

## Ombudsman's Determination

Applicant: The Trustees of the Channel Tunnel Group Pension Fund (the **Trustees**)

Scheme: The Channel Tunnel Group Pension Fund (the **Fund**)

Respondent: The Board of the Pension Protection Fund (the **Board**)

## Outcome

1. I find that the Board's Reconsideration Committee's decision, dated 4 June 2020, was reached correctly. The Board is not required to take any further action.

## Referral summary

2. The Trustees have referred a decision by the Board's Reconsideration Committee relating to the calculation of the Fund's 2019/20 risk-based levy. The Trustees consider the levy to have been incorrectly calculated by reference to the 2016 accounts for Getlink SE (the **2016 Accounts**).

## Background

3. On 23 October 2019, the Board issued an invoice (10012891-20-03) in respect of the Funds' levy for the year 2019/20. The calculation for the Fund's risk-based levy had referred to the 2016 Accounts for the May 2018 employer insolvency score.
4. Under Section 175(5), Pensions Act 2004, the Board is required to publish an annual determination of the rules relating to the calculation of the levy for that year (the **Levy Rules**). The provisions relating to the calculation of the insolvency risk for an employer or parent company are set out in Part E and the Insolvency Risk Appendix. Relevant extracts from the Levy Rules for 2019/20 are provided in the Appendix to this Opinion.
5. The Trustees submitted a review application on 15 November 2019. This asked that the Board recalculate the May 2018 employer insolvency score by reference to Getlink SE's 2017 accounts (the **2017 Accounts**). The Board issued a review decision on 12 March 2020. It declined to review the Fund's risk-based levy.
6. The Trustees submitted a reconsideration application on 8 April 2020. This was considered by the Board's Reconsideration Committee (the **Committee**). The

Committee issued its decision on 4 June 2020. The decision is summarised as follows:-

- The Levy Rules did not permit Autorité des Marchés Financiers (**AMF**) to be used as a source for collecting the 2017 Accounts.
- Because the 2017 Accounts were not publicly available on the AMF website, the accounts could not be considered to have been Filed, as defined in the Levy Rules.
- Even if it were to accept the Trustees' arguments as to this, the Levy Rules required a data hierarchy to be applied and the 2016 Accounts took precedence.
- The invoice had been correctly calculated by reference to the 2016 Accounts. The 2017 Accounts were not required to be taken into account as at the May 2018 Score Measurement Date, as defined in the Levy Rules.
- The Committee had considered two discretions: Rule B2 and Rule B4. It had concluded that neither were applicable to the Trustees' application for reconsideration.

7. The Committee gave the following reasons for its decision:-

- Each month, Experian collected data which had been Filed with permitted sources. This data included Latest Accounts which had been filed with Companies House or any Other Permitted Source, as defined. Filed meant publicly available on the official website of Companies House or an Other Permitted Source, or provided to Experian voluntarily. Companies House was defined as the executive agency of the Department for Business, Energy and Industrial Strategy or a body which undertook an equivalent role outside the UK. Other Permitted Source included the Financial Conduct Authority (**FCA**). The FCA was not defined but plainly referred to the UK regulator. The Levy Rules had not expanded the reference to the FCA to include equivalent bodies outside the UK in the way it had the definition of Companies House.
- The Levy Rules set out the data hierarchy as: firstly, Companies House; secondly, Other Permitted Source; and, thirdly, voluntary provision.
- Rule E2.8(1) set out the timing requirements for Experian to use data. Experian was required to use data which had been Filed at least one calendar month before the Score Measurement Date. For May 2018, data would have had to have been Filed by 30 April 2018, or a later date if Experian had processed it before 31 May 2018.
- Getlink SE was categorised as CRA Rated for the purposes of the Levy Rules for the month of April 2018. Therefore, May 2018 was the first month for which the 2017 Accounts could have been considered in any event.

- Rule E2.2 required Experian to collect data which was Filed with any body which undertook an equivalent role to Companies House outside the UK. Experian used a list provided by the UK Government to determine which overseas registries were equivalent to Companies House. In France, these were Infogreffe and INPI. Getlink SE accounts were filed with and available on Infogreffe only.
- Getlink SE delivered the 2017 Accounts to Infogreffe on 4 May 2018, but Infogreffe did not make the accounts publicly available until 6 June 2018. Therefore, the 2017 Accounts were not Filed, as defined in the Levy Rules, until 6 June 2018. Experian was unable to use the 2017 Accounts for the May 2018 Score Measurement Date.
- It had considered whether AMF could be considered equivalent to an Other Permitted Source, as defined. AMF was not listed as an Overseas Registry on the UK Government website. The Trustees had described AMF as a French stock market regulator and an equivalent to the FCA. It accepted that AMF undertook an equivalent role to the FCA.
- The definition of Other Permitted Source in the Levy Rules included the FCA, but had not been widened to include any body undertaking an equivalent role to the FCA. AMF was not an Other Permitted Source.
- Nor were the 2017 Accounts publicly available on AMF's website, which was a key requirement for a document to be Filed for the purposes of the Levy Rules.
- Rule E2.6 (data hierarchy) made it clear that data collected from Infogreffe for use in May 2018 would take precedence, regardless of whether it provided the most recent data.
- The Trustees had said that filing the 2017 Accounts at Infogreffe had taken longer than expected. Rule E7.5(1) provided for Experian to change an Appealable Score in certain circumstances; two of which might be relevant in the current case.
- Firstly: (1) Experian did not have access to or did not process data which would otherwise have been used for the levy calculation; and (2) the data had been Filed at least one calendar month before the relevant Score Measurement Date. The 2017 Accounts had not been Filed at least one calendar month before the relevant Score Measurement Date; that is, 31 May 2018.
- Secondly: (1) Experian did not have access to or did not process data which would otherwise have been used for the levy calculation; and (2) in the case of matters to be dealt with in accordance with Experian's ordinary course of business, the data would normally have been available to and taken account of by Experian and the lack of access was not due to action or inaction on the part of a trustee, employer, guarantor or parent company in relation to the scheme. The collection of the 2017 Accounts did not fall within matters to be dealt with in accordance with Experian's ordinary course of business. The collection of the 2017 Accounts was specifically dealt with in the Levy Rules.

