

 <p>The Pensions Regulator</p>	<p><b>DETERMINATION NOTICE</b></p> <p><b>under section 10 of the Pensions Act 1995</b></p> <p><b>Link Pension Trustees Ltd</b>  <b>in relation to</b>  <b>McDonald's Franchisees Pension Scheme</b></p>	<p><b>The Pensions Regulator case ref: C97212150</b></p>
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1. The Determinations Panel (the "**Panel**") of the Pensions Regulator ("TPR") met on 4 February 2019 to consider the issues in a Warning Notice addressed to Link Pension Trustees Ltd (the "**Trustee**") dated 10 September 2018.
2. The Trustee is the trustee of the McDonalds Franchisees Pension Scheme (the "**Scheme**"). The Warning Notice was referred to the Panel on 7 January 2019, following a period for representations.
3. The parties did not request an oral hearing in this matter, and the Panel accordingly proceeded on the papers before it. These comprised:
  - (a) The Warning Notice and its exhibits;
  - (b) The Trustee's Response dated 5 October 2018 and its exhibits;
  - (c) The case team of TPR's ("the Case Team") Reply of 13 November 2018 and its exhibits; and
  - (d) The Trustee's Response of 11 December 2018.

**Matters to be determined**

4. The Warning Notice asked the Panel to determine whether to issue a penalty notice under section 10 of the Pensions Act 1995 ("**PA 95**"). A penalty of £122,500 was sought, for breaches of requirements to:
  - (a) take all necessary steps to secure compliance with the requirement to obtain audited accounts for the Scheme for each of the years ending 5 April 2014, 5 April 2015, 5 April 2016 and 5 April 2017, as required by regulation 2(1) of the Occupational Pension Schemes (Requirement to Obtain Audited Accounts and a Statement from the Auditor) Regulations 1996 ("**the Accounts Regulations**");
  - (b) provide members with Statutory Money Purchase Illustrations ("SMPI"s) for the Scheme for each of the years 2015 and 2016, as required by regulation 17 of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 ("**the Disclosure Regulations**");
  - (c) report breaches of law to TPR as soon as reasonably practicable as required by section 70 of the Pensions Act 2004 ("**PA 04**"), in relation to the breaches listed in (a) and (b) above; and

- (d) give notification to TPR of a specified triggering event in accordance with section 22 of the Pension Schemes Act 2017 (“PSA 17”).
5. The power to issue a penalty notice under section 10 of PA 95 is a reserved regulatory function and is therefore only exercisable by the Panel.
  6. The Trustee argued that no penalty notice should be issued in this case, alternatively that the sum of any penalty should be nil or a very low amount. The Trustee’s arguments fell under three broad areas:
    - (a) As a matter of public law, TPR’s decision to issue the Warning Notice was unlawful and the Panel should determine not to take any action in this case as a result;
    - (b) The Trustee did not dispute the existence of the breaches listed in paragraph 4(a) to (c) above. However the Trustee argued that there was substantial mitigation in this case which meant that the penalty should be “a few hundred pounds or nil”.
    - (c) As regards the alleged breach of section 22 of the PSA17, the Trustee argued that as a matter of fact there had been no triggering event as alleged by the Case Team but that if there had, the Trustee had notified TPR of it so that there had been no breach of the duty to notify.

### **The Decision**

7. The Panel addressed the public law arguments first. It then proceeded to consider whether there had been a breach of section 22 of the PSA 17. Finally it considered the appropriate level of penalty in light of the breaches of requirements that had been admitted or established. It did so by considering the breaches in turn, and then collectively. This Determination Notice adopts the same structure.
8. For the reasons set out below, the Panel determined to issue a penalty notice in the amount of £73,750 to the Trustee.

### **Next Steps**

9. The penalty notice will not be issued until at least 28 days after the date of this determination, in case a reference of it is made to the Upper Tribunal.
10. The penalty is payable within 28 days of the date of the penalty notice (in accordance with Regulation 21 of the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997).
11. This Notice gives the Panel’s reasons for its determination.

## Directly Affected Persons

12. The Panel considered the Trustee to be the only person directly affected by this determination, within the meaning of that phrase in section 96(2)(d) of PA04. Neither the Warning Notice nor the Trustee's representations suggested that any other person would be directly affected by the Panel's determination.

## Public law arguments

13. The Trustee advanced an argument that the Panel should rule as a preliminary issue that the proceedings should be quashed, and no penalty should be issued, because in deciding to issue the Warning Notice the Case Team had breached a number of its duties at public law.
14. The grounds relied on for this argument overlapped with a number of grounds that the Trustee relied on in mitigation of any penalty. For example, the Trustee argued that its breaches had caused no detriment to members. This was said to be a relevant factor that the Case Team had left out of account when deciding to issue the Warning Notice, but was also relied on as a ground of mitigation.
15. This overlap meant that the Panel decided not to determine the public law arguments at a preliminary hearing. However, the Panel did consider them first, in order to determine whether individually or collectively they meant that no regulatory action should be taken in this case.
16. The Panel accepted that it had jurisdiction to determine these arguments. It did so in light of the finding of the Administrative Court when hearing a judicial review challenge to TPR's decision to issue two warning notices in the case of *R (on the application of Grace Bay II Holdings Sarl and others) v the Pensions Regulator and others* [2017] Pens L.R. 7, at [64]:

*"If the Case Team in the future refers the case to the DP, and continues reliance on WN2 in doing so, then the claimants will be at liberty to renew their arguments about WN2 to the DP. The DP may, if it is persuaded by those arguments, adjudicate accordingly. It could decide that WN2 was procedurally irregular and that as a result the DP would not issue a contribution notice based on it. That would have a similar practical effect to a quashing order from this Court."*

17. In this case the grounds of unlawfulness relied on by the Trustee were as follows:
  - (a) The Case Team's decision to issue the Warning Notice ("**the Decision**") did not take into account all relevant factors. It also put excessive weight on the fact that the Trustee was a professional trustee;
  - (b) The Decision was caused by TPR adopting a tougher approach to regulation following publication of a Corporate Plan in May

2018, but that approach had been wrongly applied to breaches pre-dating May 2018;

- (c) TPR was using its powers for an improper purpose. This was said to be because neither of the statutory objectives of TPR that the Warning Notice relied on would in fact be furthered in this case;
- (d) The Warning Notice did not refer to all relevant correspondence, meaning TPR had not acted openly or transparently, and indeed was seeking to exert undue and unfair influence on the Trustee;
- (e) The Decision was taken when discussions with the Trustee were ongoing. This was alleged to be in breach of TPR's Compliance and Enforcement Policy, and its Monetary Penalties Policy of August 2017 ("**MPP**").
- (f) The Decision was taken in breach of a legitimate expectation that the Trustee held that regulatory action would not be taken in this case. That expectation arose from (i) TPR's policies, because the Trustee's breaches gave rise to no financial detriment to members of the Scheme, and (ii) the fact that TPR had taken no regulatory action in response to the Trustee's breaches of similar requirements in 2008-2012.
- (g) The regulatory action sought by the Warning Notice was not necessary or proportionate to the damage caused by the Trustee's breaches;
- (h) The Warning Notice sought separate penalties in relation to each breach of a requirement to produce accounts, and to produce SMPs. By contrast, in another case in November 2018 the Panel had determined to impose one penalty for four separate breaches (including failures to obtain audited accounts for two scheme years).

18. The Panel's conclusions on these arguments follow.

Failure to take account of relevant matters and placing inappropriate weight on one matter

- 19. The Trustee asserted that the Decision had been taken without regard to four relevant matters.
- 20. The first was TPR's Codes, policies and guidance. The Trustee asserted that the Case Team had failed to follow TPR's procedures in deciding to issue the Warning Notice whilst discussions with the Trustees were ongoing. The Trustee did not particularise which aspect of TPR's policies or procedures this breached, and the Panel did not consider that TPR's Codes, policies, procedures or guidance precluded issuing a warning notice whilst discussions were proceeding. Nor does the issue of a warning notice prevent discussions continuing, and a resolution being reached between the parties thereafter (perhaps before the warning notice is passed to the Panel).
- 21. The Trustee also asserted that the Case Team had left out of account the factors listed in the Policy as matters that TPR may consider when deciding whether to take enforcement action. These include the financial

impact on members of a failure, and the track record of the trustee in complying with its duties.

