PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE PENSION PROTECTION FUND OMBUDSMAN

Applicant **:** Mr T Leahy, for the Trustees of the Bank of Cyprus UK Pension and Life Assurance Scheme

Scheme **:** The Bank of Cyprus UK Pension and Life Assurance Scheme

1. The Pension Protection Fund (**PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 17 April 2008.

BACKGROUND

2. In January 2007, the PPF issued invoice number 10015145-000-07-01 to the Scheme Trustees. This gave the PPF levy for 2006/07 as £66,470.28, of which £60,855.03 was in respect of the risk-based levy. In the levy formula (U x P x 0.53 x 0.8), P (the Probability of Insolvency of the employer) was stated to be 0.012221.

3. Following an appeal, Dun & Bradstreet (**D&B**) advised the Bank of Cyprus UK (the **Bank**) that, in the case of foreign companies registered in the UK, or UK branches of foreign companies, the PPF had chosen to use the local D&B failure score or risk indicator to determine the risk of insolvency. D&B said that, in the Bank's case, it had identified the HQ company as Bank of Cyprus Public Company Limited for which the risk indicator, as at 31 March 2006, was 2 (Low Risk). D&B said it had been instructed by the PPF to use a probability of insolvency for such cases of 1.2221%. The appeal was declined.

4. In subsequent correspondence with the PPF, the Bank said it had been an established bank in the UK for 50 years and, until 2004, had been a stand-alone subsidiary. The Bank said that it had been advised that the average rating for "an established UK bank" would be closer to 0.5%.

5. Following a further exchange of correspondence, D&B informed the Bank that it had calculated that the Bank had negative working capital and, for this reason, it would

not assign it a risk factor of 1. In a letter to the Bank, D&B set out which items it had taken from the Bank's accounts for current assets and current liabilities to arrive at the working capital.

RECONSIDERATION DECISION

6. The Reconsideration Committee decided:

6.1. The Applicant had requested the review on the following grounds:

- The levy calculation was materially incorrect because the probability of insolvency rating which had been applied was incorrect and led to an unfairly high levy;
- The risk indicator used did not take into account the strength of the individual organisation or industry sector and penalised the organisation unfairly in comparison to its UK peers;
- The risk indicator used failed to capture the actual strength of the Bank or the fact that it was a bank (rather than any other business in Cyprus), subject to the regulatory requirements (concerning capital) of the countries in which it operated and the EU;
- The approach adopted by the PPF breached European Community Law by penalising the Bank for being a branch of a bank incorporated in another EU member state, contrary to Articles 43 and 48 of the EC Treaty of Nice.

6.2. Certain matters, contained in the Board's Review Decision, dated 26 July 2007, were considered "factual". These were:

(a) The relevant Scheme return was dated 5 October 2005;

(b) The Scheme was a multi-employer scheme;

(c) The employer was the Bank, a UK branch of a foreign registered company (Bank of Cyprus Public Company Limited);

(d) The Bank had a probability of insolvency of 0.12221, derived from the risk indicator assigned to the Bank of Cyprus Public Company Limited, as at 31 March 2006;

(e) The Scheme Trustees had not submitted a Declaration of Scheme Structure form or a Participating Employers form on or before 31 March 2006;

(f) The Scheme Trustees had not submitted a certificate in respect of contingent assets on or before 31 March 2006;

(g) The Scheme had paid £20,000 on account, on 31 May 2007.

6.3. In addition to the formal consultation process, the Board had made "substantial efforts" to publicise its proposals and the implications for schemes and their advisers.

6.4. Reconsideration of the amount of the levies was a reconsideration of the amount of the levies in a particular case and not a reconsideration of the Board's Determination for the year in question (the **PPF Determination**).

6.5. The scope of the reconsideration should be whether the calculation of the Scheme's levy invoice had been carried out in accordance with the published PPF Determination; neither the Board nor the Reconsideration Committee had any discretion to depart from the PPF Determination in calculating the amount of the levies.

