Submitted via a standardised online form

The Pensions Regulator
Consultation on approach to the investigation and prosecution of the new criminal offences

19 April 2021

Question 1: Given that the offences have now been set in law, is our overall approach consistent with the policy intent?

Answer: No

Breadth of the legislation

This is a very difficult question to answer because the legislation is so broad that it is difficult to be clear on the policy intent. We call on the Regulator to give everyone much greater certainty about when these criminal offences are committed and will be prosecuted by agreeing with the Secretary of State and all other potential prosecutors both (a) their understanding of the policy intent and therefore the intended scope of the legislation and (b) the prosecution policy that all will apply. This would ideally be supported by a clear Ministerial Statement and/or published memorandum of understanding.

As regards public expressions by Government of the policy intent: when the Pension Schemes Bill was introduced in Parliament, Government Minister Baroness Stedman-Scott said that the intention of the relevant provisions was to "punish those who wilfully or recklessly harm their pension scheme" (we note the use of the word "their", rather than "a"). The first page of the Bill's impact assessment (Annex C) reinforces this, again with references to wilfulness/recklessness and the references to potential targets being references to employers. The Act's explanatory note refers to "unscrupulous behaviours".

There was, however, also the following from the Pensions Minister in the House of Commons (similar words were also used by Earl Howe in the House of Lords): "It is certainly not the intention to frustrate legitimate business activities where they are conducted in good faith. It is important, however, that where the elements of offences are met, no matter who has committed it, the Pensions Regulator should be able to respond appropriately. Any restriction of the persons would create a loophole for these people to potentially act in such a way."

In the legislation, the Government has preferred to err on the side of criminalising too much and relying on the Regulator not prosecuting cases that fall outside the policy intent, rather than risk criminalising too little because they do not trust their ability to draft offences without leaving loopholes.

We have sympathy with the Regulator, which has been put in an invidious position as a result of this, and is likely to be the one who will take the blame for any failed prosecutions. Our answers to this consultation should not, therefore, be taken as criticisms of the Regulator.

In very many cases of apparently acceptable behaviour, the only thing under the legislation which protects persons from criminal liability is the prosecuting authorities' and the courts' view of what constitutes a reasonable excuse.

Although the concept of reasonableness is frequently used in criminal law, it is uncommon to have a situation where so many actions are potentially criminal, and the concept of "reasonable excuse" is the only protection from criminal liability.

We therefore consider that the policy should state more forensically how the Regulator interprets the concept of "reasonable excuse", rather than relying on broad-brush principles and high-level examples.

We also strongly urge the Regulator to inform the DWP that it should not be the Regulator's role to determine the policy intent underlying criminal offences which have been drafted so exceptionally broadly.

Relationship with contribution notices

The draft policy says "Our approach to the prosecution of the new offences will be closely linked to our existing CN power, in that we would expect to consider a case for prosecution in broadly the same circumstances where we would consider seeking a CN." We think this may not match the policy intent, which appeared to us to be that criminal investigations would be a relatively small subset of contribution notice cases, with a higher bar set, i.e. they are designed to address the most heinous and wilful or reckless activities. We were not expecting criminal prosecutions generally to be considered in all the same circumstances as contribution notices.

We ask the Regulator to clarify this with the Secretary of State. As noted above, it is very important that all potential prosecutors have a common understanding and that this is published.

Question 2: Is the policy clear on our overall approach to the new offences? If not, how could we make it clearer, without constricting the powers?

Answer: No

Distinction between conduct giving rise to criminal and civil liability needs to be clearer

The policy appears to view the criminal and civil sanctions as alternatives to be used in respect of the same conduct, with the Regulator choosing between them by reference to factors such as the amount that may be recovered using civil powers and the deterrent effect of the criminal sanctions. This seems inappropriate: we would expect that there should be a qualitative difference between behaviour that leads to civil penalties, contribution notices, etc., and behaviour that leads to criminal sanctions, which should be reserved for more serious conduct.

Whilst we appreciate that this is a criminal investigation and prosecution policy, the interaction with the corresponding civil penalty provisions, which can be enforced in the alternative, cannot be ignored. They should be equally thoroughly addressed either here or in a separate document. Given the lighter burden of proof, it might be expected that more civil cases will be brought than criminal cases prosecuted. Will the Regulator adopt the same approach to the civil penalties as for criminal cases or a different one?

