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SPC News No. 5, 2008

If this issue of SPC News was forwarded to you, and you would like to receive a copy direct from us, please e-mail Carla Smidt at SPC

(carla.smidt@spc.uk.com)

SPC to feature at the Pension Show

SPC has accepted an invitation to run two sessions at this year's Pension Show at the London Excel on 19 November.

The first session is entitled: "Who is the right guardian of defined benefit promises?"

Our scene setter will be Duncan Howorth (President, SPC and Managing Director, Jardine Lloyd Thompson Benefit Solutions) and we will hear the views of Fraser Smart (Director, Northern Region, Buck Consultants), Emma Watkins (Business Development Manager, Metlife), and Kay Carberry (Assistant General Secretary, TUC). There will be contributions from the floor and discussion moderated by Duncan Howorth.

Our second session is a panel discussion on "Who should be doing what to make defined contribution a success?

This session will be led by Sir James Hodge (Chairman, SPC) and there will be contributions from Natalie Winter (Aberdeen Asset Management and Chairman SPC Investment Committee), Cathy Robertson (Standard Life and SPC Council), Jason Coates (Wragge & Co. and SPC PR Committee and Paul McGlone (Aon Consulting and SPC Council).

Contributions from the floor and interactive voting will be moderated by Sir James Hodge, who will sum up.

Featured will be results of research commissioned by us from Populus, specifically for these sessions.

Please put the show in your diary and make sure not to miss the SPC sessions. Booking is via http://web.incisive-events.com/inv/2008/11/professional-pensions-show/book-now.html

Clifford Sharp

We are sad to report the death on September 10th of Clifford Sharp. He was President of SPC from 1966 to 1968 and maintained a keen interest in SPC and the pensions world generally.

SPC was represented at his funeral by the Chairman, Sir James Hodge, and we have made a donation in his memory to the Salvation Army.

SPC London Evening Meetings

Details of forthcoming meetings are as follows:-

Date	Subject	Speakers	Venue
November 13, 2008	An Equity Analyst's View of Pension Liabilities	Peter Elwin (Cazenove)	Hammonds 7 Devonshire Square Cutlers Gardens London EC2M 4YH
November 18, 2008	Supporting Employers on Pensions in a Changing Workplace	David Lebrecht (David Lebrecht Consulting Limited)	KPMG 8 Salisbury Square London EC4Y 8BB
December 17, 2008	Investment Options for DC Members	Adam Potter & Hamish Wood (Aegon Scottish Equitable)	KPMG 1 Puddle Dock London EC4V 3PD

We are grateful to **Hammonds** and **KPMG** for hosting the above meetings. All meetings are preceded by refreshments at 5.00 p.m.; meetings begin at 5.30 p.m. and are expected to end at 6.45 p.m. following questions and answers.

The handout for the September London evening meeting, which was addressed by Girish Menezes and Terry Ritchie (Capita Hartshead), whose topic was "**Is your Pension Administration Team in the Premier League?**", is available. For a copy, please click here.

Also available is the handout for the October meeting, addressed by Billy Burrows (MPL Wealth Management Limited), his topic was "**Decumulation**". For a copy, please click here.

Draft Registered Pension Schemes (Transfers of Sums and Assets) (Amendments) Regulations 2008

We have corresponded with HMRC on the draft Registered Pension Schemes (Transfers of Sums and Assets) (Amendments) Regulations 2008.

For a copy of the correspondence, which the SPC Legislation Committee views as helpful, please click here. ■

SPC responds to DWP's consultation paper on risk sharing

We have responded to DWP's consultation paper on risk sharing. There was a link to the consultation paper in **SPC News no. 4, 2008**.

For a copy of the response, please click here.

We very much welcome this thorough examination by DWP of the possibilities for expanding the flexibility available to employers, who might wish to introduce schemes which share pre and post retirement risks in different ways to existing defined benefit and defined contribution models.

