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Pensions Summer Update 2024

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This Summer update from our Pensions Group covers topical issues in pensions law, including the latest news on automatic enrolment, an update on DORA transposition, a summary of recent commentary on master trusts and recent legislative, Pensions Authority and case law updates.

Automatic Enrolment

*Automatic Enrolment Retirement Savings System Act 2024 (the "**AE Act**")*

A further step towards the introduction of auto-enrolment ("**AE**") in Ireland has been achieved. The AE Act completed its passage through the Oireachtas and the legislation was signed into law by the President of Ireland on 9 July 2024. The AE Act provides that it will come into operation when commenced by orders passed by the Minister for Social Protection. The Minister has stated that auto-enrolment will "become a reality" in 2025, however the exact timing of the commencement of the AE Act is not yet known. The Government previously stated it was targeting collection of first contributions to the AE system in January 2025.

The AE Act provides for employees aged between 23 and 60, who earn in excess of €20,000 per year and who are not already enrolled in an occupational pension scheme, to be automatically enrolled into the new AE system.

Employers should begin preparing for AE. The main initial step is to undertake a gap analysis of your workforce to see who is covered by a pension arrangement and who is not. Employers will then need to decide whether (i) they wish to ensure all employees are included in their occupational pension scheme, or (ii) they want the AE system to apply to all employees; or (iii) they want to operate both systems in tandem for different cohorts of employees. Once this decision is taken there may be a number of steps to be taken to prepare for AE going live, including reviewing contracts of employment and relevant employment policies as well as potentially amending existing pension arrangements. For further information, please contact your usual Arthur Cox pensions or employment point of contact.

To keep up to date on the introduction of automatic enrolment in Ireland, you can subscribe to our auto-enrolment portal here.

Digital Operational Resilience Act ("DORA")

DORA is an EU regulation which aims to create a harmonised regulatory framework strengthening the ICT security of financial entities (which includes pension schemes). Its objective is to achieve a high

common level of digital operational resilience across all EU member states so that financial entities are able to effectively respond to unplanned disruption while minimising the impact on their business and customers.

DORA will be directly effective across the EU from 17 January 2025, so it is important that pension scheme trustees now begin to take steps towards compliance with its requirements in advance of this date.

The Pensions Authority (the "**Authority**") has not yet published guidance on how it expects pension schemes to comply with DORA. In the absence of such guidance, trustees are encouraged to familiarise themselves with the provisions of DORA and the accompanying Regulatory Technical Standards ("**RTS**") which set out regulatory guidance and expectations on the requirements of DORA. The first batch of RTS – covering ICT risk management frameworks, ICT third party risk management and incident handling – were issued to the European Commission for final approval on 17 January 2024 and a summary is available here. The second batch of RTS – covering the content and timing for reporting major ICT-related incidents, the conditions for subcontracting ICT services supporting critical or important functions, threat led penetration testing and regulatory oversight of critical ICT third party service providers – were first published on 8 December 2023 and subject to a period of consultation that closed on 4 March 2024. A summary is available here.

Pension schemes already assess ICT risks and, following the introduction of IORP II, will have appointed a Risk Manager. In most cases, DORA compliance will involve updates to existing arrangements and policies to align existing processes with the rubric of the additional formalities.

Legislative updates

Employment (Restriction of Certain Mandatory Retirement Ages) Bill 2024

As reported in our Spring Update, the General Scheme of the Employment (Restriction of Certain Mandatory Retirement Ages) Bill 2024 (the "**Bill**") was published by the Government on 6 March 2024. A summary of the General Scheme of the Bill from our Employment team is available here.

The Oireachtas Joint Committee on Enterprise, Trade and Employment published the report on its pre-legislative scrutiny of the Bill on 24 May 2024. The report made a number of recommendations, including that the requirement for employees to give three months' notice to their employer if they do not intend to retire at their contractual mandatory retirement age is unduly onerous on the employee. The recommendations will now be considered by the Government before the Bill is introduced to the Oireachtas, with it currently being listed as a priority for drafting on the Government's legislative programme.