The draft policy currently only refers readers to the existing Monetary Penalties Policy. If there is to be no separate policy on the new civil penalties, that existing policy needs to be revamped in light of the new civil penalties. We note that currently an individual can only be fined a maximum of £5,000 under that policy; for the new offences the maximum civil penalty is £1 million. It is therefore reasonable to expect it to be made much more substantial in respect of these new penalties and to state whether the considerations will be the same as for the corresponding criminal offences or, if not, what they will be. Those in scope, which includes trustees, can be expected to be almost as concerned about the very large civil penalty provisions as about the criminal offences – if not more so, given the lighter burden of proof.

If criminal investigations are broadly to be aligned with contribution notice investigations (though see our comment above), the policy should also consider the different burdens of proof that apply in those different types of proceedings.

Clarifying the policy without constricting the powers

The reference to "without constricting the powers" is misconceived. If the guidance is not intended to constrict the use of the powers, there is little point in publishing it. As illustrated in our answer to Question 1, the powers are drafted unreasonably broadly, and this was done in reliance on the Regulator in effect constricting them by setting out in guidance the situations in which it would not seek to exercise them.

The Regulator should, therefore, be willing to state in its guidance how it will and will not use them, even if that does result in them being constricted (and if it turns out that the balance is wrong, it is always open to the Regulator to change its guidance).

It is recognised that the guidance cannot be definitive about the meaning of the law, because the interpretation of the law falls to the courts not to the Regulator. However, this does not prevent the Regulator from being more definitive as to the circumstances in which it would or would not seek to prosecute potentially criminal activity.

In our comments, we are generally seeking more reassurance for those who act in good faith, with the intention of furthering the Regulator's aim of giving effect to the policy intention of deterring

and punishing the sort of behaviour that Parliament wishes to criminalise. Our intention is not, of course, to make it easier for wrongdoers to escape prosecution or conviction. With this in mind, if the Regulator wishes to give more comfort to those trying to do the right thing whilst not giving any ground to others, it might consider adding references to parties acting in good faith/bad faith/recklessly. This would reassure those acting in good faith and not recklessly that they do not risk prosecution, whilst still giving the Regulator full rein (where appropriate) to prosecute those who have done otherwise.

Possibility of retrospective effect

As noted above, it is likely that the guidance will need to change over time to reflect experience and changing circumstances. It is important for participants in the pensions industry to be clear what the expectations are at any given point in time, and that there will be no retrospective application of standards.

The Regulator should therefore commit to maintaining a public record (available on its website for convenience) to show what published guidance was in force at any given time, so that it can easily be established what guidance was available to participants at the relevant time.

Trustees

Trustees are clearly in scope of the criminal offences. There is specific reassurance provided in the draft guidance to lawyers, accountants and actuaries, but none to trustees. It would be appreciated if the Regulator could recognise the difficult job that trustees, including non-professional trustees, do and seek to give them some express comfort. Without this, the policy risks deterring good non-professional trustees from continuing in their role.

We also note that affordable trustee indemnity insurance is becoming increasingly hard to find and that the scope of this legislation, and uncertainty around its application, is contributing to that. This is another factor that can deter a non-professional from wishing to act as a trustee.

Question 3: Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer?

Answer: No

The policy states that the Regulator will select cases for investigation based on the policy intent, and gives a non-exhaustive list of four examples. Some of these are very vague , in particular the reference to "there has been some other unfairness in the treatment of the scheme".

We note that the choice of targets for prosecution will be based (broadly) on the extent of their involvement and whether or not they benefitted from the action or failure. This is helpful.

Finally, this section of the policy sets out four examples of types of action which might lead to prosecution. These are all actions which would be expected to fall within the existing (civil) moral hazard regime. As noted in our answer to the previous questions, we would expect the policy to set out a higher threshold of misconduct that should apply for the purposes of selecting cases to prosecute for criminal liability.

Question 4: Are the examples useful in illustrating the factors that we will take into account when considering whether a potential defendant has a reasonable excuse to act or fail to act? Are there any other examples you would consider helpful?

Answer: No

Examples can be helpful but in practice situations are usually complex and multi-faceted. The existing examples address only single factors and/or fairly black-and-white scenarios. But individuals and companies are at risk of unintentionally committing criminal offences that could see them jailed. There is no clearance or other safe harbour to be made available, so they need more help when they face difficult real life decisions. Advisers can advise but not if they do not know themselves what the answer is likely to be. We therefore consider that detailed case study discussions would be more helpful. These might include, for example, apportionment arrangements and other restructuring scenarios.

In addition, the Regulator has looked closely at many cases of significant dividend payments and has regularly issued warnings in this area about DB pension schemes being treated fairly: it would therefore seem appropriate to consider these in at least one case study. The guidance needs to be based on clear principles, however, to avoid adding to concerns or uncertainty.