It is important that this flexibility is available and it is therefore also important that this consultation leads to some concrete and early action by DWP to facilitate the adoption of these schemes by employers who wish to do so. Employers will not necessarily wish to adopt the exact models outlined in the consultation, so it is important that legislation does not build in pre-conceptions on employers' wishes, and eventually hinder flexibility by doing so.

At present, the tide is flowing strongly away from defined benefits towards pure defined contribution, and we would expect that, for the short term at least, the tide will continue to flow in this direction. However, in a short time in pension scheme terms, we expect some of the shortcomings in the defined contribution model to become increasingly apparent, as more people come to rely on it as a source of benefits, rather than as a means of accumulation.

When this happens, the existence of well thought through risk sharing models, which are the subject of current consultation, will, we expect, prove its worth.

Risk sharing schemes do have their complexities and, by their very nature, do expose members (and the sponsoring employer) to risks. However, these complexities and risks must not give rise to an unduly cautious attitude to the legislation for risk sharing schemes. We need to bear in mind that the government already permits pure defined contribution schemes, which expose members to greater risks than the schemes on which it is now consulting, and is itself devoting considerable resources to developing personal accounts, which will also expose members to more risks than risk sharing schemes.

We expect that an important factor in employers' decisions, on whether to embrace risk sharing schemes in due course, will be their view on the stability of the legislative framework within which they will operate. For a large period of the existence of defined benefit schemes, one of the most difficult challenges for employers, who chose to support them, has been government intervention through legislation, which effectively has changed the provision which they originally intended to make and, often at the same time, has made it increasingly difficult to change course on the type of provision which they offer.

A more positive general approach to risk sharing in this consultation paper would have helped to allay fears among employers that history will repeat itself in the case of risk sharing.

The way in which pensions are accounted for in company accounts is another reason for the decline in defined benefit schemes. We appreciate that this is not a matter for legislation but, nevertheless, we agree with the concerns which Mike O'Brien recently expressed to the Accounting Standards Board over changes to FRS 17. More generally, for as long as risk sharing schemes are accounted for in the same way as final salary, employers will be put off from offering them. ■

SPC responds to Pensions Regulator on cash equivalent transfer values

We have responded to the Pensions Regulator's consultation on cash equivalent transfer values.

For a copy of the response, please click here.

Our general comments were:

1. We welcomed the intention of the Pensions Regulator to publish guidance.
2. We noted, however, that the guidance was due to be finalised very close to the effective date for the relevant regulations, particularly since schemes might have to make significant changes to their approach to transfer values in the light of the regulations, and might already have been doing so with assistance from their professional advisers. We suggested that the published guidance recognise this.
3. We suggested that, where the guidance refers to "a best estimate", it would be better to refer to "the trustees' best estimate."

It could be argued that a cash transfer sum should take into account that the administrative costs for a member, who leaves within the first two years, are relatively larger, due to the lower accrued benefit, in comparison with members with longer service. Applying the same basis as CETV does not reflect this and the draft guidance does not acknowledge this, although provision for administrative expenses was mentioned later in the document. ■

DWP consultation on pension sharing legislation

We have responded in detail to DWP's consultation on the pension sharing legislation. There was a link to DWP's consultation paper in **SPC News no. 4, 2008**.

For a copy of the response, please click here.

