

## PENSION LAW UPDATE: RECENT DEVELOPMENTS

In this newsletter, we set out a number of relevant developments in pension law. These developments relate to laws and regulations that have recently entered into force or are about to do so.

### 2017 COLLECTIVE PENSION ACT

The 2017 Collective Pension Act (*Verzamelwet Pensioenen 2017*), which was originally intended to enter into force on 1 July 2017, was adopted by the Upper House on 19 December 2017. This Act has already been published in the Bulletin of Acts and Decrees (*Staatsblad*), but it is yet to be determined when it will enter into force. The Act regulates a number of amendments to the Pensions Act (*Pensioenwet*) and the Compulsory Occupational Pension Scheme Act (*Wet verplichte beroepspensioenregeling*). These concern improvements and clarifications, as well as new matters.

The first change makes it possible for closed pension funds, of which the former sponsor company still exists, to join a general pension fund (APF) on the basis of implementing regulations (*uitvoeringsreglement*). This means that those funds no longer need to rely upon the company to enter (for the benefit of the fund) into an implementation agreement with the APF if the fund wishes to transfer its rights and obligations to an APF and then go into liquidation.

The second change is with regards to the obligation to establish a supervisory board for company pension funds with a joint or independent board and invested assets of at least EUR 1 billion. For these company pension funds, the possibility of opting for a review committee (*visitatiecommissie*) as a form of internal supervision will therefore no longer apply.

Other adjustments relate to the provision of information, the coverage ratio, the conditionality declaration and the clarification that a fixed increase is possible in case of a variable annuity and that the maximum spread period for the collective allocation mechanism has been extended from five to ten years.

### DECREE IMPLEMENTING THE PENSIONS ACT AND THE COMPULSORY OCCUPATIONAL PENSION SCHEME ACT

In connection with the Collective Pension Act, a decree was published in the Bulletin of Acts and Decrees on 28 November 2017. Some of the amendments contained therein have already entered into force on 29 November 2017, while others will only enter into force once the Collective Pension Act becomes applicable.

#### Summary

- 2017 Collective Pension Act
- Value Transfer
- GDPR
- IORP-II
- PEPP

One of the amendments that has already entered into force is the change to Article 10c of the decree, which specifies the concept of “implementation costs” in the Pension Act/Compulsory Occupational Pension Scheme Act. This was prompted by the discussion on to which extent asset management related claims by third parties for the benefit of a ring-fenced circle with an APF, can be recovered directly or indirectly from the assets of that circle. While the revised text now makes it clear that this is possible, it still requires that the implementation agreement or implementing regulations be adjusted in this respect. Without this adjustment, banks will generally not want to enter into derivative or other treasury agreements with an APF.

## **VALUE TRANSFER**

The Transfer Act on Small Pensions (*Wet waardeoverdracht klein pensioen*) was adopted by the Upper House on 12 December and published in the Bulletin of Acts and Decrees on 22 December 2017. The date of entry into force is not yet known. This law will end the possibility for pension providers to unilaterally commute small non-contributory pensions (not exceeding EUR 474.11 in 2018). While commutation remains possible at the request of or with the consent of the beneficiary, starting point is that a small non-contributory pension can be transferred by the pension provider - without the consent of the beneficiary - to the new pension provider of the beneficiary. This will become a right of the pension provider, not an obligation. If five attempts by the old pension provider to make a transfer have been unsuccessful, commutation (without permission) will be an option.

Another change concerns the statutory regulation that allows for the possibility - in the event of an increase of the retirement age for tax purposes - of converting all existing pension benefits to benefits based upon the new retirement age, through an internal collective group transfer and without the beneficiaries being entitled to object thereto. On the condition the conversion must be actuarially equivalent and gender-neutral for the entire group. In addition, it must also be possible at the request of the beneficiary (without taking selection factors into account), to reconvert the converted pension entitlements into entitlements with the original retirement age.

## **GENERAL DATA PROTECTION REGULATION**

The General Data Protection Regulation (“**GDPR**”) will come into force on 25 May 2018. In this context, the legislative proposal regarding the Dutch Implementation Act was published on 13 December 2017. Together with the GDPR, this Implementation Act will replace the current Personal Data Protection Act (*Wet bescherming persoonsgegevens*).

The GDPR sets stricter rules for the processing of personal data and imposes high fines in case of non-compliance (up to the higher of EUR 20 million or 4% of the worldwide turnover). Under the GDPR, the rights of the data subjects (such as (former) participants and pension beneficiaries) are strengthened. For example, a participant will be entitled to object to the processing of his/her personal data, to transfer such data (for example to a subsequent pension provider), and the right to inspect his/her own personal data will be strengthened.

