase in the CPI should also mean that the lifetime allowance is uplifted from its current £1,073,100 level to £1,078,900 or thereabouts from 6 April 2021.[4]

The actual increases in the areas mentioned will be confirmed via statutory instrument in due course.

Trustees to 'nudge' members toward Pension Wise

A statement of policy intent from the Department for Work and Pensions (DWP) confirms that trustees and managers of occupational pension schemes will be required to refer members to Pension Wise guidance when they seek to exercise their 'Freedom and Choice' options (whether by transferring or taking benefits directly from the scheme), and to facilitate guidance appointments.[5] Before acting on the member's instructions the trustees will need to confirm that the member has either received guidance or has opted out. One of the DWP's goals is to normalize the taking of guidance.

The first step in the implementation of the policy will be commencement of section 19 of the *Financial Guidance and Claims Act 2018*, which will amend the *Pension Schemes Act 1993*. That will oblige the DWP to make regulations requiring trustees, on receipt of an application to transfer accrued rights or to start receiving benefits, to ensure that the applicant is referred to '*appropriate pensions guidance*' and provided with an explanation of its nature and purpose; and to ensure, before proceeding with the application, that the person has either received or opted out of receiving the guidance.

The DWP has concluded that the Money and Pensions Service (MaPS), which now operates the Pension Wise service, is the appropriate provider of the guidance, and plans to publish draft regulations in due course. The FCA will impose analogous requirements on the providers of contract-based schemes.

It is not entirely clear what the obligation to facilitate guidance appointments will entail. The statement of policy intent says that '*trustees and managers will be required to take proactive steps to facilitate appointments*' and that they will have to '*incorporate booking an appointment into their member engagement process*'. In the course of the research on which the policy statement relies, the Behavioural Insights Team trialled two approaches: one in which the scheme provider offered to book the appointment on the member's behalf, and another in which members were transferred to the Money and Pensions Service to make the booking for themselves.

In practice, it seems, trustees will be able to accept the member's assurances when confirming that guidance was received. The statement also suggests that opting out will be easy, and that consequently there will be little need for exemptions from the new requirements; the one possible exception that is mentioned is where the member has recently obtained independent financial advice or sought guidance from Pension Wise. Trustees will be expected to keep suitable records.

The DWP expects that the Pensions Regulator will publish trustee guidance.

The main focus of the initiative is on members seeking to gain flexible access to money purchase benefits, but those considering DB-to-DC transfers—where they are not already obliged to obtain appropriate independent advice—could also be within its scope. The draft regulations ought to make the full extent of the new obligations clearer.

[4] Readers with superior arithmetical skills—or just pocket calculators to hand—may be responding '*Eh?*' at this point. When reviewing the allowance the Treasury has in the past used unrounded index numbers (see Table 57 in the file <www.ons.gov.uk/file?uri=%2feconomy%2finflationandpriceindices%2fdatasets%2fconsumerpriceinflation%2fcurrent/consumerpriceinflationdetailedreferencetables.xls>). If the same procedure is used the calculation will be something like £1,073,100 × 109.056/108.479 ≈ £1,078,807.821, with the result rounded up to the next multiple of 100.

[5] <www.gov.uk/government/publications/stronger-nudge-to-pensions-guidance-statement-of-policy-intent/stronger-nudge-to-pensions-guidance-statement-of-policy-intent>.

DC annual benefit statements reform to go ahead

The Department for Work and Pensions (DWP) has published its conclusions about last year's consultation exercise on Simpler annual benefit statements for workplace pensions.[6] It is planning another consultation exercise later this year on a mandatory approach to simpler statements for defined contribution (DC) schemes used to automatic enrolment. As a starting point, it will use the two-page template published on the Pension and Lifetime Savings Association (PLSA) website.

The consultation will consider the rules for length, content and design of a template. To minimize the size and complexity of the statements, the template will include a line on costs and charges with a link to the more-detailed information that trustees are required to publish online. The template will direct readers to investment information too.

The Government remains attracted to the idea of a 'statement season' and plans to pursue this, however, proposals for sending statements out in a particular colour of envelope (as they are in Sweden) will not be taken forward due to respondents' lack of consensus and concerns about the potential for scams.

The DWP says that work will continue on transferring responsibility for the assumptions underlying the statement from the Financial Reporting Council (FRC) to a more appropriate owner (the DWP avoids committing itself to taking on the role).

Although the simpler benefit statements will initially only apply to DC schemes used for auto-enrolment, the DWP says that ‘[i]*t remains the long term ambition of government to improve consistency across all schemes’*. Once the legislation for DC benefit statements is implemented, the DWP plans to ‘evaluate the impact to inform a consultation on how a similar approach for all remaining schemes could be delivered’.

