

# Spring Pensions Briefing

April 2023

## 1. PENSIONS AUTHORITY'S INCREASED GOVERNANCE AND RISK MANAGEMENT EXPECTATIONS OF TRUSTEES

A report by the Pensions Authority (the **Authority**) in the lead up to the IORP II compliance deadline of 1 January 2023 (the **Deadline**) provides trustees of group schemes with some useful insights into what the Authority will expect of them in the new regulatory landscape for pensions in Ireland. We consider the key findings in that report and what the Authority has signalled as their supervisory focus over the next 12 months.

### THE ENGAGEMENT FINDINGS REPORT

The Authority held engagement meetings with a number of trustees of large DC and DB schemes in 2022. Those meetings focused on how well-prepared the schemes were to meet the enhanced governance and risk management requirements of IORP II in advance of the Deadline. The Authority published a report on its findings from that engagement process last December (the **Report**). The Report underscored the Authority's expectations of trustees in the post-IORP II environment. The Authority said it expects that all trustees and their advisors to use the findings of the Report as a basis for evaluating their own practices (and to make improvements where necessary).

We have summarised some of the key findings below.

Issue	Finding	Reminder of Expectation
<b>TRUSTEE BOARDS</b>	Few boards had reviewed their composition to assess adequacy of knowledge, skills & experience.	Trustee boards should have a structured approach to assessing each trustee’s knowledge and experience and engage with the sponsoring employer on the composition of the board/any desired changes.
<b>KEY FUNCTION HOLDERS (KFHS)</b>	The appointment of KFHS was noted to be slow for many trustee boards.	Trustees to actively engage with their KFHS throughout 2023 to embed the functions within their scheme’s internal control framework.
<b>OUTSOURCING</b>	There was a lack of review by trustees of outsourced providers and in some cases a critical review of the scheme administrator had not taken place in many years.	Trustees to ensure they have considered and have a proper understanding of what they expect from each service provider. Service providers to be made aware of the key performance indicators on which they will be assessed. Evidence of service provider performance reviews to be documented.
<b>POLICIES</b>	There was evidence of adoption of template policies proposed by advisors without sufficient consideration of content and scheme specific appropriateness.	Policies to be tailored for schemes and trustees to ensure that there is a structured process for the ongoing development and review of policies.
<b>INVESTMENT</b>	The Authority did not see enough evidence of trustees reviewing investment information and evaluating fund performance, fund managers and their investment advisers.	Trustees to be active in assessing their investments and probing investment information presented to them. The suitability of investments needs ongoing critical review. Trustees should look for regular independent investment information and advice (and such review and interaction with investment advisers should be captured in minutes).
<b>DB FINANCIAL MANAGEMENT</b>	Some DB schemes had a targeted plan for de-risking but others did not.	DB schemes need to consider their approach to de-risking and where appropriate have a focused plan. An evidence-based view of the strength of the sponsor’s covenant should form a key component of the trustees’ own-risk assessment. Regular engagement with the sponsoring employer is expected.

---

## THE AUTHORITY'S SUPERVISORY FOCUS

The Head of Supervision at the Authority recently confirmed that, as part of the Authority's 'forward looking risk-based' approach to supervision, they will be focusing on the 250 or so DB schemes with assets under managements of less than €17m. This is not surprising as small DB scheme tend to have less resources to dedicate to addressing governance and risk management. In addition, the Authority will carry out sample checks and audits of trustees' compliance with their obligation to prepare an annual compliance statement, something which commenced in recent weeks.

The Authority will also be launching a formal supervisory review process in 2024 which will focus on large DB and DC schemes, including master trusts.

---

## CONCLUSION

The clear message from the Authority is that trustees can expect more intrusive, extensive and qualitative supervision in the new post-IORP environment. The Authority expects a risk management culture to be embedded into trustees' management of their schemes as part of an effective system of governance. Therefore, as trustees adapt to IORP II's requirements, they will need to be able to demonstrate how they are living up to the Authority's enhanced expectations when it comes to governance and risk management.



