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The Pensions Regulator - powers to protect pension benefits

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Summary

The Pensions Regulator (TPR) has powers to act where it believes an employer is deliberately attempting to avoid their obligations to a defined benefit (DB) pension scheme, leaving the Pension Protection Fund to pick up their pension liabilities. A DB scheme is one in which the employee builds up pension benefits based on fixed factors - salary and length of service.

To protect scheme benefits and reduce the exposure of the PPF to claims for compensation, it can issue any of the following;

- **Contribution notices.** These allow us to direct that, where there is a deliberate attempt to avoid a statutory debt, those involved must pay an amount up to the full statutory debt either to the scheme or to the board of the Pension Protection Fund.
- **Financial support directions.** These require financial support to be put in place for an underfunded scheme where we conclude that the sponsoring employer is either a service company or is insufficiently resourced.
- **Restoration orders.** If there has been a transaction at an undervalue involving the scheme's assets, these allow us to take action to have the assets (or their equivalent value) restored to the scheme.¹

A [clearance procedure](#) is available for anyone who wishes to confirm that they will not be subject to either a contribution notice or a financial support direction following a business transaction.

In its December 2016 report on DB schemes, the Work and Pensions Select Committee recommended that TPR should be reformed to a “nimbler, more proactive regulator” able to intervene sooner when difficulties become apparent. Recommendations included that:

[...] the Government should consult on new rules for situations where TPR clearance of major corporate transactions is mandatory rather than voluntary, allowing the TPR to decide if a particular proposed corporate change could damage a pension scheme. ([Press release, 21 December 2016](#)).

In its February 2017 [Green Paper, Security and Sustainability in Defined Benefit Pension Schemes](#), the Government said that the “overarching view of virtually all stakeholders is that the regulatory regime for DB pensions is satisfactory” but that there might be a case for “limited changes to the regulation of DB provision to help employers and trustees manage liabilities more effectively in some of the circumstances that exist” (para 139-40). It asked for views on reforms that had been suggested, including:

- Proactive compulsory clearance of certain corporate activities in limited circumstances;
- Levying substantial fines on companies for corporate transactions which have a detrimental impact on schemes; and
- Widening the criteria for Regulatory Apportionment Arrangements.

This note looks at the rationale for the introduction of these ‘anti-avoidance’ powers, how they have been used in practice and whether changes are needed.

¹ [The Pensions Regulator/our powers/acting against avoidance](#)

1. Overview

A Defined Benefit (DB) pension scheme promises to pay a pre-determined amount of pension to its members based on their salary and years of contribution.²

1.1 *Pensions Act 2004*

A number of high-profile cases of schemes winding up under-funded on the insolvency of the employers, led the Labour Government to introduce a number of measures in the [Pensions Act 2004](#), aimed at improving the protection of pension scheme members' benefits and making provision easier for employers. One of these was the establishment of a new Pensions Regulator (TPR) to replace the previous Occupational Pensions Regulatory Authority (OPRA).³

The legislation previously in force had led OPRA to direct its effort towards "high volumes of relatively low value reports and breaches." In contrast, TPR would take a "risk-focused and proactive approach."⁴

It would also have a significantly wider range of powers and responsibilities.⁵ While OPRA had no power to act against employers' attempts to avoid meeting their pension obligations, and no duty to do so, TPR would have a regulatory tool kit, enabling it to take a targeted approach to protecting pension scheme members.⁶

The 2004 Act also established the Pension Protection Fund (PPF) to provide compensation to members of defined benefit (DB) pension schemes which wind up underfunded on the sponsoring employer's insolvency. The Government recognised that this created 'moral hazard': i.e. that unscrupulous employers might seek to side-step their responsibilities to a scheme and off-load it onto the PPF.⁷ The then Pensions Minister, the late Malcolm Wicks, explained that mitigating this risk was "one of the biggest challenges" the Government faced in introducing the PPF" but one that needed to be addressed to "safeguard the integrity and sustainability of the fund and avoid placing an unfair burden on levy payers."⁸

1.2 Regulator's powers

The Government recognised that the PPF created different forms of moral hazard. The legislation already included provision to address some of them – for example, a cap on compensation for those under normal

² DWP, [Security and Sustainability in Defined Benefit Pension Schemes](#), February 2017, p13

³ Library Briefing Paper [RP 04/18 Pensions Bill](#) (Feb 2004); *Pensions Act 2004*, Part 1

⁴ DWP, '[Simplicity, security and choice, working and saving for retirement: action on occupational pensions](#)', June 2003, Cm 5835

⁵ The Pensions Regulator, '[Annual report and accounts, 2005-06](#)', p3

⁶ DWP, '[Simplicity, security and choice. Working and saving for retirement. Action on occupational pensions](#)', 2003; NAO, '[The Pensions Regulator: Progress in establishing its new regulatory approach](#)', HC 1035, Session 2006-07, 26 October 2007

⁷ See Library Briefing Paper SN-03917 [Pension Protection Fund](#) (April 2016)

⁸ SC Deb, 27 April 2004, c768

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pension age would avoid “potential perverse incentives for key decision makers to allow companies to go into insolvency.”⁹

At Commons Committee Stage, Malcolm Wicks announced the introduction of powers for TPR to issue Contribution Notices and Financial Support Directions. The aim was to mitigate:

[...] the risk posed by unscrupulous employers who might seek to use company structures and business transactions as a cover for side-stepping their pension obligations in the form of the debt due from the employer under section 75 of the *Pensions Act 1995*.¹⁰

Mr Wicks explained that the provisions would be operated and enforced by TPR, working closely with the PPF:

The powers will need to be exercisable by the regulator, as the very nature of the actions that they are designed to capture is such that manipulation may occur some time before the PPF would normally get involved in a scheme as a result of an employer insolvency. Moreover, the pensions regulator will have the intelligence and expertise, as a result of its day-to-day work monitoring pension schemes, to deal proactively with the risks of moral hazard.¹¹

The then Shadow Pensions Minister, Nigel Waterson said that such ‘anti-avoidance’ provisions were “necessary, and we do not argue with the need for them.”¹²

1.3 TPR’s process

A decision to issue a Contribution Notice, Financial Support Direction or Restoration Order must be made by the determinations panel of the Pensions Regulator.¹³

TPR explained the process in evidence to the Work and Pensions Committee in 2016:

We will undertake a comprehensive investigation to determine whether it is appropriate and reasonable to exercise either of these powers. These investigations are complex and can involve the review of thousands of documents and other pieces of expert and witness evidence. When we are satisfied it is appropriate to use a power we will issue a Warning Notice to the proposed targets and any other directly affected parties.