Our main comments were as follows:-

1. DWP suggested that dealing with pension sharing is a relatively small part of a pension scheme's workload. In fact, the experience of our committee members, who play a part in administering or advising on a large proportion of the pension sharing cases which arise, is that, even after eight years of pension sharing, a disproportionately large share of the delay, dissatisfaction and error which arise in the operation of schemes is attributable to pension sharing.
2. If nothing else comes out of this review, we would like to see a consolidation of the existing legislation, with the removal of any overlaps or inconsistencies, and the publication of guidance which could be drawn upon by family lawyers and pension practitioners, so that each constituency can better understand the other's starting point on pension sharing. Our members continue to have to deal with incorrect pension sharing orders. For example orders which require only main scheme benefits to be shared and not AVCs; attempts to insert a fixed amount in the forms relating to English cases, rather than a percentage and attempts at a "Hallam formula"; and lack of clarity on the splitting of expenses.
3. We would like to see a maximum time limit in England and Wales for the provision of all necessary supporting information, similar to the two month limit in Scotland, after which a pension sharing order would become invalid. This would help to prevent cases dragging on for years unresolved, which can occur at present.
4. We would support the introduction of a statutory right for a former spouse to have an estimate of the value of their pension credit, subject to them meeting the cost. This information is needed to properly advise former spouses on the use of their pension share, but schemes are not currently required to provide it.
5. There should be an explicit exemption for trustees from the requirement to take suitable investment advice before selecting an external arrangement, where liability for a pension credit is being discharged. The existing requirement to take suitable advice, does not sit comfortably with the default external transfer option.
6. We suggest that there should be an overriding right for trustees to deduct costs from a members' benefit/pension credit, irrespective of provisions in scheme rules. Where scheme rules do not give an overriding right, and a member refuses to meet costs, cases can be very slow to resolve.
7. We would advocate a statutory provision, which allows trustees to reject a pension sharing order if they are not served with a "pre-order notification". The absence of a pre-order notification does not currently invalidate an order, but it can prevent trustees from recovering any costs or setting out their "additional requirements".
8. Clarity is needed on the valuation of pensions in payment. We understand that DWP has expressed a view that the benefit should be valued at the valuation date, although this is probably technically incorrect and could cause the former spouse loss if the member deliberately delays the start of the implementation period (and the CETV is falling). The alternative approach would be to value at the date of transfer. This would be more straightforward for money purchase schemes.

9. We would like greater clarity on what schemes may charge for, since the pension sharing legislation is not a precise match with the disclosure requirements. In particular, it appears from The Pensions on Divorce etc. (Charging) Regulations 2000 that, if a pensioner under normal pension age requests a divorce quotation, the scheme cannot charge for this as it is not specifically mentioned in the regulations.

We understand that the government is considering using a different transfer value basis for divorce and it would be helpful to have confirmation of the government's intention in this area. There would be resistance to the costs which would be imposed by having to develop separate systems for dealing with transfer values arising from pension sharing. ■

SPC responds to Pensions Regulator on record keeping

We have responded to the Pensions Regulator's consultation document on record keeping, reported in **SPC News no. 4, 2008**.

For a copy of the response please click here.

We agreed with the Regulator, that high standards of record keeping are important and, without taking an unduly prescriptive approach, we consider that the consultation document has identified some important factors in achieving high standards and provided some useful examples of the benefits of doing so, and some warnings of what can go wrong if there are problems with record keeping.

In our view, there is not a systemic problem with record keeping. Attitudes of trustees and employers do vary. Some are more inclined than others to view record keeping and administration as a commodity, to be acquired at the lowest available price and this is bound to have an impact on administrative and record keeping outcomes.

We therefore look forward to continuing to work with the Pensions Regulator and others, to seek cost effective improvement in record keeping, where improvement is necessary.

There were no questions in the consultation document, on knowledge and understanding of administration, data and record keeping. We would, however, challenge the possible implication that knowledge and competence in the administration area are poor. The percentage of staff employed by third party administrators with a relevant qualification does not provide a direct indication of competence. Third party administration is increasingly characterised by high volumes of transactions which need to be processed quickly and accurately. It is vital in this situation that the people doing the processing understand exactly what is required of them to achieve specific tightly defined tasks, and that their performance in doing so is closely monitored by suitably qualified people. However, it is not by any means always necessary for the processors themselves to have a formal qualification to do this processing. ■

DWP reviews employer consultation requirements

DWP has sought our views, as part of its review of the employer consultation requirements.

