

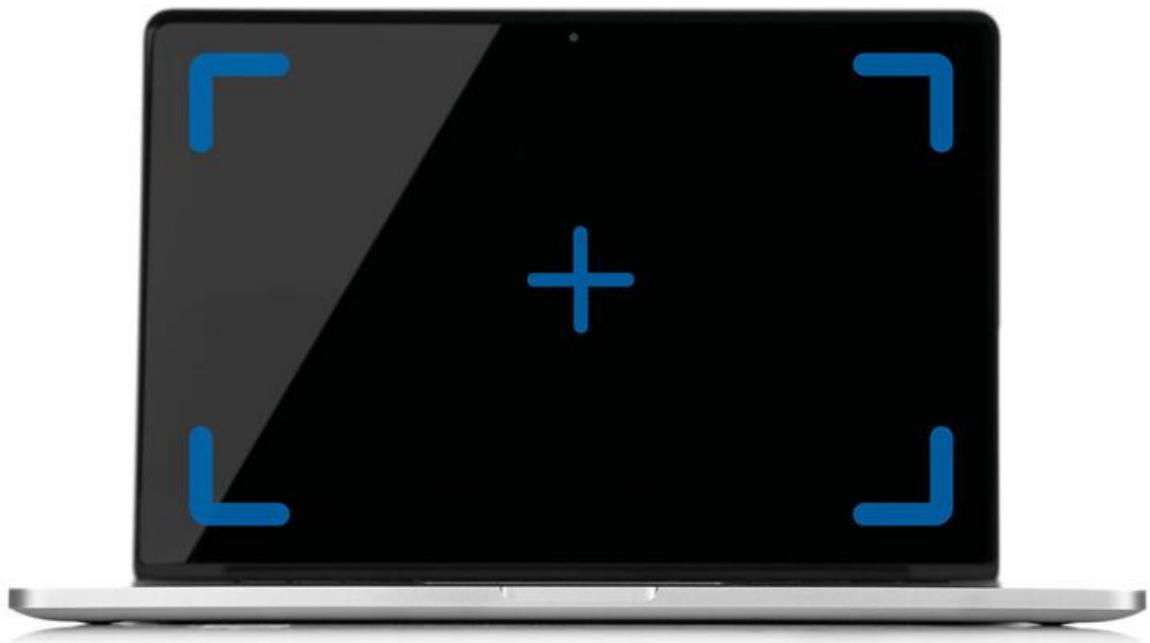
## Pensions

# Update

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# Introduction

## Welcome to our Pensions Update for Summer 2021.

Pension schemes are now officially living in the IORP II era. The roll out of IORP II implementation by the Pensions Authority will take a number of months, and we comment on the Pensions Authority's initial communication on its intentions. Our briefing on the IORP II Regulations themselves can be accessed [here](#). There have been some interesting developments for employers on the VAT front, and our tax colleagues Melissa Daly and Robert Dever comment on these. There have also been some very welcome developments on the AML front, which all trustees of pension funds and share trusts should take into account.

If you would like to discuss any aspect of this newsletter in further detail, we would be delighted to speak with you.

### Key contacts



**Peter Fahy**  
*Partner, Head of Pensions*

+353 1 6644 206  
PeterFahy  
@eversheds-sutherland.ie



**Lorcan Keenan**  
*Partner, Pensions*

+353 1 6644 219  
LorcanKeenan  
@eversheds-sutherland.ie



**David McKeating**  
*Associate, Pensions*

+353 1 6644 369  
DavidMcKeating  
@eversheds-sutherland.ie



**Melissa Daly**  
*Senior Associate, Tax*

+353 1 6644 208  
MelissaDaly  
@eversheds-sutherland.ie



**Robert Dever**  
*Senior Associate, Tax*

+353 1 6441 478  
RobertDever  
@eversheds-sutherland.ie

# VAT and Employees' Pension Fund

## Overview

On 23 March 2021, the Irish Revenue Commissioners ("**Irish Revenue**") published an update to their Tax and Duty Manual entitled *Employer's Entitlement to Deductibility of VAT Incurred in the Setting Up and Management of a Pension Fund* (the "**Revised Guidance**").

The Revised Guidance clarifies the circumstances in which an employer can recover input VAT incurred in respect of certain costs in relation to an employee pension fund.

The Revised Guidance can be accessed [here](#).

## Background

In practice, difficulties can arise in claiming VAT deductibility for costs incurred in relation to an employee pension fund due to the operation of the regulatory regime to which pension funds must adhere. In particular, the trustees of the pension scheme may be required to contract directly with the service provider or, in some circumstances, enter into a tripartite contact.