22. The Panel did not accept that the Case Team had wrongly left these out of account in deciding to issue the Warning Notice. Some were expressly mentioned in the Warning Notice, which summarised and exhibited communications from the Trustee seeking to argue mitigation for its failures. More importantly however, these were factors that could and would be considered by the Panel if this matter proceeds to determine the level of penalty in this case. The Trustee could and had put forward its arguments why these factors point towards a minimal level of fine.
23. The second matter allegedly left out of account by the Case Team in reaching the Decision was “the fact that there has been no detriment to members”. The Panel disagreed that this was a fact. There has been detriment to members of the Scheme in this case. Members had not received their SMPs for two consecutive years, depriving them of the information that statute requires them to have as to their pension pot. Their Scheme had not had audited accounts for four years, which should have acted as a valuable safeguard for members as to the assets and liabilities of the Scheme.
24. The third matter allegedly left out of account by the Case Team was the appointment of an established third-party administrator to provide appropriate Scheme governance. However the breaches in question in this case are breaches of obligations placed specifically on the trustee or manager of a pension scheme (for example Regulation 2 of the Accounts Regulations states that it is the trustees or managers of a pension scheme who shall obtain audited accounts). Trustees are not exempt from these obligations if they engage third party administrators. Further, there had been repeated breaches in this case, which were not due to a one-off failure by a third party. Indeed, the Trustee argued that the failure to obtain audited accounts or send out SMPs was due to a lack of funding to pay an auditor or an investment consultant to provide advice to the administrator in order that the administrator could produce SMPs.
25. Accordingly the Panel did not consider the Case Team ought to have given this matter any significant weight when deciding whether to give the Warning Notice to the Trustee.
26. The fourth and last matter which the Trustee alleged the Case Team had disregarded was “the lack of potential wider application of this case to the pensions regulated community”. The Panel did not accept this. The Trustee is a professional trustee. It has committed multiple breaches of particular statutory obligations that are of great relevance to the regulated community; indeed the obligation to report breaches of the law under section 70 of PA04 is of relevance to every pension scheme. The Trustee had also previously breached obligations to obtain audited accounts in 2008 and 2009, 2010 and 2011, albeit TPR took no enforcement action on those occasions. In these circumstances the

case does have a potentially wider application to the regulated community.

#### Adopting a tougher approach in May 2018

27. The Panel noted that the statutory obligation to obtain audited accounts has been in place since 1996, and the obligation to send SMPs arises from regulations made in 2013. When TPR concluded its involvement with the Scheme's failure to obtain audited accounts in 2009, 2010 and 2011 it said that it expected audited accounts to be completed for each scheme year going forward, and that any further delays must be reported to TPR immediately.
28. In these circumstances the Panel was not persuaded that the decision to bring these proceedings was due to a tougher stance adopted in May 2018, rather than being a reasonable response to repeated breaches of long-standing statutory obligations.
29. The Trustee also alleged that it had a legitimate expectation that no action would be taken regarding future breaches. That is considered below.

#### Using powers for improper purpose

30. The Trustee noted that TPR's main objectives in exercising its functions are set out at section 5 of PA 04. They include two that are relied on in this case: to protect the benefits of members of occupational pension schemes, and to promote and improve understanding of the good administration of work-based pension schemes.
31. The Trustee argued that neither of these objectives were engaged on the facts of this case, and thus that TPR was using its powers for an improper purpose. The Trustee argued that there had been no risk to members' benefits. It added that it was a professional trustee with many years' experience and an excellent track record, and had a sound understanding of the good administration of pension schemes. The Trustee argued that the circumstances of the Scheme were so case-specific they will be of no wider application to the pensions industry.
32. The Panel disagreed with these submissions. Enforcing the obligation to obtain audited scheme accounts is an important way of ensuring member benefits are protected, as it should ensure the assets and liabilities of the scheme are made clear on an annual basis. The Panel was not persuaded that the Trustee had an excellent track record or sound understanding of the good administration of schemes. As already noted, audited accounts were not obtained in 2008, 2009, 2010 and 2011. Finally, in the Panel's view the circumstances of the case are certainly of wider application, in particular due to the importance of section 70 PA 04 to the proper administration of pension schemes.

### All relevant correspondence not referred to, and unfair influence exerted

33. This appears to be an allegation of procedural unfairness because the Warning Notice did not refer to a letter of 1 June 2018 from TPR to the Trustee. However the letter was in the Warning Notice's exhibit bundle and was in no sense hidden from the Trustee. A lack of reference to it in the Warning Notice itself did not appear to the Panel a good ground to find the Warning Notice was issued unlawfully. Further, the Panel has seen no evidence of unfair or undue influence being exerted on the Trustee. It has had a proper opportunity to respond to TPR's case and advance such submissions as it wished to the Panel.

### Decision taken when discussions ongoing

34. The Panel did not accept this as a ground of unlawfulness, for the reasons given in paragraph 20 above.

### Breach of legitimate expectation

35. This argument is based on what the Trustee described as TPR's "pragmatic approach" to earlier failures to obtain accounts. However, as already noted, in 2012 TPR made clear that it expected proper compliance in the future. By email of 9 February 2012 TPR wrote "we expect audited accounts to be completed for each scheme year going forward, and any further delays must be reported to the regulator immediately".
36. The argument of a legitimate expectation is also based on the MPP and TPR's Compliance and Enforcement Policy of 2016. The Trustee argues that these documents gave the trustee a legitimate expectation that TPR would not take enforcement action in respect of these breaches "given specifically the lack of financial detriment to members". However the 2016 Policy makes clear, at paragraph 3.3, that the financial impact of a breach on members is only one factor that TPR may consider when deciding whether to take enforcement action.

### Regulatory action not necessary or proportionate

37. The Trustee argued that the proceedings were disproportionate as member benefits had not been affected and the Trustee had a strong track record in administering pension schemes. The Panel disagreed, for reasons already given, and considered that the fact that the Trustee was a professional trustee made the decision to issue the Warning Notice all the more proportionate.

### Inconsistency with earlier decision of Panel regarding appropriate penalty

38. In the *Pakistan International Airlines* case the Panel determined to issue single fines, to several individuals, for four breaches of statutory obligations (including failures to obtain audited accounts in two scheme years).

39. In this case the Case Team sought a penalty notice made up of separate fines for each breach of each statutory obligation.
40. Section 10(1) of PA 95 states that where that section applies “by reason of any act or omission”, TPR may impose a penalty “in respect of that act or omission”.
41. The Panel thus has jurisdiction to issue a penalty notice on the basis of one penalty for each breach. Whether that is appropriate, or whether one single penalty (or no penalty at all) is appropriate, is a matter for the Panel. This is not a reason to find the Decision was unlawful on public law grounds.

#### Conclusion on public law grounds

42. The Panel rejected each of the eight public law grounds relied on by the Trustee to argue that the Decision was unlawful and that no further action should be taken in the case.
43. The Panel then considered whether, taken collectively, the arguments might amount to a reason to uphold the Trustee’s contention that the Decision was unlawful as a matter of public law.
44. The Panel did not consider that was the case. The arguments did not appear to the Panel to be well-founded as matters of public law. Even when the arguments were considered together, the Panel was satisfied that the decision to issue the Warning Notice in this case was one that TPR had taken lawfully, and not in breach of its public law duties.

#### **The Scheme**

45. The Warning Notice gave the following information regarding the Scheme and the Trustee. It is not disputed by the Trustee.
46. The Scheme is an occupational defined contribution scheme established on 31 October 1996. It closed to new members in June 2009. The Scheme has 32 participating employers (“**the Employers**”). As the name of the Scheme suggests, they are all franchisees of the McDonald’s fast food brand.
47. As at 30 June 2017 the Scheme had 148 members in total of whom 7 were active and 141 were deferred members.
48. The Employers are not connected to each other within the meaning of section 1(3) of the PSA17. The Scheme is an occupational pension scheme which provides money purchase benefits, is used by two or more employers which are not connected, and is not a relevant public service pension scheme. The Scheme is therefore a Master Trust as defined in section 1(1) of the PSA17. The Trustee accepted that the Scheme is a Master Trust, although it stated that it was not aware of this until it engaged legal advisers in July 2017.

49. The Trustee is a corporate entity which was appointed as trustee of the Scheme on 20 September 2004. Between 1 February 2006 and 6 November 2017, the Trustee was known as Capita Pension Trustees Limited. On 6 November 2017 it changed its name to Link Pension Trustees Ltd following a change in the ownership of its corporate structure.
50. The Trustee's Representations accepted that it is a corporate professional trustee.
51. The directors of the Trustee at the relevant times were:
  - (a) Rosemary Kennell (Chair): appointed 20 August 2008.
  - (b) Jane Fryer: appointed 20 August 2008.
  - (c) Colin Benford: appointed 07 July 2010.
  - (d) Steve Jones: appointed on 20 August 2008 and resigned 30 June 2018.

