**Summary**

- There are concerns that pre-pack arrangements may be used by companies to offload pension liabilities into the Pension Protection Fund, which in turn risks increasing PPF levies for DB scheme sponsors.
- Although insolvency practitioners must notify both TPR and the PPF of an insolvency event that affects a DB pension scheme, there is no legal requirement to inform about an impending pre-pack deal.
- It has been suggested that all stakeholders should be able to examine all relevant documentation before a pre-pack sale, although the timing to do so may be a problem.

# KEEPING TRACK

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**Should The Pensions Regulator be more involved with pre-pack arrangements? David Adams investigates**

If your employer is in serious financial difficulty, that's bad. But if the company is then bought by a new owner who succeeds in offloading the company pension scheme obligations and you lose your pension, or end up with much lower benefits, that's even worse.

Particular concern has been expressed about pre-pack arrangements: sales of a company's assets arranged before the company begins the formal insolvency process. This means unsecured creditors, such as the pension fund, are not aware of the pre-pack deal being undertaken until it is completed. Therefore, there are understandable fears that the DB liabilities can simply be offloaded into the Pension Protection Fund (PPF) by purchasers of financially distressed companies.

**Vulnerable?**

In October 2016 it was reported that the DB pension fund of the food company Bernard Matthews is likely to receive only 1p in the pound when it enters the PPF, after the company's former owners, Rutland Partners, accepted an offer from Ranjit Singh Boporan to purchase the company without its pension scheme. The owners had rejected an initial offer from Ramjit Singh Boporan that included the pension scheme, the buyers informed *Pensions Age*. Rutland Partners is expected to receive £39 million from the sale, while the scheme's deficit is thought to be about £20 million. At the time of writing the case is under investigation by The Pensions Regulator (TPR).

Parliament's Work and Pensions Select Committee chair Frank Field MP wrote to TPR in September asking for more detail about the course of events in this case. "Whatever the specifics of this case ... it is apparent that the current regulatory regime is vulnerable to companies seeking to shed pension

promises," Field warned at the time, noting also that any increase in the number of such cases would also lead to increases in the levy that funds the PPF, which is paid by employers with DB schemes.

These issues are among those being investigated by Select Committee in its inquiry into the roles of TPR and the PPF. The inquiry is still collecting written and oral submissions at the time of writing.

According to PwC partner and head of insolvency Michael Jervis, there has been an overall reduction in the number of pre-pack insolvency sales in the recent past (regardless of whether or not a DB scheme was involved). A spokesperson for the PPF also suggests that the number of pre-pack sales involving DB schemes does not appear to be rising, although the PPF declined a request to provide further detailed comment or data to prove this.

**TPR and PPF roles**

But at present, although insolvency practitioners must notify both TPR and the PPF of an insolvency event that affects a DB pension scheme, there is no legal requirement for the practitioner to inform the PPF, TPR, or a scheme's trustees of an impending pre-pack deal. The involved parties do also have the option of approaching TPR to go through a clearance process, but this is voluntary.

Regarding the Bernard Matthews case, TPR only learned of the course of events from the PPF after the scheme's trustees contacted the PPF in September. TPR has submitted to the Select Committee a suggestion that in future clearance could be made mandatory in a very tightly defined set of circumstances, if it is clear that corporate activity could weaken a scheme's sponsor and thus support for the scheme.

A written submission sent to the committee in September by the Association of Pension Lawyers (APL) suggests that some of the shortcomings in the current system are due to TPR failing to use powers at its disposal. But the APL also notes that it would be difficult to create a mandatory clearance regime "clear enough to create certainty ... *[and suitable for]* all scenarios where a potential risk to a pension scheme could arise". It points out that TPR would require significant additional resources if its remit was extended in this way.

**Benefits**

In any case, pre-packs can deliver acceptable outcomes for scheme members, says pensions expert and former Pensions Minister Baroness Ros Altmann. "A pre-pack agreement is only supposed to happen if the company is definitely going to go bust," she points out – in which case the scheme would end up in the PPF with lower benefits for members anyway. "If the pre-pack is more likely to save members' jobs it will leave them better off."

The president of R3, the Association of Business Recovery Professionals, Andrew Tate, points to improvements to the regime governing pre-packs, made following a government review of the practice led by Teresa Graham in 2014. Its recommendations included new guidelines on marketing the sale of a business more widely. But the Graham Report was not followed by any new legislation and these requirements remain voluntary.

