

Insights

NEW CRIMINAL, CIVIL AND INVESTIGATORY POWERS FOR THE PENSIONS REGULATOR

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SUMMARY

The Pension Schemes Act 2021 significantly augments the enforcement powers of the Pensions Regulator (“TPR”). The Act not only creates new criminal offences but also enables the regulator to make use of civil financial penalties and new powers of investigation. While the behaviour that catches TPR’s eye will likely remain unchanged, its power to deter and punish improper conduct will (as of October 2021) increase considerably. Below we take a look at the key changes industry practitioners should note.

INTRODUCTION

The Pension Schemes Act 2021 creates three new criminal offences concerning improper conduct in relation to defined benefit pension schemes, and confers new powers of investigation on TPR. The changes, which will carry the force of law from 1 October 2021, have been described by TPR as “a watershed moment in [its] mission to protect savers”.¹ According to the Department for Work and Pensions, the offences will catch those who “run pension schemes into the ground or plunder pots to line their own pockets”, “deter employers from making reckless decisions” and “strengthen the regulators’ powers to take efficient and timely actions to protect members’ hard-earned savings”.²

The offences carry penalties of unlimited fines and up to seven years’ imprisonment and are accompanied by corresponding civil powers to impose substantial financial penalties.

BY WAY OF REMINDER...

Until now, TPR’s primary means of deterrence in relation to improper conduct has derived from its power to issue “contribution notices” under the Pensions Act 2004. These require money to be paid by any employer (or any person connected with that employer) who sponsored the scheme at the relevant time to either the trustees of the relevant pension scheme or the Pension Protection Fund. Such notices are only issued if TPR considers it reasonable to impose liability and the employer (or connected person):

- (a) prevents the recovery of a debt due to the scheme,³ prevents the same debt from becoming due, or compromises, settles or otherwise reduces the amount of debt due;
- (b) detrimentally (and materially) affects the likelihood of the receipt of accrued scheme benefits⁴ by scheme members;
- (c) in the opinion of TPR, would have materially reduced the amount of debt the scheme would have recovered if a debt to the scheme had fallen due; or
- (d) in the opinion of TPR, materially reduces the value of the employer's resources when compared to the amount of the scheme's estimated debt.

WHAT'S CHANGED?

Not only does the 2021 Act reinforce TPR's power to issue contribution notices by creating a new offence of failure to comply, it also creates two separate offences of (1) avoidance of employer debt⁵ and (2) conduct risking accrued scheme benefits.⁶ These offences closely mirror points (a) and (b) above, subject to the following key differences:

- While a recipient of a contribution notice must be a person who was a sponsoring employer (or connected person) within a limited period, the new offences can be committed by sponsors, trustees, relevant advisers, or any other associated person (other than insolvency practitioners, who are exempt).⁷
- The second offence of conduct risking accrued scheme benefits requires the prosecution to prove that the accused knew (or ought to have known) that their actions would cause material detriment to the likelihood of members receiving their benefits. Conversely, in the case of a contribution notice, the same burden lies with the employer or connected person.
- TPR can only issue contribution notices to those whom it also issued with warning notices within six years of the conduct in question. No such limitation period applies to the new offences.
- Both offences must have been committed without reasonable excuse; a burden that the prosecution must prove beyond reasonable doubt. TPR's [draft policy](#) on the new offences lists the following questions as central to deciphering what amounts to a reasonable excuse:
 - Was the detrimental impact an incidental, rather than a fundamentally necessary, step in achieving the accused's purpose?
 - What mitigation existed to offset the detrimental impact? Was it adequate?
 - Was there a viable alternative that could have prevented (or reduced) the detrimental impact?
- Offending conduct that occurs before 1 October 2021 cannot be prosecuted.

- Any prosecution must be in the public interest.⁸

In addition to these criminal offences, the 2021 Act confers on TPR an alternative power to impose civil financial penalties of up to £1 million in response to conduct that may amount to one of the two new offences if deemed unreasonable by TPR. However, anyone convicted of or subject to ongoing criminal proceedings regarding the offences cannot be the subject of such a penalty.⁹ Furthermore, the legislation also enables TPR to require persons to attend interviews, and to impose sanctions for non-compliance.¹⁰

WHAT WILL TPR LOOK FOR?

