

Pensions Regulator issues another FSD

The Pensions Regulator has issued a financial support direction (“FSD”) to ITV plc (“ITV”) and four of its subsidiaries in connection with the Boxclever Group Pension Scheme (the “Scheme”). ITV has appealed the issuing of the FSD to the Upper Tribunal.

The Regulator has not yet published its determination, but it has been reported that Box Clever, the sponsoring employer of the Scheme, was established as a joint venture in 2000 between Granada and Thorn, both of whom transferred their television rental businesses to the company. As part of the arrangements, Granada received £500m in dividends from Box Clever. Granada subsequently merged with Carlton Communications to form ITV.

Box Clever had borrowed £860m to fund the costs of the business acquisition (including the dividend payments) but was unable to meet its repayment obligations and went into administration in 2003. The company’s business was sold to new owners out of the administration, but the pension scheme was left significantly underfunded with assets of £14.4m and liabilities of £76.5m.

ITV is appealing the issuing of the FSD on the grounds that it has never participated in the Scheme and had no control over the development of the deficit and that the issuing of the FSD is therefore “wholly unreasonable”.

Comment

The issuing of this FSD is another demonstration that, whilst the Regulator may not exercise its anti-avoidance powers frequently, it is prepared to do so if it considers that the circumstances merit their use. This case is of particular interest since it is the first FSD to be issued to a recipient which is not in administration or other insolvency proceedings.

Of greater note, however, is the fact that the Regulator appears to have seen fit to issue an FSD in respect of events which took place over ten years ago and which pre-date the legislation granting the Regulator’s anti-avoidance powers. Although there is a six year look-back period for contribution notices, there is no express temporal limitation on events that may be considered in deciding whether it is reasonable to impose an FSD. Companies which have undertaken M&A activity in the last decade involving defined benefit pension schemes will await with interest and concern any comments which the Upper Tribunal may make regarding the Regulator’s ability to issue an FSD in respect of events which occurred prior to 2005.

If you have any questions about any of the issues raised in this update, please contact:

Devi Shah

Partner

Tel +44 20 3130 3669

Martin Scott

Partner

Tel +44 20 3130 3847

Mayer Brown is a global legal services organisation advising many of the world’s largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world’s largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore
EUROPE: Brussels, Cologne, Frankfurt, London, Paris
TAUIL & CHEQUER ADOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro
ALLIANCE LAW FIRM: Spain (Ramón & Cajal)

Please visit our web site for comprehensive contact information for all Mayer Brown offices. www.mayerbrown.com

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the “Mayer Brown Practices”). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. “Mayer Brown” and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.