Additionally, there are several other important changes. Stricter requirements apply to acquiring a participant’s consent to the processing of personal data. Moreover, the pension provider is also required to conclude a so-called

processing agreement with engaged service providers. This processing agreement regulates the manner in which personal data are processed, confidentiality aspects, how to act in the event of data breaches, and the division of liability, should this be appropriate. Furthermore, the GDPR also sets stricter requirements for the personal data security and how IT systems must be organised. Finally, pension providers are obliged to keep a register of all processing activities involving personal data.

The above means that each pension provider will have to conclude processing agreements with relevant parties and must set up its organisation and systems in such a way that all requirements of the GDPR are met, such *before* 25 May 2018.

## **REVISION IORP DIRECTIVE**

The IORP Directive 2016/2341 (IORP II), which was newly established at the end of 2016, must be implemented in Dutch legislation by 13 January 2019 at the latest. The original Directive dates back to 2003 and has been amended and supplemented on several points in recent years. However, the Directive has now been completely revised. The aim of the Directive is and will continue to be to facilitate the operation of institutions for occupational retirement provision (IORPs) in the single European market. To this end, the Directive contains rules aimed at protecting the interests of participants and pension beneficiaries, but individual Member States may also adopt own supplementary rules.

The Directive explicitly does not apply to providers of social security schemes or pay-as-you-go schemes. In the Netherlands, pension funds as well as a PPI are an IORP and therefore fall under the Directive. This does not apply to a life insurer, however. But a Member State may choose to also apply the rules set out in the Directive to life insurers.

At first sight, the impact of the revised Directive on Dutch legislation and regulations may seem very limited, but that is not the case. Many of the elements that are now included in the Directive can already be found in the current Dutch system, but differences most definitely exist as regards the manner of implementation. It also introduces new obligations, such as how to deal with cross-border group transfers and makes a number of new key functions mandatory. On 13 April 2017, the State Secretary of Social Affairs and Employment sent the implementation plan to the Lower House, together with the transposition tables for implementation of the Directive in the Financial Supervision Act, the Pensions Act and the Compulsory Occupational Pension Scheme Act. A legislative proposal on this matter is pending.

## **PEPP REGULATION**

In June 2017, the European Commission published a proposal for a regulation on a Pan-European Personal Pension product (PEPP). This proposal was accompanied by a recommendation on how personal pension products, including the PEPP, should be treated for tax purposes. The PEPP is a voluntary personal pension product that offers a new supplementary pan-European possibility to save for pensions in a simple and cost-effective way. The Commission expects that the PEPP regulation will stimulate asset pooling and the creation of economies of scale within the European market and thus contribute to the creation of the Capital Market Union.

PEPP providers may be (i) credit institutions under the CRD IV Directive, (ii) insurance institutions under the Solvency II Directive, (iii) institutions for occupational retirement provision (IORPs), (iv) undertakings for collective investment in transferable securities (UCITS) and (v) fund managers regulated under the Alternative Investment Directive. In practice, this means that EU-regulated banks, insurers, asset managers, investment firms and pension institutions can qualify as PEPP providers.

The provision of a PEPP is subject to “PEPP product authorisation” by the European Insurance and Occupational Pensions Authority (EIOPA). The Commission expects that standardisation of the core elements of the PEPP will result in cost reductions for PEPP providers and facilitate an efficient European distribution framework. The Commission also indicates that further additional regulations will be introduced to stimulate online distribution, which should provide a safe default investment option for which the PEPP saver can choose without prior advice. Affiliation is sought with the applicable information requirements under the EU Regulation on key information documents for packaged retail investment products and insurance-based investment products (PRIIPs).

The PEPP saver will have five savings options, which are designed to offer high-quality consumer protection based on proven risk mitigation methods. The PEPP will be transferable between Member States, meaning that if PEPP savers move to another Member State, they can continue to save with their existing PEPP. Specific information requirements apply, including the requirement to inform PEPP savers of the fees before they conclude a PEPP and the provision of an annual statement on the PEPP balance. One can switch every five years from PEPP provider.

Significant differences may exist in the tax treatment of a PEPP in different Member States. As regards taxation, the Commission recommends that a PEPP should be treated in the same way as existing national personal pension products. As the PEPP regulation does not harmonise tax treatment between Member States, tax inefficiencies may occur. It is therefore expected that tax structuring will be an important precondition for successful cross-border PEPP distribution.

## **AND FINALLY:**

- All DC pension providers - whether or not they themselves offer a variable annuity – must, as from 1 January 2018:
  - inform participants about the possibility of opting for a fixed or variable annuity and what that means;
  - at some point offer participants the possibility of making a (provisional) choice for a fixed or variable annuity and to adjust their investment policy accordingly; and
  - offer participants the possibility of buying a fixed or variable annuity from another pension provider (if they do not offer it themselves).
- As of 1 January 2018, the retirement age for tax purposes has been raised to 68.
- The legislative proposal “Occupational Pension Fund (Merger) Act” was submitted to the Lower House on 7 October 2017.

- The Directive of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Directive 2014/50/EU) must be implemented by 21 May 2018.

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