

Guidance note on the European Union (Supplementary Pension Rights) Regulations 2019

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Introduction

The European Union (Supplementary Pension Rights) Regulations 2019 (S.I. No. 447 of 2019) (the Regulations) came into force on 13 September 2019 (the Relevant Date). The Regulations transpose obligations imposed by Articles 4(1)(a), 4(1)(c) and 5(1) of Directive 2014/50/EU¹ (the Portability Directive) into Irish law through making amendments to the Pensions Act, 1990, as amended (the Act). Specifically, the Regulations amend the Act to insert a definition of the Portability Directive into section 27, insert a new section 32A, amend section 35, and insert a new section 39A.

The purpose of the Portability Directive is to facilitate the exercise by workers of the right to freedom of movement between European Union (EU) member states by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship.

This guidance note should be read in conjunction with and may impact on other relevant guidance issued by the Authority e.g., Preservation of Benefits and Minimum Value of Contributory Retirement Benefits Guidance Note, Pension Transfers outside the State.

Summary of the Regulations

The Regulations transpose Articles 4(1)(a), 4(1)(c) and 5(1) of the Portability Directive into Irish law. In summary, the effect of the Regulations is to incorporate into Irish law the concept of an Outgoing Worker and provide for certain protections and rights for Outgoing Workers.

These rights and protections are:

- a right to a refund of pension contributions where service in relevant employment terminates and the Outgoing Worker is not entitled to a preserved benefit under a scheme;
- a prohibition on trustees of a scheme making a transfer payment in respect of an Outgoing Worker who is entitled to a preserved benefit under a scheme without having first obtained the written consent of the Outgoing Worker to the transfer payment; and
- a right of an Outgoing Worker to join a scheme which applies to their employment (if any) within a period of no longer than 12 months after commencing employment.

¹ Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights.

The Act, as amended by the Regulations, will apply notwithstanding anything contained in the rules of a scheme.

What schemes do the Regulations apply to?

The Regulations apply to schemes or sections of schemes that accepted new members on 20 May 2014 (the date that the Directive entered into force). The Regulations do not apply to schemes or sections of schemes that did not accept new members on, and at any time after, 20 May 2014.

If a scheme or section of a scheme did not accept new members for a period on or after that date but subsequently accepted new members, the Regulations will apply to such scheme or section of such scheme.

What persons do the Regulations apply to?

The Regulations apply to Outgoing Workers only. Outgoing Worker has the same meaning in the Regulations as in the Portability Directive, namely:

‘an active scheme member whose current employment relationship terminates for reasons other than becoming eligible for a supplementary pension and who moves between Member States’.

An active scheme member is a worker whose current employment relationship entitles them after fulfilling applicable conditions to a supplementary pension from a supplementary pension scheme.

There are three criteria to satisfy under the definition of Outgoing Worker. All of these criteria must be satisfied to be an Outgoing Worker. If any criterion is not satisfied, a person is not an Outgoing Worker. The criteria are:

- the person is an active scheme member; and
- the person's current employment terminates for reasons other than becoming eligible for a supplementary pension; and
- the person moves employment between EU member states.

Determining whether a person is an Outgoing Worker

It is a matter for trustees and employers to determine whether a person is an Outgoing Worker. However, this section provides some guidance on the steps that trustees and employers might consider taking in order to assist them in making this determination.

Trustees and employers should put in place processes to allow them to make this determination

- at the point an employee commences service; or if later, the Relevant Date, and
- at the point an employee leaves service.

Commencing service

Where a new employee is or will be eligible for membership of a scheme in respect of new employment in this State, they will be an Outgoing Worker if their most recent employment prior to commencing that new employment was as an employee in another EU member state as an active member of a supplementary pension scheme. For this purpose, new employees:

- (a) include employees who commence a new employment in this State after the Relevant Date;
- (b) include employees who commenced a new employment in this State prior to the Relevant Date and are in a waiting period to join a scheme on the Relevant Date; and
- (c) does not include new employees who commenced new employment in the State prior to the Relevant Date and have joined a scheme prior to the Relevant Date.

On commencement of employment (or, if later, the Relevant Date), employers should ask the new employee:

- whether their most recent employment, prior to commencing the new employment, was as an employee in another EU member state as an active member of a supplementary pension scheme; and
- if so, for evidence of that which might include:
 - a copy of the leaving service statement from their previous supplementary pension scheme and/or a letter from their former employer or the scheme administrator confirming their employment as an employee in another EU member state as an active member of a supplementary pension scheme;
 - if there was any period between cessation of that employment in another EU member state and commencement of new employment, evidence that the new employee was not in employment during that period e.g., receipt of social welfare benefit.

If a new employee is an Outgoing Worker on commencing service or, where applicable, the Relevant Date they will remain an Outgoing Worker for all of the purposes of that employment and any scheme related to that employment.

