

Pensions Client Group

**The Pension Protection Fund and
Occupational Pension Schemes
(Miscellaneous Amendments)
Regulations 2010**

Consultation on draft regulations

October 2009

Contents

Foreword and consultation arrangements.....	3
Background.....	6
Commentary on the draft regulations.....	8
Annex A – the draft regulations.....	11

Foreword and consultation arrangements

Preface

1. The Government are seeking views on the enclosed draft of the *Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010*.

Who this consultation is aimed at

2. The Government welcome contributions from primarily the pension industry professionals, pension schemes, trustees, and industry and member representative organisations, but we would be interested in views from any source.

Subject of consultation

3. This consultation primarily concerns the Government's proposals to amend the Pension Protection Fund entry rules and other rules that apply to those schemes that have a partial Crown guarantee. The four sets of Regulations are respectively the Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005 (2005/277), the Pension Protection Fund (Entry Rules) Regulations 2005 (2005/590), the Occupational Pension Schemes (Levies) Regulations 2005 (2005/842) and the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 (2006/580).

Scope of consultation

4. This consultation applies to England, Wales and Scotland.

Duration of the consultation

5. The consultation period begins on 12 October 2009 and runs until 4 December 2009.

6. Your comments on any aspect of the draft Regulations would be welcomed.

This document is available on the Department's website at:

<http://www.dwp.gov.uk/consultations/2009/>

How to respond

7. Please send your consultation responses to:

By post:

Ian Garland
Department for Work and Pensions
7th Floor,
Caxton House

Tothill Street
London
SW1H 9NA

Tel: 020 7449 7412

Email: Ian.Garland@dwp.gsi.gov.uk

Please ensure your response reaches us by 4 December 2009.

8. When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled. We will acknowledge your response.

Queries about the content of this document

9. Any queries about the subject matter of this consultation should be made to Ian Garland at the above address.

Freedom of information

10. The information you send us may need to be passed to colleagues within the Department for Work and Pensions and published in a summary of responses received, and referred to in the published consultation report.

11. All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

12. If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Central Freedom of Information Team
Department for Work and Pensions,
The Adelphi,
1-11 John Adam Street,
London, WC2N 6HT

email: freedom-of-information-request@dwp.gsi.gov.uk

Please note that the Central FOI Team cannot advise or comment on this particular consultation exercise, only on Freedom of Information issues.

13. More information about the Freedom of Information Act can be found on the website of the [Ministry of Justice FoI](#) pages.

The consultation criteria

14. The consultation is being conducted in line with the Government Code of Practice on Consultation – [Government Code of Practice on Consultation](#). The seven consultation criteria are:

- **When to Consult.** Formal consultation should take place at a stage when there is scope to influence the outcome.
- **Duration of consultation exercises.** Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.
- **Clarity of scope and impact.** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
- **Accessibility of consultation exercises.** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.
- **The burden of consultation.** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- **Responsiveness of consultation exercises.** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- **Capacity to consult.** Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.

15. The Government Code of Practice on Consultation recommends a minimum 12-week consultation period for public consultations, unless there are good reasons for a limited consultation period. In this case the issue is narrow, specialised and of greatest interest to a specific type of pension scheme. Ministers have decided that an 8-week consultation should be undertaken.

Feedback on this consultation

16. We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Name: Roger Pugh
Address: DWP Consultation Coordinator,
Room 4F, Britannia House,
2, Ferensway, Hull HU2 8NF

Phone: 01482 609571
Fax: 01482 609658
Email: roger.pugh@dwp.gsi.gov.uk

17. In particular, please tell us if you feel that the consultation does not satisfy the consultation criteria. Please also make any suggestions as to how the process of consultation could be improved further.

18. If you have any requirements that we need to meet to enable you to comment, please let us know.

19. The responses to the consultation will be published in due course in a report on our consultation website that will summarise the responses and the action that we will take as a result of them. We will aim to publish this summary within three months of the consultation closing.

Background

20. These Regulations implement the European Commission's decision dated 11 February 2009 that the partial exemption of the BT Pension Scheme (BTPS) from payment of a levy to the Pension Protection Fund (PPF), arising from the Crown guarantee, constituted an incompatible State aid and must cease. The Government therefore propose bringing forward regulations to remove the exemption and hence avoid granting an incompatible State aid.

21. In 2006, following a complaint, the European Commission initiated a preliminary investigation on the Crown guarantee for BTPS's defined benefit liabilities, granted by the UK Government in 1984, at the time of BT's privatisation. Section 68(2) of the Telecommunications Act 1984 (as amended by the Communications Act 2003) provides that in circumstances where BT plc was being wound up, "the Secretary of State shall become liable on commencement of the winding up to discharge any outstanding liability of the successor company [i.e. BT plc] for the payment of pensions which vested in that company by virtue of Section 60 above". The guarantee can only be called upon if BT becomes insolvent and if there are not enough assets in its pension fund to finance the relevant employees' pension rights. There are differing legal views on the nature and extent of the guarantee – the BTPS may either have a partial guarantee or a full guarantee depending on the view taken.

