Pensions & Retirement Plans 2019

Contributing editor
Jan Van Gysegem

LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Pensions & Retirement Plans 2019*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Jan Van Gysegem, of Claeys & Engels, for his continued assistance with this volume.

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STATUTORY AND REGULATORY FRAMEWORK

Primary laws and regulations

1 What are the main statutes and regulations relating to pensions and retirement plans?

The Pensions Acts 1990 to 2018 (Pensions Act) and the Taxes Consolidation Act 1997 (as amended) (TCA) are the principal legislative provisions. The Pensions Act was amended to reflect Directive 2003/41/EC of the European Parliament and of the Council on the Activities and Supervision of Institutions for Occupational Retirement Provision (IORPs). Legislation has not yet been published to address Directive 2016/2341 (IORPS II). It is understood that IORPS II is intended to be transposed within the third quarter of this year, after the 13 January 2019 deadline for transposition was missed. The drafting of regulations to transpose IORPS II is understood to be at an advanced stage.

Numerous regulations have been made under the Pensions Act. The most important of these govern preservation of benefits, the funding standard, disclosure of information, and investment rules. Statutory guidance has been issued by the Pensions Authority and prescribed by the Minister for Employment Affairs and Social Protection under regulation. Statutory guidance has the force of law and has been applied to reductions in accrued benefits, funding proposal certification, contingent assets, unsecured undertakings and transfer payments. The TCA regulates the tax treatment of occupational pension schemes and pension products. Family law provisions also affect pension provision.

Regulatory authorities

2 What are the primary regulatory authorities and how do they enforce the governing laws?

The Pensions Authority, the Financial Services & Pensions Ombudsman and the Revenue Commissioners are the primary regulatory authorities for work-based pension plans.

The Pensions Authority

The Pensions Authority supervises compliance with the requirements of the Pensions Act by trustees of occupational pension schemes and trust retirement annuity contracts (RACs), personal retirement savings accounts providers, registered administrators and employers. In addition, it:

- investigates suspected breaches of the Pensions Act;
- conducts on-site inspections and compliance audits;
- instigates prosecutions and other sanctions where breaches of the Pensions Act are found to have occurred;
- provides policy advice and technical support to the work of the Minister and Department of Employment Affairs and Social Protection;
- provides relevant information and guidance to the public and those involved with pensions; and
- deals with inquiries received from scheme members, trustees, employers, the pensions industry, the general public and the media.

Financial Services and Pensions Ombudsman

Legislation to amalgamate the Office of the Pensions Ombudsman and the Financial Services Ombudsman came into force on 1 January 2018. Among other things, the new Financial Services and Pensions Ombudsman investigates and decides complaints and disputes from individuals about their occupational pension schemes, personal retirement savings accounts and trust RACs where there is maladministration or financial loss.

The Revenue Commissioners

The Revenue Commissioners enforce the TCA through the grant or withdrawal of their approval for occupational pension schemes and pension products. The grant of approval ensures a favourable tax treatment will apply to contributions and investment returns. The TCA grants discretionary powers to Revenue in relation to the approval of occupational pension schemes. The Revenue Commissioners publish a *Revenue Pensions Manual*, which gives general guidance on how its powers are exercised.

Pension taxation

3 What is the framework for taxation of pensions?

An occupational pension scheme that is approved by the Revenue Commissioners as an exempt-approved scheme is tax-efficient for several reasons. Employee contributions are allowable as an expense in assessing the member's liability to tax. In any tax year, and depending on age, tax relief will apply to contributions of between 15 per cent and 40 per cent of the employee's remuneration (up to a maximum remuneration of €115,000). An ordinary annual contribution paid by an employer is allowed as a tax deduction. Income derived from investments or scheme deposits is exempt from income tax. Pension payments are subject to income tax and levies when in payment, and commutation of pension for a tax-free lump sum is permitted within certain limits.

