

STATUTORY INSTRUMENTS

2005 No. 255

The Pensions (Northern Ireland) Order 2005

PART II

THE PENSIONS REGULATOR

Financial support directions

Financial support directions

39^{F1}.—(1) This Article applies in relation to an occupational pension scheme other than—

- (a) a money purchase scheme, or
- (b) a prescribed scheme or a scheme of a prescribed description.

(2) The Regulator may issue a financial support direction under this Article in relation to such a scheme if the Regulator is of the opinion that the employer in relation to the scheme—

- (a) is a service company, or
- (b) is insufficiently resourced,

at a time determined by the Regulator which falls within paragraph (9) (“the relevant time”).

(3) A financial support direction in relation to a scheme is a direction which requires the person or persons to whom it is issued to secure—

- (a) that financial support for the scheme is put in place within the period specified in the direction,
- (b) that thereafter that financial support or other financial support remains in place while the scheme is in existence, and
- (c) that the Regulator is notified in writing of prescribed events in respect of the financial support as soon as reasonably practicable after the event occurs.

(4) A financial support direction in relation to a scheme may be issued to one or more persons.

(5) But the Regulator may issue such a direction to a person only if—

- (a) the person is at the relevant time a person falling within paragraph (6), and
- (b) the Regulator is of the opinion that it is reasonable to impose the requirements of the direction on that person.

(6) A person falls within this paragraph if the person is—

- (a) the employer in relation to the scheme,
- (b) an individual who—
 - (i) is an associate of an individual who is the employer, but
 - (ii) is not an associate of that individual by reason only of being employed by him, or
- (c) a person, other than an individual, who is connected with or an associate of the employer.

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(7) The Regulator, when deciding for the purposes of paragraph (5)(b) whether it is reasonable to impose the requirements of a financial support direction on a particular person, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—

- (a) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of paragraph (11) of Article 4 of the Insolvency Order, whether the person has or has had control of the employer within the meaning of paragraph (10) of that Article),
- (b) in the case of a person falling within paragraph (6)(b) or (c), the value of any benefits received directly or indirectly by that person from the employer,
- (c) any connection or involvement which the person has or has had with the scheme,
- (d) the financial circumstances of the person, and
- (e) such other matters as may be prescribed.

(8) A financial support direction must identify all the persons to whom the direction is issued.

(9) A time falls within this paragraph if it is a time which falls within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question.

(10) For the purposes of paragraph (3), a scheme is in existence until it is wound up.

(11) Subject to Article 283 (protected items), no duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice given by virtue of paragraph (3)(c).

F1 mod. by SR 2005/378

VALID FROM 15/12/2008

[^{F2}Financial support directions: transfer of members of the scheme

39A.—(1) This Article applies where—

- (a) the Regulator is of the opinion by reference to any time that the conditions in Article 39 for issuing a financial support direction are met in relation to a scheme (“the initial scheme”) in relation to which that Article applies (or, but for any transfer falling within sub-paragraph (b), would be met), and
- (b) the accrued rights of at least two persons who were members of the initial scheme are transferred at any subsequent time to one or more work-based pension schemes.

(2) The Regulator may issue a financial support direction under that Article in relation to any transferee scheme (and, accordingly, any reference in Article 41 or any of Articles 43 to 46 to the scheme is to the transferee scheme).

(3) The Regulator may also issue a direction to the trustees or managers of any transferee scheme requiring them to take specified steps to secure that the financial support is put in place for the benefit of the members of the transferee scheme who were members of the initial scheme.

(4) If the trustees or managers fail to comply with a direction issued to them under paragraph (3), Article 10 of the 1995 Order (civil penalties) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.

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F2 Arts. 39A, 39B inserted (15.12.2008) by Pensions (No. 2) Act (Northern Ireland) 2008 (c. 13), ss. 103, 118(1)(2)(h)(3)(a)(v)(vi)(b), **Sch. 8 para. 10** (with Sch. 8 para. 15(3) and transitional provision in Sch. 8 para. 16(2) for art. 39B(8)(10)(a))

VALID FROM 15/12/2008

Article 39A: supplemental

39B.—(1) In Article 39A a “transferee scheme”, in relation to any time, means any work-based pension scheme—

- (a) to which the accrued rights of at least two persons who were members of the initial scheme have been transferred, and
- (b) of which any of those persons are members at that time.

