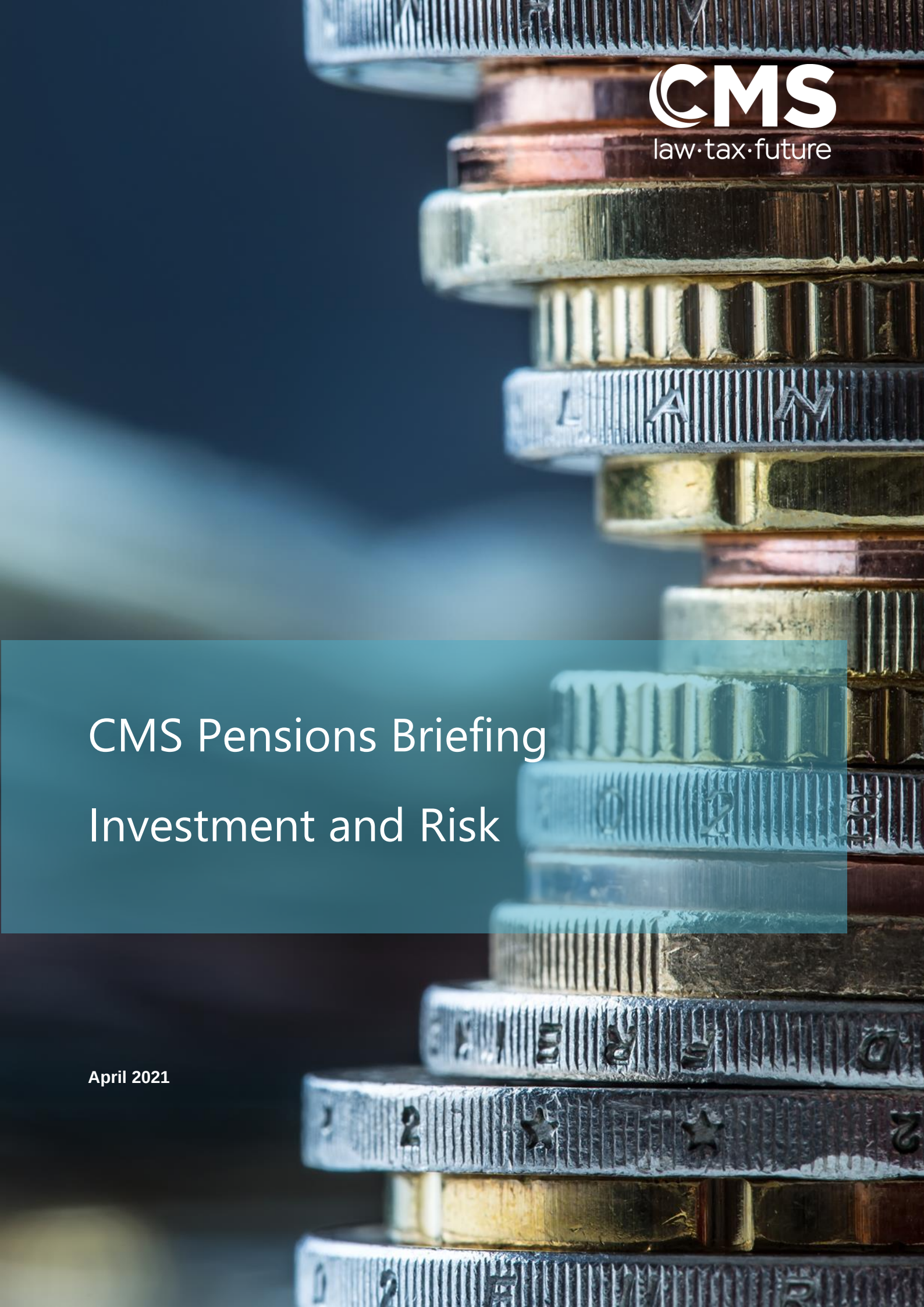

CMS Pensions Briefing

Investment and Risk

April 2021

Welcome to the first of our briefings on topical issues facing occupational pension schemes in the risk and investment spheres.

