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Legal developments: where are we now?

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Introduction

Topics to be covered

- Money purchase definition
- Budget 2013
- Auto enrolment simplification and exemption proposals
- GMP equalisation
- Proctor & Gamble v SCA
- Small pension pots
- IORP II



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Introduction

Further topics to be covered

- Wheels Common Investment Fund [2013]
- Walker v Innospec [2012]
- DC Pension Schemes Regulation
- Consultation on disclosure requirements



Money Purchase Definition

The reason for change

- DWP decision after the Supreme Court's ruling in Houldsworth v Bridge Trustees
- Supreme Court:
 - Rejected DWP argument that money purchase benefits cannot have a deficit
 - Approved outcome in earlier KPMG case where "building block benefits" were defined benefit



Money Purchase Definition

New definition

- Pensions Act 2011 new definition:
money purchase benefit where *"its rate or amount is calculated solely by reference to assets which (because of the nature of the calculation) must necessarily suffice for the purposes of its provision to or in respect of the member"*
- Once in force the new definition will have retrospective effect from 1 January 1997

Money Purchase Definition

Effect of new definition



- Benefits which could develop a deficit cannot be treated as money purchase benefits
- Some schemes which have been treated as money purchase schemes will be classed as defined benefit schemes
- DWP considering transitional protection

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Budget 2013

Key points from a pensions perspective

- New objective for the Regulator:
 - "to minimise any adverse impact on the sustainable growth of an employer"
 - expected to come into force early 2014
- Increase in personal allowance to £10,000 from tax year 2014/2015
- No stamp duty on AIM shares from April 2014



Budget 2013

Key points from a pensions perspective

- Single-tier pension introduction and abolition of state second pension brought forward to April 2016
 - the end of contracting out for DB Schemes
- Lifetime allowance will reduce to £1.25 million from 2014/2015
- QE facility to remain in place for tax year 2013/2014



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Simplification and exemption proposals (auto enrolment)

Consultation proposals

- DWP published a consultation paper in March proposing:
 - a change to the definition of 'pay reference period'
 - to allow employers to retain for two months the initial contributions paid by new members
 - to exempt workers who have opted-out of their employer's pension scheme in the 12 months before the statutory duty first arises



Simplification and exemption proposals (auto enrolment)

Consultation proposals

- to extend the 'joining window' from one month to six weeks
- to clarify the form and content of opt-out notices
- introducing an easement for employers who automatically enrol all of their staff into a qualifying pension scheme, regardless of eligibility



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Simplification and exemption proposals (auto enrolment)

Key dates

- Consultation ended on 7 May 2013
- Changes proposed to come into effect April 2014



GMP Equalisation

An interim response

- Government issued an interim response to its consultation on GMP equalisation on 8 April 2013
- Government acknowledged "*many respondents voiced strong objections against the requirement to equalise, stating that there was no clear legal requirement to do so*"
- However, the Government said that it remained "*in no doubt*" about the need for UK schemes to equalise GMPs



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GMP Equalisation

Good news?

- The Government will not publish a final version of its proposed methodology for achieving equalisation
- There is no indication of when the equalisation process will be introduced



Proctor & Gamble v SCA [2012]

The facts

- Proctor & Gamble agreed to sell part of its business to SCA, which included a TUPE transfer of 129 employees who were active members of the P&G DB scheme
- Scheme allowed for early retirement with the consent of the employer after reaching age 55
- SPA provided that SCA would be liable for any accrued pension liabilities that passed to it, the the purchase price being reduced accordingly
- Dispute arose as to whether early retirement benefits transferred under TUPE to SCA



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Proctor & Gamble v SCA [2012]

Decision

- The employee's right to be considered for early retirement benefits in good faith transferred to SCA under TUPE
- SCA will assume liability only for enhancements to an early retirement pension that are no longer available to a transferring employee following the TUPE transfer



Proctor & Gamble v SCA [2012]

- Liability for an "old-age benefit" does not pass to the buyer under TUPE
 - includes pension instalments paid to a member after he passes normal retirement age, if the sole purpose of the pension is to support the recipient after retirement.
 - this is even the case if the pension first comes into payment before normal retirement age
- The High Court has granted the defendants leave to appeal the decision