(2) For the purposes of Article 39A(1) and paragraph (1) it does not matter whether any rights are transferred to a work-based pension scheme directly from the initial scheme or following one or more other transfers to other work-based pension schemes.

(3) For the purposes of Article 39A and this Article references to the transfer of accrued rights of members of a pension scheme to another pension scheme include references to the extinguishing of those accrued rights in consequence of the obligation to make a payment, or transfer an asset, to that other scheme.

(4) In Article 39A and this Article—

- (a) “work-based pension scheme” has the meaning given by Article 4(3);
- (b) any reference to rights which have accrued is to be read in accordance with Article 67A(6) and (7) of the 1995 Order (reading any reference in those paragraphs to a subsisting right as a reference to a right which has accrued).

(5) Article 39A applies even if the initial scheme—

- (a) is wound up as a result of any transfer falling within paragraph (1)(b) of that Article, or
- (b) otherwise ceases to exist at the time of the transfer or at any subsequent time.

(6) Accordingly, in any such case, in paragraph (1) of that Article—

- (a) the reference to a scheme to which Article 39 applies is a reference to a scheme which was such a scheme before the transfer;
- (b) the reference to any conditions in Article 39 being met is a reference to any conditions in that Article that, but for the transfer, would have been met in relation to the scheme.

(7) Nothing in Article 39A or this Article is to be read as preventing the Regulator from issuing a financial support direction in relation to the initial scheme.

(8) Regulations may make provision applying, with or without modifications, any provision made by Article 39A or this Article in relation to any scheme or other arrangement in any case where the accrued rights of persons who were members of the initial scheme are transferred or extinguished directly or indirectly in consequence of or otherwise in connection with—

- (a) the making of any payment at any time to or for the benefit of the scheme or other arrangement,
- (b) the transfer of any asset at any time to or for the benefit of the scheme or other arrangement,
- (c) the discharge (wholly or partly) at any time of any liability incurred by or on behalf of the scheme or other arrangement, or

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(d) the incurring at any time of any obligation to do any act falling within sub-paragraphs (a) to (c).

(9) Any reference in paragraph (8)(a) to (d) to the doing of an act of any description at any time in relation to the scheme or other arrangement includes a reference to the doing of an act of that description at any previous time in relation to any other scheme or other arrangement.

(10) Regulations under paragraph (8) may—

(a) make provision having effect in relation to any case where rights are transferred or extinguished on or after the date on which the Department publishes a statement of the intention to make the regulations; and

(b) without prejudice to Article 287(3), make consequential provision applying with modifications any provision of this Order which relates to financial support directions under Article 39.]

F2 Arts. 39A, 39B inserted (15.12.2008) by Pensions (No. 2) Act (Northern Ireland) 2008 (c. 13), ss. 103, 118(1)(2)(h)(3)(a)(v)(vi)(b), Sch. 8 para. 10 (with Sch. 8 para. 15(3) and transitional provision in Sch. 8 para. 16(2) for art. 39B(8)(10)(a))

Meaning of “service company” and “insufficiently resourced”

40^{F3}.—(1) This Article applies for the purposes of Article 39 (financial support directions).

(2) An employer (“E”) is a service company at the relevant time if—

(a) E is a company within the meaning given by Article 3(1) of the Companies Order,

(b) E is a member of a group of companies, and

(c) E's turnover, as shown in the latest available accounts for E prepared in accordance with Article 234 of that Order, is solely or principally derived from amounts charged for the provision of the services of employees of E to other members of that group.

(3) The employer in relation to a scheme is insufficiently resourced at the relevant time if—

(a) at that time the value of the resources of the employer is less than the amount which is a prescribed percentage of the estimated Article 75 debt in relation to the scheme, and

(b) there is at that time a person who falls within paragraph (6)(b) or (c) of Article 39 and the value at that time of that person's resources is not less than the amount which is the difference between—

(i) the value of the resources of the employer, and

(ii) the amount which is the prescribed percentage of the estimated Article 75 debt.

(4) For the purposes of paragraph (3)—

(a) what constitutes the resources of a person is to be determined in accordance with regulations, and

(b) the value of a person's resources is to be determined, calculated and verified in a prescribed manner.