It is fair to say that it has been a fairly tough time for many schemes in the last year or so – first Brexit, now the coronavirus pandemic – both of which have brought volatility.

As well as touching on some of these topical issues, we also explore in this briefing some key recent (or forthcoming) developments which are also likely to be of interest.

Contents:

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Key Drivers of the Bulk Annuity Market to be reviewed by Regulators

Key points to note:

- HM Treasury is currently reviewing the insurance sector's risk-based capital regime, Solvency II, with the aims of encouraging competitiveness and innovation, maintaining the safety and soundness of insurance firms, and to ensure growth in the economy.
- This involves the review of the capital requirements of UK life insurers, such as matching adjustment and risk margin, which will have a significant influence on the Bulk Annuity Market.

In February 2021 the consultation period closed for HMT's call for evidence on a review of the UK insurance sector's risk-based capital regime, Solvency II.

The review is part of the Government's overall focus on the new regulatory landscape for financial services following the end of the Brexit transition period (there is a parallel long-term review being carried out by HMT across the entire financial services sector).

The stated objectives of the review are to consider approaches to encourage competitiveness and promote innovation in the insurance sector, to maintain the safety and soundness of insurance firms, and to encourage the provision of long term capital support to underpin growth in the UK economy.

Why the review matters to the Bulk Annuity Market?

While the scope of the review is wide ranging and covers issues relevant to the entire UK insurance sector, it is the focus on the capital requirements of UK life insurers that is of particular relevance for the bulk annuity market.

Solvency II influences a number of aspects of long-term insurance business, which includes the business of UK insurers writing bulk annuity policies, for example:

- the overall level of capital that is required to be held against long term liabilities (through the solvency capital requirement and the risk margin);
- the risk capital required to be held against different asset classes that life insurers use to back long-term liabilities (which results in some assets being unattractive to UK life insurers);
- the terms that may be included in bulk annuity policies to achieve favourable capital treatment (through the matching adjustment that allows life insurers to increase the discount rate for their liabilities); and
- the competitive landscape for life insurers (and accordingly the competitiveness of the bulk annuity market).

Furthermore the regulatory standards that apply to the insurance sector are commonly considered the "gold standard" for securing benefits payable to defined benefit pension scheme members, and it is often these regulatory standards against which the alternatives to bulk annuities (including self-sufficiency investments, or consolidator products) are compared.

Review of the matching adjustment and risk margin

Two areas that are likely to be closely monitored by participants in the bulk annuity market will be the outcome of the review on the matching adjustment and risk margin components of the Solvency II capital requirements.

Broadly, the matching adjustment framework relates to how life insurers can apply the yield from asset cashflows matching the insurer's liabilities, to discount the value of those liabilities thereby providing a more favourable capital treatment for the insurer. The review is focussed on the availability of the treatment generally (it is currently only available to life insurers that have had an application for the treatment approved by the regulator, with the regulator having little discretion once the application has been approved), and the asset classes that can be included in the portfolio of assets that support the matched liabilities. It has long been suggested that the matching adjustment asset criteria is restrictive, and it is recognised in the call for evidence that this impacts the allocation of capital from life insurers to parts of the economy that need investment (for example, infrastructure). Furthermore, the availability of suitable (capital efficient) assets to back annuity business has often been cited by market participants as a potential barrier to the growth of the bulk annuity market.

The risk margin is a component of an insurer's capital requirements intended to be available in stress scenarios for the insurer, or available to transfer to an alternative viable insurer to accept the liabilities of a failing insurer. The way in which the risk margin is calculated, particularly in low interest environments, has a significant impact on the capital requirements for life insurers and the way in which risk is managed (including through reinsurance) in bulk annuity transactions.

Appropriate improvements to these components of the Solvency II capital requirements, while maintaining policyholder security, would potentially be beneficial for the bulk annuity market.

Next Steps

This is the first step in the process for potential changes to the UK Solvency II regime. Once HMT have published their conclusions from the review there will be further proposals from both a technical and legislative perspective.

