



A New Era Dawns for the Irish Pensions Industry

April 2021

The European Union (Occupational Pension Schemes) Regulations 2021 (S.I. 128 of 2021) (the **Regulations**) were signed into law by the Minister for Social Protection, Heather Humphreys, on 22 April 2021.

The Regulations transpose EU Directive IORP II into Irish law. They run to over 70 pages and add significant new law to the legislative regime for pensions. Detailed guidance from the Pensions Authority (the **Authority**) on how trustees will be expected to comply with the requirements is still awaited. In the meantime, we consider some of the key aspects of the Regulations below.

1. EFFECTIVE SYSTEM OF GOVERNANCE

A core aspect of the Regulations is an obligation on trustees to put in place an effective system of governance with a clear allocation and segregation of responsibilities. Such system of governance should be proportionate to the size and complexity of the scheme.

This system of governance must include consideration of environmental, social and governance (**ESG**) factors. The Regulations also require trustees to put written policies in place covering risk management, internal audit and, where relevant, actuarial functions and outsourcing. The policies must be reviewed once every three years. Trustees must also take reasonable steps to develop contingency plans.

Precisely what these individual policies should contain is unclear. However, the Authority has confirmed that it will, following a consultation process, publish a code of practice (the **Guidance**) in November 2021. This Guidance will detail what the Authority expects from trustees in meeting their obligations under the Regulations. It will be important that the Guidance provides trustees with some practical support regarding what specifically these policies should cover.

2. KEY FUNCTIONS

The Regulations require trustees to put in place “*key functions*” for the scheme covering risk management, internal audit and, where applicable, actuarial functions. Although the same person can perform the risk management and actuarial key functions, the internal audit key function holder (KFH) must be independent from those other KFHs.

Also, depending on the “*size, nature, scale and complexity*” of a scheme, trustees may allow the same person to perform a key function for both the trustees and an employer, once appropriate conflict protocols are in place. It will be important that the Guidance clearly defines when trustees can invoke this power on proportionality grounds. In practice, this could reduce the costs associated with KFHs.

The Regulations also make it clear that the risk management and internal audit function shall be proportionate to the size and complexity of the scheme. While the Regulations contain some detail on what the risk management system should cover, they are light on detail on the internal audit function. Therefore, it will be important that the Guidance clearly explains how the internal audit function is intended to work and how trustees should apply the proportionality principle to both functions.

3. FIT AND PROPER

The Regulations require trustees and KFHs to be of “*good repute and integrity*”. The Regulations specify the circumstances where this requirement will not be satisfied, such as having a prior conviction for fraud or money laundering.

The Regulations prohibit anyone from acting as a trustee unless their qualifications, knowledge and experience are “*collectively adequate*” with the qualifications, knowledge and experience of the other trustees. What “*adequate*” means is not defined, but at least one trustee on the board must have two years’ experience as a trustee in the last three years.

The Guidance will need to clarify how the trustees can satisfy themselves that they meet this collective adequacy requirement, particularly in terms of qualifications and knowledge. This is not an issue that should be left open to interpretation given that trustees would be in breach of the Regulations if they do not have “*collectively adequate*” qualifications, knowledge and experience.

Trustees are also prohibited from appointing KFHs unless they are satisfied with the KFHs’ good repute and integrity and that their qualifications, experience and knowledge are “*adequate*”. There is a reference to “*professional*” qualifications for the internal audit and the actuarial key function, but that word is absent from the risk management function. Trustees must provide information to the Authority, when requested, about the scheme’s KFHs to verify they satisfy these reputational, qualification, experience and knowledge requirements.

Again, the Guidance will need to specify what is “*adequate*” in this context. Otherwise, trustees risk entering into contractual arrangements in breach of the Regulations where they appoint service providers who do not have “*adequate*” qualifications, experience and knowledge to KFH positions.

4.

OUTSOURCING

The Regulations introduce new requirements where trustees outsource or delegate the scheme management or key functions to service providers, which most schemes will do in practice. All such outsourced arrangements must be documented in a legally enforceable contract clearly defining the rights and obligations of the parties. Trustees must also notify the Authority before any such outsourcing agreement comes into force. Where any other activity is outsourced, trustees must notify the Authority within four weeks.

5.