The investigating team do not determine whether a power is exercised. This decision is made by our Determinations Panel, an independent committee which has no connection to the people undertaking the investigation. The Determinations Panel hears the case and representations from the proposed targets, and will determine if it is reasonable to exercise the power.

We can issue a Contribution Notice in relation to acts up to 6 years prior to when we issue a Warning Notice.

⁹ [SC Deb. 27 April 2004. c768](#)

¹⁰ Ibid

¹¹ Ibid; [Memorandum of Understanding between DWP, PPF and TPR](#), February 2008

¹² [Ibid c771](#)

¹³ [Pensions Act 2004](#), s9-10, Sch 2

We can issue a Financial Support Direction where a connection/association to the scheme sponsor has been in place within 2 years prior to TPR issuing a Warning Notice. We can consider, as part of our assessment of whether or not it is reasonable to exercise the power, any acts or events which have taken place during the proposed targets' connection/ association with the scheme sponsor, and there is no time limit on how far we can look back.

Generally speaking, the fact a company has moved into insolvency does not impact the use of our avoidance powers, and we have used our powers on a number of occasions in which the employer has become insolvent.

The Upper Tribunal has yet to rule on a decision by the Determinations Panel to issue a Financial Support Direction or Contribution Notice, though it has been asked to rule on related procedural matters connected with those decisions, such as whether or not to strike-out TPR's case.¹⁴

See also [Determinations Procedure](#) on TPRs website.¹⁵

1.4 Does TPR have the powers it needs?

A report by the National Audit Office in 2007 found that TPR had made sparing use of its powers, preferring to concentrate on education and influence:

4.17 TPR was given much greater enforcement powers than those of the previous regulator. To date it has used education and enablement in preference to enforcement. It has not yet felt the need to use its enforcement powers widely considering it more proportionate to use the threat of powers to influence the desired behaviour. In particular TPR believes the threat of a Contribution Notice or a Financial Support Direction has resulted in increases in the funding of pension schemes that are part of a corporate transaction.¹⁶

An article by a pensions lawyer in 2014, noted that cases in which TPR's formal powers had been used remained the exception rather than the rule. TPR had shown a willingness to use its powers but had not "held corporate activity hostage".¹⁷

More recently, particularly in relation to the BHS Pension Scheme, questions have been asked about whether it has the powers it needs and how it has used those it has.¹⁸ In a December 2016 report, the Work and Pensions Select Committee said several witnesses thought TPR's powers were sufficient and that extending them could hamper business. However, others were concerned that it did not use its powers

¹⁴ [Written Evidence to the Work and Pensions Select Committee \(PPF0004, May 2016\)](#)

¹⁵ [The Pensions Regulator. Determinations panel. Procedures for cases TPR website – determinations procedure](#); See [The Pensions Regulator. Determinations Panel Procedure](#), (revised June 2008)

¹⁶ National Audit Office, [The Pensions Regulator: Progress in establishing its new regulatory approach](#), HC 1035 Session 2006-07, 26 October 2007

¹⁷ 'Comment – The regulator's powers have not held corporate activity hostage, *Pensions expert*, May 2014

¹⁸ 'UK regulator urged to be 'robust' on the pensions before BHS collapse', *Financial Times*, 2 may 2016

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as effectively as it could. The Committee concluded that TPR had a mixed record:

145. Under TPR's existing anti-avoidance powers, an employer seeking to avoid its responsibilities to a pension scheme may well take a punt on risking enforcement action. TPR has a mixed record, resolution may take several years, and the most TPR might hope to recover is the amount of support the employer should have provided to the scheme in the first place. In the meantime, the pension scheme members are left in limbo.¹⁹

It recommended that the Government consult in its forthcoming Green Paper on:

- Giving TPR powers to add 'punitive fines' to Contribution Notices and Financial Support Directions; and
- Proposals to require advance clearance from TPR for certain corporate transactions that could be materially detrimental to the funding position of a DB scheme.²⁰

1.5 February 2017 Green Paper

In its February 2017 Green Paper [Security and Sustainability in Defined Benefit Pension Schemes](#), the Government said that the "overarching view of virtually all stakeholders is that the regulatory regime for DB pensions is satisfactory." However, there might be a case for "limited changes to the regulation of DB provision to help employers and trustees manage liabilities more effectively in some of the circumstances that exist."²¹ It asked for views in relation to a range of changes which had been suggested, including:

- Proactive compulsory clearance of certain corporate activities in limited circumstances;
- Levy substantial fines on companies for corporate transactions which have a detrimental impact on schemes.
- Require sponsors to engage with and provide information to trustees in a timely manner.
- Require consultation with trustees before paying dividends if scheme is severely underfunded.
- Better communications with members.²²

Section 2 below discusses TPR's powers, how they have been used and proposals that have been made for change.

A recommendation to consider additional scheme funding powers is discussed in CBP 4877 [Pension Scheme Funding requirements](#).

