

PENSIONS AND EMPLOYEE BENEFITS

# Summer Update 2021

July 2021

## TRANSPOSITION OF IORP II

The domestic implementing regulations for IORP II, the European Union (Occupational Pension Schemes) Regulations, 2021 (the "Regulations") were signed into Irish law on 22 April last and, in the main they did not contain anything unexpected. While there has been some initial guidance from the Pensions Authority (the "Authority") on the Regulations, the Authority has indicated that it will issue a draft code of practice on IORP II in the week commencing 19 July for public consultation with the final version to be published in November. This code of practice will supplement the high-level obligations outlined in the Regulations. Until then, trustees and employers should focus on familiarising themselves with the requirements of the Regulations and preparing for the first compliance date (which relates to putting in place a remuneration policy and having a minimum of two trustees effectively running a scheme) of 31 December 2021.

For more information in respect of the Regulations please see our recent IORP II briefing [here](#).

## EMIR (EUROPEAN MARKET INFRASTRUCTURE REGULATION)

Under the EMIR Regulation 648/2012 as amended by EMIR Refit Regulation 2019/834 (together the "Regulation") certain pension arrangements (which are deemed to be financial counterparties under the regulations) are required to clear certain over the counter ("OTC") derivative contracts including interest rate, foreign exchange, equity, credit and commodity derivatives via a central counterparty. Pension arrangements had originally been granted an exemption in respect of these clearing obligations until 18 June 2021.

The Commission Delegated Regulation (EU) 2021/962 was recently published in the Official Journal and this regulation has further extended the central clearing exemption for pension arrangements by a further year until 18 June 2022.

## REVENUE UPDATE TO PENSIONS MANUAL CHAPTER 23

On 29 June Revenue updated chapter 23 of the Pensions Manual to provide updated guidance for non-resident owners of Approved Retirement Funds

("ARF"), vested Personal Retirement Savings Accounts ("PRSA") or Approved Minimum Retirement Funds ("AMRF").

Among the updates, Revenue have included a link to the new Refund of Taxes Paid on ARF Distributions Claim form which is to be completed by non-resident claimants seeking a repayment of Irish tax on an Irish pension as well as additional information for refund claims made by non-resident claimants with unit linked ARF funds. The additional information includes further detail and worked examples in relation to the application of double taxation agreements to distributions from ARFs, vested PRSAs and AMRFs.

## RECENT CONSULTATIONS

Three consultations relating to pensions in Ireland have recently closed. The topics addressed in the consultations included: the fees payable by pension arrangements to the Authority; the gender gap in supplementary pensions; and sustainability of the State Pension and the Social Insurance Fund. Details of these consultations are set out below:

**Pensions Authority Consultation paper on fees**

- i. The Authority has published a consultation paper on fees paid by occupational pension schemes, trust RACs and PRSA providers. This is partly being driven by the IORP II Directive which requires the Authority to adopt a forward-looking risk-based approach to supervision which will involve more direct engagement with trustees and as a consequence an increase in staff numbers within the Authority. The Authority has stated that if its fee income remains unchanged, it would represent just 60% of projected expenditure in 2022. The Authority also noted that there has not been an increase in fees paid by pension schemes and PRSAs since 2002 (although there were two reductions for pension schemes in 2010 and 2011).
- ii. The Authority is proposing to change its fee structure as follows (to be reviewed again in 2024):
  - a. the primary fee would be an asset-based levy charged on an equal basis to all pension schemes and PRSAs;
  - b. the introduction of a substantial per scheme fee after an interval to allow and encourage scheme consolidation; and
  - c. the fee structure and rates would remain unchanged for single member schemes subject to the temporary IORP II derogation.
- iii. The closing date for submissions in respect of the Authority's consultation paper was 22 June 2021. It is not yet known when the Authority expects to provide an update on the consultation process.

**The Pensions Council (the "Council")**

- i. The Council launched a public consultation and is seeking views on the gender gap in supplementary pensions arising as a result of current practices within the supplementary pension system in Ireland. The Council had already published a report on "Gender, Pensions and Income in Retirement", which highlighted that the elimination of the gender pension gap would require, among other things, changes that lie outside the domain of current pension rules, such as increased provision for childcare and other measures that would improve female participation in the workforce.
- ii. At the request of the Minister for Social Protection, the Council is now reviewing more specifically the rules governing supplementary pensions. The closing date for submissions was 21 June 2021. The gender gap as it relates to income both during working life and into retirement is a topical issue at present

and it will be interesting to see what suggestions emerge to change the way the supplementary pension system is structured to improve the financial position of women in retirement.