In the above circumstances, although the employer may directly pay the service provider, typically, the invoice will be addressed to the trustees of the pension fund (as recipient of the relevant services under the contract). Consequently, the employer will not obtain a valid VAT invoice in its own name and, as such, would not otherwise be entitled to recover the VAT arising on the invoice.

## Conditions to be satisfied

The Revised Guidance confirms Irish Revenue's position that they are prepared to allow the employer to recover the VAT which the employer incurs in respect of costs in relation to the setting up and management of a pension scheme where certain conditions are satisfied (please see further below).

In order for the employer to be entitled to VAT deductibility in these circumstances, all of the following conditions must be satisfied:

- a. the costs of the input transaction form part of the employer's general costs and, as such, constitute components of the price of the taxable goods or services which the employer supplies;
- b. the employer is responsible for payment of the services that are supplied under the contract and pays the service provider directly;<sup>1</sup>
- c. the employer is not (either directly or indirectly) reimbursed in respect of the payment of the costs; and
- d. the relevant invoice includes the words "*for the account of [name of the employer]*".

Furthermore, the employer and the trustees of the pension fund must ensure there are clear controls in place to verify that there is an entitlement to recover the input VAT in respect of the costs incurred, as well as a disclaimer by the party not claiming the input VAT credit.

## Comment

The updates set out in the Revised Guidance represent a welcome clarification to Irish Revenue's position on when an employer can claim VAT deductibility for costs in relation to the setting up and management of an employee pension fund which might otherwise be irrecoverable due to regulatory requirements. The publication of the Revised Guidance follows engagement with Irish Revenue by relevant industry stakeholders and largely seeks to codify the practice which we understand Irish Revenue have previously operated.

If you would like to discuss the Revised Guidance in further detail, or any other VAT related aspects for pension schemes, our Tax Team would be delighted to speak with you

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<sup>1</sup> This arrangement should be demonstrated by way of a written agreement between the employer and the trustees of the pension fund.

# Anti-Money Laundering: Beneficial Ownership of Trusts Regulations

In a positive development for trustees of pension schemes and of employee share trusts, the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021 ("**2021 Regulations**") have exempted such schemes from the application of AML requirements. This will relieve such schemes from a significant administrative burden, recognising that such schemes are not generally used as conduits for money laundering activity.

Under Regulation 34 of the 2021 Regulations, the previously applicable European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019 ("**2019 Regulations**") have been revoked. The 2019 Regulations had applied the requirements of the 4th EU AML Directive (Directive (EU) 2015/849; "AML4") to trusts in Ireland without any specific exceptions for employee benefit trusts, and therefore Irish pension and share scheme trustees had been obliged to create beneficial ownership registers and comply with the other requirements of the 2019 Regulations.

## What trusts are now exempted from the Regulations?

The 2021 Regulations, which implement both AML4 and the 5th EU AML Directive (Directive (EU) 2018/843; "AML5"), and related amendments to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ("**2010 Act**"), now exclude occupational pension schemes and revenue approved or recognised share trusts from the scope of AML4 and AML5.

The provisions of the 2021 Regulations apply only to "relevant trusts". Regulation 2 of the 2021 Regulations defines a "relevant trust" as having the designated meaning under the 2010 Act.

S.106ZC of the 2010 Act has been amended to define a relevant trust as follows;

*'relevant trust' means an express trust established by deed or other declaration in writing and any other arrangement or class of arrangements as may be prescribed but does not include an excluded arrangement.*

An 'excluded arrangement' includes, among other things, an arrangement of the following kind:

- a. an occupational pension scheme that is an approved scheme pursuant to Chapter 1 of Part 30 of the Act of 1997;
- b. an approved retirement fund within the meaning of Chapter 2 of Part 30 of the Act of 1997;
- c. a profit sharing scheme or employee share ownership trust approved pursuant to Part 17 of the Act of 1997;
- d. a trust for restricted shares within the meaning of section 128D of the Act of 1997;...

## What obligations do the 2021 Regulations create for relevant trusts?

There is a sting in the tail.

For those schemes which are relevant trusts, the obligations under the 2021 Regulations now fully implement both AML4 and AML5 and therefore go beyond the 2019 Regulations.

For example, the previous requirement was for trustees to obtain and hold the name, date of birth, nationality and residential addresses of each of the trust's "beneficial owners". The 2021 regulations now require a statement of the nature and extent of the interest held or exercised by each beneficial owner, as well as their PPS numbers.

Whereas the 2019 Regulations required a trustee to provide the Revenue Commissioners or any State competent authority with timely access upon request to the trust's beneficial ownership register, the 2021 Regulations provide for access also by the Criminal Assets Bureau and Garda Síochána.

Most significantly, the 2021 Regulations provide for the creation of a central register for relevant trusts, in line with AML4, to be maintained by a Registrar appointed by the Revenue Commissioners.

