
STATUTORY INSTRUMENTS

2005 No. 255

The Pensions (Northern Ireland) Order 2005

PART VI

**OCCUPATIONAL AND PERSONAL PENSION
SCHEMES: MISCELLANEOUS PROVISIONS**

Modification of pension rights

Modification of subsisting rights

239. For Article 67 of the 1995 Order substitute—

“The subsisting rights provisions

67.—(1) The subsisting rights provisions apply to any power conferred on any person by an occupational pension scheme to modify the scheme other than a power conferred by—

- (a) a public service pension scheme, or
- (b) a prescribed scheme or a scheme of a prescribed description.

(2) Any exercise of such a power to make a regulated modification is voidable in accordance with Article 67G unless the following are satisfied in respect of the modification—

- (a) in the case of each affected member—
 - (i) if the modification is a protected modification, the consent requirements (see Article 67B),
 - (ii) if it is not, either the consent requirements or the actuarial equivalence requirements (see Article 67C),
- (b) the trustee approval requirement (see Article 67E), and
- (c) the reporting requirement (see Article 67F).

(3) The subsisting rights provisions do not apply in relation to the exercise of a power—

- (a) for a purpose connected with debits under Article 26(1) of the Welfare Reform and Pensions (Northern Ireland) Order 1999, or
- (b) in a prescribed manner.

(4) References in this Article and Articles 67A to 67I to “the subsisting rights provisions” are to this Article and those Articles.

(5) Paragraph (6) applies in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification where a member of the scheme dies before the requirements mentioned in paragraph (2), so far as they apply in his case, have been complied with in respect of the modification if—

- (a) before he died he had given his consent to the modification in accordance with Article 67B(4)(b), or
 - (b) before he died, or before the trustees of the scheme had become aware that he had died, the trustees had complied with Article 67C(4)(a), (b) and (d) in respect of the modification in his case.
- (6) Any of the requirements mentioned in paragraph (2), as it applies in respect of the modification—
- (a) which is satisfied in the case of the member, or
 - (b) which would have been satisfied in his case had he not died before it was satisfied,
- is to be taken to be satisfied in the case of any survivor of the member in respect of the modification.

The subsisting rights provisions: interpretation

67A.—(1) In the subsisting rights provisions, each of the following expressions has the meaning given to it by the following provisions of this Article—

- “regulated modification”
- “protected modification”
- “detrimental modification”
- “affected member”
- “subsisting right”
- “scheme rules”.

(2) “Regulated modification” means a modification which is—

- (a) a protected modification, or
- (b) a detrimental modification,

or is both.

(3) “Protected modification” means a modification of an occupational pension scheme which—

- (a) on taking effect would or might result in any subsisting right of—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,

which is not a right or entitlement to money purchase benefits becoming, or being replaced with, a right or entitlement to money purchase benefits under the scheme rules,

- (b) would or might result in a reduction in the prevailing rate of any pension in payment under the scheme rules, or
- (c) is of a prescribed description.

For the purposes of sub-paragraph (a), the reference in the definition of “money purchase benefits” in section 176(1) of the Pension Schemes Act to the widow or widower of a member of an occupational pension scheme is to be read as including any other survivor of the member.

(4) “Detrimental modification” means a modification of an occupational pension scheme which on taking effect would or might adversely affect any subsisting right of—

- (a) any member of the scheme, or

- (b) any survivor of a member of the scheme.
- (5) A person is an “affected member”—
- (a) in relation to a protected modification within sub-paragraph (a) or (b) of paragraph (3), if, at the time the modification takes effect, he is—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,and, on taking effect, the modification would or might affect any of his subsisting rights as mentioned in that sub-paragraph,
 - (b) in relation to a protected modification within sub-paragraph (c) of that paragraph, if he is of a prescribed description, and
 - (c) in relation to a detrimental modification which is not a protected modification if, at the time the modification takes effect, he is—
 - (i) a member of the scheme, or
 - (ii) a survivor of a member of the scheme,and, on taking effect, the modification would or might adversely affect any of his subsisting rights.
- (6) “Subsisting right” means—
- (a) in relation to a member of an occupational pension scheme, at any time—
 - (i) any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or
 - (ii) any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules, and
 - (b) in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member.
- For this purpose, “right” includes a pension credit right.
- (7) At any time when the pensionable service of a member of an occupational pension scheme is continuing, his subsisting rights are to be determined as if he had opted, immediately before that time, to terminate that service.
- (8) “Scheme rules”, in relation to a scheme, means—
- (a) the rules of the scheme, except so far as overridden by a relevant legislative provision,
 - (b) the relevant legislative provisions, to the extent that they have effect in relation to the scheme and are not reflected in the rules of the scheme, and
 - (c) any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the requirements of Chapter 1 of Part IV of the Pension Schemes Act (preservation of benefit under occupational pension schemes).
- (9) For the purposes of paragraph (8)—
- (a) “relevant legislative provision” means any provision contained in any of the following provisions—
 - (i) Schedule 5 to the Social Security (Northern Ireland) Order 1989 (equal treatment for men and women);