Viral news – October 2020

Regulator DC guidance on gated funds updated

The Pensions Regulator has (without publicizing it) updated its guidance on ‘gated’ (temporarily closed) funds.[7] It adds to the situations in which the re-direction of the member's contributions back to the original fund (the one that was gated), when it re-opens, will not establish a default arrangement. It now also refers to both future contributions and assets accumulated in the alternative fund while the original fund was gated.

Since June 2020, the Regulator's guidance has highlighted the issue of creating a ‘default arrangement’, triggering charge-capping and the requirement for a default-specific statement of investment principles, by moving a member's contributions into an alternative fund if the fund the member selected closed (became ‘gated’). In addition, it states that once the gated fund re-opens, the act of re-directing contributions back to the original investment choice could perhaps make that (original) fund a default arrangement. The Regulator expects that where members had given prior consent or been given advanced warning that their contributions would revert to their original fund once it opens then this would avoid the inadvertent establishment of a default fund.

The updated guidance now also considers that a member's original choice of fund could still apply (and so prevent the creation of a default fund on re-direction) if, in the trustees view, that choice still applies and the member is given the opportunity to object before the contributions are re-directed.

Job Support / Retention Schemes

[*We were set to include a summary of the new Job Support Scheme that was to have replaced the Coronavirus Job Retention Scheme (CJRS) from 1 November 2020; but events overtook us and we have removed it.*] Coinciding with the announcement of new restrictions in England effective from 5 November 2020, the Government has extended the CJRS—also known as the furlough scheme—until December 2020.[8] It has also enhanced the terms of the support on offer, so that for the hours not worked by an eligible employee the Government will pay eighty per cent of wages, up to a cap of £2,500, and the employer will only need to cover the National Insurance and pensions contributions due. They will also be responsible, in the normal way, for paying the employee for any hours worked. More guidance is expected in due course.

[6] <www.gov.uk/government/consultations/simpler-annual-benefit-statements-for-workplace-pensions> for more details on the original consultation please see our article in *Current Issues* December 2019, <www.hymans.co.uk/insights/research-and-publications/publication/pensions-investments-round-up-december-2019/>.

[7] <www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider/dc-investment-and-transfer-values-covid-19-guidance-for-trustees#7ac60e87c2e94ea6ab8e6e1a4c6d961b>.

[8] <www.gov.uk/government/news/furlough-scheme-extended-and-further-economic-support-announced>.

Government rejects need for evaluation of pensions tax reliefs

The Government has rejected the Public Accounts Committee's suggestion that it should conduct a formal evaluation of the impact of pension tax reliefs.[9] It has accepted most of the Public Accounts Committee's other recommendations for work on tax reliefs.

The Public Accounts Committee (PAC) concluded that the Government 'does not understand the impact of any of the largest tax reliefs, including reliefs on pensions which were forecast to cost £38 billion in 2018–19' and recommended that Her Majesty's Revenue and Customs (HMRC) evaluate the impact of pension tax reliefs within the next 12 months.

The Government disagrees with PACs recommendation and lists various consultations it has carried out over the last five years to gain an insight into the effect of pension tax reliefs and the impact of any changes made. It notes in particular the consultation in 2015 on *'Strengthening the Incentive to Save: A Consultation on Pensions Tax Relief*', responses to which indicated that there was no clear consensus for change. The Government says it will continue to engage with stakeholders to understand the impacts of pensions tax relief, but does not think that this is the right time for a formal evaluation.

Court judgments

Transfers of personal data to the USA

In July the European Court of Justice (ECJ) invalidated the 'EU – US Privacy Shield' arrangement as a basis upon which personal data can be lawfully transferred from within the EU to 'third countries', outside of the EU.[10] Data transfers based on standard contractual clauses are still possible, but data controllers and processors need to critically assess the level of protection that they will provide, in the context of the third country's legal system.

Background

The General Data Protection Regulation (GDPR) sets out several routes by which personal data can be transferred to third countries. The judgment is concerned with transfers under 'adequacy decisions'—specifically the one covering the United States of America—and with 'standard contractual clauses'.

In an adequacy decision, the European Commission declares that a third country ensures an '*adequate level of protection*' over personal data. The absence of an adequacy decision covering a third country need not prevent transfer of data to it, if the data controller and processor have provided appropriate safeguards in other ways. One available mechanism involves the use of standard contractual clauses adopted by the Commission.

The judgment is the latest episode in a long-running fight to prevent Facebook Ireland Ltd from transferring personal data from the EU to Facebook Inc. in the USA. In 2015, the ECJ invalidated the Commission's adequacy decision concerning the Privacy Shield's predecessor, known as the 'Safe Harbour' scheme, following revelations about the extent of the surveillance activities of US security agencies. The Commission reassessed the US legal system and received representations and commitments from the US Government—prominent amongst them the creation of a new Ombudsperson to oversee national security interference—leading it to make a new adequacy decision that established the EU – US Privacy Shield as a basis for the transfer of personal data to the US.