Given the range of areas that will be covered by the review we can expect that it will be some time before the full impact of the review on the bulk annuity market will be capable of being assessed. However, as HMT recognises that life insurance is a particular differentiator of the UK insurance sector compared to the EU, one can expect that the outcomes will have relevance to the bulk annuity sector and that it will be much discussed by participants in the bulk annuity market in the coming months.

The requirements on Trustees to fight climate change are clarified

Key points to note:

- New regulations and guidance have clarified trustees' new duties to make climate-related financial disclosures and establish new governance processes to ensure that people managing the scheme are assessing the climate-related risks and opportunities. These will be implemented in phases according to the types and sizes of the pension schemes.
- The Government has indicated it will go further and is looking to introduce more detailed requirements around reporting on an investment portfolio's 'warming potential'.

The passing of the Pension Schemes Act 2021 and the DWP's recent response to its Task Force on Climate-related Financial Disclosures (TCFD) consultation – along with draft regulations and guidance – have shed more light on the continued expansion of pension scheme trustees' duties to take into account the effect of climate change on their pension scheme.

The requirements will stand alongside demands on trustees to evaluate ESG (Environmental, Social, and Governance) factors, if financially material, when investing scheme assets (see the CMS ESG brochure here), and signifies a further intensification of the push by Government towards a 'green' economy. Fundamental questions for trustees remain: is climate change really pension trustees' responsibility? If so, how does this fit in with the core financial duties to scheme members?

What do the regulations provide?

The regulations stem from powers in the Pension Schemes Act to impose requirements aimed at securing '*effective governance of the scheme with respect to the effects of climate change'* and require trustees to publish information relating to this aim.

The proposals will initially apply to schemes with £5 billion or more in assets, authorised master trusts and collective defined contribution schemes. Questions previously raised as to what assets should count towards that threshold have been answered. For example, a buy-in contract won't count towards that threshold as it is the insurer that controls the underlying investments of that buy-in, not the trustee (although note that buy-ins will still need to be considered when looking at the climate change risks and opportunities). However, where the risk has not been divested completely, such as a longevity swap, assets are not, at present, exempt from the threshold test.

The Trustees of schemes in scope will need to implement effective governance, strategy, risk management and accompanying metrics and targets, in order to assess and manage climate risks and opportunities. Trustees will need to report on their activities in line with recommendations from the TCFD, and this report must be made available to scheme members. Penalties of up to £50,000 could be imposed for breaches.

The requirements will apply to large schemes and master trusts from October 2021 (with the reporting requirements due seven months from the end of the scheme year then underway) and be rolled out to schemes of £1 billion or more in assets a year later. In due course, all schemes may have to comply.

Why are they being made?

The new framework is presented as a tool to keep trustees ahead of the curve in the face of economic and environmental change. The Department for Work and Pensions has said: '*we must ensure that pension scheme governance is as robust as possible to withstand the potential shocks that climate change and our response to it will bring*'. The effects of climate change are not all about risk; there is recognition that the developing landscape could also yield opportunities for trustees to take advantage of.

The DWP has previously promoted the publication requirements not only as an incentive to compliance, but also as a touchstone against which lower-performing schemes can compare themselves, indicating that an element of public scrutiny will encourage sharing of best practice and challenges to poor practice.

Comment: are these changes controversial?

Against the backdrop of growing political momentum towards a green economy, a concern is that the new rules will erode trustees' ultimate financial duty to scheme members and dilute focus on this with other considerations. The Pensions and Lifetime Savings Association, for example, vocalised criticisms when the regulation-making powers in the Pension Schemes Bill initially arose, stating "*parts of these new amendments… would give unprecedented new powers to Government bodies to interfere and request changes to private sector schemes' investment strategies*."

Pension scheme trustees must use their investment powers for their proper purpose – in a DB scheme, that means exercising them to make sure that benefits are paid in full, or, in the default fund of a DC scheme, making sure that members receive a reasonable return. The new requirements could be interpreted as an attempt to influence asset-picking behaviour in the first place. The initial consultation attempted to head off criticism of this nature, stating "*none of these proposals – or future proposals – will attempt to direct trustees in their investment decisions; that discretion will remain with trustees*".