22. The PPF was established by the Pensions Act 2004 (the 2004 Act) as a public corporation to protect members of eligible pension schemes by paying compensation to scheme members where the sponsoring employer becomes insolvent leaving their pension scheme under-funded. The cost of PPF compensation is financed through a pension protection levy on eligible schemes in addition to the residual assets of pension schemes transferring to the PPF. In addition, schemes eligible for the PPF pay an administration levy to meet the running costs of the PPF. The PPF broadly covers defined benefit occupational pension schemes and defined benefit elements of hybrid schemes. While it is the scheme that pays the levies to the PPF, it is one of

the overall pension costs which is supported by the sponsoring employer as part of the funding strategy.

23. Some schemes are not eligible for the PPF and consequently are not liable to pay pension protection levies. The Pension Protection Fund (Entry Rules) Regulations 2005 (“the Entry Rules Regulations”) describe the schemes which are not eligible schemes. These include unfunded public service schemes: schemes to which a Minister of the Crown has given a guarantee and public sector schemes providing pensions to local government employees.

24. Schemes with a partial Crown guarantee, that is, a guarantee covering only certain members, benefits or any particular part of a scheme are eligible schemes but will only be liable to pay the PPF levies in respect of that part of the scheme that does not have a Crown guarantee. The legislation, in the Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005 (“the Partially Guaranteed Schemes Regulations”), was introduced in 2005 and was in part intended to ensure that the PPF does not impose the pension protection levy on that part of the scheme which has the guarantee (the “secured” part of the scheme) and is therefore already protected. The part of the scheme without the guarantee is referred to as the “unsecured part” in those Regulations. The Occupational Pension Schemes (Levies) Regulations 2005 (the Levies Regulations) are also modified as they affect schemes with a partial guarantee, albeit in respect of the administration levy.

25. The exemption from all or part of the PPF levies for schemes with a guarantee does not normally create any problems for those schemes whose sponsoring employers do not as a rule operate as commercial undertakings in a competitive market. In November 2007 the European Commission decided to open a formal investigation into potential State aid issues arising from the BTPS’s Crown guarantee. The Commission’s investigation under EC Treaty State aid rules focused on the effects of a UK Crown guarantee for some of the pension liabilities of BT plc on EU telecommunications markets.

26. The Commission’s investigation considered whether the guarantee provided an advantage to BT (in particular by reducing the levy payable to the PPF), and therefore gave rise to an incompatible State aid. In their decision of 11 February 2009, which can be found at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-55-2007-WLAL-en-11.02.2009.pdf, the European Commission concluded that a UK Crown guarantee covering the pension liabilities of BT plc on the EU telecommunications markets was partially incompatible under EC Treaty State aid rules. The Commission did not call into question the safeguards for BT’s employees at the time of privatisation, introduced by the guarantee. However, the Commission concluded that the partial exemption from payment of a levy to the PPF since 2005 conferred an unfair competitive advantage to BT that constituted State aid. The Commission decided that such aid cannot be justified under EU rules because it merely dispensed BT from charges that its competitors have to pay. As a result of the Commission’s decision, the UK Government was asked to cease the incompatible aid.

27. The proposed Regulations are therefore made as a consequence of the Commission's decision and intended to ensure that the relevant sets of Regulations do not give rise to an incompatible State aid within the meaning of Article 87 of the EC Treaty. The intention is that the Regulations should come into force in the current tax year to enable the PPF to issue an invoice to the BTPS for the pension protection levy for 2009/10 and for the Pensions Regulator to issue an invoice for the administration levy for that financial year as well.

28. In order to reflect the fact that there are different legal views on the nature and extent of the Crown guarantee and therefore whether it is either a) not an eligible scheme and therefore not liable to pay the levies at all or b) a partially guaranteed scheme and therefore liable to pay the levies in respect of the unsecured part of the scheme, the Entry Rules Regulations, and the Partially Guaranteed Schemes Regulations and the Levies Regulations are to be amended. A scheme with a partial Crown guarantee is required to pay the administration levy only in respect of those members that are not covered by the guarantee. We consider that the European Commission's State aid decision also applies to the administration levy. It is therefore proposed to make changes to the Levies Regulations.

