

Group Briefing

Summer 2018

Pensions Update

1. THE GDPR GENERALLY

1.1 The GDPR

The General Data Protection Regulation (“**GDPR**”) came into effect on 25 May 2018. It was recommended in our January 2018 update (available [here](#)) that trustees undertake a number of actions to ensure compliance with their obligations in advance of the enforcement date. If trustees have not yet completed these actions and you require further advice or information on the effect of GDPR on trustees’ obligations, please contact us.

1.2 Data Protection Act 2018

The Data Protection Act 2018 (the “**Act**”) was signed into law on 24 May 2018 with effect from 25 May 2018. While the GDPR did not require implementing national legislation to be effective, the Act, along with related regulations which the Government may introduce, is designed to give effect to the GDPR and to provide clarity on provisions which allow a certain limited flexibility to data controllers and processors. Of particular interest to trustees is section 50 of the Act which provides an exemption from the requirement to obtain a data subject’s consent for processing health data in respect of occupational pension schemes and the provision of insured benefits.

1.3 Pensions Authority Guidance Note

Prior to the GDPR coming into operation, the Pensions Authority issued a guidance note on data protection considerations for trustees of occupational pension schemes (“**Guidance Note**”). In summary the Guidance Note highlights that trustees need to demonstrate: processing activities are in line with the GDPR; the legal basis for processing data is identified and recorded; they have issued GDPR-compliant privacy notices to members and other data subjects in a manner consistent with the requirements of the GDPR; that procedures for handling data subject access requests have been reviewed and updated where necessary; members and other data subjects are informed of their new rights; a data breach policy has been adopted; and consideration has been given to whether a data protection officer should be appointed by them (in most cases one will not be required).

2. A ROADMAP FOR PENSIONS REFORM 2018-2023 – PROGRESS TO DATE

The Government published A Roadmap for Pensions Reform 2018-2023 (the “**Roadmap**”) on 28 February 2018. The Roadmap aims to build on reports published by previous Governments,

identify specific actions that need to be taken and set out a timetable for implementation. The reform of the State pension and creation of a new auto-enrolment savings scheme were two of six key strands of pension provision identified in the Roadmap. The following steps have been taken in relation to those strands:

2.1 Reform of State pension

On 28 May 2018, the Minister for Employment Affairs and Social Protection launched a public consultation on the State Pension (Contributory). The consultation is aimed at informing the design of a new total contributions approach (“**TCA**”) to State pensions that will be implemented for all new applicants for the State Pension (Contributory) from 2020 onwards.

Up to now, an averaging approach has been used. This penalised those with large gaps in their work history, many of whom were women who left the work force to act as carers. It is possible, under the current system, to qualify for a full State pension with as little as 10 years’ continuous contributions, while someone who paid contributions for 40 years, but has a significant gap in their record, would have a reduced rate. The TCA approach is seen as being more

equitable in terms of contributions made and pension payments received. When the TCA consultation process closes, a detailed report will be compiled on the proposals and observations made by those who engaged in the consultation.

2.2 Creation of a new auto-enrolment savings scheme

On 10 May 2018, the Department of Employment Affairs and Social Protection established an interdepartmental Automatic Enrolment Programme Board to drive a new national 'soft mandatory' pension scheme. By 2022, the Government aims to introduce a State sponsored supplementary retirement savings system in which workers will be automatically enrolled. How auto-enrolment will interact with existing pension schemes is not yet clear.

2.3 IPRTG consultation on supplementary pensions reform

In addition, an Interdepartmental Pensions Reform and Taxation Group is undertaking a review of a number of pension policy matters to inform Government policy. Interested parties are invited to make submissions by 19 October 2018. The consultation process focuses on three separate pension areas within the Roadmap:

- a. identifying measures to simplify pensions, tackle inconsistencies within the supplementary pensions system and reduce the current number of pension vehicles;
- b. review of the cost of supplementary pensions to the Exchequer; and
- c. review of the utilisation of the Approved Retirement Fund (ARF) option.

3. PENSIONS AUTHORITY COMPLIANCE ALERT: MANAGING CONFLICTS OF INTEREST

As a part of their decision-making process, trustees should be mindful of potential conflicts of interest which may affect key decisions made by a trustee board. The Pensions Authority

("Authority") has recommended some practical actions that can assist trustees with managing conflicts of interest.

3.1 Identification of Conflicts of Interest

The Authority recommends that conflicts of interest are a standard item on the agenda of trustee meetings and that trustees and advisors are made aware that they should declare any potential conflict of interest in relation to a particular agenda issue.

