Sackers

Alert - TPR consults on new criminal sanctions policy

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Introduction

TPR today published a consultation, which closes on 22 April 2021, on its proposed policy approach towards investigating and prosecuting two new criminal offences being introduced under the Pension Schemes Act 2021: avoidance of a statutory employer debt and conduct risking accrued DB benefits ("the Offences"). The Offences are slated to come into force this autumn, with the final policy expected to be published later this year.

Key points

- TPR's approach is guided by its understanding that the Offences are aimed at enabling it to "address the more serious intentional or reckless conduct" that is already within the scope of its contribution notice (CN) powers, or would be in scope if the person was connected with the scheme employer. Its overall intention is that the Offences will help "to deter conduct that could put pension schemes at risk".
- Ultimately, it will be for the Courts to decide the correct interpretation of the law.
- While the Offences will not apply retrospectively, TPR notes that evidence pre-dating their commencement may be relevant to its investigation or prosecution if, for example, it indicates someone's intention.
- The clearance process (under which parties to a transaction can seek a statement from TPR that, based on the information provided, it will not use its anti-avoidance powers) does not apply to the Offences and there will be no equivalent process available.
- When it comes to the Offences, TPR is not alone in the driving seat, as both the Secretary of State and the Director of Public Prosecutions could initiate a prosecution. The proposed policy will only apply to TPR's actions and will not tie the hands of the other two.

Background

The Act received Royal Assent on 11 February, bringing with it beefed up powers for TPR (see our Alert). The Offences (both punishable by an unlimited fine and/or up to seven years in prison) were hotly debated during the Act's passage through Parliament, and have caused a great deal of industry alarm. Owing to the breadth of the drafting, they have the potential to capture ordinary business activity, as well as a wide

spectrum of people (including directors of sponsoring employers, trustees and their advisers).

Avoidance of employer debt ("the avoidance offence")

A person commits this offence if, without a reasonable excuse, they intentionally do an act or engage in a course of conduct (including a failure to act) that:

- prevents the scheme from recovering all or any part of a statutory employer debt (under section 75 of the PA95)
- prevents that debt becoming due
- compromises or otherwise settles that debt, or
- reduces the amount of the debt which would otherwise become due.

Conduct risking accrued DB benefits ("the conduct offence")

A person commits this offence if, without a reasonable excuse, they:

- do an act or engage in a course of conduct (including a failure to act) that detrimentally affects in a material way the likelihood of accrued scheme benefits being received (whether or not the benefits are to be received under the scheme), and
- knew or ought to have known that what they were doing would have that effect.

Accrued scheme benefits are benefits which were accrued before the act, or before the last act in a series, and are assessed by reference to section 67 of the PA95 (which protects a member's accrued rights, known as "subsisting rights").

TPR's proposed approach

Given the commonalities between the Offences and TPR's power to issue a CN, TPR intends to take a similar regulatory approach when assessing potential liability.

Material detriment

The wording used in the conduct offence is very similar to the material detriment test, one of the existing grounds for imposing a CN. As a consequence, in deciding whether there has been a material detriment for the purposes of the conduct offence, TPR will take account of its code of practice and guidance in relation to the CN material detriment test. As such, it would not normally expect to prosecute anyone who could establish the statutory defence for a CN (broadly, this encompasses giving appropriate prior consideration to the impact of a transaction upon a scheme, documenting decisions and, where necessary, providing appropriate mitigation).

In considering what the person ought to have known, TPR will consider the circumstances as they were at the time of the act and not with the benefit of any hindsight based on knowledge of what has happened since.

Secondary liability

There is a slight warning bell for advisers in TPR's draft policy, as it makes clear that anyone who helps or encourages someone to commit either of the Offences is liable to be tried and punished in the same way as

the principal offender.

However, an adviser will not be liable if they have a reasonable excuse for advising in the way that they did, even in circumstances where the principal may be found liable. Recognising that professional judgement may differ, TPR reassures that, in most instances, "a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of the advice being given, is likely to have a reasonable excuse".

Reasonable excuse

The legal burden is on the prosecution to prove the absence of a reasonable excuse, but TPR expects those it investigates to explain their actions and put forward sufficient evidence of any matters that might amount to a reasonable excuse. The basis for the reasonable excuse should be clear from contemporaneous records such as minutes of meetings, correspondence and written advice.

What amounts to a reasonable excuse in any particular case will be fact-specific, but TPR sets out three factors which it considers will be significant in determining whether there is a reasonable excuse for the act or course of conduct:

- whether the detrimental impact on the scheme / likelihood of full scheme benefits being received was an incidental consequence, as opposed to a fundamentally necessary step to achieve the person's purpose. The more incidental the detriment was to the person's purpose, the more that purpose would tend towards establishing a reasonable excuse. Examples given here include the employer's business being harmed by the withdrawal of an unrelated, at-arm's length supplier, or a lender refusing to extend an existing facility (or even bringing it to a close)

- the adequacy of any mitigation provided to offset the detrimental impact. Where the detrimental impact has been fully mitigated, the person is more likely to have a reasonable excuse. Adopting a similar approach to clearance, TPR also expects the scheme to be treated fairly in relation to other parties, taking into account the relative position of the scheme and the person under investigation. An example of adequate mitigation given here is the employer granting security for the benefit of entities outside the direct covenant, but that security does not take precedence over all present and future scheme liabilities

- where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact. If there was a viable alternative with a less detrimental impact, that would suggest an absence of reasonable excuse.

As well as examples for each of the above, TPR sets out additional factors which may have a bearing on whether it begins or continues a criminal investigation. These include:

- the extent of communication and consultation with the scheme trustees before the act took place

- whether the person complied with any statutory duty to notify TPR of certain events affecting the scheme, and

- where TPR were engaged, the extent of the openness and timeliness of communication.

Selecting cases for investigation and prosecution

When selecting cases for prosecution, TPR will be mindful of the policy intent behind the Offences. For example, it will look at whether:

- the primary purpose of the conduct is the abandonment of the scheme without 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 PPF have been misled or not appropriately informed.

TPR considers that the following might be in the frame for prosecution:

- the sale of an employer without replacing an existing parental guarantee over the statutory employer debt, resulting in the loss of the guarantee (in circumstances where the trustees were not told about the sale in advance)
- the purchase of an employer with no further investment into its business, subsequent mismanagement of the company, and extraction of value before the company went into administration
- the stripping of assets from an employer, resulting in substantial weakening of scheme support
- taking steps to bring about the unnecessary insolvency of the scheme employer, with the intention of buying the employer's business without the scheme.

Next steps

This is the first in a series of consultations for TPR as it takes forward the Government's plans outlined in the Act.

Whilst the examples of behaviour set out in the draft policy might help to allay some industry fears, there will still be a lot of shades of grey. Given this, the Offences may well result in more cautious corporate behaviour where the legal position is not so clear.

If you have any questions on any of the above, **please speak to your usual Sackers contact**.

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