The TCA imposed a maximum allowable retirement pension fund for tax purposes by imposing a lifetime limit on the total capital value of pension benefits that an individual can draw in his or her lifetime from tax-relieved pension products. This applies where those benefits are taken or come into payment for the first time on or after 7 December 2005. The limit is called a 'standard fund threshold'. It is currently €2 million (having gradually reduced down from a higher limit). In certain circumstances, individuals may have applied for a higher personal fund threshold from Revenue on or before 1 July 2015. Any excess above the threshold is subject to an upfront income tax charge of 41 per cent.

STATE PENSION PROVISIONS

Framework

4 What is the state pension system?

The state pension (contributory) is a social insurance payment made to people aged 66 or over who satisfy certain social insurance contribution conditions. The pension (personal rate) is not means tested nor affected by other income.

The state pension (non-contributory) is a means-tested payment for people aged 66 or over who do not qualify for the state pension (contributory) based on their social insurance record.

Pension calculation

5 How is the state pension calculated and what factors may cause the pension to be enhanced or reduced?

To qualify for a state pension (contributory) a person must be aged 66 or over and have enough Class A, E, F, G, H or S social insurance contributions.

They need to:

- have paid social insurance contributions before a certain age;
- have a certain number of social insurance contributions paid; and
- have a certain average number of contributions over the years since they first started to pay.

The qualifying conditions are very detailed and are described on the website of the Department of Employment Affairs and Social Protection.

Aims

6 Is the state pension designed to provide a certain level of replacement income to workers who have worked continuously until retirement age?

The state pension will provide a basic level of retirement income, provided a person qualifies for this benefit. The state pension is intended to ensure that everyone receives a basic standard of living in retirement. Some people do not receive a full state pension because they have not been credited with enough social insurance contribution payments. In these cases, lower levels of state pension may be paid.

Current fiscal climate

7 Is the state pension system under pressure to reduce benefits or otherwise change its current structure in any way on account of current fiscal realities?

Yes, in a number of ways. The state pension age increased on 1 January 2014 from the age of 65 to the age of 66. It will increase to the age of 67 from 1 January 2021 and the age of 68 on 1 January 2028.

The state pension (transition), which was payable at the age of 65 will no longer be paid. This pension was stopped from 1 January 2015.

Further changes are proposed in 2020 to the qualifying conditions. The *Roadmap for Pensions Reform 2018–2023* was published in 2018, in which the government proposed that a total contributions approach (TCA) for the state pension (contributory) will be introduced from 2020.

Under the TCA, the total amount of contributory pension that a person receives will be proportionate to the contributions they make, taking into account periods for child rearing, full-time caring, and periods in receipt of social protection payments.

OCCUPATIONAL PENSION SCHEMES

Types

8 What are the main types of private pensions and retirement plans that are provided to a broad base of employees?

Defined benefit plans, defined contribution plans and hybrid plans are established under trust.

Hybrid plans generally combine characteristics of defined benefit and defined contribution plans and historically have been set up under separate trusts.

Some defined benefit plans have become frozen plans under which future accrual has ceased and instead is provided under a new separate defined contribution plan. Therefore, an employee might, at retirement, have benefits paid from two plans.

Restrictions

9 What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Under the Pensions Act, an employer must comply with the principle of equal treatment under the Pensions Act in relation to the manner in which it affords its employees access to a scheme. The principle of equal treatment under the Pensions Act means that there will be no direct or indirect discrimination in any scheme rule on any of the discriminatory grounds under the Pensions Act, which include gender, age and family status among other grounds, with exceptions or savings applying to many of them. Otherwise, there are no restrictions.

10 Can plans require employees to work for a specified period to participate in the plan or become vested in benefits they have accrued?

A maximum service period of six months for eligibility to participate is acceptable before an employer must facilitate an alternative arrangement. If the qualifying service period is longer than six months, then the employer must facilitate the employee with access to a standard Personal Retirement Savings Account (PRSA). This means that the employer must allow its payroll system to deduct contributions from salary if the employee so requests and pass them to the PRSA provider with which the employer has entered into a PRSA arrangement. There is no statutory obligation on an employer to contribute to a PRSA, though an obligation may arise through the contract of employment.