Leaving service

If an active member of a scheme leaves service in relevant employment, the trustees should, at the point of leaving that employment, make appropriate enquiries of the member to ascertain whether that member is an Outgoing Worker. If, having made such enquiries, the trustees are of the view that the member is proposing to take up employment in another EU member state or it is not clear whether the member is proposing to do so, that member may be an Outgoing Worker.

On leaving service in relevant employment and ceasing to be an active member of the scheme, trustees should ask the member:

- whether they are leaving employment to take up employment in another EU member state; and
- if so, for evidence of that (evidence might include a letter from their new employer confirming that they are taking up employment in another EU member state).

When is a person an Outgoing Worker on leaving service?

A person is an Outgoing Worker where they:

- (a) were an Outgoing Worker on commencing service, or
- (b) leave service in relevant employment as an active member of a scheme in circumstances where the next employment they commence after leaving that employment is employment in another EU member state.

A person is not an Outgoing Worker where they:

- (a) were not an Outgoing Worker on commencing service, and
- (b) leave service in relevant employment as an active member of a scheme in circumstances where the next employment they commence after leaving that employment is not employment in another EU member state.

In each case, trustees or employers will have ascertained whether (a) is the case at the point at which the person has commenced service (or, if later, the Relevant Date). Trustees will be able to ascertain whether (b) is the case by making appropriate enquiries at the point of a member leaving service where, at that time, the member is immediately taking up a new employment.

In circumstances where a member (who is not already an Outgoing Worker) is leaving service but not immediately taking up a new employment, it will not be possible to determine whether they are an Outgoing Worker at the point in time when such a member leaves

service. In that case, trustees should take appropriate steps to ascertain whether they become an Outgoing Worker, e.g. follow up with the relevant member at regular intervals after they leave service.

Until such time as the trustees have ascertained whether or not the former employee is an Outgoing Worker, the trustees should not take any step which might prejudice such member's rights under the Act, as amended by the Regulations.

Rights and protections afforded to an Outgoing Worker under the Regulations

Section 32A

Where an Outgoing Worker is not entitled to a preserved benefit from the scheme at the point of leaving service:

- in the case of a defined contribution (DC) scheme, the Outgoing Worker shall be entitled to a refund of the sum of their own and any employer contributions made in respect of the Outgoing Worker to the scheme in respect of periods of employment falling after the Relevant Date (or the investment value of those contributions);
- in the case of a defined benefit scheme, the Outgoing Worker shall be entitled to a refund of their own contributions to the scheme in respect of periods of employment falling after the Relevant Date.

Section 35(1A)

Where an Outgoing Worker has a preserved benefit under a scheme, no transfer of the Outgoing Worker's preserved benefit shall be made without the prior written consent of the Outgoing Worker.

Section 39A

Where section 39A applies, an Outgoing Worker in a waiting period to join a scheme must be permitted to join no longer than 12 months after commencing service with their new employer.

Where an Outgoing Worker in a waiting period to join a scheme commenced service with a new employer prior to the Relevant Date and was in service on the Relevant Date, such an Outgoing Worker must be permitted to join the scheme on the earlier of the expiry date of the waiting period under the rules of the scheme or the expiry date falling after 13 September 2019 of a period of 12 months since the date of joining service. This would require appropriate enquiries to be made by employers of such employees in a waiting period to join a scheme at the Relevant Date as set out under "*Commencing Service*" above.

What periods of employment do the Regulations apply to?

The Regulations only apply to periods of employment falling after the Relevant Date.

If an Outgoing Worker has a period of membership in a scheme both prior to and after the Relevant Date, and they leave service in circumstances where:

- section 32A applies, they will be entitled only to a refund of relevant contributions related to employment after that date; or
- they are entitled to a preserved benefit, section 35(1A) will prevent the element of that preserved benefit related to employment after that date being transferred out without the Outgoing Worker's written consent. As Revenue will not ordinarily permit split transfers of benefits, in practice, this may mean that no part of the preserved benefit can be transferred out without the Outgoing Worker's prior written consent.

Equal treatment

Pension schemes are required to comply with the principle of equal pension treatment in section 70 of the Act. The application of the Regulations to Outgoing Workers may in some circumstances result in a difference of treatment between Outgoing Workers and other persons.

As with any rule of a scheme which applies differing treatment to members of a scheme, trustees and employers should consider whether such differing treatment might amount to a breach of the principle of equal pensions treatment. In particular trustees and employers should consider whether indirect discrimination contrary to that principle arises or might arise. This is a matter for the trustees' and the employer's own legal advice and will depend on the specific circumstances of the scheme.

Tax treatment of refunds of employer contributions

The ability (in the case of a DC scheme) to refund employer contributions (or the investment value of those contributions) and the tax treatment of refunds payable to members affected by the Regulations is a matter for Revenue and trustees should satisfy themselves as to any conditions or tax treatment that applies to such payments prior to making those payments.