Introduction

The new Corporate Insolvency and Governance Bill (the Bill) has been introduced into Parliament and proposes significant changes to insolvency law, including:

- that companies will be able to trigger a standalone moratorium on enforcement actions; and
- the introduction of the “restructuring plan” which will be a new mechanism for companies to compromise their obligations to creditors/members.

In addition, the Bill proposes to introduce temporary changes which are intended to provide a measure of protection to companies during the COVID-19 pandemic. For example, the Bill includes a prohibition on winding up petitions (WUPs) being presented by any creditor on or after 27 April 2020 on the basis of a statutory demand served from and including 1 March to one month after the Bill comes into force (expected sometime at the end of June or July).

In this briefing, we provide some high-level thoughts on the key pensions implications of each of the: (i) restructuring plan; (ii) the moratorium; and (iii) the temporary restrictions on WUPs.

Restructuring plan

In recent years, we have seen companies in financial distress using insolvency procedures (such as schemes of arrangements and company voluntary arrangements (CVA)) to make proposals to creditors to compromise existing obligations.

Defined benefit pension schemes can be a significant creditor of companies. The restructuring plan offers a potentially more flexible option for companies that sponsor defined benefit pension schemes to compromise their obligations to creditors and, potentially, to the pension scheme itself:

Voting requirements: The restructuring plan must be approved by 75 per cent. by value in each class of creditors/members (subject to cross class “cram down” – see below). Unlike schemes of arrangements/CVAs, there are no requirements for majorities: (i) in the number of voters; or (ii) amongst unconnected voters. The voting rules therefore allow for the possibility that the pension scheme vote could be used to offset dissenting votes even where the pension scheme is connected with the company. This is in contrast to CVAs, where the impact of the pension scheme’s vote is dependent on the accident of how the trustee arrangements are structured. The voting requirements of the restructuring plan could therefore increase the leverage of the pension scheme in negotiations.

For pension schemes, it will also be important to understand who exercises the vote in a restructuring plan. It is not currently proposed that the restructuring plan will be an “insolvency event” which may potentially trigger a “PPF assessment period”. The PPF will therefore not exercise the vote of the pension scheme trustee on a restructuring plan proposal (in contrast with, for example, a CVA proposal where the CVA triggers a PPF assessment period).

In practice, we expect that a trustee would not exercise its vote without consulting with the PPF and the Pensions Regulator extensively beforehand. However, the trustee (rather than the PPF) voting in the restructuring plan may mean that the scheme is more likely to vote in favour of the plan. The trustee will often have a greater interest in the plan succeeding than the PPF, which has wider policy aims such as not setting market precedents in how it votes rather than simply focusing on what is best for the members of the particular pension scheme in question.

We would note that, in parliamentary debate on the Bill, some peers in the House of Lords called for the restructuring plan to trigger a PPF assessment period to give the PPF a greater role in a company’s insolvency proceedings. The restructuring plan could, therefore, be
included as an “insolvency event” via a later statutory instrument. As noted above, however, this does not necessarily equate to greater protection for the members of the particular pension scheme.

There are further advantages for companies/trustees in the restructuring plan not triggering PPF assessment period in that it would make scheme administration easier. For example, pension schemes do not need to consider whether pension scheme benefits need to be reduced during the restructuring plan as they would during any PPF assessment and deficit repair contributions would not be suspended.

Cram down: Dissenting classes may also be ‘crammed down’ (ie the court may sanction the plan despite there being dissenting classes) provided that:

- no members of the dissenting class would be worse off than in the most likely alternative scenario (in the court’s view) if the plan is not sanctioned (the relevant alternative); and

- the plan is agreed by at least 75 per cent. by value of a class of creditor/members who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.

If the pensions vote is being used to cram down another class of creditors, the conditions for the cram down mean that there may be an advantage in a pension scheme being categorised within a smaller class for the purposes of fulfilling the second condition. In addition, the value to the company of the pension scheme’s vote (and therefore the pension scheme’s leverage to extract concessions from the employer) may be significantly increased where the pension scheme’s vote is required to cram down dissenting voters.

Compromising pension obligations: There also seems to be the possibility that the restructuring plan could be used to compromise company obligations to pension schemes (including via a cram down without the scheme’s consent). This would require that the pension scheme’s position would be “no worse” under the restructuring plan than under the relevant alternative (which may be another insolvency process, such as administration).

If the compromise were done with the trustee’s consent, it would raise a number of issues:

- Where the PPF votes in a CVA, it has a number of onerous conditions that a company must fulfil in terms of mitigation for the pension scheme before the PPF will vote in favour. However, if it is the trustee and not the PPF which has the vote, might that fact make the PPF and the Pensions Regulator compromise conditions less relevant than they are in an CVA? This would not necessarily be detrimental to the pension scheme if it

enabled a different type of deal to be done where insolvency was the only alternative.

