

Pensions in Restructuring Survey 2020

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They are a go-to firm for cases of pensions insolvency or litigation with murky issues... they handle big court cases well.

Chambers & Partners UK 2018

Introduction

Welcome to the results of our third annual Pensions in Restructuring Survey.

We extended the range of people contacted about the survey this year, including some at private equity houses and lenders for the first time, to go with our usual mix of professional trustees, pension managers, insolvency practitioners, covenant advisers, actuaries, benefit consultants and lawyers. It has produced some interesting results.

During each of the three years in which we have carried out our survey, it appeared that we were on the crest of a wave for headlines about and interest in pensions in restructuring matters; yet the ante has been upped each following year and it may be that we are saying the same again in 12 months' time.

This past year has seen further comments from the Work and Pensions Select Committee chaired by Frank Field, including when joining forces with the Business, Energy & Industrial Strategy Committee for a report on the demise of Carillion.

It has also seen further criticism of the way in which the Pensions Regulator approached the pension issues affecting certain high-profile business failures over the past year. This led to press speculation – unfounded, as it turns out – that the Joint Select Committee report on Carillion would recommend the introduction of a single body combining the functions of the Pensions Regulator and the Pension Protection Fund. This is something that we explored in our first two surveys, with 79% of our respondents supporting the idea in 2016 and 73% in 2017.

There has been some fall-out for the Regulator, with Lesley Titcomb recently announcing that she will not seek renewal of her appointment as Chief Executive when her term comes to an end next February.

In our two previous surveys, we focused on market experience of the approach taken by the Regulator and the PPF to doing deals with distressed companies. This is to allow restructured businesses to trade on, free of their defined benefit pension obligations, with the scheme entering the PPF. The results of the surveys were broadly consistent, showing little change in market experience of how the Regulator and the PPF approach such deals. We did not have a sense that the position would be much different this year, if we were to follow the same line; anyway, we were presented with an ideal opportunity for a different focus, with the publication of the Government's White Paper: Protecting Defined Benefit Pension Schemes, on 19 March 2018.

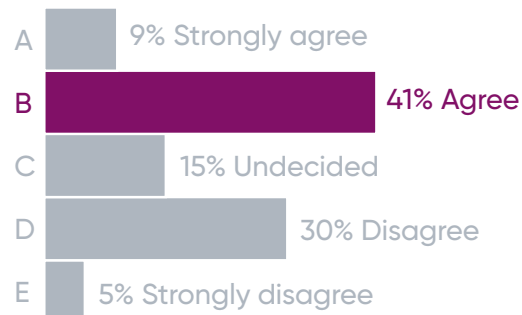
The White Paper contained wide-ranging proposals and has generated a lot of debate, as much for what is not included as a proposal in it (an override for employers or trustees to move from RPI to CPI for pension increases) as for what is (such as the proposal to introduce a criminal offence to punish wilful or grossly reckless behaviour of directors and connected persons in avoiding defined benefit pension liabilities).

As the introduction to the penultimate question of our survey this year said: "It is clear that the White Paper is just the latest step on a long road, with further consultations proposed in many areas". It will be interesting to see what the next 12 months' bring, with the only certainty being that there are still more headlines to be made for pensions in restructuring matters.

The results: a snapshot

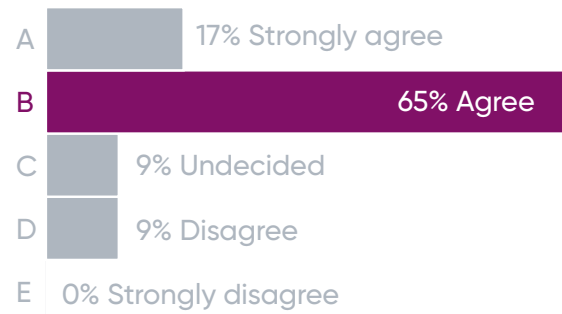
1. One of the more eye-catching proposals in the White Paper is the introduction of a criminal offence to punish wilful or grossly reckless behaviour of directors and any connected persons in relation to a defined benefit pension scheme.

Do you agree that such behaviour in respect of a pension scheme should be a criminal offence when such behaviour towards other creditors has civil but not criminal consequences?