Specific issues raised by the application

6.6. The D&B Risk Indicator

- In the formula U x P x 0.8 x 0.53, the PPF Determination provided (in paragraphs 25 and 26) that, in the case of an overseas employer, P should be the assumed probability of insolvency associated with the failure score or risk indicator, which the Board had been advised was appropriate;
- In the case of an employer which is not registered in the UK, the Board is obliged to use the failure score or local equivalent assigned to such employers by D&B's relevant associated undertaking or, in the absence of such a failure score or equivalent, the risk indicator assigned to the employer in question;
- There was no failure score for the Bank, but there was a risk indicator;

- The Scheme had made use of D&B's appeal procedure and the outcome of this was that the Board was required to use the risk indicator;
- D&B had confirmed that the risk indicator was based on information, including financial data, specific to the employer in question; it was, therefore, not correct to say that the risk indicator did not take into account the strength of the individual organisation;
- A risk indicator was a less sophisticated measure of insolvency risk, because it was based on more limited information and divides undertakings into four bands rather than one hundred;
- This reflected the fact that more limited information was available in some jurisdictions than in others and that the extent of the commercial demand for information about insolvency risk did not justify D&B developing a fully fledged failure score system for all jurisdictions;
- D&B had been selected as the provider because it could offer more comprehensive data than the alternative providers and could offer a generic score for a high proportion of employers;
- The Board had decided against using credit ratings because (amongst other things) they were only available for a smaller number of employers, which would lead to inconsistency, and they measured default risk rather than insolvency risk.

6.7. Discretions within the PPF Determination

- Paragraph 5 did not apply because it provided for situations in which the PPF Determination failed to make a provision necessary for the levy calculation to be performed and that was not the case here;
- Paragraph 6 provided for the Board to review a levy where it had been based on information which was incorrect in a material respect, but that was not the case here because D&B had confirmed that their assessment was correct;

- Paragraph 11 allowed the Board to take steps to obtain further information, but, since the Board was required to use D&B's risk indicator, there was no scope for it to obtain further information.

6.8. Breach of EU law

- The PPF Determination required that the insolvency risk for all employers, irrespective of nationality, be determined by D&B and, in that respect, the Board is not treating employers differently according to their nationality;
- The Board seeks the normal D&B rating for the employer in their country; being the rating that D&B would provide in the ordinary course of its business;
- Although the information available to and used by D&B varied according to the country to which the employer belonged, the Board endeavoured to use the most accurate risk probability offered by D&B in all cases;
- Although risk indicators were less sophisticated measures of insolvency risk, it did not follow that their use automatically led to a higher probability of insolvency;
- In these circumstances, if there was any discrimination, it would be indirect discrimination and not unlawful if it pursued a legitimate objective compatible with the Treaty of Nice and was proportionate and justified in the public interest;
- The Board was pursuing a legitimate objective in that it was required to assess an employer's probability of insolvency in order to impose a risk-based levy;
- The Board's approach, as set out in the PPF Determination, was reliable, affordable and based on readily available data. In the absence of satisfactory alternatives, the Board's approach was proportionate.

Conclusion

6.9. The Reconsideration Committee upheld the original calculation of the levies for the Scheme.

APPLICANT'S GROUNDS FOR REFERENCE

7. The Applicant submits:

7.1. The probability of insolvency factor (P) used in the levy calculation has been derived from the Cypriot country-wide risk indicator;

7.2. It is not obvious why D&B are unable to provide a specific failure score for the Bank, especially as the Bank of Cyprus Public Company Limited has credit ratings from agencies such as Fitch and Moody's;

7.3. The application of a country-wide risk indicator has resulted in a higher levy than is usual or expected for a company in its position and in its area of financial activity;

7.4. The risk indicator supplied by D&B is an assessment of the risk posed by country-wide factors and does not take into account the strength of the individual organisation or the sector in which it operates;

7.5. If the risk-based levy had been calculated by reference to a probability of insolvency of 0.5% (consistent with other banks), it would have been £24,897.73;

7.6. The Reconsideration Committee accept that the use of a country-wide risk indicator is a less sophisticated measure of insolvency risk and, therefore, appears to accept that the Bank has been subject to a potential disadvantage;

