XPS Pensions

Briefing
Note No. 7
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New, stronger powers for TPR confirmed by Government

In brief

- The Government has published a response to its consultation on strengthened powers for TPR
- The headline changes are to the penalty regime, with jail sentences of up to seven years and/or unlimited fines for employers that behave wilfully or recklessly in relation to a pension scheme. New civil penalties of up to £1 million are also introduced for certain offences
- Employers will have to report a wider range of notifiable events to TPR, although some proposals have been dropped
- Employers undertaking certain corporate transactions will be required to produce a 'declaration of intent'
- Some notable changes to the anti-avoidance regime will also be made

Next steps

- The Government aims to legislate as soon as Parliamentary time allows. No date is given by which the changes are expected to be implemented
- The detail of many of the changes is subject to further consideration or consultation

On 11 February 2019, the Government published its response to its consultation last year on strengthening the powers of the Pensions Regulator (TPR). The fact that employers might be jailed for up to seven years if they 'behave wilfully or recklessly in relation to a pension scheme' is the headline news but other significant changes are in the offing as well.

Background

The White Paper 'Protecting Defined Benefit Pension Schemes' was published in March 2018 and promised a number of consultations over 2018 and 2019. In June of that year, the first consultation, on proposals for a range of new powers for TPR, was published.

Notifiable events framework

The notifiable events framework is an 'early warning' system aimed at identifying events that could lead to a call on the Pension Protection Fund (PPF). An event occurring does not necessarily mean that something has gone wrong, but could indicate a potential risk to the pension scheme. The consultation proposed four new notifiable events and the response confirms that the Government intends to go ahead with adding the following two new employer-related notifiable events:

- Sale of a material proportion of a business or assets of an employer who has funding responsibility for at least 20% of the scheme's liabilities.
- Granting of security on a debt to a creditor to give it priority over the debt to the scheme.

The Government noted that how terms relating to these new events are defined will be 'crucial' and plans to work with stakeholders before consulting on draft regulations.

In light of feedback, the Government has accepted that the two other proposed new notifiable events (significant restructuring of the employer's board of directors or other senior management appointments, and the sponsoring employer taking independent pre-appointment insolvency/restructuring advice) would 'be difficult to operate in practice' and so is not taking these forward. In addition to the two new notifiable events, the current employer-related event of 'wrongful trading of the sponsoring employer' is to be removed on the grounds that it is unlikely to be effective (since any such admission by a director might lead to personal financial consequences for them).

At the current time, the Government does not plan to introduce any other new notifiable events or to extend the notifiable events framework to cover dividends. However TPR will, as part of its work on scheme funding, consider whether dividend payments are appropriate in relation to a scheme's funding position or agreed recovery plan.

The Government will consult on the detail of the new employer-related notifiable events and TPR will update its guidance on the notifiable events framework and consult on a revised Code of Practice. The Government will also work with TPR and industry to identify where earlier notification of employer-related notifiable events would be beneficial and how this should be made clear. Finally, it will carry out an assessment of the impact on business of the changes to the notifiable events framework.

Some respondents suggested that some changes should be made to scheme-related notifiable events. The Government states that it would consult if such changes are made, suggesting that it is at least considering this as an option.

Declaration of intent

It had been proposed that sponsoring employers would be required to make a statement of intention when planning certain transactions. Feedback on this was split with some (including trustees) in favour of an 'early warning system' that forced employers to engage with trustees, but others (including employers) expressing concern that it might be an obstacle to legitimate corporate transactions.

Whilst the Government noted the divided feedback, it still intends to legislate to require planners of a corporate transaction to prepare a declaration of intent to be shared with the trustees and TPR. The requirement will cover the following transactions:

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

It is not planned to specify in law the precise point in a transaction process that employers should start to engage with trustees and issue a declaration of intent. The Government is working with TPR to review the guidance in the Code of Practice on notifiable events and also plans to consider in more detail the content of the declaration of intent.

Improved powers for TPR

A new criminal offence will be introduced with a maximum penalty of seven years' imprisonment and/or unlimited fines for wilful or reckless behaviour by a sponsoring employer (and others associated or connected) in relation to a pension scheme. This is intended to deter the 'most serious cases of wrong-doing'.

Failure to comply with a contribution notice will also be a criminalised, although in this case, the penalty will be an unlimited fine (a custodial sentence not being thought to be appropriate). There will also be a new power for TPR to issue a fine of up to £1 million for more serious breaches. The proposed new or amended civil sanctions are as follows:

- For failure to comply with a financial support direction, the notifiable events framework or the requirements for the declaration of intent – a new civil penalty of up to £1 million;
- For knowingly or recklessly providing false information to the trustees or to TPR - a new civil penalty of up to £1 million;
- For non-compliance with information requests (including inspections and interviews) or a delay in providing information – fixed and escalating fines, the levels of which will be set out in secondary legislation;
- For non-compliance with the proposed new clearer funding standards (on which TPR is expected to consult later this year) – TPR's existing powers to impose schedules of contributions/recovery plans (sometimes called section 231 powers) will be strengthened and other powers (such as improvement notices) will also apply.
- For failures around a Chair's statement (such as failing to provide one) – the existing civil penalties will apply (fines of up to £5,000 for an individual and £50,000 in other cases).

The proposal in the consultation to make failure to comply with the notifiable events framework a criminal offence has been dropped. Several respondents asked what would be done with the proceeds of penalties, suggesting that they be paid to the affected scheme, TPR or the PPF. The Government is considering where the proceeds should go.

Anti-avoidance powers for TPR

The Government intends to go ahead with some of its proposals to streamline the way financial support directions (FSDs) operate. The Government will not widen the scope of FSD targets to include directors but it will be widened to include individuals who are controlling shareholders of sponsoring employers. The consultation response confirms that the proposed changes to the way contribution notices operate will be implemented.

Next steps

The Government state that they 'will bring forward legislation as soon as Parliamentary time allows'. It is notable that no date is given by when the changes are expected to be in force, and that much of the detail is to be the subject of further consideration or consultation (probably as a result of pressure on both Government and Parliamentary time due to Brexit).

For further information

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