

**Pension Protection and
Stewardship Division**

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

Government response to consultation on
draft regulations

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Introduction

1. Between 12 October 2009 and 4 December 2009, the Department for Work and Pensions (“DWP”) undertook a consultation exercise on the draft Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010 (“the draft Regulations”). The draft Regulations were made available on the DWP website.
2. DWP received four responses to the consultation. A list of respondents is included at Annex A. These draft Regulations would principally affect one scheme – the BT Pension Scheme¹. Officials of the Department met Lovells, the Trustee’s solicitor, on two occasions during the consultation period to discuss the Regulations. Linklaters, BT plc’s solicitor, were also present at these meetings as were officials from the Department for Business, Innovation and Skills who attended to deal with issues on State aid. The Department is grateful for all of the written contributions received and for the helpful discussions with Lovells and Linklaters.
3. The final Regulations will be laid before Parliament and will shortly come into force, subject to Parliamentary approval.
4. This document sets out the main points made by respondents and provides the Government’s response. The response sets out the Government’s view on the legal effect of the Regulations, where relevant, but it should not be taken as an authoritative interpretation of the law, which only the Court can determine. Separately, the response should not be relied upon as legal advice.
5. The final Regulations and accompanying explanatory memorandum will be available on the Office of Public Sector Information’s website at:
<http://www.opsi.gov.uk/si/si-2010-index>
6. This document is available on the DWP website at:
<http://www.dwp.gov.uk/consultations/2010/>
7. A paper copy of this document can be obtained from:

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¹ Either because it has a full Crown Guarantee or it has a partial guarantee falling within the meaning of the Pension Protection Fund (Partially Guaranteed Schemes) Regulations 2005.

Responses to the consultation on the draft Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010 and the Government's response

8. There were four responses to the consultation on the draft Regulations. Comments on the draft Regulations and the Government's responses follow below.

State aid and uncertainty for schemes

9. The Association of Pension Lawyers (APL) and rpm and the Railways Pension Trustee Company Ltd expressed concern that the Regulations would create uncertainty for schemes with full or partial state guarantees. In particular, in the APL's view, the absence of a European Commission decision for schemes other than BT would mean that they would not know if there was incompatible State aid and an effect on their PPF levy.

10. The Department is not aware of any other pension scheme, other than the BT Pension Scheme, that has a Crown guarantee and could be affected by these Regulations. There are a number of schemes with a Crown guarantee which, by virtue of that guarantee, are not eligible for PPF compensation and which do not therefore pay the PPF levy. But, as explained in the consultation document, 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.

11. The Commission decided in the case of BT that aid given through the non-payment of the PPF levy could not be justified under EU rules because it relieved the company from charges that its competitors have to pay². The question of (incompatible) State aid would therefore only arise where the sponsor is a commercial business operating in a competitive market and no PPF levy is paid. The schemes that are ineligible for the PPF under regulation 2(1)(d) of the Pension Protection Fund (Entry Rules) Regulations 2005 (590/2005) are by and large public sector schemes whose employers do not operate in a commercial environment. They are backed by a guarantee, present no risk and consequently do not pay the PPF levy. The PPF has no plans to levy these schemes as a result of the Commission's decision because issues of competitive advantage and State aid do not arise.

Regulation 1 (Citation and commencement)

12. There were no comments on this paragraph.

² The decision can be found at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-55-2007-WLAL-en-11.02.2009.pdf,

Regulation 2 (Amendment of the Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005

13. In the original draft of the Regulations, regulation 2(2) and (3) of the draft Regulations amended 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 107 of the Treaty on the Functioning of the European Union³. This meant that schemes in such circumstances would not be recognised as having a secured and an unsecured part with a partial guarantee would have Part 2 of the Pensions Act 2004 ("the 2004 Act") applied to them as if they had no guarantee. Following responses received to the consultation such schemes will now be treated as being two distinct eligible schemes where the modifications contained in regulation 2(1) of the Partially Guaranteed Schemes Regulations would give rise to incompatible State aid, as explained at paragraphs 24 to 27 below.

14. Regulation 2(5) 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 modifications in Part 2 of the Act do apply to (i.e. where there is no State aid) 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.

Appropriate Trigger for disapplying the eligibility exemptions

15. In their responses to the consultation, the BT Pension Scheme (BTPS) and BT plc were of the view that the trigger point for applying the Regulations based on the wording in the Regulations of "incompatible State aid" was unclear. Both responses suggested that the Regulations should be re-drafted so that the trigger should be defined by reference to a decision of the European Commission.

