

EXPLANATORY MEMORANDUM TO
THE PAYMENT OF PENSION LEVIES FOR PAST PERIODS REGULATIONS 2014

2014 No. 2939

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**

The European Commission's decision dated 11 February 2009 (state aid case N° C 55/2007) (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_C55_2007) stated that an exemption in respect of the British Telecommunications Pension Scheme from payment of a levy to the Pension Protection Fund (PPF) amounted to incompatible State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union (the Lisbon Treaty) (<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2007:306:TOC>). 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. The exemption in respect of the BT Pension Scheme was in relation to pension liabilities covered by a Crown guarantee. BT challenged the decision but it was subsequently upheld by the General Court in September 2013 and then by the judgment of the Court of Justice of the European Union on 22 October 2014 (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=158805&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=197792>). Accordingly, that incompatible State aid is now to be recovered by the UK.

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

None.

4. **Legislative Context**

These Regulations are being made further to the decision of the European Commission on 11 February 2009, upheld by the Court of Justice of the European Union on 22 October 2014. Following the Commission's decision in 2009, two sets of regulations were made in 2010 to ensure compliance with the decision going forward from 2010. Specifically, those regulations were regulations 2, 3 and 8 of the Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendment) Regulations 2010 (<http://www.legislation.gov.uk/uksi/2010/196/contents/made>) and regulation 2 of the Occupational Pension Schemes (Levies) (Amendment) Regulations 2010 (<http://www.legislation.gov.uk/uksi/2010/1930/contents/made>). In essence, those 2010 regulations provided that in relation to crown guarantee schemes, such as the BT Pension Scheme, where an issue of incompatible State would arise, that scheme

would then no longer be exempt but would be an eligible scheme, liable to pay pension levies to the Pension Protection Fund . These Regulations deal with the period before 2010. They provide that the Pensions Act 2004 (<http://www.legislation.gov.uk/ukpga/2004/35/contents>) and regulations made under it, in so far as they relate to the requirement to pay pension levy, have effect as if amendments by the 2010 regulations always had effect. In other words, where an issue of incompatible State aid arises, there is no exemption for a scheme covered by a Crown guarantee from payment of pension levies and the scheme must pay pension levies in respect of past periods from the time of the PPF's inception.

5. Territorial Extent and Application

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

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. Where a scheme has a guarantee from the Crown in respect of its liabilities, members do not need the protection of the Pension Protection Fund (PPF) as the guarantee will ensure member benefits can be paid out in the event of employer insolvency where the scheme is underfunded.

7.2. The European Commission investigated a number of schemes with Crown guarantees in 2008/2009 in order to establish whether the guarantees constituted unlawful state aid contrary to article 107 of the Treaty on the Functioning of the European Union.

7.3. In the case of the British Telecommunications Pension Scheme, which was given a guarantee on privatisation in 1984, the Commission concluded that the guarantee itself did not constitute unlawful State aid. Its reasoning was that the guarantee did not provide a competitive advantage to BT since it would only come into effect in the event of the insolvency of BT plc. The Commission did, however, conclude that the exemption from the PPF levies did constitute unlawful State aid.

7.4. Pending the final outcome of the legal challenge, the PPF, the BT Pension Scheme Trustee and BT plc reached an agreement in respect of the PPF risk-based pension protection levy from 2005/6 to 2008/9 through the setting up of an escrow account – an arrangement whereby an independent and trusted third party holds and distributes money and assets under a legal contract for two or more parties. The maximum amount of risk-based pension protection levies that could be due in respect of each levy year up to and including 2008/9, plus the applicable recovery interest were placed in the blocked account. The Commission agreed to this arrangement.

7.5. To ensure compliance going forward regulations were introduced in March 2010 on the risk-based pension protection levy and in July 2010 for the PPF administration levy. This means that the risk-based levy has been paid from 2009/10 onwards, and the administration levy from 2010/11.

7.6. The outstanding levies are therefore the risk-based levy for the years 2005/6 to 2008/09, which is held in the escrow account, and the administration levy from 2005/6 to 2009/10. It is in respect of the levies for those years that the regulations are needed in order to comply with the Commission's decision, upheld by the General Court in September 2013, and by the Court of Justice of the European Union in October 2014 to ensure that the PPF has power to collect in the levies for those years and to impose a corresponding obligation on the BT Pension Scheme to pay those amounts. In its judgment of 22 October, the Court of Justice of the European Union upheld the Commission's decision of 11 February 2009.

7.7. Section 45 of the Pensions Act 2014 (<http://www.legislation.gov.uk/ukpga/2014/19/contents>) enables the Secretary of State to make regulations to require payment of pension levies in respect of past periods.

- ***Consolidation Outcome***

7.8 Informal consolidated text of instruments is available to the public free of charge via 'The Law Relating to Social Security' (Blue Volumes) on the Department for Work and Pensions website at <http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/> or the National Archive website [legislation.gov.uk](http://www.legislation.gov.uk). An explanation as to which instruments are maintained on each site is available [here](#)."

8. Consultation

8.1 Consultation on these regulations was not required for three key reasons. Firstly, in the absence of any requirement in the Pensions Act 2014 to consult on these Regulations, there is no statutory requirement to consult. Secondly, in terms of their effect, in particular in relation to the retrospective effect, these Regulations are narrow in their application. Thirdly, consultation had already been carried out in relation to the 2010 regulations, the substance of which these Regulations essentially give effect to. The consultation on the previous draft Regulations that were introduced in 2010 ran from 12 October to 4 December 2009. A total of four responses were received, all of which focused on the detail of the proposals. In addition discussions were held with the legal representatives of the British Telecommunication Pension Scheme and British Telecommunications plc. The comments related to the implementation of the Commission's decision and matters covered by the Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010 which were laid before Parliament on 8 February. None of the responses commented on the PPF administration levy to which those Regulations relate. In addition discussions were held with the legal representatives of the BT Pension Scheme and BT plc following the decision of the European Commission.

8.2 A full analysis of that consultation outcome was 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 extremely limited application; it is therefore inappropriate to issue specific guidance. The Department is in a position to explain the provisions to schemes and pension specialists should it be necessary.

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 or and civil society organisations.

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 business unless they were commercial undertakings with a defined benefit scheme and a Crown guarantee, and a reduction in the PPF levies gave rise to an incompatible State aid. No such small businesses have been identified.

12. Monitoring and review

A post implementation review is not needed. The trustee of the BTPS sought a declaration on the scope of the Crown guarantee. The Court of Appeal judgment concluded that the Crown guarantee is a guarantee of any outstanding liability of BT on voluntary wind up and covers pre and post privatisation members. .

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.