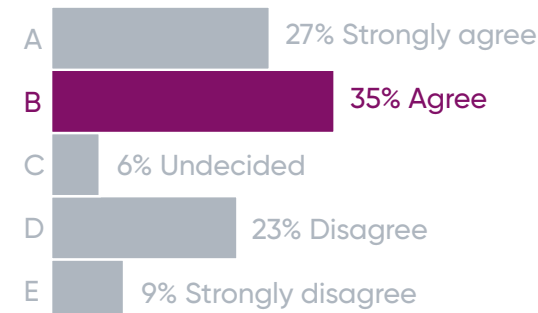
2. The voluntary clearance system is designed to give parties comfort that, when they are considering a particular transaction, the Pensions Regulator will not use its powers (moral hazard powers such as use of contribution notices) should the transaction go ahead. The White Paper indicates that seeking clearance will not be mandatory but instead, for transactions which “pose the highest potential risk”, the sponsoring employer or parent company will be required to make a “statement of intent” on how any risks to the pension scheme will be mitigated.

Do you agree that a requirement to commit in writing to how the impact of any transaction on a pension scheme will be mitigated rather than a requirement to apply for prior clearance strikes the right balance between protecting pension schemes and encouraging responsible corporate activity?



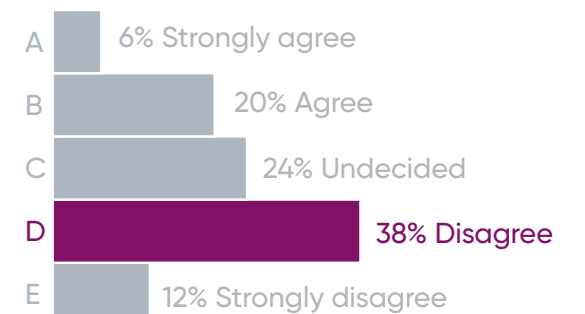
3. The Pensions Regulator is to be given greater powers to gather information to enable it to better monitor and proactively prevent harm to pension schemes. These powers will include the ability to gain access to premises, potentially without giving any notice, in order to inspect relevant records and electronic devices to assist the Regulator to investigate potential wrongdoing.

Do you agree that the Pensions Regulator needs to be given greater powers to gather information, such as having the right to inspect records and electronic devices without giving advance notice?



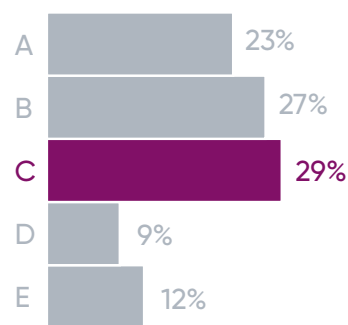
4. The Pensions Regulator is to consult on a revised Defined Benefit Funding Code of Practice, focusing on how “prudence” and “appropriateness” can be defined to “better balance employer commitments with risks to members and the PPF”. Further, the Government intends to supplement the revised code by “legislating at the earliest opportunity to require trustees and sponsoring employers to comply with some or all of the clearer funding standards”.

Do you agree that being more prescriptive as to the way in which defined benefit pension plans are funded, in the manner proposed above, will achieve the better balance between employer commitments and risks to members and the PPF as envisaged?



5. The Government will be consulting on introducing a framework for “commercially run consolidation vehicles”, with such vehicles to be an option for securing member benefits and breaking the sponsoring employer link. The Government considers that, if designed properly, such vehicles could “both reduce some inefficiency within the system and have the potential to offer better long-term outcomes for certain scheme members whilst offering an alternative strategy for managing legacy Defined Benefit schemes”.

Which one of the following most closely reflects your views on “commercially run consolidation vehicles”:



A it will be helpful for employers and trustees generally to have an option other than sticking with a pension plan or buying-out benefits with an insurance company

B such vehicles may be of particular use in restructuring situations, providing another route for an employer legitimately to end its responsibility for defined benefit pension provision as part of a strategy to help a business survive

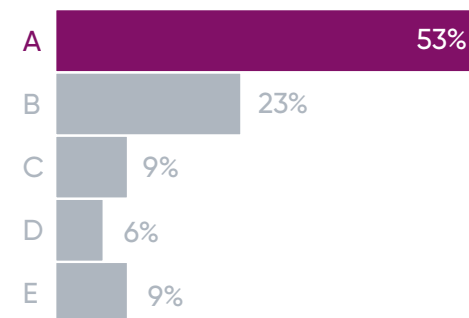
C it is too early to say whether such vehicles will have any value in practice

D these vehicles could be used by employers to dump their defined benefit pension liabilities

E pension plan members should receive either the protection of the regulatory regime supporting insurance companies that follows from a buy-out or compensation from the Pension Protection Fund, before an employer is absolved of its responsibilities to fund a defined benefit pension plan

6. The White Paper says that the Government is “presently ruling out measures which would override provisions in scheme rules and allow employers, or schemes, to change the measure of inflation used to calculate annual increases.”

