



Introduction

This issue of PECOMA Pension News provides a summary of the circulars 2008/02 and 2009/01 issued by the Inspectorate General for Social Security (IGSS) as well as an update on a number of ongoing issues covered in our Pension News I – 2008.

Circular 2008/02

This circular covers the introduction of the new format of the annual tax certificate required for each pension plan. It confirms the different treatment of internally funded pension plans set out in our previous newsletters and employers with significant internal pension provisions may wish to re-consider their pension plan in the light of the increased costs that this change brings.

The circular also provides freshly revised templates for the detailed regulatory reporting to the IGSS. For a transitory period from 2006 to 2009, plan administrators may use either the new formats or the provisional report format published in 2007 in respect of the following:

- Basis of assessment of dependency contributions for the year 2006 to 2009.
- Basis of assessment of the IGSS levy for the years 2005 to 2009.
- Statistical information for the year 2007.

We have now received the notification of plan identification codes for a number of clients and will be contacting all clients in this respect over the coming weeks.

Circular 2009/01

The IGSS issued circular 2009/01 on 1 March 2009, which covers a number of issues arising over recent years in the application of the law on occupational pensions (LRCP) of 8 June 1999.

Impact of legislative changes

The changes arising from the unification of legal provisions applicable to white collar workers and blue collar ("statut unique") workers set out in our Pension News I-2008 has been confirmed. However, we re-iterate our suggestion that membership rules must be reviewed for all plans where these two categories of workers are currently subject to different rules.

On the subject of age discrimination, Luxembourg has now introduced the exemption available under the EU directive 2000/78/EC, to permit differences in age to be used in the determination of pension benefits, where this is based on objective criteria and does not constitute sexual discrimination. We have reported on this matter in our Pensions News I-2008.

Interpretation of existing legislation

Article 5 (h) of the LRCP allows for the designation of beneficiaries upon the death of pension plan member, which may deviate from the statutory order of inheritance. Two scenarios need to be distinguished:

- In the case of widow's/widower's or orphan's pensions this is straightforward – except that the plan rules must provide for the definition of spouses to include civil partnerships and that the rules of the country of residence of the member or the spouse are relevant – pension scheme rules may need to be reviewed in this context.
- In the case of capital sums becoming payable at death, these may be assigned to bank as security for loans made, but in this case the appropriate four-way documents must be in place.

In the absence of specific rules on the statute of limitations in occupational pensions, general rules are applicable. The time limit runs from the date the member or former member is informed about the benefits that are payable (retirement date or leaving date, if the pension plan provides for alternatives to the maintenance of pension rights) and is generally three years. After that period the vested rights may be written back or deducted from premiums, depending on the form of the plan.

The LRCP includes provisions for the protection of former employees subject to statutory early retirement provisions under book V, chapter VIII of the Employment Code. The IGSS has clarified that these rules do not apply to informal early retirement arrangements, where the employee would not be required to work in return for a reduction in salary; in the latter case the employment contract continues and the employee is generally treated as a part-time employee for the purposes of the occupational pension plan.

Taxation

It has now been clarified that foreign employers employing staff in Luxembourg through a branch or a similar permanent establishment fall under the regulations of the LRCP. The definition of permanent establishment used is the definition under direct income tax law and the tax authority (Administration des Contributions Directes) will establish a tax residence certificate, if required.

In principle, all transfers of pension rights to Luxembourg are subject to taxation at entry and benefits then tax free. The tax authorities have now confirmed that an exemption from this obligation is available, where the pension rights in question have already been taxed at the rate of at least 10% in their country of origin. A certificate from the relevant tax authority will be required.

A similar clarification on the treatment of outgoing transfers has not been provided at this stage.

Clarification of rules relating to cash payouts from pension plans

Further to article 13 of the LRCP, and subject to the plan rules providing for this possibility, the repayment of pension rights is available to former affiliates, who take up a post outside Luxembourg. Following a number of cases of suspected or actual abuse, the production of a certificate of affiliation from the foreign social security institution is now required for such a claim. In addition, evidence of self-employment (as above) is acceptable to obtain a payout.



In addition, the rules for payout claims have been eased in two important respects:

- Subject to stricter rules in the plan rules, claims for payout need not be made immediately upon termination of employment any more, but are accepted after a prolonged period, to take into account the personal or professional situation of many former affiliates.
- It has also been confirmed that a payout claim can be made upon the initial termination of employment or upon a subsequent change of employer. This will enable affiliates to obtain the cash payout in two cases, where this was not previously considered possible:
 - If the initial termination of employment took place before the age of 50, payout may not have been possible. If the employee then changes employment after the age of 50, the payout from the initial pension plan is now possible.
 - The payout of personal contributions may not have been possible prior to the application of circular 2008/01 due to the fact that the de-minimis-test was applied to the aggregate of proceeds from employer and employee contributions, but it may now become available upon a subsequent change of employment.

Dependency contribution

Finally, the IGSS has clarified that the benefits payable from employee's personal contributions should not be subject to dependency contributions, because they are paid out of the salary after deduction of the dependency contribution. We understand that this change of practice be effective from February 2009.

Analysis in brief

Impact of the economic crisis on occupational pension

No newsletter would be complete without a few observations on the current economic turmoil. We have seen an increase in the number of enquiries on the subject of vested rights and would like comment these as follows:

The notion of vested rights differs between defined benefit plans (vested rights defined as benefit entitlement at retirement) and defined contribution plans (vested rights represented by the current value of contributions made in the past).

The LRCP provides for the maintenance of vested rights upon termination of employment and upon bankruptcy.

In cases of mergers or transfers of business, the protected rights include the rights of active members that have not yet vested. The new employer must maintain the benefits transferred, but is not obliged to provide for additional benefits.

The position of active employees, which remain with their current employer, is as follows: Article 6 of the LRCP provides that an employer may only make unfavourable changes to or terminate the pension plan, where legislative changes or the economic situation of the business would render the employer's contribution to the plan to become excessive.

As a result, where plans are amended many employers provide for the compensation of any expected shortfalls for staff as a matter of personnel policy. Detailed calculations are required to demonstrate the expected outcome of the old plan, to compare it to a new plan and to support the measures taken by the employer to avoid or compensate any shortfall. We would strongly recommend that advice be sought at an early stage, if such modifications are contemplated.

Similarly, if an employer wishes to amend or terminate a pension plan under the provision of article 6 LRCP, we recommend that advice is sought at an early stage; we note that the meaning of "excessive" has not yet been tested in the courts.

News in brief

Compliance of BVV pension plans

As previously reported, PECOMA International S.A. has been advising clients on the formalities required to ensure compliance of pension promises funded with the BVV, further to the transposition of the IORP-Directive in Germany and in Luxembourg. We have now clarified the tax treatment of these plans and would advise all employers using the BVV to fund their pension plans that specific plan rules must be filed with the IGSS, an annual tax certificate must be submitted and the payment of benefits is subject to the submission of individual forms to the IGSS.

Non-compliance with these rules may lead to full taxation of the benefits in Luxembourg. Please do not hesitate to contact us, if you have any queries in this matter.

PECOMA International S.A. is an employee benefits and actuarial consultancy advising its customers in the areas of risk benefits and retirement planning. We also assist our customers in finding the appropriate funding vehicle for their benefits and retirement plans. We deal with all aspects in this area, be it financial or actuarial, tax, accounting or labour law issues.

For further information, please do not hesitate to contact us.

*Customer contact:
Gerd Gebhard, Director
Tel 2626091 / Fax 26262100 / info@pecoma.lu*