Ministers gave a commitment during the passage of the Pensions Act 2004, that the requirements might need to be amended as pension schemes develop and innovate over time.

Sections 259-261 of the Pensions Act 2004 provide for regulations to prescribe the circumstances when employers should consult when prescribed decisions are proposed for certain pension schemes. The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 set out the details of this requirement, including the changes which trigger consultation, the employers which are required to consult and who they should consult with. The requirement applies to all employers with 50 or more employees.

The requirement was introduced to ensure that pension scheme members are aware of the prospective changes to their pension arrangement and have some opportunity to comment on these changes.

At the time of preparing this issue of SPC News, our response was under preparation. ■

Pensions Regulator's powers acknowledged in United States with Sea Containers FSD

On 19 September 2008 the US Bankruptcy Court approved a settlement based on the Financial Support Directions (FSDs) issued by the UK Pensions Regulator to Sea Containers Limited (SCL), effectively acknowledging the reach of the Regulator's powers.

FSDs require a connected or associated company to provide financial support to

a pension scheme in the same group, where the sponsor company is a service company or has insufficient funds and assets. SCL is the US listed Bermudan parent of the UK service company Sea Containers Services Limited (SCSL), which sponsors the Sea Containers pension schemes. SCL and SCSL are in Chapter 11 bankruptcy proceedings in the US.

On 5 February 2008 the Determinations Panel of the Regulator issued SCL, a non-UK company, with FSDs. Without the FSDs, the trustees' claim was principally against SCSL alone, rather than the better resourced SCL. The trustees and SCL reached an agreement which would put the FSDs into effect, by providing financial support to the schemes, subject to the US Bankruptcy Court's approval. SCL's other main creditors, a group of bondholders, mounted a challenge to the settlement, as it would reduce the pot of money available to them, but were unsuccessful.

The US Bankruptcy Court has approved the agreement for financial support as a key component of the Chapter 11 plan for SCL's bankruptcy. This means that the pension scheme will rank equally with SCL's other unsecured creditors in the Chapter 11 proceedings; subject to final approval of the Chapter 11 plan, the trustees should receive significant funding for the scheme as a result.

The US Bankruptcy Court's decision has a fundamental impact both for trustees of UK pension schemes sponsored by groups with US parents, and those US parent companies:

1. The US Bankruptcy Court has acknowledged the role and powers of the Regulator and effectively, by approving this settlement, it has accepted the validity of the FSDs. However, the context of its approval is that overall the settlement reached is reasonable in the circumstances.
2. Chapter 11 bankruptcy proceedings create an "automatic stay" period, which protects debtors from their creditors, who cannot seek payment of debts. The bondholders argued that the issuing of the FSDs was a violation of the automatic stay, giving the trustees "an unwarranted jump in priority". The US Bankruptcy Court rejected this argument, instead stating that the FSDs were not an attempt to assert a claim or collect a debt, and should not be ignored as invalid.
3. The US Bankruptcy Court confirmed that buy out is an appropriate basis for valuing the pension schemes' claims, in line with the Section 75 debt calculation, which is used to gauge the maximum extent of financial support which may be sought under an FSD. It confirmed that UK pensions law should be applied in relation to the valuation and method of calculation, as the schemes are created, operated and regulated in the UK.

The impact of this judgment is that any US parent, which believes itself buffered from UK pension liabilities, may be exposed to the UK Regulator's regime; a regime which potentially has the power to pierce the corporate veil and the automatic stay period of protection in bankruptcy. ■

The Regulator publishes its response to the consultation document on mortality assumptions

In February the Pensions Regulator issued the consultation document "Good practice when choosing assumptions for defined benefit pension schemes with a special focus on mortality". We summarised the document in **SPC News No. 2, 2008**. The Regulator received 80 replies to this consultation and it has now published its response to them.