¹⁹ Work and Pensions Committee, [Defined Benefit pension schemes](#), December 2016

²⁰ Ibid, para 141-6

²¹ DWP, [Security and Sustainability in Defined Benefit Pension Schemes](#), Cm 9412, February 2017, para 139-40

²² DWP, [Security and Sustainability in Defined Benefit Pension Schemes](#), Cm 9412, February 2017, para 139-40 page 73

2. Powers to protect benefits

This section looks at how current policy developed, how TPR has used its powers and what proposals have been made for change.

2.1 Notifiable events framework

There are duties on pension scheme trustees and their sponsoring employers to notify TPR when certain events occur – such as a decision by the employer to cease to carry on business in the United Kingdom, or a decision by a controlling company to relinquish control of the employer company.²³

2.2 Contribution Notices

Section 75 of the *Pensions Act 1995* provides for the calculation of the employer debt to a pension scheme in certain circumstances: insolvency, the scheme being wound up or an employer withdrawing from a multi-employer scheme.²⁴

When the *Pensions Act 2004* was before Parliament, the Government announced that it had decided to give TPR power to issue a Contribution Notice where there was an “act or deliberate failure, a main purpose of which is to prevent the recovery of the whole or part of the section 75 debt.”²⁵ The maximum contribution required would be calculated with reference to the section 75 debt that might otherwise have been recoverable from the employer.²⁶

In April 2008, the Government proposed amendments to address concerns about new business models which might “sever the link between the employer and the pension scheme in order to operate well-funded occupational pension schemes for profit.”²⁷ It proposed:

- Enabling TPR to issue a Contribution Notice where “the effect of an act is materially detrimental to a scheme’s ability to pay members’ current and future benefits” (i.e. it would no longer be necessary to prove intent to avoid funding the scheme);
- Removing the provision preventing a Contribution Notice being issued where a party has “acted in good faith, but their actions have had the effect of preventing a debt becoming due.” This had proved to be “an unhelpful hurdle which would prevent the powers being used in situations where parties [had] simply not considered the impacts on pension schemes”; and

Contribution Notice can be issued...

Where TPR believes there has been an attempt to avoid supporting a pension scheme, their actions have weakened the sponsor’s ability to support the scheme, or where a sponsor that is part of a corporate group is insufficiently resourced to support the scheme. It requires those responsible to make a payment into the scheme of an amount which could equate to the cost of securing member benefits in full with a third party insurer.

In relation to acts up to 6 years prior to TPR issuing a warning notice.

[\(PPF004-May 2016\)](#)

²³ [Cm 9412](#), Feb 2017, para 69; TPR Code of Practice 02, [Notifiable Events](#), April 2005; Pensions Act 2004, s69; [SI 2005/900](#)

²⁴ And [Occupational Pension Schemes \(Employer Debt and Miscellaneous Amendments\) Regulations 2008 \(SI 2008 No. 731\)](#)

²⁵ SC Deb, 27 April 2004, c768

²⁶ Ibid

²⁷ DWP Press Release, ‘14 April 2008 - [Increasing protection for pension scheme members – O’Brien](#)’; DWP, [‘The powers of the Pensions Regulator. Amendments to the anti-avoidance measures in the Pensions Act 2004.’](#) April 2008, para 2

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- Providing that a Contribution Notice could be triggered by a series of acts, not just a single act aimed at avoiding a debt to the pension scheme.²⁸

The proposals had a mixed response, with the CBI giving a “cautious welcome” and arguing that it was important not to “ratchet up the regulatory burden” and the TUC saying the changes would “help protect pension schemes against smash-and-grab raids.”²⁹

Following consultation, the Government announced three filters to the new power:

- TPR would issue a statutory Code of Practice for the circumstances in which it expected to use its power;
- The legislation would include a non-exhaustive list of factors that TPR would be required to consider when determining whether an act or failure to act was “materially detrimental”;
- It would not be possible to issue a Contribution Notice where a party had “undertaken due diligence before the act and considered and, where appropriate, mitigated the detriment, and could reasonably conclude that the act would not be materially detrimental.”³⁰

The amendments to the existing powers were made in the [Pensions Act 2008](#) s126 and Sch 9 and are now in the [Pensions Act 2004](#), ss38-42, as amended.³¹

For the debates on the provisions, see Library Briefing Paper SN-02141 [Pensions Bill 2007-08 – debates in Parliament](#) (August 2008) (s 7.9).

Code of Practice No. 12 - [Circumstances in relation to the material detriment test](#) - was published in June 2009.

In practice...

In June 2010, the Pensions Regulator issued its first Contribution Notice, for £5 million, in respect of the Bonas Group Pension Scheme.³² In June 2011, it announced that it had agreed to settle for £60,000 but commented that this did not signal any change in its approach and that it would not hesitate to use its powers where appropriate to improve

²⁸ [‘Statement on planned DWP consultation on the powers of the Pensions Regulator’](#), 14 April 2008

²⁹ ‘Regulator will be able to force buy-out firms to fund pensions’, *Guardian*, 15 April 2008; TUC Press Release, 18 June 2008, [‘TUC calls for full review of buyouts model to safeguard members’ interests’](#); ‘Pension regulator gains new powers’, *Financial Times*, 15 April 2008

³⁰ DWP, [‘The powers of the Pensions Regulator. Amendment to anti-avoidance measures in the Pensions Act 2004’](#), April 2008; HL Deb, 27 October 2008, c1432; DWP, [‘The powers of the Pensions Regulator. Amendments to the anti-avoidance measures in the Pensions Act 2004’](#), October 2008

³¹ Section 126 and Schedule 9

³² [TPR press release, Regulator confirms Contribution Notice](#), June 2011

the outcome.³³ *Occupational Pensions* commented that the case would have dented companies' respect for the regulator's powers.³⁴

In March 2012, TPR set out the action it had taken in relation to the Desmond and Sons Pension Scheme.³⁵ In May 2015, in advance of an appeal hearing, TPR said the trustees had reached an agreement for contributions to the scheme.³⁶