Trustees will be under an obligation to make an initial central filing with the Central Register, deliver beneficial ownership information, and keep such information up to date.

## Information in focus

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Examples of the information to be submitted to the Central Register will include, among other things;

- the name, date of birth, nationality and residential address of each beneficial owner of the trust;
- a statement of the nature and extent of the interest held, or the nature and extent of control exercised by, each such beneficial owner;
- the PPS number (or equivalent) of each beneficial owner of the trust

## The Next Step

It is important for trustees to clarify whether or not they are subject to the 2021 Regulations.

The 2021 Regulations now fully implement the AML4 and AML5 Directives, and trustees should establish whether they need to implement the Regulations' requirements.

Whilst the 2021 Regulations do create extensive obligations in relation to beneficial ownership, they also exclude many entities from such obligations, and should therefore be seen as a welcome development by many.



# IORP II Information Published by the Pensions Authority

IORP II has been transposed into Irish law by the European Union (Occupational Pension Schemes) Regulations 2021 (the “**Regulations**”). On 13 May 2021 the Pensions Authority published an information note on the Regulations for trustees (the “**Information Note**”), which is available on the Authority’s [website](#).

## Summary of key provisions

Part A of the Information Note contains a useful summary of the key provisions of the Regulations. This includes information on the new governance and fitness and probity requirements for trustees, the supervisory review process, and the new powers given to the Authority to issue Advisory Notices and require the production of External Reports.

Following transposition in April we issued an update offering our initial observations on the Regulations. Our update, which covers much of the detail found in Part A of the Information Note, can be found [here](#).

## Compliance with Regulations

Part B of the Information Note sets out how the Authority will supervise compliance with the Regulations, and provides details on the effect of derogations and transitional periods included in the Regulations.

### One-member arrangements (OMAs)

As detailed in our previous update, for OMAs established before 22 April 2021, there is a general derogation from compliance with the Regulations until 22 April 2026. However, full investment and borrowing rules apply immediately (except in respect of investments made / borrowings entered prior to 22 April 2021, to which an open-ended derogation applies). OMAs established on or after 22 April 2021 do not benefit from these derogations.

The Authority’s supervisory focus for OMAs will be:

OMAs established before 22 April 2021	OMAs established on or after 22 April 2021
<b>Now</b>	<b>Now</b>
Compliance with investment and borrowing rules in respect of new investments / borrowings implemented on or after 22 April 2021	Compliance with requirements on borrowing, and investments being predominantly in regulated markets
<b>22 April 2026</b>	<b>1 July 2022</b>
Full compliance with requirements (i.e. following end of transitional period)	Full compliance with requirements

The Information Note states that the Authority will be paying particular attention to the establishment date of OMAs, and their compliance with the applicable investment and borrowing rules. It adds that attempts to mislead the Authority may result in prosecution. This is a clear signal that the Authority will be looking out for evidence of efforts to backdate the establishment of, or entry into investment / borrowing arrangements by, an OMA.

### Master trusts

The Regulations do not contain any master trust specific provisions.

The Authority’s supervisory focus for master trusts will be:

Now	1 July 2022
Direct engagement to assess progress towards full compliance with requirements, to include review of compliance with the Authority’s DC master trust requirements published in 2019 (which can be found <a href="#">here</a> )	Full compliance with requirements

The reference to “direct engagement” suggests master trusts will be an immediate priority for the Authority. This makes sense given their size, and the key role master trusts are expected to play in driving scheme consolidation. It seems likely that trustees of master trusts can expect regular engagement with the Authority over the next twelve months with a view to ensuring full compliance ahead of 1 July 2022.

The Information Note also references that the Authority is aiming to issue guidance for the public and employers on expected minimum master trust standards in December.

### **Other schemes and trust RACs**

The Authority’s supervisory focus for other schemes and trust RACs will be:

<b>Now</b>	<b>1 July 2022</b>	<b>From 2023</b>
Evidence of a plan to achieve full compliance	Newly established schemes expected to be fully compliant from establishment	Full compliance with requirements

The Information Note does not elaborate on what evidence of a compliance plan will be sought, or when / how frequently. It does state the plan should include specified timelines and progress milestones. This may indicate that, in seeking evidence of a plan, the Authority will query if specific items have been addressed yet (written policies, fitness and probity, appointment of key function holders etc.) or, if not, when the trustees are aiming to achieve compliance.

It is worth noting the Authority has reserved its right to initiate enforcement action. It is possible the Authority may use its powers where it considers that trustees are not making sufficient progress towards full compliance.

### **Proportionality**

One wrinkle on trustees’ ability to proceed with implementation is the lack of clarity around proportionality. Various requirements imposed by the Regulations must be addressed in a manner which is proportionate to the size, nature, scale and complexity of a scheme. The Information Note does not address proportionality. However, the Authority’s Head of Supervision and Enforcement (Grace Guy), speaking at the recent IAPF DC conference, acknowledged that clarity is needed on this issue and is coming.