Under an occupational pension scheme, benefits vest under the Pensions Act when a member leaves service having completed two years' qualifying service (ie, service as a scheme member, service as a member of a scheme of the same employer and service as a member of a scheme of a different employer from which a transfer payment has been received).

Overseas employees

11 What are the considerations regarding employees working permanently and temporarily overseas? Are they eligible to join or remain in a plan regulated in your jurisdiction?

If the employee is working temporarily overseas, on secondment from an Irish employer for a limited period and can be deemed to remain on the employer's payroll, the employee may remain or become a member of the Irish employer's Revenue-approved scheme.

If an employee is sent abroad, other than on secondment to serve with a non-resident company in a group of which the parent company is resident in the state, but the parent company can recall or direct the employee elsewhere, the employee may remain or become a member of the Irish employer's Revenue-approved scheme, but this must first be referred to Revenue.

Funding

12 | Do employer and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

Employers must contribute in some form as a condition of Revenue approval, but there is flexibility as to the extent of their contributions provided they are meaningful, which could mean operating costs and death-in-service premiums. It is now unusual that balance-of-cost defined benefit schemes (ie, where an employer carries the costs above the employee's contributions) are non-contributory. Those that were such historically have largely introduced employee contributions or reduced future accrual.

Defined contribution schemes may be contributory or non-contributory. Some will have a core ordinary employer and employee contribution and additional matching employer contributions if members contribute some or further contributions.

Occupational pension schemes are established under trust so that trustees hold the pension fund assets separate from the employer's assets.

13 | What rules apply to the level at which benefits are funded and what is the process for an employer to determine how much to fund a defined benefit pension plan annually?

The Pensions Act imposes a statutory minimum funding standard on defined benefit schemes, which increased on 1 January 2016 to include a reserve. The actuary must carry out a valuation of such schemes every three years in order to advise, recommend or set the employer contribution rates (depending on what the deed provides for) and must also complete an annual test. Meeting that standard means that the scheme can buy annuities for pensioners but only provide transfer values for active and deferred members.

If a scheme does not satisfy the standard, the trustees must submit a funding proposal to the Pensions Authority to rectify the situation within a specified period. The scheme actuary will also value the fund on an ongoing basis and perhaps on another basis to assess approximately how much of the benefits could actually be secured. For example, in a frozen scheme that is a balance-of-cost scheme, the actuary might be asked by trustees to value the fund on a self-sufficiency basis to map out a plan as to when the scheme might be able to secure all benefits and what funding arrangement over what time period might achieve that result. In a balance-of-cost scheme, the balance of power in the scheme's contribution rule may influence the level of additional funding from time to time, depending on how the rate is set and the strength of the employer covenant.

Level of benefits

14 | What are customary levels of benefits provided to employees participating in private plans?

In a defined benefit plan, benefits are based on a fraction of pensionable remuneration for each year of pensionable service, depending on how these terms are defined in the governing trust deed and rules. Generally a fraction of one-sixtieth applies. Very often the formula takes the state pension (contributory) into account.

In a defined contribution plan, a member builds up a retirement account from the value of employee and employer contributions. The account is used to secure benefits at retirement usually as the member decides from a range of options and subject to Revenue rules (ie, securing members' and dependants' pensions with a life office, paying a tax-free lump sum, paying a taxed lump sum, or making a transfer to an approved retirement fund or approved minimum retirement fund).

Pension escalation

15 | Are there statutory provisions for the increase of pensions in payment and the revaluation of deferred pensions?

There is no statutory increase to pensions in payment. If a former employee has an entitlement to a deferred pension that has vested under the Pensions Act (ie, become preserved), it will normally be revalued (at the lesser of 4 per cent or the increase in the consumer price index) at the end of each year until payment commences. The Pensions Act provides for an adjustment downwards if the Minister of Employment Affairs and Social Protection declares a negative revaluation percentage. This has only occurred on one occasion to date.

Whether or not trustees can reduce preserved deferred benefits will depend on the wording of the scheme rules.

Death benefits

16 | What pre-retirement death benefits are customarily provided to employees' beneficiaries and are there any mandatory rules with respect to death benefits?

