# EXPLANATORY MEMORANDUM TO

# THE PENSION PROTECTION FUND AND OCCUPATIONAL PENSION SCHEMES (MISCELLANEOUS AMENDMENTS) REGULATIONS 2010

## 2010 No. 196

**1.** This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

## 2. Purpose of the instrument

In the main this instrument implements the European Commission's decision dated 11 February 2009 regarding State aid case N° C 55/2007, that the exemption from the payment of a levy to the Pension Protection Fund (PPF) corresponding to the pension liabilities covered by a Crown guarantee constitutes incompatible State aid in respect of the BT Pension Scheme.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

## 4. Legislative Context

These Regulations are being made as a consequence of the European Commission's decision. They remove an exemption from the payment of the PPF levy where it gives rise to incompatible State aid. The main changes in these Regulations amend The Pension Protection Fund (Entry Rules) Regulations 2005, The Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005 and The Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006. The relevant provisions in the above Regulations are disapplied where they would give rise to State aid that is incompatible with the internal market within the meaning of Article 107 of the Treaty on the Functioning of the European Union (the Lisbon Treaty). Article 107 is the re-numbered Article 87 of the Treaty on European Union and Establishing the European Community dealing with assistance from a public body, or publicly-funded body, given to commercial undertakings on a discretionary basis, with the potential to distort competition and affect trade between member states of the European Union.

## 5. Territorial Extent and Application

This instrument applies to Great Britain. Corresponding provisions will be made in Northern Ireland.

## 6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

- ***What is being done and why***

7.1 Most defined-benefit occupational pension schemes are eligible for the Pension Protection Fund which pays compensation to members of those schemes where the employer becomes insolvent leaving the scheme underfunded. Certain levies are payable by such schemes which in part pay for the compensation the PPF pays to scheme members and the administration of the PPF. A limited number of schemes have the benefit of a Crown guarantee which means that, where a scheme has an insolvent employer and becomes underfunded, the Government will meet the liabilities of the scheme or the employer in respect of the whole or part of the scheme. Where such a guarantee has been given, that scheme will only pay levies in respect of the liabilities which the guarantee does not cover and compensation will only be paid by the PPF in respect of that part.

7.2 Schemes which have a Crown guarantee given in relation to a particular part of the scheme, certain members or certain benefits, are eligible schemes and are known as "partially guaranteed schemes". The part of the scheme that the guarantee does not cover is referred to as the "unsecured part" in the relevant regulations. Schemes which, by contrast, have the benefit of a full crown guarantee – meaning there is no part, members or benefits which do not have the benefit of the guarantee – are not eligible schemes and no levy is payable at all in respect of such schemes.

7.3 The European Commission's decision dated 11 February 2009 ruled that the exemption of the BT Pension Scheme from payment of a levy to the PPF, arising from the Crown guarantee, constituted an incompatible State aid and must cease. The Commission decided that aid given through the non-payment of a levy could not be justified under EU rules because it relieved the company from charges that its competitors have to pay.

7.4 These Regulations are necessary in order to comply with the Commission's decision. The Regulations ensure that where a Crown guarantee, given to a pension scheme whose sponsor is a commercial business operating in a competitive market, gives rise to (incompatible) State aid, the scheme as a whole (or as two separate schemes, where a scheme has a partial Crown guarantee) is eligible for the PPF and must pay the full Pension Protection levy.

7.5 The Commission decision means that incompatible State aid can arise in both the case of a partially guaranteed scheme which only pays part of the PPF levy in respect of the unsecured part of the scheme, and in the case of a

scheme with a full guarantee that pays no levy at all. For that reason these Regulations disapply the relevant Regulations where they give rise to incompatible State aid in respect of both types of schemes.

7.6 In the case of a partially guaranteed scheme the parts of the scheme with the guarantee and without the guarantee are both treated as separate eligible schemes for the purposes of the PPF.

7.7 The main changes are made to The Pension Protection Fund (Entry Rules) Regulations 2005, The Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005 and The Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006.

7.8 These changes will treat the guaranteed part and the non-guaranteed part of a partially guaranteed scheme (referred to as the secured and the unsecured part in the Regulations) as eligible for the PPF where it would otherwise mean there was incompatible State aid. Each separate part is therefore liable to pay a pension protection levy in accordance with the Commission's decision. In addition, they will ensure that where a scheme with a full Crown guarantee does not pay the pension protection levy, and this gives rise to incompatible State aid, the scheme will become eligible for the PPF, and therefore liable to pay the levy as required by the Commission's decision. Also, where the secured part of a partially guaranteed scheme becomes eligible for the PPF, because it would otherwise mean there was incompatible State aid if that part of the scheme is a fully guaranteed scheme, it will still be eligible for the PPF and have to pay the levy.