The key points are:

- Mortality assumptions will not be used as a "primary trigger" as proposed in the initial consultation document. Instead, mortality assumptions will only be scrutinised where a scheme is flagged up by its existing funding triggers. The Regulator describes this as a "secondary trigger".
- Where the secondary trigger applies, the Regulator will normally ask trustees to justify their assumptions in the light of the advice they have obtained.
- Although the Regulator will use long cohort with some form of underpin as the secondary trigger, it recognises that other approaches (e.g. medium cohort with a stronger underpin) could achieve the same effect. It will therefore look at the underlying life expectancies used in a scheme's valuation at two ages (with and without allowances for improvements) to assess against the secondary trigger.
- The Regulator still remains silent on the level of underpin referred to above. It also says that the judgement it will place on the mortality assumptions adopted by the scheme will depend on the circumstances, and that practice will evolve over time.
- The Regulator confirms that the guidance applies to valuations with an effective date after 21 September 2008 rather than from March 2007.
- The Regulator expects the impact of mortality assumptions to be clearly demonstrated and suggests that ways of doing this are by showing the impact on technical provisions or life expectancy, but it does not intend to be prescriptive on the method used.
- If schemes strengthen the mortality assumption in the light of the guidance, the Regulator acknowledges that contributions are still subject to the employer affordability criterion, so a longer recovery plan might be acceptable.
- The guidance for trustees on the process for determining mortality assumptions will be released with some modifications.

The Regulator will amend the earlier (May 2006) statement "How the Pensions Regulator will regulate the funding of defined benefits" to reflect these changes.

Although it has removed the mortality assumption as a primary trigger, it is worth noting that the Regulator's analysis of funding plans last year showed that 70% of schemes triggered, and would therefore have their mortality assumptions scrutinised under this new guidance. ■

Pensions Regulator's final guidance on transfer values

The Pensions Regulator has issued its final guidance on transfer values from 1 October 2008. There are few changes to the draft guidance and the salient points are noted below:

- It is clarified that the guidance is for private sector schemes only.
- The position on allowing for options favourable to the scheme has not changed. The Regulator continues to state that such options must not be allowed for.
- Statements that the funding and cash equivalent bases must be "capable of rational reconciliation" have been dropped. The final version of the guidance only says that the trustees should "consider how the two bases relate to each other".
- The Regulator still maintains that trustees should not normally reduce cash equivalents where the employer's covenant is strong and the shortfall is being remedied over a relatively short period.
- The Regulator has changed its position on when it might be appropriate to base reductions on an existing GN11 report. It now says that either:
  - the maximum reductions permitted by the GN11 report should not be materially greater than those that would result from a new insufficiency report; or
  - the GN11 report provides sufficient comfort that reductions lower than the current maximum can still be supported (i.e. the actual proposed reductions are permitted by the GN11 report and are lower than those that would currently be permitted).
- There is no longer a suggestion that allowance for winding-up expenses is only appropriate when winding-up is potentially imminent.
- The steer towards applying an underpin for transfers out after a transfer in has been dropped. Trustees are now simply expected to discuss the issue with their actuary and decide the way forward.
- The final guidance only requires information about discretionary benefits and options to be provided on request (not automatically with the statement of entitlement). ■

PPF levy for 2008/9

Trustees of final salary schemes have started to receive their Pension Protection Fund (PPF) levy invoices for 2008/09. The chances of successfully challenging the amount of the levy are small, unless there is a clear error in the calculation.

PPF levies for the period 2008/9 are calculated in accordance with a paper published annually by PPF, known as the 'Determination'.

This sets out the factors by which PPF levies for that year are to be assessed and paid. While invoices must be paid within 28 days of the date of the invoice, any queries/appeals must also be made within this time frame. Thereafter, trustees have 28 days to escalate their appeal. Only in exceptional circumstances will an appeal outside these time limits be allowed by PPF.

