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GMP Equalisation and Legal Aspects

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THE HISTORY

What is a GMP and why is it unequal
between sexes?

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GMP history

- Introduced in 1978 at the same time as SERPS
- Broadly replicates the SERPS benefit
- Significant overhaul in 1988

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GMP inequality derives from...

- the accrual rate
- the payment age

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and is made more complex by...

- the increase provisions
- the revaluation provisions
- the anti-franking provisions

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Accrual rate based on “working life”

- begins at the start of the tax year in which age 16 is reached
- ends at the end of the tax year before the one in which age 65 (men) or age 60 (women) is reached

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The post-1988 GMP formula

The post-1988 GMP is:

- 20% of the aggregate revalued earnings factors from 6 April 1988 onwards
- averaged over the length of the earner's **working life** from 6 April 1978 (that length deemed never to be less than 20 years)

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and that is unequal because...

the concept of a “working life” is different for men and women:

- it starts at age 16 for both
- it ends at 65 for a man and 60 for a woman

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Why was it done like this?

- Woman’s “working life” was shorter
- Being able to accrue pension faster compensated for that
- SERPS was the same

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Unequal payment dates

- Woman's GMP comes into payment at age 60 (may be postponed to a later age with a postponement increase)
- Man's GMP comes into payment at age 65
- GMP age not linked to state pension age

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Does not mean women are necessarily better off overall

- Interaction with SERPS
- Women have a higher accrual rate, and a pension age that is 5 years earlier
- BUT – a higher GMP can result in a lower overall benefit

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Higher GMP does not mean higher overall benefit

- From the end of contracted-out service, the GMP is calculated as a separate (minimum) element of pension
- Increased in payment, and revalued in deferment, differently to the excess over GMP

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GMP increases

- Price inflation capped at 3%
- Currently CPI is used
- Usually less generous than increases to excess

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GMP revaluation

- A choice of methods but fixed-rate revaluation is more common
- Often more generous than revaluation of excess
- Protected by anti-franking legislation

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THE LEGAL POSITION

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Treaty on the Functioning of the European Union

Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. (Art. 157)

(formerly Art. 119, Treaty of Rome)

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Equality Act 2010

- (1) *If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.*
- (2) *A sex equality rule is a provision that has the following effect— ... if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;*

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Defrenne v Belgium (1971)

There cannot be brought within this concept, as defined in Art. 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking ... concerned, which are obligatorily applicable to general categories of workers.

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Bilka-Kaufhaus v Weber (1986)

... the occupational pension scheme ... although adopted in accordance with the provisions laid down by German legislation for such schemes, is based on an agreement between Bilka and the staff committee ... and has the effect of supplementing the social benefits paid under national legislation ... It must therefore be concluded that the scheme does not constitute a social security scheme.

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Barber v GRE (1990)

... unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Art. 119 of the Treaty.

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Moroni v Collo (1993)

... an obligation imposed by a national provision to pay the occupational pension at the same time as the statutory pension cannot have the effect of excluding the occupational scheme from the scope of Art. 119

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Williamson (2000)

As GMPs are not expressly excepted from the application of the equal treatment rule then, in my judgment, by virtue of that rule, they must be equalised.

Note: Pensions Ombudsman determination, not approved by a court

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Niemi v Valtiokonttori (2002)

... the Court has held that a decisive criterion is the existence of a link between the employment relationship and the retirement benefit, and has not regarded the structural elements of a system of pension benefits as playing a decisive role.

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Allonby v A&R College (2004)

... where State legislation is at issue, the applicability of [Art. 157] is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work...

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Do GMPs need to be equalised?

- Case law suggests yes

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Counter-arguments

- GMP is a calculation factor and not “pay” for the purposes of Art. 157
- GMP replicates SERPS and is excluded by virtue of *Defrenne v Belgium*
- Untested
- In our view, these arguments unlikely to succeed (others may disagree)

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THE GOVERNMENT’S POSITION

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Ministerial statement (2010)

The examination of the relevant legislation and case law has led the Government to conclude that where a scheme member has accrued entitlement to a guaranteed minimum pension after May 1990, European law requires that any inequality in scheme rules which results from the legislative provisions governing GMPs should be removed, whether or not a person can show that a comparator exists.

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Ministerial statement (2010) (ctd.)

The Government intends to bring forward amending legislation when Parliamentary time allows. However, in the meantime, it is the Government's opinion that, in order to ensure full compliance with European law, trustees and others should act as if existing domestic legislation requires equalisation in respect of differences resulting from GMPs whether or not real comparators exist.

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Consultation paper (2012)

The Government understands the current situation is that contracted-out schemes which hold GMP liabilities are already under an obligation to ... equalise pensions for the effect of the GMP rules for any accruals from 17 May 1990 to 5 April 1997...

