

Pension Schemes Act 2021 – TPR provides further guidance on using its powers



What you **need to know**

- The Pension Schemes Act 2021 (PSA2021) introduced two new criminal offences - avoidance of employer debt and conduct risking accrued scheme benefits - which came into force on 1 October 2021.
- In spring 2021, The Pensions Regulator (TPR) consulted on a draft policy on its approach to the investigation and prosecution of these two offences. TPR has now responded to the consultation and has published its final policy.
- TPR acknowledged that a number of consultation responses suggested that it would be helpful for the interaction of the new criminal powers to be put into context in relation to TPR's other financial penalty powers.
- In light of this, TPR has published a consultation on three draft policies outlining its approach to overlapping powers, monetary penalty powers, and information gathering powers. The consultation will run until 22 December 2021, with TPR expected to finalise the policies early in the new year.
- Additionally, TPR has updated its code of practice 12 to include the two new tests which can be used when determining whether a contribution notice (CN) should be issued.



Actions you can take

- **Carry out training** on the new powers and how TPR intends to use them.
- **Review governance processes**, including conflicts management and decision-making processes, to ensure events that are covered by the new powers are identified, managed and notified (if relevant).
- Review or put in place **information sharing agreements**, between trustees and employers to ensure any relevant event is identified and managed in a timely and proportionate manner.

What's changed in TPR's final policy on using its criminal sanctions?

Increase in clarity

TPR states 'we don't intend to prosecute behaviour which we consider to be ordinary commercial activity'. TPR goes on to say it will 'investigate and prosecute the most serious examples of intentional or reckless conduct'.

In our view, the policy aims to give greater comfort to the industry but inevitably grey areas remain given the wide drafting of the underlying legislation.

The 'act' element and the 'mental' element

One of the new offences will have been committed when three elements are met:

- the 'act' element is met if an individual carries out an act (or failure to act) that falls under the powers.
- the 'mental' element is met if the person intended their act (or failure to act) to have this effect (for the avoidance of employer debt power) or if the person knew (or ought to have known) that their action would have a materially detrimental effect (for the conduct risking accrued benefits power).
- the person did not have a reasonable excuse for the act (or failure to act).

Reasonable excuse defence

An appendix has been added setting out example scenarios where TPR would generally expect a reasonable excuse to be present.

Case studies

A detailed case study of a refinancing scenario has been added.



The finer detail

Criminal offences final policy

The new offences

The offences of avoidance of employer debt and conduct risking accrued scheme benefits are committed where a person's act (or failure to act) meets the relevant 'act' and 'mental' elements, without a reasonable excuse.

Who the offences apply to

Any person potentially falls within the scope of the new offences (apart from someone acting as a insolvency practitioner) regardless of their connection or otherwise with the scheme or sponsoring employer.

Approach to investigation

Although the legal burden is on the prosecution to prove the absence of a reasonable excuse, TPR expects those who are investigated to explain their actions and put forward evidence of anything that might be a reasonable excuse.

What amounts to a reasonable excuse will depend on the facts and circumstances of the particular case. TPR will consider the person's reasons for acting in the way that they did, the circumstances in which the act took place (e.g. any time constraints), and the person's own circumstances (e.g. their duties, skills and experience). TPR will also consider other relevant factors including the extent to which the detriment to the scheme was an incidental consequence, the adequacy of any mitigation and whether there was a viable alternative that would have avoided or reduced the detriment to the scheme.

Approach to new powers and interaction with existing powers

Overlapping powers

There might be situations where TPR has the option use more than one power in relation to the same set of circumstances. The draft overlapping powers policy explains TPR's approach where there is an overlap between its regulatory powers (such as a statutory notice or a financial penalty) and its criminal powers. Where TPR has a choice on which power to use it will consider the nature and effect of each of the powers and the outcome they might achieve.

Monetary penalty powers

With effect from 1 October 2021, TPR has the power to issue financial penalties of up to £1m for acts such as failing to comply with a CN or knowingly or recklessly providing false information to TPR. The amount of the penalty will depend on the person's level of culpability (e.g. whether an act was intentional) and the harm caused to the scheme and saver outcomes as well as whether there are any aggravating or mitigating factors present.

Information gathering powers

Also with effect from 1 October 2021, the PSA2021 extended TPR's powers to inspect premises and gave it a new power to interview individuals. The draft information gathering powers policy sets out the information TPR might ask for, what options it has for information gathering (both voluntary requests and statutory powers) as well as the possible consequences of non-compliance (including financial penalties and criminal prosecution).

Code of practice 12

Consultation

Also with effect from 1 October 2021, TPR has two new grounds on which it may issue a CN. The employer insolvency test and the employer resources test have been introduced in addition to the existing material detriment test. An updated version of TPR's code of practice 12 that explains what these tests are and the circumstances in which TPR expects to use them has been laid before Parliament and will come into force in due course.

For further information, please get in touch with **Rob Wallace** or **Helen Billing** or speak to your usual XPS Pensions contact.



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