In selecting cases for investigation and prosecution, TPR has stated¹¹ that it will focus on circumstances in which:

- the primary purpose of the conduct is the abandonment of the scheme without provision of appropriate mitigation;
- significant financial gains have been unreasonably made to the detriment of the scheme;
- there has been some other unfairness in the treatment of the scheme; and/or
- the trustees, TPR and/or the Pension Protection Fund have been misled or not appropriately informed.

WHAT CAN WE EXPECT?

In its draft policy, TPR notes Parliament's intention that the new offences are not designed to trigger "a fundamental change in commercial norms or accepted standards of corporate behaviour", nor to alter the kind of behaviours TPR regulates, but rather to broaden the options at the regulator's disposal.¹² Even so, it is difficult to imagine that the introduction of such a wide array of new powers will not impact how employers, trustees and their advisers operate in practice, particularly in light of potential criminal liability.

Parliament's decision to strengthen TPR's armoury is unsurprising; indeed, it seems to follow a broader trend towards increased sanctions and a greater number of possible offences facing corporates in the UK. In addition to the "failure to prevent" offences that compliance regimes must now account for under both the Bribery Act 2010 and the Criminal Finances Act 2017, commercial organisations are soon likely to face financial sanctions for failure to comply with their transparency obligations under the Modern Slavery Act 2015.¹³ In addition, there may yet be a push towards a "failure to prevent economic crime" offence (see our previous blog ['Corporate Criminal Liability in the UK: A new era is coming... isn't it?'](#) on this and the future of corporate criminal liability more generally).

Though TPR has only issued two contribution notices since 2016,¹⁴ it will no doubt be looking for opportunities to live up to its stated aim to be a “bold and effective regulator”¹⁵ by the existence and ultimate use of its new capabilities.

Footnotes

[1] <https://blog.thepensionsregulator.gov.uk/2021/02/16/an-act-to-protect-pension-savers/>

[2] <https://www.gov.uk/government/news/landmark-moment-for-uk-pensions-as-bill-receives-royal-assent>

[3] “Debt” refers to a debt incurred under section 75 of the Pensions Act 1995: a statutory debt owed by the employer to the trustees of the scheme, which becomes payable in circumstances defined by the legislation.

[4] Namely, benefits accrued before the relevant conduct (see sections 58B(4) & (5) of the Pensions Act 2004). Benefits that members receive from the Pension Protection Fund or under the Financial Assistance Scheme are disregarded when considering what scheme benefits are accrued (see section 58B(7) of the Pensions Act 2004).

[5] Section 58A Pensions Act 2004.

[6] Section 58B Pensions Act 2004. Both offences apply only to occupational pension schemes that are not (a) money purchase schemes or (b) prescribed schemes or schemes of a prescribed description.

[7] See sections 58A(4) & (9), and 58B(7) Pensions Act 2004.

[8] <https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/prosecution-policy>, page 3.

[9] Section 88A(10).

[10] Sections 72A & 77A Pensions Act 2004.

[11] <https://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#4d7835fb10aa445195f4ca20bd64c6eb>

[12] Ibid.

[13] <https://www.gov.uk/government/speeches/foreign-secretary-on-the-situation-in-xinjiang-and-the-governments-response>

[14] [https://www.thepensionsregulator.gov.uk/en/about-us/freedom-of-information-\(foi\)/recently-released-information/the-number-of-contribution-notice-and-financial-support-directions-issued-in-the-last-five-years](https://www.thepensionsregulator.gov.uk/en/about-us/freedom-of-information-(foi)/recently-released-information/the-number-of-contribution-notice-and-financial-support-directions-issued-in-the-last-five-years)

[15] <https://www.thepensionsregulator.gov.uk/en/about-us/what-tpr-does-and-who-we-are#5fed9f778190400487a4d0c86a4be594>

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