Dependants' pensions as a percentage of the member's pension may be payable under a defined benefit scheme. A lump-sum death-in-service benefit will usually apply.

A separate lump-sum death-in-service benefit is usually insured under a defined contribution plan. In some cases, a spouse's pension as a percentage of salary is also insured. The value of the member's retirement account will also usually be paid. In some cases, the amount of lump-sum payment will have regard to the amount of the retirement account or may have regard to death benefits payable under another scheme of the employer where a restructuring of pension arrangements has occurred and the member has an entitlement under that other scheme.

On death in deferment, if a member is entitled to a deferred pension in a defined benefit scheme that is preserved under the Pensions Act, its actuarial value must be paid to the legal personal representatives. Alternatively, the trustees may pay dependants' pensions in lieu, if the scheme rules allow for dependants' pensions on death in service. If a deferred pensioner in a defined contribution scheme dies in deferment with a preserved benefit, an amount is paid to his or her legal personal representatives, which is usually equal to the member's retirement account.

Retirement

17 | When can employees retire and receive their full plan benefits? How does early retirement affect benefit calculations?

Members may retire early under Revenue rules on or after their 50th birthday, if the scheme rules permit.

Under Revenue rules, but depending on the scheme rules, benefits may be paid immediately regardless of age if retirement is caused by ill health. Under Revenue rules, 'ill health' means physical or mental deterioration that is serious enough to prevent the individual from following his or her employment or very seriously impairs his or her earning capacity.

Ill-health early retirement is usually subject to employer or trustee consent and the qualifying condition under the scheme rules may be more onerous. On ill-health early retirement, benefits under Revenue rules may be the same fraction of remuneration the employee would have received if they remained in service until normal retirement age. Alternatively, he or she may be the leaving service benefit. The actual benefit will depend on the scheme rules.

On normal early retirement, Revenue rules place a restriction on maximum benefits. In a defined benefit scheme, the scheme rules will usually provide for an actuarial discount because the pension will be paid earlier and for longer.

Early distribution and loans

18 Are plans permitted to allow distributions or loans of all or some of the plan benefits to members that are still employed?

No.

Change of employer or pension scheme

19 Is the sufficiency of retirement benefits affected greatly if employees change employer while they are accruing benefits?

In terms of moving between defined benefit schemes, members will lose the link to a final pensionable salary on completed pensionable service if the formula is based on a final-salary calculation. If the Pensions Act preserves their deferred benefit, statutory revaluation may apply under the scheme. During the recent economic climate, when salary inflation stalled, it has not been unusual for statutory revaluation on deferred pensions to exceed salary inflation for active members. The terms of the new defined benefit scheme will also have an impact here.

In terms of moving between defined contribution schemes, any impact from changing employer will depend on the contribution rates and investments in both schemes. If moving from defined benefit to defined contribution, then the nature of pension provision changes and this may affect the sufficiency of benefits. This may be influenced by whether or not the defined benefit scheme is actually able to pay the benefits when they fall due and the level of contributions to, and their investment in, the defined contribution scheme.

20 In what circumstances may members transfer their benefits to another pension scheme?

A transfer may be made from one Revenue-approved scheme to another. Subject to the scheme trust deed and rules, trustees must make and receive a transfer at a member's request if it is a deferred pension preserved by the Pensions Act. Transfers are not permitted by Revenue once benefits come into payment. However, on winding up a scheme, trustees may transfer pensions in payment between schemes pursuant to the Pensions Act. A transfer payment from a scheme should relate to the whole of an employee's benefits under that scheme; split transfers are not permitted.

If the transfer is to another EU member state, regulations made under the Pensions Act apply and the overseas scheme must be operated or managed by an IORP within and subject to the IORP Directive.

If the transfer is outside the EU, a transfer may not be made to a country other than one in which the member is currently employed. Revenue rules apply to all such transfers and these should be assessed with advice as to their application to the particular transfer to determine whether a submission to Revenue is required.