## 2. AUTO-ENROLMENT PROPOSAL: EMPLOYER ADMINISTRATIVE HEADACHE AHEAD?

---

As per our [Winter 2022 briefing](#), auto-enrolment (AE) is to be introduced in Ireland following approval of the General Scheme of the Automatic Enrolment Retirement Savings System Bill (**AE Heads of Bill**).

Since approval, the AE Heads of Bill has been progressing through the Irish legislative process with several key stakeholders (the Pensions Authority, Insurance Ireland & the ESRI) contributing to the latest stage of pre-legislative scrutiny of the Heads. In this briefing we consider the key themes emerging from the ongoing legislative process.

---

### NEXT STEPS

The AE Heads of Bill, which set down a high-level outline of the form of AE to be introduced in Ireland, will require translation into draft legislation and enactment before the Irish AE scheme is established. As such, AE proposals are still at a relatively early stage and the Heads of Bill are open to amendment. However, and despite the criticism of the ambitious timeline, the Government is resolutely keeping to the 2024 target roll-out date for now.

---

### BACKGROUND

AE provides for auto-enrolment in a workplace pension of employees between the ages of 23 and 60 and earning more than €20,000. The system would operate on an 'opt-out' basis which means, in broad terms, that employees who wish to 'opt-out' can only do so after being enrolled for 6 months and at which point they would be refunded their contributions but then re-enrolled periodically. The introduction of AE is expected to result in the enrolment of 750,000 employees in a new workplace pension scheme. This number is expected to grow significantly over time.

---

## KEY THEMES

- **AGE/SALARY CRITERIA**
  - › proposed age criteria of 23 has been cited as high by international standards and as having the potential to discriminate against those entering the workforce without first attending third level education.
  - › proposed qualifying salary of €20,000 has also come in for criticism as being too high a threshold.
- **THE GENDER PENSIONS GAP**
  - › several stakeholders consider the AE proposals (as currently drafted) have the potential to exacerbate the gender pensions gap in Ireland e.g., a qualifying salary of €20,000 could result in the exclusion of part-time, hospitality and care workers, which would disproportionately impact women.
  - › AE Heads of Bill do not envisage any facility for payment of voluntary or additional employee contributions to top up retirement savings after periods of absence from the workforce.
- **TAX STRUCTURE**
  - › use of a State top-up tax incentivisation, included for equality reasons (i.e., the top-up was more valuable to lower earners and easier to understand), has been criticised as overly complex given its interaction with the tax relief in schemes.
- **TIMELINE**
  - › 2024 introduction of AE has been acknowledged as ambitious, given the need to establish the Central Processing Authority (**CPA**) through which AE would operate, and stakeholders have queried whether more time might be necessary given the experiences in other jurisdictions.

---

## ADMINISTRATIVE COMPLEXITY FOR EMPLOYERS WITH SCHEMES

---

Under current proposals, employers with an existing pension scheme may be exempt from AE if the existing scheme satisfies the threshold for a “qualifying occupational pension scheme” (a **Qualifying Scheme**). The AE Heads of Bill provides as follows:

- a. a Qualifying Scheme must be a scheme into which the employer and employee are “actively making contributions”. For employers that operate a scheme where employee contributions are voluntary (even if employer contributions are higher than AE levels) that employer may still need to operate AE separately to its scheme;
- b. a waiting period for AE is prohibited. For any employer that operates a scheme on the basis of a waiting period for eligibility, that employer may need to comply with AE at least until employees are eligible for scheme membership; and
- c. the employee has no choice but to be enrolled in AE (subject to the ability to opt-out). As such, for employers that operate a scheme with voluntary membership, the employer may also need to operate AE separately for employees that decline membership of the scheme.