29. BT plc has brought an action against the European Commission seeking to annul the Commission's decision of 11 February [C(2009) 685]. This case will be heard in due course by the Court of First Instance. In the event of the Court of First Instance, or the European Court of Justice on appeal, annulling the Commission's original decision in relation to the BTPS, the PPF has the power to review any decision it takes pursuant to these draft Regulations to impose a full levy on the Scheme.

Commentary on the draft regulations

30. The following summary explains the purpose of each of the provisions:

Regulation 1

Regulation 1 contains the citation and commencement arrangements.

Regulation 2

Regulations 2 and 3(1) of the Partially Guaranteed Schemes Regulations modify Part 2 of the 2004 Act in relation to schemes with a partial guarantee, the effect of which is that a scheme with a partial Crown guarantee does not pay the full pension protection levy. In particular, regulation 3(2)(a) modifies section 131 of the 2004 Act so that the definition of "protected liabilities" includes only the liabilities of the unsecured part of the scheme. The effect of this modification is that a partially guaranteed scheme will not pay the full pension protection levy under section 175 of the 2004 Act.

Regulation 2(2) and (3) of these draft Regulations amends regulation 2(1) of the Partially Guaranteed Schemes Regulations with the effect that the modifications

contained in that regulation would not apply where it would give rise to incompatible State aid within the meaning of Article 87 of the EC Treaty. This means that schemes with a partial guarantee will have Part 2 of the 2004 Act applied to them as if they had no guarantee.

Regulation 2(4) amends the Partially Guaranteed Schemes Regulations so that section 175 of the 2004 Act is modified for schemes with a partial guarantee in such a way that only the assets of the unsecured part of the scheme are taken into account when determining the pension protection levy. This amendment is not made as a direct result of the European Commission's decision but is required so that in the event that the Partially Guaranteed Schemes Regulations do apply to a particular scheme, only the assets of the unsecured part of the scheme are taken into account by the PPF in determining the correct levy.

Regulation 3

Regulation 3(2) amends the PPF Entry Rules Regulations so that regulation 2(1)(d) of those Regulations is disapplied in the event that its application would give rise to incompatible State aid. The effect of this disapplication is that a scheme with a full guarantee becomes an eligible scheme where the exemption from the PPF levies gives rise to incompatible State aid within the meaning of Article 87 of the EC Treaty.

Regulation 3(3) amends regulation 21 of the Entry Rules Regulations so that the PPF must assume responsibility for a scheme even where it has not been eligible for the full 3 years prescribed in that regulation, but only in the event that the scheme becomes eligible by virtue of the disapplication of regulation 2(1)(d) of those Regulations by regulation 3(2) of these draft Regulations i.e. where it becomes an eligible scheme because the exemption from the PPF levies resulting from its ineligibility for the PPF amounts to an incompatible State aid. This addresses the potential situation where the employer of a scheme with a full guarantee goes into insolvency and where the scheme has become eligible for PPF compensation within 3 years of that insolvency. It ensures the scheme, which should always have been eligible and have paid the PPF levies, is treated as such for the purposes of PPF compensation.

Regulation 4

Regulation 4 amends the Occupational Pension Schemes (Levies) Regulations 2005 so that where a scheme becomes eligible part way through the year, again as a result of the disapplication of regulation 2(1)(d) of the Entry Rules Regulations, the PPF can impose an administration levy for the whole year and not for part of the year as required by section 181(5) of the 2004 Act. This is required because, provided the Regulations receive Parliamentary approval, the BTPS will be levied for 2009/10 near the end of the year and would, without the amendment, only pay a levy which is proportionate to the part of the year they had been eligible.

Regulation 4 also amends the Levies Regulations so that the modification of those Regulations for partially guaranteed schemes does not apply where it would give rise

to unlawful State aid. This ensures that the full administration levy is payable by schemes with a partial guarantee where partial payment of the levy would give rise to unlawful State aid.

Regulation 5

Regulation 5 amends the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 so that where a scheme becomes eligible part way through the year, again as a result of the disapplication of regulation 2(1A) of the Entry Rules Regulations, the PPF can impose a pension protection levy for the whole year and not for part of the year as required by section 181(5) of the 2004 Act. Again, this is required because, provided the Regulations receive Parliamentary approval, the BTPS will be levied for 2009/10 near the end of the year and would, without the amendment, only pay a levy which is proportionate to the part of the year they had been eligible.

Impact

31. As indicated above, these Regulations are being made in response to the European Commission's decision to ensure that commercial undertakings do not have an unfair competitive advantage. The changes proposed in these Regulations will not have an impact on the costs of businesses, charities or the voluntary sector unless they are commercial undertakings with a defined benefit scheme and a Crown guarantee, and a reduction in the PPF levies gives rise to an incompatible State aid.

