The Pensions Regulator Draft Policy: Approach to the investigation and prosecution of the new criminal offences under the Pension Schemes Act 2021
R3 response
April 2021

About R3

1. R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession.

2. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.

3. The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession promotes economic regeneration, resolves financial distress for businesses and individuals, saves jobs, and creates the confidence and public trust which underpin trading, lending and investment.

4. This document sets out our feedback on The Pensions Regulator's draft policy approach to the investigation and prosecution of the new criminal offences under the Pension Schemes Act 2021. Rather than responding to each of the consultation questions in turn, we have focussed our response on a number of specific areas based on our members' expertise and feedback.

5. If you would like to meet us to discuss this response in more detail, or if you have any other queries, please contact R3's Head of Press, Policy, and Public Affairs, James Jeffreys, at james.jeffreys@r3.org.uk or on 020 7566 4220.

Overview

6. When the Pension Schemes Act was being debated in Parliament, R3, along with a number of other stakeholders, expressed concerns about the potentially negative implications of the legislation on legitimate insolvency and restructuring activity. In our comments on the legislation, we noted:

    a. "R3…recognises the need for Government action to ensure the integrity of the defined benefit pension scheme framework, and the pensions system more generally. We appreciate that the Pension Schemes Bill is a potentially important step in achieving these goals.

    b. "However, the Bill, as it stands, risks damaging the UK's business rescue culture – and ultimately the financial position of pension schemes that the Government is seeking to protect – by making directors of financially struggling firms less likely to attempt a restructuring of their company and more inclined to simply seek a formal insolvency procedure as a way of resolving that company's financial situation. The Bill could also make it harder for directors to seek expert, regulated advice by exposing insolvency practitioners and other professional advisers to civil and criminal liability."

7. While the draft guidance goes some way to assuage concerns about the likelihood of this activity being caught by the new offences, by underlining the policy intention behind the offences (to tackle "more serious intentional or reckless behaviour") as well as TPR's proposed approach to using these powers ("where the seriousness of the behaviour warrants such intervention"), further clarity on a number of issues would be welcomed, as we set out below.

Insolvency practitioner exemption from the scope of the offences

8. R3 welcomed the inclusion of a carve-out for these criminal offences in respect of an individual's function as an insolvency practitioner (IP) within the then Pension Schemes Bill. However, we raised concerns about the precise scope of this exemption: whether it applied solely to insolvency practitioners appointed as office holders in an insolvency procedure, or more widely to individuals licensed to act as insolvency practitioners who had not been appointed as an office holder but who may be advising a company, for example during the crucial planning stages of a restructuring.

9. While the guidance suggests the former rather than the latter, express reference would be welcomed in the final guidance. For example, under '*Common elements*', the guidance states only that "the offences cannot be committed by someone appointed as and acting within their functions as an insolvency practitioner", while under '*Our CN power, and points of commonality and difference with the new offences*', the guidance states that "the offences can be committed by anyone other than an insolvency practitioner appointed and acting within the scope of that appointment." These two statements are not strictly the same, with the first being less specific than the second.

10. IPs play a key role in resolving the future of a financially distressed or insolvent company's pension scheme, both when appointed as an office holder in an insolvency procedure, and when acting as advisors to struggling but still solvent companies in respect of the restructuring of pension schemes outside of an insolvency procedure, including by way of a court-approved scheme of arrangement. The importance of addressing distress at an early stage, and utilising restructuring tools rather than potentially more value-destructive formal insolvency processes, is one of the key policy approaches advocated by the Insolvency Service. Given the dual aspects of the profession's work in this regard, and in light of the importance of the profession's work outside of formal insolvency appointments, clarity on the precise scope of the carve-out for IPs would be welcomed.

Restructuring

11. As noted above, clarity on the scope of the carve-out for IPs specifically would be helpful; equally, it may be more beneficial for the guidance to state explicitly that where a person is providing legitimate insolvency and restructuring advice, then without information to the contrary, it is to be assumed that the individual would not have the intention/knowledge to commit the offences, and/or would have a reasonable excuse.