Employers are likely to face several administrative and technical challenges if operating AE in parallel to their existing scheme. For example, as a fundamental point, employee contributions to schemes are deducted from net pay whereas in the AE system deductions are planned to be made from gross earnings. The calculation of contributions will also be distinct as the AE Heads of Bill envisages calculation of contributions on the basis of gross earnings (defined to include notional pay and share-based remuneration) whereas most defined contribution schemes, in our experience, calculate contributions on the basis of basic salary. Employers are therefore likely, in due course, to at least consider amending existing schemes to meet the threshold for Qualifying Schemes in order to avoid operating AE in tandem with a separate scheme.

---

## CONCLUSION

The next stage in the AE legislative process is for draft legislation, in the form of a Bill, to be published. Draft legislation will bring further clarity to Ireland’s AE proposals however, in the meantime, employers should continue to monitor developments and progress early stage plans/work programmes for AE compliance in due course.

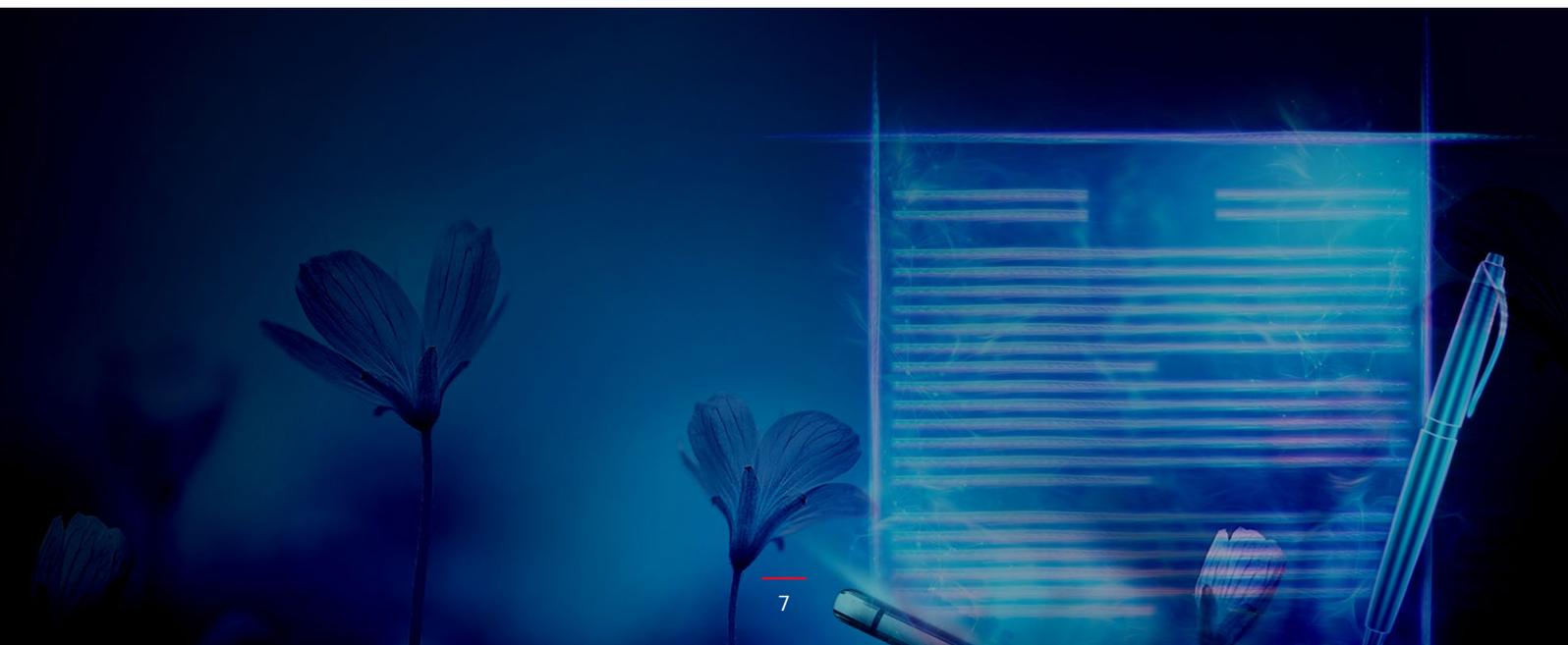
### 3. ENFORCEABILITY ISSUES FOR PENSION ADJUSTMENT ORDERS ON TRANSITION TO MASTER TRUSTS