16. The Government's starting point is the legal principle that the Commission has sole competence to determine compatibility of aid. Therefore the reference to "incompatible" aid in the draft Regulations must have its foundations in a Commission decision. In the case of the BTPS, it is based on the reasoning given in the Commission's Decision of 11th February regarding State aid case N° C 55/2007 which appeared in Official Journal L242 of 15 September 2009, page 21. The Government's second assumption is that although the Commission decision in respect of BT applies only to BT, the Commission will expect the UK Government to apply the reasoning to schemes in comparable legal and factual situations. The reasoning set out in paragraphs 78 and 79 of the Commission's decision in respect of

³ References in the Regulations to article 87 of the EC Treaty have been changed to references to article 107 of the Treaty on the Functioning of the European Union since the coming into force of that Treaty, which incorporates the EC Treaty.

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BT as to why there would be aid is capable of application to the circumstances of any other scheme as is the compatibility assessment set out in paragraphs 92 following.

17. Therefore, the PPF, if faced with a scheme and employer in similar legal and factual situations to BT, might consider that these Regulations should apply. It would, however, be open to the scheme and relevant employer to put arguments forward as to why the Regulations should not apply. For that reason the Government does not think it appropriate that the trigger for application of the Regulations should be linked to a specific Commission decision.

Repayment

18. BT plc believes the European Commission's decision is incorrect and has applied to the European Court of First Instance (CFI) to annul the decision. Both the company and the scheme expressed concerns in their consultation responses about the applicability of the Regulations if the Commission's decision on the incompatibility of the State aid in the case of BT is overturned and in particular whether it would be clear that any levy paid should be returned, with interest, and what the mechanism would be for repayment of any levy.

19. BTPS and BT plc were concerned that the scheme's right to seek a review of a PPF decision has to be exercised within 28 days of a decision, and that absent any provision enabling the scheme to request a review, the scheme would have to rely on the PPF's discretion either to review its own decision or to allow an application for review out of time.⁴ As the power to review is not a duty but is only discretionary, BTPS and BT plc believe it cannot be relied upon as a mechanism to ensure repayment of any overpaid levies.

The Department's view

20. In the event of a CFI judgment annulling the Commission's decision the Department considers that the effect will be that there is no incompatible State aid. The decision would have effect as a statement of the law as it has always been, that is, back to the date the law in respect of levies came into force. The effect of that decision would be that, assuming that the BT scheme is a partially guaranteed or fully guaranteed scheme, the partial or the full pension protection levy would never have been properly payable. The PPF would therefore repay the overpaid levies. The Department does not, therefore, consider it necessary to create either a specific right of review outside of the usual 28 days for reviewing decisions for schemes, or for a specific repayment mechanism in the event that a decision giving rise to the application of the Regulations is overturned by a Court.

21. In the very unlikely event that the PPF did not repay what by virtue of the Court's decision had become overpaid levies a claim in restitution would lie for the

⁴ The Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005

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trustee to seek to recover the overpaid levy, and interest could be awarded as part of such a claim. Moreover, in the unlikely event that the PPF did not repay the overpaid sums, the Trustee could request a review of the levy invoices and if necessary pursue such a review to the PPF Ombudsman. Any decision of the PPF not to exercise its discretion to review the levies outside of the 28 day period might also be the subject of an application for judicial review. The power to pay compensation on a review would allow for the payment of a sum representing compensation for being kept out of the money, i.e. in effect interest.

Eligibility for PPF Protection

22. In their response, BTPS raised the concern that regulation 2(3)(b) of the draft Regulations could be applied disjunctively. The Department understands that to mean that regulation 2(3)(b) would only disapply the relevant modification of Part 2 of the 2004 Act, contained in regulation 3 of the Partially Guaranteed Schemes Regulations 2005, which gave rise to incompatible State aid and not the whole of Part 2. If the scheme was correct the Regulations would not have the intended effect of disapplying all the modifications of Part 2 of the 2004 Act in respect of partially guaranteed schemes where only one aspect of that modification (in the case of BTPS the partial payment of the PPF levy) would give rise to incompatible State aid.

The Department's view

23. The Department is satisfied that regulation 2(3)(b) has the intended effect that none of the modifications of Part 2 of the 2004 Act would apply where any one aspect of those modifications gave rise to incompatible State aid. The Department does not accept that only the modification of Part 2 which gives rise to incompatible State aid should be disappplied, as that would not be a natural reading of the provision.

