



COUNTRY SPOTLIGHT IRELAND

A re-awakening?

After a delay of over two years, the IORP II Directive has finally been transposed into Irish law. Whilst all member states are governed by the regulations, it's about to shake up the Irish pensions sector like never before.

Natalie Tuck reports

The Irish pensions sector, according to the country's Pensions Regulator, Brendan Kennedy, is an "outlier" of Europe. He means by this, that Ireland is unique in the vast number of small pension schemes it has compared to the frequently seen industry-wide schemes of countries on the continent.

The European Union's updated pension legislation, the IORP II Directive, which all member states are governed by, therefore creates a unique challenge for Ireland's pensions sector. For the Pensions Authority, however, it could be an opportunity to shake up the industry and serve as a catalyst for the consolidation of the country's pension schemes.

The IORP II directive

Ireland was the last member state to transpose the directive over two years past the original deadline in April 2021. The directive itself builds on the original IORP Directive of 2003.

Europe's pension markets are heterogeneous in nature, which is why the directive allows for a degree of flexibility in its implementation; for its part, the Irish government has chosen to mirror the directive in its

transposition. The regulations are now in the hands of the Pensions Authority, which is tasked with overseeing compliance of IORP II.

Its draft code of practice was published for consultation in July, with stakeholders given until mid-September to submit their responses. It is expected that a finalised code will be published for schemes in November. However, there will be a grace period to become fully compliant.

William Fry senior associate, Ciara McLoughlin, explains that the authority recognises the major regulatory change to the pensions landscape: “The Pensions Authority has consistently recognised these challenges in its communications with industry, and this is reflected in the compliance grace period in place up to the end of 2022. This will allow schemes and employers time to assess what the implications of IORP II are for them and decide how best to approach the regulatory challenges it brings”.

The draft code of practice

At first glance, the draft code appears to be very detailed in its instructions, with the huge amount of documentation required standing out. Those that have delved deeper into the code, however, have noted a lack of detail in some areas.

Irish Association of Pension Funds (IAPF) CEO, Jerry Moriarty, says: “On the one hand it is very prescriptive; I have counted over 50 different documents that trustees must keep and update at different intervals but then there are other areas where it is a little bit vague and unclear. One of the big concerns we have is that it states that this is the minimum code that applies to all schemes and there are some schemes that will need to do more but it doesn’t give any detail of what that more might be.”

This links to a key theme highlighted by those in the industry, which is the lack of proportionality seen in the draft code. The IORP II Directive frequently mentions that the requirements should be proportionate to the size, nature and scale, and the complexity of the activities of the IORP.

LCP Ireland partner, Roma Burke, says: “The detail can be a double-edged sword. On the one hand, it is very helpful in the context of a new legislative environment to have a clear set of instructions. On the other hand, it doesn’t allow schemes much leeway.”

This is echoed by Law Debenture director, Paul Torsney, who says that there isn’t a mechanism within the draft code that, subject to a reasonable minimum level, gives trustees a certain amount of discretion to decide what suits their scheme best given the circumstances of the scheme and the resources available. “If you look at each of the prescriptive requirements in isolation they generally appear quite reasonable. In a world with infinite resource and time you can do everything,” he notes.

On the flip side, Torsney too, cites a “vagueness” in terms of talking about risk and the assessment of risk. “There is some wording [*in the draft code*] that needs to be fleshed out more and hopefully that will be in the final code.

Another issue that highlights the differences between large and small schemes is how much of the regulations will be completely new for schemes. McLoughlin says there will be a divide between schemes of different sizes.

“We’ve got some large pension schemes as clients, that are very well-run schemes and a lot of what they are doing is in the code and already in their system of governance. What they’re doing

[*to prepare for the regulations*] is looking at all their current practices and undertaking a gap analysis to see where there is a gap in their governance requirements,” she says.

“We would anticipate that, for smaller schemes, a lot of the requirements will be new, and often those schemes would not be accustomed to this level of governance. For example, small schemes would have almost none of the policies in place that are envisaged under the code.”

With the huge amount of documentation required, Moriarty says a lot of the work will be around documenting what is already being done. For example, the rationale behind all decisions made by trustees must be documented. However, Moriarty raises the point that this goes against what legal practice would recommend.

In some instances, the code brings in new processes for all schemes, such as the internal audit function. Torsney says that for most schemes this requirement will be completely new. This is an area that awaits more clarity, he says, as it is not yet clear what exactly this role will entail.

