

## First Briefing, August 2023

### Contracted-out schemes: Are rule amendments now void?

On 16 June 2023, the ruling in the case of Virgin Media Ltd v NTL Pension Trustees II Ltd & Others was handed down.

The judge found that a 1999 amendment to the rules of the NTL Pension Plan (a contracted-out Defined Benefit scheme) would have been rendered void if the Scheme Actuary had not provided written confirmation that the Plan would still satisfy the relevant statutory standard after the amendment had been made.

In this briefing, we set out the background and facts of the case, and discuss what might happen next.

- The Scheme Actuary *considered the proposed alteration* and *confirmed to the trustees in writing* that they are satisfied that the scheme *would continue* to pass the reference scheme test *if the alteration were made*.

The relevant legislation was amended several times over the period running from 6 April 1997 (when the reference scheme test was introduced) to 6 April 2016 (when DB contracting-out ended).

It's also worth noting that section 37 allows the government to make regulations that would validate retrospectively any amendments that would otherwise be voided by it.

#### Background of the case

Prior to 6 April 1997, contracted-out Defined Benefit (DB) schemes had to provide each member with a guaranteed minimum pension (GMP), which was an individually calculated minimum amount. From 6 April 1997, the requirements for contracted-out DB schemes changed significantly. Instead of providing a GMP, post 6 April 1997 contracted-out rights provided by a scheme – known as ‘section 9(2B) rights’ – had to satisfy an overall quality requirement. The Scheme Actuary had to certify (and periodically recertify) that the scheme satisfied this requirement, which was known as the ‘reference scheme test’.

At the time of the events considered by the case, the legislation governing contracted-out DB schemes included requirements around the alteration of their rules. Section 37 of the Pension Schemes Act 1993 provided that the rules of a contracted-out DB scheme *cannot be altered* unless the alteration is *of a prescribed description, except in prescribed circumstances*.

The contracting-out regulations further provided that the rules of a contracted-out DB scheme relating to section 9(2B) rights *cannot be altered* unless:

- The trustees *informed* the scheme actuary *in writing of the proposed alteration*, and

#### The Virgin Media v NTL Pension Trustees II case

The case concerned amendments made to the rules of the National Transcommunications Ltd Pension Plan in 1999, which aimed to reduce the level of revaluation given to deferred pensioners. This reduction only affected future benefit accrual. The Plan was a contracted-out DB scheme.

The judgment assumed that the Scheme Actuary did not provide the required section 37 written confirmation. It appears that no such confirmation had been found. The judge emphasised that the court had not made a ruling on whether this confirmation was made.

The key finding of the judge is that in the absence of the confirmation from the Scheme Actuary, the 1999 amendments are void.

The judge also found that the requirement for confirmation from the Scheme Actuary applied to changes affecting both past and future service rights. (The employer had tried to argue that the legislation at the time only applied to changes to past service rights.)

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Registered address: First Actuarial LLP, Mayesbrook House, Lawnswood Business Park, Leeds, LS16 6QY

Finally, the judge also found that all amendments (including benefit improvements) – and not just adverse amendments – could potentially be voided as a result of an absence of actuarial confirmation.

The potential impact on benefit improvements may possibly be less material, as scheme rules may give trustees the power to improve benefits retrospectively. Typically, such powers can only be used with the employer's consent, although this would depend on the scheme rules in question.

According to the judgment, the cost to the Plan of the amendments being voided has been estimated at around £10 million.

### Next steps in this case

We understand that Virgin Media Ltd has been given permission to appeal the High Court judgment. Clearly, the results of any appeal would play out over the coming months.

Some commentators have speculated that the Government might be lobbied by the pensions industry to use their powers to make regulations that retrospectively validate amendments that section 37 would otherwise void. Again, it is not currently clear whether this might happen, and it would depend on the Government's will to do this in the face of competing priorities.

### First Actuarial's view

DB pension schemes that were contracted out on a salary-related basis from April 1997 to April 2016 may well have made amendments to their benefits during this period (e.g. closing the scheme to future accrual, changing pension increases, normal retirement ages or accrual rates). These amendments could be void in the absence of any evidence of the Scheme Actuary's confirmation.

As a result, trustees might instruct their advisers to check whether the required confirmations were provided for rule amendments between 1997 and 2016. However, given that the Virgin Media Ltd decision may be appealed, we suggest that it makes sense for trustees to wait for a final outcome before starting any investigation into historical amendments. If trustees decide to do nothing for now, they may wish to document their reasons for doing so.

The exception to the 'wait and see' approach is schemes that are in the process of buying-out benefits with an insurer. Here, it's important for trustees to buy the correct benefit. Trustees should work closely with their legal advisers to understand the extent to which investigations need to be carried out and to which indemnity policies can cover any potential additional liability.

### Further information

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