12. There are also a number of specific insolvency and restructuring issues and procedures to which reference is either entirely lacking in the guidance, or where additional detail would be welcomed:

    a. *Restructuring Plans*: the draft guidance notes that TPR would only be "likely" to consider that a court-sanctioned Restructuring Plan would qualify as a reasonable excuse. We would suggest that the guidance be refined to confirm that a court-sanctioned Restructuring Plan should in *all* instances be considered a reasonable excuse; the prospect of action by TPR in respect of such a procedure that has been approved by the court would appear to be inappropriate.

    b. The prospect of uncertainty under the current draft guidance may also make Restructuring Plans, introduced by the Government last year for the very purpose of providing an additional tool with which to support company rescue, less attractive as a restructuring option.

c. *Schemes of Arrangement, Regulated Apportionment Arrangements (RAAs) and Company Voluntary Arrangements (CVAs)*: the draft guidance makes no comment on any of these three important restructuring mechanisms and where they fit within TPR's proposed approach to investigating and prosecution of the new offences. In light of our comments at paragraph 11, and to avoid any doubt, the guidance should make clear that a person advising on or agreeing to any of these three tools would have a reasonable excuse.

d. *Pre-packs*: the draft guidance suggest that the use of a pre-pack administration, an important and legitimate business rescue tool – a point recently recognised by the Government in its 'Pre-pack sales in administration' report – may be an appropriate action for TPR to prosecute: "…The stripping of assets from an employer, which resulted in substantial weakening of the support for the scheme…Taking steps to bring about the unnecessary insolvency of the scheme employer with the intention of buying the employer's business without the scheme…[are] the types of acts that we have previously encountered that might be considered appropriate for prosecution". It would be helpful for TPR to set out exactly what "stripping" means in this context, and how its interpretation interacts with the legitimate use of pre-packs to support business rescue.

13. Crucially, we would suggest that further detail within the guidance as to how TPR will avoid criminalising the legitimate insolvency and restructuring activities mentioned above, which are themselves subject to an established and extensive regulatory framework and ultimate scrutiny of the court, would help to avoid the potential unintended consequences referred to in paragraphs 6-7, above.

Funding

14. The draft guidance also sets out TPR's approach to the investigation and prosecution of the new offences in respect of the funding community. While the guidance does provide some detail of this approach, in particular that TPR "would not expect [a lending syndicate] to [provide further funding] if it was materially against their interests, e.g. if they assess there is a high risk of default on that further lending, or they consider they will recover more of their existing lending by default now than extending lending terms further", we believe that further clarity would be helpful to assist lenders in understanding the approach TPR might take to distressed lending, which often provides a vital role in the survival of businesses.

15. To this end, we have included below suggested examples for inclusion in the guidance, which would help to illustrate the instances where there ought to be no liability and where a lender might be required to justify its action or inaction.

New lenders/syndicate/money

16. *Example 1*: The guidance deals with the position of a lending syndicate that is approached to provide more money; however, it does not deal with the approach TPR will take if a new lender/syndicate with no existing relationship is approached to lend. In both cases, the guidance should be clear that such cases are not within the scope of the offences, and neither will the lender/syndicate be required to justify its decision not to lend, or (in the case where the new lender/syndicate *is* providing more funds) its decision to lend. We do not think the policy or scope of the offences is intended to capture these situations: they fall within arm's-length, ordinary commercial transactions, and as such the guidance should make that clear.

Adjusting existing credit facilities

17. *Example 2*: if an asset-based lender with a non-committed facility decides to disallow debt, restrict cash flow, or change the advance rates etc. to reflect credit risk, we think that this should be dealt with in the same way as set out in example 1, as this is within the contractual terms of the facility.

Further queries

18. In addition to the broader themes above, our members have highlighted a number of specific queries where clarification as to TPR's approach would be welcomed in the final guidance.

    a. Whether the section 58A offence, which according to the guidance only applies to situations where a section 75 debt is actually due, is correct; or does it, when read in conjunction with section 75, capture situations where a section 75 debt could potentially become due?

    b. The new offences can capture a series of actions, and the guidance indicates that evidence from before the effective date of the legislation may be taken into account. Does that mean that actions taken before the criminal sanctions come into force will be caught? We assume this is not the case, given the representations made by Ministers in the parliamentary debate that the legislation is not intended to have retrospective effect; confirmation in the guidance would be useful.