- (ii) Chapters 2 to 5 of Part IV of the Pension Schemes Act (certain protection for early leavers) or regulations made under any of those Chapters;
 - (iii) Part IVA of that Act (requirements relating to pension credit benefit) or regulations made under that Part;
 - (iv) section 106(1) of that Act (requirement as to resources for annual increase of guaranteed minimum pensions);
 - (v) this Part (occupational pensions) or orders or regulations made or having effect as if made under this Part;
 - (vi) Article 28 of the Welfare Reform and Pensions (Northern Ireland) Order 1999 (pension debits: reduction of benefit);
 - (vii) any provision mentioned in Article 279(2) of the Pensions (Northern Ireland) Order 2005;
- (b) a relevant legislative provision is to be taken to override any of the provisions of the scheme if, and only if, it does so by virtue of any of the following provisions—
- (i) paragraph 3 of Schedule 5 to the Social Security (Northern Ireland) Order 1989;
 - (ii) section 125(1) of the Pension Schemes Act;
 - (iii) Article 114(1);
 - (iv) Article 28(4) of the Welfare Reform and Pensions (Northern Ireland) Order 1999;
 - (v) Article 279(1) of the Pensions (Northern Ireland) Order 2005.
- (10) For the purposes of this Article—
- (a) “survivor”, in relation to a member of an occupational pension scheme, means a person who—
 - (i) is the widow or widower of the member, or
 - (ii) has survived the member and has any entitlement to benefit, or right to future benefits, under the scheme rules in respect of the member, and
 - (b) a modification would or might adversely affect a person’s subsisting right if it would alter the nature or extent of the entitlement or right so that the benefits, or future benefits, to which the entitlement or right relates would or might be less generous.
- (11) In the subsisting rights provisions, in relation to—
- (a) the exercise of a power to modify an occupational pension scheme to which the subsisting rights provisions apply, or
 - (b) a modification made, or to be made, in exercise of such a power,
- references to “the scheme” are to be read as references to the scheme mentioned in subparagraph (a).

The consent requirements

67B.—(1) References in the subsisting rights provisions to the consent requirements, in respect of a regulated modification, are to be read in accordance with this Article.

- (2) The consent requirements apply in the case of an affected member—
 - (a) if the modification is a protected modification;

- (b) if it is not a protected modification, unless the actuarial equivalence requirements apply in his case.
- (3) The consent requirements consist of—
 - (a) the informed consent requirement (see paragraph (4)), and
 - (b) the timing requirement (see paragraph (6)).
- (4) The informed consent requirement is satisfied in the case of an affected member if before the modification is made—
 - (a) the trustees have—
 - (i) given him information in writing adequate to explain the nature of the modification and its effect on him,
 - (ii) notified him in writing that he may make representations to the trustees about the modification,
 - (iii) afforded him a reasonable opportunity to make such representations, and
 - (iv) notified him in writing that the consent requirements apply in his case in respect of the modification, and
 - (b) after the trustees have complied with sub-paragraph (a)(i), (ii) and (iv), the affected member has given his consent in writing to the modification.
- (5) If—
 - (a) the modification is not a protected modification, and
 - (b) before the modification is made the trustees notify an affected member in writing that—
 - (i) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but
 - (ii) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification,

the trustees are to be taken to have complied with paragraph (4)(a)(iv) in respect of him.
- (6) The timing requirement is satisfied in the case of an affected member if the modification takes effect within a reasonable period after the member has given his consent to the modification in accordance with paragraph (4)(b).

The actuarial equivalence requirements

67C.—(1) References in the subsisting rights provisions to the actuarial equivalence requirements, in respect of a detrimental modification which is not a protected modification, are to be read in accordance with this Article and Article 67D.

- (2) The actuarial equivalence requirements apply in the case of an affected member only if—
 - (a) the modification is not a protected modification, and
 - (b) the trustees of the scheme determine that they are to apply in his case.
- (3) The actuarial equivalence requirements consist of—
 - (a) the information requirement (see paragraph (4)),
 - (b) the actuarial value requirement (see paragraph (5)), and
 - (c) the actuarial equivalence statement requirement (see paragraph (6)).