Trustees should create and maintain a register of conflicts where any actual, potential or perceived conflicts are recorded. The Authority recommends that each trustee (or trustee director) signs an annual return confirming that their information contained on the register continues to be correct.

3.2 Conflicts of Interest Policy

The Authority recommends that a conflicts of interest policy should be adopted by trustees. The policy should address the circumstances or scenarios in which:

- a. a conflict can be declared and recorded on the conflicts register but no further action is required;
- b. a conflicted trustee is restricted from voting but allowed to participate in the related discussion;
- c. a conflicted trustee is required to leave the meeting during the related discussion;
- d. a sub-committee of the trustees is established to deal with the conflicted matter; and
- e. a conflicted trustee is required to resign.

The policy should also address how trustees can manage any actual, potential or perceived conflict of interest in relation to their advisers.

4. APPROVED RETIREMENT FUNDS TO BE MADE MORE WIDELY AVAILABLE

Approved Retirement Funds ("ARFs"), designed to enable retirees have greater

flexibility in how they manage their pensions, are to be made more widely available due to a change in Revenue practice. Until now, retirees with defined contribution pensions had to have a guaranteed income of at least €12,700 before they could put their pension fund into an ARF. The State pension is currently €12,651 per annum and therefore many pensions were just €49 per annum short of the amount required to meet the threshold for an ARF. Revenue have now decided that the State pension Christmas bonus will be included in calculations for reaching the €12,700 threshold which will significantly increase the availability of ARFs for retirees.

5. IRISH ASSOCIATION OF PENSION FUNDS (IAPF) SURVEY OF DEFINED BENEFIT SCHEMES

A recent IAPF survey of defined benefit ("DB") schemes showed higher employer contribution rates to defined contribution ("DC") schemes for members of closed DB schemes. 65 companies participated in the survey: 20% still had a DB scheme open to new entrants and future accrual; 37% were closed to new entrants but open to future accrual; and 37% were closed both to new entrants and future accrual. 6% of schemes wound up during the course of the survey. Where future DB accrual was removed, DC was in place for 90% of respondents. Of these, almost 41% of respondents had paid higher employer contribution rates for former DB members than for other DC scheme members.

The most common minimum employer contribution rate for former DB members was 8-10% (31% of respondents), while over 10% was paid by 17% of respondents.

12% of respondents were considering a windup of their scheme, but of these, just one-sixth (2%) considered it likely they would proceed. About 40% of DB schemes are paying increases to pensioners at a fixed rate. The same amount have the power to award increases on a discretionary basis, with 50% of these not having paid an increase

for over eight years. About 18% of schemes pay no increases to pensions in payment.

6. BRITISH AIRWAYS WINS APPEAL AGAINST PENSION INCREASES (BRITISH AIRWAYS PLC V AIRWAYS PENSION SCHEME TRUSTEE LTD [2018] EWCA CIV 1533)

On 5 July 2018, the UK Court of Appeal handed down judgment in the British Airways case on discretionary increases. The Court, allowing an appeal by British Airways (“BA”), found by a two to one majority that the trustees of the Airways Pension Scheme (the “APS”) acted for an improper purpose in unilaterally amending the APS rules to give themselves the power to grant discretionary increases. The case arose from the UK Government’s announcement in 2010 that it would use Consumer Price Index (“CPI”) instead

of Retail Price Index (“RPI”) for Pension Increase (Review) Orders (“PIRO”) purposes. Pension increases in the APS were granted by reference to PIRO. This resulted in a change in the APS and the granting of increases by reference to CPI was objected to by members.

In 2011, the trustees considered amending the APS rules to ‘hardwire’ RPI, but instead decided to exercise their unilateral power of amendment to introduce a discretionary increase power. This power required the trustees to consider annually whether to grant above PIRO increases and two thirds of trustees to vote in favour of a discretionary increase for above PIRO increases to be awarded. No increase was granted in 2011 or 2012 but in 2013 the trustees voted to grant an increase of 50% of the difference between RPI and CPI, amounting to a 0.2% discretionary increase, despite BA’s strong opposition

to the decision. At its actuarial valuation as at 31 March 2012, APS had a deficit on a technical provisions basis of £680m.

In December 2013, BA issued proceedings to challenge both the amendment of the APS rules by the trustees to introduce the discretionary increase power and the exercise of that power in 2013. The High Court found in the trustees’ favour in May 2017 but granted permission for BA to appeal on whether the amendment was outside the scope and purpose of the amendment power.

The Court of Appeal decided that the amendment to introduce the discretionary increase power was within the scope of the express wording of the amendment power but was invalid as it was made for an improper purpose. The Court therefore set aside the amendment of the trust deed and rules to include a discretionary increase power.

KEY CONTACTS

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