

Update

Financial Support Directions against ITV Group approved – Case referred to the Upper Tribunal

It has been reported that ITV is contesting a decision by the Determinations Panel of the Pension Regulator to authorise the issuance of five Financial Support Directions (FSDs) against companies within its corporate group. The FSDs require ITV plc and four other companies to provide financial backing for the Box Clever Group Pension Scheme (the **Scheme**), which has a deficit of over £62 million.

FSDs are a regulatory tool available to the Pensions Regulator under the Pensions Act 2004. They have the effect of making a company liable to provide specified financial support for a pension scheme operated by an employer which is connected or associated with it, even if the target company has had no prior involvement with the scheme. They are designed to protect the Pension Protection Fund (PPF) by ensuring that a scheme will receive adequate backing from the corporate group in which the scheme is situated, by means of “piercing the corporate veil”.

The Scheme was operated by the Box Clever Group, a TV hire business that was formed in 2000. The corporate connection with ITV comes in because Box Clever was formed as a joint venture between Granada and Thorn TV. Granada later merged with Carlton Communications to form ITV.

Employees of Granada were transferred to Box Clever when the joint venture was set up. For the first 15 months, they continued to accrue benefits in their existing Granada pension scheme. Then, in October 2001, the Scheme was established. As well as providing ongoing pension accrual to the ex-Granada workers, it took over responsibility for a proportion of their past-service pension benefits relating to their future salary increases.

Box Clever went into administrative receivership in 2003. The administrative receivers carried out a restructuring and sold the business to new owners in 2005. The pension fund, which only ranked as an unsecured creditor, was left with a very large deficit. As of 31 December 2009, it had assets of £14.4m and liabilities of £76.5m. It is estimated that £41 million of the resultant deficit

relates to former Granada employees. Following the failure of the business, the Scheme trustees tried to negotiate a settlement with ITV in relation to the Scheme members' benefits, but without success.

The Regulator's Determinations Panel decided on 21 December 2011 to issue FSDs against the five ITV target companies. The Regulator has **published the reasons** for this decision.

Two factors appear to have carried particular weight with the Determinations Panel:

- Granada benefited from the establishment of Box Clever to the tune of over £500 million, while the new joint venture was backed by substantial debt, including a secured bank loan of £860 million. The targets' response to this was that the joint venture had been undertaken on commercial terms and was underpinned by sophisticated due diligence.
- The targets claimed that Granada had had an arm's length relationship with Box Clever, but evidence was presented that Granada had taken an active role in Box Clever's management. Indeed, Granada and its executives had been involved in discussions over Box Clever's pension arrangements in 2000-02.

Interestingly, the targets had their own complaint about pension arrangements: ex-Granada employees had continued to accrue benefits in the Granada scheme over the 15 months between the establishment of Box Clever and the establishment of the Scheme. The targets claimed that Box Clever had not paid sufficient contributions to the Granada scheme to meet the resultant liabilities.

Companies which are made subject to FSDs have the right to refer their case to the Upper Tribunal, which will conduct a re-examination of the evidence and issue a new decision. Technically, this is not an appeal, but it has the same effect as one. It has been reported that ITV is exercising its right to refer its case to the Upper Tribunal. The Tribunal is presided over by a High Court judge, and its decisions can be appealed to the Court of Appeal.

The FSDs themselves will not formally be issued until the present legal process has been completed, and, if ITV is unsuccessful in its challenge, it remains unclear what level of financial support it will be required to make available.

The Scheme's trustees have welcomed the Determination Panel's decision and have called upon ITV to accept it.

It has been reported that there is a provision for £16 million in ITV's interim accounts for the six months to 30 June 2011 which is stated to relate to "*potential liabilities that arise as a result of Boxclever having been placed into administration, most of which relate to pension arrangements*".

Clyde & Co Comment

This is the latest in a series of recent cases in which the Regulator has exercised its powers to issue FSDs and Contribution Notices under the Pensions Act 2004, and it shows that the Regulator remains willing to pursue proceedings against employers and companies associated with them. Nor was the Regulator deterred by the complex issue of whether there was sufficient control – following the administrative receivership – for the targets to be associated with the Scheme's employers. This boiled down to the question of whether a holding company in the Box Clever group had voting control of three employer entities, and the Panel had to interpret the terms of a debenture under which the holding company had granted security over the entities' shares to the bank. Another problem was the lack of clarity and documentation regarding share transfers within the Box Clever group.

This may also be the last time that targets will be able to raise the issue of an unfair process – an allegation which was rejected by the Determinations Panel. The FSDs had to be issued within 2 years of the relevant time for testing whether the criteria were met. This meant that there was only three months from the service of the Warning Notice – the Regulator's statement that it is intending to use its powers – until the deadline for issuing the FSDs. The Pensions Act 2011 now requires the Warning Notice – rather than the FSD itself – to be issued within the two year period. This will allow more time for preparation for a Determinations Panel hearing.

Finally, this enforcement action is unusual insofar as the FSD regime was originally intended to prevent excessive calls from being made on the PPF. In this case, the scheme is not a candidate for PPF entry, and it appears to have been rejected by the Financial Assistance Scheme (which provides financial support where schemes started winding up before the PPF came into existence). This illustrates that the FSD legislation is wide and is not confined to cases where the scheme in question can have recourse to the PPF or the FAS.

Further information

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