SLAUGHTER AND MAY/

PENSIONS ON AIR
PENSIONS PODCAST
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Charles Magoffin	Hello and welcome to the July episode of the Slaughter and May pensions podcast, Pensions on Air. A bit of a change of pace this month as Dan and Catrin are both enjoying a break from the world of pensions. Instead, you have me, Charles Magoffin, senior counsel in the pensions team and I am joined by Karen Mumgaard, knowledge counsel in the team. I feel we have big shoes to fill but we're going to give it our best shot. Karen, does the Pension Schemes Bill last month and the announcement about Virgin Media mean that the pensions minister has emptied his in-tray before summer and there is nothing left to talk about?
Karen Mumgaard	I would be surprised if we get much more from DWP before the summer, but there is still a lot to talk about in the bill. Last time Dan and Catrin focussed on the proposals on surplus, but as Catrin mentioned there a number of other interesting things in there.
Charles	I know the Government somewhat controversially said that it intended to include a power in the Bill to enable it to set mandatory investment targets for schemes, if change does not take place as envisaged by the Mansion House Accord. Is that in there?
Karen	Sort of – but not quite in the form I envisaged. To explain the investment provisions we have to start with the Government's proposals to increase scale in the DC market.
Charles	Is this on the basis that both it and TPR say that larger DC funds have advantages in terms of governance, economies of scale and available investment opportunities?
Karen	Precisely. One of the mechanisms in the Bill to achieve scale is a requirement for master trusts and GPPs used for auto-enrolment to have a main default fund of £25 billion by 2030 – with transitional provisions for schemes that haven't quite got there but will. This feels like quite an ask to me as looking at a league table of mater trusts from October 2024, only 3 out of 19 had assets of more than £25bn. If a default fund cannot meet the required scale, the relevant GPP or master trust won't be a qualifying scheme for auto-enrolment and employers will presumably have to find an alternative. Those funds that reach the required scale will still need to be approved by TPR. The approval criteria will mostly be in regulations but the bill says approval will only be given if a required percentage of assets are invested in "qualifying assets" which are to be defined in regulations but can include private equity, venture capital and UK assets. This does not quite feel like a power to be used only if industry does not do things on its own.

Charles	And it begs the question of how it can be reconciled with a trustees' fiduciary obligations to exercise their investment powers in the best financial interests of their beneficiaries, not to pursue a government agenda of investing in UK businesses. It will be interesting to see how that proposal evolves. Are there other proposals in the Bill which will drive the consolidation agenda?
Karen	In relation to DC, TPR and the FCA have been talking about a new value for money framework for a long time with the intention of having something that ensures consistency in the measurement and disclosure of things like investment performance and costs as well as more subjective things like service quality. The Bill provides a framework for regulations to achieve this but no details and it is not clear how the provisions will apply to hybrid schemes. We have some idea what the framework will look like as the FCA consulted on its version for contract-based schemes last year. It would require schemes to disclose both net and gross investment performance over various time periods and for different cohorts. Disclosure of metrics relating to quality of service will also be required and schemes would need to compare their performance against 3 others, at least two of which have assets above £10bn. Schemes will need to determine whether they provide value compared to other schemes and if they do not and there is no prospect of doing so within a reasonable time, they will need to wind-up.
Charles	That sounds like it is likely to entail a significant amount of work for DC schemes once it comes online. One could speculate that it will require so much work that a lack of value might be triggered by the value for money assessment itself! What other pro-consolidation measures are in the Bill?
Karen	Progress has finally been made on legislation to consolidate the large number of small DC pots that have been a side effect of auto-enrolment. From 2030, schemes will need to identify auto-enrolment regime pots of £1000 or less which have been dormant for 12 months. Once identified, trustees will need to communicate with the member and, if the member does not tell them which consolidator to transfer their pot too, they will be allocated to one. There will be an authorisation regime for consolidators which may include requirements as to scale. There is no indication as to what appropriate scale might be, but one option would be to tie it into the mega-funds requirements.
Charles	I note that we are also seeing more consolidation in the DB space and Clara has recently announced its fourth transaction involving a transfer of £55m from the church mission scheme, 730 members and a contingent guarantee from the original sponsor. I know that the government wants to encourage further DB consolidation – will the Bill do this?
Karen	It will certainly try. The transactions to Clara so far have been done under an interim regime established by TPR which has 3 gateway tests that transfers need to satisfy: the scheme must not be able to access buy out now, there must be no realistic prospect of buy-out in the foreseeable future and the transfer must improve the likelihood of members receiving full benefits.