## **Background**

52. As part of an initiative to engage with schemes that fall within the PSA 17 definition of a Master Trust, TPR contacted the Scheme on 28 April 2017.
53. The purpose of that engagement was to understand the Trustee's intentions regarding Master Trust authorisation for the Scheme, and in particular, whether the Trustee would be applying for authorisation.
54. During this engagement it became apparent that the Trustee had failed to comply with a number of its statutory obligations, namely the obligation to obtain audited accounts, the obligation to send SMPs, and the obligation to report these breaches as soon as reasonably practicable.
55. As noted above, the Trustee had breached the obligation to obtain audited accounts before. It was warned by TPR in 2012 that it expected compliance "each year" in the future, and for any delays to be reported to TPR immediately.
56. Despite this, audited accounts had not been obtained for the Scheme years 2014, 2015, 2016 or 2017. The Trustee was well aware of this statutory obligation, as shown by the Scheme's risk register which identified the risk of accounts not being completed within the statutory deadline and said:

*"Timetable agreed between Capita and auditor and circulated to the Trustee in the auditor's annual audit plan.*

- *Approval*
- *date for accounts included in Trustee Business Plan.*
- *Progress monitored by Capita."*

57. The risk of accounts being completed late was graded 1 (out of 5) for impact and 2 (out of 5) for “likelihood”.
58. Representatives of the Trustee and the Case Team met on 25 August 2017.
59. Following this the Trustee submitted a report under section 70 of PA04 by a letter of 2 November 2017. This reported a failure to produce scheme accounts for the years 2014-2016 inclusive, failures to send SMPs in any year since 2014, the fact that the Scheme’s Statement of Investment Principles was last prepared in 2003 and the last documented review of the default strategy and performance of the default funds was completed in July 2003, and finally a failure to ensure the Scheme had at least three trustees with the majority being non-affiliated. The Trustee also noted five occasions of late employer contributions that had not been reported (between 3 and 17 days late).
60. Separately during 2017 and 2018, TPR and the Trustee communicated on the issue of whether the Trustee intended to seek authorisation for the Scheme to operate as a Master Trust after 31 March 2019, or whether it was intended that the Scheme would wind up. These communications are central to TPR’s case that the Trustee has breached the statutory obligation on it to notify TPR of a “triggering event” under the PSA 17. They are therefore dealt with under that heading below.

#### **Breaches of Accounts Regulations, Disclosure Regulations and section 70 PA 04**

61. Paragraph 4 of the Response stated that the Trustee “accepts responsibility” (which it says reflects its stance as a professional practice) in respect of:
  - (a) breaches of the Accounts Regulations by not obtaining audited Scheme accounts, without reasonable excuse, for the years ending 5 April 2014, 5 April 2015, 5 April 2016 and 5 April 2017;
  - (b) breaches of the Disclosure Regulations by not providing SMPs to members for the years 2015 and 2016;
  - (c) breaches of section 70 of PA04 by not notifying TPR as soon as reasonably practicable of the breaches identified at (a) and (b).
62. The Panel considered this was a realistic and sensible stance to take.
63. The Trustee raised several points in mitigation, arguing that the appropriate level of penalty was much lower than that sought in the Warning Notice. These points applied to all the breaches alleged by the Case Team, and the Panel preferred to address them once it had made its findings on the one contested allegation of breach, namely the breach of section 22 of PSA 2017.
64. It should be noted that the breaches have been remedied. The Warning Notice states at paragraph 129 that *“the Case Team notes that the Trustee has co-operated with the Case Team and accepted*

*responsibility for the reported breaches of law and has addressed the issues, save in relation to the failure to notify a triggering event".* The papers provided to the Panel showed that the outstanding audited scheme accounts were obtained on 16 April 2018.

### **Alleged Breach of section 22 of PSA 2017**

65. The PSA 2017 imposes obligations on specified persons involved with Master Trusts to notify TPR of particular events in relation to a Master Trust. Those events are listed in a table at section 21(6) of PSA 2017. They are described in that table as "Triggering events" and the Panel will use that description in this Notice.
66. One of the triggering events is the following:

*"A scheme funder, scheme strategist or the trustees decide that the Master Trust scheme should be wound up, where the person making the decision has power to do so under the scheme or the rules of the scheme".*
67. Section 21(6) provides that the date of this event is the date of the decision.
68. Pursuant to section 22(3) of PSA 2017, the person who must notify TPR of this event is the person or persons who take the decision. The notification must be made within seven days of the date of the event, assuming it occurred on or after 20 October 2016 (Schedule 2 to the PSA 2017, section 37(7)). The PSA 2017 does not impose notification obligations in respect of events occurring before 20 October 2016.
69. Failure to comply with a requirement imposed by section 22 of PSA 2017 may lead to the issue of a penalty notice under section 10 of PA 95 (section 22(10) of PSA 2017).
70. In this case the Case Team argued that a triggering event within section 21(6) of PSA 2017 had occurred because the Trustee had decided that the Scheme should be wound up, and the Trustee had power under the Scheme's Rules to wind up the Scheme. However the Case Team alleged that the Trustee had not notified this triggering event to TPR and so was in breach of its notification obligations, and should receive a penalty notice under section 10 of PA 95.
71. The Trustee accepts that the Scheme is a Master Trust Scheme, so that the notification obligations under PSA 2017 would apply if there had been a triggering event. However, it stated that:
  - (a) There has been no triggering event, and
  - (b) If there had been, the event had been notified to TPR by the Trustee so that its notification obligations had been complied with.
72. It is convenient to begin with some observations on the triggering event relied on in this case. This Notice then turns to consider the case that

there had been a triggering event, before setting out the Panel's conclusions.

73. For the reasons that follow, the Panel does not find there has been a triggering event in this case. In those circumstances it is unnecessary to consider the Trustee's alternative argument that any such event, if it had occurred, had been notified to TPR.

#### The Triggering Event relied on

74. The table at section 21(6) of PSA 2017 lists ten triggering events. For some it appears relatively easy to determine that they have occurred. Thus the first triggering event in the table is:

*“The Pensions Regulator issues a warning notice under the standard procedure in respect of a decision to withdraw the scheme's authorisation.”*

75. The description of the triggering event relied on in this case is not so straightforward to apply. As relevant to this case, it reads “..the trustees decide that the Master Trust scheme should be wound up, where the person making the decision has power to do so under ... the rules of the scheme”.

76. The Case Team's position is that there has been a triggering event because there has been:

- (a) A decision,
- (b) By the Trustee,
- (c) That the Scheme “should” be wound up, and
- (d) The Trustee has power to wind up the Scheme under the Rules.

77. The Panel considered it critical to the test being met that there had in fact been a decision, taken by the Trustee, that the Scheme “should” be wound up.

78. In this case the Trustee is a corporate body with three directors, its own Articles of Association and governing documentation. These may result in particular requirements that must be met in order for it to make an effective “decision”. This is an issue considered further below. For present purposes it is enough to note that it is “the Trustee”, as a corporate body, that has power to wind up the Scheme under the Rules (Rule 24.1.1). There must therefore be evidence that the Trustee, as a corporate body, has decided the Scheme should be wound up.

#### The Case Team's position

79. The Warning Notice sets out several communications to TPR from the Trustee, its ultimate parent company, and the Scheme's Administrator from 2017 and 2018, which suggest that persons within the Trustee had formed the view that the Scheme would be wound up in due course rather than seeking authorisation to operate as a Master Trust. These communications are the essence of the case that a triggering event has

occurred. They are set out in full below, in the way in which they are quoted and discussed in the Warning Notice:

67. *“On 14 June 2017, Liam Broderick of the Administrator informed TPR that the Trustee had decided that the “Scheme will be wound up over the next 6- 9 months” [149]. Following notification from TPR that such a decision constituted a triggering event under section 21 of the PSA17, that is Trigger Event 8 – a decision being made that the Scheme “should” be wound up) on 20 June 2017, Liam Broderick replied noting that “There has been no formal decision to wind up, and therefore nothing has been minuted. I therefore don’t think there has yet been a Triggering Event...”.*
68. *Ms Kennell emailed TPR on 25 July 2017 in relation to an upcoming meeting. In this email Ms Kennell noted that “Clive Pugh of Burges Salmon, who is the Scheme’s legal adviser will attend the meeting with me and we can then outline the steps that will be taken to wind up the Scheme.”*
69. *On 21 August 2017 Ms Kennell emailed TPR noting that the “new Master Trust regulations will be too onerous for the Scheme as it is only available to a small group of employers and does not operate commercially, so the Scheme will be wound up before April 2018...”. This email attached a wind up plan.*
70. *During a meeting with TPR on 25 August 2017, the Trustee discussed its proposals for wind up but again stated that this had not been formally agreed by the Trustee board and therefore they did not consider the requirement to report had been triggered.*
71. *On 28 September 2017 the Trustees wrote to TPR noting that “no decision has yet been taken on whether to wind up the scheme, so no board meeting to discuss this issue has been scheduled.”*
72. *On 8 January 2018, Matthew Richards (Head of Legal, Link Asset Services (the Trustee’s ultimate parent company)) emailed TPR noting that the “Trustee is not intending to work towards authorisation and does intend to wind-up the scheme at some point in the future. At present, this decision has not been formally concluded and documented in a meeting because the main priorities of the Trustee have been to rectify the governance issues (as disclosed under separate cover) as quickly as possible and work with the Employers to try to put the scheme in funds to allow the various wind-up costs to be met...”.*
73. *On a conference call on 23 January 2018, Matthew Richards informed the Case Team that the “likely direction of travel is not to seek authorisation,*

as they feel the employers are unlikely to fund them for that process". However, in any event before proceeding to take further steps, the Trustee would explore the only remaining option available to it to secure further funds in order to maintain its continued existence – that is secure funding from Scheme Employers.