It is possible that the Government will double down on measures of this nature, given its aim of achieving net zero emissions by 2050 as part of its commitment in the Paris Agreement to hold the increase in global warming to below 2°C. The new papers released suggest that the Government may take climate change reporting further and introduce 'Paris alignment reporting' – which is reporting the 'warming potential' of a portfolio – but this remains optional for now pending a robust and accurate methodology. The Government also intends to consult in due course on a requirement for authorised DB superfunds to undertake climate change governance and reporting, irrespective of the value of assets under management.

We anticipate this will be a significant new governance hurdle for trustees. It combines with mounting pressure on trustees' decision-making, and its exposure to public scrutiny – a reminder to trustees to apply increased care and rigour when exercising the scheme investment power.

Dealing with the challenges of completing a Valuation during the COVID-19 pandemic

Completing a valuation can be challenging at the best of times, particularly where the way in which the scheme rules interact with pensions legislation means that the trustees need to secure the employer's agreement. While it feels like we are nearing the end, the ongoing COVID-19 pandemic has also presented its own unique challenges. These challenges will probably continue for some time after the pandemic is over while employers re-establish their businesses fully in the new economic environment.

Finding the right balance

From the trustees' perspective, trustees need certainty that, where a deficit exists, they will receive sufficient contributions from the employer(s) over time in order to fund the benefits already accrued by the scheme's members, all things being well.

However, at the current time, employers will naturally be more reluctant to over-commit to making deficit recovery contributions if they have material concerns that these may become unaffordable with the COVID-19 pandemic putting increased pressures on a company's free cash. It may also have meant that the employer has had little choice but to burden the business with new debt.

There is therefore a delicate, and often difficult, balance to be reached.

The importance of covenant advice

It is important that trustees are able to assess what employers are both able to afford and willing to commit to the scheme. Sector resilience to change, both short and long-term, in light of sudden economic change is another key consideration.

As recognised in the Pensions Regulator guidance published in March 2020 and updated in June 2020, *"trustees need to decide whether there is genuine and possibly temporary uncertainty or if there has been a material deterioration in the employer covenant"* before making fundamental decisions regarding the valuation assumptions (more below) and also the most appropriate length for any recovery plan. This guidance from the Pensions Regulator remains in place and most trustee boards are likely to lack the requisite expertise to make such a judgement call themselves.

It has always been recommended that trustees consider seeking covenant advice as a valuation progresses, but the unique challenges presented by the COVID-19 pandemic have perhaps never made it more important that trustees obtain such covenant advice before making key decisions likely to impact on the outcomes from the valuation. Schemes may consider refreshing covenant advice taken earlier in the valuation as part of this to ensure that those decisions taken are based on the most up-to-date information available to the trustees. It is possible that more trustee boards will look to continue this practice even once the pandemic is over where the benefits of taking this approach to valuation discussions have been clear and added value.

Linked to this, the Pensions Regulator appears to still be encouraging schemes to progress valuations based on a range of outcomes in the current environment or factor in post-valuation experience, with any final decisions taken by trustees delayed until they are satisfied that they have sufficient certainty, e.g. over the strength of the employer's covenant and affordability in the future.

What about the statutory deadline?

By law, a scheme's triennial valuation must be completed within fifteen months of its effective date.

While the Pensions Regulator originally gave schemes some leeway where schemes were approaching the fifteen-month deadline during the early months of the COVID-19 pandemic, its position changed as it saw a return to 'business as usual' over the summer last year. In the updates made to the guidance in June 2020, the Pensions Regulator emphasised the fact that it does not have the power to waive trustees' obligations for any recovery plan required to be submitted within this fifteen-month period notwithstanding the ongoing COVID-19 pandemic. In line with the Regulator's expectation, scheme reporting duties relating to late valuations and recovery plans have also largely returned to normal from the start of this year, with no change in approach announced since the start of the third lockdown.

However, the Pensions Regulator has always said that it *"will continue to take a reasonable approach to late submission caused by COVID-19 issues"* and that it has been prepared to *"support trustees if they cannot agree a valuation for valid reasons"*. After all, the Pensions Regulator has also said that its preference is for the best outcome to be reached for the scheme rather than for trustees to agree a valuation under pressure simply in order to meet the statutory deadline.