Eligibility for PPF Protection – secured and unsecured parts of schemes with partial Crown guarantees

24. BTPS raised concerns that in removing any distinction between the secured and unsecured parts of schemes, the Regulations went further than required by the Commission decision. In its response the scheme argued that the proposed Regulations could prejudice the benefits of relevant scheme members. The current applicable legislation, where a scheme has the benefit of a partial Crown guarantee, within the meaning of the Partially Guaranteed Schemes Regulations, treats the secured and unsecured parts of the scheme separately. The consultation draft of the Regulations would, in the view of the scheme, make the scheme eligible for PPF protection as one scheme and remove the distinction between the “secured” and “unsecured” members. They expressed concerns that the removal of the distinction between the separate parts of a scheme would have potential consequences in terms of ensuring that any benefit from the guarantee could be apportioned to those scheme members to which it is intended, and not diluted across all members, and that this went beyond what was required by the Commission's decision.

The Department's view

25. The Department has concluded that it is appropriate to retain a distinction between the secured and unsecured parts of a partially guaranteed scheme in these Regulations as removing that distinction is not a necessary part of the Commission's decision. This has been achieved by treating such parts of a scheme as distinct eligible schemes for all purposes under Part 2 of the 2004 Act, to both of which Part 2 of the Act will apply. See regulations 2(3) and 2(4).

26. However, the issues surrounding the guarantee in respect of the BTPS are complex and the question of whether BTPS itself is a partially guaranteed scheme to which the Partially Guaranteed Schemes Regulations apply is not decided. The proceedings concerning the nature and extent of the Crown Guarantee given in respect of BTPS may impact on the issue.

27. The Department will keep the Partially Guaranteed Schemes Regulations under review.

Regulation 3 (amendment of the PPF Entry Rules Regulations so that those Regulations are disapplied in the event that the application would give rise to incompatible State aid)

28. Regulation 3(2) amends the PPF Entry Rules Regulations so that a scheme with a full guarantee becomes an eligible scheme where non eligibility would give rise to incompatible State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union.

29. 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 three years prescribed in that regulation, but where the scheme became eligible because an exemption from PPF levies would be an incompatible State aid. This addresses the potential situation where the employer of a scheme with a full guarantee, or a scheme with a partial guarantee where the two parts of the scheme becomes separate eligible schemes by virtue of regulation 2A of the Partially guaranteed Schemes Regulations, goes into insolvency and where the scheme has become eligible for consideration for PPF entry within three 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. The inclusion of a scheme with a partial guarantee that is treated as two separate eligible schemes has been inserted post consultation and is consequential on treating such a scheme as having separate parts which are both eligible schemes.

30. No consultation responses were received in relation to this regulation.

PPF Assessment Period

31. The Association of Pension Lawyers (APL) also raised a question of whether, because of the existence of the Crown guarantee, it was necessary for the scheme

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(or guaranteed part) to go into a PPF assessment period. This was based on the assumption by the APL that the guarantee would provide that, on the insolvency of the sponsor employer, the scheme (or guaranteed part) would be fully funded. As explained in paragraph 21 of the consultation document, there are differing legal views on the nature and extent of the guarantee given in respect of the BTPS. The trustee of that scheme is seeking a Court declaration on the scope of the guarantee and there are a range of possible outcomes. How and in respect of what the guarantee would operate at such time as it becomes payable is not known and cannot therefore be reflected in these regulations. As stated above, the Partially Guaranteed Schemes Regulations will be kept under review and they may need to be revisited in the future.

Regulation 4

32. Regulation 4 is a new regulation which was not included in the consultation draft of the Regulations. It makes an amendment to the Pension Protection Fund (Reviewable Matters) Regulations 2005 (the Reviewable Matters Regulations) which is consequential to the decision to treat the secured and unsecured parts of a scheme as separate eligible schemes for the purposes of Part 2 of the Pensions Act 2004.

33. Under schedule 9 of the 2004 Act, failure by the Board of the PPF to obtain an actuarial valuation of the scheme and/or its assets and liabilities are reviewable matters. The approval or failure to approve a valuation of a scheme, and/or its assets and protected liabilities are also reviewable matters. Regulation 3 of the Reviewable Matters Regulations 2005 modifies schedule 9 so that these are only reviewable matters where there is such a failure in respect of the unsecured part of the scheme. Regulation 4 of these Regulations operates so that in the case of a partially guaranteed scheme to which regulation 2A of the partially guaranteed schemes regulations apply, that is, where there is incompatible state aid and as a result the scheme is treated as having two separate parts both of which are eligible schemes for the purposes of Part 2 of the 2004 Act, regulation 3 of the Reviewable Matters Regulations is disapplied. The effect is that the approval by the Board, or a failure to approve or obtain a valuation in respect of the secured part of a scheme, are also reviewable matters.