7.9 The new provisions will ensure that where a scheme with a full or partial guarantee becomes eligible part way through the year as a result of the provisions on incompatible State aid, the PPF can impose a pension protection levy for the whole year and not for only part of the year as required by the Pensions Act 2004. They will also dispense with the normal requirement that a three-year period must have elapsed before the PPF may assume responsibility for a scheme where a scheme becomes an eligible scheme during a financial year because the relevant PPF provisions have been disapplied on grounds of incompatible State aid.

7.10 The Regulations also make a change to The Partially Guaranteed Schemes (Modification) Regulations as they modify section 175 of the Pensions Act 2004 so that when calculating the pension protection levy in respect of the unsecured part of a scheme, (where there is no State aid and the PPF is only concerned with the unsecured part) the PPF has to take into account the assets of the unsecured part only, and not the assets of the whole scheme. This ensures the unsecured part of the scheme pays the correct levy. This change is not required by the Commission's decision and only applies to schemes where there are no issues of State aid.

7.11 Finally, the Regulations make consequential changes to ensure that, where both parts of a partially guaranteed part of a scheme are treated as eligible schemes, those parts will be subject to the Regulations on PPF

reviewable matters, the requirement that trustees and managers provide certain information to members of both parts; regulations on Fraud Compensation Payments and the Fraud Compensation Levy.

- ***Consolidation***

7.12 This Statutory Instrument amends seven instruments. Consolidation is not appropriate in respect of these Regulations because they make minor changes only to the other instruments. The Government will, however, keep under review whether there is a case for consolidating Instruments relating to the PPF.

## 8. Consultation outcome

8.1 The consultation on the draft Regulations ran from 12 October to 4 December 2009: eight weeks. A shortened consultation period was chosen because:

- the Regulations are technical and have very limited application; and
- discussions were held with the legal representatives of the BT Pension Scheme and BT plc following the decision of the European Commission in February 2009 and the issues to be covered in the Regulations had already been discussed in detail with the relevant parties - in particular two meetings to discuss the content of the draft Regulations took place in October and November which ensured the Department was aware of the main issues the Regulations raised during the consultation period and it had sufficient time to consider whether the Regulations needed to be amended to reflect those issues.

8.2 A total of four responses were received, all of which focused on the detail of the proposals. In particular, the legal advisers for the BT Pension Scheme and BT plc sought reassurance that the implementation of the Commission's decision dealt adequately with the circumstances in which the Regulations will apply and how and in what circumstances repayment of any overpaid levy would operate. They also raised a concern that as schemes with a partial guarantee would no longer be treated as having two distinct parts, in the event of an employer's insolvency, the benefit of that guarantee might not be applied only for the benefit of the part of the scheme it covered.

8.3 Having fully considered the circumstances in which the Regulations will apply and how and in what circumstances any overpaid levies would be repaid, the Department believes the circumstances in which the Regulations will apply are clear.

8.4 As a result of the consultation, however, the draft Regulations were changed so that instead of a partially guaranteed scheme being treated as one eligible scheme, such schemes are treated as two separate eligible schemes for the PPF so that, in the event of an employer insolvency, the benefit of a Crown Guarantee would only be applied in respect of the part of the scheme it covered.

8.5 A full analysis of the consultation outcome has been published and is on the DWP website: http://www.dwp.gov.uk/consultations/2010. The Report details the reactions to the individual proposals and the Government's response.

## 9. Guidance

The Regulations have very limited application; it is therefore inappropriate to issue specific guidance. The Department and the PPF, who will have copies of the instrument, are in a position to explain the provisions to schemes and pension specialists.

## 10. Impact

10.1 The Regulations are being made in response to the European Commission's decision to ensure that commercial undertakings do not have an unfair competitive advantage. They have only a negligible impact across business, charities or voluntary bodies.

10.2 The impact on the public sector is negligible.

10.3 A full impact assessment has not been prepared for this instrument.

## 11. Regulating Small Business

The legislation does not apply to small businesses 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, in which case the impact is negligible.

## 12. Monitoring and review

The effect of these changes will be monitored by the Department for Work and Pensions from information that will be provided by the Board of the PPF. The trustee of the BTPS is seeking a court declaration on the scope of the Crown guarantee and there is a range of possible outcomes. The Department intends to review the Regulations following the outcome of those proceedings.

## 13. Contact

Ian Garland at the Department for Work and Pensions - Tel: 020 7449 7412 or email: Ian.Garland@dwp.gsi.gov.uk - can answer any queries regarding the instrument.