That said, where it looks likely the scheme will be unable to complete the valuation within the fifteen-month period, open dialogue with the Pensions Regulator should be encouraged. The Pensions Regulator expected this to be the case even in a non-COVID-19 environment. It is in those cases where the trustees have not engaged with the Pensions Regulator at an early enough stage (or at all) where it has subsequently decided to take enforcement action for not meeting the statutory deadline.

Scenario planning and having a clear understanding of the timings of key milestones in the valuation process can also help to mitigate against this particular risk materialising.

Key points to note:

- Trustees need to balance the scheme's interests with the employers' ability to afford the contributions.
- It is important for trustees to obtain covenant advice for valuation discussions, especially under the current circumstances.
- The scheme valuation duties and deadlines have largely returned to normal from the pandemic-related leeway. However open dialogues with the Pensions Regulator are encouraged if schemes are unable to meet their valuation obligations, as is the case in a non-COVID-19 environment.

The Palestine Solidarity judgment – how does it affect Trustees of trust-based pension schemes?

On 29 April 2020, the Supreme Court released its judgment in the R (*on the application of Palestine Solidarity Campaign Ltd and another) -v- Secretary of State for Housing, Communities and Local Government [2020] UKSC 16* case which involved a challenge to certain aspects of the changes to the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016.

Background

Regulation 8 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (the **"Investment Regulations"**) provided that the Secretary of State could make a direction requiring that the administering authorities of the LGPS invest as specified in such direction.

However, when the direction was published, the guidance purported to prevent administering authorities from making any investments which would be counter to UK Government foreign policy or counter to the UK Government's Defence policy and policy on the Arms Trade.

The guidance was challenged in Judicial Review in the High Court by the Palestine Solidarity Campaign Limited and Ms Jacqueline Lewis (together the **"Claimants"**). On 22nd June 2017, the High Court ruled that the Guidance was unlawful. However, on 6th June 2018, the Court of Appeal set aside the High Court's judgment.

The Supreme Court

The Claimants, supported by other organisations, applied for leave to appeal to the Supreme Court and won the right to have the Supreme Court rule on the claim.

On 29th April 2020, the Supreme Court upheld the Claimant's position.

But does the case have wider application than for the public sector?

What does this mean?

On the face of it, this case is a narrowly focussed case on investment decisions under the LGPS.

However, the use by the court of the Law Commission's "two-stage test" when assessing the investment decision under *Palestine* does imply a wider consideration for Trustees of private sector Schemes, not least whether the two stage test is now "good law".

The Law commission set out a two-stage test for non-financial decisions by trustees:

- The first stage was whether the trustees have good reason to think that the scheme members share the trustees' concerns about the investment, and
- The second stage is that the decision should not involve a *risk of significant financial detriment* to the fund.

Lord Wilson, in his judgment, looked at the guidance issued by the Secretary of State and, while he acknowledges that the Guidance does contain language broadly similar to that of the Law Commission report, he also looks at it in its context as guidance for a public authority entering into contracts. In making it clear that the Local Government Pension Scheme is not a scheme written under trust (although analogous to such a scheme) and that the administering authorities are not trustees, he makes the statement relative to one of the Government's submissions related to the disputed part of the Guidance that, as guidance for public bodies, "*It has no relevance to investment decisions made by trustees or by those in an analogous position.*"

Lords Wilson and Carnwarth, in Palestine consider the guidance to state that the second limb of the test to be "…*not involving significant risk of financial detriment*" whereas the Law Commission's test is

"…*not involve a risk of significant financial detriment*", which is subtly different.

The first version, *"…not involving significant risk of financial detriment*" points towards the risk analysis of the investment and goes to the heart of decision making requiring the investors to determine the level of risk posed in an investment. Trustees will have to consider this as part of their investment duties in any event but it only forms part of the decision when electing to invest.

The Law Commission's test is different, it is "…*not involve a risk of significant financial detriment*", so focusing on the outcome rather than the process. Under this analysis, the investor should focus on the possibility of significant financial loss - whether the risk is "significant" or not is a completely different analysis from Lord Carnwarth's test.