Master Trusts

Pensions Council publishes Practical Guide to Master Trust transition exercises

On 7 June 2024, the Pensions Council published a practical guide to Master Trust transition exercises for Employers and Trustees (the "**Practical Guide**"). The purpose of the Practical Guide is to set out some of

the practical steps and considerations for employers and trustees when working through a move to a master trust.

The Practical Guide identifies a number of items that employers and trustees should give particular attention to when considering a master trust transition, including (amongst others):

1. *Documentation*: a review of the master trust documentation should include a review of the documentation required to wind-up the employer's existing scheme; transfer the assets and liabilities of the existing scheme to the master trust; and admit the employer to participation in the master trust.
2. *Charging structure*: employers and trustees should consider the competitiveness of the charging structure within the master trust, and whether it can be unilaterally altered by the master trust provider following the transition. Employers should also consider whether any exit charges apply.
3. *Investment*: the range of investment options available to members in the master trust, and in particular the default investment option, should be reviewed to ensure they are appropriate.
4. *Transition of existing scheme details*: employers and trustees should seek to understand the extent to which bespoke benefit structures in the existing scheme will be replicated in the master trust, and that existing Pension Adjustment Orders and expression of wishes forms will be honoured by the master trust trustee post-transition. Where necessary, commitments from the master trust provider to replicate and/or honour such arrangements should be included in the transition documentation.
5. *Deferred members*: under current Irish pensions legislation, a bulk transfer of deferred members is solely permitted where the transferring scheme is being wound-up. This has two potential implications that should be considered on master trust transitions:
   (a) where the employer's existing pension scheme is not being wound-up in conjunction with the master trust transition, it will not be possible to bulk transfer deferred members to the master trust; and
   (b) if the employer subsequently decides to switch to a different master trust provider, it will not be possible for deferred members of the employer's section of the master trust to be transferred to the new master trust, unless the existing master trust is being wound-up.
6. *Ongoing management*: employers should consider how the master trust provider will manage their master trust section post-completion, including matters such as member communications, employer liaison, investment reporting and management of death-in-service claims and pension adjustment orders.

A copy of the Practical Guide is available here and should be considered by employers contemplating a move to master trust and by trustees when requested to undertake a master trust transition exercise. However, the issues arising on a master trust transition are unique to each scheme and we recommend that employers and trustees seek legal advice prior to and during the course of any transition exercise they undertake.

Pensions Authority updates

Authority publishes investment strategy (liquidity risk) guidance for trustees

On 18 June 2024, the Authority published guidance for trustees on investment strategies that may give rise to significant liquidity risks. The Authority has previously noted that there are lessons to be learned from the issues that arose in Autumn 2022 for UK defined benefit pension schemes that were exposed to liability driven investments ("**LDIs**"), requiring intervention from the Bank of England to stabilise the UK pensions and gilts markets.

The Authority identifies investments that may give rise to significant risks as including LDIs, leveraged LDIs, sale and repurchase agreements (repos), swaps, currency hedging and inflation hedging. The Authority noted that such strategies involve more complexity than traditional strategies and may incur losses requiring the liquidation of scheme assets. It stated that, as a result, greater understanding and proactivity is required on the part of trustees in managing the risk.

The Authority's guidance states that trustees pursuing an investment strategy which includes such investments should:

1. ensure that their investment strategy complies with the requirements of the Pensions Act 1990, the Occupational Pension Schemes (Investment) Regulations 2021; and the Authority's Code of Practice;
2. set out detailed information on the investment strategy in their Statement of Investment Policy Principles ("**SIPP**");
3. satisfy themselves that their investment managers have the necessary expertise and operational capability to manage such investments;
4. acting in conjunction with their advisers, establish a target level of liquidity and have a liquidity preparedness plan in place to restore the target level of liquidity following adverse market movements or during periods of decreased market liquidity;
5. have operational arrangements in place that ensure that the scheme's decision-making process can cope with rapid market movements; and
6. closely monitor the risks and performance of their investment strategy and include information on these in the trustee annual report.

