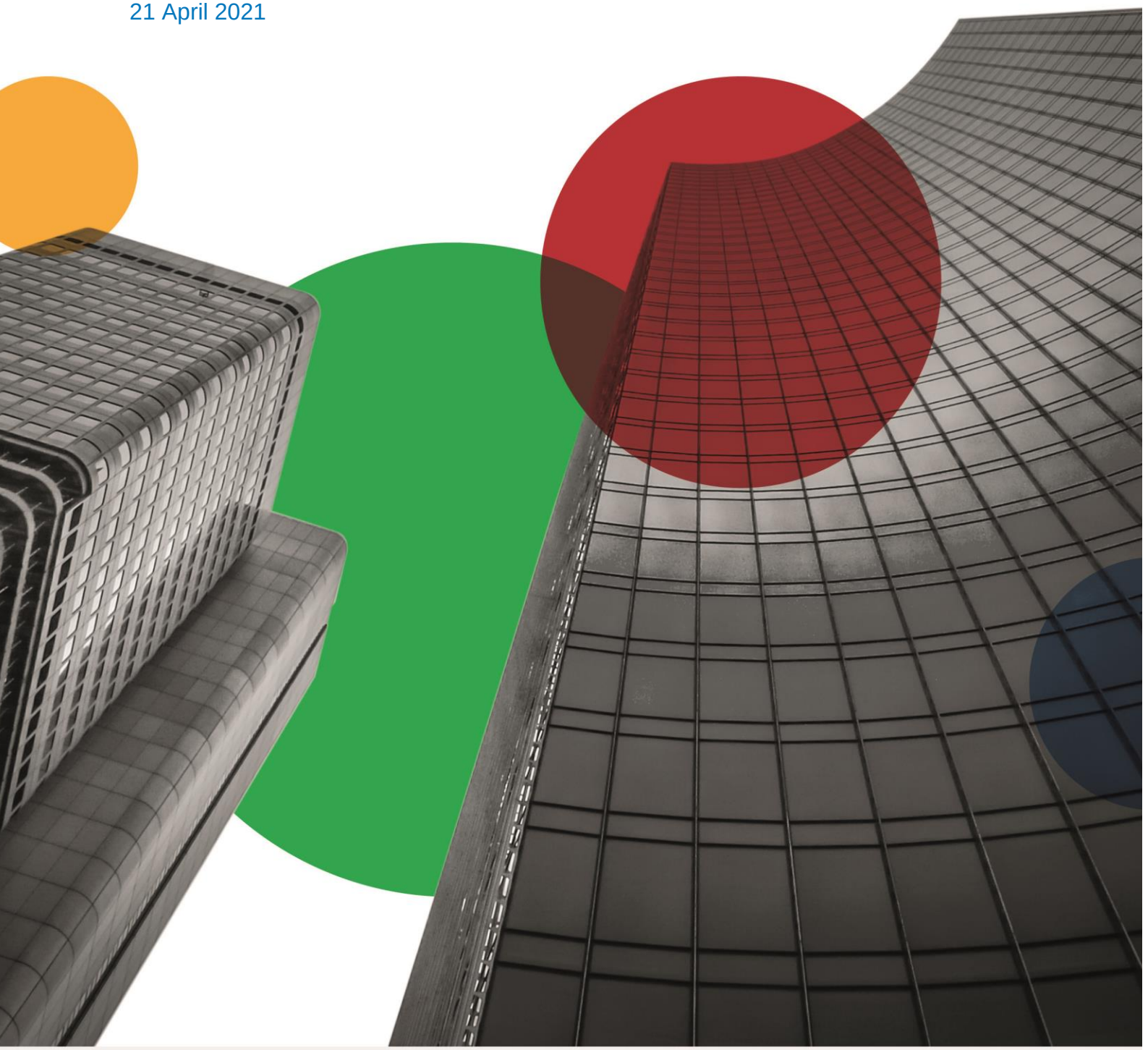
Draft policy on new criminal offences under the Pensions Scheme Act 2021

Response from ICAS to TPR

21 April 2021



ICAS

Introduction

The ICAS Pensions Panel has responded to The Pension Regulator's (TPR's) draft policy on its approach to the investigation and prosecution of the new criminal offences set out in the Pension Scheme's Act 2021.

There are two new criminal offences introduced by the Act:

1. The avoidance of employer debt, sometimes referred to as Section 75 debt.
2. Conduct risking members' accrued benefits.

