Thinking about the future
The potential effects of Brexit on UK pensions

With the referendum date now set for 23 June 2016, this document looks at some of the key legal issues for occupational pension schemes should the UK vote to leave the EU.

The precise outcome would, of course, depend on the Brexit model adopted and any transitional provisions agreed, as this would determine the extent to which the UK would still be required to comply with EU law. It is likely to take at least a year or two, some say much longer, for exit terms to be negotiated. For more information on the background and potential Brexit models, please see our Making sense of Brexit brochure.

In any event, substantial legal changes are unlikely to come about immediately upon exit. EU based laws that already form part of UK legislation would not simply disappear. Even in the absence of EU membership, it is difficult to imagine a wholesale repeal of pension laws on fundamental matters like equality. In addition, some elements of UK pensions legislation comply with European law but have been introduced as a result of drivers from within the UK, the Pension Protection Fund (PPF) being one example.

Legal change in some areas could, however, happen gradually over time, as the UK parliament and courts would, unless otherwise agreed, no longer be obliged to enact or interpret law by reference to current EU treaties and directives. Additionally, schemes could see a reduction in future EU based rules and regulations, perhaps including some of those currently in the pipeline.

This document does not consider the impact of potential post-Brexit financial volatility – views differ on this. However, DB schemes in particular should bear in mind that, depending on the business, focus and sector of the scheme employer, there could be an impact on covenant. Investments (particularly those based elsewhere within the EU), contingent assets and funding levels could be affected. UK schemes might also be excluded from opportunities provided by Capital Markets Union, a plan intended to promote cross border capital flows and generate a new range of infrastructure investments.

The table on the next page summarises some of the key legal issues and potential implications of Brexit for occupational pension schemes. Note that the implications would in each case depend on the precise exit terms agreed.
Issue

**Anti-discrimination/equal treatment legislation** – preventing discrimination in pension provision on basis of age, sex, race, disability, part-time status and for same sex partners.

**PPF/insolvency** – level of benefits provided by PPF in the event of employer insolvency affected by EU insolvency law (eg Waterford Crystal case – less than 50% protection is insufficient).

**Scheme funding** – current scheme funding requirements (under Pensions Act 2004) based on EU law.

**Draft IORP II Directive** – if enacted, would impose new obligations on pension schemes (funding, governance and communications focus – extent of changes still unclear).

**Cross-border schemes** – EU law has had effect of discouraging DB schemes from operating cross-border due to onerous funding requirements imposed on those that do. These requirements may be amended under the new IORP Directive but it is not yet clear how.

**Role of European Insurance and Occupational Pensions Authority (EIOPA)** – EU advisory body that has proposed a levy on schemes (not yet confirmed).

**Pensions investment** – financial services legislation heavily EU regulated.

**Guaranteed Minimum Pension (GMP) equalisation** – UK government’s proposal, based on its own contentious interpretation of EU case law, to force schemes to provide GMPs on a sex equalised basis.

**Sex based actuarial factors** – exemption for sex based actuarial factors in annuity pricing struck out in Test-Achats CJEU case, though many pension schemes still retain sex based factors internally.

**TUPE transfers** – exemption under TUPE for occupational pensions: Beckmann and Martin CJEU cases cut a swathe through this exemption. Business transfers involving occupational pensions would be simpler if these cases did not need to be followed.

**Scottish schemes** – what happens if Scotland becomes independent and negotiates to remain in EU?

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**Potential effect of Brexit**

Unlikely to change substantively, though query whether some elements, such as age discrimination, could eventually be relaxed in relation to pension schemes.

Unlikely to change substantively for the foreseeable future, if at all. It would probably be politically unacceptable to reduce level of PPF coverage.

Potential for some deviation from European model over time but key funding requirements unlikely to change in short to medium term.

Depending on timing of exit and adoption of new IORP II Directive, possible that UK might not be bound by this. Note that current IORP Directive has been incorporated into UK law so its provisions would continue to apply, though there might be scope for UK to deviate from these in future.

Assuming cross-border funding requirements no longer form part of UK law, UK might start to operate more cross-border schemes – but those operating across multiple EU jurisdictions would still need to comply.

EIOPA may no longer have powers in respect of UK schemes and a new scheme levy, if introduced, might not apply in UK, depending on nature of deal agreed.

Financial services industry likely to continue to comply with most EU regulation – to facilitate participation in what is a sizeable market for that industry.

Proposal to legislate for equalisation of GMPs “on the backburner” for some time. This could fall away if UK courts were no longer bound by EU authorities.

Schemes that retain sex based factors could most likely continue to do so. There may be scope for UK annuity providers to revert to sex based factors.

**Beckmann** and **Martin** are now reflected in UK case law but if these were no longer binding authorities, UK courts may feel able to deviate from them. There could also be scope for UK government to amend parts of TUPE itself.

Difficult to tell how this would work in practice – Scottish solution would be heavily negotiated.