



Pensions stop press

A stronger Pensions Regulator

Briefing

February 2019

Government announces possible prison sentences for directors who recklessly mismanage pension schemes.

Introduction

The Department for Work and Pensions (DWP) has published the Government's [response](#) to its June 2018 consultation on plans to improve the powers of the Pensions Regulator (TPR). The DWP's aim is to better protect members' benefits by improving TPR's and the trustees' ability to monitor relevant corporate transactions and events which may impact adversely on a defined benefit (DB) scheme.

The consultation contained proposals to improve TPR's powers, facilitating earlier involvement and enabling it to

- Be more proactive where employers make changes which could affect the funding strength of the scheme.
- Obtain the right information about a scheme and its sponsoring employer.
- Get effective redress for members if things go wrong.

On February 11, 2019, TPR issued a [statement](#) in which it welcomed the proposals and highlighted that it sees the enhanced powers package as allowing TPR to identify potential problems earlier and take more effective action. While recognising that the vast majority of scheme sponsors and trustees already do the right thing, the new powers (TPR says) will act as an additional deterrent against the poor treatment of pension schemes and help TPR in protecting members. The intention is to provide further assistance by delivering clearer funding standards and revised Codes of Practice.

Below we look at, and comment on, the DWP's principal conclusions in the consultation response.

Two new criminal offences

The DWP plans to go ahead with proposals for criminal sanctions to prevent and penalise the mismanagement of pension schemes.

The first is a new custodial sentence of up to seven years' imprisonment, or an unlimited fine. It will target individuals who "wilfully or recklessly" endanger members' pensions by such actions as chronic mismanagement of a business, allowing huge unsustainable deficits to build up or taking huge investment risks (or a combination of any of these).

The second is an unlimited fine for a failure to comply with a contribution notice. A civil sanction of up to £1 million will also be introduced for this offence.

Comment

The consultation also proposed criminalising a failure to comply with the notifiable events framework but this has not been pursued. The consultation responses expressed concern that such a failure to comply could result in a criminal sanction. Criminal sanctions should be limited to only the very worst wilful or reckless behaviour, and questions remain in relation to how they are to be defined and enforced. Collecting evidence that passes the criminal burden of proof of "beyond reasonable doubt" is unfamiliar territory for TPR and will be fundamental to the effectiveness of the deterrent.

Transaction oversight

Notifiable events

New notifiable events are to be introduced covering

- Sale of a material proportion of the business or assets of a scheme employer with funding responsibility for at least 20 per cent of the scheme's liabilities.
- Granting of security on a debt giving it priority over debt to the scheme.

Wrongful trading of the sponsoring employer is to be removed from the notifiable events framework.

Comment

The DWP recognises that the definition of terms relating to each of these new events will be crucial, and it is difficult to comment in detail until the relevant draft regulations and revised codes are available for consultation.

The removal of the existing notifiable event of "wrongful trading of the sponsoring employer" is sensible, as a requirement relying on self-reporting is unlikely to be effective.

Declaration of Intent

The consultation looked at TPR's and pension scheme trustees' ability to monitor relevant corporate transactions and events, and to engage with employers where appropriate to prevent possible future detriment to a DB scheme. The DWP sought views on a proposal to introduce a Declaration of Intent, to be provided to the trustees and shared with TPR by an employer company considering a corporate transaction. The proposal has been retained in respect of the three following scenarios

- Sale of the controlling interest in a sponsoring employer.
- Sale of the business assets of a sponsoring employer.
- Granting of security on a debt to give it priority over debt to the scheme.

Comment

Questions of proportionality arise here and we suggest it would be inappropriate to capture transactions involving employers where the scheme is fully funded or where a relatively low percentage of the business or assets is to be sold. If small asset disposals are not to be caught, it may be more relevant to require a Declaration of Intent only where all the business or assets of a sponsoring employer are to be sold. Again, the details on the proposed mandatory contents of the Declaration in future regulations, and clear guidance in the revised Notifiable Events Code of Practice will be key. The consultation response states that the DWP recognises this and will work with TPR to ensure dovetailing of the Declaration of Intent contents with the new notifiable events framework.

Heads of Terms

The consultation proposed bringing forward the time at which information relating to some transactions is required to be shared with the trustees and TPR to the point at which Heads of Terms were agreed. While trustees were supportive of earlier notification to TPR in order to increase their opportunity for ongoing engagement with the employer, this proposal was not without difficulty, as such agreements often change during the course of negotiations. Although employers recognised the need for advance warning of events which could have a significantly detrimental effect on a scheme, the introduction of such a requirement was seen as potentially discouraging parties from using heads of terms.

The consultation response recognises that the area requires further work. Identification of circumstances where early notification could be beneficial is needed and the DWP intends to work with industry to establish how best to make this clear.

Comment

The DWP's acknowledgment that this area requires further information gathering and consultation is welcome. A better time to pin the obligation to notify could be within a short time of scheduled exchange, and a more useful commitment might be to provide a clear summary of the deal once the transaction is signed, so that confidentiality is maintained in the negotiation stages.

Payment of dividends

The consultation noted the intention to address the issue of dividend payments as part of the separate consultation by BEIS on corporate governance, and not to consider such payments as part of the notifiable events framework.

The response confirms that the DWP has no proposals to extend the framework to cover the payment of dividends. However, TPR will consider whether the level of dividend payment made by the sponsoring employer or its parent company is appropriate in relation to the scheme's funding when the triennial valuation is submitted or where a recovery plan has been agreed.

Comment

Many respondents to the DWP's consultation commented that responsible dividend policies play an important part in business growth and in the overall investment returns for the economy. Dividend payments should not be considered automatically to be detrimental to pension schemes.

Conclusions

It is unlikely that any of the DWP's proposed changes will be in force before the Spring of 2020.

The answers to many of the questions raised in the consultation remain unclarified and subject to future consultation, followed by the eventual production of revised Codes of Practice from TPR and draft regulations from the DWP. One such issue is where the money will go from increased fines on errant corporates, and the consultation response merely states that the Government is giving consideration to the treatment of civil penalty proceeds.

Generally, the new criminal sanctions have dominated the headlines in the pensions and financial press. The Government sees the introduction of the new criminal offences as "a major step forward in stamping out abuses ... and bringing fat-cat failures to book." Although this move has been welcomed by some, it was first announced as an intention in 2017 and is still years away from being implemented. It will be extremely difficult to establish that someone behaved "wilfully or recklessly" and as a result endangered a pension scheme and members' benefits, particularly with the high level of proof required to impose a criminal sanction.

Contacts

If you would like further information please contact:



Peter Ford
Partner

Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com



Lesley Browning
Partner

Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.