74. The Case Team understands that the Trustee had, by 27 March 2018, following a unilateral amendment to the Scheme's Trust Deed and Rules made by the Trustee, written to the Employers seeking further funds from Employers and confirmation as to whether the Employers wanted the Trustee to apply for authorisation. It is the Case Team's understanding that no Employers had responded to the Trustees with a commitment to provide further funds or instructions that the Scheme should seek authorisation.
75. On 15 May 2018 TPR wrote to the Trustee noting that in the circumstances, given the statements made by the Trustees in 2017 and having subsequently exhausted all of its available options for further funds for the Scheme to enable it to continue as a Master Trust, it appeared that the Trustee had made the decision that the Scheme should be wound up, and therefore that a triggering event under section 21(6) of the PSA17 (item 8) had occurred. The Case Team's email noted that the requirements of PSA17 (item 8) is that the decision of the Trustees is "should" rather than "would" and that the absence of a formal minute documenting that decision did not prevent a triggering event from being crystallised. TPR therefore expected the Trustee to confirm that the decision had been made by the Trustee that the Scheme should be wound up and to notify TPR in accordance with the PSA17 requirements.
76. On 24 May 2018 Matthew Richards wrote to TPR noting that it "will not be possible to make such confirmations within the agreed timeframe". The rationale provided for such decision was that the Trustee felt its duties to the Employers and members required it to "give them as much notice as possible of any final decision."
80. These communications and documents are certainly consistent with there having been a decision that the Scheme should be wound up. In particular the email of 14 June 2017 from the Scheme's Administrator says in terms:
- "The Trustee of the Scheme, Capita Pension Trustees Limited, has therefore taken the view that the new Regulations covering the operation of DC Master Trusts will be too onerous for this scheme to continue. It has therefore decided that the Scheme will be wound up over the next 6-9 months".*

81. It is also striking that the wind up project plan attached to Ms Kennell's email of 21 August 2017 shows a number of phases as 100% complete, including "*Decision re destination of bulk transfer*". This might also suggest that a decision to wind up had been made.
82. However these communications also appear to show the Trustee had not ruled out the possibility of the Scheme continuing, and until perhaps May 2018 was seeking funding from the Scheme's employers to enable this to happen.

### A Decision?

83. The communications quoted above also show the Trustee's consistent position that no "formal" decision to wind up had been taken. Indeed there appears to have been room for some uncertainty within the Case Team about whether the test had been met. On 20 June 2017 a Case Manager at TPR described the triggering event as "*the Trustee's formal decision to wind up the Scheme*", which he assumed would have been made at a board meeting and therefore minuted. On 23 May 2018 an internal email at TPR reported on a call with the Trustee on 25<sup>th</sup> April. It concludes "*the call was left with them to provide a further update or trigger event when decision made*".
84. In its Response the Trustee stated that its internal policies and procedures require that a resolution can only be passed by two of its directors.
85. The Case Team noted in its Reply that no such policies or procedures were identified or quoted, but it did not deny that they existed, or that they had the effect that two directors of the Trustee were required for it to pass a valid resolution. The policies were not exhibited by the Trustee, nor does it appear that the Case Team requested copies of them from the Trustee (if necessary using section 72 of PA 04).
86. In these circumstances, particularly in the absence of an oral hearing and any contrary evidence from the Case Team, the Panel cannot dismiss the Trustee's evidence as to its internal policies and procedures. The Panel considered that it ought to proceed on the basis that for the Trustee to make a decision two of its directors are required to pass the relevant resolution.
87. Under the Determinations Panel Procedure, paragraph 28, the burden of proof in a case such as this is on the Case Team and the standard of proof is on the balance of probabilities. The burden of proof is accordingly on the Case Team to show that there has been an effective decision by the Trustee that the Scheme should be wound up.
88. The Panel did not consider this burden was discharged by the communications set out in the Warning Notice and quoted above. It is true that some of them are consistent with the relevant decision having been made, but they are also consistent with there still being uncertainty

as to what the Scheme should do, and with no effective decision having been made by the Trustee that the Scheme should be wound up.

89. The difficulty for the Case Team's argument is that there is no evidence of when the relevant decision was taken, by which individuals, and what was decided. Without such evidence it would be very difficult for the Panel to find that there had been an effective decision, taken by the Trustee as a corporate body, that the Scheme should be wound up. Indeed pinpointing the date of the decision is important to start time running under section 21 of PSA 2017 for the notification obligation.
90. The Panel noted that on 25 August 2017 representatives of the Trustee told the Case Team that there had been no board meetings since 5 April 2016, suggesting that the wind up plan and communications before 25 August 2017 are not evidence of any Trustee board decision that the Scheme should be wound up.
91. TPR's Master Trusts Code of Practice says at paragraph 384:
- "There are some triggering events which need to be notified when a decision has been made. A decision can be taken outside of a formal meeting and our expectation is that where clear steps have been taken regards to an event, without a formal minuted decision, a notification will need to be made."*
92. The application of this paragraph is complicated in this case by the particular circumstances. Here, the relevant circumstances are:
- (a) The power to wind up the Scheme is vested in the Trustee, as a corporate;
  - (b) For there to be a triggering event as alleged by the Case Team, there has to have been a decision by the Trustee, as a corporate;
  - (c) The Trustee's evidence is that its decision-making is subject to restrictions and policies that mean that a minimum of two directors must pass a resolution;
  - (d) Unless the Trustee passes a board resolution, as a corporate body it has not reached a "decision" on an issue;
  - (e) There is no evidence that two or more directors of the Trustee have passed a resolution that the Scheme should be wound up.
93. The Panel did not consider it was adopting too technical a reading of section 22 of PSA 2017. Rather, this approach gives proper meaning to the word "decision" in the test.

### **Whether to impose a penalty and, if so, its amount**

94. The Panel considered the breaches of duty in turn, assessing how serious they were and what mitigating factors there were, before deciding on an appropriate amount of penalty. It applied the approach set out in the MPP of August 2017. Once that was complete, the Panel stood back and looked at matters in the round to see whether the overall penalty sum appeared reasonable and proportionate in all the

circumstances. In making its decision the Panel had regard to the matters listed in section 100 PA 04.

95. The MPP provides a framework for the assessment of the amount to be imposed by way of monetary penalty (if any). Assuming that the relevant statutory threshold for imposing a monetary penalty is met, the MPP identifies the first question as whether to impose a penalty at all. This question is to be answered by looking at the underlying objective in imposing a penalty, the nature and extent of the breach, and the person concerned and their conduct (MPP paragraph 7).
96. The Panel concluded that it should impose a monetary penalty in respect of all three categories of breach in this case (the Accounts Regulations; the Disclosure Regulations; and section 70 of PA 04). This was because the breaches were significant and none of the breaches were “one-off”, but occurred over several years and had been preceded by breaches in 2008-2011. There was also more than one breach in each category. The fact that the Trustee is a professional trustee also suggested there should be a monetary penalty in this case. Finally, the Panel considered that only imposing a penalty would send the right message to the regulated community about the importance of these statutory obligations, and thus promote the good administration of pension schemes in the future.
97. The MPP sets out three principles and a framework that guide TPR in determining the amount of a penalty (MPP, paragraphs 8-9). The principles are:

*“The penalty should be proportionate to the nature of the breach and any harm caused (eg the number of members affected and/or the level/significance of detriment).*

*The amount of the penalty should aim to change the behaviour of the person in breach.*

*The penalty should aim to deter repetition of the breach among the wider regulated community.”*
98. The framework comprises three “bands” of breach, depending on the nature and impact (or potential impact) of the breach, which attract different levels of penalty. Thus band 1 is the lowest level, attracting a penalty between £0 and £10,000 for a corporate, and the MPP gives examples of band 1 breaches, including failing to submit a scheme return on time.
99. The MPP provides that once the Panel has decided to impose a monetary penalty, it will then decide into which band the breach or breaches in question fall. The MPP describes at paragraph 9.2 that in assessing the appropriate band, the Panel is guided by TPR’s statutory objectives and by the circumstances of the case. Once it has decided on a band, the Panel will determine the appropriate starting point within that band for the penalty, and then adjust that starting point to take account

of the facts of each case. Potentially relevant factors for this stage are listed at paragraph 9.4 of the MPP.