---

Implementing the IORP II Directive into Irish law gave rise to a marked increase in compliance requirements (and related costs) for trustees of pension schemes in Ireland. These requirements have led directly to a large-scale transition of group-defined contribution occupational pension schemes and one-member arrangements to master trusts. Master trusts allow multiple unconnected employers to provide pension benefits for their employees through participation in a single group pension scheme. They are seen as an attractive option as the increased compliance costs of the pension scheme can be spread across all employers/members participating in the master trust.

The move to master trusts has had unforeseen consequences for pension adjustment orders (PAOs), particularly contingent (or death in service) benefits.

In brief, family law legislation in Ireland requires the Court to consider the value of pension benefits in arriving at a financial settlement after granting of a decree of judicial separation or divorce. A PAO involves the Court adjusting a pension scheme member's pension rights in favour of their spouse/civil partner/qualified cohabitant or dependent child.



---

The Court may make a PAO regarding retirement benefits and/or contingent benefits. In either case, a PAO is addressed to the trustees of the scheme of which the member spouse is a member at the date of the PAO—leading to some uncertainty around whether PAOs remain applicable where the member spouse’s benefits have transferred to a master trust. We understand that some master trust providers have received advice that they cannot administer benefits on foot of a PAO addressed to the trustees of a transferring scheme. For individuals in whose favour a PAO was made, this has clear potential to lead to the loss of valuable benefits.

Helpfully, for PAOs granted in connection with retirement benefits, this issue can, in some cases, be addressed by the affected individual. It is possible to apply to the Court for a PAO regarding retirement benefits at the time of the judicial separation, divorce, or any time afterwards (provided that the non-member spouse has not remarried). Alternatively, the trustees to whom the PAO is addressed may be able to establish an independent benefit for the affected individual on the wind-up of the relevant scheme or arrangement.

Regarding contingent benefits, however, a PAO can only be made within 12 months of granting the relevant decree of judicial separation or divorce. This means that, in many cases, it will not be possible for the affected individual to apply for a new PAO following the transfer of the member spouse’s benefits to a master trust.

## COMMENT

---

The Authority and the Law Society are aware of the potential for this issue to impact individuals negatively and have been working together to address the matter. In the absence of emergency legislation (which appears to us to be required to address the issue fully), the Law Society has requested that the Authority use its statutory authority under Section 10(1)(c) of the Pensions Act 1990 (as amended) to provide guidance to trustees.

## 4. PENSION SCHEMES & CYBER SECURITY: NEW LAWS ON 'DIGITAL OPERATIONAL RESILIENCE'

Recent legislation has consolidated the information and communication technology (ICT) risk requirements for the EU financial services sector at a European level. The relevant EU legislative acts are Regulation (EU) 2022/2554 (**DORA**) and its amending Directive (EU) 2022/2556 (**DORA Amending Directive**) (together the **DORA Rules**). This enhanced and consolidated framework for 'digital operational resilience' specifically brings IORPs (i.e., pension schemes) within its application. Our team has summarised the DORA Rules for the general financial services sector [here](#). This briefing considers the impact of the DORA Rules on pension schemes.

### THE DORA RULES

The DORA Rules focus on guarding against cyber-attacks and ensuring that in-scope entities (including pension schemes) are subject to uniform rules mitigating ICT-related operational risk. We set out the key aspects of the DORA Rules in a high-level overview below.