Trustees of defined benefit schemes should consider whether their investment strategy includes investments identified by the Authority as potentially giving rise to significant liquidity risks and, to the extent that they are not already doing so, seek to implement the steps outlined above in respect of such investments.

FSPO updates

FSPO Publishes Overview of 2023 Complaints

On 27 March 2024, the Financial Services and Pensions Ombudsman ("**FSPO**") published its overview of the complaints it received in 2023. The FSPO received a total of 6,182 complaints in 2023, of which 336 related to pensions. This represented a 44% increase in pensions complaints compared to 2022.

Of the 336 pension complaints received by the FSPO, 71% related to occupational pension schemes and 20% related to PRSAs, with the balance relating to Retirement Annuity Contracts or other pension products. The most common ground for complaints was maladministration (46%), followed by mis-calculation of pension benefits (22%) and failure to provide correct information (10%).

Case Law updates

Vodafone Ireland Limited v Farrell & Ors

In this case the High Court was asked to interpret certain provisions of the Vodafone Ireland Pension Plan ("**VIPP**") regarding the entitlement of certain members of the VIPP to post-retirement increases in their pensions. Vodafone Ireland (the "**Principal Employer**") argued that pension increases under the pension increase rule were at the discretion of the Principal Employer, whereas the VIPP Scheme Trustee and the members argued that the pension increase rule provided for guaranteed increases aligned throughout their retirement with salaries for the grade and point at which that member retired (i.e. pay parity increases).

The High Court closely analysed the pensions increase rule, taking into account the text of the pension increase rule, the other pension increase provisions within the VIPP Scheme Rules and the wider context in which the pension increase rule was drafted. Contextual factors which the Court considered relevant to its interpretation exercise included the general employment history of the relevant members (almost all of whom were formerly employed in the civil service prior to transferring to Vodafone), legislative provisions in relation to the transfer of members to private sector employment, the manner in which the VIPP was operating at the time the pension increase rule was drafted and any stated reasons or objectives for introducing the pension increase rule. Having considered these factors, the Court concluded that the pension increase rule provided for guaranteed "pay parity" increases for the relevant members.

The High Court's judgment summarises the main criteria applicable in considering the correct interpretation of complex or ambiguous provisions in scheme governing documentation.

Masterson & Ors v Córas Iompair Éireann

In this case the High Court was asked to interpret rule 20 of the Córas Iompair Éireann Superannuation Scheme 1951 (the "**Scheme**") which provides for the liability of CIÉ to contribute to the Scheme. Rule 20 states that 'In every year the Board shall contribute to the Fund such sum as the Board after consulting the Actuary determines to be necessary to support and maintain the solvency of the Fund'. The questions put to the High Court included whether rule 20 and CIÉ's obligation 'to support and maintain the solvency of the Fund' placed an obligation on CIÉ to pay employer contributions sufficient to ensure that the Scheme meets the statutory minimum funding standard ("**MFS**") and the funding standard reserve, each as provided for in the Pensions Act 1990.

The High Court held that an assessment of 'solvency' in this context requires that the Scheme must satisfy the MFS and the funding standard reserve buffer. Based on a construction of the rules of the Scheme as whole, the Court held that the obligation on CIÉ to determine the contribution '*necessary to support and maintain the solvency of the fund*' requires a determination as to the adequacy of the assets to meet liabilities, to include the liabilities for which provision must be made to satisfy the MFS. The Court went on to note that where there are liabilities, whether relating to future benefits such as those arising from projected wage increases, which do not come within the terms of the MFS, these must also be taken into account. However, the Court also noted that the obligation on CIÉ to contribute to the fund is not absolute and noted, in particular, that the rules of the Scheme explicitly refer to the right of the committee

to vary members' contributions in certain circumstances where the CIÉ contribution required to support and maintain the solvency of the fund exceeds a certain threshold.