Trustees are concerned that they are in scope of the criminal offences and there is no specific comfort given to them in the draft policy: some guidance and reassurance for them in the examples too (or case studies) could help to allay their fears and avoid deterring good people from acting as trustees.

Issues with existing examples

Whilst we understand that the Regulator does not want to fetter its future decision making and that it is having to work with very broadly drafted legislation, the approach taken in many of the examples is so tentative that it will add to uncertainty and give rise to concerns where none would otherwise exist. We think that the whole approach to the examples needs to be reconsidered.

Scenarios are discussed, in the context of potential criminal prosecutions, which do not seem to come anywhere close to being evidence to be considered in a criminal investigation, let alone prosecution.

For example:

- In none of the three examples of cases where the detrimental impact "might be" considered incidental can we see anything that is other than incidental. To effectively say that there still might be a criminal prosecution based on these facts may therefore give rise to unnecessary concerns and inhibit normal business activity.

- This same concern is even more acute in the three examples of full mitigation of detrimental impact. The draft policy only says that these are scenarios "where the mitigation might be considered adequate". The mitigation is stated as being full, so surely the policy can say that it "will be" (not "might be") adequate. If not, an explanation is needed.

Could these concerns perhaps be addressed by saying something like "In the absence of other relevant factors indicating that an offence has been committed, we would not prosecute"?

In other examples, parties, including unconnected persons, are unreasonably expected to disregard their own interests. For example, the draft policy says:

- "However, we won't generally expect someone to pursue an alternative that means unreasonably disregarding their interests" (emphasis added): this seems to be saying that the Regulator will sometimes expect a person to pursue a course that would involve them unreasonably disregarding their interests. Expecting someone to act unreasonably would in itself be unreasonable.

- "However, we would not expect them to do so if it was materially against their interests" (emphasis added): this seems to be saying that the Regulator will expect unconnected lenders to do something that the lender considers to be on balance may be against its own interests. Lenders of course play an important role in helping to keep companies out of insolvency and this stance risks discouraging lending where there is any connection to a DB pension scheme. That will have an adverse impact on covenant, with foreseeable avoidable insolvencies in some cases.

In many cases, the Regulator would also seem to be expecting directors of employers, lenders and others to act in conflict with their legal duties (which include the duty to promote the success of their company for the benefit of its shareholders), putting them in an impossible position.

In this same section, difficult close judgment calls (i.e. whether continuation of the employer is a better outcome for the scheme than its insolvency / whether a lender will recover more by default now or by extending lending terms further) are included in the factors that the Regulator will consider. A difficult borderline judgment call decision in the normal course of business should not be considered a material factor in any determination regarding the bringing of serious criminal proceedings. Discussing them in this context can only cause concern and inhibit normal commercial practices.

More needs to be said about when implementing, or apparently even proposing, a court-sanctioned restructuring under the Corporate Insolvency and Governance Act 2020 might, in the Regulator's view, nevertheless result in those parties committing a criminal offence. Saying only that this is unlikely still leaves concerns and, if there is to be a deterrent and understanding, those involved need to be able to consider why the Regulator might still expect to prosecute notwithstanding the court's approval.

Question 5: Do you have any other feedback?

Clearance

The policy covers clearance statements briefly but does not say whether parties are entitled to feel reassured that, where it grants clearance, no criminal prosecution will be brought (unless, of course, there has not been accurate disclosure or new relevant facts come to light). This could very usefully be added.

Statutory defence

These sentences give a misleading impression of the law: "In the case of the offence under section 58B, it is for the prosecution to prove that the person knew or ought to have known that their actions would cause material detriment to the likelihood of members receiving their benefits. By contrast, in the case of a material detriment CN the burden is on the person to establish the statutory defence under section 38B.". There is no obligation on CN targets to make out the statutory defence in a material detriment case if they do not wish to do so: the Regulator still needs to prove the case. There is therefore no such contrast here.

Deterrent effect

We have some concerns about the references to deterrence. We assume that the Regulator would not choose to pursue a prosecution merely to make an example of the person involved. It would be helpful if the guidance can clearly state that TPR would only pursue a prosecution where this is objectively justified in its own right, not to send a signal to the market.

"Ought to have known"

One of the more uncertain aspects of the section 58B offence is the reference to what a person "ought to have known". Whilst the statement in the draft policy that the Regulator will consider the circumstances as they were at the time of the act and not with the benefit of hindsight is helpful, further guidance on how the Regulator will approach the question of what a person "ought to have known" would be helpful.