Sanlam

Legal Report

October 2023

1. Information request on Open Finance

The Financial Sector Conduct Authority (FSCA) has issued an information request on Open Finance-related activities performed by financial institutions and third party providers.

“Open Finance” is defined in the request as “*the practice of financial institutions sharing their financial customers’ financial data with third parties, for the provision of Open Finance Services by those third parties, and any activities connected therewith*”.

“Open Finance Services” is defined as “*services developed for a financial customer by a third party, using that customer’s financial data, which rely on the provision and movement and/or use of that customer’s data*”.

“Third Party Provider” is defined as “*a person that provides Open Finance Services*”.

The background to the information request is that the FSCA in June 2023 published a draft Position Paper on Open Finance, which sets out the FSCA’s proposed policy position on Open Finance and the intended direction regarding the future regulation of Open Finance from a conduct and consumer protection perspective. The information request is part of an information-gathering exercise to consider the uptake, usage and practices by financial institutions and third-party providers that participate in Open Finance. Findings from the study will assist in shaping the Final Position Paper on Open Finance and the Conduct Standards to be developed in the future.

All financial institutions and third-party providers that participate in Open Finance must complete the information request online form, available on the FSCA’s website, by no later than 10 November 2023.

2. Two pot system

The second draft of the two pot legislation was published for public comment on 9 June 2023. The commentary period has expired, and National Treasury has submitted their draft responses to comments received.

The following is of note:

It is proposed that the implementation date of the two pot system be postponed from 1 March 2024 to 1 March 2025. According to National Treasury, this is due to the magnitude of the reform and the desire to ensure that when implemented the system operates as seamlessly as possible. This will also provide sufficient time for funds and trustees to consult fund members about rule changes and to communicate clearly to members what the impact on their future contributions will be. It is important to note that although National Treasury has proposed that the implementation date be postponed, the final decision in this regard lies with Parliament, and not with National Treasury. Until such time as the matter has been deliberated in Parliament, it will accordingly not be possible to state for certain whether or not the implementation date will be postponed.

The legislation currently stipulates that 10 percent of the value of the vested component as at the implementation date of the two pot system, to a maximum of R25 000, will be allocated to the savings component as so-called seeding capital. This is to enable members to have immediate access to a portion of their retirement savings when the two pot system comes into effect. It is proposed that the maximum of R25 000 be increased to R30 000.

In terms of the current legislation, defined benefit funds are required to apply the two pot system based on the reduction of period of service methodology. Some defined benefit funds are however unable to apply this methodology. It is proposed that defined benefit funds that are unable to apply the reduction of pensionable service basis be allowed to use an alternative method of calculating the value of the two pot system contribution split. The application of this alternative method should be fair and equitable and will be subject to approval by the Financial Sector Conduct Authority to ensure financial and actuarial soundness.

In terms of the current legislation, members of provident funds who were 55 years or older on 1 March 2021 will automatically form part of the two pot system unless they elect to continue contributing to the vested component. This is not in accordance with the policy intent, and the legislation will therefore be amended to reflect the policy position, namely that these members will, by default, be excluded from the two pots regime, with the opportunity to opt in should they choose.

The following will be excluded from the two pot system:

- funds with no active participating members, i.e. funds in liquidation, beneficiary funds, closed funds and dormant funds;

- pensioners.

All other credits and allocations to the member's account, including group life and disability cover, should be allocated in the same manner as contributions, in other words 1/3d to the savings component and 2/3rds to the retirement component.

The legislation will be amended to clarify that seed capital should be taken proportionately from the T-day vested and non-vested benefits.

In terms of the current legislation, the fund will have to apply for a tax directive before paying a savings withdrawal benefit. The legislation will be amended so that it rather refers to the withholding method contemplated in paragraph 2(2B) of the Fourth Schedule to the Income Tax Act. This means that the South African Revenue Service (SARS) will indicate the correct tax rate to the fund administrator, as it currently does for pensioners with more than one source of income.

Amendments will be made to the legislation to clarify that the calculation of the seeding amount can occur on or after 1 March 2025, but the allocation is to be backdated to 1 March 2025.

The legislation will be amended to clarify that deductions from a member's benefit in terms of section 37D of the Pension Funds Act must be made proportionately across all three components.

The current two pot legislation not only proposes amendments to the Income Tax Act, but also proposes various amendments to the Pension Funds Act. The proposed amendments to the Pension Funds Act are mainly aimed at making provision for the two pot system, but also deal with certain other aspects. The legislation will be amended to limit the amendments to the Pension Funds Act to two pot system related changes.

Retirement funds or other clients requiring more information should not hesitate to contact their consultant.