If trustees believe the amount shown on their levy invoice to be incorrect, they must identify the specific area with which they are concerned, and contact the appropriate party:

- D&B – to check that they have used the correct failure score/probability of insolvency
- PPF – to query the scheme–based levy or the underfunding risk factor of the risk–based levy or for any other query.

Appeals must be made to D&B and may only be made on grounds of D&B's use of information publicly available at one of D&B's standard sources before 31 March 2008. D&B has a five–stage process for dealing with these appeals.

Trustees may only appeal against the calculation of their PPF levy by reference to information submitted to PPF/Pensions Regulator on or before 31 March 2008. PPF has two main procedures for handling complaints:

- informal – deals mainly with invoice issues (eg invoices sent to wrong party/ address)
- formal – deals mainly with issues related to whether PPF correctly followed the rules set out in the 'Determination' when calculating the levy (eg more up–to–date information would have produced a lower levy invoice amount).

Following a decision at the formal stage, an application can be made to the PPF Reconsideration Committee and, ultimately, the independent PPF Ombudsman. While it is understood that there have been numerous appeals against PPF levy calculations, to date there have only been a limited number of PPF Ombudsman decisions.

Where PPF calculates the levy correctly, in accordance with the 'Determination' and based upon information available at 31 March 2008, there is currently little prospect of persuading the PPF Board/Ombudsman that the amount of the levy should be reviewed. There is an argument that PPF has an overarching discretion to review the amount of the levy. In addition, it could be argued that the 'Determination' may also allow PPF a wide discretion to obtain amended information for the purposes of recalculating the risk–

based levy. However, until arguments along these lines are tested and upheld in the courts, it is likely that the PPF Board will continue to resist appeals on the grounds that there is only a limited discretion. Even if the discretion is found to be wider, it ought only to be exercised in exceptional circumstances, having regard to the greater need to ensure consistency and certainty for all levy payers.

The Pensions Bill 2008 contains provisions to allow PPF to charge interest on late levy payments. The regulations, which will facilitate this, are expected to come into force in April 2009, and are likely to apply to levy invoices for 2009/10. ■

Consultative document issued by European Commission on harmonisation of solvency rules

The European Commission has issued a consultative document on the harmonisation of solvency rules applicable to institutions for occupational retirement provision.

For a copy please click here.

At the time of preparing this issue of SPC News, we had the document under consideration. ■

Levy for 2009/10

PPF has issued a consultation document on proposals relating to the 2009/10 levy. For a copy please click here.

It has also issued a draft Determination. For a copy, please click here.

The levy will largely be calculated in line with the basis applying for 2008/9, i.e. 31 March 2008 will continue to be the measurement date for underfunding and insolvency risk. However, the 2009/10 levy invoice can be reduced on the basis of contingent asset certificates and deficit reduction contribution certificates being submitted by 31 March 2009 and 7 April 2009 respectively.

The levy scaling factor is expected to be finalised in November, but the draft consultation indicates it will be 2.22 (it was 3.77 in 2008/9). The overall levy estimate for 2009/10 will be increased only in respect of indexation and is targeted at £700 million.

The funding thresholds for the levy taper remain the same as 2008/9. No risk-based levy will be payable for schemes more than 140 per cent funded on a section 179 basis, and tapering relief will apply for schemes between 120 per cent and 140 per cent funded. The levy cap at 1 per cent of liabilities remains unchanged.

Contingent assets, deficit reduction contributions and block transfers must now be certified via the Pensions Regulator's Exchange. There will be no reminders from PPF about recertifying contingent assets.

PPF confirmed that Dun & Bradstreet has been appointed as its insolvency risk provider for three years, subject to contract.

