

## **Civil Liability (Amendment) Bill 2015**

### **Revised Draft General Scheme**

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**Head 1: Short title, commencement and collective citation**

- 1.—** (1) This Act may be cited as the Civil Liability (Amendment) Act 2015
- (2) The Civil Liability Acts 1961 and 1964, Part II of the Civil Liability and Courts Act 2004 and this Act may be cited together as the Civil Liability Acts 1961 to 2015.
- (3) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions

**Explanatory Note:**

This is a standard provision.

## **Head 2: Amendment of the Civil Liability Act 1961 – Insertion of Part IVB**

### **Provide that:**

The Civil Liability Act 1961 is amended by the insertion of the following Part after Part IVA:

**“PART IVB  
PERIODIC PAYMENTS ORDERS”**

## Interpretation

### Provide that:

#### Head 51H.

In this Part, unless the context otherwise requires—

*“act”* has the same meaning as in section 1 of the Principal Act;

*“Act of 2004”* means the Civil Liability and Courts Act 2004;

*“catastrophic injury”* means a severe injury, involving serious impairment, the direct and proximate cause of which requires the plaintiff to receive life-long, permanent care and assistance.

*“court”* means the court in which an action has been brought, being the High Court, Circuit Court or District Court, as the case may be;

*“damages”* has the same meaning as in section 1 of the Principal Act;

*“defendant”* has the same meaning as in section 1 of the Principal Act;

*“Insurance Compensation Fund”* has the same meaning as in Section 2 of the Insurance Act 1964;

*“Minister”* means the Minister for Justice and Equality;

*“Periodic Payments Order”* means an order made under Head 51I;

*“plaintiff”* has the same meaning as in section 1 of the 1961 Act;

*“Principal Act”* means the Civil Liability Act 1961;

*“State authority”* has the same meaning as in section 7 of the Act of 2000.<sup>1</sup>

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<sup>1</sup> Section 7 of the National Treasury Management Agency (Amendment) Act 2000 sets out the following definition of a State authority. The definition is updated by Ministerial regulation.

*“State authority”* means—

- (a) the State (whether or not described in the claim as Ireland),
- (b) a Minister of the Government,
- (c) a body specified in the *Schedule* or, if appropriate, the head of such a body,
- (d) the Commissioner of An Garda Síochána,
- (e) the Governor of a prison,
- (f) the board of management of a community school, or a comprehensive school, which is a recognised school within the meaning of section 2 of the Education Act, 1998,

### **Explanatory Note:**

This is a standard provision containing various definitions of expressions, including references to statutes, used in the Bill.

The definition of “catastrophic injury” is necessary to reflect the Government’s decision that the legislation should apply solely to those who have suffered catastrophic injury. The definition has been developed in light of the deliberations of the Inter-Departmental Working Group on Legislation on Periodic Payment Orders (IDWG), established by the Department of Justice and Equality, to examine the technical aspects of introducing a Periodic Payments Order (PPO) scheme for non-State defendants.

The IDWG decided that any definition of “catastrophic injury” should not be based on a specific financial threshold or size of award but should include reference instead to the fact that the plaintiff would require life long care and attention, reflecting the primary purpose of periodic payment legislation which is to ensure that those needing long term care would have the necessary financial resources to cover such care costs for the duration of their lives.

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- (g) the board of management of, or person for the time being managing, a school certified under section 45 of the Children Act, 1908, or a place of detention registered under section 108 of that Act, in which young offenders are detained,
  - (h) the Attorney General,
  - (i) a person in respect of whom a Minister of the Government pays, or agrees to pay, the amount (if any) payable in respect of a claim against the person, or
  - (j) any other body that the Minister may, at the request of that body, if appropriate, and with the consent of the relevant Minister of the Government, prescribe by order, being a body established by or under any enactment (other than the Companies Acts, 1963 to 1999), and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government, or the head of any such body,

and State authorities shall be construed accordingly.

