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SPP Response to TPR Consultation on our approach to the new powers introduced by the Pension Schemes Act 2021 and their interaction with our existing powers

17 December 2021

Question 1: Is the complete package of policies sufficiently clear about our overall approach to the new powers? If not, is there any additional policy/guidance that you would find useful?

- ✓ Yes

Overall, we think there is now sufficient guidance in place.

For the purposes of this response, we are interpreting "package of policies" as the three new policies plus the "original" policy on the investigation and prosecution of the new criminal offences.

Our members welcome the additional guidance which the Regulator has provided in the three new policies and much of the additional content is helpful.

We recognise that the Regulator's objective when issuing the three new policies was to address specific concerns coming out of recent consultation on the Regulator's approach to the investigation and prosecution of the new criminal offences. We understand, therefore, why the policies have been issued as separate policies subject to consultation at this stage. We do, however, think that it is burdensome, as well as reducing the overall clarity of the guidance, to have to read various policies side by side. This is the case for both the current package of policies, as well as the other regulatory materials on the Regulator's powers into which this package fits. For example, a reader wanting to get a full picture of the Regulator's anti-avoidance powers will now need to read at least nine documents, running to over 100 pages (Code of Practice 12, Code of Practice 12 Code related guidance, clearance guidance, the policy on the Regulator's approach to criminal investigation and prosecution and the three new policies and the Prosecution Policy).

We note that the Regulator's intention is to consolidate guidance relating to changes from the Pension Schemes Act 2021 as part of a future phase of its work on the Single Code. We suggest that it would be useful to consolidate this guidance soonest as part of a response to the current consultation exercise. We also suggest that the paragraphs be numbered for ease of reference.

We think it may improve overall clarity of this package of policies and would be more consistent with the common driver behind publication of all the policies in the package (i.e., to provide guidance on how the Regulator will approach its new powers), to focus this package to the

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Regulator's new powers. For example, the inclusion of all overlapping powers scenarios in the overlapping powers policy (e.g., covering how the regulator will enforce breach of automatic enrolment requirements and employer related investments as well as anti-avoidance type scenarios) may make it harder for readers to focus on how the Regulator's new powers will operate.

We also note that all examples are 'He' and that this is problematic in relation to diversity and inclusion.

We would suggest that the Regulator may wish to produce a short summary version for lay readers – 'What are the Regulator's powers?'.

OVERLAPPING POWERS

Question 2: Is the policy clear on the factors we will take into account when we have a choice of which power to use?

✓ No

Clearer, express identification of factors

Although the policy contains some helpful commentary, it is difficult to identify what all the factors are, and which factors are relevant in which particular scenarios. It would be helpful to expressly state at the start of the policy what the factors are and then be clear in each of the sections which particular factors are relevant.

There are various points in the policy where statements are made about things which imply that they are factors which will be taken into account, without expressly stating that they are factors. For example, it is clear (although not expressly stated) that the nature and effects of the Regulator's powers will be a factor which is taken into account when choosing between powers. It is not clear whether other points which are covered in the policy, such as legal tests / considerations are factors or not. For example, there is a reference to the standard of proof and later to the fact that the applicable prosecutor's tests for prosecution will also need to be met in order to bring a public prosecution. The inclusion of information about this suggests that they are - but this is not expressly stated.

Greater clarity on factors determining whether the Regulator seeks a criminal penalty or civil £1m fine

The draft policy correctly states that the Regulator will not impose both financial and criminal penalties in relation to the same behaviour.

It would be helpful to provide more clarity/guidance on the factors that are likely to determine which penalty the Regulator seeks to impose in practice. This would be particularly helpful given that the behaviour giving the Regulator grounds to impose these penalties is almost identical.

The draft policy currently refers to the fact that behaviour has to be "serious" in order to impose a high fine but does not provide much in the way of additional commentary or compare this to the type of behaviour that is likely to lead the Regulator to seek an alternative criminal penalty. It may be helpful to cross refer to the commentary in the criminal investigation and prosecution policy here and clarify what, if any, distinction there is between the two. The criminal investigation and prosecution policy refers to the "most serious examples of intentional or reckless conduct" being selected for prosecution.



Greater clarity on why the Regulator would usually pursue criminal proceedings first

In the penultimate paragraph of the Avoidance section, the policy states: "Where we pursue both regulatory and criminal proceedings, we will usually exhaust criminal proceedings before seeking any regulatory remedy. However, we may pursue regulatory proceedings for a CN first, or in tandem, to address the harm to the scheme and to ensure that time limits for exercise of the CN power are not exceeded". It could be clearer why the Regulator would usually pursue criminal proceedings first (in a similar way as it has explained why it might need to pursue a CN first in the second sentence). As currently drafted, these sentences, when read together, are confusing. It is also unclear how it fits with the statement earlier in this section that states that the Regulator will generally prioritise seeking a CN.

We think it would be helpful to include some colour coding of the offences to indicate if they would prompt TPR to impose a financial penalty and/or pursue a financial prosecution. This could be helpful to make clear that for actions in the category of "breaches of legislation (other than ERI)", TPR would not seek to pursue a financial penalty and a criminal sanction for the same act, but for "avoidance"- activity TPR could pursue either or both.

Question 3: Are the examples useful in illustrating what we will take into account when considering which power to use? Are there any other examples that you would find useful?

