Pension Schemes Bill 2020

Feature for Professional Pensions

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Simon Kew
Director
Simon.Kew@teneo.com

From Virgil in ancient Rome, to Star Trek and even Terry Pratchett's Discworld novels, versions of the phrase "the road to hell is paved with good intentions" have been used to highlight the unintended consequences of the deeds of well-meaning folk.

The proposed Pension Schemes Bill ("the Bill") which, at the time of writing, is currently progressing through the House of Lords, is well intended. However, it is important to get it right, even if that means a brief delay – because a delay is much easier to manage than rectifying unforeseen errors after it is passed.

Let me provide an example. The Bill introduces new criminal offences, for avoiding employer debt and risking scheme benefits that apply to 'any person' and in relation to 'any act or failure to act'. That, if passed as written, could mean all advisers, lenders, supply chain, non-executive directors – the list goes on. It also begs the question of whether it could even encompass the author of a particular article, a political campaign, or change to a Government contract that ultimately impacts a company's reputation or solvency. An extreme, although valid, question as the terminology is so wide and, following the rejection or removal of all amendments put forward in the House of Lords in early March, it appears intentionally so.

A more plausible scenario may be this. Company A transacts with Company B. Company B sees that they will achieve better terms if they were to legitimately cease their contract with Company A, to go into business with Company C – which they do. As a result, Company A is no longer solvent and ceases to trade, with the scheme entering the Pension Protection Fund ("PPF"). Theoretically, the current Bill (if passed) could expose any or all of the people involved in the decision to cease trading with Company A to the risk of a criminal sanction, with the penalty of imprisonment (up to 7 years) and/or an unlimited fine – whether they "knew or ought to have known" that their action would cause detriment to the scheme – unless they can provide a "reasonable excuse". The term "reasonable excuse" hasn't yet been defined, so is unlikely to provide much comfort to those trying to establish their risk of exposure, at least until legal precedents have been established.

Likewise, if an overseas company was looking to purchase in the UK, it may look to raise funds to buy Company X – the sponsor of a Defined Benefit ("DB") pension scheme. If at some point in the future Company X ceased to trade, causing the scheme to enter the PPF, it could be argued that the overseas company and its directors, along with lenders, acted (by leveraging the purchase of Company X, potentially weakening covenant or providing security above the scheme) and could be a target for the same criminal punishments.

Each of these theoretical situations could create a world where suppliers and purchasers of goods and services are reluctant to enter into a contract with any company that has a DB scheme. Equally, if an overseas firm is looking to buy a company, they may look outside of the UK to avoid the risk of potential action from The Pensions Regulator (TPR) on a technicality, some way down the track.

Both these circumstances are regular business decisions. There's no suggestion of immoral actions that are 'wilful, reckless or unscrupulous' (as one proposed amendment to the Bill had suggested). However, if the Bill makes it to legislation as written, it may be detrimental to well-run DB schemes – fallout from the rhetoric that implies corporate deals are bad for pension schemes. There are many corporate transactions that are beneficial to schemes through improving employer covenant, injecting funds, providing security or access to a wider group – hampering these could be an unintended consequence.

There is some uncertainty around quite when we will see further movement on the Bill, as progress had been halted in the House of Lords due to emergency health legislation, in connection with COVID-19. This means there is still time to reflect and amend the current drafting after Easter.

The 'good intention' of the Bill is to prevent material detriment to pension schemes, the unintended consequence may be disruption and uncertainty for businesses in the UK – the very companies that pension scheme trustees invest in and scheme members are employed by.

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