## Power to award damages by periodic payments

### Provide that:

#### Head 51I.

(1) Subject to *subheads (2), (3) and (5)* and *Head 51J*, a court in awarding damages for future pecuniary loss in respect of catastrophic injury, may, having regard to the circumstances of the case and in particular to:

(a) the nature of the injuries in respect of which an award of damages in respect of catastrophic injury is being made;

and

(b) the form of award that best meets the plaintiff's needs,

order that the whole or part of such of those damages as relate to -

(i) the future medical treatment of the plaintiff,

(ii) the future care of the plaintiff,

and

(iii) the provision for assistive technology or other aids and appliances associated with such care or treatment.

be paid as periodic payments in such amount or amounts and for such period, or periods, not exceeding the remaining lifetime of the plaintiff, as the Court shall in that order provide.

(2) Save where the parties have consented to the making of a periodic payments order under *subhead (3)*, the court shall not make a periodic payments order unless:

(a) it has heard the plaintiff's preference for the form of payment;

(b) it has heard the defendant's preference regarding the form of payment;

and has determined that, in the best interests of the plaintiff, a Periodic Payments Order is the most appropriate method for ensuring that the plaintiff's required medical care and attention will be met.

- (3) A Periodic Payments Order may be made by consent of the parties. Such an order must be approved by the court subject to *subheads (1)(a)* and *(b)*.
- (4) A Periodic Payments Order may, subject to *subheads (1)(a)* and *(1)(b)*, include damages in respect of any future loss of earnings by the plaintiff only where the parties consent to the inclusion of such damages.
- (5) A court may make provision in a Periodic Payments Order that the amount awarded under *subhead (1)* is to increase or decrease on a specific date or dates consistent with expected changes in the claimant's needs during his or her life.
- (6) In making an order under *subhead (5)*, the court must specify:
  - (a) the reasons justifying the increase or decrease;
  - (b) the date on which the increase or decrease is to take effect; and
  - (c) the amount of the increase or decrease at current value.

**Explanatory Note:**

Head 51I implements the main recommendation of the Working Group on Medical Negligence and Periodic Payments (MNWG) to empower the courts to make, as an alternative to lump sum awards, consensual and non-consensual periodic payments orders to compensate injured victims in cases of catastrophic injury where long term permanent care will be required for the costs of (a) future treatment, (b) future care and (c) the future provision of medical and assistive aids and appliances.

In line with the Government decision (S180/20/10/1704) which specifically stated that the introduction of a Periodic Payment Order scheme should be limited to catastrophic injuries, the Head limits consideration of payment of a PPO to cases where the plaintiff has suffered a catastrophic injury which is defined as an injury, involving serious impairment, the direct and proximate consequences of which requires the plaintiff to receive life long medical care and attention.

Subhead (1) is based on section 2A(1) of the Damages Act 1996 (UK) (as inserted by section 100 of the Court Act 2003) which provides that the Civil Procedure Rules may require a court to take specified matters into account in considering whether to order periodical payments. Under this provision the court must consider, in determining whether a periodic payment order is appropriate in any particular case, the nature of the injuries in respect of which the award of damages is made and the form of award which best meets the plaintiff's needs.

Subhead (2) provides that the court (save where a PPO is agreed with the consent of all parties) must hear the views of all parties regarding the nature of the award and

must make an award only where it is satisfied that a PPO is in the best interests of the plaintiff.

The subhead draws from Rule 41.7 of the UK Civil Procedure which requires the court when considering whether periodic payments or a lump sum are likely to be more appropriate for all or part of an award of damages, to have regard to all circumstances of the case which best meets the claimant's needs (having regard also to the factors set out in Practice Direction 41B). The formulation of the subhead also takes into account the views expressed by the MNWG which found that case-law to date indicates that the court's views of the best interest of the claimant takes precedence over the views of the parties (Tameside and Glossop Acute Services NHS Trust v Thompson).

Subhead (3) provides that a PPO may be made by consent of the parties but that any such order must be approved by the court. This provision is designed to ensure that continuity of payment of a PPO consented to by the parties is in accordance with the provisions of this Part.

Subhead (4) provides that a Periodic Payments Order may be made in respect of damages relating to any future loss of earnings by the plaintiff only where both parties consent. It implements recommendation (ii) of the MNWG report that "the courts should be empowered to make periodic payments orders to compensate for future loss of earnings only with the consent of all parties to the relevant claim". The MNWG reported that it was conscious that the power to make Periodic Payments Orders would be a significant innovation in the law of damages within this jurisdiction and as such did not consider that a pressing case had been made for the application of mandatory Periodic Payments Orders to compensate for future loss of earnings.