**Pension Commission Stakeholder Forum**

- i. The Pensions Commission (the "Commission") was established in November 2020 as part of a Government commitment. The Commission has been asked to develop a range of options for the Government to consider in order to address the sustainability of the State Pension and the Social Insurance Fund in terms of pension age, eligibility criteria, contribution rates, pension calculation methods and pension payment rates. It will also consider the issue of retirement ages in private employment contracts that are set below the State Pension age, and pension provision for long-term carers.
- ii. The Stakeholder Forum was held on 21 April 2021 and forms part of the Commission's consultation process. Presentations were given by the OECD, Age Action, the ESRI, IBEC, ICTU and NWCI. The Forum aimed to facilitate an exchange of experiences, knowledge and insights amongst key stakeholders and Commission members.
- iii. The Commission was due to report to the Government by the end of June but has stated that it will instead report shortly after the summer recess which ordinarily ends in September. Due to this delay it is likely to be March 2022 before the Government can make a decision on the Commission's recommendations.

**REGULATORY TECHNICAL STANDARDS ("RTS") UNDER THE SUSTAINABLE FINANCE DISCLOSURE REGULATION ("SFDR") DEADLINE EXTENDED UNTIL 1 JULY 2022**

The aim of SFDR is to lay down harmonised rules on transparency for financial market participants (which term includes pension schemes) with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts and the provision of sustainability related information and to support the European Union's goals in relation to climate, sustainability and the environment. While certain 'level 1' obligations came into effect on 10 March last (involving high-level principles-based disclosure requirements), they were due to be supplemented by more detailed 'level 2' requirements due to enter into force from 1 January 2022. This has now been deferred to 1 July 2022. From that date, certain entities must comply with detailed pre-contractual and annual

reporting disclosures and must make these disclosures in the mandatory templates which are set out in the annexes to the SFDR RTS for relevant products.

The European Commission (the "Commission") sought to introduce RTS to give guidance on the context and format of ESG reporting under SFDR. The change in date in finalising the RTS affects the reporting element of the SFDR but does not affect the processes and principles underlying the reporting which should already be in place in accordance with SFDR. Trustees are required to take environmental, social and governance ("ESG") factors (with related disclosures) into account in the context of the requirements under both SFDR and IORP II (and to a related degree under the Shareholders' Rights Directive ("SRD")).

To the extent that you require any advice in relation to SFDR, IORP II or SRD please contact the Arthur Cox Pensions team.

**PENSIONS AUTHORITY REPORT ON DEFINED BENEFIT SCHEME STATISTICS FOR 2020**

On 8 June the Authority published its report on defined benefit scheme statistics for 2020. The Authority expressed its concern about the level of investment risk inherent in the provision of defined benefit schemes and noted that the risk is borne primarily on members who have not yet retired. The Authority further noted that this group continues to diminish and the risks associated with defined benefit schemes becomes more concentrated as a result.

The report noted that there are currently 310,640 members of defined benefit schemes consisting of 104,196 retired members, 136,485 deferred members and 69,959 active members. The total funding standard related liabilities in respect of these members is €61 billion which rises to €64.2 when the funding standard reserve is included. Total assets held by defined benefit schemes were valued at €70.5 billion with a total surplus of €9.5 billion. These figures mark an increase in value from the 2019 figures which noted total assets of €65.2 billion and a total surplus of €7.2 billion.

The report notes that as of 31 March 2021, there are currently 560 schemes (558 continuing schemes and 2 schemes in wind-up) subject to the funding standard provisions of section 44 of the Pensions Act 1990. The figure of 560 continuing schemes represents a decrease of 10 from the 2019 report.

Of the 558 continuing schemes, 374 of the schemes are noted as current (contain active scheme members) and 184

are noted as frozen (the scheme is only providing benefits for members whose service had terminated or continuing service in employment does not entitle members to long service benefits with no new members being admitted).

Pursuant to the Annual Actuarial Data Returns submitted it was found that 59 of the 558 schemes did not satisfy the funding standard provided for in section 44(1) the Act and that 112 of the 556 continuing schemes did not hold sufficient additional resources to satisfy the funding standard reserve. The funding standard reserve liabilities of schemes ranged from 1% to 15% of the funding standard liabilities.

#### CASE LAW

There have been two recent cases before the High Court of England and Wales which are worth noting and which may prove to be persuasive before the Irish courts. The first case relates to the introduction of a forfeiture provision into a trust deed and provides useful guidance in respect of the limitation periods which operate in respect of claims for benefit arrears. The second case relates to the rectification of a trust deed where there is evidence that there has been a clear mistake.

#### **Punter Southall Governance Services Limited v Jonathan Hazlett (as a representative defendant) [2021] EWHC 1652 (Ch) ("Axminster Carpets")**

The Axminster Carpets case revolved around a number of legal issues in the Axminster Carpets Group Retirement Benefits Plan (the "Plan"). This case primarily related to the validity of forfeiture provisions and trustees' discretion with regard to unclaimed benefits. Forfeiture provisions are often included in occupational pension schemes, stating that a member loses their right to benefits if they do not claim the benefits after a certain period of time (typically six years).

