



Law Society
of Scotland

Consultation Response

The draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017

May 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Pensions Law Sub-committee welcomes the opportunity to consider and respond to the Department for Work and Pensions' consultation on the draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017.¹ The Sub-committee has the following comments to put forward for consideration.

General Comments

The proposed deferred debt arrangement option may provide some relief to a limited number of employers but the circumstances are limited and there will be additional costs in meeting the complicated conditions.

The following detailed comments assume that the proposals are to be implemented but we would suggest that you consider the simpler option of amending the multi- employer debt provisions so that ceasing to employ active members does not trigger employer debt. This option would mean that employers are treated in a way that is consistent with the treatment of employers in multi-employer schemes (where, at the point of cessation, no other employer is employing active members) as well as the position that applies in single employer schemes. Legislation is already in place to prevent employers abandoning, seeking to abandon or avoiding liabilities in those types of schemes. Deferral would therefore occur in all cases unless a particular employer decided to pay its debt in full.

¹ <https://www.gov.uk/government/consultations/the-draft-occupational-pension-schemes-employer-debt-amendment-regulations-2017>

Response to questions

Q1. We would welcome your views on the deferred debt arrangement proposal. In particular, will it be helpful to employers of non-associated multi-employer schemes in managing an employer debt when they cease to employ an active member?

We support the proposal to introduce a deferred debt arrangement. It should allow employers to defer their scheme debt without having a negative effect on scheme funding and therefore, overall, represents a positive change.

However, we consider that some minor improvements to the detail of the proposal should be considered. In particular, we consider that it would be preferable to allow employers to enter into or end a deferred debt arrangement without the need for trustee consent, provided that certain conditions are met.

It would also be helpful if some guidance could be provided to explain how the deferred debt arrangements would operate in practice.

Q2. Will the proposed conditions to enter into a deferred debt arrangement work in practice for the employer and the trustees and managers of the scheme?

As noted above, we would favour the removal of the requirement for trustee consent set out in regulation 6F(1)(c) and instead allow employers to enter into, or leave, deferred debt arrangements as long as objective conditions are met. This should give employers both the flexibility and certainty to ensure that the new arrangements are used and can operate efficiently in practice.

Q3. Do you envisage any difficulties in the practical operation of the deferred debt arrangement?

In practical terms we think that the deferred debt arrangement should operate reasonably smoothly.

However, we consider that there are a number of drafting difficulties in relation to the interaction between the definition of “deferred employer” and the new regulation 6F requires amendment to allow the arrangements to operate as intended. For example, regulation 6F(1)(b) stipulates that an employer must be a deferred employer in relation to whom an employment cessation event has occurred before a deferred debt arrangement can take effect; yet the definition of “deferred employer” required the employer to be participating in a deferred debt arrangement in order to be deemed a deferred employer.

Q4. Do you agree with the list of circumstances in which the deferred debt arrangement would end, and can you identify any other circumstances in which it will end?

As noted above, employers are only likely to use the deferred debt arrangement mechanism if they can exercise sufficient control also in terms of termination: we would therefore favour removing the requirement for trustee consent.

Q5. The deferred debt arrangement is available to employers who have entered into a period of grace. Should the deferred debt arrangement be available to employers who have already used one of the other arrangements for managing their employer debt?

It is not clear to us why an employer who had entered a different agreement for managing employer debt would wish to enter a deferred debt arrangement.

Q6. i) Will this amendment work in practice where an organisation's restructuring, is limited to changing its status and are there any further situations it should cover? ii) Are any changes needed to regulations 6ZA and 6ZB of the Employer Debt Regulations to provide for a restructuring where the receiving employer is the new legal status of the exiting employer?

We do not have any comments on this question.

Q7. i) Is the funding test appropriate for the deferred debt arrangement? ii) Are any further changes needed to the test to ensure it works in practice? iii) Are there any circumstances in which it would be necessary?

We do not consider that the funding test is appropriate for the deferred debt arrangement. We note that the test would not be applied if the deferred debt arrangement were not to be entered into. Furthermore, if an employer chooses to enter a deferred debt arrangement, it will remain bound by its original funding obligations and therefore imposing the funding test merely adds an additional condition with no obvious benefit.

Q8. i) Does this provision adequately address the problems schemes have faced in calculating an employer debt in relation to more than one employment-cessation event? ii) Is this provision a fair way to attribute liabilities to an employer who has undergone two sequential employment-cessation events? iii) Does there need to be any related assessment of the scheme's funding position in relation to it? iv) Does this provision pose any risk to the funding of pension schemes and members' pensions?

We consider that the legislation should deal specifically with employers who have undergone more than one employment-cessation event.

Q9. Will a three month period allow sufficient time for both employers and trustees to process a period of grace application?

A three month period should allow sufficient time for both employers and trustees to process a period of grace application but extensions should be allowed where this is justified by particular circumstances.

Q10. i) Will the arrangements enabling a deferred debt arrangement to follow on from a period of grace arrangement work in practice? ii) Are any further changes needed to facilitate this?

We do not think that the arrangements as currently drafted would work in practice. This is because the new provisions are based on the assumption that an employment cessation event occurs when a scheme becomes frozen but this is incorrect.

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