(5) In this Article the “estimated Article 75 debt”, in relation to a scheme, means the amount which the Regulator estimates to be the amount of the debt which would become due from the employer to the trustees or managers of the scheme under Article 75 of the 1995 Order (deficiencies in the scheme assets) if—

(a) paragraph (2) of that Article applied, and

(b) the time designated by the trustees or managers of the scheme for the purposes of that paragraph were the relevant time.

(6) When calculating the estimated Article 75 debt in relation to a scheme under paragraph (5), the amount of any debt due at the relevant time from the employer under Article 75 of the 1995 Order is to be disregarded.

(7) In this Article “the relevant time” has the same meaning as in Article 39.

F3 mod. by SR 2005/378

Meaning of “financial support”

41^{F4}.—(1) For the purposes of Article 39 (financial support directions), “financial support” for a scheme means one or more of the arrangements falling within paragraph (2) the details of which are approved in a notice issued by the Regulator.

(2) The arrangements falling within this paragraph are—

- (a) an arrangement whereby, at any time when the employer is a member of a group of companies, all the members of the group are jointly and severally liable for the whole or part of the employer's pension liabilities in relation to the scheme;
- (b) an arrangement whereby, at any time when the employer is a member of a group of companies, a company (within the meaning given in Article 4 of the Companies Order) which meets prescribed requirements and is the holding company of the group is liable for the whole or part of the employer's pension liabilities in relation to the scheme;
- (c) an arrangement which meets prescribed requirements and whereby additional financial resources are provided to the scheme;
- (d) such other arrangements as may be prescribed.

(3) The Regulator may not issue a notice under paragraph (1) approving the details of one or more arrangements falling within paragraph (2) unless it is satisfied that the arrangement is, or the arrangements are, reasonable in the circumstances.

(4) In paragraph (2), “the employer's pension liabilities” in relation to a scheme means—

- (a) the liabilities for any amounts payable by or on behalf of the employer towards the scheme (whether on his own account or otherwise) in accordance with a schedule of contributions under Article 206, and
- (b) the liabilities for any debt which is or may become due to the trustees or managers of the scheme from the employer whether by virtue of Article 75 of the 1995 Order (deficiencies in the scheme assets) or otherwise.

F4 mod. by SR 2005/378

Financial support directions: clearance statements

42^{F5}.—(1) An application may be made to the Regulator under this Article for the issue of a clearance statement within sub-paragraph (a), (b) or (c) of paragraph (2) in relation to circumstances described in the application and relating to an occupational pension scheme.

(2) A clearance statement is a statement, made by the Regulator, that in its opinion in the circumstances described in the application—

- (a) the employer in relation to the scheme would not be a service company for the purposes of Article 39,

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- (b) the employer in relation to the scheme would not be insufficiently resourced for the purposes of that Article, or
 - (c) it would not be reasonable to impose the requirements of a financial support direction, in relation to the scheme, on the applicant.
- (3) Where an application is made under this Article, the Regulator—
- (a) may request further information from the applicant;
 - (b) may invite the applicant to amend the application to modify the circumstances described.
- (4) Where an application is made under this Article, the Regulator must as soon as reasonably practicable—
- (a) determine whether to issue the clearance statement, and
 - (b) where it determines to do so, issue the statement.
- (5) A clearance statement issued under this Article binds the Regulator in relation to the exercise of the power to issue a financial support direction under Article 39 in relation to the scheme to the applicant unless—
- (a) the circumstances in relation to which the exercise of the power under that Article arises are not the same as the circumstances described in the application, and
 - (b) the difference in those circumstances is material to the exercise of the power.

F5 mod. by SR 2005/378

Contribution notices where non-compliance with financial support direction

43^{F6}.—(1) This Article applies where there is non-compliance with a financial support direction issued in relation to a scheme under Article 39.

(2) The Regulator may issue a notice to any one or more of the persons to whom the direction was issued stating that the person is under a liability to pay to the trustees or managers of the scheme the sum specified in the notice (a “contribution notice”).

(3) The Regulator may issue a contribution notice to a person only if the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice.