- Rule B2 might apply if it appeared that the information supplied for or used in the calculation of the levy was incorrect in a material respect. Information was not incorrect where it was correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused the Levy Rules to be applied differently.
- In considering the discretion provided in Rule B2, it had considered guidance published by the Board on the issue of corrections. In particular, the statement:  
“We will only consider correction requests, not updates. A correction is where, at the relevant deadline, the information was available to the scheme and the levy requirements could, in principle, have been met. We regard an update as where some or all of the information or requirements were obtained/met after the deadline.”
- There was nothing to suggest that the 2016 Accounts were incorrect. It was simply that the 2017 Accounts provided more recent data. It considered the 2017 Accounts to be an update; not a correction. The discretion to correct data, under Rule B2, did not arise.
- Rule B4 allowed it to take account of information Submitted, as defined, after a deadline in certain circumstances. Namely, the information was despatched at an appropriate time, but was delayed or lost in transit, or provision of the information by the deadline had been prevented by: temporary inaccessibility of the PPF website or Exchange; interruption of electronic communications; or an other comparable cause. The information had to have been Submitted as soon as reasonably practicable thereafter.
- Rule A2.2 defined the term Submitted. It expressly stated that it did not apply to the voluntary provision of information under Rule E2.3. It did not refer to the requirements for a document to be Filed as provided for in Rule E2.2. The definition of Submitted did not, therefore, include documents collected by Experian.
- Notwithstanding this, Rule E2.8(5) allowed the Board to direct Experian to accept information provided voluntarily under Rule E2.3 which had been received after a deadline in the same circumstances as set out in Rule B4. However, it did not have the scope to read Rule E2.8(5) as applying in broader circumstances. The requirement for a document to be Filed did not fall within the meaning of Submitted in the context of Rule B4. The discretion to take account of delayed information did not arise in the circumstances of the case.

8. The Committee went on to provide the following further comments, which it explained did not form part of its decision and were provided for information only:-

- Information provided by the Trustees at the review stage had indicated that the 2017 Accounts had taken 33 days to become available on the Infogreffe website, compared to between zero and four days in the previous three years. The



Trustees had also provided evidence that Infogreffe could take up to 17 working days to publish accounts. This meant that accounts deposited on 4 May 2018 could have taken up to 1 June 2018 to be made publicly available.

- In their reconsideration application, the Trustees had submitted evidence for a shorter period to publication which meant that, had Infogreffe complied with its usual service level, the 2017 Accounts would have been available for the Score Measurement Date of 31 May 2018.
- Rule B4.1(1) allowed the Board, at its discretion, to take account of information Submitted after a deadline if the information had been despatched at an appropriate time but had been delayed or lost in transit. The 2017 Accounts had been deposited within the one month requirement under French law and, therefore, could be considered to have been despatched at an appropriate time. However, it was not clear that the information had been delayed or lost in transit. Rather, it appeared that the delay occurred during Infogreffe's processing of the 2017 Accounts. It did not appear to the Committee that the information could be regarded as delayed or lost in transit.
- Rule B4.1 (2) allowed the Board to take account of information Submitted after a deadline if: provision of the information by the deadline had been prevented by temporary inaccessibility of the PPF website or Exchange, interruption of electronic communications, or an other comparable cause; and the information had been Submitted as soon as reasonably practicable afterwards.
- For Getlink SE to ensure that the 2017 Accounts would be certain to be used for May 2018, they had to have been Filed by 30 April 2018. Getlink SE did not deposit the 2017 Accounts until 4 May 2018.
- The Committee would need to assume that Experian would have processed the 2017 Accounts before the end of May 2018. If it accepted that Infogreffe's standard processing was around one or two days and Experian would likely have processed the 2017 Accounts within the same month, it accepted that the 2017 Accounts could have been available for use at the May 2018 Score Measurement Date but Getlink SE was prevented from achieving this because of inaction by Infogreffe.
- If discretion did arise in this case, it would have regard to all the relevant circumstances when considering whether to exercise discretion.
- It noted that the impact on the levy was material. However, materiality of levy impact would not outweigh other relevant factors. In particular, it noted that it had been open to Getlink SE to have deposited the 2017 Accounts sooner, which would have increased the chances of them being Filed before 30 April 2018. There was a real chance that Infogreffe could take longer than one or two days to process the accounts. It had been open to Getlink SE or the Trustees to monitor the Infogreffe website to identify delay and seek to address this.