OWN-RISK ASSESSMENT

Trustees will be required to carry out and document an “own-risk assessment” (an **ORA**). The Regulations are very prescriptive on the range of risks the ORA must cover. However, this obligation is subject to a proportionality requirement, which may dilute the level of assessment that smaller or less complex schemes will have to undertake.

The ORA must be carried out at least every three years and any time where there is a significant change in the risk profile for the scheme. Trustees must have measures in place to assess short-term and long-term risks for the scheme. They also must take their ORA into account when making “strategic” decisions concerning the scheme. This means that in practice, the ORA will need to be integrated into the trustees’ decision-making processes in a similar way to existing risk registers.

6.

REMUNERATION POLICY

Trustees will need to establish a remuneration policy covering the trustees, KFJs, trustee staff and service providers to whom key functions are outsourced. The policy must align with the “long-term” interests of the members, and trustees will be required to disclose “publicly relevant information”.

Helpfully, trustees have until 31 December 2021 to put this policy in place. They are entitled to have regard to the size and complexity of the scheme in framing the policy. Given that a remuneration policy in the context of a pension scheme is an entirely novel concept, it will be important that the Guidance explains how this requirement should be applied in practice.

7.

**COMPLIANCE
STATEMENT**

Trustees will be required to issue the Authority with an annual compliance statement covering many of the governance requirements contained in the Regulations. However, schemes will have until 31 January 2022 to prepare these statements in respect of 2021, which will allow trustees to put in place the necessary governance arrangements to enable them to prepare these statements.

8.

**ENHANCED ROLE
OF THE PENSIONS
AUTHORITY**

One key development under the Regulations is the enhanced regulatory role of the Authority. The Authority is given a range of new powers to take a more proactive and risk-based approach to scheme supervision. New powers will include the power:

- to undertake a “*supervisory review process*” of a scheme’s strategies, processes and reporting procedures;
- to require trustees, by notice, to carry out a stress-test on their scheme to identify any deterioration in the scheme’s finances and to monitor remediation;
- to issue an “*Advisory Notice*” advising trustees of the remedial actions required where, in the Authority’s opinion, the trustees are failing to act in a manner that would enable them to satisfy certain prudential or governance requirements under the Regulations; and
- to require an “*External Report*” to be prepared on matters concerning the scheme, where the Authority is unable, based on certain information, to determine if a scheme complies with certain governance requirements under the Regulations.

9.

INVESTMENT & ESG

The Regulations amend existing pensions legislation to include many of the requirements which schemes were already subject to under investment regulations relating to regulated markets and diversification.

However, what is new is that trustees now have statutory authority to consider ESG factors in their investment decision-making process. They must also notify the Authority where they invest any scheme assets in certain debt instruments. This is to help the Authority discharge its new duty to monitor schemes' credit assessment processes, intended to reduce reliance by schemes on credit rating agencies.

10.

PENSION BENEFIT STATEMENT

The Regulations introduce a new form of benefit statement, which is to be provided to members annually by electronic means. However, members may request a paper copy. These annual benefit statements will have to be supplied to both active and deferred members. However, schemes will have until 31 December 2022 to comply with the new requirements. This timeframe allows schemes some time to assess and improve the data they have relating to deferred members.

COMMENT

It is clear given the breadth of changes the Regulations introduce that trustees will need time to adapt to these new requirements. However, there are practical challenges to complying with several key areas within the Regulations as drafted. The Authority's proposed consultation on the Guidance is to be welcomed. The consultation process should allow those issues to be aired and hopefully addressed in the Guidance once finalised. In the meantime, trustees should familiarise themselves with the Regulations and start to develop a plan with the help of their advisers as to how they will address the new requirements.

CONTACT US

For more information, please contact Ian Devlin, or your usual William Fry contact.



Ian Devlin
HEAD OF PENSIONS GROUP
+353 1 639 5064
ian.devlin@williamfry.com



Ciara McLoughlin
SENIOR ASSOCIATE
+353 1 489 6611
ciara.mcloughlin@williamfry.com



Jane Barrett
ASSOCIATE
+353 1 489 6684
jane.barrett@williamfry.com



Rebecca McEvoy-Martin
ASSOCIATE
+353 1 639 5258
rebecca.mcevoy-martin@williamfry.com

WILLIAM FRY

DUBLIN | CORK | LONDON | NEW YORK | SAN FRANCISCO | SILICON VALLEY

T: +353 1 639 5000 | E: info@williamfry.com

williamfry.com