Investment management

21 Who is responsible for the investment of plan funds and the sufficiency of investment returns?

Responsibility for investment is usually with the trustees, but the governing trust deed may also provide a role for the employer.

In defined contribution plans, the trust deed may provide for members' investment choice from a range of investments selected by the trustees on investment advice. Likewise, for the additional voluntary contributions paid by members to a defined benefit scheme, which are invested on a defined contribution basis. Trustees must comply with investment regulations made under the Pensions Act. This includes investing predominantly in regulated markets (while keeping other investments to a prudent level) and diversifying investments so as to minimise the risk of large losses owing to excessive concentration of risk. Trustees must prepare a statement of investment policy principles and ensure their investment powers under their trust deed are adequate.

The Pensions Authority has conducted consultation on financial management of defined benefit schemes, having published draft guidelines intended to supplement the *Trustee Handbook* and representing the Authority's view of good practice. The introduction states that the guidelines are 'intended to assist trustees by providing practical guidance on how they set about the day to day tasks of managing the current and future financial situation of their scheme'. The guidelines 'set out what practices the Authority expects trustees to follow in order to understand and manage the funding and investment of their defined benefit scheme' but recognise that trustees may have adopted an alternative, but equivalent, approach to scheme management.

The Pensions Authority has published codes of governance in relation to defined contribution schemes. This includes a code of practice in relation to investment in which it states that trustees are expected to exercise their investment powers in the best interests of scheme beneficiaries and ensure proper investment of scheme assets. The code guides trustees generally in relation to investment and other matters.

Reduction in force

22 Can plan benefits be enhanced for certain groups of employees in connection with a voluntary or involuntary reduction in workforce programme?

Enhancement of benefits is generally regulated by the trust deed and requires the consent of employers or trustees. In a defined benefit scheme there will be funding implications that must be addressed. In defined contribution schemes, enhancement would be by way of the employer paying more contributions into the member's retirement account.

Executive-only plans

23 Are non-broad based (eg, executive-only) plans permitted and what types of benefits do they typically provide?

Historically, non-broad based plans were set up on a defined benefit basis with more generous pension formulae. Alternatively, an executive participating in a broad-based employee scheme accrued a top-up under a separate defined benefit scheme.

In the context of defined contribution schemes, the governing trust deed and rules will usually provide that employers can pay higher contributions into the retirement account under an augmentation clause without the necessity for a separate scheme. Alternatively, the same defined contribution scheme may have separate sets of rules for different categories of members.

24 | How do the legal requirements for non-broad based plans differ from the requirements that apply to broad-based plans?

One-member schemes are not always subject to the same restrictions and requirements under the Pensions Act and its regulations as schemes with more than one member. This may give more flexibility, for example, with investment rules. However, under Revenue rules, further restrictions do apply and these need to be carefully monitored.

Unionised employees

25 | How do retirement benefits provided to employees in a trade union differ from those provided to non-unionised employees?

It is customary to provide the same retirement benefits to union and non-union members with the same employer.

26 | How do the legal requirements for trade-union-sponsored arrangements differ from the requirements that apply to other broad-based arrangements?

Trade unions do not sponsor schemes other than those they establish as employers for their own employees to which no difference in legal requirements apply. Disclosure obligations of trustees sometimes extend to a trade union representing scheme members in addition to the disclosure obligations applying to the scheme members.

ENFORCEMENT

Examination for compliance

27 | What is the process for plan regulators to examine a plan for periodic legal compliance?

The Pensions Authority has powers to conduct compliance audits and on-site inspections and is increasing its engagement with pension schemes. Since 2010, the Pensions Authority has carried out on-site inspections of registered administrators. The latter must be appointed by trustees to provide 'core administration functions' (ie, preparation of annual reports and annual benefit statements for the trustees and maintenance of sufficient and accurate records of members and their entitlements to discharge those functions).

Governance and disclosure are currently the stated main focus of the Pensions Authority, and new guidance notes and model documents have been published to this effect. Since 2015, the Pensions Authority has increased its engagement with trustees of defined benefit schemes. Part of this engagement process involves inviting defined benefit trustees into the Pensions Authority to discuss how their scheme is governed. A letter of recommendations, from the Pensions Authority to the trustees, follows this up.