An issue in the *Storm Funding* case, considered by the High Court in 2014, was whether - in circumstances where two or more companies in a group were the subject of contribution notices - the aggregate maximum was limited to the 'shortfall sum' (or section 75 debt).³⁷

In 2017, the High Court refused an application for judicial review against TPR's decision to issue a second warning notice in relation to the Silentnight Group DB Scheme, in part because there was a procedure for challenging decisions through TPR's Determinations Panel.³⁸

2.3 Financial Support Directions

TPR also has the power to issue a Financial Support Direction (FSD), requiring strong employers within a group to support the pension schemes of weak employers in the group. An FSD may be issued where the regulator concludes that the sponsoring employer is a "service company or is insufficiently resourced, and it is reasonable to do so."³⁹

When the legislation was before Parliament, the then Pensions Minister, the late Malcolm Wicks, explained:

There may be circumstances in which, as a result of actions that may well have been perfectly legitimate and not aimed at avoiding pension liabilities, schemes end up with a participating employer who is financially weak and unable to meet its pension liabilities. In particular, that may apply in the case of the debt on the employer imposed under section 75 of the 1995 Act in the event of the scheme winding up or the sponsoring employer becoming insolvent. An example of that is the use of service companies, often as part of entirely legitimate group arrangements. Such entities frequently have no material assets and their sole revenue comes from amounts charged to other group companies for the service of the employees, pursuant to inter-company agreements. If the parent company wishes to dump its pension liabilities, it can simply terminate its agreement with the company and wind both it and the scheme up. The service company will have no assets with which to pay any section 75 debt due. Similarly, the participating employer may, by chance, be a weak member of the group, equally unable to meet any debt and suitable to be sacrificed by the parent in order to reduce the

Financial Support Directions

Where the scheme sponsor is under-resourced or a service company, to require ongoing financial support to be provided from elsewhere in the corporate group. Often used to ensure parent companies in corporate groups support the schemes of subsidiaries that cannot provide support on their own. Financial support can be provided in a number of ways, including by a lump sum payment, a parent company guarantee or other additional financial resources.

Where a connection to the scheme sponsor has been in place within 2 years prior to TPR issuing a warning notice. [PPF004-May 2016](#)

³³ Ibid; [Report on Bonas case under s89](#), June 2011

³⁴ Occupational Pensions, 'Regulator in climb-down over its first contribution notice', July 2011

³⁵ [TPR Press Release, Regulator publishes details of Contribution Notice case, March 2012](#)

³⁶ [Report under s89 in relation to Desmond and Sons](#), May 2015

³⁷ 'Pensions again – 'just when you thought it was safe to go into administration'', Professor Ian Fletcher, Gary Squires, *Insolvency intelligence*, 2014

³⁸ [The Pensions Regulator is successful in legal challenge concerning the Silentnight Group DB scheme](#), PN 17-02, 12 January 2017

³⁹ [TPR issues FSD on Sea Containers Ltd](#), 6 February 2008

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group's pension liabilities. I am sure that hon. Members will agree that, in general terms, sponsoring employers of pension schemes should be genuine entities carrying on a material trading activity or holding material assets, so that the employer guarantee of the scheme is meaningful.⁴⁰

In response to concerns, the Government provided that the majority of individuals (directors or shareholders) would be excluded from the scope of financial support directions.⁴¹

In practice...

TPR issued its first Financial Support Directions (FSDs) in relation to Sea Containers Limited (SCL) directing it to provide "financial support for the two pension schemes of its London-based UK subsidiary Sea Containers Services Ltd."⁴² On 6 February 2008, following the withdrawal of an appeal to the Pensions Regulator Tribunal, TPR confirmed that SCL would be compelled to provide a form of financial support for the pension schemes within 30 days.⁴³

In 2010, TPR issued FSDs against companies in the Nortel and Lehman Brothers groups. The companies challenged these directions in the Courts. In July 2013, the Supreme Court delivered a judgment to the effect that "liabilities under a financial support direction (FSD) issued against an insolvent company would rank as a provable debt." TPR commented that:

The judgment therefore confirms that the FSD is effective in an insolvency, but overrules the findings of the High Court and the Court of Appeal that the costs of complying with an FSD issued against an insolvent target company following insolvency would rank as an expense of the administration or liquidation.⁴⁴

An article in *Insolvency Intelligence* argued that had the Court of Appeal decision not been reversed, the need to take account of pension fund deficiencies elsewhere in the group might have deprived "otherwise-viable members of a corporate group...of any reasonable prospect of survival."⁴⁵

In January 2012, TPR explained its decision to issue Financial Support Directions against ITV in relation to the Box Clever Group Pension Scheme, on the basis that Box Clever Technology Ltd had been set up as

⁴⁰ [SC Deb, 27 April 2004, cc 780-781](#)

⁴¹ DWP Press Release, '[Results of industry consultation on moral hazard clauses in Pensions Bill](#)', 25 October 2004; See also, [HL Deb, 1 November 2004, c25-29](#)

⁴² TPR, '[Regulator uses anti-avoidance powers on Sea Containers](#)', (PN 07-10), 18 June 2007; TPR, '[Regulator issues Financial Support Directions on Sea Containers](#)', (PN 08/02, 6 February 2008); TPR, '[Reasons of the Determinations Panel of the Pensions Regulator in relation to the Determination Notices issued on 15 June 2007 re. The Sea Containers 1983 Pension Scheme and the Sea Containers 1990 Pension Scheme](#)'; NAO, '[The Pensions Regulator: Progress in establishing its new regulatory approach](#)', HC 1035, 26 October 2007, p24

⁴³ TPR Press Release, '[Regulator issues Financial Support Directions on Sea Containers](#)' 6 Feb 2008

⁴⁴ '[Nortel-Lehman' Supreme Court judgement – regulator statement, 24 July 2013](#)

⁴⁵ 'Pensions again – just when you thought it was safe to go into administration', Professor Ian Fletcher and Gary Squires, *AlixPartners, Insolvency intelligence*, 2014

part of a “highly leveraged transaction” and that the burden of servicing the resulting debt had been a major factor in its insolvency:

[...] the scheme’s principal employer, Box Clever Technology Ltd (‘BCT’), was set up by the Granada and Thorn groups as part of a highly leveraged transaction that effectively extracted value from the consumer rentals businesses of those groups, whilst leaving the possibility for Granada and Thorn to share in any future profit of BCT. A requirement of the transaction was that a pension scheme was set up for transferring employees. The ITV group received cash proceeds of approximately £500m as a result of the Box Clever transaction, which was paid from total debt of £860m raised by the BCT group. That borrowing was secured on all the assets of BCT and the other sponsoring employers of the scheme, but not the Granada or Thorn group companies, thereby insulating them from any downside. The burden of servicing this debt was a major factor in the insolvency of BCT group, including the sponsoring employers of the scheme, in 2003. The Panel did not find any misconduct on the part of the target companies, but considered FSDs to be an appropriate and reasonable response to these events.⁴⁶

ITV appealed through various stages and in March 2015, the Court of Appeal allowed its appeal against the decision of the Upper Tribunal to refuse its application to strike out certain parts of the cases advanced by TPR and the scheme trustees. It remitted the matter back to the Upper Tribunal. ITV’s Lawyers commented that legal action had help clarify the extent of TPR’s powers.⁴⁷ Legal firm Eversheds commented that there was “ample scope in the appeals process for a reluctant target of regulatory attention to drag the process out for many years.”⁴⁸ The Work and Pensions Committee commented that such cases could be “extraordinarily protracted”:

A final hearing in the case of the Box Clever pension scheme is due before the Upper Tribunal in early 2018. The Determinations Panel ruled in December 2011 that a FSD should be issued to ITV, which has repeatedly appealed that decision. Box Clever itself, which was a joint venture between ITV and another television company, went insolvent in 2003.⁴⁹

In November 2016, TPR issued Warning Notices in respect of the BHS Pension Scheme – to Sir Philip Green, Taveta Investments Limited, Taveta Investments (No. 2) Limited, Dominic Chappell, Retail Acquisitions Limited., setting out evidence to support the use of its Contribution Notice and Financial Support Direction powers.⁵⁰ In February 2017, TPR it announced the terms of a settlement as a result of which enforcement action against Sir Philip Green, Taveta Investments Limited, Taveta Investments (No. 2) Limited would cease.⁵¹

⁴⁶ [TPR Press Release, FSD determination in Box Clever case, 31 January 2012](#)

⁴⁷ [‘Court of Appeal allows ITV’s appeal in the Box Clever FSD litigation’, *Pensions World*, 25 March 2015](#)

⁴⁸ [Box Clever Financial Support Direction – Court of Appeal Decision, 27 March 2015](#)

⁴⁹ Work and Pensions Committee, [Defined Benefit Pension Schemes](#), December 2016

⁵⁰ [BHS TPR launches enforcement action](#), November 2016

⁵¹ TPR, [A quick guide to the BHS pension settlement](#), February 2017

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In December 2016, TPR said it had secured a settlement with Coats for two of its schemes, covering approximately 90% of the total membership, following the issue of Warnings Notices.⁵²

Proposals for reform

In its December 2016 report on DB schemes, the Work and Pensions Select Committee recommended that the Government consult on giving TPR powers to impose punitive fines

21. We recommend that in its forthcoming Green Paper the Government consult on giving TPR powers to add punitive fines to Contribution Notices and Financial Support Directions. These fines would have to be set at a high level to ensure they incentivised sponsors to properly fund pension schemes and seek clearance for corporate transactions which may be to a scheme's detriment. We recommend that fines that could treble the original demand be considered. The intention would be that such fines would not need to be imposed: they would act as a nuclear deterrent to avoidance.(Paragraph 146)⁵³

In its February 2017 Green Paper, the Government asked for views whether TPR should have the power to impose punitive fines "for corporate transactions that are detrimental to schemes" and, if so, in what circumstances.⁵⁴

2.4 Restoration Orders

At Report Stage in the Commons the Government introduced a further power, allowing TPR to impose a Restoration Order directing that the position of a scheme be "restored where the scheme has entered into a 'transaction at an undervalue' within a two-year period leading up to an insolvency event." Malcolm Wicks explained:

A transaction at an undervalue is exactly what it says—a transaction involving scheme assets that results in the scheme receiving no consideration, or consideration that is less than the market value, in return. That could include, for example, trustees being persuaded to purchase a property on the basis of planning permission for a development that does not actually exist, or a director of a company persuading trustees to offer him a transfer on a very generous basis to prevent his benefits being reduced by the compensation cap should the scheme enter the PPF. There is currently provision in insolvency legislation retrospectively to undo "transactions at an undervalue" involving company assets, which occur in the run-up to insolvency. New clauses 12 to 16 introduce similar provision in respect of transactions involving scheme assets, in order both to protect scheme members from having the assets of their scheme unfairly depleted and to guard against the possibility of the PPF having to assume responsibility for such schemes where it otherwise would not have done so.⁵⁵

⁵² [TPR reaches £255m settlement in Coats anti-avoidance case](#), December 2016

⁵³ Work and Pensions Committee, [Defined benefit pension schemes](#), December 2016

⁵⁴ Ibid, para 320 and p73

⁵⁵ [HC Deb, 18 May 2004, c899-900](#)

2.5 Regulated Apportionment Arrangements

Section 75 of the *Pensions Act 1995* provides that a debt is due from a sponsoring employer if they become insolvent or their scheme starts to wind up underfunded, or an application is made to the PPF for it to take responsibility for the scheme.⁵⁶

When these rules came into force in 2005, the rules included detailed provisions for dealing with the employer debt when an employer exited a multi-employer scheme:

- The employer debt was calculated on a 'full buy-out' basis,⁵⁷ but with provision for 'withdrawal arrangements' - allowing a lower amount to be paid on provision of a guarantee.
- The employer debt to be apportioned among the remaining employers.⁵⁸

The Government made changes to the rules in 2008 to provide more flexibility while at the same time aiming to prevent mis-use of the apportionment rule, with the aim of preventing a debt from being apportioned to weak employers or shell employers.⁵⁹

They also introduced the new option of Regulated Apportionment Arrangement (RAA), whereby debt could be apportioned outside the usual parameters, with the involvement of TPR. This could only take place where a scheme:

- Was in a PPF assessment period; or
- An assessment period was likely to commence in future; and
- The PPF Board agreed to the arrangement (usually because it would result in a higher level of funding for the scheme than if the employer became insolvent).⁶⁰

RAAs were intended to be extremely uncommon. In deciding whether to allow on, TPR considers:

- whether insolvency of the employer would be otherwise inevitable or whether there could be other solutions (including funding options for the scheme) which would avoid insolvency;
- whether the scheme might receive more from an insolvency;
- whether a better outcome might otherwise be attained for the scheme by other means (including through the use of the regulator's powers where relevant);
- the position of the rest of the employer group; and
- the outcome of the proposals for other creditors.⁶¹

⁵⁶ As amended by *Pensions Act 2004*, s271; [explanatory notes, para 1065; Occupational Pension Schemes \(Employer Debt\) Regulations 2005 \(SI 2005/678\)](#)

⁵⁷ The amount that would need to be paid to secure buy out of the pension's full liabilities with an insurance company

⁵⁸ [Explanatory Memorandum to SI 2008/731](#)

⁵⁹ Ibid para 7.4-8

⁶⁰ [Explanatory Memorandum to SI 2008/731](#)

⁶¹ TPR, [RAAs and employer insolvency](#), August 2010

15 The Pensions Regulator - powers to protect pension benefits

In an August 2016 paper setting out its [Approach to Employer Restructuring](#), the PPF explained that its aim was to “make sure that the pension scheme is in a much better position than it would have been if we had done nothing.”

In practice...

TPR gave approval for an RAA in the case of the Uniq pension. This provided for an insurance arrangement to ‘buy out’ scheme benefits at a level that would at least equal PPF compensation but would be less than full scheme benefits. TPR said this was a good example of what close and positive co-operation could achieve:

The funding challenges had appeared intractable and threatened the solvency of the business. No recovery plan was possible without taking inappropriate investment risk. But, unusually, there were no senior creditors ahead of the pension scheme. The scheme was in the uncommon position of being the dominant creditor and effectively owner of the company. This paved the way for an innovative solution that enabled the scheme to maximise the value of its interest in the employer and for the company to be sold as a going concern - achieving benefit levels at least equal to PPF compensation and protecting PPF levy payers.⁶²

TPR also approved an RAA in relation to the BMI Pension Scheme, allowing for its controlled entry into the PPF. It decided not to grant clearance to a proposal that would have involved keeping the scheme open. This was because the proposed voluntary contributions from Lufthansa (which had no statutory obligation to fund the scheme) were “insufficient in isolation to prevent a deterioration in the Scheme’s funding position, leaving the proposal almost wholly reliant on investment outperformance. TPR considered that this posed unacceptable risks to members’ benefits and PPF levy payers and therefore worked to explore alternatives:

Following further discussions, the regulator issued a clearance statement for a second proposal which involved a controlled entry to the PPF via a rarely used mechanism called a Regulated Apportionment Arrangement (RAA). Under the arrangement, the Scheme (and therefore PPF) received £16 million, significantly more than would have been received from the insolvency of British Midland Airways Limited (BMAL), the Scheme’s statutory employer. In addition, Lufthansa provided a further voluntary contribution of £84 million to top up members’ benefits outside the PPF.⁶³

An RAA was also approved in the case of the Kodak Pension Plan. TPR explained that members were given the option to transfer to a new scheme that would offer benefits better than PPF compensation levels but those that would have been provided through the scheme:

In January 2012, the Kodak group’s US parent, Eastman Kodak Company, entered Chapter 11 bankruptcy proceedings. This

⁶² [Pensions Regulator press release, 2 March 2012, Regulator publishes report on Uniq plc Pension Scheme](#)

⁶³ [Regulator publishes report on BMI pension scheme](#), PN12-15, 31 May 2012

meant that the Kodak Pension Plan was at risk of losing both existing support from the wider Kodak group and ongoing contributions from its sponsoring employer.

In order to maximise the value available to the Kodak Pension Plan, a deal was agreed under which the trustees acquired Kodak's cash generative 'personalised imaging' and 'document imaging' businesses. In exchange, the Kodak group was released from its liabilities to the Kodak Pension Plan.

Despite the acquisition, there remained serious doubts as to whether the assets could provide adequate support for the scheme's existing liabilities. Therefore members were given the option to transfer to a new scheme which would offer benefits better than the Pension Protection Fund, but lower than in the Kodak Pension Plan. Members representing in excess of 94% of liabilities have decided to transfer.

The regulator and the trustees have agreed a governance framework to limit risks to member benefits and the PPF, including monitoring the performance of the acquired businesses and imposing restrictions on discretionary pension benefit awards and investments.⁶⁴

In November 2013, it issued a report regarding its role in the restructuring of UK Coal's operations following a "catastrophic fire" earlier that year. It said:

Our role in this new situation was to work with the parties concerned to reach the best available outcome for pension scheme members and the PPF. With greatly increased business challenges and risks, the regulator's view was that balancing the needs of the company and the scheme was no longer possible."

The regulator notes that subsequent to the completion of the 2013 restructuring, UK Coal has been obliged to participate in a further restructuring, which is expected to result in a managed closure of the business.