Breach of EU Law

7.7. Articles 43 and 48 confer the right for a company registered in one EU member state to establish a permanent or settled base of business activity in another EU member state without unjustifiable restrictions;

7.8. This has been recognised as a "fundamental freedom";

7.9. Unjustifiable restrictions can include discriminatory treatment on the basis that the company is incorporated in another member state;

7.10. The application of a country-wide risk indicator when other options were available to the PPF effectively penalises the Bank for being incorporated in Cyprus and this treatment cannot be shown to be justified or necessary;

7.11. The right of freedom of establishment is not confined to the initial setting-up of operations[1];

7.12. Articles 43 and 48 provide that the provisions of national law must not constitute an obstacle to the effective exercise of a fundamental freedom[2], which the ECJ has interpreted as requiring all companies incorporated in one EU member state, which establish themselves in another member state, to receive the same treatment as nationals of that member state[3];

7.13. Even minimal differences of treatment may constitute a violation of Articles 43 and 48[4];

7.14. The ECJ has also held that Articles 43 and 48 prohibit all covert or indirect forms of discrimination, which, by the application of other criteria of differentiation, lead to the same discriminatory results[5];

7.15. Even if the difference of treatment does not result from the application of different rules to companies incorporated in another member state, the application of the same rules to both types of company to the disadvantage of a company incorporated in another member state may infringe Articles 43 and 48[6];

7.16. The Bank has been placed at a disadvantage due to the use of a country-wide risk indicator to assess its levy; this constitutes direct discrimination on the basis of nationality;

7.17. It was not correct for the Reconsideration Committee to suggest that there was no direct discrimination, on the basis that all corporate employers were treated alike in that the standard D&B ratings were applied, because there is a difference, between nationals and non-nationals, in how the D&B ratings were applied;

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[1] *Commission v Greece* [1989] ECR 1461, [21]
[2] *Kraus* [1993] ECR I-1663, [28]
[3] *Commission v France* [1986] ECR 273 [14] and *Marks & Spencer v Hasley* [2005] ECR I-10837
[4] *Denkavit International BV and Denkavit France SARL v Ministre de l'Economie, des Finances et de l'Industrie* [2006] ECR I-11949, [22]
[5] *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, [14]; *Halliburton* [1994] ECR I-1137, [15]
[6] *Caixa Bank France* [2004] ECR I-8961

7.18. Alternatively, the Bank has suffered indirect discrimination in that it has been disadvantaged in practice by the application of rules which penalise it for being incorporated in another EU member state.

Justification

7.19. Restrictions on the freedom of establishment can only be justified in certain circumstances and must meet four conditions[7]:

- They must be applied in a non-discriminatory manner;
- They must be justified by imperative requirements in the public interest;
- They must be suitable for securing the attainment of the objective which they pursue; and
- They must not go beyond what is necessary in order to attain it.

7.20. If a restriction is directly discriminatory, a member state can only justify it on the grounds of public policy, security and health, as set out in Article 46[8];

7.21. If the Bank has been subject to direct discrimination, it can only be objectively justified on the grounds of public policy; the other heads of justification being inapplicable;

7.22. There is an obvious public policy goal of ensuring that occupational pension schemes remain solvent and protected, but there is no rational link between the application of a country-wide risk indicator to assess insolvency risk and the public policy objective;

7.23. The bureaucratic convenience of using D&B's standard practice cannot be described as necessary to advance compelling public policy objectives.