Another big concern for schemes is the cost of complying with the new regulations, and Moriarty says the cost benefit of some of the policies is debatable. When the IORP II Directive was implemented in the UK a full cost benefit analysis was undertaken, he states, something that has not been done in Ireland.

“[*The draft code*] implies that you do a tender for new administrators every three years but if you’ve got a good relationship with your current provider it can be quite a costly exercise to then do a full tender.”

Time is also a big factor and, initially, McLoughlin predicts the set-up of becoming compliant is going to take up a lot of time and input from trustees, but once that

set-up is complete, it may not be that much work on an ongoing basis.

Some are concerned though that becoming compliant by the end of the authority's grace period at the end of 2022 will be "very challenging". Torsney expects that trustees will need to have a significant number of meetings next year to work through everything. "Next year there might need to be a lot of extra more focused and shorter meetings just to get it over the line... It does feel like a challenge to become compliant by 2023."

Broadly, the feeling from the industry, Moriarty says, is that there is apprehension around how practical it is. "There is a lot of concern around how much additional work is required and that leads to a general concern of whether it will improve member outcomes or whether it is going to lead to additional work and additional costs, which ultimately will come back to members and employers anyway."

Impact on trusteeship

"The bar for trusteeship is obviously being raised significantly," Torsney says of the draft code. This, he explains, includes increases in areas such as the time commitment, the level of scrutiny, and the sense of liability and risk on an individual trustee.

Those in the industry are aligned on their view that such a change will see a decrease in the number of lay trustees because of the extra responsibilities and liabilities set out by the code, and the need for at least one trustee to have a qualification. "We have a really big concern that this is going to be the end of lay trustees, particularly," Moriarty says.

"If you only have professional trustees then you only have professionals in the room for

conversations, you've lost the people who understand the employees, understand the company and understand the backgrounds... if you can't get lay trustees anymore then that just changes the whole landscape, and not necessarily in a good way."

On the other hand, the use of professional trustees is expected to become more popular. "We think there is going to be a trend towards professional trustees and we've heard of new providers from the UK as well entering into the Irish market," McLoughlin says.

Law Debenture is one of those firms that has recently entered the Irish market and Torsney says part of the reason for the expansion across the Irish Sea is due to "looking at what's coming down the track" and the need for more professional trustees.

Consolidation

It is no secret that the Pensions Authority would like to see significant consolidation in the Irish pensions market.

The Pensions Regulator, Brendan Kennedy, writes in his guest column for *European Pensions* [page 19] that the "obligations of IORP II are almost certainly too onerous and costly for small pension schemes", which is why consolidation is a priority for the authority.

Moriarty, who questions whether it is right for the regulator to set such a policy, says a lot of the draft code of practice is "really driven at making it so difficult that you will only have that small number of schemes".

The problem with pushing for consolidation, the experts agree, is the lack of viable options for schemes to consolidate in to. One option could be for DC schemes to join master trusts but last year the authority ruled that none of these schemes were "fit for purpose".

"That puts schemes and employers in a very difficult position because on the one hand they are being told they have to consolidate, but on the other hand they're being told the things you need to consolidate into are not fit for purpose, so what do you do in the meantime?... I think a lot of schemes are in a very difficult position in terms of how to move forward with this," Moriarty says.

Further guidance on master trusts is due from the authority in December, McLoughlin says. "What we are seeing is a 'wait and see' approach and that is what we are advising a lot of our clients to do who are looking at consolidation or appointing a professional trustee."

Another issue is the wind-up process for schemes, Lockton Companies partner, Niall O'Callaghan, says: "At the moment there is quite a significant process involved in winding up a trust and moving it to a different trust." He believes that if the authority wants to consolidate schemes, then it also needs to look at the regulation around wind up to make it easier for schemes, whilst also protecting the rights and benefits of members.

How can schemes prepare?

Whatever the impact, the regulations are here to stay and many are interested in whether the authority will take on board the key points made by the industry. Regardless of the outcome, schemes are advised to begin work immediately and then review the final code in November to identify any areas that may need addressing.

The first deadline for schemes is the Remuneration Policy on 31 December, Burke says, so if that is to be met, the work must start now. "Complying with IORP II is a big job, but possibly the hardest part is actually starting," she concludes. ■