

Pensions versus Insolvency: changes to The Pension Regulator's powers

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There has always been a tension between protecting the interests of defined benefit pension schemes and insolvency given on the one hand The Pensions Regulator (TPR) seeks to protect the interests of pension scheme members and the Pension Protection Fund and on the other, the insolvency regime seeks to protect the interests of creditors as a whole.

We published an article in July 2018 reporting on a consultation paper issued by The Department for Work and Pensions. In that, we highlighted our concerns about proposed changes to the notifiable events framework and the impact that increasing TPR's powers might have on the insolvency profession and the rescue of companies with defined benefit pension schemes.

The Government has now published its response to that consultation which we consider below.

To read our previous article click [here](#).

Notification of pre-insolvency advice

Last year's consultation paper sought views on introducing a new "notifiable event" whereby employers (those sponsoring a defined benefit pension scheme) would be required to notify TPR in circumstances where it took pre-insolvency or restructuring advice. We reported our concerns about the effect that this might have on company rescue particularly given the ambiguity over what might constitute advice and the consequences of failing to notify.

The Government thankfully confirms in its response that:

- (a) it will not be introducing a requirement to notify TPR when taking pre-insolvency or restructuring advice; and
- (b) the existing notifiable event of "wrongful trading" will be removed from the list of notifiable events.

The Government recognised concerns raised by respondents to the paper (including our own) that the proposed changes might be difficult to operate in practice and might stifle legitimate business activity or in the case of insolvency, business rescue. This confirmation is a welcome relief!

Declarations of intent

The consultation also sought views on introducing a requirement for sponsoring employers to provide a declaration of intent confirming that they had considered the implications of how a transaction (for example, a proposed sale of the business and assets) would impact on the pension scheme. The declaration would also be required to confirm that the trustees had been consulted and set out how any detriment to the scheme would be mitigated. It would then be shared with TPR who, if it thought appropriate, could take action.

Whilst early engagement with trustees and TPR should be encouraged, this is already something which happens in practice when corporates seek restructuring advice.



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Our concern about this proposal was the additional costs and delay this would incur (with no material benefit to the pension scheme) at a time when the business is already under pressure and a sale may need to happen quickly in order to preserve the value of the underlying business.

The Government provided reassurance in its response that involvement of TPR will not result in time critical delay and confirms that in assessing the impact of this proposal it will consider time and costs implications. Whilst we hope that this will include consideration of the cost and time implications when dealing with a distressed sale, it remains our view that an impact statement is unlikely to make any material difference to the effect of such a sale on the pension scheme and is therefore unnecessarily burdensome.

It also raises further concern (at least for directors of the relevant company) that failure to comply with this requirement may give rise to the possibility of a fine of up to £1,000,000!

Earlier notification of the sale of the business or assets

The consultation paper also sought views on moving the timing of notification forward suggesting, in the case of a proposed business or assets sale, that TPR be notified when heads of terms are agreed.

Whilst the Government will implement this proposal, it has indicated that it will work with industry to identify when that earlier point will be, recognising that notification at the point heads of terms are agreed does not work in all cases.

In the context of a sale negotiated in an insolvency process, we were unable to see how earlier notification would result in a material benefit to TPR whereas imposing additional requirements in a distressed situation do not always assist. We hope that the Government will take concerns on board about timing when the earlier point is agreed.

New targets and penalties

Whilst there will be no requirement to notify when taking pre-insolvency or restructuring advice there will be a requirement to (a) notify a sale of the business or assets; and (b) provide a declaration of intent and failure to do either could result in a fine.

This is of larger concern to sponsoring employees/directors given the new civil penalties.

The new penalties include fines of up to £1 million; which in the case of failure to notify of a sale could be levied against the sponsoring employers and in the case of failure to provide a declaration of intent could be levied against sponsoring employees and others associated or connected (i.e directors). Whilst directors appear to avoid fines in the context of failure to notify of a sale, this was alluded to in the consultation paper.

Whilst it is extremely unlikely that sponsoring employers/directors would receive a fine of £1million if a declaration isn't made or sale notified in an insolvency process – this level of fine being likely reserved for what TPR refers to as “willful or reckless behaviour” – it is unclear what level of fine might be imposed. There is a big gap between £0 and £1 million!

Finally

Whilst not part of the consultation the Government confirms in its response that TPR will be given power to call any person for interview (which would include insolvency practitioners) regardless of professional obligations/confidentialities. This comes about partly in response to the difficulties TPR encountered obtaining relevant information surrounding the collapse of BHS . This is unlikely to be an issue for an IP and at least provides clarity on their obligations in the future.

Conclusion

Our initial fears, about the impact of the proposals on business rescue and culture, are somewhat relieved by the Government confirming that notification of taking pre-insolvency or restructuring advice will not become a notifiable event. However, the earlier notification of a sale and the new requirement to produce a declaration of intent remains of some concern because it is not yet clear how these might impact on corporate rescue and restructuring. The biggest concern being additional cost and delay where, as we noted in our initial article, there is no obvious benefit to TPR, and of course, concern for directors of corporates who could face a hefty fine if these steps are not met.

To review the Government's full response click [here](#) To read our pension colleagues' comments on the response click [here](#).

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