Indirect Discrimination – Proportionality Analysis

7.24. Differences in treatment which are indirectly discriminatory may be objectively justified if they are necessary to achieve a pressing legitimate aim,

[7] *Inspire Art Ltd* [2003] ECR I-10155
[8] *Bond van Adverteerders v Netherlands* [1988] ECR 2085. [32] – [33]; *Svensson* [1995] ECR I-3955, [15]; P Craig and G de Búrca *EU Law: Text, Cases and Materials* (4th ed.) (Oxford: OUP, 2008), 802-3; *Reyners* [1974] ECR 631, [43]

are rationally linked to attaining that aim and do not restrict the right of freedom of establishment to an unnecessary degree[9];

7.25. The fact that company law is not harmonised in the EU has been found to be insufficient justification[10];

7.26. Even where a legitimate aim is established, a measure may not be justified if it goes beyond what is necessary to attain it[11];

7.27. The imposition of the bureaucratic requirement that D&B's default method of assessing insolvency risk, without any further effort to assess the true situation, is not rationally linked to any legitimate aim;

7.28. The use of the country-wide risk indicator is not only unfair to the Bank, it is also potentially misleading and inaccurate and contributes nothing to maintaining an effect and fair system of risk-based levies;

7.29. The use of this indicator was not appropriate and went beyond what was necessary to achieve a legitimate objective;

7.30. Alternative and more accurate ways of assessing insolvency risk were available, e.g. credit ratings or a specific failure score for the Bank;

7.31. Economic reasons of cost alone cannot justify a restriction on the freedom of establishment[12].

WRITTEN REPRESENTATIONS

8. The PPF Ombudsman has received written representations from the PPF and the Bank, which are summarised below.

The PPF

9. In addition to the points already made by the Reconsideration Committee, the PPF submits:

9.1. Whilst the Board's application of the PPF Determination is a reviewable matter, the PPF Determination itself is not;

[9] *Marks & Spencer v Hasley* op. cit.; *Stöber and Piosa Pereira* [1997] ECR I-511, [39]
[10] *Centro Ltd* [1999] ECR I-1459, [28]
[11] *Marks & Spencer v Hasley* op. cit.
[12] *Marks & Spencer v Hasley* op. cit.

9.2. However, the Board and the Ombudsman are not in a position to review the terms of the PPF Determination, once it has been made, or to make exceptions for individual schemes;

9.3. The Ombudsman may only interfere with the decision of the Reconsideration Committee if it has been reached incorrectly, i.e. it has misdirected itself or reached a conclusion not open to a reasonable decision-maker;

9.4. Under Section 175 of the Pensions Act 2004, the Board must impose a risk-based levy and a scheme-based levy. The risk-based levy must be assessed by reference to the difference between the value of the scheme's assets and the amount of its protected liabilities, the likelihood of an employer insolvency event and certain other risk factors as the Board considers appropriate;

9.5. The Board must publish details of its determination on the PPF website and, on request, in a paper format;

9.6. Section 176 and regulations made thereunder require the Board to consult before making its determination;

9.7. Section 181(3) provides that the Board must determine the schemes in respect of which the levies are imposed, calculate the amount of the levies and notify those liable to pay of the amount of the levies and the due date;

9.8. Paragraphs 25 to 27 of the Schedule to the PPF Determination set out how failure scores and insolvency probabilities will be obtained and used in the levy calculations;

9.9. If a scheme's levy has been correctly calculated in the manner called for by the PPF Determination, there is no proper basis for changing the amount of the levy on review;

9.10. The PPF Determination required the calculation of the risk-based levy to be based (amongst other things) on the failure score provided by D&B in the ordinary course of its business;

9.11. Sub-paragraph 26(d) provided that, in the case of employers not registered in the UK, D&B was to provide a failure score or local equivalent or, in the

absence of a failure score or local equivalent, the risk indicator assigned to the employer in question;

9.12. In this case, the terms of the PPF Determination have been applied to the calculation of the levy and none of the information used was incorrect; therefore there is no basis for a review nor would a review be mandatory;

9.13. If the Board had had the discretion to review the levy, this would not have been an appropriate case for the favourable exercise of such a discretion;

9.14. The points raised are such that, if applied across the PPF's universe of schemes, it would require a subjective assessment of an employer's risk of insolvency; such an approach would not be practical.