In July 2014 the PPF took on the assets and liabilities of the UKCOL Sections of the Industry Wide Coal Staff Superannuation Scheme and the Industry Wide Mineworkers' Pension Scheme, and will provide compensation for their 7,000 members.⁶⁵

The Halcrow Pension Scheme was in deficit and its sponsoring employer unable to afford the necessary contributions to repair it. In this case, TPR, the PPF, Halcrow Group Limited (HGL) and its parent company CH2M Ltd negotiated a proposal that would involve offering members the chance to transfer to a new scheme or remain in the existing one and transfer to the PPF. CH2M would make a cash payment to the scheme, together with an equity stake in HGL in view of the loss of employer support through an RAA.⁶⁶

⁶⁴ ['Kodak and UK Coal case reports published,' TPR press release, Monday 3 November 2014; Report in relation to the Kodak Pension Plan](#) (November 2014)

⁶⁵ Ibid; [Report in relation to UK Coal Operations Ltd](#) (November 2014)

⁶⁶ TPR, [Regulatory Intervention Report issued under s89 of the Pensions Act 2004 in relation to Halcrow Pension Scheme](#), July 2016

In May 2017, TPR announced that it had reached agreement in principle on the key commercial terms of an RAA in relation to the British Steel Pension Scheme.⁶⁷

In June 2017, TPR announced an RAA in relation to the Hoover Pension Scheme, which would “receive £60 million from Hoover and is expected to transfer into the Pension Protection Fund (PPF).”⁶⁸

Proposals for reform

The Work and Pensions Select Committee said it thought TPR should become involved at an earlier stage and take a more iterative approach:

92. The Regulated Apportionment Arrangement (RAA) is a means of negotiating an outcome for scheme members that is better than the PPF in instances where a sponsoring employer is in mortal danger. When agreed, it can produce results that are better for pensioners, better for employers and better for the PPF than insolvency. It is, however, very rarely used, and the process includes potentially harmful delays. It is an emergency measure, but it does not operate at an emergency pace.

93. We recommend that in its forthcoming Green Paper the Government consult on:

- **reducing the interval, currently 28 days, between TPR issuing a warning notice of an impending RAA and issuing a final notice; and**
- **relaxing the requirement for insolvency to be inevitable within 12 months for an RAA to be approved.**

We further recommend that TPR guidance be amended to encourage its involvement at an earlier stage in the formulation of RAA proposals in order to facilitate a more iterative approach.⁶⁹

In its February 2017 DB Green Paper, the Government asked for views on proposals to allow struggling businesses to separate from scheme sponsors more easily, including by widening the criteria for RAAs. It commented that:

227. Our analysis highlights that there appears to be a group of employers who are likely but not certain to become insolvent before the completion of the recovery plan or members benefits are paid in full. However, many of these employers may not be able to access an RAA as it is not clear that they will become insolvent in the next 12 months. For the schemes sponsored by these employers, the current system does not offer any alternative. Their only option is to aim for investment returns to enable them to reach full funding or for the business to improve and generate more cash. But the burden of the pension scheme may itself be compromising the ability of the business to invest and recover, or to restructure. This also creates a risk for PPF

⁶⁷ [TPR Statement on British Steel Pension Scheme](#), PN 17/25, 17 May 2017; For more detail, see Library Briefing Paper SN-05656 [Occupational pension increases](#) (June 2017), section 3.

⁶⁸ [TPR finalises pensions deal with Hoover](#), 2 June 2017

⁶⁹ Work and Pensions Select Committee, [Defined benefit pension schemes](#), December 2016

members and levy payers because there is a risk that the PPF deficit could grow very substantially in the run up to a likely future insolvency.⁷⁰

It said there could be a considerable prize – giving struggling employers the chance to emerge as a sustainable business and generate more value for the pension scheme – but that it would also require a “different trade-off” between sponsors, members and the PPF levy payers and would raise moral hazard issues:

229. It is also important to recognise that the options that involve a ‘transfer of wealth’ from the members to the sponsor would raise moral hazard issues and there would need to be appropriate quid pro quo provisions in place. For example similar provisions to the condition for RAAs where the scheme would need to receive more than it would otherwise on insolvency, to ensure that the scheme is being treated fairly compared to other creditors to the employer.⁷¹

2.6 Clearance statements

The clearance procedure was introduced to enable companies undergoing restructuring to gain assurance that TPR’s anti-avoidance powers would not be used in relation to the transaction. The guidance states:

‘Clearance’ is the term used to describe the voluntary process of obtaining a clearance statement from the regulator. A clearance statement gives assurance that, based on the information provided, the regulator will not use its anti-avoidance powers to issue to the applicants either contribution notices or financial support directions in relation to a defined benefit occupational pension scheme and a particular event. ‘Events’ include transactions, agreements, decisions, other acts and failures to act.⁷²

TPR seeks to balance different factors in reaching a decision:

- The regulator's preferred outcome is an appropriately funded scheme with a solvent employer.
- The regulator will deploy its resources in a risk-based manner, targeting risk in a proportionate, responsive, flexible, pragmatic, consistent, transparent and reasonable way.
- The regulator will seek to protect members' benefits and reduce the risk of calls on the PPF, while at the same time recognising commercial activity and business needs.⁷³

It cannot stop a corporate transaction from proceeding but can issue an assurance that its powers will not be used after the event. It strongly advises seeking clearance where “ there is an event that may be

⁷⁰ [Cm 9412](#), Feb 2017

⁷¹ Ibid

⁷² TPR, [Clearance Guidance](#), June 2009 - introduction

⁷³ TPR, [Clearance Guidance](#), June 2009; An earlier version of the guidance, as at March 2008, is here: <http://collections.europarchive.org/tna/20100210154308/http://www.thepensionsregulator.gov.uk/pdf/clearanceGuidance2008.pdf> (UK Govt Web Archive)

materially detrimental to the ability of the scheme to meet pensions liabilities – such as a change of ownership.”⁷⁴

TPR published [guidance on clearance](#) in June 2009.

