

Pensions law group – January 2021

The impact of Brexit on pension schemes

When the UK left the EU on 31 January 2020, a transitional period started during which the relationship between the UK and the EU continued as if the UK were still a part of the EU. That Brexit transition period ended at 23:00 on 31 December 2020. The last-minute UK-EU trade agreement then took effect.

Whilst significant aspects of UK pensions law derive from the EU, for example much of the law relating to scheme funding and discrimination, these have mostly been incorporated into UK law. UK pensions law is therefore largely unaffected by the ending of the transition period. There are, however, a number of practical considerations that both trustees and employers should bear in mind as a result of the Brexit process.

UK pensions law from 31 December 2020

The UK government is not expected to seek to make any significant changes to UK pensions law immediately after the transition period, but divergence may occur in the longer-term. The UK is no longer required to transpose EU legislation into UK law and Parliament could legislate to move away from existing EU law.

UK courts are no longer bound by decisions of the Court of Justice of the European Union (the **CJEU**) made after the end of the transition period. In addition, the Supreme Court and the Court of Appeal will have the ability to depart from past CJEU decisions. The UK courts' interpretation of UK pensions law may therefore differ from CJEU decisions over time – for example, in the area of equal treatment where there have been significant CJEU decisions in the past.

Other areas where the UK could eventually diverge from current EU law include:

- **Pension Protection Fund (PPF) compensation levels** – in light of the recent *Grenville Hampshire* case (which saw the CJEU rule that PPF compensation limits in certain circumstances were unlawful), will the UK depart from the CJEU's ruling and reduce the level of PPF compensation payable?
- **Employment transfers** – will the government legislate to clarify the scope of the 'pensions exemption' in the Transfer of Undertakings (Protection of Employment) Regulations 2006 whereby certain rights under defined benefit occupational pension schemes transfer to a new employer?

Additional complexities and considerations may apply to schemes with overseas members and to cross-border pension schemes. The Stephenson Harwood pensions law group is happy to provide tailored advice in these circumstances.

Practical considerations

Whilst pensions law is largely unaffected in the immediate aftermath of Brexit, there are some practical considerations that trustees and employers should be aware of.

Financial uncertainty

Market volatility is likely to be one of the most significant issues for pension schemes, compounded by significant economic uncertainty as a result of COVID-19. Sponsors of defined benefit pension schemes may find that their businesses are adversely affected and trustees will need to be aware of changes to employer covenant. Consideration may need to be given to whether current integrated risk management strategies, investment strategies and covenant monitoring continue to be appropriate. Trustees should also consider if there are any opportunities arising as a result of changing market conditions.

Data protection

There was some concern that the UK would be deemed a 'third country' for data protection purposes following the end of the Brexit transition period. This would have had an impact on schemes where member data is transferred to or from an EEA country (for example, where a service provider is based in the EEA).

However, the UK-EU trade deal allows personal data to flow freely from the EU and the EEA to the UK for up to an additional six months in order to allow time for adequacy decisions to be adopted.

Nevertheless, the Information Commissioner's Office does recommend that, as a precaution, those who receive personal data from the EU and/or EEA should put in place alternative transfer mechanisms in order to safeguard against any future interruption of the flow of data. The Stephenson Harwood pensions law group can advise on the implementation of appropriate measures.

Annuities via EEA firms

Existing passporting rights ceased at the end of the transition period but EEA firms will be able to continue operating in the UK through a temporary permissions regime for a period of time while they get permanent FCA authorisation. The government has also established a financial services contracts regime which will enable firms which do not wish to enter the temporary permissions regime to carry on servicing customers under existing contracts while they wind down their business in the UK.

Pension scheme documentation

Trustees should check their scheme rules, service provider contracts and contingent asset documentation for any amendments that may be required as a result of the end of the transition period. The Stephenson Harwood pensions law group can help with this.

Comment

As the dust settles on the new trade deal and the UK gets to grips with its new sovereignty, pensions law may evolve. It is not, however, expected that there will be any major divergence from key European concepts such as equal treatment and scheme funding requirements (at least in the short-term). We will issue updates as this area continues to develop.

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