Use of the country-wide risk indicator

9.15. The Bank appears to accept that the probability of insolvency used to calculate the levy was that which was provided by D&B in accordance with the terms of the PPF Determination;

9.16. D&B provided a risk indicator of 2 (associated with a probability of insolvency of 1.2221%) and have confirmed that this was the figure which was or would have been assigned, in the ordinary course of its business, to the Bank, as at 31 March 2006;

9.17. The question of whether the risk indicator assigned to the Bank was purely a standard figure relating to the country in which the Bank is incorporated goes to D&B's process for compiling risk indicators;

9.18. The compilation of statistical information necessarily varies from country to country, according to the type of information available. D&B's failure score system is based on a wide range of data elements, which vary according to availability from country to country. In the UK, the failure score incorporates more than 30 data elements, including audited accounts, directors' information, County Court judgments and a range of demographic factors. For certain countries, including certain EU member states, D&B are not able to provide a failure score because it would not be statistically appropriate where fewer data elements can be collected;

9.19. D&B provide the PPF with its standard service. The development of the failure score system is expensive and its availability for any particular country is determined by demand and the availability of data elements for that country;

9.20. Whilst it is the case that there are country specific factors in the risk indicator supplied in respect of the Bank, it is also determined by data elements specific to the Bank and its industry sector, e.g. strength of working capital, value of net worth and age of latest filed accounts;

9.21. The Bank raised an appeal with D&B in respect of the risk indicator originally assigned to it (3) and it was amended to 2 in recognition of an error in identifying the Bank.

Breach of EU Law

9.22. The Board does not consider that there has been direct discrimination;

9.23. In all cases, the relevant liability lies with the parent company (the Bank of Cyprus Public Company Limited), which is the relevant employer in relation to the scheme; the fact that the Bank of Cyprus Public Company Limited has an operation in the UK does not alter this;

9.24. The fact that the Bank is subject to UK banking regulation does not alter the fact that the Bank of Cyprus Public Company Limited is not; it is, therefore, appropriate that the risk is assessed by reference to the place in which the Bank of Cyprus Public Company Limited is established;

9.25. The Board understands that it is not possible for D&B to provide ratings for branches because separate data does not exist for branches;

9.26. Whilst the position of companies registered in those countries for which D&B cannot provide a failure score cannot be assessed as precisely, the same underlying principle of a fixed set of rules applied to an objectively measurable set of data elements applies;

9.27. If the Ombudsman were to find that the assessment of probability of insolvency provided by D&B amounted to indirect discrimination, the Board

believes that its approach pursues a legitimate objective compatible with the Treaty of Nice and that any element of discrimination can be justified;

9.28. Any system devised to assess insolvency risk is likely to be preferable to some types of employers than to others. The Board aimed to find an affordable and fair method of assessing risk across all employers in relation to eligible schemes; any system which allowed it to apply a different method in the case of the Scheme might be said to be unfair and might incorporate subjective elements which would make the provision of a robust appeals process unworkable;

9.29. Given the Board's objective to appoint a sole external insolvency risk provider, for which it operated an EU law compliant tendering process, the adoption of a system which provides less precise, but comparable, results in those countries for which a failure score system is not available must be said to be a proportionate means of achieving that aim;

9.30. The Board is not aware of any alternative provider which might offer a more precise scoring system for Cyprus, but, in any event, it would not be appropriate or proportionate to engage a separate insolvency risk provider for Cyprus or any of those countries for which a failure score system is not available.

Further Submissions

9.31. The Trustees appear to believe that the risk indicator used related only to the country of establishment of the relevant employer. This is not the case. The D&B risk indicator, for countries such as Cyprus, may vary on a scale of 1 to 4 and the Bank's risk indicator is calculated by reference to data elements specific to itself and its industry sector. This is evidenced by the Bank being able to improve its score without providing evidence of a different country of incorporation.

9.32. It has been argued that the Board has not been able to satisfy itself that it is proceeding on the basis of a properly calculated risk factor and that it is not entitled to take the view that the risk indicator is a matter for D&B, over which it has no control. This argument is misconceived for three reasons:

- The PPF Determination provides for the Board to use the failure scores assigned by D&B in the ordinary course of its business, subject to specified, limited exceptions. The Board has no discretion to depart from the PPF Determination and the Trustees appear to accept this. There are good practical reason why it is not sensible for the Board to become involved in the details of calculating the risk factor, when it has engaged an expert commercial provider of such information to do it. This is, in any case, a complaint about the PPF Determination and not the levy.