Judgment

The ECJ declared the Commission's adequacy decision on the Privacy Shield invalid. It said that when the GDPR says that a third country must ensure '*an adequate level of protection*', it must be understood as requiring that data subjects are provided with a level of protection essentially equivalent to that guaranteed within the EU. The extent of the US's surveillance programme and the limited ability of the Ombudsperson to provide data subjects with an effective means of redress meant that the Privacy Shield was incompatible with the GDPR.

The Commission's adoption of the standard contractual clauses was not invalidated. However, the ECJ made it clear that the due diligence for transfers must take into consideration both the contractual clauses themselves and aspects of the third country's legal system, such as the appropriate safeguards, enforceable rights and effective legal remedies that it provides.

[9] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922031/CCS0920222512-001_Government_response_to_the_Seventh_to_the_Thirteenth_reports_from_Session_2019-21_Web_Accessible.pdf>.

[10] *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Case C-311/18).

In response, the Government plans to amend the Brexit legislation related to data protection to remove the Privacy Shield as a basis for transfer of personal data to the USA.[11]

Overseas transfers of pension scheme members' personal data could occur when, for example, cloud storage is used for record keeping, or if scheme data can be viewed onscreen by a service provider. This latest judgment means that mechanisms for the lawful transfer of personal data to US processors still exist; however, data controllers must comprehensively assess the privacy risks involved with the transfer, and put a stop to it if (for example) they become aware of violations of privacy.

It remains to be seen what will happen after the Brexit transition period. The UK Government could potentially take a more relaxed view of UK – US transfers, but its ability to do so will depend on whether equivalence of data protection laws forms part of the UK – EU trade deal.

Discrimination against male survivors of female scheme members

In a judgment published online in August 2020, an Employment Tribunal judge says that the *Teachers' Pension Regulations 2010* discriminate unlawfully against the widowers and surviving male civil partners of female scheme members, because their pensions are calculated less favourably.[12] The judgment is very brief, presumably because it was made '*by consent*'. Her Majesty's Treasury announced in a Written Ministerial Statement on 20 July 2020 that it had accepted that the difference in treatment (whereby male survivors of female scheme members receive lower pensions than comparable female survivors of male scheme members and survivors of same-sex relationships, when the members have pre-6 April 1988 service) would need to be addressed across the public sector.[13]

Private-sector schemes were not mentioned in the Government's announcement, but it is possible that some of them mirror the discriminatory public-sector terms. If that is the case, the trustees should seek legal advice.

Pensions VAT

In October 2020 the ECJ ruled that '*investment fund management services supplied for an occupational pension scheme, which do not provide any indemnity from risk, cannot be classified as "insurance transactions" ... and thus do not fall within the value added tax (VAT) exemption ... in favour of such transactions.*'[14] The trustees of a company's pension scheme argued that they were owed a VAT refund on fund management fees because Her Majesty's Revenue and Customs (HMRC) had in the past extended the VAT exemption applicable to '*insurance transactions*' to the fund-management activities of insurers. Notably, the trustees argued that the VAT should be refunded even if the management activities were carried out by *non*-insurers: this aspect of their case was based on the principle of 'fiscal neutrality', which says that VAT system should not distort competition between different sorts of suppliers.

This judgment is primarily of historical interest. From 1 April 2019, HMRC withdrew its policy of allowing all pension fund management services provided by insurance companies to be exempt from VAT.[15]

[11] <www.legislation.gov.uk/ukdsi/2020/9780348213522>.

[12] *Linda Goodwin v The Secretary of State for Education* (Case Number: 1308506/2019) <assets.publishing.service.gov.uk/media/5f2ac0858fa8f57acac33793/Mrs_L_Goodwin__vs__SOS_for_Education_-_JUDGMENT.pdf>.

[13] <www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-20/HCWS397>.

[14] *United Biscuits (Pension Trustees) Limited and another v Commissioners for Her Majesty's Revenue and Customs* (Case C-235/19).

[15] *Revenue and Customs Brief (2017) 3: VAT—Treatment of Pension Fund Management Services* <www.gov.uk/government/publications/revenue-and-customs-brief-3-2017-vat-treatment-of-pension-fund-management-services>.

HMRC newsletters—October 2020

HMRC *Pension Schemes Newsletter 125*[16] covers:

- confirmation that the protected pension age easement, introduced to facilitate re-employment of key workers during the coronavirus pandemic, will expire on 1 November 2020;
- some new features of the Accounting for Tax facility within the online Managing Pension Schemes service;
- a reminder to administrators operating ‘relief at source’ on member contributions to submit the declarations due as part of the annual return of information;
- updated pension flexibility statistics;
- information about HMRC’s ongoing programme of removal of dormant log-in credentials for its online services; and

the latest scheme registration statistics.

[16] <www.gov.uk/government/publications/pension-schemes-newsletter-125-october-2020/pension-schemes-newsletter-125-october-2020>.

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