PPF Administration Levy

34. Regulation 4 in the consultation draft of the Regulations was intended to provide that where a scheme became eligible part way through the year, as a result of the disapplication of regulation 2(1)(d) of the PPF Entry Rules Regulation, the Secretary of State could impose an administration levy under s.117 of the 2004 Act for the whole year. As regulations made under this power require an affirmative resolution of Parliament, it is proposed to take this change forward within a separate set of regulations.

35. No comments were received on this regulation in the consultation responses.

Regulation 5

36. Regulation 5 is a new regulation which was not included in the consultation draft of the Regulations. It makes an amendment to the Pension Protection Fund (Provision of Information) Regulations 2005 (the Provision of Information Regulations), which is consequential to the decision to treat the secured and unsecured parts of a scheme as separate eligible schemes for the purposes of Part 2 of the 2004 Act.

37. Regulation 4 of the Provision of Information Regulations provides that when schemes are in an assessment period certain information set out in Schedule 2 to those Regulations must be provided by the trustees or managers of an eligible scheme to the members of the scheme. Schedule 2 provides that in respect of a partially guaranteed scheme certain information only has to be provided to the members of the unsecured part of the scheme. Regulation 6 of these Regulations amends Schedule 2 so that the modifications in Schedule 2 that apply to partially guaranteed schemes do not apply to a scheme to which regulation 2A of the Partially Guaranteed Schemes Regulations applies, that is, where there is incompatible state aid and the scheme is treated as having two separate parts both of which are eligible schemes for the purposes of Part 2 of the 2004 Act. The effect of this amendment is that the trustees or managers of a scheme will have to provide the relevant information to the members of the secured part of such a scheme as well as to the unsecured part.

Regulation 6

38. Like regulations 4 and 5, regulation 6 is a new regulation which makes amendments which are consequential to the decision to treat the secured and unsecured parts of a scheme as separate eligible schemes for the purposes of Part 2 of the 2004 Act.

39. Regulation 6 amends the Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendment) Regulations 2005 (the Fraud Compensation Regulations).

40. Regulation 5 of the Fraud Compensation Regulations is amended so that members of the secured part of a partially guaranteed scheme falling within regulation 2A of the Partially Guaranteed Schemes Regulations can make an application for a fraud compensation payment. Without the amendment only members of the unsecured part could make such an application.

41. Regulation 7 of the Fraud Compensation Regulations sets out the basis on which fraud compensation will be provided and paragraph 5(b) provides that in the case of the unsecured part of a partially guaranteed scheme, only the assets of that unsecured part will be relevant for the calculation. Since a scheme to which regulation 2A of the Partially Guaranteed Schemes Regulations applies will be

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treated as two separate eligible schemes to retain paragraph 5(b) is unnecessary in such a case.

42. Regulation 11 of the Fraud Compensation Regulations modifies most of the fraud compensation provisions of Part 2 of the 2004 Act as they apply to partially guaranteed schemes, the effect of which is that they do not apply to the secured part of such schemes. Regulation 11 is amended so that those modifications do not apply to a scheme to which regulation 2A of the Partially Guaranteed Schemes Regulations applies as such schemes will be treated by that regulation as having two separate eligible parts, to both of which the fraud compensation provisions should apply.

Regulation 7

43. Regulation 7 is a new regulation which, again, makes amendments which are consequential to the decision to treat the secured and unsecured parts of a scheme as separate eligible schemes for the purposes of Part 2 of the 2004 Act.

44. Regulation 7 amends the Occupational Pension Schemes (Fraud Compensation Levy) Regulations 2006 so that those Regulations apply to both the secured and unsecured parts of a partially guaranteed scheme, where they are treated as separate eligible schemes by virtue of regulation 2A of the Partially Guaranteed Schemes Regulations. Without the amendment, only the unsecured part of such a scheme as an eligible scheme could have the provisions in the Fraud Compensation Levy Regulations applied to it, meaning no levy would be payable in respect of the secured part, as a separate eligible scheme.

Regulation 8

45. Regulation 8 was regulation 5 in the consultation draft of the Regulations. Regulation 8 ensures that, where a scheme becomes eligible part-way through the year, it would ensure that the PPF can impose a pension protection levy for the whole year and not a part year as required by section 181(5) of the 2004 Act. The Regulation has been amended following the consultation so that the full pension protection levy can be imposed on a scheme that becomes eligible by virtue of either the disapplication of regulation 2(1)(d) of the PPF Entry Rules Regulations or by virtue of regulation 2A of the Partially Guaranteed Schemes Regulations.

46. No comments were received on regulation 5 in the consultation responses.

Thanks

47. We are most grateful to the respondents who took the time to comment on the consultation document.

Annex A –

List of respondents to the consultation

The Association of Pension Lawyers

The BT Pension Scheme

BT plc

rpm and the Railways Pension Trustee Company Ltd