

SCHEDULE 4

Regulation 22

Methods of securing shortfall in cases of serious underprovision

Preliminary

1.—(1) In this Schedule—

“relevant institution” means—

- (a) an institution authorised under the Banking Act 1987⁽¹⁾;
- (b) a building society incorporated under the Building Societies Act 1986⁽²⁾;
- (c) a European deposit-taker within the meaning of regulation 82(3) of the Banking Coordination (Second Council Directive) Regulations 1992⁽³⁾;

“Article 60 shortfall”, in relation to a scheme, means the increase in the value of the scheme assets required by Article 60(2) as the result of a serious shortfall valuation, less any payment made to the trustees or managers by or on behalf of the employer since the valuation to secure the whole or part of that increase;

“Article 75(1) shortfall”, in relation to a scheme, means so much of the amount treated by Article 75(1) as a debt due from the employer to the trustees or managers at the applicable time (as defined in Article 75(3)) as is attributable to the value of the scheme assets falling short of the amount of the scheme liabilities by more than 10 per cent;

“the shortfall period”, in relation to a scheme, means the period beginning with the signing of a serious shortfall valuation for the scheme and ending with the signing of a minimum funding valuation which is not a serious shortfall valuation.

(2) If, in the case of a scheme in relation to which there is more than one employer, an amount is secured by one of the employers, or by 2 or more acting jointly (but not by all of the employers), in a manner specified in paragraph 2, 3 or 4, references in this Schedule to a relevant insolvency event occurring in relation to the employer are references to such an event occurring in relation to that employer, or, as the case may be, to one of the employers who are acting jointly, and not to such an event occurring in relation to any of the other employers.

Appropriate letters of credit

2.—(1) The employer may secure the whole or part of the Article 60 shortfall by arranging, with the agreement of the trustees or managers of the scheme, for an appropriate letter of credit to be given to the trustees or managers which satisfies the requirements of this paragraph.

(2) In sub-paragraph (1) “appropriate letter of credit” means a guarantee in writing from a relevant institution that—

- (a) if a relevant insolvency event occurs in relation to the employer during the relevant period;
- (b) if the scheme begins to be wound up, or
- (c) in the case of a guarantee which terminates before the end of the relevant period, if the employer fails to secure a renewal of the guarantee before it expires,

then the institution will pay the trustees or managers a sum of an amount equal—

- (i) in the cases mentioned in heads (a) and (b)—

(1) 1987 c. 22
(2) 1986 c. 53
(3) S.I.1992/3218

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(I) to the amount specified in the letter as the maximum amount that the institution guarantees (“the specified maximum”), or

(II) to the Article 75(1) shortfall,

whichever is less, and

(ii) in the case mentioned in head (c), to the specified maximum.

(3) In paragraph (2) “the relevant period” means the period beginning with the date on which the appropriate letter of credit is given and ending with—

(a) the time it ceases to be in force;

(b) the shortfall period;

(c) the time when the Article 60 shortfall is first extinguished,

whichever occurs first.

(4) The appropriate letter of credit shall be given on terms under which—

(a) it is to remain in force for a period of not less than 18 months, and

(b) it may be renewed on an application made by the employer before the end of that period.

(5) Where an appropriate letter of credit has been given under sub-paragraph (1) to secure an amount following a serious shortfall valuation, the trustees or managers may accept a fresh appropriate letter of credit in substitution for it (or for any such letter previously accepted by them in substitution for it under this sub-paragraph) to secure that amount, notwithstanding that the period within which that amount may be secured in that manner has expired.

(6) Except as provided in this paragraph, an appropriate letter of credit shall not be capable of revocation or amendment during the shortfall period.

Designated deposit accounts

3.—(1) The employer may secure the whole or part of the Article 60 shortfall by arranging, with the agreement of the trustees or managers of the scheme, for the payment of a sum into a deposit account with a relevant institution on the terms mentioned in sub-paragraphs (2) to (6).

(2) The account shall be held in the name of the trustees or managers and designated as an account to which the provisions of this paragraph apply.

(3) The trustees or managers shall hold the amount for the time being standing to the credit of the account on trust—

(a) if during the shortfall period a relevant insolvency event occurs in relation to the employer or the scheme begins to be wound up, to pay to the scheme a sum equal to—

(i) the sum standing to the credit of the account at that time, or

(ii) the Article 75(1) shortfall,

whichever is less, and

(b) subject to head (a), for the benefit of the employer absolutely.

(4) Where a sum has been paid into a deposit account with a relevant institution under sub-paragraph (1) to secure any amount following a serious shortfall valuation—

(a) the trustees or managers may agree to the sum standing to the credit of the account being transferred to another account with the same or another relevant institution on the terms mentioned in sub-paragraphs (2) and (3) to secure that amount, notwithstanding that the period within which that amount may be secured in that manner has expired, and

(b) if—

- (i) a fresh obligation arises under Article 60(2) as a result of a further serious shortfall valuation, and
- (ii) the trustees or managers agree that the account shall continue as a method of securing the amount required to be secured in pursuance of the further valuation on the terms mentioned in sub-paragraph (3),

then, for the purposes of Articles 56 to 61 and these Regulations (but not for any other purposes), such a payment as is mentioned in sub-paragraph (1) shall be deemed to have been made on the date of that agreement.