- **Governance and control** – an internal governance and control framework must ensure effective and prudent management of ICT risks to achieve high digital operational resilience.
- **Contractual provisions** – contractual arrangements with ICT third-party service providers will need to contain specified key contractual provisions.
- **ICT risk management framework** – a sound, comprehensive and well-documented ICT risk management framework must be implemented as part of the overall risk management system.
- **ICT security** – entities must design and implement ICT security policies, procedures, protocols and tools to ensure the resilience, continuity and availability of ICT systems.
- **ICT incident management, classification and reporting** – in-scope entities should use a consistent and integrated process to detect, manage and notify ICT-related incidents.
- **Testing** – comprehensive digital operational resilience testing of ICT tools, systems, methodologies, practices and processes is required.
- **Sharing information** – sharing of cyber-threat-related information and intelligence is required.



---

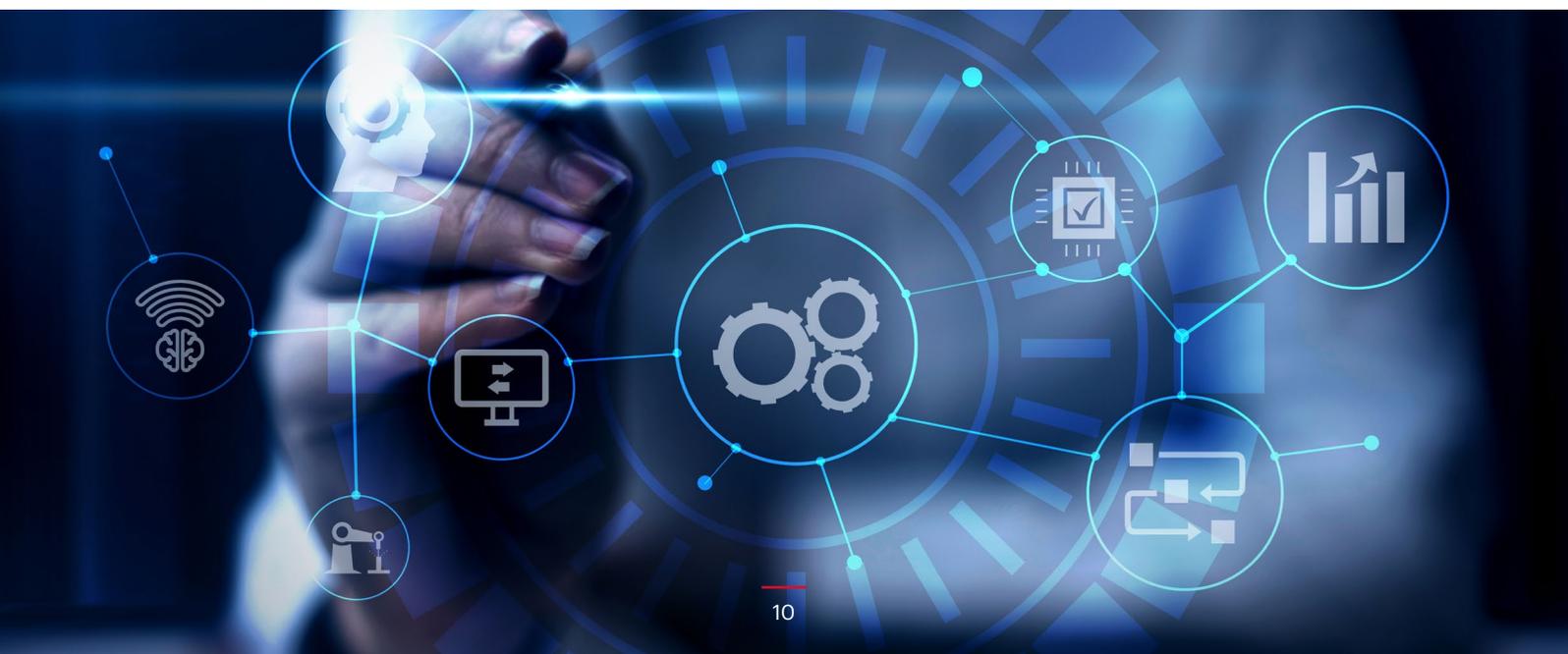
## TIMELINE

DORA will be directly effective from 17 January 2025 without transposing measures. EU Member States must also implement the DORA Amending Directive from the same date. Regulatory technical standards (**RTSs**), proposed by the European Supervisory Authority, will underpin DORA by specifying further detail, e.g., (among other things) on the elements to be included in ICT security policies and the content and format of an ICT risk management framework. The RTSs are expected to be submitted to the European Commission by early 2024, with some public consultation starting this summer.

---

## THE IMPACT FOR PENSION SCHEMES

- **Trustee responsibility** – DORA places its requirements on the “management body” of a financial entity, defined as the persons who effectively run the entity. In practice, these will be the trustees for most pension schemes.
- **IORP II update** - The DORA Amending Directive amends IORP II by adding to the governance requirements that IORPs take reasonable steps to ensure continuity and regularity in the performance of their activities, including developing contingency plans, and must “set up and manage network and information systems in accordance with [DORA] where applicable”. As such, the DORA rules will become part of the overall governance requirements for schemes.
- **Exemption for Small Schemes** - The DORA Rules will not apply to IORPs that operate pension schemes that together do not have more than 15 members.



---

