

## Article 50 triggered: implications for employers and pension schemes

March 2017

### Overview

**The Prime Minister has issued formal notice of the UK's intention to leave the European Union, triggering the start of a two-year negotiation process. The countdown has begun – but a countdown to what?**

As with the referendum vote itself, in practical terms nothing has changed with the triggering of Article 50, except that the timetable has crystallised. The difficulty is that what will happen at the end of the two-year negotiation period is still unknowable – talks could result in anything from an agreement to an extension of time, or to the UK leaving the EU with no deal and years of negotiation to follow.

In this context, what should employers and pension schemes focus on over the months ahead? Some may already have started contingency planning, but here are the key action areas to focus on now that formal negotiations are under way.

### Governance and communications

**Any internal Brexit team should ideally include members with HR and pensions remits – or you should seek to establish formal lines of communication between these individuals and the team planning the organisation's response to Brexit.**

- For HR, being engaged from an early stage with the employee and benefits implications of the business strategy will be crucial, particularly if relocations, restructurings, downsizings or cost-saving measures are a possibility.
- Pension scheme trustees also need to be aware of the group's strategic plans, particularly in relation to employers participating in the scheme. This is a good time to review confidentiality agreements and information protocols to ensure that shared information is appropriately protected.
- It's also important to ensure that communications – to the workforce, to pension scheme members and to external audiences – are appropriately aligned, to avoid mixed messages.

## Employment contingency planning

- Consider individual/group communications to alleviate employee concerns. These should be carefully scripted based on what is actually known and what comfort, if any, can be given on operations, relocations, jobs and employment terms.
- Conduct an audit to identify UK nationals working elsewhere in the EU or in Iceland, Norway, Liechtenstein and Switzerland, as well as nationals from those countries working in the UK. This will help to plan for the worker mobility restrictions and labour shortages that could result from Brexit.
- Review European expatriate and secondment arrangements. There may be risk exposure if arrangements have to be terminated early and there is no job for individuals to return to in their home country. Should pending arrangements be delayed?
- Check and monitor the immigration status of UK inbound and outbound expatriate workers, the duration of their stay abroad or in the UK and the date on which they can apply for permanent residence or citizenship (including potential dual citizenship) under local rules.
- Is it worth bringing some workers into the UK now, or encouraging them to secure their UK immigration status or citizenship rights? This may help to manage the risk that they will be affected by future immigration restrictions.
- How would the business fill possible skills or service gaps if Brexit affects customer demand for products or services, or if restrictions on worker mobility mean that employees are prevented from working temporarily or that jobs could be put at risk? Anticipate the need for possible redundancies.
- Check whether contractual mobility provisions or provisions with geographical restraints linked to the EU or EEA (for example, restrictive covenants, confidentiality or IP obligations) need to be bolstered or amended to address any unenforceability risks that will follow Brexit.
- Could Brexit or related proposals trigger structural change provisions or a duty to inform and consult any European Works Council (EWC)? For UK-based EWCs, check rights and obligations to amend or renegotiate the agreement and the process for doing so.

## Pensions contingency planning

- Defined benefit schemes should continue to focus on risks to their sponsoring employers' strength and ability to support the scheme. What is the expected impact for the wider corporate group and, specifically, for scheme sponsors of different possible exit scenarios?
- From a corporate perspective, does the scheme present risks that could be mitigated? Are there opportunities to agree funding and/or investment changes to reduce potential volatility?
- Are current integrated risk management arrangements sufficient? Trustees may wish to monitor covenant strength and investment issues more frequently during this period of uncertainty.
- Check the terms of any existing contingent funding arrangements – in what circumstances are reporting or funding requirements triggered (for example, by a negative change in corporate credit ratings)?
- Market volatility can lead to pricing opportunities for schemes that are looking to reduce risk. Is the scheme buy-in/buyout ready if particular pricing triggers are met (see, for example, our guide: '[Ten steps to buyout for UK pension schemes](#)')?
- Currency fluctuations can also create opportunities to lock in contingent funding arrangements, for example from an overseas parent company. For more information, see our [guide to alternative financing options for pension funds](#).
- For members of DC schemes, a key issue will be the ongoing appropriateness of member options (bearing in mind that long-term outcomes are not directly linked to short-term volatility). Trustees and employers providing contract-based arrangements may wish to consider reminding members to review their investment options regularly in light of their personal objectives.
- The DC Code requires trustees to be aware of, and communicate with members about, the protections that apply to members' DC pension savings, for example in the event of provider failure. Assessing and, where relevant, improving those protections should be a priority – see our '[Quick guide to the security of DC assets](#)' for more information.