Deadline dates for 2009/10 and 2010/11

The deadline for the submission of scheme return data and the measurement date for underfunding and insolvency risk for the 2009/10 levy year was 31 March 2008. The following deadlines are also relevant:

2009/10 Levy

- 31 March 2009: Certify new contingent assets/recertify existing ones via the Exchange and send PPF any supporting documents in hard copy by the same deadline.
- 7 April 2009: Certify deficit reduction contributions (via the Exchange only - from November 2008) (contribution to be received by 31 March 2009).
- 30 April 2009: Certify full block transfers (i.e. transfers of 100 per cent of assets and liabilities) – partial block transfers occurring between 1 April 2008 and 31 March 2009 will not be taken into account for the 2009/10 levy.

2010/11 Levy

- 31 March 2009: Submit levy-related information via the Exchange.
- 31 March 2009: Submit information to Dun & Bradstreet for the calculation of sponsor failure scores.
- 30 April 2009: Submit block transfer certificates for material partial transfers (minimum £1.5 million or 5 per cent of scheme assets, whichever is less).
- 31 March 2010: Certify new contingent assets/recertify existing contingent assets.
- 7 April 2010: Certify deficit reduction contributions.
- 30 April 2010: Certify full block transfers.

The consultation period ended on 23 October 2008. PPF intends to publish a summary of responses, together with the determination and confirmation of the levy scaling factor, in November. It is also expected that the 2010/11 levy will be on a similar basis to 2009/10, but for 2011/12 it will take account of long-term risk.

For a copy of our response to PPF's consultation, please click here. ■

ECJ Cases

Heyday

The Advocate-General (AG) of the European Court of Justice gave his opinion on the Heyday case on 23 September 2008. His opinion is that the Equality Directive covers compulsory retirement, which means it is a form of direct discrimination.

Heyday is a UK High Court case which challenges the right of employers under UK law to require staff to retire from age 65. The basis for the challenge is that the UK Age Regulations have not properly implemented the Equality Directive. The High Court has made a reference to the ECJ on the interpretation of the Equality Directive. As the AG has now given his opinion, an ECJ ruling on the issue is expected later this year, before the case is referred back to the High Court.

This AG opinion (which the ECJ may well follow) is in line with the previous ECJ Palacios ruling. However, unlike the Palacios case, in Heyday there was no argument before the ECJ as to whether this compulsory retirement age can be justified. It will be up to the High Court to determine if the UK can justify having a compulsory retirement age on the grounds that it is an appropriate and necessary means of achieving a legitimate aim. It is only once the High Court has ruled on this (perhaps in about a year) that UK employers will know whether compulsory retirement at age 65 is permitted or not. However, the High Court ruling will probably be subject to further appeals.

Bartsch

In the German *Bartsch v Bosch* and Siemens case, in line with the AG's opinion delivered earlier this year, the ECJ ruling published on 23 September 2008 held that there was no EU protection against age discriminatory practices, which were in place before the Equality Directive had to be transposed by Member States. This meant that the practice in 2004, of not paying a survivor's pension where there was an age gap of more than 15, years was not discriminatory.

The UK Age Regulations have a specific exemption allowing survivor pensions to be actuarially reduced where the survivor is more than a specified number of years younger than the member. In the AG opinion in Bartsch such practices were noted as being age discriminatory, but it was suggested that a scaled reduction may be acceptable. Unfortunately, the final ECJ ruling on this case did not comment on this point. This means it is still uncertain if the exemption in the Age Regulations, which allows actuarial reductions where a partner is more than a specified number of years younger than the member, is compliant with EU law. ■

SPC response on monitoring and scrutiny of actuarial work

We have responded to the Financial Reporting Council/Professional Oversight Board discussion paper on monitoring and scrutiny of actuarial work. There was a link to the discussion paper in **SPC News no. 3, 2008**.

For a copy of the response, please click here. ■

FRC Discussion Paper: promoting actuarial quality

We have responded to the FRC discussion paper "Promoting Actuarial Quality". There was a link to the discussion paper in **SPC News no. 3, 2008**.