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Consultation paper (2012)

These draft Regulations are, therefore, only changing domestic legislation to reflect the development of the jurisprudence of the [CJEU], thereby codifying a scheme's existing obligations in EU law into UK law.

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Consultation paper (2012)

The Government appreciates that a degree of uncertainty has existed for some time over equality and the GMP and wishes to offer schemes as much help as is practicable in providing equalised benefits

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Draft regulations

... a sex equality clause is a provision that has the effect that if, by virtue of the application of the guaranteed minimum pension provisions, a term of A's that relates to ... the scheme concerned is less favourable to A than it would be if A were of the opposite sex, the term, in so far as a sex equality rule would have effect in relation to it, is modified so as not to be less favourable.

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Consultation paper (2012)

- Confirmed the position of the ministerial statement
- Set out a possible method for equalisation
- Not intended to be definitive
- Draft legislation
- Negative reaction

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Interim response (2013)

Whilst the consultation did not ask for comments on either the need to equalise pensions for the effect of the GMP or the use of a notional comparator when doing so, the majority of respondents focused on these two issues.

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Interim response (2013)

... the Government had already considered the request to sponsor a test case, and had decided that this would not be an appropriate way forward. The Government's view has not changed...

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Interim response (2013)

The Government is in no doubt that the draft regulations merely reflect the outcome of recent judgements in European case law, and will be laid in the future. This action has been delayed so that the Government can give further consideration to providing statutory guidance for schemes on GMP conversion.

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Foreseeable outcomes

- Government unlikely to change its view on the need for GMP equalisation
- Amendments to UK legislation will make ambiguities in European position irrelevant
- Test case unlikely

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Uncertainties

- How the “DWP method” will be modified
- Equalisation as part of GMP conversion

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EQUALISATION METHODS

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Range of reasonable methods

- Wide range of possible methods
- But fall into certain basic categories
- GMP conversion

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The DWP method

- Every time pension is calculated ...
- Recalculate on assumption member is of opposite sex for GMP purposes
- Use whichever is higher

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The DWP method - advantages

- Conceptually simple
- Less likely to be successfully challenged
- Consistent with PPF method (which has modifications to reflect special circumstances of the PPF)

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The DWP method - disadvantages

- Overcompensates
- Inconsistent with concept of “equalisation”?
- Difficult to administer
- Complicates actuarial calculations

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Equal payment method

- Every time the pension is recalculated ...
- Offset any gains/losses compared to the amount that would have been received if the member was of the opposite sex

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Equal payment method - advantages

- (Arguably) the fairest method

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Equal payment method - disadvantages

- Difficult to administer
- Complicates actuarial calculations
- More costly than the method we will consider next...

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Actuarial equivalence method

- As a one-off exercise ...
- Compare value of pension with value if person was of opposite sex for GMP purposes, using actuarial assumptions
- Apply an uplift if this shows they would have been better off

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Actuarial equivalence method - advantages

- Avoids over-compensation
- Certainty at the outset
- Simple to administer and value in future
- Consistent with approach taken elsewhere – section 67, GMP conversion

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Actuarial equivalence method - disadvantages

- Not conceptually simple
- Use of assumptions creates inaccuracy
- May be more vulnerable to challenge

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PRACTICAL ISSUES

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What should schemes do now?

- Ongoing scheme: do nothing, but monitor developments
- Scheme in wind-up/buy-out: equalise GMPs (somehow), consider protection, and monitor developments

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Finite assets on wind-up

- Uplift to any member costs the others
- Advisers' fees cost all members

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Members with no further entitlement

- Deaths
- Transfers out
- Trivial commutation / WULS
- Contribution refund

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Pensions in payment

- Interest on backpayments?

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Limitation

- How far back to adjust pensions in payment?
- Limitation under statute/equity
- Forfeiture clauses in scheme rules

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Not all the GMP needs equalising

- Only GMP accrued in the period from 17 May 1990 to 5 April 1997
- So pre-1988 GMP can be ignored altogether
- How to determine how much of post-1988 GMP falls in that period?

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Spouses

- and divorces

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TRUSTEE DUTIES

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Fiduciary duties

- Apply under law of trusts in England and Wales
- Supplements duties under statute and European law
- Duty to act in the best interests of the beneficiaries
 - Always includes members
 - May also include employer

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Duty to act in members' interests

- Applies when resolving a point of doubt
- Does not mean adopt the most generous method
- Balance competing interests
- Avoidance of windfall benefits

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CONCLUDING COMMENTS

- GMP equalisation is coming (or already here)
- It can be done
- Uncertainty means that there are risks to be balanced
- Position continues to evolve

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Questions

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