(4) The information requirement is satisfied in the case of an affected member if before the modification is made the trustees have taken all reasonable steps to—

- (a) give him information in writing adequate to explain the nature of the modification and its effect on him,
- (b) notify him in writing that he may make representations to the trustees about the modification,
- (c) afford him a reasonable opportunity to make such representations, and
- (d) notify him in writing that the actuarial equivalence requirements apply in his case in respect of the modification.

(5) The actuarial value requirement is satisfied in the case of an affected member if before the modification is made the trustees have made such arrangements, or taken such steps, as are adequate to secure that actuarial value will be maintained.

(6) The actuarial equivalence statement requirement is satisfied in the case of an affected member if the trustees have, within a reasonable period beginning with the date on which the modification takes effect, obtained an actuarial equivalence statement relating to the affected member in respect of the modification.

(7) For the purposes of paragraph (6) “actuarial equivalence statement” means a statement in writing which—

- (a) is given by—
 - (i) the actuary appointed in relation to the scheme under Article 47(1)(b), or
 - (ii) a person with prescribed qualifications or experience or who is approved by the Department, and
- (b) certifies that actuarial value has been maintained.

(8) For the purposes of paragraphs (5) and (7) as they apply in relation to an affected member, actuarial value is maintained if the actuarial value, immediately after the time at which the modification takes effect, of the affected member’s subsisting rights is equal to or greater than the actuarial value of his subsisting rights immediately before that time.

The actuarial equivalence requirements: further provisions

67D.—(1) This Article applies for the purposes of Article 67C.

(2) Where—

- (a) the information requirement has been satisfied in the case of an affected member in respect of a proposed modification (“the original modification”),
- (b) before the trustees have made a determination, or given their consent, for the purposes of Article 67E(1) in relation to the original modification, the original modification has been revised, and
- (c) the modification as so revised (“the revised modification”) does not differ from the original modification in any material respect,

the information requirement is to be taken to have been satisfied in relation to the revised modification.

(3) The trustees are to be regarded as having taken all reasonable steps to notify an affected member as mentioned in Article 67C(4)(d) in respect of a modification if they have taken all reasonable steps to notify him in writing that—

- (a) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but

(b) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification.

(4) Any calculation for the purposes of Article 67C of the actuarial value of an affected member's subsisting rights at any time must conform with such requirements as may be prescribed.

(5) Requirements prescribed by regulations under paragraph (4) may include requirements for any such calculation to be made in accordance with guidance that—

(a) is prepared and from time to time revised by a prescribed body, and

(b) if the regulations so provide, is approved by the Department.

(6) Nothing in paragraphs (6) and (7) of Article 67C precludes actuarial equivalence statements relating to—

(a) two or more affected members, or

(b) affected members of any particular description,

in respect of a modification being given in a single document.

The trustee approval requirement

67E.—(1) For the purposes of Article 67(2)(b), the trustee approval requirement is satisfied in relation to the exercise of a power to make a regulated modification if—

(a) the trustees of the scheme have determined to exercise the power to make the modification, or

(b) if the power is exercised by another person, the trustees have consented to the exercise of the power to make the modification,

and the making of the determination, or giving of consent, complies with paragraphs (2) and (3).

(2) The trustees must not make a determination, or give their consent, for the purposes of paragraph (1) unless, in the case of each affected member—

(a) if the modification is a protected modification, the informed consent requirement is satisfied (within the meaning of Article 67B), or

(b) if it is not a protected modification—

(i) the informed consent requirement is satisfied, or

(ii) the information and actuarial value requirements are satisfied (within the meaning of Article 67C),

in respect of the modification.

(3) The trustees must not make a determination, or give their consent, for the purposes of paragraph (1) more than a reasonable period after the first consent given by an affected member under Article 67B(4)(b) in respect of the modification was given.

The reporting requirement

67F.—(1) For the purposes of Article 67(2)(c), the reporting requirement is satisfied in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification if the trustees have, in accordance with paragraph (2)—

(a) notified each affected member in whose case the consent requirements apply in respect of the modification, and

(b) taken all reasonable steps to notify each affected member in whose case the actuarial equivalence requirements apply in respect of the modification, that they have made a determination, or given their consent, for the purposes of Article 67E(1) in relation to the exercise of the power to make the modification.

(2) The trustees must give (or, where the actuarial equivalence requirements apply, take all reasonable steps to give) the notification—

- (a) within a reasonable period beginning with the date of the determination or giving of consent mentioned in paragraph (1), and
- (b) before the date on which the modification takes effect.