The Pensions Authority has conducted consultation on the future structure and regulation of defined contribution schemes and it is expected that amended legislation will emerge in due course. In the meantime, the Pensions Authority has published *DC Codes of Governance for Defined Contribution Schemes*. These are not statements of law, but set out the standards of behaviour that the Pensions Authority expects trustees to adopt to demonstrate their commitment to serving the best interests of members, deferred members and other beneficiaries.

The government, in its *Roadmap for Pensions Reform 2018-2023* last year, stated that it intends to create a new fitness and probity regime for pension schemes to be administered by the Pensions Authority, whereby new and existing schemes must gain 'authorised status' from the Pension Authority in order to carry out activities and obtain tax relief.

All schemes must maintain detailed and up-to-date records in order that information regarding contributions and benefits is available for audit purposes by the Revenue Commissioners.

The Pensions Authority has issued guidance on considerations for trustees arising from IORP II. The guidance advises trustees to keep rigorous documentary evidence of their compliance with the new requirements. The requirements include 'fit and proper' tests for trustees, written policies on key areas of risk management and outsourced services, and minimum standards for communication with members. The Pensions Authority also published Considerations for Trustees under IORPS II, which indicate an increased enforcement initiative on its part following the implementation of IORPS II.

Penalties

28 | What sanctions will employers face if plans are not legally compliant?

The Pensions Authority may take court proceedings against various parties, including employers and trustees. Fines or imprisonment may result. There is also provision for on-the-spot fines for non-compliance.

The Revenue Commissioners can withdraw exempt approval for the scheme.

Rectification

29 | How can employers correct errors in plan documentation or administration in advance of a review by governing agencies?

This will depend on the particular circumstances involved and require advice.

Disclosure obligations

30 | What disclosures must be provided to the authorities in connection with plan administration?

Actuarial funding certificates and funding proposals for pre-funded defined benefit schemes must be submitted to the Pensions Authority. All schemes must submit specified details to the Authority online. The TCA obliges the scheme administrator to furnish information to Revenue and also particulars Revenue considers relevant.

31 | What disclosures must be provided to plan participants?

There are very detailed disclosure of information regulations under the Pensions Act, which require that trustees must provide specified information within specified time scales to scheme beneficiaries in various circumstances (eg, basic information on joining and around changes to that information, individual annual benefit statements and information triggered by events such as leaving).

Enforcement mechanisms

32 | What means are available to plan participants to enforce their rights under pension and retirement plans?

The Pensions Authority or the Pensions Ombudsman is available to the member, depending on the nature of the complaint.

Trustees must have internal disputes resolution procedures in place, to which complainants can submit certain complaints. Generally, they must do so before the Pensions Ombudsman will become involved on appeal from the trustee determination.

Participants may be able to enforce their rights through the courts.

PLAN CHANGES AND TERMINATION

Rules and restrictions

33 What restrictions and requirements exist with respect to an employer's changing the terms of a plan?

The Pensions Act will restrict amendments to accrued benefits in a defined benefit scheme that is not wound up, unless carried out through relevant provisions in the Act pursuant to a direction by the Pensions Authority. The trust deed and rules will include restrictions on amendments and generally require trustee consent. All amendments must be submitted to Revenue. Amendments cannot be such as to prejudice Revenue approval of the scheme. Separately, employment law advice would most likely be required in addition to pensions law advice.

34 What restrictions and requirements exist with respect to an employer terminating a plan?

The restrictions and requirements will depend on the governing trust deed and rules of the scheme. The balance of power in determining contributions to the plan and any termination notice must be considered. Other influences may be found under the contractual arrangements between the employer and employees, thus requiring employment law advice in addition to pensions law advice.

The General Scheme of the Social Welfare and Pensions Bill 2017 proposes to make it harder for solvent employers to terminate defined benefit plans through the introduction of an automatic 12-month notice period and minimum funding requirements. While the proposed legislation has not yet been published, the Minister for Employment Affairs and Social Protection has recently indicated, in response to parliamentary questions on the matter, that drafting is ongoing.