However, the Law Commission's report is not a definitive statement of the law whereas the decision of the Supreme Court could be argued to set a legal precedent for trustees in the consideration of non-financial factors when making investment decision.

What does this mean for Trustees?

The decision in the *Palestine* case is a very narrow decision relating to whether administering authorities under the Local Government Pension Scheme, as public authorities entering into investment contracts, have to take non-financial factors, in this case the wider UK Government policy on foreign investments and UK defence considerations, into their decision making process.

Our view is that, while the case considers the Law Commission report and recommendations, it does so in a specific context so the case does not clearly provide a precedent for Trustees simply to apply the two-stage process considered under *Palestine*.

The *Palestine* case, therefore, does not directly give the Law Commission's test judicial authority and Trustees need to continue to be careful when looking at non-financial factors when arriving at investment decisions.

Key points to note:

- The two-stage process (for looking at non-financial factors when making investment decisions) considered under the *Palestine* case does not, in our view, create a direct precedent for trustees.
- Trustees need to continue to be cautious in the consideration of non-financial factors when arriving at investment decisions.

Patient capital allocation for DC savers

Key point to note:

— The 'Long Term Asset Fund' (LTAF) will be launched within the year to provide long-term alternative and innovative investments.

Introduction

The considerable growth in assets under management in DC savings pots accelerated by auto-enrolment, has created demand not only for low-cost, high-volume funds for pension savers (that the current market caters for well), but an exploration of alternative and innovative investments aimed at long-term growth.

The investment industry, and in particular the Investment Association (IA), is looking to meet the latter of these challenges with the 'Long Term Asset Fund' (LTAF), a vehicle for 'patient' capital. Plans are well advanced, and the Chancellor of the Exchequer, Rishi Sunak, speaking in November last year, is committed to launching the LTAF within the year, by November 2021.

Investment types

The LTAF is looking to unlock asset classes which will not be as liquid as the debt and equity securities pension investors typically invest in but have a growth horizon acceptable to savers with long-term targets. The IA is targeting:

— Private equity
— Private credit
— Venture capital
— Infrastructure, including transport
— Real estate
— Forestry
— Collective Investment Vehicles for private asset classes, such as limited partnerships

The IA envisages that these will not necessarily take up a large proportion of investors' holdings but perhaps could play a small part in optimising growth strategies. The option for heavier investment however will remain available for more sophisticated clients or those with large enough holdings and an appetite to allocate a larger stake to alternative strategies.

Fund structure

The specifics will be subject to further consultation, but the IA has indicated that the fund will be open-ended, meaning the price of each unit will fluctuate in step with the underlying assets, rather than investor appetite for fund units. Additionally, in order to manage liquidity, units are likely to be able to be sold only at set intervals (for example, quarterly) with notice requirements preventing sharp market outflows. The aspiration is to avoid issues that funds promising to be more liquid have encountered during downturns – such as gating of property funds during the COVID-19 crisis.

Comment

The LTAF seems to fit neatly into many objectives of current policymakers. The associated reallocation of capital is likely to help the initiative to kickstart the green economy, so it sits comfortably alongside government commitments surrounding ESG and 'building back greener'. Further, Guy Opperman, Minister for Pensions, has in a recent speech indicated that looking to long-term assets is also a pathway to portfolio innovation for modern pensions investment.

Project leaders looking to access investment will also welcome this exciting market development as they look set to benefit from an influx of funds. This dovetails with another government priority: the Treasury's National Infrastructure Strategy, which looks to 'level up' the UK through infrastructure investment.

Whilst in principle providing further diversification potential to pension savers has to be welcomed, the success of the fund will be dependent on ensuring it has the investor protections to be marketable to a retail audience, and pragmatically structured to be appealing to institutional investors. Getting this balance correct with industry buy-in will be essential, and should trump the policy-maker set deadline to get it up and running as soon as possible.

Other items of interest

The Pension Schemes Act 2021 is finally here!