Powers of the Authority: voidable modifications

67G.—(1) Paragraph (2) applies in relation to a regulated modification made in exercise of a power to which the subsisting rights provisions apply which is voidable by virtue of—

- (a) Article 67(2), or
- (b) Article 67H(3).

(2) The Authority may make an order declaring that paragraph (6) applies in relation to the regulated modification.

(3) An order under paragraph (2) relating to a regulated modification may also declare that paragraph (6) applies in relation to—

- (a) any other modification of the scheme made by the exercise of the power mentioned in paragraph (1), or
- (b) the grant of any rights under the scheme (whether by virtue of the attribution of notional periods as pensionable service or otherwise) in connection with the regulated modification.

(4) An order under paragraph (2) relating to a regulated modification must specify the affected member or affected members or description of affected members in respect of whom paragraph (6) applies (“the specified persons”).

(5) An order under paragraph (2) relating to a regulated modification may also—

- (a) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of giving effect to the order;
- (b) declare that paragraph (7) applies in relation to anything done by the trustees after the time at which the modification would, disregarding the order, have taken effect which—
 - (i) would not have contravened any provision of the scheme rules if the modification had taken effect at that time, but
 - (ii) as a result of the modification being void to any extent by virtue of the order, would (but for that paragraph) contravene such a provision.

This is without prejudice to Article 166(3).

(6) Where the Authority make an order declaring that this paragraph applies in relation to a modification of a scheme, or the grant of any rights under the scheme, the modification or grant is void to the extent specified in the order, and in respect of the specified persons, as from the time when it would, disregarding the order, have taken effect.

(7) Where, by virtue of paragraph (5)(b), the Authority make an order under paragraph (2) declaring that this paragraph applies in relation to anything done by the trustees, that thing is to be taken, for such purposes as are specified in the order, not to have contravened any provision of the trust deed or scheme rules.

(8) An order under paragraph (2) relating to a regulated modification, or other modification, of a scheme or the grant of any rights under the scheme may be made before or after the time at which the modification or grant would, disregarding the order, have taken effect.

Powers of the Authority to intervene

67H.—(1) Paragraph (2) applies where the Authority have reasonable grounds to believe that a power to which the subsisting rights provisions apply—

- (a) will be exercised, or
- (b) has been exercised,

to make a regulated modification in circumstances where the modification will be voidable by virtue of Article 67(2).

(2) The Authority may by order—

- (a) in a case within paragraph (1)(a), direct the person on whom the power is conferred not to exercise the power to make the regulated modification;
- (b) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of securing that any of the requirements mentioned in Article 67(2) is satisfied.

(3) A regulated modification made in exercise of a power to which the subsisting rights provisions apply is voidable in accordance with Article 67G if—

- (a) the exercise of the power contravened an order under sub-paragraph (a) of paragraph (2), or
- (b) the trustees fail to comply with a requirement imposed by an order under sub-paragraph (b) of that paragraph relating to any exercise of the power to make the modification.

Subsisting rights provisions: civil penalties

67I.—(1) Paragraphs (2) and (3) apply where a regulated modification is voidable by virtue of Article 67(2).

(2) Where the modification was made by the exercise of a power—

- (a) by the trustees of the scheme, or
- (b) by any other person in circumstances which do not fall within paragraph (3),

Article 10 applies to any trustee who has failed to take all reasonable steps to secure that the modification is not so voidable.

(3) Article 10 applies to any person other than the trustees of the scheme who, without reasonable excuse, exercises a power to make the modification if—

- (a) the trustees have not given their consent, for the purposes of Article 67E(1), to the exercise of the power to make the modification, or
- (b) in the case of any affected member, the timing requirement is not satisfied (within the meaning of Article 67B) in respect of the modification.

(4) Where the trustees fail to comply with any requirement imposed, by virtue of paragraph (5)(a) of Article 67G, by an order under paragraph (2) of that Article, Article 10 applies to any trustee who has failed to take all reasonable steps to secure such compliance.

(5) Where a regulated modification is made by the exercise of a power in contravention of an order under Article 67H(2)(a)—

- (a) if the power is exercised by the trustees, Article 10 applies to any trustee who has failed to take all reasonable steps to secure that the order was not contravened,
 - (b) Article 10 applies to any other person who without reasonable excuse exercises the power in contravention of the order.
- (6) Where the trustees fail to comply with any requirement specified in an order under Article 67H(2)(b), Article 10 applies to any trustee who has failed to take all reasonable steps to secure such compliance.”.