(4) The Regulator, when deciding for the purposes of paragraph (3) whether it is reasonable to impose liability on a particular person to pay the sum specified in the notice, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—

- (a) whether the person has taken reasonable steps to secure compliance with the financial support direction,
- (b) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of paragraph (11) of Article 4 of the Insolvency Order, whether the person has or has had control of the employer within the meaning of paragraph (10) of that Article),
- (c) in the case of a person to whom the financial support direction was issued as a person falling within Article 39(6)(b) or (c), the value of any benefits received directly or indirectly by that person from the employer,
- (d) the relationship which the person has or has had with the parties to any arrangements put in place in accordance with the direction (including, where any of those parties is a company within the meaning of paragraph (11) of Article 4 of the Insolvency Order, whether the person has or has had control of that company within the meaning of paragraph (10) of that Article),

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- (e) any connection or involvement which the person has or has had with the scheme,
- (f) the financial circumstances of the person, and
- (g) such other matters as may be prescribed.

(5) A contribution notice may not be issued under this Article in respect of non-compliance with a financial support direction in relation to a scheme where the Board has assumed responsibility for the scheme in accordance with Chapter 3 of Part III (pension protection).

F6 mod. by SR 2005/378

The sum specified in an Article 43 contribution notice

44^{F7}.—(1) The sum specified by the Regulator in a contribution notice under Article 43 may be either the whole or a specified part of the shortfall sum in relation to the scheme.

- (2) The shortfall sum in relation to a scheme is—
- (a) in a case where, at the time of non-compliance, a debt was due from the employer to the trustees or managers of the scheme under Article 75 of the 1995 Order (deficiencies in the scheme assets), the amount which the Regulator estimates to be the amount of that debt at that time, and
 - (b) in a case where, at the time of non-compliance, no such debt was due, the amount which the Regulator estimates to be the amount of the debt under Article 75 of the 1995 Order which would become due if—
 - (i) paragraph (2) of that Article applied, and
 - (ii) the time designated by the trustees or managers of the scheme for the purposes of that paragraph were the time of non-compliance.
- (3) For the purposes of this Article “the time of non-compliance” means—
- (a) in the case of non-compliance with sub-paragraph (a) of paragraph (3) of Article 39 (financial support directions), the time immediately after the expiry of the period specified in the financial support direction for putting in place the financial support,
 - (b) in the case of non-compliance with sub-paragraph (b) of that paragraph, the time when financial support for the scheme ceased to be in place,
 - (c) in the case of non-compliance with sub-paragraph (c) of that paragraph, the time when the prescribed event occurred in relation to which there was the failure to notify the Regulator, or
 - (d) where more than one of sub-paragraphs (a) to (c) apply, whichever of the times specified in the applicable sub-paragraphs the Regulator determines.

F7 mod. by SR 2005/378

Content and effect of an Article 43 contribution notice

- 45**^{F8}.—(1) This Article applies where a contribution notice is issued to a person under Article 43.
- (2) The contribution notice must—
- (a) contain a statement of the matters which it is asserted constitute the non-compliance with the financial support direction in respect of which the notice is issued, and
 - (b) specify the sum which the person is stated to be under a liability to pay.

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(3) The sum specified in the notice is to be treated as a debt due from the person to the trustees or managers of the scheme.

(4) The Regulator may, on behalf of the trustees or managers of the scheme, exercise such powers as the trustees or managers have to recover the debt.

(5) But during any assessment period (within the meaning of Article 116) in relation to the scheme, the rights and powers of the trustees or managers of the scheme in relation to any debt due to them by virtue of a contribution notice, are exercisable by the Board to the exclusion of the trustees or managers and the Regulator.

(6) Where, by virtue of paragraph (5), any amount is paid to the Board in respect of a debt due by virtue of a contribution notice, the Board must pay the amount to the trustees or managers of the scheme.

(7) The contribution notice must identify any other persons to whom contribution notices have been or are issued in respect of the non-compliance in question and the sums specified in each of those notices.

(8) Where the contribution notice so specifies, the person to whom the notice is issued (“P”) is to be treated as jointly and severally liable for the debt with any persons specified in the notice who are persons to whom corresponding contribution notices are issued.

(9) For the purposes of paragraph (8), a corresponding contribution notice is a notice which—

- (a) is issued in respect of the same non-compliance with the financial support direction as the non-compliance in respect of which P's contribution notice is issued,
- (b) specifies the same sum as is specified in P's contribution notice, and
- (c) specifies that the person to whom the contribution notice is issued is jointly and severally liable with P, or with P and other persons, for the debt in respect of that sum.

