BROADSTONE

Briefing note – Pensions Act 2021: Setting the agenda

Pensions Act 2021

Introduction

Thanks to Brexit and, of course, COVID-19 the progress of Pensions Act 2021 has been a long-drawn out affair. First tabled in the Autumn of 2019 and then again in January 2020 following the 2019 General Election, very little has changed from that first draft. It finally received Royal Assent on 11 January 2021.

It has 6 key themes and we'll summarise them in this note. It should be recognised that much of what is included is setting the scene for secondary legislation, which will fill in the detail. Much will also require guidance from the Pensions Regulator (TPR) and so the topics herein are not at their final position.

This is a major Pensions Act and sets the scene for a different legal and regulatory regime. It touches on lots of areas such as, future collective pensions, the long-term DB funding challenge, scams, future pensions technology solutions and ESG.

The key themes – a summary

A new collective pension savings solution – the legislative framework for a new collective saving solution in the UK, Collective Defined Contribution or CDC. Don't be confused by the terminology - in the regulations this is called Collective Money Purchase, though no-one other than pedants and legislators will call it that.

New powers for TPR – certainly the headline grabbing area where TPR is given a much larger stick to beat those that are deemed to have treated a defined benefit scheme unfairly. This includes unlimited fines and imprisonment.

New funding rules – the delay in this Act reaching its final stages has delayed TPR's ability to complete its consultation on a new funding code. The basis of the new funding code is included in the Act.

Pensions Dashboard – another long-running project, albeit one that has been able to make progress broadly in parallel with the Act. The Pensions Dashboard is a significant technology initiative that will help people find and remain connected to their pensions earned during previous employment.

Tighter transfer rules – the rules governing what is a statutory (i.e. a legal right to transfer) will be amended to make it more difficult to be transferred to a scam arrangement.

Climate risk – the government has also been working on this during the Act's gestation and the Act includes wording to allow the government to require trustees to assess and disclose the impact of climate change on their pension scheme.

The key themes – in more detail

Collective Defined Contribution Scheme

A CDC scheme resembles, in many ways, a traditional DC scheme. Contributions are paid in by member and employer and these funds are invested. However, linked to this is a loose benefit target which could be expressed like a defined benefit, e.g. 1/60th of pensionable salary with some indexation. However, unlike a traditional defined benefit scheme the scheme cannot fall into deficit. Instead the assets for all the members are pooled and if it is deemed that there is not enough money in the scheme, the benefits (primarily the future indexation) will be reduced rather than a create call on the employer to provide further funding. This would be a new type of pension scheme in the UK, though the concept is well-established in the Netherlands and other countries. The Act provides the legal and regulatory framework to allow such schemes to be established. There is also an authorisation process akin to the DC Master Trust process. The biggest challenge for these schemes will be the ability to make it crystal clear to the members what benefits they can expect, without giving so much weight as to make that benefit appear a promise. We shall await with interest the employers that establish these schemes. We know that Royal Mail are likely to be one of the "early adopters" in this space.

New powers for TPR and notifiable events

The Act has created new criminal and civil offences linked to the operation of defined benefit pension schemes. Pleasingly the government has confirmed that these offences

will not have retrospective application. However, all those involved with pension schemes should familiarise themselves with the actions now deemed to be actionable offences. The criminal penalties associated with these offences are an unlimited fine and up to seven years in prison.

Employer debt – should someone avoid the payment of a debt to a pension scheme without a reasonable excuse. This is a very loosely-worded offence and could apply to normal behaviour concerning actions or decisions a trustee or employer would routinely carry out.

Accrued benefits – if someone's conduct has a detrimental impact on the likelihood of a member receiving accrued rights. Here, the person knew or should have known this would be the effect, and in addition, they had no reasonable excuse for being unaware of this outcome. Again, the wording is loose and could impact normal behaviours and with no malice to the actions, but where they should have known it would have had an impact. This also applies to advisers. It is easy to see rather normal transactions being delayed, with additional cost, as the parties seek to clarify that they won't be held to account under these newly-defined offences.

False or misleading information – if a person knowingly or recklessly gives TPR false or misleading information. Here we are in the realms where the interpretation as an unambiguous offence appears more reasonable. The offence comes with a £1m fine.

Failure to comply with a contribution notice – again, without reasonable reason. While contribution notices are enforceable in court, the rule allows TPR to take criminal action. In addition to this offence, new tests are introduced to allow TPR to issue contribution notices.

1. Employer Insolvency Test – Is not actually linked to the likelihood or otherwise of insolvency but seeks to check whether at the time of an act, or failure to act, the scheme had a funding deficit and the act or failure to act had "materially reduced the amount of debt likely to be recovered". It is effectively an attempt to test what would happen if insolvency occurred.