100. The MPP makes clear that different considerations may arise on a case by case basis, which may result in the appropriate penalty for a particular breach being higher or lower than the middle of the band in which the breach falls in the MPP.

### Accounts Regulations

101. The first question is whether to treat the breach of the Accounts Regulations in 2014, 2015, 2016 and 2017 as one overall breach, or four separate breaches. The Panel preferred the latter approach. This was because the obligation to obtain audited accounts arose every year, and was breached every year. The Trustee was told of precisely this obligation in 2012 by TPR, following similar failures in 2009, 2010 and 2011. As a professional trustee the Panel considered the Trustee should have taken steps each year to ensure compliance.
102. The Panel recognised that the Pakistan International Airlines case had adopted a different approach, but in that case the penalties were imposed on several individuals, not a professional trustee with a track record of similar breaches in the past. The Panel in that case recognised that breaches of the Accounts Regulations in separate years were separate breaches, and could lead to separate penalties (paragraph 47).
103. In this case the Panel concluded that separate penalties were appropriate, rather than just one. The importance of this point can be overstated however. If the Panel had treated the separate breaches as one overall course of conduct, resulting in only one penalty, it would have been a penalty in a higher sum. The Panel would then have regarded the course of conduct as sufficiently serious to merit treatment as a band 2 breach rather than band 1.
104. The MPP does not indicate whether breaches of the Accounts Regulations should fall under band 1, 2 or 3. The Warning Notice suggests that they should be treated as band 1, and the starting point for the penalty should be the middle of that band (i.e. £5,000 per breach). The Pakistan International Airlines determination also treated breaches of the Accounts Regulations as band 1. The Panel agreed that these breaches should fall in band 1, and agreed with the Warning Notice that a starting point of the middle of that band was appropriate.
105. As regards aggravating factors, for all of the breaches, the Warning Notice listed the following:
- (a) A track record of previous breaches,
  - (b) The fact the Trustee was a professional trustee,
  - (c) A low level of trustee knowledge and understanding,
  - (d) The breach could have been prevented, and was not due to circumstances outside the Trustee's control, and
  - (e) Failure to notify TPR in advance of the breaches, although there has been cooperation since discovering the breaches.

106. The Panel found the evidence on point (c) was not conclusive, being only a comment drawn from a note of a meeting between TPR and Trustee in 2017. The Panel did not place weight on point (e) as an aggravating factor as there was already a breach alleged of failing to notify as soon as reasonably practicable. However, the other three points listed were, in the Panel's opinion, established by the evidence as aggravating factors that would merit increasing the penalty from the middle of the range.

107. The Trustee raised several points in mitigation:

- (a) Lack of financial impact on members from the breaches,
- (b) Lack of funds available to allow the Trustee to retain advisers for the Scheme,
- (c) Trustee's exemplary track record,
- (d) Trustee's collaborative approach to working with TPR to address the governance failings as soon as possible,
- (e) Time and cost incurred by the Trustee in remedying the failures,
- (f) Appointment of a third-party administrator,
- (g) Lack of application of the case to the wider pensions industry.

108. The Panel did not accept point (c) or (g) were factually correct, as discussed above, and found point (f) to be of limited relevance. Even if the breaches were contributed to by a third-party administrator, which is not clear, the statutory obligations in question have been placed on the Trustee and it appears that in this case they were simply ignored for several years.

109. As regards the other mitigating factors relied on:

- (a) The Case Team's Response to the Trustee's Reply states "*it is acknowledged that there are factors in this case which could counter the need for enforcement action, for example the number of members affected, and the potential financial impact*". The number of members affected is the entire Scheme membership, of c. 148. This did not seem to the Panel to be a mitigating factor. The Panel did take account of the fact that there had been no financial impact from the breaches, but as noted above it considered there was member detriment. In any event, a breach of the obligation to obtain accounts is unlikely to lead (at least on its own) to a financial impact for members. The lack of such impact is thus perhaps lessened as a mitigating factor by the nature of the breach.
- (b) The Panel did take account of the fact that the Trustee had spent its own money remedying the breaches (point (e)), but point (b) is rather different. As the Trustee explains, until 9 January 2018 the Scheme's governing documents did not provide for scheme expenses to be claimed from the employers. The only source for payment of such expenses was member funds, which were small. The Trustee states in its Response that it has had the option to use this source for many years but has made a conscious decision not to do so. Hence it has not

engaged auditors to prepare accounts. This approach is a troubling one; the statutory obligations which the Trustee is under must be complied with. The Trustee has made a conscious decision not to use member funds to do so, in circumstances where the Scheme has no other source of funds. The effect of the decision will therefore be that no Scheme accounts are obtained. That appears to the Panel to be a misconceived approach, and certainly not a mitigating factor.

- (c) The Panel noted that the Case Team accepts there has been co-operation in addressing the breaches.

110. Taking the aggravating and mitigating factors together, the Panel considered an increase of 25% to the starting level to be appropriate. This results in four penalties of £6,250, totalling £25,000 for the breaches of the Accounts Regulations.

### Disclosure Regulations

111. There are two failures under this heading, in 2015 and 2016. As with the Accounts Regulations breaches, and for the same reasons, the Panel decided to impose separate penalties in respect of each breach.

112. The failure to give SMPs is mentioned in the MPP as an example of a band 2 breach. The Panel agreed, and adopted the middle of that band as the appropriate starting point for calculating the penalty. Accordingly, the starting point for the penalty is £12,500 per breach.

113. The parties relied on the same points as aggravating and mitigating factors for these breaches as for the breaches of the Accounts Regulations. However, the Panel considered the circumstances of these breaches were materially different. The Panel placed weight on the following factors (several of which are specifically identified in MPP paragraph 9.4 as potentially relevant matters):

- (a) The Trustee did have a track record of previous failures to comply with obligations, but its previous failures did not include failures to provide SMPs;
- (b) The duration of the breaches was two years, rather than four for the breaches of the Accounts Regulations, meaning members would have received SMPs in 2014 and in 2017;
- (c) Following on from the above, the detriment caused to members by these breaches was less than the breaches of the Accounts Regulations, and the financial impact also appears to have been very limited. In that regard the Trustee was fortunate that the Scheme's membership was (comparatively) small in number;
- (d) The Trustee accepted that it had committed these breaches in its first breach of law report to TPR. By contrast, the Trustee did not accept a breach of the Accounts Regulations in 2017 until later in the process;
- (e) Members could have asked for missing SMPs, but apparently did not. This also suggests the breaches had limited impact on members;

- (f) The penalty was higher for these breaches because they were in band 2;
- (g) The Trustee was a professional trustee, and the breaches could easily have been prevented.

114. Taking these matters together the Panel determined that a reduction of 25% from the starting point of the middle of band 2 was appropriate. This results in a reduction in the penalty amount from £12,500 to £9,375 per breach, leading to £18,750 for both breaches.

#### Section 70 of PA 04

115. Six breaches are relied on, as there were six failures to comply with the law that ought to have been notified to TPR by the Trustee in this case. They were not so notified until November 2017, prompted by the Case Team engaging with the Trustee over Master Trust authorisation. This is disappointing given the clear instruction to the Trustee in 2012 that any delay in producing audited accounts in the future must be reported to TPR immediately. It appears that if the Case Team's engagement had not led to these breaches being uncovered, they would not have come to light at all.

116. The Panel considered these were each band 1 breaches, and that there was no reason to increase or decrease the penalty amount from the middle of that band. The appropriate fine was therefore £5,000 per breach, so £30,000 in total.

#### Overall

117. The total of the above three penalty amounts is £73,750. The Panel considered whether that amount was reasonable and proportionate in all the circumstances of this case.

118. The Panel concluded that it was. It is not out of proportion to the size of Scheme membership or its assets (c. £2 million to £3 million). These were breaches of several important statutory obligations, which had occurred over several years. While the breaches may not have caused identifiable financial detriment to members, they deprived members of information and a level of protection regarding their pension pots. The Panel would have expected better of a corporate professional trustee, particularly one that had been warned about breaches of one of the same obligations in 2011-12.

119. The Panel considered whether this level of penalty accorded with the MPP's three principles on the amount of any penalty, set out at paragraph 98 above. In the Panel's view:

- (a) The level of penalty of £73,750 was proportionate to the nature of the breaches (including their recurrence and reasons for them) and harm caused,
- (b) The level should make clear to the Trustee that its behaviour needs to change,

- (c) This level of penalty should deter repetition of these breaches in the regulated community.