- The Board did seek information about how D&B operated before it was engaged and is aware of the essential features of D&B's system for assessing insolvency risk, although not of all the precise details; particularly those elements in respect of which D&B claims commercial confidentiality.

- When this matter came before the Reconsideration Committee, steps were taken to make sure that the D&B system was as the Board believed it to be and that it was a lawful approach to adopt. Information was gathered in the form of statements from the Board's Chief Executive and a Senior Operations Manager at D&B. These confirmed that the risk indicator was based on company-specific information and represented the best assessment that was commercially available to the Board.

The Bank

10. The Bank makes the following further submissions:

10.1. It does not dispute that the Ombudsman's jurisdiction is limited to reviewing whether the levy has been calculated in accordance with the formula in the PPF Determination; the way in which the general formula for determining the levies was arrived at in the first place is not itself subject to review by the Ombudsman;

10.2. The basis of the Bank's request for review of the Reconsideration Committee's decision is that the amount of the levy determined as payable by

the Bank was incorrectly calculated under section 181(3) of the Pensions Act 2004 and under the terms of the PPF Determination;

10.3. Paragraph 26(d) of the Schedule to the PPF Determination must be read in conjunction with paragraph 6;

10.4. It submits that the levy was incorrectly calculated because the application of a country-wide risk indicator was not required or justified by the PPF Determination and its application was inconsistent with the PPF's wider legal obligations;

10.5. Paragraph 26(d) make it clear that, when a risk indicator is provided by D&B in the absence of a failure score, it is that which has been assigned to the employer in question; there is no provision for the application of a country-wide risk indicator;

10.6. Properly construed, paragraph 26(d) requires the risk indicator to reflect the position of the employer; this avoids the application of a blanket risk indicator which discriminates under Articles 43 and 48; D&B and/or the PPF should have applied a risk factor which took into account the particular degree of stability of the Bank and the particular sector in which it operated;

10.7. The PPF has not provided any evidence that this was the case and may not know with any certainty what the basis of the calculation of the risk indicator is;

10.8. The PPF is not in a position to satisfy itself that it is proceeding upon the basis of a properly calculated failure score or risk indicator nor is it in a position to consider reviewing a levy under paragraph 6 on the basis that some of the information used may be materially incorrect;

10.9. Nothing in the PPF Determination, the Pensions Act or the Regulations made thereunder, required the PPF to accept unquestioningly the correctness of applying a risk indicator under paragraph 26(d);

10.10. To do so would be inconsistent with paragraph 6, which gives the PPF the discretion to review a levy where it appears *to it* that the information upon which a levy has been based is materially incorrect;

10.11. The PPF is not entitled to adopt the stance that the failure score or risk indicator is simply a matter for D&B, over which it has no control and for which it cannot be accountable by way of a review;

10.12. The Bank submits that:

- The Ombudsman should quash the PPF's decision on the basis that it has not properly considered the basis of the risk indicator provided by D&B; or
- Call for the detailed information which the PPF "understands" has affected the risk indicator provided by D&B;

10.13. The PPF, as a public authority, should have taken into account that the application of a country-wide risk indicator was or might be unlawful; particularly where it was not expressly stipulated in the PPF Determination, and it is not under a duty to accept such a blanket indicator from D&B; there is no indication that the PPF considered this point, nor could it have done so given its apparent unfamiliarity with D&B's procedures;

10.14. The Bank has not called for a universal subjective assessment to be carried out for each eligible scheme without regard for the factors and formulae laid down by the PPF Determination; this would be contrary to the terms of Section 175 and Section 181(3).