(5) An account held for the purposes of this paragraph may be held on terms allowing repayment to the employer of any amount by which the amount standing to the credit of the account at any time exceeds the Article 60 shortfall at that time.

(6) Except as provided in sub-paragraph (4), the terms of the trust on which the account is held shall not be capable of amendment during the shortfall period.

Charges over unencumbered assets

4.—(1) The employer may secure the whole or part of the Article 60 shortfall by arranging, with the agreement of the trustees or managers of the scheme, for the trustees or managers to be given a charge over assets, which are otherwise free from encumbrances, being a charge in respect of which the requirements of this paragraph are satisfied.

(2) The charge shall be made on the following terms—

- (a) that, subject to head (b), during the shortfall period the assets stand charged with the payment of a debt from the employer to the trustees or managers of the sum specified in the charge as the maximum amount that is secured by it;
- (b) that, if during that period a relevant insolvency event occurs in relation to the employer or the scheme begins to be wound up, the assets stand charged with a debt from the employer to the trustees or managers of a sum equal to—
 - (i) the amount mentioned in head (a), or
 - (ii) the Article 75(1) shortfall,whichever is less;
- (c) that at no time during the shortfall period the employer will take or omit to take any steps the taking or omission of which results or may result in a reduction in the value of the assets to an amount less than the Article 60 shortfall at that time.

(3) The charge shall be registrable—

- (a) in a case where the employer is a company, under Part XIII of the Companies (Northern Ireland) Order 1986(4), and
- (b) in any other case, in a register maintained under an enactment,

and the Article 60 shortfall shall not be treated for the purposes of Article 60 as having been secured by the charge unless a legal adviser appointed by the trustees or managers has certified in writing to them that all such steps have been taken as are necessary for the purpose of protecting their interests in the charge.

(4) Before agreeing to an amount required to be secured by Article 60(2) being secured by a charge over assets, the trustees or managers shall be satisfied that the assets proposed to be charged are suitable as security for payment of that amount and, in particular, that, if a relevant insolvency event occurs in relation to the employer—

(4) S.I. 1986/1032 (N.I. 6)

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- (a) the value of the assets will not be substantially reduced, and
- (b) the assets may be converted into cash without undue difficulty and within a reasonable period.

(5) Where an Article 60 shortfall has been secured by a charge under this paragraph, the trustees or managers may accept a fresh charge over different assets in substitution for the original charge, notwithstanding that the period within which that shortfall may be secured in that manner has expired, if they are satisfied that the requirements of this paragraph are satisfied.

(6) Where an amount required to be secured by virtue of a serious shortfall valuation has been secured by a charge under this paragraph, if—

- (a) a fresh obligation arises under Article 60(2) as a result of a further such valuation, and
- (b) the trustees or managers are satisfied that, if the charge were being taken by them as a result of that further valuation, the requirements of this paragraph would be satisfied,

then—

- (i) they may agree to accept the charge as security under this paragraph in respect of the amount required by Article 60(2) to be secured by virtue of the further valuation (so far as that amount does not exceed the sum specified in the charge as the maximum amount that is secured by it), and
- (ii) if they do so, then for the purposes of Articles 56 to 61 and these Regulations (but not for any other purposes) the charge shall be deemed to have been given on the date of that agreement.

(7) A charge given for the purposes of this paragraph may allow the release of assets from the charge where—

- (a) there has been a reduction in the Article 60 shortfall, and
- (b) the trustees or managers are satisfied that the assets which will be subject to the charge after the release would be accepted by them to secure an amount equal to the Article 60 shortfall at the time of the release if the charge were given at that time.

(8) Except as provided by this paragraph, a charge given under this paragraph shall be given on terms under which it may not be amended or revoked during the shortfall period.

Expenses

5. Expenses incurred by the trustees or managers in connection with securing any arrangement under this Schedule may not be paid out of the assets of the scheme.

Valuation of increases secured as mentioned in this Schedule

6.—(1) An increase in value secured by the method specified in paragraph 2 shall at any time be treated for the purposes of Article 60 as being of an amount equal to—

- (a) the amount specified in the appropriate letter of credit as the maximum amount the institution guarantees, or
- (b) the Article 60 shortfall at that time,

whichever is less.

(2) An increase in value secured by the method specified in paragraph 3 shall at any time be treated for the purposes of Article 60 as being of an amount equal to—

- (a) the amount standing to the credit of the account at that time, or
- (b) the Article 60 shortfall at that time,

whichever is less.

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(3) An increase in value secured by the method specified in paragraph 4 shall at any time be treated for the purposes of Article 60 as being of an amount equal to—

- (a) the amount specified in the charge as the maximum amount to be secured by it, or
- (b) the Article 60 shortfall at that time,

whichever is less.