- However, because it had decided that no discretions arose, it had not concluded whether it would have been minded to exercise its discretion.
- The Board administered and collected the levy for thousands of schemes. It did this in a way which was efficient and fair to all schemes by setting clear and transparent rules for all schemes to follow. The Board was required to expend considerable resources ensuring fair and thorough reviews of reconsideration applications. It became overwhelmingly and disproportionately inefficient and expensive for the Board to make individual accommodations in cases where filing deadlines had been missed.

## **Grounds on which the reference is made**

### **9. The Trustees submit:-**

- The Committee has incorrectly applied Rule E7.5 of the Levy Rules.
- Experian can, and should, change the Fund's levy score.
- Rule E7.5(1)(b) provides that Experian can change an Appealable Score when it did not have access to or did not process relevant data which would otherwise have been used for the purposes of a Rule E2.1 calculation. This is data which would normally have been available to Experian, and would normally have been taken into account by it, and the lack of access was not related to any action or inaction on the part of trustees, an employer, a guarantor or ultimate parent or group subsidiary.
- The Committee's decision does not address the first part of Rule E7.5(1)(b)(i). Its decision incorrectly states that the circumstances in Rule E7.5(1)(b)(i) only relates to the second part of the rule.
- The collection of the 2017 Accounts is dealt with in the Levy Rules. The situation falls squarely within the wording of the first part of Rule E7.5(1)(b)(i). Collection of data is clearly a matter to be dealt with under the Levy Rules in accordance with Experian's ordinary course of business. Rule E2 provides that Experian collects data to calculate Monthly Scores.
- The Committee was, therefore, incorrect to conclude that Experian had no ability to accept the late information.
- The 2017 Accounts were data which would normally have been available to and taken into account by Experian. The lack of access was not related to any action or inaction by the Trustees or an employer, a guarantor or ultimate parent or group subsidiary. The lack of access was related to inaction by Infogreffe.
- Rule E7.4(1)(a) or (b) contain the time limits for an appeal to Experian. Given the delay caused by the Committee's incorrect application of Rule E7.5(1)(b)(i), the Board should appeal to Experian under Rule E7.2(5) for the 2017 Accounts to be

used. Alternatively, the Board should confirm, under Rule E7.4(1)(c), that it is reasonable for the Trustees to appeal under Rule E7.2(1).

- Experian and the Board also have the option to agree that the appeal is to be determined by the Board under Rule E7.9.
- The Trustees raised an appeal with Experian in July 2019. This appeal was declined in September 2019. This does not preclude a further appeal to Experian now because: (a) material new evidence is available; (b) the Committee has incorrectly applied Rule E7.5(1)(b)(i); and (c) the Board is entitled to appeal to Experian in any event.
- In the alternative, the Committee incorrectly concluded that its discretion under Rule B2 did not apply.
- The Committee concluded that the 2016 Accounts were not incorrect because: (a) something is not incorrect if it is correct and legitimate in itself but it would have been open to the person supplying it to supply some different or additional information which might have caused the Rules to have been applied differently (Rule B2.1(3)); and (b) the Board will only consider correction requests, not updates. A correction is where, at the relevant time, the information was available to the scheme and the levy requirements could have been met; whereas, an update is where information was obtained after the relevant deadline.
- The 2016 Accounts were incorrect because: (a) the 2016 Accounts were not correct or legitimate in themselves because they were based upon out-of-date information; and (b) the 2017 Accounts were a correction because, at the relevant deadline, the information was available to the Fund. The information was available to the Fund regardless of whether the 2017 Accounts had been published on the Infogreffe website and they were available publicly elsewhere. The 2017 Accounts were not obtained after the relevant deadline.
- Given the materiality of the levy increase and the circumstances of Infogreffe's inaction, the Committee should exercise its discretion, under Rule B2(1), to calculate the levy by reference to the 2017 Accounts.
- The Committee was incorrect to conclude that the 2016 Accounts would take precedence under the data hierarchy rules.
- The Levy Rules do require a data hierarchy to be applied to the collection of data, but it is incorrect that the 2016 Accounts take precedence.
- Rule E2.6 provides that the data hierarchy applies in the event that the collection of data in accordance with Rule E2.1 results in conflicting data items. Applying this test, the 2016 Accounts would not take precedence over the 2017 Accounts.

- The 2016 Accounts and the 2017 Accounts are not conflicting data. There is no conflict because they relate to different financial years. Therefore, the data hierarchy rules did not apply.
- The 2016 Accounts were held by Experian and used for the previous levy year. They were, therefore, not collected for the purpose of Rule E2.6.
- Both the 2016 Accounts and the 2017 Accounts will have been collected from a Company/Charity Source; namely, Infogreffe's website. Even if a conflict were found, Rule E2.6(2)(a) applies and provides that the most recent data should be preferred. Therefore, the 2017 Accounts should be used in preference to the 2016 Accounts.