## Known knowns

Major EU-driven changes to data protection rules will take effect from May 2018 under the General Data Protection Regulation (GDPR). These will affect employment data processing, pension scheme administration, information provided to members and agreements with data processors such as third-party administrators. Breach notifications will be a major compliance issue (with potentially significant fines attached). As the Information Commissioner's Office develops guidance this year, employers and pension schemes need to revisit practices and work together to establish appropriate new protocols in this area. See, for example, our [GDPR webpage](#) and separate [guide](#) to the pensions implications of the GDPR.

The IORP II Directive (the revised EU Directive on the activities and supervision of institutions for occupational retirement provision) is due to be implemented by Member States by 12 January 2019. The likelihood and impact of implementing this Directive in the UK is less clear. Implementation could potentially lead to increased governance requirements for pension schemes – for example in relation to risk assessments, regulatory oversight of 'fit and proper person' status, and ethical investing. However, in many areas the degree of change from current UK law may not be great, and IORP II may struggle to get legislative or regulatory traction, given the timing involved.

## Conclusion

The precise implications of leaving the EU depend not only on what deal (if any) is negotiated between the UK and 'the 27' but also on each corporate group's own circumstances: location, market sector, group structure, current strengths and weaknesses, future plans, and so on.

These are complex and highly organisation-specific issues, and while we have already seen some high-profile entities making public statements about their Brexit strategy, the reality is that most of the pieces on the board are still moving. Strategies need to be flexible, but the goal is to plan for a range of contingencies, to learn from the experiences of others, and to enable your organisation to respond as nimbly and effectively as possible to developments over the next two years – and to whatever comes after that.

## Find out more

For more briefings on what Brexit means for UK businesses – from the macro level of the UK's future relationship with the EU to sector-specific analysis and business implications – visit Allen & Overy's [Brexit Law](#) pages.

## Known unknowns

One of the most important outstanding questions is the impact of Brexit – in whatever form – on financial services regulation and arrangements for cross-border access and passporting rights. This will have implications for banking and investment services, derivatives, fund managers, insurers and others, and will be a key area to watch over the months ahead – for more detail, see this [Brexit analysis](#) from our financial services experts. Trustees should maintain a watching brief on knock-on implications for scheme investments.

## Your Allen & Overy contacts



**Sarah Henchoz**  
Partner - London  
Litigation Employment  
Tel +44 2030 884810  
Mob +44 7917 080382  
sarah.henchoz@allenoverly.com



**Mark Mansell**  
Partner - London  
Litigation Employment  
Tel +44 2030 883663  
Mob +44 7788 144945  
mark.mansell@allenoverly.com



**Karen Seward**  
Partner - London  
Litigation Employment  
Tel +44 2030 883936  
Mob +44 7767 247661  
karen.seward@allenoverly.com



**Louise Skinner**  
Counsel - London  
Litigation Employment  
Tel +44 2030 882083  
Mob +44 7879 890897  
louise.skinner@allenoverly.com



**Neil Bowden**  
Partner - London  
Corporate Pensions  
Tel +44 2030 883431  
Mob +44 7973 601609  
neil.bowden@allenoverly.com



**Dána Burstow**  
Partner - London  
Corporate Pensions  
Tel +44 2030 883644  
Mob +44 7887 754980  
dana.burstow@allenoverly.com



**Jane Higgins**  
Partner - London  
Corporate Pensions  
Tel +44 2030 883161  
Mob +44 7825 384786  
jane.higgins@allenoverly.com



**Maria Stimpson**  
Partner - London  
Corporate Pensions  
Tel +44 2030 883665  
Mob +44 7899 063396  
maria.stimpson@allenoverly.com



**Jessica Kerslake**  
Counsel - London  
Corporate Pensions  
Tel +44 2030 884710  
Mob +44 7920 713329  
jessica.kerslake@allenoverly.com



**Andrew Cork**  
Senior Associate - London  
Corporate Pensions  
Tel +44 2030 884623  
Mob +44 7825 384780  
andy.cork@allenoverly.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.

**Allen & Overy** means Allen & Overy LLP and/or its affiliated undertakings. The term **partner** is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. | CO:29312189.2