Proposals for reform

The Work and Pensions Select Committee noted that clearance applications had declined substantially, falling from 263 in 2005-06 to nine in 2015-16. It recommended that the Government consult on new rules for situations where clearance was mandatory:

140. Clearance has the clear benefit of enabling TPR to tackle potential moral hazard implications of corporate transactions head-on rather than after the event, while providing comfort and certainty to the scheme members and sponsoring firm. Clearance is far preferable to the drawn-out—and resource-intensive—legal process of enforcement action. It is, however, voluntary and employers are increasingly skipping it: there were 263 applications in 2005–06 but just nine in 2015–16. The incentives to seek clearance are currently weak. Some unscrupulous sponsors may well be calculating that they are better off risking a protracted anti-avoidance battle than coming to an immediate pension settlement.

141. We recommend that in its forthcoming Green Paper the Government consult on proposals to require advance clearance from TPR for certain corporate transactions that could be materially detrimental to the funding position of a DB scheme. The circumstances in which clearance was compulsory would have to be narrow to prevent a disproportionate effect on normal economic activity. They might include the sale or merger of a scheme sponsor where the pension deficit is higher than a fixed proportion of the value of the company. It is also reasonable to expect any prospective purchaser to have a credible plan for tackling a substantial pension deficit.⁷⁵

In its DB Green Paper, DWP said “very significant difficulties” would need to be overcome before clearance could be required in certain specified circumstances:

314. Making clearance a compulsory procedure even in very limited circumstances has the potential to make turnarounds more difficult and lead to more businesses being placed into insolvency. With turnarounds, there is often limited time available in which to conclude a deal. Businesses with an attached DB scheme could find themselves as unattractive investment targets. That could put more schemes into the PPF with consequences for the members and the PPF itself.

315. Giving the Regulator this power could also reduce the attractiveness of UK companies with DB pension schemes to investors, especially if investors believe this could restrict the ability of these companies to speedily restructure their operations should they fall into difficulty in the future.

⁷⁴ Article by Tony Hobman, Chief Executive of the Pensions Regulator in HR Director, issue 38, June 2007, <http://bit.ly/cnOiOc> (UK Govt Web Archive)

⁷⁵ Ibid

316. The current regime seeks to balance the tension between the aim of protecting the pension scheme and the future prospects of the employees who also have an interest in the outcome of any deal. Any revised regime would also need to manage this difficult balance as it is inevitable that there will be circumstances where the business restructuring should proceed to ensure that jobs are saved even when the risks to the scheme have not been fully mitigated.

317. Some stakeholders have also pointed out that there are business decisions which are less recognisable as corporate transactions, but are likely to affect the ability of the sponsor to fund their DB scheme. For example, moving assets from the sponsor to another part of the corporate group cannot be effectively managed/controlled through a prospective clearance regime, and can only be addressed retrospectively.⁷⁶

It said that another, less stringent approach – which could encourage employers to engage with TPR earlier - would be to give it power to levy a significant fine (in addition to pursuing the employer for any support) where activity was shown to be detrimental without appropriate mitigation. Criteria would need to be very clear to prevent TPR being overwhelmed with clearance applications and corporate activity being held up.⁷⁷

The Government asked for views on whether it would be possible to “design a system of compulsory proactive clearance by the Regulator of certain corporate transactions without significant detriment to legitimate business activity.”⁷⁸

2.7 Trustees

The vast majority of private sector DB schemes are set up under trust.⁷⁹ This means that they are legally separate from the sponsoring employer and trustees are responsible for running the scheme – including decisions around scheme funding, recovery plans, investment choices and the assumptions used to calculate scheme liabilities. The February 2017 DB Green Paper describes them as “very much the ‘first line of defence’ for scheme members.”⁸⁰

TPR provides guidance and support to trustees to help them understand their duties and had “a range of powers to intervene” where it has “concerns about a funding plan or where an employer is seeking to walk away from its pension promises.”⁸¹

It also has power to appoint independent trustees where it is satisfied that this is necessary:

⁷⁶ DWP, [Security and Sustainability in Defined Benefit Pension Schemes](#), Cm 9412, Feb 2017, p 7

⁷⁷ Ibid, para 320

⁷⁸ Ibid, p 73

⁷⁹ Ibid. The exception are those – usually in the public sector - set up under statute

⁸⁰ Ibid, p15

⁸¹ Ibid

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- to secure that the trustees as a whole have, or exercise the necessary knowledge and skill for the proper administration of the scheme;
- to secure that the number of trustees is sufficient for the proper administration of the scheme
- to secure the proper use or application of the scheme's assets.⁸²

Between 2010 and May 2015, TPR appointed an independent trustee in respect of 184 appointments.⁸³ For example, in 2007, it used these powers in relation to the Telent Pension Scheme, due to concerns about potential conflicts of interest.⁸⁴

In its December 2016 report, the Work and Pensions Committee recommended that the Government consult on "proposals to give trustees powers to demand timely information from sponsors." This was to prevent trustees being "kept in the dark about information crucial to them carrying out their duties effectively."⁸⁵

The February 2017 Green Paper asked:

- Should trustees be given extra powers such as powers to demand timely information from sponsors, to strengthen their position? If so, what extra powers might be helpful?
- Should trustees be consulted when the employer plans to pay dividends if the scheme is underfunded – and if so, what level of funding?⁸⁶

⁸² Section 7, Pensions Act 1995

⁸³ [TPR FOI response](#), May 2015

⁸⁴ TPR Press Release, PN07-18, '[Regulator confirms use of powers on Telent pension scheme](#)', 9 November 2007; TPR Press Release, PN 08-08, 11 April 2008, [Telent pension scheme undertaking received](#).

⁸⁵ [Defined Benefit pension schemes](#), Work and Pensions Committee, December 2016, para 13

⁸⁶ DWP, [Security and Sustainability in Defined Benefit Pension Schemes](#), Cm 9410, December 2016, p73

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