## **Conclusion**

120. For these reasons the Panel determined to issue a penalty notice in the amount of £73,750 to the Trustee, Link Pension Trustees Ltd, payable 28 days from the date of the notice.
121. By virtue of section 96(5) of PA04 the penalty will not be issued during the 28-day period within which this determination may be referred to the Upper Tribunal and, if so referred, until the reference and any appeal against the Upper Tribunal's determination has been disposed of. If no referral to the Upper Tribunal is made within 28 days, then a penalty notice will be issued to the Trustee.
122. **Appendix 1** to this Determination Notice contains important information about the rights to refer this decision to the Upper Tribunal.

## **Legislative framework**

123. The relevant statutory provisions are set out in Annex 1 to this Determination Notice.

Signed:

Chairman: David Latham

Dated: 5 March 2019

## Relevant Statutory and Code Provisions

### Pension Schemes Act 1993

#### Section 1 - Categories of pension schemes

(1) In this Act, unless the context otherwise requires-

"occupational pension scheme" means a pension scheme-

(a) that-

(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or

(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people, is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and

(b) that has its main administration in the United Kingdom or outside the EEA states, or a pension scheme that is prescribed or is of a prescribed description;

#### Section 168 - Breach of regulations

...

(4) The regulations may provide for a person who has contravened the provision to be required by notice in writing to pay to the Regulatory Authority, within a prescribed period, a penalty not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, others in section 10(2)(a) of the Pensions Act 1995.

### Pensions Act 1995

#### Section 10 Civil penalties

(1) Where the Authority are satisfied that by reason of any act or omission this section applies to any person, they may by notice in writing require him to pay, within a prescribed period, a

penalty in respect of that act or omission not exceeding the maximum amount.

(2) In this section "the maximum amount" means-

(a) £5,000 in the case of an individual and £50,000 in any other case, or

(b) such lower amount as may be prescribed in the case of an individual or in any other case, and the Secretary of State may by order amend paragraph (a) by substituting higher amounts for the amounts for the time being specified in that paragraph.

(3) Regulations made by virtue of this Part may provide for any person who has contravened any provision of such regulations to pay, within a prescribed period, a penalty under this section not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, others in subsection (2)(a).

(4) An order made under subsection (2) or regulations made by virtue of subsection (3) do not affect the amount of any penalty recoverable under this section by reason of an act or omission occurring before the order or, as the case may be, regulations are made.

(5) Where-

(a) part from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership , and

(b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6), this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable.

(6) The persons referred to in subsection (5)(b)-

(a) in relation to a body corporate, are-

(i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and

(ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and

(b) in relation to a Scottish partnership, are the partners.

(7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.

(8) A penalty under this section is recoverable by the Authority.

(8A) Any penalty recoverable under this section-

(a) shall, if the county court so orders, be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of that court; and

(b) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(9) The Authority must pay to the Secretary of State any penalty recovered under this section.

#### Section 47 - Professional advisers

(1) For every occupational pension scheme there shall be-

(a) an individual, or a firm, appointed by the trustees or managers as auditor (referred to in this Part, in relation to the scheme, as "the auditor"), and

(b) an individual appointed by the trustees or managers as actuary (referred to in this Part, in relation to the scheme, as "the actuary").

(2) For every occupational pension scheme the assets of which consist of or include investments there shall be an individual or a firm appointed by or on behalf of the trustees or managers as fund manager.

(2A) References in this section to investments must be read with-

(a) section 22 of the Financial Services and Markets Act 2000;

(b) any relevant order under that section; and

(c) Schedule 2 to that Act.

(3) If in the case of an occupational pension scheme any person-

(a) is appointed otherwise than by the trustees or managers as legal adviser or to exercise any prescribed functions in relation to the scheme, or

(b) is appointed otherwise than by or on behalf of the trustees or managers as a fund manager,

section 10 applies to any trustee, and to any manager, who in exercising any of his functions places reliance on the skill or judgement of that person.

(4) In this Part, in relation to an occupational pension scheme-

(a) the auditor, actuary and legal adviser appointed by the trustees or managers,

(b) any fund manager appointed by or on behalf of the trustees or managers, and

(c) any person appointed by the trustees or managers to exercise any of the functions referred to in subsection (3)(a), are referred to as "professional advisers".

(5) This section does not apply to an occupational pension scheme falling within a prescribed class or description and regulations may-

(a) make exceptions to subsections (1) to (3),

(b) specify the qualifications and experience, or approval, required for appointment as a professional adviser.

(6) Regulations may make provision as to-

(a) the manner in which professional advisers may be appointed and removed,

(b) the terms on which professional advisers may be appointed (including the manner in which the professional advisers may resign).

(7) Subject to regulations made by virtue of subsection (6), professional advisers shall be appointed on such terms as the trustees or managers may determine.

(8) If in the case of an occupational pension scheme an auditor, actuary or fund manager is required under this section to be appointed but the appointment has not been made, or not been made in accordance with any requirements imposed under this section, section 10 applies to any trustee, and to any manager, who has failed to take all such steps as are reasonable to secure compliance.

(9) Regulations may in the case of occupational pension schemes-

(a) impose duties on any person who is or has been the employer, and on any person who acts as auditor or actuary to such a person, to disclose information to the trustees or managers and to the scheme's professional advisers,

(b) impose duties on the trustees or managers to disclose information to, and make documents

available to, the scheme's professional advisers.

(10) If in the case of an occupational pension scheme a person fails to comply with any duty imposed under subsection (9)(a), section 10 applies to him.

(11) If in the case of an occupational pension scheme any duty imposed under subsection (9)(b) is not complied with, section 10 applies to any trustee, and to any manager, who has failed to take all such steps as are reasonable to secure compliance.

### The Occupational Pension Schemes (Scheme Administration) Regulations 1996

#### Regulation 3 - Exemptions from the professional advisers requirements

(1) Section 47(1)(a) of the 1995 Act (for every occupational pension scheme there shall be an individual, or a firm, appointed by the trustees or managers as auditor) does not apply to-

(a) a scheme which is-

(i) provided for, or by, or under an enactment (including a local Act); and

(ii) guaranteed by a Minister of the Crown or other public authority.

(c) an occupational pension scheme which provides relevant benefits and which on or after 6th April 2006 is not a registered scheme;

(e) unfunded occupational pension schemes;

(f) occupational pension schemes with less than 2 members;

(h) a scheme-

(i) with fewer than 12 members where all the members are trustees of the scheme and either-

(aa) the provisions of the scheme provide that all decisions which fall to be made by the trustees are made by unanimous agreement by the trustees who are members of the scheme; or

(bb) the scheme has a trustee who is independent in relation to the scheme for the purposes of section 23 of the 1995 Act (power to appoint independent trustees), and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section; or

(ii) with fewer than 12 members where all the members are directors of a company which is

the sole trustee of the scheme, and either-

(aa) the provisions of the scheme provide that any decisions made by the company in its capacity as trustee are made by the unanimous agreement of all the directors who are members of the scheme; or

(bb) one of the directors of the company is independent in relation to the scheme for the purposes of section 23 of the 1995 Act, and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section;

(i) occupational pension schemes with a superannuation fund such as is mentioned in section 615(6) of the Taxes Act;

(m) the AWE Pension Scheme established by a deed made on 29th March 1993;

(o) the Babcock Naval Services Pension Scheme, established by a deed made on 29th August 2002.

(2) Section 47(1)(b) of the 1995 Act (for every occupational pension scheme there shall be an individual appointed by the trustees or managers as actuary) does not apply to-

(a) money purchase schemes;

(b) schemes mentioned in-

(i) paragraph (1)(a), (e) to (f), (h), (m) and (o); or

(ii) paragraph (1)(c) or (i) where these schemes have fewer than 100 members.

(3) Section 47(2) of the 1995 Act (for every occupational pension scheme the assets of which consist of or include investments there shall be an individual or a firm appointed by or on behalf of the trustees or managers as fund manager) does not apply to-

(a) relevant schemes of a kind mentioned in paragraph (4) of regulation 4 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (Managing investments: occupational pension schemes);

(b) wholly insured schemes; and

(c) schemes mentioned in paragraph (1)(a) to (f) and (i).

(4) Section 47(3) of the 1995 Act (legal advisers, fund managers, and persons exercising prescribed functions in relation to the scheme to be appointed by the trustees or managers)

does not apply to schemes mentioned in paragraph (1)(a) to (f) and (i) .

(5) Subject to paragraph (6), where the trustees or managers of a scheme appoint a custodian on terms-

(a) which allow the custodian to use the services of an appointed person; and

(b) which-

(i) in the case of a custodian appointed before the relevant date, set out in writing, or

(ii) in the case of a custodian appointed on or after the relevant date, specify that, before taking up the appointment the custodian must disclose in writing to the trustees or managers, whether, and if so, the extent to which the custodian accepts liability in respect of functions exercised or exercisable on his behalf by an appointed person; and

(c) which require that, immediately upon any subsequent change in the extent of the liability accepted by the custodian in respect of functions exercised or exercisable on his behalf by an appointed person, the custodian must disclose in writing to the trustees or managers whether and, if so, the extent to which his liability has changed,

section 47(3) of the 1995 Act shall not apply with respect to any reliance placed on the skill or judgement of the appointed person in the exercise of any of the functions given to the appointed person.