	The Bill provides for a new statutory regime for superfunds which aims to be in force by 2028. It is intended to stimulate the superfund market and encourage new models and entrants. As we have only seen 4 transactions so far out of more than 5000 DB schemes, there is clearly scope for more. The criteria for transfers to superfunds will be similar but not identical to the current gateway tests. In particular, it will not be necessary to show that buy-out is unlikely to be possible in the foreseeable future.
Charles	And its worth remembering that the Government is still considering the possibility of using the PPF as a public consolidator. Were there any non-bill related developments that it's worth discussing?
Karen	After a long wait, we finally have new a data protection law in the form of the Data Use and Access Act. As you can imagine, I was underwhelmed by the prospect of reading data protection legislation having been scarred by GDPR, especially when I read a comment from the ICO that "*Most [changes in the Act] offer …an opportunity to do things differently, rather than needing… specific changes to comply*." There are some changes which might affect pension schemes including a confirmation that when someone asks for access to their personal information controllers, only have to make reasonable and proportionate searches rather than peering in every filing cabinet and under every chair. There is also a new requirement to have a mechanism to facilitate complaints and to ensure they are acknowledged within 30 days so trustees will need to consider whether existing processes cover this or they need to make changes. I know my next comment might be greeted with less than enthusiasm, but the new Act, together with the pensions dashboards make it a good time to think about reviewing data protection policies.
Charles	I also noticed that there was a recent case on "corrective construction" or, in other words, construing a pension scheme trust deed in such a way as to get around an obvious mistake. Does it generally say helpful things for schemes that come across issues in their documents?
Karen	It does – although the facts were quite extreme which might limit its general application. The case was about a DC underpin introduced in the 1990s to deter members from leaving to join personal pension schemes. The underpin promised that a pension would be the greater of the DB benefit or the value of a notional DC account. The question arose whether this meant the DB pension should be compared to the whole value of the DC account or the pension that could have been secured with it. If the whole value interpretation was correct, it would have increased the liabilities from £140m to £1.6bn and was manifestly not what was intended. The underpin would also not have been a DC benefit or within revenue limits. The court said that where it is clear something has gone wrong with the language and what a reasonable person would have understood the parties to have intended, it would not bind the parties to a mistake.

	This must have been a relief to all concerned and it's good to know that the courts can find a way around obvious mistakes. I really felt for the draftsman here as it was so easy to see how the mistake found its way in.
Charles	Indeed – drafting standards of the past were very different to now so it is always reassuring where the court comes to a sound decision around dealing with mistakes. So, how do you think our first presenting gig went? Did we honour the legacy of those who have gone before us?
Karen	I hope so – I have to confess that one of my childhood ambitions was to be a newsreader. Clearly that fell by the wayside but this has come closer than I have ever come before. I'm not however going to invite views on whether listeners think it is fortunate that I pursued a career in law but it was fun. What about you – did you enjoy our foray into the world of broadcasting?
Charles	More than I thought I would. Those who know me well, will have been surprised to see me venturing into this territory, but how could discussing pensions for 15 minutes be anything other than entertaining? Again, probably best not to ask for listener feedback on that. We hope you'll join us again next month, possibly from the beach if you are away. If you like what you have heard, you can subscribe to the Pensions on Air show within the Slaughter and May podcast channel on your preferred podcast platform. If you have any comments, please leave us a review. Goodbye and enjoy your summer.