## UNFAMILIAR TERRITORY?

For many regulated entities in the Irish financial services sector, the DORA Rules are nothing new. The Central Bank of Ireland already has detailed guidance in place for these entities on ICT risks. For pension schemes, IORP II already partially captures ICT risk within its general governance and risk management provisions. Therefore, it is not entirely new territory for pension schemes. The DORA Amending Directive amends IORP II to bring the detailed prescriptive rules of DORA within the ambit of scheme governance. That level of prescription will be new for pension schemes.

In practice, most pension schemes won't have their own 'network and information systems' and instead rely on third-party service providers. The recitals of the DORA Amending Directive acknowledge this and refer specifically to the importance of competent authorities taking a vigilant but proportionate response to IORPs that *"outsource a significant part of their core business, such as asset management, actuarial calculations, accounting and data management, to service providers"*. As such, the outsourcing aspects of DORA Rules will be a key compliance issue for pension trustees.

The Pensions Authority's Code of Practice already requires that contracts with service providers have provisions on data security. The DORA Rules will ramp up the level of detail required on data security in these contracts.

---

## CONCLUSION

Although trustees will not feel the impact of the DORA Rules until 2025, trustees will need to undertake significant groundwork to bridge the compliance gap between now and then. There is currently an opportunity for trustees to consult with their legal advisors and begin to prepare a gap analysis of scheme processes against the new requirements as an initial preparatory step.

## CONTACT US

For further information, please contact Ian Devlin, Ciara McLoughlin, Jane McKeever, Jane Barrett or your usual William Fry contact.



**Ian Devlin**  
HEAD OF PENSIONS GROUP  
+353 1 639 5064  
[ian.devlin@williamfry.com](mailto:ian.devlin@williamfry.com)



**Ciara McLoughlin**  
CONSULTANT  
+353 1 489 6611  
[ciara.mcloughlin@williamfry.com](mailto:ciara.mcloughlin@williamfry.com)



**Jane McKeever**  
CONSULTANT  
+353 1 489 6682  
[jane.mckeever@williamfry.com](mailto:jane.mckeever@williamfry.com)



**Jane Barrett**  
ASSOCIATE  
+353 1 489 6684  
[jane.barrett@williamfry.com](mailto:jane.barrett@williamfry.com)

# WILLIAM FRY

DUBLIN | CORK | LONDON | NEW YORK | SAN FRANCISCO

William Fry LLP | T: +353 1 639 5000 | E: [info@williamfry.com](mailto:info@williamfry.com)

[williamfry.com](http://williamfry.com)