### **Code of practice**

We expect the issue of proportionality will be covered in a draft code of practice due to be published by the Authority in July. That code will set out what the Authority expects from regulated entities to meet their obligations under the Regulations. Following publication there will be an eight week consultation period on the code, and the Authority is aiming to publish the final code in November.

The absence of a finalised code is not a reason to delay work on a compliance plan. However, trustees will need to be cognisant of any clarifications from the Authority on its expectations around proportionality.

### **Annual compliance returns**

The Regulations impose a new requirement for trustees to submit an annual compliance return to the Authority. The first such return is due for submission by 31 January 2022.

The Information Note confirms the Authority plans to issue guidance to assist trustees in November 2021. Addressing the IAPF DC conference, Grace Guy also confirmed the Authority will be taking a reasonable approach in respect of its expectations for the submissions due in January 2022. This displays welcome pragmatism from the Authority.

### **Next steps**

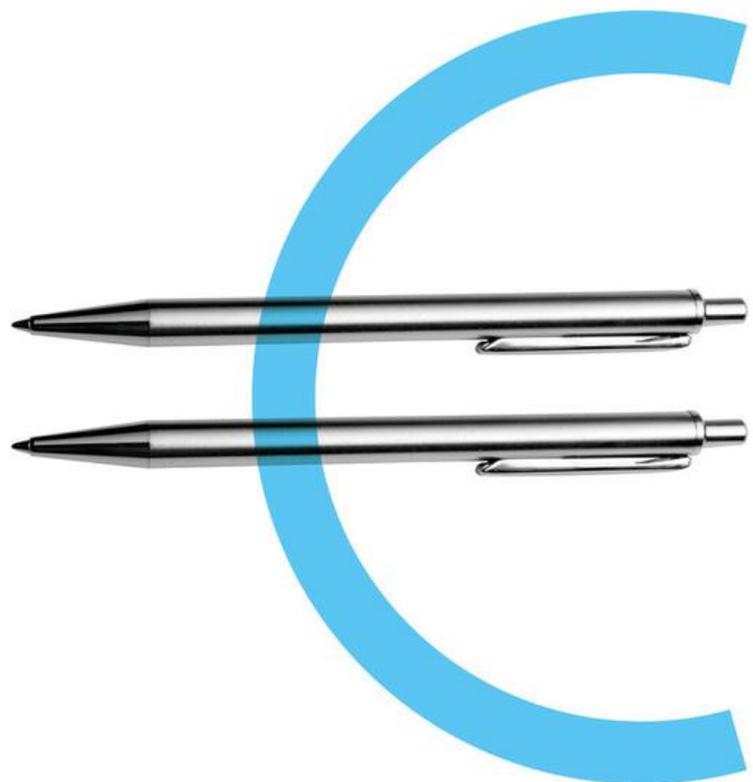
Existing schemes should have, or be working on, an IORP II compliance plan. As referenced above, this plan should include specified timelines and progress milestones, which the Authority will expect to see trustees adhere to.

With the Authority having provided a 12-18 month window for schemes to achieve full compliance, our advice is to use this time wisely. By tackling compliance in stages, trustees can ensure they are able to devote the necessary time and attention to different strands of the Regulations. Trustees of larger schemes might explore establishing one or more sub-committees to lead work on specific strands, and perhaps appointing / designating a project manager to oversee and track implementation generally.

# Pensions Authority to Increase Fees

The Pensions Authority has issued a consultation paper in which it proposes to increase the overall fees collected from occupational pension schemes and the method of calculation of those fees. It is proposed that the primary fee would be an asset-based levy charged on an equal basis to occupational schemes and PRSAs. You can view the Authority's consultation paper [here](#). The consultation closes for submission on June 22nd.

This is a significant development, particularly for larger schemes. The IAPF will be responding to the consultation, and trustees should make their views known to the IAPF if they do not wish to respond directly to the consultation.



# Training on SFDR

The Sustainability Related Disclosures in the Financial Services Sector Regulation (SFDR) is the most significant development to date in ESG legislation for Irish pension schemes. With the recent confirmation that the Pensions Authority will be the body that regulates compliance with SFDR in Ireland, it is important that trustees are fully briefed on what SFDR means for your scheme.

We provide SFDR training to individual trustee boards which explains where SFDR fits into the bigger EU picture and assists trustees in devising a road map for compliance with SFDR. If you would like to book a training session please contact Adrienne Burke at [AdrienneBurke@eversheds-sutherland.ie](mailto:AdrienneBurke@eversheds-sutherland.ie). We will be in touch to arrange a suitable date and time.



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