Subhead (5) provides that the court may make provision at the time of the making of the PPO for a stepped PPO which would take into account important foreseeable milestones in the claimant's life such as entering school, reaching the age of majority, and anticipated changes in care needs, such as the plaintiff's move into residential care etc.

Subhead (6) makes it clear that, if making a stepped PPO, the court must specify both the date on which the stepped PPO is to come into effect and the amount of the increase or decrease at current value.



## Security of periodic payments

### Provide that:

#### Head 51J.

- (1) A court may not make a Periodic Payments Order unless it is satisfied that the continuity of payment under the Order is reasonably secure.
- (2) For the purpose of *subhead (1)* the continuity of payment under a Periodic Payments Order is deemed to be reasonably secure where—
  - (a) the payments under the Periodic Payments Order are protected in a manner provided for in *head 51K*,
  - or
  - (b) the source of the payments under the Periodic Payments Order is a State authority.
- (3) A Periodic Payments Order may include provision requiring the paying party to make the periodic payments concerned by a method which the court is satisfied would ensure that continuity of payment is reasonably secure,
- (4) Where a Periodic Payments Order is made, the method by which the payments are made may not be altered without the prior approval of the court.
- (5) In this section, “*paying party*” includes any defendant in proceedings against whom a Periodic Payments Order is made and any person who has undertaken on behalf of such a defendant the obligation to make payments under such Order to the person to whom they are or will become due.

#### Explanatory Note:

Head 51J is based on section 5 of the draft Bill contained in the Report of the MNWG.

Subhead (1) implements recommendation (iii) of the MNWG, namely, that “periodic payment orders may only be made in circumstances where the court is satisfied that continuity of payment under the periodic payments order is reasonable”. The availability of funds to satisfy Periodic Payments Orders over the duration of a plaintiff’s life is fundamental to the operation of any periodic payment regime.

Subhead (2) defines what is meant by “the continuity of payments is reasonably secure”. In this context, “reasonably secure” means that Periodic Payments Orders

are protected in the manner specified in Heads 51K(1)(b) or 51K(1)(c) or where the defendant is a State authority.

Subhead (3) outlines the manner in which the court may require that the periodic payment order is to be paid.

Subhead (4) deals with proposed changes in the method of payment of the periodic payment order. It provides that, except where the changed method comes within the meaning of subhead (2), any change in the method of payment must be approved by the court.

Subhead (5) defines what is meant by “paying party” in the context of the Head.

## **Guarantees of future periodic payments**

### **Provide that:**

#### **Head 51K**

- (1) For the purposes of Head 51J continuity of payment may be considered, by the court, to be reasonably secure where:
  - (a) the defendant is a State authority and the payments are protected under a scheme of indemnity administered by the State which guarantees the payment of the Order; or
  - (b) the defendant is not a State authority but the court is satisfied that the Periodic Payments Order is eligible for payment from the Insurance Compensation Fund; or
  - (c) the defendant is not a State Authority but can provide evidence, to the satisfaction of the court, that it can guarantee continuity of payment by some means other than those specified in *subheads 1(a)* and *1(b)*.
  
- (2) In considering whether a mechanism put forward by a defendant under *subhead 1(c)* can be considered to be reasonably secure, the court may take account of whether the proposed mechanism:
  - (a) is capable of making equal payments to the plaintiff over the plaintiff's lifetime; and
  - (b) takes into account the likely effects of inflation over the plaintiff's lifetime.

#### **Explanatory Note:**

Head 51K addresses the issue of guarantees in respect of Periodic Payments Orders. The use of PPOs rather than lump sums transfers certain risks from the claimants to the insurer. Receiving payments on a regular basis reduces several risks for the claimant, such as inflation risk, investment risk and longevity risk. However, PPOs carry an inherent risk for the claimant if the insurer becomes insolvent, therein rendering the award redundant and possibly leaving the claimant without the resources to pay for necessary care and medical attention. Adequate guarantees are needed to protect the claimant's periodic payments award even if an insurer becomes insolvent and to guard the claimant against the potential risk of loss of the periodic payment award.

