Time to get tough?

Sarah Hickling and Jonathan Sharp consider how DB regulation in the UK may change

As the final stages of the BHS and Tata Steel sagas play out, The Pensions Regulator has said that it will "transform" the way in which it regulates DB pension schemes. And with DB regulation likely to be a key part of the government's White Paper due in the winter, it is possible that we could see wider changes to the regulatory regime. Here, we take a look at some key aspects of the possible changes and what these might mean for trustees and sponsors of DB schemes.

The regulator's new approach

In July, the regulator published its initial report from its TPR Future work. One of the key messages is that the regulator intends to adopt a quicker, clearer and tougher approach. Some key themes from the report and subsequent statements from the regulator are:

- **Quicker:** The regulator has been criticised for the speed at which it has deployed its powers. It has typically taken years for anti-avoidance enforcement action to reach a conclusion; the attempt by the regulator to impose a financial support direction against companies in the ITN group, which started in 2011, is still ongoing. The regulator has, therefore, said that it will use its powers more frequently, quickly and at an earlier stage.
- **Clearer:** Despite the amount of regulatory guidance available, the regulator's approach can vary significantly between cases in practice. This means companies find it hard to know what to expect from their dealings with the regulator. The regulator has said that it will improve the consistency of its casework and regulatory processes.
- **Tougher**: The regulator has a significant regulatory toolkit, but has only exercised its anti-avoidance powers seven times since 2005. And it still hasn't used some of the powers which are available to it. Our experience is that the regulator's failure to exercise its powers decisively (particularly against higher-profile targets) has diluted the 'fear factor' for some companies compared to when the regulator's powers were first introduced. The Work and Pensions Committee concluded that, under the current regime, "an employer seeking to avoid its responsibilities to a pension scheme may well take a punt on risking enforcement action". The regulator has said that it will make use of its existing powers more in the future.

Tough to be tough

The regulator appears to have taken on board many of the criticisms that have been levelled at it. However, it remains to be seen how far the regulator will be able to implement its TPR Future work unless some of the key reasons behind the regulator's previous approach also change.

The regulator's limited resources, for example, have contributed to its tendency to work behind the scenes to influence behaviour rather than fully engaging its powers, and have meant that it has had to pick and choose its targets. There does not appear to be any prospect of the regulator being given significant additional resources – although the government has acknowledged that this may be necessary if the regulator is given new powers.

Nor are the amounts at stake – given the size of some pension deficits – likely to change. The significance of these amounts has meant that potential targets are often incentivised to fight enforcement action throughout.

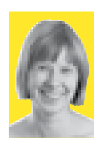
Wider changes?

The government has indicated that the regulator's powers will be one area where proposals for reform will appear in the White Paper. Based on statements by the government, including in the Green Paper, these could include:

- Compulsory proactive clearance by the regulator of certain corporate transactions.
- A new power for the regulator to impose punitive fines for corporate transactions that are detrimental to schemes.
- Imposing more prescriptive requirements in relation to scheme funding, such as giving the regulator the power to set binding standards.
- New information-gathering powers, for example a power to compel potential targets to attend an interview.

Giving new powers to the regulator along such lines could play well politically in the wake of BHS and would be consistent with the government's manifesto commitments. Furthermore, giving the regulator significant new powers (particularly the first two), would likely reduce the number of potential targets 'taking a punt'.

That said, in the Green Paper the government acknowledged the challenges that introducing such changes would entail; namely the dual risks of inhibiting legitimate business activity and potentially stifling the competitiveness and effective operation of the UK economy. Each of these risks is especially relevant in light of Brexit. Therefore, it remains to be seen just how tough the government is prepared to be.



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