### **Written representation by the Board**

10. The Board states its position remains as set out in the Committee's reconsideration decision. It wishes to make the following further submissions:-
  - The Trustees have misinterpreted Rule E7.5(1)(b)(i). There are three key elements which must all apply in order for Experian to consider whether to change an Appealable Score: (i) Experian did not have access to or did not process data which would otherwise have been used for a calculation under Rule E2.1; (ii) the data must relate to matters to be dealt with under the Levy Rules in accordance with Experian's ordinary course of business; that is, data which would normally have been available to and taken into account by Experian; and (iii) the lack of access to the data must not relate to any action or inaction on the part of the relevant parties. The second element cannot be satisfied.
  - The Levy Rules prescribe the manner in which such data is to be obtained. Under Rule E2.1, there were two ways in which the 2017 Accounts could have been collected or provided. They could have been collected by Experian under Rule E2.2 or they could have been provided voluntarily to Experian under Rule E2.3. Since the 2017 Accounts were not provided under Rule E2.3, their collection falls to be dealt with under Rule E2.2.
  - Rule E2.2 prescribes the way in which Experian is to collect data. It does not refer to Experian's ordinary course of business. Experian has no power to change the Appealable Score and accept the late information.
  - If the PPF Ombudsman were to disagree with this position, the matter should be remitted to the Committee for it to decide whether the Board will exercise its discretion to appeal to Experian or to extend the time limit for the Trustees to appeal.
  - Rule B2.1 may only be considered where Rule E7.5 does not apply. If the PPF Ombudsman were to find that Rule E7.5 applies, then Rule B2.1(2) operates to expressly exclude Rule B2 from applying. The matter would be dealt with under

Rule E7. If the PPF Ombudsman agrees that Rule E7.5 does not apply, he may proceed to consider Rule B2.1 further.

- It has published guidance entitled “Seeking changes to data used to calculate the levy: practice and principles”. This is available on its website.
- The relevant issue is whether the 2016 Accounts were incorrect in a material respect so as to permit it to consider exercising discretion to amend the Fund’s data under Rule B2.2.
- Its position is that the 2016 Accounts remain correct and legitimate. The Trustees have not argued that the 2016 Accounts contained an error; simply, that the 2017 Accounts provide more up-to-date information.
- The essential requirement for the 2017 Accounts to be Filed was not met until after the relevant collection deadline. Therefore, the Trustees’ request is not a correction request and Rule B2 does not apply.
- If the PPF Ombudsman were to disagree with this position, the matter should be remitted to the Committee for it to decide whether the Board will exercise its discretion under Rule B2.2(1).
- It does not agree that Rule E2.6 applies so that it is obliged to use the 2017 Accounts.
- The Committee explained why the filing of the 2017 Accounts with AMF failed to satisfy the Levy Rules and why the 2016 Accounts must be used in calculating the Fund’s levy. The collection of data in accordance with Rule E2.1 did not result in a conflict which needed to be resolved by the application of data hierarchy rules.

## **Adjudicator’s Opinion**

11. The Trustees’ referral was considered by one of our Adjudicators who concluded that no further action was required by the Board. The Adjudicator’s findings are summarised below:-

- The Trustees had referred the decision by the Committee not to recalculate the Fund’s risk-based levy for the levy year 2019/20. This was a reviewable matter under Paragraph 19, Schedule 9, Pensions Act 2004.
- The Trustees submit that Rule E7.5(1)(b)(i) would permit Experian to change the May 2018 insolvency score on the grounds that it did not have access to relevant data which it would otherwise have used for the calculation of the score.
- Under Rule E2.1, Monthly Scores and Adjusted Monthly Scores were to be calculated by reference to the position as at each Score Measurement Date, using data which had either: (1) been collected by Experian under Rule E2.2; or (2) been provided to Experian under Rule E2.3.

- Rule E2.2 provided that the Board had instructed Experian to collect such of the data referred to in Rule E2.2(2) as was either Filed with one of the sources referred to in Rule E2.2(3) or available from such other sources as the Board instructed Experian to collect from and use from time to time.
- For the 2019/20 levy year, the Board had not instructed Experian to collect data from any sources other than those specified in the Levy Rules. The sources referred to in Rule E2.2(3) were: Companies House; the Charity Commission; or any Other Permitted Source. Other Permitted Source for the levy year 2019/20 was defined as:

“... the following sources (or any successor entity carrying out the functions of the source named below):