Subhead (1) outlines three instances where the court may consider that continuity of payment could be reasonably secure. Subhead (1)(a) relates to payments by State authorities where the payments are administered by the State Claims Agency.

Subhead (1)(b) concerns payments by a non-State defendant where the defendant's payments are guaranteed through the defendant's participation in the Insurance Compensation Fund established under section 2 of the Insurance Act 1964 (as amended).

Subhead (1)(c) deals with a situation where the payment is secured by a non-State defendant through some other means acceptable to the court.

Subhead (2) outlines the issues the court must take into account when deciding whether a mechanism proposed under subhead 1(c) can be considered to be reasonably secure.

## **Amendment of section 3 of the Insurance Act 1964 (as amended)**

### **Provide that:**

#### **Head 51L**

Section 3 of the Insurance Act 1964 is amended by the insertion of the following subsections after subsection (4):

- (4A) Where a court has made a Periodic Payments Order within the meaning of the Civil Liability (Amendment) Act 2015, the limits specified in subsection (4) shall not apply to that Order.

### **Explanatory Note:**

Section 3 of the Insurance Act 1964 (as amended) deals with payments from the Insurance Compensation Fund where an insurance company goes into liquidation.

Subsection 3(4) deals with the maximum amounts that may be paid from the Fund in the event of a liquidation of an insurance company. It provides that the total amount that may be paid out of the Fund under subsection (1) in respect of any sum due to a person under a policy shall not exceed (whether as one payment or as the total of a series of payments) 65 per cent of that sum, or €825,000, whichever is the less.

However, such restrictions would not guarantee payments under a Periodic Payments Order wherein a set amount is provided for the lifetime of the plaintiff. The Department of Finance has indicated that its preferred mechanism for guaranteeing payments under a PPO would be to remove the restrictions on the amount of payments where an insurance company which is the subject of a PPO goes into liquidation.

The proposed new subhead (4A) provides that the limits specified in section 3(4) of the Insurance Act 1964 shall not apply where the court has made a Periodic Payments Order within the meaning of the Act.

## Indexation of periodic payments

### Provide that:

#### Head 51M.

- (1) A Periodic Payments Order made under this Part shall be subject to an annual revision to cater for changes in costs.
- (2) For the purposes of this Part, the index used to calculate the revision shall be the annual rate of the Irish Harmonised Index of Consumer Prices (HICP) index as published by the Central Statistics Office.
- (3) The rate attributable to indexation under this Part shall be subject to an initial review within 5 years after the coming into operation of this Act and thereafter every five years. Any changes to be prospective only and not retrospective.
- (4) Following each review of the indexation rate, the Minister may, with the agreement of the Minister for Finance, make regulations to amend the indexation rate applicable.
- (5) The regulations shall specify the indexation to be applied for the subsequent 5 year period.
- (6) Such regulations shall have the aim of ensuring that the indexation used to calculate annual changes in the costs arising for plaintiffs adequately measures such changes in costs, having regard to the changes that have occurred in the index and in such costs over the previous 5 year period.
- (7) *Section 26 of the Debtors (Ireland) Act 1840* does not apply to any future payment becoming due under a Periodic Payments Order until the date on which the payment in question has become due and remains unpaid.
- (8) This section applies notwithstanding *section 22(2)(e) of the Courts Act 1981*.

### Explanatory Note:

The MNWG concluded in its Report that a specific index rate should be developed, with the Central Statistics Office, for application to PPOs which would be an Irish equivalent of the index used in the UK (ASHE 6615).

The IDWG examined this issue thoroughly, drawing on an analysis prepared by Towers Watson. It was conscious of the need to use an index which offered long-

term stability in terms of price changes and which assessed changes of costs across a broad range of goods and services. It considered that the index chosen should be as stable as possible and provide certainty for all parties. For that reason it concluded that the most appropriate indexation measure for inclusion in the legislation is the Irish Harmonised Index of Consumer Prices (HICP), with the question of providing for an additional uplift for additional wage growth and of determining the percentage of such uplift to be reviewed at 5 yearly intervals.

Subhead (1) indicates that a Periodic Payments Order shall be subject to an annual revision to cater for increases in costs.

Subhead (2) specifies that the index to be used, initially, is the annual rate of Irish HICP as published by the CSO.