- ✓ Yes

Yes, the examples are helpful, but it would have been good to link the possible fines to the relevant tables shown later in the document. Also, we would wish for more specific comments on exactly what powers the Regulator would have used in the circumstances. The culpability of Trustee C, the member-nominated trustee, in the ERI example may be seen as unclear

While we welcome the clear statement that TPR considers a breach of any requirement it sets to be unacceptable, we would expect that, in practice, it would distinguish between deliberate obstructions and accidental oversights –for example where a personal issue might result in such requests not being responded to.

Question 4: Do you have any other feedback about the overlapping powers policy

- Clearer headings

The clarity of the policy could be improved with clearer and more consistent use of signposting / headings. For example, the various headings on "breaches" on Pages 7 and 8 is not consistent with all of the previous headings, which relate to Regulatory powers.

It would be helpful to set out what exactly the section under the heading "Breaches of legislation (excluding employer-related investments)" is relevant for. From a legal perspective, this would likely be interpreted at covering breaches of specific duties under legislation - for example breach of automatic enrolment duties - as opposed to behaviour which could give the Regulator grounds to exercise specific powers (e.g., anti-avoidance type behaviour). If that is correct, it may be helpful to explain that distinction.

We presume (but it would be helpful to clarify) that the first paragraph under the heading "Breaches of legislation (excluding employer-related investments)" relates to criminal penalties?

- Description of offences as opposed to legislative references



It would help readers follow the policy more easily if the criminal offences are referred to by a brief description (e.g., conduct risking accrued benefits) rather than by referring to sections of the legislation. For example, Page 2 refers to "a prosecution under section 58B of that Act".

- Table 1 specific drafting points

In the table at the beginning of the policy - we presume that the criminal offence of failure to pay a contribution notice under Section 42A has not been included in the table as the failure to pay does not have a direct civil equivalent (as it is the non-payment of the CN, rather than the underlying avoidance which gave rise to the CN, which forms the basis of the offence). If this is correct, it may be helpful to reference this somewhere in the table so that if readers are referring to the table for an overview of potential penalties, this offence is not overlooked.

In the table at the beginning of the policy - in the fifth row (Providing false or misleading information in a notice to TPR (notifiable events/statement of intent)). It is not clear why there is a "no" under the regulatory penalty column. Breach of Section 69 (and in due course Section 69A) are included in the list of information which can give the Regulator grounds to issue a financial penalty under Section 80A. We note that the provision of false and misleading information is also included in row 12 (which does pick up the Section 80A reference, but makes no reference to notifiable events).

- We also suggest that the paragraphs be numbered for ease of reference.

MONETARY POLICIES (HIGH FINES) POLICY

Question 5: Is the policy clear on the approach we will use when calculating the fine amount?

- ✓ Yes

We consider that there is too much repetition under each of the headings and that they (i.e., High fines (avoidance) etc) are clear as the policy sets out the activities covered. For example, immediately after the listing of avoidance actions a., b.i. and b.ii. the policy states: "We also have power to issue a high fine in other circumstances...." and cites the information gathering actions. Under the section headed "High fines (information gathering)", TPR lists actions a., b. and c. but then also states "We also have the power to issue a high fine in other circumstances which are not covered by this policy..." and cites the avoidance actions.

We welcome the clarity in the example relating to non-payment of a Contribution Notice. We also think the banding approach is clear in relation to debt avoidance and conduct risking accrued benefits, while acknowledging the scope for further adjustment through the application of mitigating or aggravating features.

Question 6: Have we identified the relevant factors for assessing culpability and harm as well as the aggravating and mitigating factors? If not, what other factors do you think might be relevant?

- ✓ No

In the example factors relevant for assessing the level of harm, there is whether a particular act may undermine public confidence in pensions generally. This strikes us as being extremely wide and we query whether it would be more appropriate to limit this factor to undermining confidence in DB savings - i.e., the type of harm which the anti-avoidance penalties are aimed at. There is little distinction in the public's mind between DB and DC arrangements and we can see



how it could be argued that causing harm to a DB arrangement undermines public confidence in saving into any type of arrangement. This seems to us to be prone to ‘political’ influence and we are unclear that there is any reliable and objective way to measure public confidence in pensions.

We would caution against allowing media sensation and press uproar to drive thinking about the degree of harm through the undermining public confidence in pensions criterion. Instead, we feel that there should be an objective assessment. (In addition, it is not clear to us how the public could be in full possession of the facts prior to the Regulator’s actual determination in the case.)

We think that whether the Trustees/company had taken professional advice is a relevant factor to consider.

Monetary penalties powers - high fines (information gathering). It would be helpful to clarify in this section what the Regulator’s approach is likely to be where it has the power to impose a high fine under both Section 69 and Section 69A, particularly in circumstances where the breach took place in relation to the same notifiable event.

Question 7: Do you have any other feedback about the high fines policy?

We think that it may be more appropriate for the banding for the high fines to start at £50,000 rather than £100,000 in relation avoidance (Table 2) and £0 in relation to information gathering (Table 3). We think that this would be more consistent with the civil penalties which the Regulator can impose under Section 10 Pensions Act 1995 with the high fines regime.

INFORMATION GATHERING POLICY

Question 8: Is the policy clear on the options available to us and in which circumstances they may be used?

- ✓ Yes

We would though welcome more clarity on voluntary requests versus the choosing to use statutory powers.

Question 9: Is the policy clear on the consequences for non-compliance with our information gathering powers?

- ✓ No

We would ask for further clarity on which table of fines apply in which situation

In relation to the escalating fines, we suggest a cumulative 3-year figure in Table 6 would be helpful.

Question 10: Do you have any other feedback about the information gathering policy?

- ✓ Yes

We would like the opportunity to be taken to improve the drafting. Currently the policies are much less accessible than they could be.

Response ends