

Criminal offences – the Pensions Regulator gets tough

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Keen readers will recall that, in previous articles, we have highlighted changes for pensions introduced under the Pension Schemes Act 2021 (PSA). While we expect further legislation to add meat to the bones in many areas, the Pensions Regulator (TPR) has recently announced its intention for the new criminal offences brought in by the PSA and due to go live in the autumn.

In a blog released on 19 April 2021, TPR's Executive Director of Regulatory Policy, Analysis and Advice, David Fairs, confirmed TPR's watch words of "clearer, quicker, tougher", emphasising "that's the regulator we have worked hard to become, and the new powers awarded to us under the [PSA] support that approach ..."

To step back and remind readers, the PSA introduced two new offences, expected to come into force on 1 October 2021: avoidance of "employer debt" in relation to a defined benefit occupational pension scheme (**DB scheme**) and materially reducing the likelihood that members will receive their accrued benefits under a DB scheme. Perpetrators could receive an unlimited fine or face up to seven years in prison. Sponsors, trustees, relevant advisers, or any other associated person (other than insolvency practitioners, who are exempt) could all come within the remit of the new offence regime. The aim is to enable TPR to "address the more serious intentional or reckless conduct that was already within the scope of our Contribution Notice [CN] powers".

There are similarities with TPR's current "moral hazard" regime in, for instance, its assessment of any "material detriment" caused to the ability of a DB scheme to pay out benefits. Under its moral hazard or anti-avoidance powers, TPR may require a connected or associated person to inject funds into a DB scheme, or provide financial or other support subject to conditions. There is also an expansion of the CN regime under the PSA, with two new tests which apply in respect of any "person", the "employer resources test" and the "employer insolvency test". If you have not received our first in a series of flyers on the PSA and would like to understand more on these, please do ask your Dentons' contact.

On 11 March 2021, TPR published a draft policy on its approach for the investigation and prosecution of the new criminal offences. TPR confirmed that the onus will be on determining any "reasonable excuse", clarifying that the new offences would not involve identifying and considering "every possible excuse open to someone". TPR underlined its expectation in its draft policy that "those we investigate ... explain their actions and put forward sufficient evidence of any matters that might amount to a reasonable excuse and will give them the opportunity to do so." TPR noted "the basis for the reasonable excuse [should] be clear from contemporaneous records such as minutes of meetings, correspondence and written advice." TPR followed its draft policy with a consultation which closed on 22 April 2021.

Against the backdrop of the draft policy and the end of the consultation, and while we await TPR's response to that, Mr Fairs used his blog to highlight that both new offences have three elements. These are: intent; an act or failure to act; and the absence of a reasonable excuse. Therefore "the lives of competent and responsible trustees, advisers or employers, or anyone operating in this space [are not intended to become] harder ..." The clear aim is to calm

"heated debate", which Mr Fairs recognises, about the reach and remit of the new powers.

Mr Fairs underlined TPR's commitment to protecting pension savers, making clear that TPR "won't hesitate to use our powers to protect savers ... when it's the right thing to do ..." Nonetheless, Mr Fairs was careful to balance this with reassurance to sponsors of DB schemes (and wider reassurance, given the broad pool of individuals and entities potentially falling within the scope of TPR's new powers) that TPR will not "overstretch the intent and purpose behind the powers". He provided further comfort in confirming that TPR's approach will be both appropriate and proportionate, a theme which pervades pensions regulation.

Mr Fairs confirmed that TPR will not be "targeting acts pre-dating the offences coming into force" (expected to be autumn 2021), an issue of some concern to a wide range of parties where a DB scheme is involved. TPR will not impose offences retrospectively, but its draft policy states that evidence of prior acts or omissions "may be relevant to our investigation/prosecution of actions after that date, for example, if it indicates ... intention."

With this in mind, we are advising clients with DB schemes to take steps to ensure that they follow robust and proper decision-making processes and record deliberations and reasoning appropriately. Mr Fairs confirmed that TPR's powers "should not worry those who are doing the right thing and properly thinking through the actions and decisions they take."

Watch this space for further updates on developments on TPR's new powers.

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