

VIRGIN MEDIA - A SOLUTION AT LAST?

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The Government has tabled amendments to the Pension Schemes Bill which are aimed at addressing the problems which have arisen as a result of the decision in the Virgin Media case. Trustees and sponsors that had placed dealing with Virgin Media issues on hold pending a legislative resolution will therefore need to put consideration of those issues back on the agenda.

Where schemes have already identified alternative mechanisms to confirm the validity of past amendments where Virgin Media had given rise to doubt, the legal efficacy of those mechanisms will not be undermined by the introduction of the proposed legislative fix, and further action should not be required.

BACKGROUND

Between 6 April 1997 and 6 April 2016, schemes could contract members out of the second tier of the state pension on a “reference scheme test” basis, which meant the scheme had to provide benefits which were broadly equivalent to or better than a notional “reference scheme”.

Legislation (in the form of section 37 Pension Schemes Act 1993 and regulation 42 of the Contracting-out Regulations 1996) provided that amendments relating to reference scheme benefits would be void if the scheme did not obtain, in advance of the amendment, written actuarial confirmation that the test would continue to be met (the precise requirements varied over time).

The Court of Appeal in Virgin Media concluded that the effect of this legislation was that if a required actuarial confirmation was not obtained, in-scope amendments were void.

We are waiting for a decision in Verity Trustees v Wood, which will look at a number of issues in relation to Virgin Media, including whether confirmation was required in relation to issues such as scheme closure and the level of evidence needed to establish if confirmation was given.

THE PROBLEM

It would appear that many schemes have been unable to track down appropriate actuarial confirmations for all deeds of amendment between 1997 and 2016. In some cases, the confirmations may have been lost, and in others, simply not obtained. In almost all cases, the relevant changes would not in practice have affected the ability of the scheme to meet the reference scheme test, as this had to be re-certified by the actuary at three yearly intervals in any event.

THE SOLUTION

Following extensive lobbying from the industry, the Government promised earlier in the year that it would introduce legislation to address the potential issues caused by Virgin Media and it has now tabled amendments to the Pension Schemes Bill which do so.

The amendments say more or less what the industry was expecting, and are extremely welcome. Trustees will be able to ask the scheme actuary to give confirmations now in relation to historic deeds, and actuaries will have considerable flexibility in relation to what they can take into

account when doing so. If confirmation is given, an amendment will be treated as though it has always been valid.

Amendments in scope: The legislative fix will apply to “*potentially remediable alterations*”, which (subject to exceptions) are amendments that:

- Engaged the statutory actuarial confirmation requirements referred to above;
- Have been treated as valid by the trustees;
- Have had no “positive action” taken in relation to them on the basis that the trustees consider them void for non-compliance with the actuarial confirmation requirements.

“Positive action” for these purposes requires trustees *either* to have notified members in writing that an amendment is void *or* to have taken administrative steps to change benefits as a result of having concluded that the amendment is void.

Merely reaching a decision that an amendment is potentially problematic will not count as “positive action”, and neither will any statements in scheme or sponsor accounts that there could potentially be a Virgin Media issue.

Amendments will also be out of scope if any Virgin Media issues have already been determined by the court in relation to them, or if there were ongoing “legal proceedings” in relation to such issues on or before 5 June 2025. There is no definition of “legal proceedings” for these purposes so this restriction might require some further consideration where there are currently any Virgin Media related disputes with members or beneficiaries.

Process: If an amendment is “potentially remediable”, then it will be treated as always having been valid if:

- The trustees request the scheme actuary to consider whether it would have prevented the scheme from “*continuing to satisfy*” the reference scheme test. There are no timing requirements around making such a request so it could be done at some point in the future; and
- The actuary confirms in writing that in their opinion it is “*reasonable to conclude*” that, if validly made “*the alteration would not have prevented the scheme from continuing to satisfy*” the reference scheme test. This is a somewhat softer test than requiring the actuary to confirm now that the scheme would have continued to meet the test.

In making a decision the actuary can take into account the information currently available to them, provided that they regard that information to be sufficient to allow them to form an opinion on the matter, and can likewise make any assumptions or presumptions that they consider professionally appropriate.

It is anticipated that there may be actuarial guidance to help actuaries in giving any required confirmations.

Schemes that have wound-up: There are also provisions to deal with a scheme which has wound-up before the legislation comes into force.

In this case, a potentially remediable alteration is to be treated for all purposes as having complied with the actuarial confirmation requirements. This means that where a scheme has bought-out and wound-up, there is no need to consider whether there might be claims under employer indemnities or residual risks insurance as a result of Virgin Media. However, if wind-up has not completed by the in-force date, this provision will not apply and trustees will still need to address any potential issues even if all liabilities have already been bought-out.

QUESTIONS FOR TRUSTEES TO CONSIDER

This solution will be extremely welcome news for trustees and sponsors but it does give rise to a number of issues that trustees will need to consider:

- Where a deed is potentially void for lack of confirmation, should trustees use the new provisions and ask the actuary for confirmation now? Are there any factors which mean that they should not - remembering that both benefit improvements and reductions may be void where appropriate confirmations were not obtained?
- What amendments might actually need confirmations? Not all benefits are within the reference scheme test and so subject to the statutory requirements considered in Virgin Media. If the actuary is asked to provide confirmations for amendments where none was required, this could give rise to unnecessary costs and potential problems if the actuary concludes they are unable to give the required confirmation.
- What level of information might an actuary consider to be “sufficient” to make their decision? How much information do trustees have and what information will the actuary actually need?
- What will happen if the actuary is unable to give the required confirmations. Are there any other steps that could be taken to limit the impact of a potentially void deed?
- If a scheme is in the process of buying-in, trustees will need to consider whether their scheme actuary thinks they will be able to give confirmations in relation to any potentially void deeds as this will affect the benefits to be secured.
- If a scheme is in the process of buying-out and winding up, the trustees should note that the legislation treats amendments in schemes that have already wound up by the date it comes into force differently from those that have not.

Trustees and sponsors should also note that the Verity Trustees case was heard by the High Court before the summer and judgment is expected in the coming weeks. This case dealt with a number of evidential issues in relation to Virgin Media, which may be relevant to trustees considering how much information the actuary will need to give required confirmations, as well as questions relating to the scope of the underlying statutory requirements themselves. It is also likely to deal with other questions relating to the validity of amendments, including closure deeds, so again is something worth waiting for before taking definitive action.

Finally, the proposed amendments are in draft and may be subject to change so parties should watch out for further developments.

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