2. Employer Resources Test – so that at the time of an act, or failure to act, there had been a reduction in the resources of the employer and this reduction was material to the section 75 debt.

We don't yet know how these will work and there will be more detailed guidance from TPR on this. What is clear is that, similar to the above, such sweeping descriptions will apply to even the more mundane of corporate activities, resulting in more advice and more delays. Any guidance will need to be sufficiently detailed to provide true clarity, but also will not necessarily make anyone immune from the law. What is ultimately deemed right or wrong could end up being decided in court and in front of a jury.

The Act also proposes changes to the notifiable events framework and introduces additional statements to be made when advising the regulator. The detail of this will be in additional regulations but the original idea was to include "a declaration of intent" which would describe the impact of the event on the scheme and any mitigation. It isn't yet clear if this remains the direction of travel. This would not replace the clearance framework, although this may be amended in line with how the requirement to declare intent develops.

DB Funding

Many miles of commentary has been written on this, but this element of the Act relates directly to the legal framework for TPR's consultation on the future of DB funding. This has been well rehearsed over the past 12 months and we expect part 2 of the DB Funding Code consultation to happen in 2021. Rather than try your patience we will merely summarise that the Act introduces the concept of "long-term objectives" (LTO) where the scheme must outline a strategy (investment and funding) to reach a state of low dependency on the employer, along with a journey plan to describe how the destination will be reached. This will be encapsulated in a written strategy statement aka The Funding and Investment Strategy (FIS) Statement. TPR also proposes the option of Fast Track or Bespoke compliance routes for schemes carrying out their valuations, with Trustees declaring compliance with Fast Track or opting for Bespoke. How this works in practice is the key component of part 2 of TPR's consultation.

Pensions dashboards

The Pensions Act creates the framework for Pensions dashboards (plural) to be developed. These solutions will be websites where people can see their occupational, personal and state pensions. This is a major data project being run by the Money and Pensions Service via their Pensions Dashboard Programme. A lot of work is happening behind the scenes to determine what data will be needed when, and how it will be provided. Schemes are expected to start providing data in 2022 with a go-live date in 2023.

Tighter transfer rules

Pension scams remain a scourge on the pensions industry and one of the more frustrating delays has been the wait for new rules around the definition of a statutory transfer. It is not uncommon for Trustees and their administrators to be in a position where they know (or at least strongly suspect) that a receiving scheme is a scam arrangement but as the member has a legal (statutory) right to transfer it cannot be stopped. The change being proposed is an attempt to tighten up the definition of a statutory transfer. It would mean that should there not be a clear link between the member and the scheme sponsor (where the receiving scheme is an occupational scheme) the transfer can be stopped. This will help curtail transfers to some SSASs established as scam vehicles. More detail on how this restriction will apply will be outlined in further regulations.

Climate risk

The Pensions Act allows the government to make further regulations (some of which are already being consulted on) to require trustees to increase their governance efforts when assessing the risk posed by climate change. The new disclosures and actions are part of the Task Force on Climate-related Disclosures (TCFD). The largest schemes (£5bn+) are first in line and will need to comply by 1 October 2021. A further tranche of large schemes (£1bn+) must comply by 2022 and the remainder are expected to be included in 2023. While focussing on disclosure on the outside, there is a great deal in the consultation about how trustees include climate-risk in their assessment of risk on funding, investment and covenant. There will be a steep learning curve for Trustees, who will need to work through this over the coming year.

Broadstone view

This Acts sets the scene for 2021 and beyond. It is going to be a busy year or two for Trustees and sponsors getting to grips with the initiatives that this puts into motion.

This Act will be seen as the kick to launch ESG and investing for climate-risk into the mainstream. Albeit with a few years of lead in for the smaller schemes.

As we always say the devil will be in the detail and so the all-important secondary legislation and regulation will describe what we'll need to do and how. Of course this will also lead to reams of TPR guidance and the new DB Funding Code of Practice. It's going to be a busy year.

Contact

David Brooks
Technical Director
David.brooks@broadstone.co.uk

www.broadstone.co.uk

100 Wood Street
London EC2V 7AN
UK

This Broadstone briefing note is based on Broadstone's understanding of the law and is provided for information only. It should not be relied upon as a definitive statement of the law and detailed legal and financial advice should be obtained on the specific circumstances before proceeding.

Broadstone Corporate Benefits Limited is authorised and regulated by the Financial Conduct Authority. Registered in England & Wales under no. 07978187. Registered office 100 Wood Street, London EC2V 7AN.

Broadstone is a trademark owned by Broadstone Corporate Benefits Limited and used by companies in the Broadstone group.