Annex A – the draft regulations

STATUTORY INSTRUMENTS

2009 No. [Consultation draft]

PENSIONS

**The Pension Protection Fund and Occupational Pension Schemes
(Miscellaneous Amendments) Regulations 2010**

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 126(1)(b), 146(1), 181(5), 307(3), 315(2), (4) and (5) and 318(1) of the Pensions Act 2004(a).

The Secretary of State has consulted with such persons as he considers appropriate in accordance with section 317 of the Pensions Act 2004.

Citation and commencement

- 1.—(1) These Regulations may be cited as The Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010.
- (2) These Regulations come into force on [date to be inserted] 2010.

Amendment of the Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005

- 2.—(1) The Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005(b) are amended in accordance with this regulation.
 - (2) In regulation 1 (citation, commencement and interpretation)—
 - (a) at the end of the definition of “partially guaranteed scheme” omit “and”, and
 - (b) after the definition of “partially guaranteed scheme” insert—
 - ““the Treaty” means the Treaty establishing the European Community; and”.
 - (3) In regulation 2 (modification of Part 2 of the Act)—
 - (a) the provisions of regulation 2 become paragraph (1) of that regulation, and

(a) 2004 c.35. Section 318(1) is cited because of the meaning it gives to “prescribed” and “regulations”.
(b) S.I. 2005/277; there are no amendments to these Regulations.

(b) after paragraph (1) insert—

“(2) Paragraph (1) shall not apply where it would give rise to incompatible State aid within the meaning of Article 87 of the Treaty.”.

(4) In regulation 3 (application and effect), after paragraph (4) insert—

“(5) Section 175(2)(a)(i) (pension protection levies) of the Act applies as if, for the words “a scheme’s assets” there were substituted the words “the assets of the unsecured part of a scheme.”.

Amendment of the Pension Protection Fund (Entry Rules) Regulations 2005

3.—(1) The Pension Protection Fund (Entry Rules) Regulations 2005(c) are amended in accordance with this regulation.

(2) In regulation 2 (schemes which are not eligible schemes)—

(a) after paragraph (1) insert—

“(1A) Paragraph (1)(d) shall not apply where it would give rise to incompatible State aid within the meaning of Article 87 of the Treaty.”, and

(b) for paragraph (8) substitute—

“(8) In this regulation—

“PPF Ombudsman” has the meaning given in section 209 of the Act (the Ombudsman for the Board of the Pension Protection Fund); and

“the Treaty” means the Treaty establishing the European Community.”.

(3) In regulation 21 (refusal to assume responsibility – schemes which become eligible schemes) after paragraph (2), insert—

“(3) Paragraph (1)(a) shall not apply where regulation 2(1A) (schemes which are not eligible schemes) applies to a scheme.”.

Amendment of the Occupational Pension Schemes (Levies) Regulations 2005

4.—(1) The Occupational Pension Schemes (Levies) Regulations 2005(d) are amended in accordance with this regulation.

(2) In regulation 7 (schemes eligible for only part of the financial year), after paragraph (2) insert—

“(3) Where—

(a) a scheme is not an eligible scheme at the beginning of a financial year; and

(b) it becomes an eligible scheme during that year by virtue of regulation 2(1A) of the Pension Protection Fund (Entry Rules) Regulations 2005 (schemes which are not eligible schemes),

paragraph (1) shall not apply and so the full amount of the levy is payable.”.

(3) In regulation 16 (partially guaranteed schemes)—

(a) after paragraph (2) insert—

“(2A) Paragraph (1) shall not apply where it would give rise to incompatible State aid within the meaning of Article 87 of the Treaty.”, and

(b) for paragraph (3) substitute—

“(3) In this regulation—

“relevant public authority” has the meaning given in section 307(4) of the 2004 Act; and

“the Treaty” means the Treaty establishing the European Community.”.

(c) S.I. 2005/590, to which there are amendments not relevant to these Regulations.

(d) S.I. 2005/842, to which there are amendments not relevant to these Regulations.

Amendment of the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006

5.—(1) The Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006(e) are amended in accordance with this regulation.

(2) In regulation 20 (schemes that are eligible schemes for part of a financial year)—

(a) the provisions of regulation 20 become paragraph (1) of that regulation, and

(b) after paragraph (1), insert—

“(2) Where a scheme—

(a) is not an eligible scheme at the beginning of a financial year; and

(b) it becomes an eligible scheme during that year by virtue of regulation 2(1A) of the Pension Protection Fund (Entry Rules) Regulations 2005 (schemes which are not eligible schemes),

section 181(5) of the Act does not apply and so the full amount of the levy is payable.”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

Signed by authority of the Secretary of State for Work and Pensions

Minister of State,
Department for Work and Pensions

(e) S.I. 2006/580, to which there are amendments not relevant to these Regulations.