(6) In a case where-

(a) sub-paragraph (b)(ii) of paragraph (5) applies; or

(b) there has been a change of a kind mentioned in sub-paragraph (c) of that paragraph,

section 47(3) of the 1995 Act shall not be disapplied by virtue of that paragraph unless the custodian has made the disclosure required by that sub-paragraph (b)(ii) or, as the case may be, that sub-paragraph (c).

(7) In paragraphs (5) and (6)-

"appointed person" means any person appointed by a custodian, or by any other person empowered by the terms of his own appointment to appoint another person, to exercise any of the functions given to the custodian;

"custodian" means a person appointed by the trustees or managers to exercise any of the

functions set out in regulation 2(c) of these Regulations (custody of cash, securities, etc); and

"relevant date" means 22nd July 1998.

Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996

Regulation 2 - Requirement of trustees or managers to obtain documents

(1) Subject to paragraphs (2), (2B) and (2C) , where the requirement of section 47(1)(a) of the Pensions Act 1995 (requirement to appoint an individual or a firm as auditor) applies, the trustees or managers of an occupational pension scheme shall obtain not more than seven months after the end of each scheme year which ends on or after 6th April 1997-

(a) accounts, prepared in accordance with regulation 3, audited by the auditor;

(b) the auditor's statement, prepared in accordance with regulation 4, about contributions under the scheme.

(2) In the case of an ear-marked scheme, the requirements contained in paragraph (1)(a) shall not apply and the trustees and managers of such a scheme shall-

(a) upon receiving a written request from a person specified in section 41(4) of the Pensions Act 1995-

(i) make available a copy of the most recent accounts published in relation to the insurance companies (whether as part of a group of companies or otherwise) with which they hold ear-marked policies of insurance or annuity contracts in relation to that person; and

(ii) make that information available to the person who requested it within a reasonable time of receiving the request; and

(b) provide each scheme member within 12 months of the end of each scheme year with a statement detailing the amount of contributions credited to him during that scheme year.

(2AA) Information may be made available under paragraph (2) in accordance with regulations 26 to 28 of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (giving information and documents).

(2B) In relation to a scheme to which section 47(1)(a) of the Pensions Act 1995 does not apply, the requirement to obtain accounts in accordance with paragraph (1)(a) or an auditor's statement in accordance with paragraph (1)(b) shall apply-

(a) to such a scheme-

(i) which falls within regulation 3(1)(c) or (i) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996, and

(ii) which has 100 or more members;

(b) to such a scheme which falls within regulation 3(1) (m) or (o) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996.

(2C) The requirement to obtain an auditor's statement in accordance with paragraph (1)(b) does not apply in relation to a scheme for a scheme year in which, on the first day of that scheme year, the scheme has at least 20 participating employers.

(3) Where the trustees or managers of a scheme have failed without reasonable excuse to take all such steps as are necessary to secure compliance with either the requirement to obtain accounts audited by the auditor of the scheme or the requirement to obtain an auditor's statement about contributions to the scheme in accordance with paragraph (1)(a) or (b), they shall be liable to pay to the Regulator, within 28 days from the date of its imposition, a penalty not exceeding-

(a) £5,000 in the case of an individual; and

(b) £50,000 in any other case.

#### Pensions Act 2004

##### Section 5 - Regulator's objectives

(1) The main objectives of the Regulator in exercising its functions are-

(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,

(b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),

(c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2),

(cza) in relation to the exercise of its functions under Part 3 only, to minimise any adverse impact on the sustainable growth of an employer,

(ca) to maximise compliance with the duties under Chapter 1 of Part 1 (and the safeguards in sections 50 and 54) of the Pensions Act 2008, and

(d) to promote, and to improve understanding of, the good administration of work-based pension schemes.

#### Section 10 - Functions exercisable by the Determinations Panel

(1) The Determinations Panel is to exercise on behalf of the Regulator-

(a) the power to determine, in the circumstances described in subsection (2), whether to exercise a reserved regulatory function, and

(b) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question.

(2) Those circumstances are-

(a) where the Regulator considers that the exercise of the reserved regulatory function may be appropriate, or

....

(3) Where subsection (1) applies, the powers mentioned in that subsection are not otherwise exercisable by or on behalf of the Regulator.

(4) For the purposes of this Part, a function of the Regulator is a "reserved regulatory function" if it is a function listed in Schedule 2.

#### Section - 70 Duty to report breaches of the law

(1) Subsection (2) imposes a reporting requirement on the following persons-

(a) a trustee or manager of an occupational or personal pension scheme;

(aa) a member of the pension board of a public service pension scheme;

(b) a person who is otherwise involved in the administration of an occupational or personal pension scheme ;

(c) the employer in relation to an occupational pension scheme;

(d) a professional adviser in relation to such a scheme;

(e) a person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme.

(2) Where the person has reasonable cause to believe that-

(a) a duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has not been or is not being complied with, and

(b) the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions, he must give a written report of the matter to the Regulator as soon as reasonably practicable.

(3) No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a written report under this section. This is subject to section 311 (protected items).

(4) Section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to any person who, without reasonable excuse, fails to comply with an obligation imposed on him by this section.

#### 82 Restricted information

(1) Restricted information must not be disclosed-

(a) by the Regulator, or

(b) by any person who receives the information directly or indirectly from the Regulator.

...

(5) Any person who discloses information in contravention of this section is guilty of an offence and liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum, or imprisonment for a term not exceeding 12 months, or both;

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both.

#### Section 95 - Application of standard and special procedure

(1) The Regulator must comply with the standard procedure (see section 96) or, where section 97 applies, the special procedure (see section 98) in a case where-

(a) the Regulator considers that the exercise of one or more of the regulatory functions may be

appropriate, or

(b) an application is made under or by virtue of-

(i) any of the provisions listed in section 10(6), or

(ii) any prescribed provision of this or any other enactment, for the Regulator to exercise a regulatory function.

(2) For the purposes of section 96, references to the regulatory action under consideration in a particular case are-

(a) in a case falling within subsection (1)(a), references to the exercise of the one or more regulatory functions which the Regulator considers that it may be appropriate to exercise, and

(b) in a case falling within subsection (1)(b), references to the exercise of the regulatory function which is the subject-matter of the application.

(3) Neither section 96 (standard procedure) nor section 98 (special procedure) apply in relation to a determination whether to exercise a regulatory function on a review under section 99 (compulsory review of regulatory action).

Section 100 - Duty to have regard to the interests of members etc

(1)The Regulator must have regard to the matters mentioned in subsection (2)-

(a) when determining whether to exercise a regulatory function-

(i) in a case where the requirements of the standard or special procedure apply, or

(ii) on a review under section 99, and

(b) when exercising the regulatory function in question.

(2) Those matters are-

(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and

(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Schedule 2 – The Reserved Regulatory Functions

Part 1 – Functions under the Pension Schemes Act 1993

...

(3) The power under regulations made by virtue of section 168(4) to require a person to pay a penalty.

...

Part 2 - Functions under the Pensions Act 1995 (c. 26)

...

11 The power to require a person to pay a penalty under section 10 (including under regulations made by virtue of subsection (3) of that section).

...

Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013

...

Regulation 5 - Civil penalties relating to occupational pension schemes

Where in relation to an occupational pension scheme a person fails without reasonable excuse to comply with any requirement imposed under these Regulations, the Regulator may, by notice in writing, require that person to pay, within 28 days, a penalty that must not-

(a) in the case of an individual, exceed £5,000, and

(b) in any other case exceed £50,000.

...

Regulation 17 - Statements of benefits: money purchase benefits

(1) Information relating to a member's money purchase benefits must be given in accordance with this regulation to a member who-

(a) has rights to money purchase benefits, and

(b) is not an excluded person.

(2) The information listed in Part 1 of Schedule 6 must be given.