The Plan was established in 1961 and came to be governed by a definitive trust deed and rules in 1992 (the "1992 Deed"). The 1992 Deed contained a clause which gave the trustee the ability to apply unclaimed monies for other purposes. As the clause did not contain clear and explicit wording to the effect

that a member's right to benefits would be forfeited if unclaimed after a specified period of time it was held that the clause did not constitute an effective forfeiture provision.

A further Deed was drafted in 2001 (the "2001 Deed") which contained explicit language to the effect that benefits would be forfeited if unclaimed. In contrast to the 1992 Deed, it was held that the explicit reference to forfeiture rendered this provision an effective forfeiture provision.

Interestingly, the High Court found that a forfeiture provision does not necessarily contravene a scheme's amendment power (to the extent that it contains a restriction on diminishing accrued benefits) as it does not always act to diminish the benefits to be provided to members. As the forfeiture only operated in circumstances where a member failed to make a claim it could not be said that benefits were diminished but rather there was merely a risk of same.

The Court further offered guidance on the extent of a trustee's discretion to use unpaid monies. It outlined that a trustee must first ensure that members are not underpaid as oftentimes members are not at fault for a failure to claim monies. However, the Court noted that other factors such as administrative difficulties in paying arrears or previous underpayment due to an error of a previous trustee may be considered when using monies for purposes other than paying members.

The Court also offered guidance on the limitation period for claiming arrears. It stated that there is no limitation period for a member to claim arrears or compensation for a breach of trust caused by a current trustee. In circumstances where such arrears or breach of trust arise as a result of the actions of a previous trustee, members have a period of six years from the breach in which to pursue a claim against the previous trustee. The Court considered that a claim for arrears does not include interest but the court may award such interest at its discretion while claims for breach may include interest.

This case underlines the importance of clear drafting when including a forfeiture clause in a trust deed. Further, the case provides useful guidance to trustees as regards their discretion in dealing with

unpaid monies as well as the options available to members in pursuing claims for unpaid benefits and breaches of trust against current and former trustees.

#### **Iggesund Paperboard (Workington) Ltd, Iggesund (UK) Pensions Limited v Messenger [2021] EWHC 627 (Ch)**

The High Court recently handed down a decision in *Iggesund Paperboard (Workington) Ltd, Iggesund (UK) Pensions Limited v Messenger* in which it ordered the rectification of a trust deed and rules. The case concerned a pension increase rule which prior to the scheme being amended had facilitated the use of an index other than the retail price index (RPI) to be applied to pension increases. The amended version of the trust deed and rules omitted this flexibility (by omitting the words "... or such other index as the actuary advises to be appropriate") thus hardwiring RPI as the basis for increases to pensions in payment.

The High Court noted that there are "two common situations in which rectification of pension deeds is sought. The first is where the employer and trustees intended to make a particular change but the change was incorrectly reduced to writing. The second is where the employer and trustee did not intend to make the amendments, so that they did not address their minds at all to the relevant words". The present case was deemed to fall into the second category in that the words were omitted and their omission was not spotted.

The case highlights the detailed gathering of evidence which is required in a claim for rectification. The Court noted on a detailed review of the documentation relating to the drafting of the amended deed and rules as well as evidence from the individuals involved in drafting same that "there was an error which was carried through from the beginning of the drafting process". The Court noted that this occurred notwithstanding the full review of the documents by specialist advisers. The Court described the case as "the clearest possible case for rectification of a pension deed based on an omission that was not noted by any of the persons involved". The Court concluded that "the short point is that there is no good reason to make any other order than an absolute order for rectification in the circumstances of this case where what has been uncovered is clearly an unintended error."

KEY CONTACTS



**Philip Smith**  
Partner  
+353 1 920 1204  
philip.smith@arthurcox.com



**Sarah McCague**  
Partner  
+353 1 920 1051  
sarah.mccague@arthurcox.com



**Michael Shovlin**  
Of Counsel  
+353 1 920 1046  
michael.shovlin@arthurcox.com



**Daniel Watters**  
Associate  
+353 1 920 1323  
daniel.watters@arthurcox.com



**Katie Lawless**  
Associate  
+353 1 920 1476  
katie.lawless@arthurcox.com



**Doireann Nic Mhathúna**  
Associate  
+353 1 920 1900  
doireann.nicmhathuna@arthurcox.com

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**Dublin**  
+353 1 920 1000  
dublin@arthurcox.com

**Belfast**  
+44 28 9023 0007  
belfast@arthurcox.com

**London**  
+44 207 832 0200  
london@arthurcox.com

**New York**  
+1 212 782 3294  
newyork@arthurcox.com

**San Francisco**  
+1 415 829 4247  
sanfrancisco@arthurcox.com

**arthurcox.com**