For a copy of the response, please click here. ■

Conflicts and company directors who are trustees

Introduction

Certain provisions of the Companies Act 2006, which came into force on 1 October 2008, relate to the duties owed by directors to their companies and ultimately the shareholders. The Act develops the common law position. Under s175 of the Act there is a statutory duty on company directors to avoid a situation in which they have, or can have, a direct or indirect interest which conflicts, or possibly may conflict, with the interests of the company. However, this duty will not be breached if the matter has been authorised by the non-conflicted directors of the company (or possibly, in some circumstances, the shareholders).

Being a trustee of an occupational pension scheme, whether as an individual or as director of a corporate trustee, can expose a director to potential or actual conflicts of interest with that of the company of which he or she is a director. It is therefore important that company directors who are trustees obtain confirmation that they have the necessary Companies Act authorisation. Similarly, directors of a corporate trustee may be exposed to conflicts or potential conflicts between that director role and other roles they may have, such as with the employer company. Therefore such directors should check that they have any required authorisation to continue with these roles. Responsibility for

compliance with the Act's requirements rests with the individual directors and the company of which they are directors.

Authorising conflict

Authorisation of actual or potential conflict is possible by the directors (or, in some circumstances, the shareholders) if they have the power to do so. This depends upon whether the company of, which the trustee is director, is a private or public company (both as defined in the Act) and on the company's constitution. Directors should therefore satisfy themselves if they have the power under the company's constitution to provide the necessary authorisation for those of its directors who require it.

The directors who provide the authorisation must not themselves be conflicted, which means, in the pensions context, that directors of an employer company, who are trustees of the occupational pension scheme, cannot take part in the employer company's authorisation process. This could mean that the necessary quorum of directors cannot be achieved for the authorisation and there may be alternative means of authorisation, such as by the shareholders.

Under the Act, if company directors have an unauthorised conflict they will be in breach of their statutory duty to the company, and the company itself could potentially enforce any breach against them. The company's remedies against its directors include court action for damages, and the director's removal from office. It remains to be seen how this would apply in the pensions context, where, if the employer company taking such action had itself appointed its directors as trustees, it presumably saw this as being beneficial to the trustee/employer relationship for those directors to be trustees.

Wider conflicts issues

The Act covers the issue of conflicts of interest between a company and its directors from the perspective of a company, but it is equally important to view the issue from the perspective of the pension scheme trustees. At common law trustees must not allow their judgement to be affected by conflicts of interest. Trustees should have, and be seen to have, a procedure for identifying, monitoring and managing conflicts. The Pensions Regulator sees conflicts management as integral to good scheme governance and has published guidance for trustees on the issue. It sees having a conflicts protocol as being particularly important. In the interests of transparency the protocol could specify that any trustees, who are also directors, have the necessary authorisation under the Act.

SPC Poll

In our latest SPC online poll, we asked "Do you think that the new duty to avoid conflicts under the Companies Act 2006, and the procedure for allowing Trustee Directors to authorise conflict situations, will change the way in which Trustee Directors manage conflict situations?"

The result was:-

Yes	**71%**
No	**29%**

About SPC

SPC is the representative body for the providers of advice and services needed to establish and operate occupational and personal pension schemes and related benefit provision. Our Members include accounting firms, solicitors, life offices, investment houses, investment performance measurers, consultants and actuaries, independent trustees and external pension administrators. Slightly more than half the Members are consultants and actuaries. SPC is the only body to focus on the whole range of pension related functions across the whole range of non-State provision, through such a wide spread of providers of advice and services. We have no remit to represent any particular type of provision.

The overwhelming majority of the 500 largest UK pension funds use the services of one or more of SPC's Members. Many thousands of individuals and smaller funds also do so. SPC's growing membership collectively employ some 15,000 people providing pension-related advice and services.

SPC's fundamental aims are:

(a) to draw upon the knowledge and experience of Members, so as to contribute to legislation and other general developments affecting pensions and related benefits, and

(b) to provide Members with services useful to their business.

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