

Sixty second summary

Regulator outlines policy on new DB criminal powers

The Pensions Regulator has made known the approach that it proposes to take to the investigation and prosecution of new criminal offences connected with defined benefit pension schemes.¹ Its draft policy provides examples of activities that might trigger investigation and when ‘*a reasonable excuse*’ might exist.

Background

The *Pension Schemes Act 2021* will establish two new criminal offences, one concerned with avoidance of employer debt, and the other with conduct risking accrued scheme benefits. Someone found guilty of one of the offences might be liable to a fine of unlimited extent or imprisonment for up to seven years, or both. The section containing the offences is not yet in force.

From their inception, the offences have been the source of disquiet. The issue has been (and continues to be) with the relatively unbounded grasp of the offences, as drafted; both in the spectrum of activity (or inactivity) that might be criminalized, and the persons who might be prosecuted. Although they apply only to conduct that is intentional, in the case of avoidance of employer debt, or effects that are expected or foreseeable, in the case of acts detrimental to the likelihood of members receiving their accrued benefits; and only when the accused had no reasonable excuse for their behaviour; there is a fear that even a purely hypothetical risk of having to defend oneself in court will have a damping effect on ordinary corporate transactions.

In answer to such criticisms, the Government, reluctant to redraft the offences to make them more sharply focused (and thereby render them less adaptable to unexpected circumstances), gave an undertaking that the Regulator would consult upon and publish guidance on the application of the legislation.

The draft policy

The Regulator’s position is that:

The intent of the new criminal offences is not to change commercial norms or accepted standards of corporate behaviour. Rather it is to tackle the more serious examples of intentional or reckless conduct that puts members’ savings at risk; and strengthen the deterrent and punishment for that behaviour.²

The Regulator infers that Parliament’s intention was to give it additional options when responding to the worst examples of the sort of conduct that is already within reach of its existing contribution-notice (CN) powers (or that would be, if the perpetrator were sufficiently connected with a scheme employer). It does not expect to extend the range of activity that it will investigate. Whether it will go down the CN or criminal-prosecution route in any particular case will depend on considerations of seriousness, efficiency and the public interest.

¹ *Consultation on our approach to the investigation and prosecution of the new criminal offences* <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences>. *Draft policy: Our approach to the investigation and prosecution of the new criminal offences* <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences/draft-policy-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences>.

² *TPR consults on new criminal sanctions policy* (PN21-08) <www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2021-press-releases/tp-consults-on-new-criminal-sanctions-policy>.

Detrimental effects & reasonable excuses

The draft policy compares the new offences and the existing powers, highlighting points of similarity and differences. For example, the offence concerned with conduct that puts accrued benefits at risk involves a material detriment test, as does the CN power. The Regulator does not anticipate prosecuting anyone who would have a good defence to a 'material detriment' CN (in summary, because they gave due consideration to the extent to which their actions might affect the likelihood of accrued being received, took all reasonable steps to minimize the potential detrimental effects, and concluded that any residual detriment would not be material). However, there is no statutory provision for clearance statements in connection with the offences.

The Regulator stresses that the onus is on the prosecuting authority to prove that an accused person had no reasonable excuse. However, that does not mean that it must identify and disprove every available justification; anyone who might be investigated should be prepared to explain their actions and provide contemporary evidence, such as meeting minutes and written advice, to support their case. The Regulator identifies three factors as particularly significant to whether an excuse is reasonable or not: whether the detrimental effect was incidental, the adequacy of mitigation efforts, and (in the absence of effective mitigation) whether there was a non- or less-detrimental alternative course of action that was open. The transparency and timeliness of a person's communication with the trustees and Regulator will also be relevant.

The draft policy contains examples of the types of behaviour that could fall within the scope of the new offences, and those where a reasonable excuse might exist.

Consultation & beyond

The six-week consultation period for the draft guidance ends on 22 April 2020. The Regulator asks whether its general approach and its proposed strategy for selecting cases for investigation are clear, and consistent with the underlying policy intent; and whether its examples are helpful to those seeking understand what might constitute a reasonable excuse. The Regulator expects to publish the guidance later in the year (presumably in time for the commencement of the section that creates the new offences, which is likely to be effective from 1 October 2021). Although the Government has said that the new criminal sanctions will apply only to acts occurring after the powers come into force,³ the Regulator indicates that prior events may still be relevant when establishing an accused person's intentions.

The draft guidance acknowledges the concerns that exist about the new offences and signals the Regulator's willingness to provide greater certainty (although it is only able to instigate prosecutions in England and Wales, and is not even the only institution able to do so in those places).

Historically, the Regulator has been slow to use the 'nuclear options' available to it. Considering the height of the bar for a successful criminal prosecution and the burden of proving that the accused had no reasonable excuse, we suspect that this might not change any time soon. However, readers will recognize some very high-profile cases— anonymized, but unambiguously depicted— amongst the Regulator's examples of behaviour that might invite prosecution. There are people who will be left in no doubt that the Regulator will be sizing them up for prison clothing if they pull similar stunts again.

Although there is no statutory route for the Regulator to provide clearance from the risk of prosecution, the existing facility in relation to contribution notices would seem capable of offering some measure of reassurance. We wonder if there might be a new enthusiasm for clearance applications, and how ready the Regulator will be to respond.

Those engaging in corporate transactions, restructuring or refinancing should seek advice, document their decisions carefully, and engage early with their trustees, to reduce regulatory risk.

³ <questions-statements.parliament.uk/written-questions/detail/2020-12-17/131181>.