Subhead (3) provides that the index rate shall be reviewed after an initial five year period and subsequently every five years.

Subhead (4) gives the Minister the power, with the agreement of the Minister for Finance, to amend the index, or the index rate applicable to PPOs, by means of regulation.

Subheads (5) and (6) specify the policy that would underpin such regulations. The aim would be to ensure that the index being applied correctly measured the change in costs for plaintiffs, assessed against its performance in tracking such changes over the previous 5 year period. Subhead (6) specifies that the regulations would set out the index and rate to be applied for the subsequent 5 year period.

Subheads (7) and (8) are technical provisions relating to interest payments on PPOs.

## **Prohibition on assignment, charging or commutation of right to periodic payments without court approval**

**Provide that:**

### **Head 51N.**

- (1) A plaintiff's right to receive payments under a Periodic Payments Order may not be assigned, charged or commuted without the prior approval of the court which made the Periodic Payments Order and—
  - (a) the court shall not approve an assignment, charge or commutation unless it is satisfied that special circumstances make it necessary,  
  
and
  - (b) subject to *subhead (2)*, a purported assignment, charge or commutation, or agreement to assign, charge or commute a right mentioned in this section, is void unless it has been approved by the court.
- (2) *Subhead (1)* does not apply where a plaintiff assigns a right mentioned in *subhead (1)* to a person who has compensated the plaintiff in full for the loss of the value of the right, in accordance with an enactment or with a scheme operated under an enactment.
- (3) In considering whether to authorise an assignment, charge or commutation in accordance with this section, a court shall, in addition to any other required matter, have regard, where appropriate, to:
  - (a) the arrangement which would be in the best interests of the plaintiff;  
  
and
  - (b) the likely future security of the periodic payments.

### **Explanatory Note:**

Head 51N deals with restrictions on the assignment, charge or commutation of a PPO. Commutation is a right that a beneficiary has to exchange one type of income for another. It is often offered to beneficiaries of annuities and life insurance policies, so that they might receive a lump-sum payment instead of a series of future payments.

The Head seeks to address the risk that if the right of commutation were not restricted, it could undermine the entire rationale behind the legislation as it could



encourage a claimant to commute the periodic payment award into a lump sum payment even if the court considered that there were compelling reasons, linked to the claimant's long-term care needs, for the claimant to receive the payment in the form of a periodic payment. For that reason, the Head provides that a Periodic Payments Order cannot be assigned, charged or commuted without the prior approval of the court.

Subhead (1) states the general rule that the plaintiff's right to receive payment of a PPO cannot be assigned, charged or commuted without the prior approval of the court and approval by the court will only be granted in special circumstances.

Subhead (2) provides an exception to the general rule which will allow a plaintiff to assign a right to payment to a person where that person has compensated the plaintiff to the full value of the right in accordance with any enactment or scheme under an enactment.

Subhead (3) requires the court, in considering an application to assign, charge or commute a PPO, to take into account the best interests of the plaintiff and the security of payment.

## Costs

### Provide that:

#### Head 510.

- (1) An offer of terms of settlement made under section 17 of the *Civil Liability and Courts Act 2004* shall specify:
  - (a) the amount of the offer which is attributable to future pecuniary loss;  
and
  - (b) the portions of that amount which are attributable, respectively, to the claimant's:
    - (i) future medical treatment;
    - (ii) future care;
    - (iii) provision for mechanical or other appliances associated with such care or treatment; and
    - (iv) future loss of earnings.
  
- (2) Where the court makes a Periodic Payments Order –
  - (a) section 17 of the *Civil Liability and Courts Act 2004* shall not apply to that part of the costs of the proceedings which is attributable to any head of loss the subject of the Periodic Payments Order,  
and
  - (b) the court shall, when determining liability for the part of the costs of the proceedings referred to in paragraph (a) as between the parties, take into account:
    - (i) all offers, if any, not qualified as being made without prejudice;  
and
    - (ii) all offers, if any, made without prejudice save as to the issue of costs made by or on behalf of a party to the proceedings, after their commencement, to effect a compromise of the proceedings.

**Explanatory Note:**

Head 51O provides clarification of the relationship between PPO and the proffering of offers of settlement under Section 17 of the Civil Liability and Courts Act 2004.