  - (a) the Higher Education Funding Council for England;
  - (b) the Certification Officer appointed pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992;
  - (c) the Financial Conduct Authority; and
  - (d) the Homes & Communities Agency.”
- Getlink SE filed its accounts with Infogreffe. This was a company registry which performed a similar role to that of Companies House in the UK. It was one of two registries listed on the gov.uk website for France. Under the Levy Rules, accounts filed with Infogreffe were collected by Experian because the definition of “Companies House” included “any body which undertakes an equivalent role outside of the UK”.
- The 2017 Accounts were sent to Infogreffe on 4 May 2018. However, they were not published on the Infogreffe website until 6 June 2018. This was too late for them to be used for the May 2018 insolvency score.
- The Committee had accepted that the 2017 Accounts had been delivered to Infogreffe at the earlier date, but had decided that this did not satisfy the definition of “Filed” under the Levy Rules. This required the 2017 Accounts to be “publicly available on the official website” of Infogreffe. In the Adjudicator’s view, the PPF Ombudsman would agree with this analysis.
- It was for this reason that Experian was not able to change the May 2018 score under Rule E7.5(1)(a); that is, the data had not been Filed at least one calendar month before the Score Measurement Date.
- Rule E7.5(1)(b)(i) applied to “matters to be dealt with under these Rules in accordance with Experian’s ordinary course of business”. Experian was permitted to change an Appealable Score if the data it did not have access to was data which would normally have been available to it and taken into account by it;

provided that the lack of access was not due to action or inaction by the relevant scheme trustees or employer.

- Arguably, the lack of access to the 2017 Accounts in time for the May 2018 insolvency score was not due to action or inaction on the part of the Trustees or Getlink SE. The Trustees had shown that the time taken by Infogreffe to publish the 2017 Accounts on its website was much longer than usual. The 2017 Accounts would normally have been available to Experian and would have been taken into account by it. The Adjudicator said she took the Committee's point that it would have been open to Getlink SE to deposit the 2017 Accounts with Infogreffe at an earlier date to be sure that they were Filed in accordance with the Levy Rules. It was, perhaps, a little onerous to suggest that Getlink SE and/or the Trustees should have been monitoring the Infogreffe website for possible delay.
- The Committee had decided that the collection of the 2017 Accounts did not fall within matters to be dealt with in accordance with Experian's ordinary course of business; that is, the collection of the 2017 Accounts was specifically dealt with in the Levy Rules.
- Given that the Levy Rules were quite specific as to where Experian should source company accounts, in the Adjudicator's view, the PPF Ombudsman was likely to agree with the Committee's analysis. She said she had not identified anything within the Levy Rules which would suggest that Experian had been permitted to collect accounts as it would in the ordinary course of its business. Instead, it had been instructed by the Board to collect this data in a particular way; that is, from certain defined sources. Rule E7.5(1)(b)(i) did not apply in the circumstances and Experian could not change the May 2018 insolvency score by reference to the 2017 Accounts.
- The Adjudicator noted the Trustees' submission that the Committee had failed to address the first part of Rule E7.5(1)(b)(i) and that its decision incorrectly stated that the circumstances in Rule E7.5(1)(b)(i) only related to the second part of the rule. In her view, Rule E7.5(1)(b)(i) had to be read as a whole. Rule E7.5 stated:  

"Experian can only change an Appealable Score when all other provisions of Rules E7.1 – E7.4 have been satisfied and one (or more) of the following applies: ... (b) In the case of: (i) matters to be dealt with under these Rules in accordance with Experian's ordinary course of business ... it is data which would normally have been available to, and would normally have been taken into account by, Experian and that lack of access was not related to any action or inaction of any of the following ..."
- It did not assist the Trustees' case to try and separate out different parts of Rule E7.5(1)(b)(i) because they could not get past the fact that the collection of the 2017 Accounts was not a matter to be dealt with in accordance with Experian's ordinary course of business.

- The Adjudicator noted the discussion as to whether AMF undertook an equivalent role to the FCA and could, therefore, be considered an Other Permitted Source. Although the Financial Conduct Authority was not separately defined in the Levy Rules, an ordinary reading of the words used to define Other Permitted Source suggested that it was the UK regulator which was being referred to. The Adjudicator noted that the definition of Other Permitted Source referred to “the Financial Conduct Authority” (emphasis added); not a financial conduct authority. Nor was there any provision to extend the definition of the FCA to include any body which undertook an equivalent role outside of the UK; as was the case with Companies House. AMF could not qualify as an Other Permitted Source for the collection of the 2017 Accounts by Experian.
- It remained to consider whether the Levy Rules provided any discretion for the Board to instruct Experian to revise the May 2018 insolvency score by reference to the 2017 Accounts. The Committee had identified two potential discretions: Rule B2 and Rule B4.
- Rule B2 provided for the Board to correct data used in the calculation of the levies if it was incorrect in a material respect. For the purposes of Rule B2, information was not incorrect if it was correct and legitimate in itself, but the person supplying it could have supplied some different or additional information which might have resulted in the Levy Rules being applied differently. The Committee had taken the view that the 2016 Accounts were not incorrect; that is, they were correct and legitimate in themselves. The Trustees had submitted that the 2016 Accounts were incorrect because they were based upon out-of-date information.
- The Adjudicator acknowledged that, at the Score Measurement Date for the May 2018 insolvency score, the 2016 Accounts had been overtaken by the 2017 Accounts. However, in her view, this did not mean that the 2016 Accounts were not correct and legitimate in themselves. The 2017 Accounts did not ‘correct’ the 2016 Accounts, rather, as the Committee had decided, the 2017 Accounts updated the financial information provided by the 2016 Accounts. In any event, the Adjudicator noted that Rule B2.1 excluded information used to calculate a Monthly Score.
- Rule B4 applied where there had been a disruption in the delivery of relevant information. The Board was permitted, at its discretion, to take account of information which had been Submitted after a deadline. The term “Submitted” referred to information having been submitted in one of the ways specified under Rule A2.2. However, Rule A2.2(8) made it clear that Rule A2.2 did not apply to the provision of information to Experian. Rule B4 was clearly intended to cover circumstances in which a provider of information was submitting that information directly to the Board and was prevented from doing so in time because of the specified reasons; it did not apply to the collection of data by Experian.
- The Adjudicator noted the discussion as to whether the data hierarchy provisions set out in Rule E2.6 should apply and, if so, whether the 2016 Accounts should