Our responses to each of the consultation questions is set out below.

Consultation questions and responses

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

Yes.

Please give your reasons.

We believe that the draft policy is consistent with the policy intent behind the legislation and is broadly a helpful document. Without any case law or the experience of investigating cases which are potentially criminal, it is inevitable that the policy will need to evolve over time.

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?

Yes, for the most part.

Please give your reasons:

The policy appears to include all the main areas we would expect to see. However, we set out in our responses to the remaining questions some scope for additional clarity and information to be provided.

Selecting cases for investigation and prosecution

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

No, not entirely.

Please give your reasons:

As a general point this section is focused on selecting cases for prosecution whereas it is headed 'selecting cases for investigation and prosecution'. For example, where this section uses bullet points, these are introduced with reference to 'prosecution' rather than investigation and potential prosecution. We recommend that TPR considers whether the tone of this section is as intended.

We believe this section of the draft policy could be improved by distinguishing aspects of the policy relating to each criminal offence separately.

For example, the first four bullet points in this section setting out examples of where cases may be selected for prosecution could be made clearer by specifying which criminal offences they relate to.

Also, the second list of four bullets on acts previously encountered by TPR that may be considered for prosecution seems to include one example obviously relating to the avoidance of employer debt but nevertheless the guidance could specify which examples relate to which criminal offence.

Our reading of the guidance is that most of the examples relate to the risking of scheme benefits. If this is the case, then we recommend that TPR considers increasing coverage in the draft policy on matters relating to the avoidance of employer debt.

Statutory exception - reasonable excuse

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?

No, not entirely.

Please give your reasons:

We support the use of illustrative examples generally and the use of examples in relation to illustrating whether a potential defendant may have a reasonable excuse.

This concept of 'reasonable excuse' is at the heart of how potential offences may be prosecuted and illustrative examples are needed especially in the absence in law of a definition for a 'reasonable excuse'.

In general terms, we think that the guidance could benefit from including further examples.

The first set of examples relate to circumstances where detriment (to accrued scheme benefits) are incidental. However, one of the examples is expanded on to illustrate where the circumstances could move from being incidental to being considered central. It would be more meaningful to expand the other two examples to illustrate where the circumstances could also be considered to be central rather than incidental. If the two other examples are always likely to be incidental and therefore always constitute a reasonable excuse, they lose the power to illustrate the point being made.

Where the policy introduces examples on the adequacy of mitigation we don't understand the following premise:

"Where the detrimental impact has been fully mitigated the person is more likely to have a reasonable excuse."

If a detrimental impact has been fully mitigated, logically there is no detriment. Where there is no detriment, then it is difficult to envisage a scenario where a reasonable excuse for actions would be needed.

The illustrative examples in this section do not obviously cover the avoidance of employer debt and nowhere in the draft policy is there any coverage of scenarios where an employer participates in a multi-employer scheme. The avoidance of employer debt offence is important given the potential for this to include debt compromises and apportionment arrangements (such as Flexible Apportionment Arrangements) within its scope.

In relation to multi-employer defined benefit (DB) schemes, the balance of power will likely sit with the scheme rather than the employer which could be an unincorporated business or a charity. Employers participating in multi-employer schemes can find themselves negotiating with the scheme, for example, to agree a Section 75 debt, with negotiations able to reach a lawful outcome as things stand at the moment: we understand that this will continue to be the case following the implementation of the new criminal offence. However, we recommend that the draft policy confirms that this will be the case.

Reaching agreement with the scheme on the amount and terms of repayment of a Section 75 debt or, for example, payments to the scheme under a Deferred Debt Arrangement may be critical to an employer's survival. Unincorporated businesses and charities are particularly vulnerable in a situation where they may not have the resources to pay for professional advice and/or may not realise they need it; therefore, it is vitally important that TPR's policy includes coverage of this important issue.

In circumstances where an employer participating in a multi-employer scheme receives professional advice on how to close to future accrual, which could include exiting the scheme and incurring a Section 75 debt, it will also be vital for the adviser to understand the extent of any risk of being caught by the new criminal offence of avoiding employer debt.

Other feedback

5. Do you have any other feedback?

Secondary liability

The section of the draft policy on new offences under the heading 'secondary liability' includes four examples of an adviser acting in a way that could mean being investigated and prosecuted under the new criminal offence of risking accrued benefits.