- (3) The information listed in paragraphs 6 to 8 of Schedule 6 must be given except where paragraph (6) applies.
- (4) Where paragraph (6) applies, the information listed in paragraphs 6 to 8 of Schedule 6 may be given.
- (5) Where the information listed in paragraphs 6 to 8 of Schedule 6 is given under paragraph (3) or (4), the information listed in-
- (a) paragraphs 9 to 14 of that Schedule must be given with that information, and
  - (b) Part 3 of that Schedule must be given.
- (6) This paragraph applies where-
- (a) the member is in receipt of benefits under the scheme,
  - (b) the date referred to in paragraph 4 of Schedule 6 is not more than two years before the member's retirement date for the purpose of Part 2 of Schedule 6,
  - (c) in relation to the member-
    - (i) the value, determined in accordance with the relevant guidance, of the member's accrued rights to money purchase benefits under the scheme was less than £5,000 on the last illustration date in respect of which the information listed in Part 2 of Schedule 6 was last given,
    - (ii) since that previous illustration date, no contributions (including transfers of pension rights and pension credits) have been made to the scheme by, or on behalf of, the member in respect of the member's money purchase benefits, and
    - (iii) the trustees or managers of the scheme have previously given notice to the member that the information listed in Part 2 of Schedule 6 will not be given to the member again unless further contributions referred to in paragraph (ii) have been made,
  - (d) in relation to the member-
    - (i) on the first illustration date after 5th April 2003, the value, determined in accordance with the relevant guidance, of the member's accrued rights to money purchase benefits under the scheme was less than £5,000,
    - (ii) no contributions, including transfers of pension rights and pension credits, have been made to the scheme by, or on behalf of, the member after 5th April 2003 in respect of the member's

money purchase benefits, and

(iii) the trustees or managers of the scheme think that no further such contributions are likely to be made after that illustration date, or

(e) the member's benefit is calculated by reference to the greater of a money purchase formula and a defined benefit formula and the trustees or managers of the scheme think the benefit calculated using the money purchase formula is unlikely to affect the pension payable.

(7) The information to be given under paragraphs (2) to (5) must be given within 12 months of-

(a) in the case of an occupational pension scheme, the end of each scheme year, except where paragraph (9) applies, and

(8) Where paragraph (9) applies, the information mentioned in paragraphs (2) to (5) may be given.

(9) This paragraph applies where-

(a) the scheme year is the first to end on or after the date the person became a member of the scheme, and

(b) the end of that scheme year falls at a time when-

(i) no contributions have been credited to the scheme in respect of the person, or

(ii) the person has the right to opt out of the scheme under section 8 of the Pensions Act 2008 (jobholder's right to opt out).

(10) For the purposes of paragraph (6), a part of an occupational pension scheme that provides additional money purchase benefits where the member pays voluntary contributions to that part is to be treated as a separate scheme from any other part of that scheme.

### Pension Schemes Act 2017

#### Section 1 - Master Trust schemes: definition

(1) In this Act, "Master Trust scheme" means an occupational pension scheme which-

(a) provides money purchase benefits (whether alone or in conjunction with other benefits),

(b) is used, or intended to be used, by two or more employers,

(c) is not used, or intended to be used, only by employers which are connected with each

other, and

(d) is not a relevant public service pension scheme.

(4) In this section-

"employer", in relation to an occupational pension scheme, means a person who employs or engages persons who are, or are entitled to become, members of the scheme;

"money purchase benefits" has the same meaning as in the Pension Schemes Act 1993 (see section 181 of that Act);

"occupational pension scheme" has the same meaning as in the Pension Schemes Act 1993 (see section 1(1) of that Act);

"relevant public service pension scheme" has the meaning given in section 2.

### Section 3 - Prohibition on operating a scheme unless authorised

(1) A person may not operate a Master Trust scheme unless the scheme is authorised.

(2) Section 10 of the Pensions Act 1995 (civil penalties) applies to a person who breaches subsection (1).

(3) If the Pensions Regulator becomes aware that a Master Trust scheme is operating without authorisation, it must notify the trustees of the scheme that the scheme is not authorised.

### Section 4 - Application for authorisation

(1) The trustees of a Master Trust scheme may apply to the Pensions Regulator for authorisation.

(2) The application must include the following-

(a) the scheme's latest accounts;

(b) the latest accounts of each scheme funder;

(c) the scheme's business plan (see section 9);

(d) the scheme's continuity strategy (see section 12).

(3) In considering an application, the Pensions Regulator may take into account any matters it considers appropriate, including-

- (a) additional information provided by the applicant, and
- (b) subsequent changes to the application or to any information provided by the applicant.
- (4) The application must be made in the manner and form specified by the Pensions Regulator.
- (5) The Secretary of State may make regulations setting out-
  - (a) other information to be included in an application, and
  - (b) the application fee payable to the Pensions Regulator.
- (6) Regulations under this section are subject to negative resolution procedure.

#### Section 21 - Triggering events

[Ed note: This section is in force for limited purposes only; see the "Commencement" note to this section.]

- (1) A triggering event occurs in relation to a Master Trust scheme if-
  - (a) an event within the second column of the table in subsection (6) occurs in relation to it, and
  - (b) the event does not occur within an existing triggering event period for the scheme (subject to subsection (2)).
- (2) An event within item 1, 2 or 3 of the table (notice of decision to withdraw authorisation; notification that scheme is not authorised) is a triggering event even if it occurs within an existing triggering event period.
- (3) A triggering event occurs on the date specified in relation to the event in the third column of the table.
- (4) A "triggering event period" for a Master Trust scheme is a period-
  - (a) starting with the date on which a triggering event occurs in relation to the scheme, and
  - (b) ending with the earliest of the dates given by subsection (5).
- (5) The dates are-
  - (a) the date on which the scheme is wound up;
  - (b) the date on which the trustees receive notification from the Pensions Regulator that the

Regulator is satisfied that the triggering event has been resolved (see section 25);

(c) in the case of an event within item 1 or 2 of the table (notice of decision to withdraw authorisation), the date on which it becomes clear that authorisation is not to be withdrawn (see section 34).

(6) The table is-

...

<i>Item</i>	<i>Triggering event</i>	<i>Date event occurs</i>
8.	A scheme funder, scheme strategist or the trustees decide that the Master Trust scheme should be wound up, where the person making the decision has power to do so under the scheme or the rules of the scheme.	The date of the decision.

...

(7) A Master Trust scheme is to be taken to permit the trustees of the scheme to make the decision referred to in item 10 of the table, to the extent that it would not otherwise do so.

(8) In this section-

"determination notice" has the meaning given by section 98(2)(a) of the Pensions Act 2004;

"special procedure" has the meaning given by section 98 of that Act;

"standard procedure" has the meaning given by section 96 of that Act;

"warning notice" has the meaning given by section 96(2)(a) of that Act.

#### Section 22 - Notification requirements

(1) Subsection (2) applies if an event within an item of the table in section 21(6) that is listed in the first column of the table in subsection (3) occurs in relation to a Master Trust scheme.

(2) Each person specified in relation to the event in the second column of the table must notify the Pensions Regulator.

(3) The table is-

...

<i>Event</i>	<i>Person under duty to notify Pensions Regulator</i>
Item 8 (scheme funder, scheme strategist or trustees decide that scheme should be wound up)	The person or persons who take the decision.

...

(4) If an event within an item of the table in section 21(6) that is listed in the first column of the table in subsection (5) occurs in relation to a Master Trust scheme, and

(b) a person specified in relation to the event in the second column of the table becomes aware that the event has occurred, the person must notify the Pensions Regulator.

(5) The table is-

...

<i>Event</i>	<i>Persons under duty to notify Pensions Regulator if become aware of event</i>
Item 8 (scheme funder, scheme strategist or trustees decide that scheme should be wound up)	The trustees. A scheme funder. A scheme strategist.

...

(7) A notification under this section must be given before the end of the period specified in regulations made by the Secretary of State.

(8) No duty to which a person is subject is to be regarded as contravened merely because of any information provided to the Pensions Regulator under this section.

(9) A person is not required by this section to disclose anything in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality of communications) could be maintained in legal proceedings.

(10) Section 10 of the Pensions Act 1995 (civil penalties) applies to a person who fails to comply with a requirement imposed by this section.

(11) Regulations under this section are subject to negative resolution procedure.

Schedule 2 - Master Trusts Operating Before Commencement: Transitional Provision

Section 37

(4) Section 22 (notification requirements) has effect as if-

(a) for subsection (7) there were substituted-

(7) A notification under this section must be given-

(a) in a case where the triggering event occurs on or after 20 October 2016 but before the commencement date, before the end of the period of seven days beginning with the date on which the triggering event occurred;

(b) in a case where the triggering event occurs on or after the commencement date, before the end of the period specified in regulations made by the Secretary of State.

## Referral to the Tax and Chancery Chamber of the Upper Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”). You have 28 days from the date this Determination Notice is sent to you to refer the matter to the Tribunal or such other period as specified in the Tribunal procedure rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice.

The Tribunal’s address is:

Upper Tribunal  
(Tax and Chancery Chamber)  
Fifth Floor  
Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal procedure rules.

You should note that the Tribunal procedure rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to the Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support  
The Pensions Regulator  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.

Tel: 01273 811852

A copy of the form for making a reference, FTC3 ‘Reference Notice (Financial Services)’, can be found at:

[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=3043](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043)