Section 17 of the Act of 2004 provides that all parties in a personal injuries action shall make a formal offer of settlement prior to the commencement of a trial in the action and that the offer must be lodged in court. On the conclusion of the case, the court may, in making a decision on costs, have regard to the terms of the formal offers and the reasonableness of the conduct of the parties in making the offer.

Subhead (1) provides that in making a formal offer, the terms of the offer must include the amount of the offer attributable to future pecuniary loss and the relevant portions of that amount attributable to medical care, treatment etc.

Subhead (2)(a) provides that section 17 of the 2004 Act shall not apply to that part of the costs of the proceedings which is attributable to any head of loss the subject of the Periodic Payments Order while subhead 2(b) deals with the court's power to take formal offers into account while determining costs in the matter of PPOs.

### Head 3 – Amendment of Bankruptcy Act 1988

#### Provide that:

The *Bankruptcy Act 1988* is amended by:

- (a) the substitution of the following subsection for *subsection (4)* of *section 44*:
  - “(4) The property to which *subsection (1)* applies does not include—
    - (a) property held by the bankrupt in trust for any other person, or
    - (b) any sum which vests in the Official Assignee under *section 52(1)* of the *Property Services (Regulation) Act 2011*, or *section 30(i)* of the *Central Bank Act 1971*, or
    - [(c) any right to receive payments under a Periodic Payments Order within the meaning of *section 51* of the *Civil Liability Act 1961*.”]
- [(b) the insertion of the following subsection immediately following *subsection (2)* of *section 65*:
  - “(3) An order made under this section shall not affect payments made to a bankrupt under a Periodic Payments Order within the meaning of *section 51* of the *Civil Liability Act 1961*”.]
- [(c) the substitution of the following section for *section 71*:
  - “**71.** — The Court may make to the bankrupt out of his estate such allowances as the Court thinks proper in the special circumstances of the case, provided that where the bankrupt enjoys a right to receive periodic payments under or by virtue of a Periodic Payments Order made under *section 51* of the *Civil Liability Act 1961*, no such allowance shall be made out of the estate in respect of any expenditure (or any part of any expenditure) likely to be incurred by or for the bankrupt as a result of the personal injury to which the order relates where the Periodic Payments Order relates to or includes payment of or in respect of that expenditure (or such part of that expenditure).”]

#### Explanatory Note:

Head 3 provides for the Bankruptcy Act 1988 to be amended to protect a claimant’s periodic payment award in the event of the claimant’s bankruptcy so that a claimant would continue to have the possibility of receiving the resources needed to cover necessary long-term care and medical attention and that such resources would not be available for disposal by creditors.

## Head 4 – Amendment of Personal Injuries Assessment Board Act 2003

### Provide that:

Section 21 of the *Personal Injuries Assessment Board Act 2003* is amended by:

(a) the substitution of the following for *subsection (4)*:

“(4) An assessment may, in respect of the damages which it provides for, specify that they shall be paid in 2 or more instalments.

(b) the insertion, following subsection (4) of the following new subsection:

“(5) Where an assessment is made by the Board in respect of a catastrophic injury and the assessment specifies that the damages shall be paid in the manner prescribed in subsection (4), the provisions of the Civil Liability (Amendment) Act 2015 shall apply to such assessment.”

### Explanatory Note:

Head 4 provides for the Personal Injuries Assessment Board Act 2003 to be amended to enable the Personal Injuries Assessment Board to have the power to make an award in the form of periodic payments.

Subhead (a) substitutes the existing section 21(4) of the PIAB Act 2003 with a new provision which allows the Personal Injuries Assessment Board to provide that an assessment provided for under its auspices can be paid in more than one payment. The effect of the amendment is that an assessment made by the Board may be paid in 2 or more instalments.

Subhead (b) inserts a new subsection (5) into section 21 of the PIAB Act 2003 which deals specifically with assessments made by the PIAB in relation to catastrophic injury cases. Where the Board specifies that the assessment be paid in 2 or more instalments, the provisions of the Civil Liability (Amendment) Act 2015 will apply to such cases. In essence, the amendment means that in such cases, the Board must apply the same criteria regarding security of PPOs, guarantees regarding payment and indexation as the courts.