The example of "An accountant who knowingly assists in a material misstatement of the employer's accounts in the knowledge these will be relied on to support a going concern status in an upcoming sales process which caused material detriment" is problematic.

Employers engaging in corporate activity which could risk investigation and prosecution are likely to be of a magnitude where they employ professionally qualified accountants within a finance team. It will likely be the finance team which would be responsible for preparing the statutory annual accounts of the employer. Depending on the size of the employer and the type of entity, the employer's annual accounts may receive an audit by the appointed registered auditor, although it is difficult to envisage that the replacing of the word 'accountant' with 'auditor' in this scenario would make it realistic, as it is the responsibility of the directors to prepare accounts and the FRC's Ethical Standard places limitations on the role of the auditor in relation to the preparation of statutory accounts as this creates a self-review threat. Indeed, the auditor of a Public Interest Entity cannot be involved in the preparation of the entity's accounts.

Statutory annual accounts are for a general purpose and therefore it would be unlikely that there would be a duty of care towards a person who invested in an employer on the basis of the information in those accounts. It is also likely that a decision to buy would be influenced by other information not included in those accounts. Therefore, it would be difficult to apportion an appropriate amount of 'blame' on an accountancy adviser for a buyer's decision.

If the accounts referred to are accounts prepared for a special purpose i.e. as evidence of the financial health of the employer, for example, prior to the selling of the business, it is highly likely that these accounts would also be prepared in-house. In such circumstances, a registered auditor could be appointed to undertake a review of these accounts and issue a report. In which case, the auditor would likely insist on a tripartite engagement letter being signed by the employer and the potential purchaser. The engagement letter would set out clearly the extent of any duty of care afforded to the potential purchaser. As in the example relating to an employer's statutory accounts, replacing the word 'accountant' with 'auditor' would not be likely to provide a realistic scenario.

Unintended consequences (prosecuting authorities and drafting issues)

Prosecuting authorities
We appreciate that the new criminal offences could have a positive effect through earlier engagement by employers with scheme trustees about potential corporate activity. However, the absence of a consistent approach across all authorities which may bring prosecutions in respect of these new criminal offences may have a damping effect on corporate activity.

The guidance states that it only reflects the Regulator's policy and not that of other prosecutors. A consistent and co-ordinated approach by all prosecuting authorities would provide greater certainty to those who could fall within the scope of these new criminal offences, for example in the form of a Memorandum of Understanding between them. It would also reduce the risk of complaints (including vexatious complaints) being made to more than one prosecuting authority resulting in public money being wasted.

As there are prosecuting authorities which do not have a UK-wide remit, has the risk of regulatory arbitrage been considered collectively by all potential prosecuting authorities, or does TPR's UK-wide remit guard against this? We would welcome TPR taking a role in the establishment of a consistent and co-ordinated approach by prosecuting authorities to provide a degree of certainty that legitimate acts won't fall foul of the new criminal offences. By way of example as to why a Memorandum of Understanding would be helpful, the Crown Office and Procurator Fiscal Service in Scotland will have an ability to prosecute these offences in Scotland and a substantively different criminal justice system operates in Scotland which has different evidential requirements and a significantly different approach to jury trials.

Similarly, many companies have pan-UK operations, with decisions being taken across the UK and, therefore, potentially within the scope of more than one prosecutor for the purposes of the new offences.

Drafting issues and the need for further clarity
Our reading of the policy is that TPR anticipates that sponsoring employers and possibly their advisers are more likely to be caught within the scope of the offence of risking members' accrued benefits than scheme trustees and their advisers. However, there is the potential for scheme trustees to be caught unintentionally within the scope of this offence whether they be corporate, employee nominated or employer nominated trustees (including charity trustees who are also trustees of their charity's sponsored scheme): there is cause for concern within the industry about this. Therefore, we would welcome reassurance from TPR that trustees making investment decisions in good faith will not be viewed as risking accrued scheme benefits.

Similarly, sponsoring employers continuing to accrue additional benefits could be seen as risking the security of existing scheme benefits where the employer's finances and the employer covenant is weak. Charities participating in multi-employer schemes could be particularly vulnerable in such a scenario.

Review of the policy

We understand that in time the courts will determine how to interpret these new criminal offences, therefore, we welcome TPR's commitment to amending the policy in light of court decisions. We would also recommend that consideration is given to reviewing the policy at an earlier stage if TPR's experience of investigating potential criminal offences highlights aspects of the policy which could be improved.

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