have taken precedence. In her view, the circumstances provided for in Rule E2.6 did not arise because, at the Score Measurement Date, there was no conflicting data. At the time, the 2017 Accounts had not been collected by Experian and could not, therefore, be said to conflict with the 2016 Accounts. The Trustees had argued that the 2017 Accounts were available from AMF. If this were to be accepted, the 2016 Accounts would take precedence under Rule E2.6 because Infogreffe would rank higher in the data hierarchy than AMF. Rule E2.6 specified that no account would be taken of which source provided the most recent data, except for sources at the same level in the hierarchy.

- The Committee had considered Rule E2.8(5). This rule allowed the Board to direct Experian to accept information provided voluntarily under Rule E2.3 where this had been received after a deadline in the same circumstances as set out in Rule B4. The Committee had concluded that it could not read Rule E2.8(5) as applying in broader circumstances. This was because the requirement for a document to be Filed did not fall within the meaning of Submitted in the context of Rule B4. Given that Rule E2.8(5) explicitly referred to Rule E2.3, in the Adjudicator's view, the PPF Ombudsman would agree with the Committee's analysis.
  - The Trustees had referred to Rule E7.9, which provided for Experian and the Board to agree that an appeal to Experian was to be determined by the Board. In the Adjudicator's view, this would be unlikely to assist the Trustees' case since the matter has already been considered by the Board under the review and reconsideration procedures.
12. The Trustees did not accept the Adjudicator's Opinion and the referral was passed to me to consider. The Trustees provided a supplementary statement which is summarised below. The Board also provided further comment which is summarised below. I have considered the supplementary statement and comment but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

## **Supplementary statement**

13. The Trustees submit:-

- Rule B2.1(2)(b) allows the Board to correct data used to calculate a Monthly Score in respect of which the manner in which it is said to have been incorrect cannot be dealt with through Rule E7.
- If the matter cannot be dealt with through Rule E7, it can be dealt with under Rule B2.
- Based upon the Board's published guidance "Seeking changes to data used to calculate the levy: practice and principles", the 2017 Accounts would be a "correction".

## **Further comment by the Board**

14. The Board has stated that its position is that Rule B2.1 does not operate to exclude information used to calculate a Monthly Score in the specific circumstances of the Fund because of the express reservation in Rule B2.1(2)(b).

## **Ombudsman's decision**

15. In order for the May 2018 employer insolvency score to be calculated by reference to the 2017 Accounts, they had to have been collected by Experian from the sources specified in the 2019/20 Levy Rules prior to the Score Measurement Date. Experian had not collected the 2017 Accounts at the relevant time because they had not been published on the Infogreffe website at that time. I concur with my Adjudicator's analysis of the status of AMF as an Other Permitted Source. As an alternative, the 2017 Accounts could have been provided to Experian directly but this had not happened either.
16. The Trustees must, therefore, establish that there is a mechanism within the 2019/20 Levy Rules whereby the May 2018 employer insolvency score could or should have been revised subsequently.
17. The Trustees sought to rely upon Rule E7.5(1)(b)(i). Rule E7.5 allowed Experian to change an Appealable Score where it did not have access to, or did not process, data which it would otherwise have used to calculate a monthly score. Certain conditions applied, however, so that: either (a) the data had been Filed at least one calendar month before the Score Measurement Date; or (b) it was data which would normally have been available to and taken into account by Experian and the lack of access was not related to action or inaction on the part of, amongst others, the trustees of a scheme. Rule E7.5(1)(b)(i) specified that it applied to "matters to be dealt with under these Rules in accordance with Experian's ordinary course of business".
18. The Committee decided that the collection of the 2017 Accounts did not fall within matters to be dealt with in accordance with Experian's ordinary course of business.
19. I agree with my Adjudicator's analysis on this point. The Levy Rules were quite prescriptive as to where Experian should source company accounts. It was not permitted to collect accounts simply as it would have done in the ordinary course of its business. Instead, it had been expressly instructed by the Board to collect this data in a particular way; that is, from certain defined sources. Consequently, Rule E7.5(1)(b)(i) did not apply in the circumstances and Experian could not change the May 2018 insolvency score by reference to the 2017 Accounts.
20. The Trustees submit that, if the matter of revising the May 2018 Monthly Score by reference to the 2017 Accounts cannot be dealt with under Rule E7, it can be dealt with under Rule B2.
21. Rule B2 allowed for the correction of data by the Board. Under Rule B2.1(1)(a) data could be corrected if it appeared to the Board that the information used in the

calculation of a levy was “incorrect in a material respect”. However, Rule B2.1(1) was subject to sub-paragraphs (2) and (3). Rule B2.1(2) provided “Save for” exceptions to the circumstances set out in sub-paragraph (1). These included: “(b) information used to calculate an Appealable Score or Monthly Score (or an Appealable Score or Monthly Score itself) **in respect of which the manner in which it is said to have been incorrect is not a matter capable of being dealt with through Rule E7**” (emphasis added).