Which one of the following most closely reflects your views on the Government’s position:



A many schemes’ rules pre-date the introduction of CPI, with RPI used as a proxy for “the Government’s specified measure of inflation” and such schemes have become unintentionally locked into a higher inflation measure

B a power to override a scheme’s rules and switch from RPI to CPI would have been a useful tool in restructuring situations

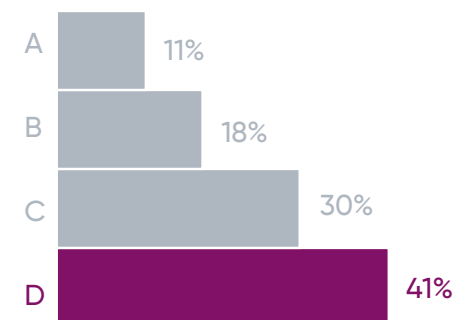
C I am not sure whether such an override power should be introduced

D it is right not to introduce an override power, as such a power could be used by unscrupulous employers to avoid some of their pension liabilities

E the principle of protecting members’ accrued pension rights means that it is right that nothing should be done to change, in any way, any benefits that have already been earned

7. It is clear that the White Paper is just the latest step on a long road, with further consultations proposed in many areas.

If all of the proposals referred to in the questions above – apart from an override power to change the measure of inflation used to calculate annual increases – are implemented do you consider that:



A this will make it easier to deal appropriately with defined benefit pension schemes on company restructurings

B this will make it harder to deal appropriately with defined benefit pension schemes on company restructurings

C this will neither make it easier nor harder to deal appropriately with defined benefit pension schemes on company restructurings

D it is too early to say whether it will make it easier or harder to deal appropriately with defined benefit pension schemes on company restructurings



[Mark Smith] has deep knowledge of pensions and provides well thought-out advice. He is excellent at finding practical answers, inspires total confidence, and has a fast response time.

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Uncertain effect on restructurings

We asked, if all the proposals in the White Paper were implemented – other than an override power to change the measure of inflation used to calculate annual increases (given the government has said it does not intend to introduce such a power) – what effect would this have on defined benefit pension issues on company restructurings.

The most popular answer was that it is too early to tell, with 41% taking that view.

Of the remainder, 30% considered that it would neither make it easier nor harder to deal appropriately with such issues on company restructurings, with (a perhaps disappointingly low) 11% thinking it would make it easier to deal with such issues and 18% thinking it would make it harder.

Just one wish

As a final question, we asked respondents what the one thing is they wished the White Paper would have proposed. Respondents were given free rein to say what should have been included. We had some interesting answers.

Whilst an RPI to CPI override was a popular answer, others went further, wanting an easier route to restructure pension benefits in relation to distressed businesses. The comments included:

“The ability to essentially do an internal restructuring of the pension promise going beyond merely CPI v RPI. For distressed businesses, it may make sense to restructure accrued rights without having to go through the technical hoops that British Steel and others need to go through”.

“Making it easier to carry out restructuring in smaller pension schemes (e.g. perhaps introducing a simplified RAA mechanism for smaller schemes)”.

At the other end of the spectrum were those who wanted to see restrictions on certain corporate activity or, at least, stricter disclosure requirements. Comments along these lines included:

“Restricting the ability of employers to make dividend payments / pay interest on inter-company loans if a shortfall is ‘too large’”.

“Greater information powers for trustees or perhaps stronger obligations on employers to disclose to trustees any activities which might affect the pension scheme (though confidentiality and commercial sensitivity issues are acknowledged)”.

Other ideas that had support included simplification of the multi-employer debt regime and an effective framework for collective defined contribution schemes. One of the most popular other ideas was an effective and straightforward means of taking away the complexity resulting from GMPs, which one witty respondent redefined as “Greatest Mistake in Pensions”: doubtless there will be many who would agree!

Concluding remarks

The range of responses to our questions is not surprising, given the different roles played by those who we surveyed.

The answers that stand out are the split view on whether there should be a criminal offence, strong support for a statement of intent in relation to pension obligations rather than mandatory clearance, and a sense that many private sector schemes have been inappropriately locked into retaining RPI as the measure for increasing pensions.

To go full circle to where we started, whilst the road ahead is uncertain, in terms of how many of the proposals in the White Paper may end up enshrined in legislation and if so, what the detail will be, one thing is clear: issues on pensions in restructuring have made front page news over the past year and there is little chance of that changing over the next twelve months before our 2019 Pensions in Restructuring Survey.

Other relevant resources

Click the links below:

- [Pensions](#)
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- [Pensions webinar – Rules and pitfalls](#)
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