FURTHER SUBMISSIONS

11. The Bank makes the following further points:

11.1. It can see some merit in the argument that the extent of commercial demand for information about insolvency risk in Cyprus does not justify developing a fully fledged failure score system;

11.2. However, there can be no doubt that a 1-4 risk indicator system offers less granularity than a 1-100 failure score system and has potentially a greater impact on the final probability of insolvency rating and risk-based levy;

11.3. It suggests that a less sophisticated measure of insolvency risk would lead to a higher probability of insolvency and, thus, discriminates against it as a bank incorporated in another EU state;

11.4. D&B has stated that it does not take into account the fact that the relevant employer is a bank and, therefore, subject to regulatory capital requirements; surely this is a relevant factor in evaluating risk;

11.5. D&B failed to answer some of the questions put to it by the PPF;

11.6. It cannot accept the lack of evidence or rationale provided by D&B as to why the Bank has been assigned a risk indicator of 2 (rather than 1);

11.7. Nor does it accept that the PPF has no role in ensuring the data provided by D&B is credible and robust (rather than a means to an end);

11.8. It disagrees with the methodology adopted by D&B to arrive at a negative working capital when it is a well capitalised, liquid and profitable European bank.

CONCLUSIONS

12. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.

13. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2006/07.

14. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2006/07 levies were assessed; those factors were set out in the PPF Determination for the year in question. The PPF has correctly submitted that the Determination, itself, is not a reviewable matter nor is the Board able to amend the Determination on an individual application for review or reconsideration.

15. The PPF Determination provided for the probability of insolvency used in the calculation of the levy to be derived from the failure score assigned by D&B "in the ordinary course of its business". Paragraph 26(d) provided that, where a failure score was not available, D&B should provide a risk indicator, which is what it did for the Bank. D&B have provided a list of the countries comprising the EU, together with an

indication of which system (failure score or risk indicator) they provide for each. This confirms that Cyprus is among those countries for which D&B use the risk indicator system. I am satisfied that, in the ordinary course of its business, D&B do not provide failure scores for companies incorporated in Cyprus and, therefore, it was in accordance with the PPF Determination that it should provide a risk indicator in respect of the Bank.

16. The Bank's challenge to its 2006/07 levy is largely based on the premise that D&B have provided a country-wide risk indicator. It is clear from the statements provided by the PPF (copies of which have been provided to the Bank) that this is not the case. D&B have explained that, even for those countries for which it only provides a risk indicator, assignment to one of the four bands is achieved by applying a decision tree process or a set of rules to a set of data elements. Those data elements are specific to the company in question. No doubt, it would always be the case that for any company certain factors are more favourable to them than others and they would prefer D&B to use the more favourable data. This would, however, undermine the consistency that D&B and the PPF seek to achieve by the use of an independent assessment.

17. The Bank has been able to challenge D&B's calculation of the risk factor it has assigned to it and, had D&B been persuaded to change the risk factor, there was the option for it to notify the PPF accordingly. There is, however, no provision within the PPF Determination for the Board to set aside the risk factor notified to it by D&B on the application of an individual scheme.

18. It remains the case, however, that the Bank is not subject to the same assessment system as a bank incorporated in the UK. It is argued that there has been a breach of Articles 43 and 48 of the Treaty of Nice.

19. I find that there is a compelling argument that the use of a risk indicator did not amount to an unjustifiable restriction on the ability of the Bank of Cyprus Public Company Limited to establish a business in the UK. The four conditions, referred to by the Bank, for justification to be established would appear to be met. The fact remains that the information available for assessment varies between countries (even countries of the EU) and it is not possible for D&B (or any other provider) to analyse the risk of insolvency to the same degree for every company. It does, however,

provide a risk assessment which is specific to the company concerned; albeit that the level of refinement varies in relation to the information available to it.

20. Although the Bank refers to the "bureaucratic convenience" of using D&B's standard service, which it considers does not provide such justification, it does not address the counter-arguments concerning the cost of obtaining a bespoke system or systems nor the need for objectivity and consistency.

21. In my opinion, the use of D&B's risk indicator was suitable for securing the objective which the PPF sought to attain, namely, an assessment of the probability of insolvency for the relevant employer. I do not consider that it goes beyond what is necessary in achieving that aim.

22. I find that the Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is, therefore, not required to take any action.

TONY KING
Pension Protection Fund Ombudsman

13 November 2009