- Pension schemes may cease to be eligible for PPF entry where the trustee of a scheme enters into a legally enforceable agreement which reduces any section 75 debt. Compromises under a scheme of arrangement are currently explicitly exempt from this rule, but it remains to be seen whether compromises under a restructuring plan will also be made exempt by amendment to the PPF Entry Rules. It might also not be possible to trigger a PPF assessment period (because the restructuring plan is not an insolvency event). Unless these issues were addressed, a trustee would only vote in favour of a restructuring plan: (i) which proposes to compromise obligations to a pension scheme, where the scheme was fully funded on a PPF basis; or (ii) where an alternative restructuring mechanism for compromising obligations to the pension scheme was used alongside the restructuring plan – which in turn would require PPF and Pensions Regulator involvement.

- Any attempt to compromise a company’s obligations to a pension scheme (even with the trustee’s consent) raises issues of the Pensions Regulator potentially seeking to use its moral hazard powers against the company/trustee. In addition, when the Pension Schemes Bill becomes law, there is also the possibility of criminal sanctions for companies and directors (see our previous blog post discussing the new criminal sanctions here). However, the fact that the restructuring plan has to be sanctioned by the court should make it difficult for the Pensions Regulator to argue that it is reasonable to attach criminal or civil liability specifically to the implementation of the restructuring plan.

If the compromise were done without the trustee’s consent (ie if the scheme were “crammed down”) then, alongside the moral hazard/criminal risks set out above, there remains the question of whether the court would refuse to sanction a restructuring plan on the basis that it would not be just and equitable to compromise the company’s obligations to the pension scheme. This would seem likely where the proposed compromise would mean the scheme ceases to be eligible for PPF entry if it does not have sufficient assets to cover its PPF liabilities.

Moratorium

The moratorium protects companies from creditor action by granting a “payment holiday” for “pre-moratorium debts”, which are debts due prior to the moratorium coming into force or debts which become due during the moratorium if they relate to obligations incurred pre-moratorium. Some pre-moratorium debts are excluded from the payment holiday (for example, debts or other liabilities which arise under a contract or other instrument involving financial services, such as bank lending).

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The Corporate Insolvency and Governance Bill – a pensions perspective

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For pension schemes, the impact of the moratorium does not seem to have been well thought through and significant issues arise:

**Are pensions payments subject to the moratorium?**

Given the aims of the moratorium, it might be expected that deficit repair contributions (DRCs) would not be payable during a moratorium. However, the moratorium, as currently framed in the Bill, does not apply to a wide range of financial products and it would, conversely, also seem inconsistent with general policy to have the pension scheme put at a disadvantage compared with lenders.

Unfortunately, the Bill is not completely clear on whether DRCs are payable during the moratorium.

Section A18(3) of the Bill states that “wages or salary arising under a contract of employment” are excluded from the definition of pre-moratorium debts for which a company has a payment holiday during a moratorium. Section A18(7) states that “wages or salary” includes “a contribution to an occupational pension scheme”.

It is unclear, however, whether “a contribution to an occupational pension scheme”: (i) is limited only to contributions in respect of the future accrual of benefits due to active service; or (ii) also includes DRCs payable pursuant to a schedule of contributions (or, indeed, any section 75 debts and moral hazard liability imposed by the Pensions Regulator).

The narrower view seems to us to be the correct interpretation as it is the more natural reading of “wages or salary”. It is also more consistent with some of the explanatory notes which accompany the legislation. However, this would put pension schemes at a significant disadvantage compared with other financial creditors, particularly when the “super priority” position is taken into account.

**Super priority**

If the company enters into administration or liquidation within 12 weeks from the end of the moratorium, pre-moratorium debts which are not subject to a payment holiday have “super priority” and rank ahead of expenses of an administration and preferential debts and unsecured creditors in a liquidation or administration.

If unpaid DRCs and other payments to pension schemes such as section 75 debts are caught by the payment holiday, then significant creditors (eg creditors in respect of unsecured accelerated financial debt) could gain super priority over the pension scheme whereas, in a normal insolvency process, they would rank alongside the pension scheme’s claims.

**Temporary restrictions on winding-up petitions**

If DRCs are not paid on their due date, a pension scheme may enforce that obligation as a debt. The trustees will have the usual remedies of an unsecured creditor – the most significant of which is seeking to wind up the sponsoring employer.

Because of the temporary restrictions on issuing WUPs, pension schemes will lose key leverage in their negotiations with a sponsoring employer in the near term. This is the case even though failure to pay DRCs may have other consequence, such as triggering a scheme wind-up under the scheme’s rules.

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