22. Under Rule B2.1(2)(b), therefore, if the manner in which the information was said to be incorrect was not a matter which could be dealt with under Rule E7, it was excluded from data which could be corrected by the Board under Rule B2.1(1)(a). In other words, it fell into the “Save for” exceptions to Rule B2.1(1). The Board was able to correct data, under Rule B2.1(1)(a), if the way in which it was deemed to be incorrect could otherwise have been dealt with under Rule E7 by appeal to Experian. In any event, sub-paragraph (2) went on to state that Rule B2 did not apply in relation to “any information which is used to calculate an Appealable Score or a Monthly Score, or to Appealable Scores or Monthly Scores themselves”.
23. I note the Board’s comment as to the operation of Rule B2.1(2)(b). However, it may not be necessary for me to make a finding as to the operation of Rule B2.1(2)(b) if I find that Rule B2.1(3) applied.
24. Rule B2.1(3) specified that information was not incorrect where it was correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused the 2019/20 Levy Rules to be applied differently.
25. The Trustees submit that the 2017 Accounts were a correction of the data used to calculate the May 2018 Monthly Score. They have referred me to guidance published by the Board.
26. In the guidance document referred to by the Trustees, the Board said it would only consider correction requests and not updates. It described a correction as:

“... at the relevant deadline the information was available to the scheme and the levy requirements could, in principle, have been met.”

It described an update as:

“... where some or all of the information or requirements were obtained/met after the deadline.”
27. My Adjudicator took the view that the 2017 Accounts did not correct the 2016 Accounts, rather they updated the financial information provided in the 2016 Accounts. I can see why the Trustees would argue that the 2017 Accounts were a correction; inasmuch as the information which they contained was available to the scheme at the relevant time. However, I do not find that this means that the 2016 Accounts were not correct and legitimate in themselves. The information contained in

the 2016 Accounts was correct at the time the accounts were drawn up. I would agree that the 2017 Accounts provided more up-to-date financial information, but this does not render the 2016 Accounts incorrect. It is the nature of accounts that they provide a time-specific snapshot of financial information. They become 'out-of-date' almost at once, but this does not mean that they should not be considered correct and legitimate in themselves.

28. And, for the avoidance of doubt, in determining whether the Committee's decision was reached correctly, it is the Levy Rules which take precedence over any guidance published by the Board.
29. I find, therefore, that Rule B2.1(3) did apply in the circumstances and the Board's discretion to correct the data used to calculate the Fund's 2019 levy did not arise. I need make no further finding as to the operation of Rule B2.1(2)(b).
30. In conclusion, I find that the Committee's decision was reached correctly and the Board is not required to take any further action.

**Anthony Arter**

Pension Protection Fund Ombudsman

30 March 2022

## **Appendix**

### **The Levy Rules for the year 2019/20**

31. Rule A1.1 set out definitions used within the Levy Rules. “Filed” was defined as:

“... either:

- (a) publicly available on the official website of ... Companies House, the Charity Commission, or an Other Permitted Source;
- (b) provided to Experian pursuant to Rule E2.3.”

32. “Other Permitted Source” was defined as:

“... the following sources (or any successor entity carrying out the functions of the source named below):

- (a) the Higher Education Funding Council for England;
- (b) the Certification Officer appointed pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992;
- (c) the Financial Conduct Authority; and
- (d) the Homes & Communities Agency.”

33. “Score Measurement Date” was defined as:

“... the final day of any month from and including April 2018 to and including March 2019.”

34. Rule B2 “Correction by the Board” provided:

B2.1 When could data be corrected?

- (1) Subject to Rule B2.1(2) and (3), this Rule B2 applies if it appears to the Board that either:
  - (a) the information supplied for or used in the calculation of the Levies (including information contained in any data Submitted) is incorrect in a material respect;
  - (b) a notification required by or under a certificate in relation to Contingent Assets has not been duly given; or
  - (c) a confirmation, certificate or declaration given for the purposes of these Rules was improperly given or contained information which was incorrect in a material respect.

- (2) Save for:
  - (a) information relating to the identity of the Employer or Certified Guarantor; and
  - (b) information used to calculate an Appealable Score or Monthly Score (or an Appealable Score or Monthly Score itself) in respect of which the manner in which it is said to have been incorrect is not a matter capable of being dealt with through Rule E7,

and without prejudice to Rule E7.8, this Rule B2 does not apply in relation to any information which is used to calculate an Appealable Score or a Monthly Score, or to Appealable Scores or Monthly Scores themselves.

- (3) For the purposes of Rule B2.1(1)(a), information is not incorrect where it is correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused these Rules to be applied differently.

