

The Pension Schemes Act 2021 gives the Pensions Regulator increased powers to protect pension schemes from detrimental effects of some forms of corporate activity. The relevant provisions, in Part 3, come into force on 1 October 2021.

the law before the PSA 2021 changes

The so called “moral hazard” provisions of the Pensions Act 2004 have two purposes. One is to increase the possibility that a DB scheme in deficit might obtain additional funding and the other is to protect the Pension Protection Fund where there are other possible sources of funding for the scheme.

contribution notice (PA 2004 s38 to s42B) The employer in relation to a pension scheme and persons connected or associated with it (including other companies, employees, directors, shareholders), can be made personally liable under a contribution notice made by TPR, if they are party to an act or a deliberate failure to act, which either:

- (i) has as its or one of its main purposes to prevent the pension debt from being recovered in full or part; or
- (ii) results in a material detriment to the scheme.

The material detriment test is met if TPR is of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received. The amount of the contribution can be all or part of the pension debt calculated on the discontinuance basis, ie the cost of securing the scheme benefits in full with an insurance company.

financial support direction (PA 2004 s43 to s51) If a scheme employer is a service company or is under-resourced, ie if its value is less than 50% of the scheme’s deficit on a discontinuance basis, TPR can make a financial support direction. The effect of this is that other companies in the same group (and also others including individuals connected or associated with the employer) can be made jointly liable for some or all of the debt. In contrast with a contribution notice, which requires the payment of money, a financial support direction imposes a joint liability, which will result in actual payment only if the debt become payable.

If a financial support direction is not complied with, TPR may issue a contribution notice to every person to whom the direction was made, requiring each person to make a payment to the scheme of the whole or part of the amount by which the scheme’s assets fall short of the amount or estimated amount of the debt.

clearance (PA 2004 s42 and s46)

TPR has power, on an application to it and if it is appropriate, to give written clearance that the relevant act or failure to act will not give rise to a clearance notice or that a financial support direction will not be given.

restoration order (PA 2004 s52 to 56) TPR may make a restoration order in respect of a transaction involving assets of the scheme to restore the position to what it would have been if the transaction had not been entered into, if:

- (i) a relevant event has occurred in relation to the employer (either an insolvency or the scheme trustees apply or receive notice for the PPF to assume responsibility for the scheme); and
- (ii) a transaction at an undervalue was entered into not more than two years before the relevant event.

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effect of the PSA 2021

Section 103 amends the PA 2005 by adding two more grounds on which a contribution notice may be served, which are that either the employer insolvency or the employer resources test is met.

employer insolvency test (PA 2004, s38C) This test is met in relation to an act or failure to act if TPR is of the opinion that:

- (i) immediately after the relevant time, the value of the assets of the scheme was less than the amount of the liabilities of the scheme, and
- (ii) if a debt under PA 2004, s75, ("the s75 debt") had fallen due from the employer to the scheme immediately after the relevant time, the act or failure would have materially reduced the amount of the debt likely to be recovered by the scheme.

"The relevant time" means in relation to an act or failure to act the time of either the act or the failure occurred.

employer resources test (PA 2004, s38E) This test is met in relation to an act or failure to act if the Regulator is of the opinion that:

- (i) the act or failure reduced the value of the resources of the employer, and
- (ii) that reduction was a material reduction relative to the estimated s75 debt in relation to the scheme.

"The relevant time" has the same meaning as in s38E.

criminal offences and financial penalties (PA 2004 s58A to 58D inserted by PSA 2021 s107)

TPR's "bite", its enforcement powers, have been strengthened by the following criminal and increased civil sanctions:

- (i) up to seven years' imprisonment or a fine or both under s58A (Offence of avoidance of employer debt) and s58B (Offence of conduct risking accrued scheme benefits);
- (ii) a fine under s42A (Offence of failing to comply with a s 38 contribution notice);
- (iii) civil penalties up to a maximum of £1m (see also s88A) under s58C (Financial penalty for avoidance of employer debt), s58D (Financial penalty for conduct risking accrued scheme benefits) and s42B (Financial penalty for failure to comply with a section 38 contribution notice).

notifiable events (PA, s69A, in inserted by PSA 2021, s109)

Apart from the expanded moral hazard provisions, there are additional notification duties with criminal and increased civil penalties.

TPR's objectives in PA 2004, s5

- (a) to protect benefits under occupational pension schemes,
- (b) to protect benefits under personal pension schemes,
- (c) to reduce the risk of compensation being payable from the Pension Protection Fund.
- (cza) in relation to scheme funding only, to minimise any adverse impact on the sustainable growth of an employer,
- (ca) to maximise compliance with the automatic enrolment duties, and
- (d) to promote the good administration of work-based pension schemes.

TPR's policy on criminal powers given by the PSA 2021 and its consultation on how it will exercise them are intended to counter widespread concern that the increase of its powers will stifle normal corporate and business activity.

END