**Intervention**

The Pensions and Lifetime Savings Association (PLSA) has suggested TPR should have greater scrutiny over corporate transactions. "One of the questions we think is worth debating is whether greater intervention at an earlier stage might improve the *[outcome]*," says PLSA DB policy lead Helen Forrest-Hall.

A spokesperson for the PPF says the input it has provided to the Select Committee has included an indication that the PPF would also support "a more interventionist approach from the regulator" in future, encompassing new efforts "to improve oversight of corporate transactions and support timely action to prevent avoidance or weakening of the employer covenant".

University of Essex Business School professor of accounting Prem Sikka, who has contributed material to the Select Committee inquiry, believes the regulator should be able to veto corporate activity if it has reason to believe there will be an unfairly negative impact on a DB scheme.

But this would not be straightforward. PwC's Michael Jervis points out that directors' duties are prescribed by insolvency legislation to

act in the best interests of a company's creditors. "If The Pensions Regulator were to be given a power of veto you would probably see pensions legislation and insolvency legislation in conflict," he says.

When submitting oral evidence to the Select Committee in November, TPR chief executive Lesley Titcomb was asked to consider whether it might be possible for the regulator to actually stop a transaction. "I think we could only be given *[that power]* if the number of schemes and given situations was very tightly defined," she said, "if timeframes ... were applied to us, so that we couldn't hold things up ... and obviously it would have resource implications for us.

"So it is something that it superficially attractive, but we absolutely have to be clear that we can achieve it without gumming up the entire works of British industry, in terms of corporate transactions."

Lawyer and Nabarro pensions partner Kate Richards points out that even with its current resources in place, TPR has achieved some impressive results. She cites as an example the agreement struck in 2014 between TPR, the Kodak Pension Plan and Kodak's parent company EKC, which filed for Chapter 11 bankruptcy in the US in 2012.

TPR approved a Regulated Apportionment Arrangement (RAA), a tool that can be used to support DB schemes where a sponsor is in financial distress. The pension scheme acquired the assets of Kodak's imaging technology businesses, now known as Alaris. Its revenues will now be used to deliver the necessary revenues to meet the scheme's financial needs. Scheme members have had to settle for reduced benefits, but probably at a higher level than they would have received in the PPF.

"These are the types of things we may see in future," says Richards. "Generally, where the regulator has been able to intervene early, that has often been a good thing. That should be encouraged ... but it's difficult, because *[TPR]* has a number of competing statutory objectives."

**Monitoring**

At present, according to PPF chief executive Alan Rubenstein when speaking to the Select Committee in November, the PPF monitors around 500 schemes with deficits, alongside some companies monitored "on a risk basis". The list of these companies is shared with TPR on a quarterly basis, although, Rubenstein added, if necessary the PPF would contact TPR immediately with urgent, specific concerns.

Sikka believes all stakeholders should be able to examine all relevant documentation before a pre-pack sale, removing the "excessive secrecy" that can surround pre-pack deals. But Ros Altmann can see some practical obstacles. "I think trustees need to be involved, but there are risks to the ongoing business and TPR and PPF need to be sensitive to privacy requirements," she says. "If the company workforce were to know that the firm was about to fail, it could undermine the business and end up jeopardising jobs."

However, she continues, if there were no active members of the scheme still employed by the sponsoring employer, the case for trustee involvement on a confidential basis would be strengthened.

But PwC director for pensions credit advisory Dickon Best sees another practical problem. "By the time a corporate is considering a pre-pack the options to do anything else may be limited, or there may be limited time," he says. "Trustees are often unable to progress restructuring discussions with the employer unless it is on the brink of insolvency. This is often too late for restructuring proposals to be progressed that could otherwise have potentially secured benefits for the members somewhere between PPF *[level of benefits]* and full benefits." It is in such situations, he suggests, where a little more regulatory power and the ability to intervene earlier might be useful.

For now, everyone awaits the outcome of the Select Committee's investigations and the next Pensions Green Paper. There does not seem to be any prospect of pre-pack arrangements being outlawed. But it is striking how many different stakeholders in this system suggest that this is one area where TPR could perhaps take a more active role in future.

**Written by David Adams, a freelance journalist**