Insolvency protection

35 What protections are in place for plan benefits in the event of employer insolvency?

The plan assets are held under trust separate from the employer. If both a defined benefit plan and the employer are insolvent, the state may provide the necessary money to pay some of the benefits subject to criteria set out in legislation. In either a defined contribution scheme or a defined benefit scheme, some outstanding contributions owed to the plan may be paid by the state if not otherwise recoverable from the insolvent employer.Business transfer

Business transfer

36 How are retirement benefits affected if the employer is acquired?

tirement benefits in a single-employer scheme but other considerations will apply in a group scheme with more than one employer. In an asset acquisition, whether or not the retirement benefits are affected will depend on the deal made and transfer of undertaking regulations. The latter includes a pensions exception around the non-transferability of certain pension rights but this has been very narrowly interpreted by the courts.

Surplus

37 Upon plan termination, how can any surplus amounts be utilised?

This is determined by the governing trust deed and rules and may lead to augmentation of benefits or retirement accounts or refunds to employers (subject to tax) or a combination of such options. Surplus might also be transferred to another scheme of the same employer. It is not likely to occur very often or to any great extent.

FIDUCIARY RESPONSIBILITIES

Applicable fiduciaries

38 Which persons and entities are 'fiduciaries'?

The trustees of the plan.

Fiduciary duties

39 What duties apply to fiduciaries?

The trustees' basic duty is to administer the plan in accordance with the law, its terms under the governing trust deed and rules and in the best interests of the beneficiaries. The trustees' duties are set out under the trust deed and rules, the Pensions Act, the TCA, other relevant legislation and case law.

Breach of duties

40 What are the consequences of fiduciaries' failing to discharge their duties?

The trustees may be personally liable for breach of trust. Failure to discharge their duties can lead to sanction by the Pensions Authority, the courts, an adverse finding by the Financial Services and Pensions Ombudsman or placing the Revenue-approved status of their plan in jeopardy.

Exoneration and indemnity clauses may be available to trustees under the trust deed or under statute.

LEGAL DEVELOPMENTS AND TRENDS

Legal challenges

41 Have there been legal challenges when certain types of plans are converted to different ones?

In an industrial relations context, there have been disputes around replacing defined benefit plans with defined contribution plans.

42 Have there been legal challenges to other aspects of plan design and administration?

Yes. These are generally taken before the Office of the Financial Services and Pensions Ombudsman, having been through a trustee's internal disputes resolution process. (See question 32.)

Future prospects

43 How will funding shortfalls, changing worker demographics and future legislation likely affect private pensions in the future?

Funding shortfalls in defined benefit schemes will continue to influence investment de-risking strategy or their complete replacement by defined contribution schemes. There have in recent years been a number of Private Member's Bills dealing with funding on scheme wind ups, solvent employers and the funding standard although these appear to have lapsed and may be addressed by the Social Welfare and Pensions Bill, once published. The growing popularity of defined contribution schemes will focus increased attention on their governance and investment. Legislation transposing IORPS II is expected shortly.

UPDATE AND TRENDS

Current developments

44 Are there any current developments or trends that should be noted?

Following its publication of the Roadmap for Pensions Reform 2018-2023 last year, the government recently launched a public consultation process and a Strawman proposal for a new automatic enrolment retirement savings system. The government intends to introduce automatic enrolment by 2022, as a state-sponsored supplementary employment-related retirement system, supported by employee, employer and state contributions. The consultation is intended to address the preferred operational structure and governance of the automatic enrolment system, as well as the target membership, contribution rates, financial incentives provided by the state and the options available at the income drawdown or payout phase.

The Pensions Authority has also in the past year initiated a consultation on the future regulation of defined contribution master trusts (as distinct from single employer schemes) with a view to encouraging consolidation in the sector. The Pensions Authority opines that the number and membership of DC master trusts is likely to increase following the additional obligations on trustees contained within IORP II, and is considering how to appropriately regulate and legislate for such schemes to reflect the particular risks associated with them.

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