#### B2.2 Correction of the data

- (1) Where Rule B2.1(1)(a) applies, the Board may calculate the Levies on the basis of information which appears to it to be correct for the purposes of these Rules. Where the Levies have already been calculated ... the Board may review and revise the amount of the Levies ... but it shall not be under an obligation so to act.
- (2) The Board is under no obligation to take into account corrected information merely because the Scheme has been disadvantaged by the failure of the trustees or those acting on its or their behalf to supply correct information at the proper time.”

#### 35. Rule B4 “Disruption in the delivery of information” provided:

“B4.1 ... the Board may at its discretion take account of information Submitted after any applicable deadline but only in circumstances where it appears to the Board that:

- (1) the information was despatched at an appropriate time, but was delayed or lost in transit; or
- (2) both:
  - (a) the provider of the information was prevented from meeting the deadline by the temporary inaccessibility of the PPF website or Exchange, or the interruption of electronic communications, or other (in the opinion of the Board) comparable cause; and

- (b) the information was Submitted as soon as reasonably practicable thereafter.”

36. Part E contained the rules for measuring employer insolvency risk. Rule E2 “Data used to calculate Scores” provided:

“E2.1 Data collection and use for Monthly Scores

Monthly Scores and Adjusted Monthly Scores will be calculated in accordance with these Rules by reference to the position as at each Score Measurement Date, using data ... which either:

- (1) has been collected by Experian under Rule E2.2;
- (2) has been provided to Experian under Rule E2.3; ...

in each case, by the time stipulated in Rule E2.8.

E2.2 Routine Collection for Monthly Scores

- (1) The Board has instructed Experian to collect ... such of the data referred to in Rule E2.2(2) ... as is either Filed with one of the sources referred to in Rule E2.2(3), or available to Experian from such other sources as the Board instructs Experian to collect and use from time to time ...
- (2) The data to be collected is:
  - (a) the Latest Accounts ...
- (3) The relevant sources are:
  - (a) Companies House;
  - (b) the Charity Commission;
  - (c) any Other Permitted Source.

E2.3 Voluntary provision of data

Scheme Employers, Ultimate Parents, Group Subsidiaries and trustees may voluntarily provide to Experian the following information ...

E2.6 Data hierarchy

- (1) Subject to (2) below, in the event that the collection of data in accordance with Rule E2.1 results in conflicting data items, the following hierarchy will be applied to resolve the conflict (and, for the avoidance of doubt, no account will be taken of which source provides the most recent data):
  - (a) A Company/Charity Source;

- (b) any Other Permitted Source ...
- (c) any other source specified by the Board ...
- (d) voluntary provision ...

## E2.7 Data Quality

Save to the extent expressly set out in these Rules and the Insolvency Risk Appendix, Experian shall apply such data quality procedures and shall resolve conflicts between data items using the same approach that it would adopt in its ordinary course of business from time to time.

## E2.8 Timing of data collection and use

- (1) Except where (2), (3), (4), (6) or (7) below applies, the Board and Experian will use such data as has either:
  - (a) been collected or received ... and which Experian ... has been able to process by the Score Measurement Date in question; or
  - (b) has been Filed at least one calendar month before the Score Measurement Date ...”

## 37. Rule E7 “Experian appeals” provided:

“E7.1 What elements of the levy calculation can be appealed to Experian?

Experian can only deal with appeals relating to an Appealable Score ...

## E7.2 Who can appeal to Experian?

The following can appeal to Experian:

- (1) a Scheme trustee in relation to any Appealable Score relating to the Scheme of which he is a trustee; ...
- (5) the Board

...

## E7.4 What are the time limits?

Save where an appeal is made by the Board, Experian can only deal with an appeal if:

- (1) either:
  - (a) it is sent to Experian by email no later than 28 days after the date shown on the notification of the Levies ...
  - (b) it is sent by registered first class post no later than 26 days after the date shown on the notification of the Levies ...



- (c) the circumstances of a case are such that, in the opinion of the Board, it is reasonable for an appeal to be sent after the end of the period mentioned in (a) or (b) ... and the Board confirms this in writing to Experian; ...

#### E7.5 When can Experian change an Appealable Score?

Experian can only change an Appealable Score where all other provisions of Rules E7.1 – E7.4 have been satisfied and one (or more) of the following applies:

- (1) Experian did not have access to or did not process data which would otherwise have been used for calculation pursuant to Rule E2.1 and one of the following applies:
  - (a) That data had been Filed at least one calendar month before the Score Measurement Date; or
  - (b) In the case of:
    - (i) matters to be dealt with under these Rules in accordance with Experian's ordinary course of business ...

it is data which would normally have been available to, and would normally have been taken into account by, Experian and that lack of access was not related to any action or inaction of any of the following:

- (A) the trustee(s) of the relevant Scheme;
- (B) any Employer in relation to that Scheme;
- (C) any Guarantor in relation to that Scheme; or
- (D) any Ultimate Parent or Group Subsidiary relating to any Employer in relation to the Scheme.

...

#### E7.8 Statutory Review Rights

For the avoidance of doubt and without prejudice to Rule E7.7, the Board may review an Appealable Score pursuant to section 207 of the Act on the grounds that the decision reached by Experian following an appeal pursuant to this Rule E7 was incorrect.

#### E7.9 Determination by Board

Experian and the Board may agree that an appeal to Experian is to be determined by the Board."