(10) A debt due by virtue of a contribution notice is not to be taken into account for the purposes of Article 75(2) and (4) of the 1995 Order (deficiencies in the scheme assets) when ascertaining the amount or value of the assets or liabilities of a scheme.

F8 mod. by SR 2005/378

Article 43 contribution notice: relationship with employer debt

46^{F9}—(1) This Article applies where a contribution notice is issued to a person (“P”) under Article 43 and condition A or B is met.

(2) Condition A is met if, at the time at which the contribution notice is issued, there is a debt due from the employer to the trustees or managers of the scheme under Article 75 of the 1995 Order (deficiencies in the scheme assets).

(3) Condition B is met if, after the contribution notice is issued but before the whole of the debt due by virtue of the notice is recovered, a debt becomes due from the employer to the trustees or managers of the scheme under Article 75 of the 1995 Order.

(4) The Regulator may issue a direction to the trustees or managers of the scheme not to take any or any further steps to recover the debt due to them under Article 75 of the 1995 Order pending the recovery of all or a specified part of the debt due to them by virtue of the contribution notice.

(5) If the trustees or managers fail to comply with a direction issued to them under paragraph (4), Article 10 of the 1995 Order (civil penalties) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.

(6) Any sums paid—

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- (a) to the trustees or managers of the scheme in respect of any debt due to them by virtue of the contribution notice, or
- (b) to the Board in respect of any debt due to it by virtue of the contribution notice (where it has assumed responsibility for the scheme in accordance with Chapter 3 of Part III (pension protection)),

are to be treated as reducing the amount of the debt due to the trustees or managers or, as the case may be, to the Board under Article 75 of the 1995 Order.

(7) Where a sum is paid to the trustees or managers of the scheme or, as the case may be, to the Board in respect of the debt due under Article 75 of the 1995 Order, P may make an application under this paragraph to the Regulator for a reduction in the amount of the sum specified in P's contribution notice.

(8) An application under paragraph (7) must be made as soon as reasonably practicable after the sum is paid to the trustees or managers or, as the case may be, to the Board in respect of the debt due under Article 75 of the 1995 Order.

(9) Where such an application is made to the Regulator, the Regulator may, if it is of the opinion that it is appropriate to do so—

- (a) reduce the amount of the sum specified in P's contribution notice by an amount which it considers reasonable, and
- (b) issue a revised contribution notice specifying the revised sum.

(10) For the purposes of paragraph (9), the Regulator must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—

- (a) the amount paid in respect of the debt due under Article 75 of the 1995 Order since the contribution notice was issued,
- (b) any amounts paid in respect of the debt due by virtue of that contribution notice,
- (c) whether contribution notices have been issued to other persons in respect of the same non-compliance with the financial support direction in question as the non-compliance in respect of which P's contribution notice was issued,
- (d) where such contribution notices have been issued, the sums specified in each of those notices and any amounts paid in respect of the debt due by virtue of those notices,
- (e) whether P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
- (f) such other matters as may be prescribed.

(11) Where—

- (a) P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
- (b) a revised contribution notice is issued to P under paragraph (9) specifying a revised sum,

the Regulator must also issue revised contribution notices to those other persons specifying the revised sum and their joint and several liability with P for the debt in respect of that sum.

F9 mod. by SR 2005/378

Articles 39 to 46: interpretation

47^{F10}.—(1) In Articles 39 to 46—

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“group of companies” means a holding company and its subsidiaries within the meaning given by Article 4(1) of the Companies Order, and “member” in relation to such a group is to be construed accordingly;

“holding company” has the meaning given by Article 4(1) of that Order.

- (2) For the purposes of Articles 39 to 46—
 - (a) references to a debt due under Article 75 of the 1995 Order include a contingent debt under that Article, and
 - (b) references to the amount of such a debt include the amount of such a contingent debt.
- (3) For the purposes of Articles 39 to 46—
 - (a) Article 7 of the Insolvency Order (connected persons) applies as it applies for the purposes of any provision of Parts II to VII of that Order, and
 - (b) Article 4 of that Order (associated persons) applies as it applies for the purposes of that Order.

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