

Pensions Regulator consults on approach to new criminal offences

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The Pensions Regulator (TPR) is consulting on its approach to investigating and prosecuting new criminal offences under the Pension Schemes Act 2021. Eagerly-awaited by employers, lenders, trustees and advisers, the guidance provides comfort in some areas but leaves gaps and raises questions in others. TPR appears open to feedback, so there is an opportunity to have your say.

Key takeaways | The new offences | General approach to prosecutions | When will a 'reasonable excuse' exist? | Other points to note

Key takeaways

TPR has published a draft policy on its approach to investigating and prosecuting two new criminal offences introduced by the Pension Schemes Act 2021: avoidance of employer debt and conduct risking accrued scheme benefits. Although the consultation document and draft guidance are quite short, there are a lot of points to unpack. TPR has clearly tried to calm some industry concerns, stating that 'the introduction of the offences is not expected to change the kind of behaviour we investigate', but the guidance leaves plenty of questions unanswered and raises some new ones. It doesn't, for example, clearly address the circumstances in which TPR may choose to pursue a financial penalty as opposed to a criminal prosecution.

TPR's consultation invites comments on all aspects of the policy. We will be submitting a response; if you have feedback that you would like us to include (on an anonymous basis), or would like to discuss the current draft policy, please contact your usual A&O adviser. The deadline for responses is 22 April 2021.

Read the consultation document.

Read the draft policy.

The new offences

Avoidance of employer debt

Under this offence, a person commits an offence if:

- they act or engage in a course of conduct (including failing to act) that: prevents the recovery of all or part of a section 75 debt; prevents such a debt becoming due; or compromises/reduces such a debt which would otherwise become due. Debts include contingent debts;
- the person intended the act or course of conduct to have such an effect; and
- the person did not have a reasonable excuse for doing the act or engaging in the course of conduct.

Conduct risking accrued scheme benefits

Under this offence, a person commits an offence if:

- they act or engage in a course of conduct (including failing to act) that detrimentally affects in a material way the likelihood of accrued scheme benefits being received;
- the person knew or ought to have known that the act or course of conduct would have that effect; and
- the person did not have a reasonable excuse for doing the act or engaging in the course of conduct.

TPR has indicated that:

- in considering what a person ought to have known, TPR will consider the circumstances as they were at the time of the act and not with the benefit of hindsight; and
- in assessing whether there has been material detriment, it will take the same approach as to the material detriment test for a contribution notice (CN), and that its existing guidance and past determinations on this will be relevant. It has said that it would not 'usually expect' to prosecute anyone who could establish a statutory defence to the material detriment test for a CN.

General approach to prosecutions

TPR has said its approach is guided by its understanding of the government's policy intention, namely that the offences were not intended to achieve a fundamental change in commercial norms or accepted standards of corporate behaviour in the UK, and are aimed at enabling TPR to address the more serious intentional or reckless conduct that was already within the scope of the CN power (or would be in scope if the person was connected with the scheme employer). It has also said that it would expect to consider a case for prosecution in broadly the same circumstances where it would consider seeking a CN.

TPR has given some high-level guidance on conduct that might be selected for prosecution based on:

- The policy intent behind the new offences: for example, where the primary purpose of the conduct is scheme abandonment, without appropriate mitigation.
- Conduct it has previously encountered: for example, the purchase of an employer with no further investment into its business, subsequent mismanagement of the business, and the extraction of value before an administration.
- A person's circumstances: in deciding whether to prosecute, TPR has said it will consider: the person's relationship, duties and proximity to the employer, the scheme, and the act/omission; the extent of their involvement or influence; and any (in)direct benefit to the individual.

It's worth noting that this guidance applies to TPR only – it does not explain when, or if, other bodies entitled to prosecute offences under the Act may choose to do so (and if so, how those powers would be exercised). It is hoped that a memorandum of understanding, or similar statements, will provide greater certainty on this issue.

When will a 'reasonable excuse' exist?

The draft policy states that the burden is on TPR to show that there was no reasonable excuse, but that it is not required to identify and disprove every possible excuse. It expects potential suspects to provide suitable and sufficient evidence to explain the reasons for acting in the way that they did, and has said that it will consider any explanation given (and supporting information). The basis for the reasonable excuse should be clear from contemporaneous records (eg minutes of meetings, correspondence and written advice). TPR will also take into account factors such as engagement with trustees and TPR, and compliance with notification obligations.

The policy sets out the following factors that TPR considers significant in determining the existence of a reasonable excuse, with examples for each:

1. Whether the detrimental impact was an incidental consequence of the act or omission, as opposed to a fundamentally necessary step to achieve the person's purpose.
2. The adequacy of any mitigation provided to offset the detrimental impact.
3. Where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact.

Other points to note

Other points to note in the guidance include:

- **Retrospectivity:** TPR has said that evidence pre-dating the commencement of the offences, which is currently expected to be 1 October 2021, may be relevant to TPR's investigation or prosecution of actions after that date – this appears to deviate from the indication previously given by the government.
- **Clearance:** there is a short statement that there is no clearance procedure for the criminal offences.
- **Trustees:** there is no specific guidance, or examples, on when TPR may choose to investigate or prosecute in relation to trustee conduct. Unless this is subsequently included in the final guidance, trustees will have to rely on the general principles, and overall tone, of the policy for comfort.
- **Other parties:** there is a section of the policy covering the potential prosecution of those who help, assist or encourage conduct (including several examples). TPR considers that in most instances where a professional adviser is acting in accordance with their applicable professional duties, conduct, obligations and ethical standards, they are likely to have a reasonable excuse. There is also some comfort for lenders, who are not expected to act against their own interests: an example is given of a lender being able to refuse further lending where there is a high risk of default. However, there is less good news in TPR's comment that a court-sanctioned restructuring process is 'likely' to be a reasonable excuse in relation to the criminal offence, but that it may still issue a CN or financial support direction (FSD) to relevant parties.

In summary, some significant questions and concerns remain and we hope that the consultation process will enable further clarity to emerge on important issues that will affect the future conduct of business where a DB pension scheme is part of the picture.

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