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Small pension pots

Issues and proposals

- Automatic enrolment will lead to more small pots and members may lose track of their savings
- DWP December 2011 proposals:
 - encourage voluntary transfers
 - central “aggregator” scheme
 - automatic transfer to new employer
- DWP consultation response:
 - pot follows job
 - new rule not universal



Small pension pots

Potential difficulties

- Difficulties include:
 - gaps between jobs
 - multiple jobs
 - risk relating to receiving scheme investment performance
 - cost and administration burden for employers
 - fit with wider consumer protection legislation?



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IORP II



Purpose of the review of IORP directive

- Proposed change is said to be required for a number of reasons:
 - encourage employer-sponsored retirement provisions in view of changing demographics
 - promote the number of cross-border schemes
 - ensure consistency across the EU in the implementation of original IORP Directive
 - ensure consistency of regulation with the insurance sector's Solvency II provisions



IORP II

Proposed changes

- “holistic balance sheet”
 - assets = scheme assets, contingent assets, the value of the employer support underlying the scheme and possibly also insurance protection systems e.g. PPF
 - technical provisions = risk-free discount basis to achieve the 'best estimate' of scheme liabilities + explicit risk margin, potentially based on a buyout price



IORP II

Impact

- Increase in scheme funding requirements
 - £291 billion according to a submission by the NAPF to DWP Select Committee in March 2012
- Administration and governance of UK schemes would change considerably
 - Trustees are likely to have less discretion and flexibility



Wheels Common Investment Fund case

VAT exemption



- There is an exemption from VAT for the management of an authorised unit trust scheme or an open-ended investment company
- Following the 2007 ECJ decision in JP Morgan Fleming Claverhouse Trust plc v HMRC [2007] the exemption was extended from 1 October 2008 to cover closed-ended collective investment undertakings such as investment trust companies

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Wheels Common Investment Fund case

Facts of the case

- The WCIF was a fund that pooled the assets of several DB Schemes. Fund management services were provided to the WCIF by Capital International Ltd, which levied VAT on their services
- Following the Claverhouse decision, Capital claimed repayment of VAT on its services provided to the WCIF over the period 1 July 2004 to 30 June 2007



Wheels Common Investment Fund case

ECJ decision and impacts

- The ECJ ruled that neither a DB scheme nor a common investment fund in which the assets of several such schemes were pooled constituted a "special investment fund"
- The failure of this case will deny DB schemes in the UK the prospect of a £2 billion windfall in reclaimed VAT
 - would the outcome have been different if a DC scheme had been party to the case?



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Walker v Innospec [2012]

Facts of the case

- Mr Walker, who was a retired member of the Innospec pension scheme, claimed that Innospec Limited had discriminated against him in relation to his pension benefits
- The Innospec scheme provided a spouse's pension to a member's civil partner only in relation to service since 5 December 2005
- The respondents relied on the proviso in the Equality Act 2010 saying equality is only necessary for pensionable service since 5 December 2005



Walker v Innospec [2012]

Decision

- The tribunal held that the company had directly discriminated against Mr Walker and that such discrimination was prohibited by the Framework Directive
- The exemption in the Equality Act 2010 should be interpreted compatibly with the Directive so as to preclude the respondents from relying on it



DC Pension Schemes Regulation

What is proposed?

- The Pensions Regulator is consulting on the proposed approach to the regulation of DC pension schemes
 - consultation includes a draft code and draft guidance
- Consultation sets out a package of measures based on 31 DC quality features
- The Code sets out the DC quality features which are underpinned by legislation and gives trustees practical guidance



DC Pension Schemes Regulation

More proposals

- Guidance provides information and assistance on good practice standards of governance
- The quality features are aspirational and are open to interpretation in how they should be achieved



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Consultation on disclosure requirements

Proposals

- Consolidation of existing regulations
- Government also intends to:
 - align requirements for occupational and personal pension schemes
 - introduce new requirements regarding lifestyle options
- Changes due to come into force in October 2013



Questions?



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