While it has taken a year to make its way through Parliament and has been subject to much debate during that time, the Pension Schemes Act received Royal Assent on 11 February 2021.

As many will be aware, the Act heralds some of the most significant changes in the Pensions Regulator's powers (both civil and criminal) in the past 17 years. In the Regulator's own words, these new powers are designed to enable TPR "*to act against unscrupulous employers and enhances our ability to gather information more efficiently, and to scrutinise how defined benefit pension schemes are funded and the actions that affect them*". While many of these powers will require secondary legislation to be passed to bring them into force, employers and trustees alike continue to have questions regarding the scope of these powers.

While it is TPR's new powers which has resulted in the most press attention, the new Pension Schemes Act also introduces a plethora of other significant developments – (i) introduces new climate change reporting obligations on trustees; (ii) ushers in critical changes to the scheme funding and statutory transfer frameworks; and (iii) lays down a template for things to come in the shape of pension dashboards and collective DC arrangements.

To help employers and trustees navigate all of the material changes being introduced via the new Pension Schemes Act, we have produced an interactive guide and we encourage you to consult this, in addition to seeking advice from your legal advisers where needed.

To accompany the Pension Schemes Act 2021, we can also expect an updated DB Funding Code in due course. TPR recently announced that it expects this to be in place and operational by 'late 2022 or early 2023'. With more consultation during H2 2021, there is more we can expect in this area before the year is over.

Lloyds Bank case and historic transfers involving GMPs – a cause for new headaches?

More than two years on from the original Lloyds Bank judgment handed down on 26 October 2018, which held that trustees of pension schemes must equalise pension benefits for the effect of GMPs accrued between 17 May 1990 and 5 April 1997, trustees continue to grapple with a multitude of thorny issues and practical implications arising from the judgment.

While the High Court delivered an important further judgment in November 2020 on GMPs and past transfers of unequalised benefits, and this provided some further clarity in this area, it is clear that the judgment has also led to some additional considerations for trustees and scheme administrators which also need to be addressed. The pensions industry as a whole continues to wrestle with these important issues.

It is therefore important that trustees and employers continue to work closely with their legal advisers to help work through these difficult issues in a proportionate and pragmatic way.

Changes afoot for the general pension levy from 1 April 2021

In December 2020, DWP issued a consultation on proposals for changes to the structure and rates of the general pensions levy on occupational and personal pension schemes.

On 4 March 2021, DWP published its response to the consultation.

In that document, the DWP confirms that it has decided to proceed with the proposed "Option 1" approach without any changes. This option provides for an increase in levy rates and for the simultaneous introduction of four separate sets of rates: for DB, DC (non-master trust), master trusts and personal pension schemes. The changes came into effect on 1 April 2021.

The Government intends to monitor its impact and will give consideration as to whether any further structural changes are required in the light of experience (including possible additional categories for new scheme types such as DB superfunds).

The response also confirms that the Government has decided to freeze the 2021/22 operating budgets of TPR and The Pensions Ombudsman at 2020/21 levels, and also reduce by 25% the core element of the Money and Pensions Service funding for 2021/22 that will be chargeable to the levy

Trustee oversight of investment consultants and fiduciary managers – consultation response delayed

On 29 July 2019, the DWP issued its consultation on draft regulations that would impose new obligations on trustees in relation to the fiduciary management and investment consultancy services they receive following implementation of the CMA Order. On 31 July 2019, TPR published its own consultation on draft guidance aimed at helping trustees to comply with their new duties, as well as engaging effectively with their investment providers, as appropriate. Both consultations closed in September 2019.

The Government has however recently confirmed that the publication of the consultation response and the final regulations on trustees' oversight of investment consultants and fiduciary managers is delayed. It expects to be able to publish these in the first half of 2022. In the meantime, trustees will need to comply with the CMA Order itself, which will continue to apply in the interim.

CMS Pensions LawCast

We continue to add new content to our recently launched CMS Pensions LawCast video and podcast series. Click here to view our latest LawCasts (DB member options and liability management, Master Trusts, TPR investigations) as well as earlier topical episodes including bulk annuity issues, ESG issues and the Corporate Insolvency and Governance Act.

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