



# AVOIDING EMPLOYER DEBT AND PUTTING SCHEME BENEFITS AT RISK – THE PENSIONS REGULATOR’S PROPOSED APPROACH TO THE INVESTIGATION AND PROSECUTION OF THE NEW CRIMINAL OFFENCES

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ICAEW welcomes the opportunity to comment on the consultation on *Avoiding employer debt and putting scheme benefits at risk – The Pensions Regulator’s proposed approach to the investigation and prosecution of the new criminal offences* published by The Pensions Regulator on 11 March 2021.

We broadly support the intention of the Pensions Regulator to provide guidance to those at risk of prosecution. However we are concerned that the draft guidance leaves open too much uncertainty and relies on subjective judgements which will be made after the event. This creates a risk that businesses with defined benefit pension schemes will be considered too risky for investors and others to become involved with them.

We are concerned that the inter-relationship between clearance applications, employers helping the Pensions Regulator and the protection against self-incrimination is not clear in the draft guidance.

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This response of 22 April 2021 is made by ICAEW's **Business Law Department** and reflects consultation with its Pensions Sub-Committee and other ICAEW expert groups including the Corporate Finance Faculty.

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## ANSWERS TO SPECIFIC QUESTIONS

**Question 1. Given that the offences have now been set in law, is our overall approach consistent with the policy intent? (Yes/No)**

**Answer: We are unable to specify yes or no.**

Please give your reasons below:

1. We note that you have summarised your understanding of the policy intent behind the new criminal offences using some very specific language '*ministers confirmed that the offences were not intended to achieve a fundamental change in commercial norms or accepted standards of behaviour*' – it would be very helpful for you to cross refer to Hansard in the final guidance as we have not been able to identify the statements you refer to. (By way of explanation, the ministerial statements we have seen have a different emphasis. They say what behaviour the Government intend is not criminalised, i.e. what is untouched by the new law ('*We do not want to stop legitimate business activity...*'), but they don't say that this is not intended to achieve change.)
2. We recognise that a number of the concerns we express in this response stem from the very broad criminal offence that has been created. The Institute, and several other bodies, did raise concerns about that during consultation on what was the Pension Schemes Bill.
3. The reason for those concerns is that very broadly-drafted criminal offences create a very wide risk that conduct may be in breach of those laws. This risk will deter investors (and directors and corporate finance advisers in considering debt financings, reorganisations and acquisitions or disposals) from becoming involved in companies with defined benefit schemes, perhaps preferring for them to enter insolvency before becoming involved. Using insolvency to 'cleanse' the position would potentially be an offence itself! This risks eliminating routes to rescue, undermining our enterprise culture and thus threatens jobs and pensions.

**Question 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/No)**

**Answer: No.**

Please give your reasons below:

4. Some of the detail is helpful and does provide assistance, but overall the approach is insufficiently clear to address very real concerns that practitioners have that advising employers and trustees on the risks of criminal liability will discourage them from involvement with defined benefit pension schemes. By way of example, in our view a list of factors of similar detail to those set out in [section EG12.3.2](#) of the [FCA's enforcement guide](#) would improve the draft guidance (for convenience, we include these in the Appendix below).
5. **Territorial Jurisdiction** – The guidance explains that prosecutions in Scotland and Northern Ireland will be the remit of the prosecution authorities in those countries. But the guidance does not contain any principles for determining where an act is treated as occurring. For instance if an employer is a Scottish-registered company does that pass authority to the Scottish prosecutors regardless of where an act occurs, or need the act be in Scotland? What about acts that are agreed upon in a meeting with attendees phoning or video-linking in from different countries of the UK?

6. Is there a possibility of joint guidance being agreed with the prosecution authorities for Scotland and Northern Ireland or, as a minimum, confirmation of the legal approach to key concepts, such as the 'person did not have reasonable excuse' element of the offence?
7. **Subjective Judgment** – In a number of key areas the guidance indicates that subjective judgements will be made by the Regulator in determining whether or not, in its view, the criminal offence has been committed. These are clearly going to result in a lot of safety first and last decisions because even being investigated would be career threatening. In the following quotations from the guidance we highlight the words that indicate a subjective judgement will be made. It would be clearer if the Regulator could indicate the factors it will take into account in making the subjective assessments.

*'We will use these powers where the **seriousness** of the behaviour warrants such intervention to further our statutory objectives and protect savers.'*

*'We would not **usually** expect to prosecute anyone under section 58B who could establish a statutory defence to a material detriment CN under section 38B.'*

*'We recognise that professional judgement may differ, however **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.'*

*'When considering the adequacy of mitigation, we expect the scheme to be treated **fairly** in relation to other parties, taking account of the relative positions of the scheme and the person under investigation.'*

**Question 3. Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer? (Yes/No)**

**Answer: Yes**

Please give your reasons below:

8. However, we still have significant concerns. In our view it would be helpful for the final guidance to be clearer on the points below.
9. We are concerned that it is not clear what rights employers, trustees and advisers will have in interacting with the Regulator. The guidance states *'When engaging with potential suspects we will expect them to explain the reasons for acting in the way that they did, and that those reasons are well documented.'*
10. As criminal offences are involved, each person who might be at risk of prosecution has the right not to incriminate themselves and a public body investigating possible criminal conduct has obligations to caution suspects as to their rights. But, on the other hand, in the experience of our members, employers, trustees and their advisers are normally co-operative in helping the Regulator understand the circumstances of their scheme.
11. Given the breadth of the offence as drafted, will the Regulator be able to confirm in specific individual cases when it considers that the behaviour of individuals involved is commercially normal and within the accepted standards of corporate behaviour in the UK so that employers, trustees and their advisers know that they can co-operate with the Regulator as they have done for many years?
12. We are also concerned by words which we have highlighted in bold in the sentence *'We are aware that **proposing or acting in accordance with a scheme authorised by a court under Part***

*26A of the Corporate Insolvency and Governance Act 2020 could satisfy the 'act' and 'intention' elements of either or both of these offences, but **we are likely to consider** the fact of the court sanction a reasonable excuse.*

13. This indicates that there is the possibility that a court-approved scheme could still constitute a criminal offence. This seems extraordinary given the detailed review that would normally occur prior to court approval, unless the Regulator has any specific examples in mind – for instance, if the court was not told of the pension scheme. We would suggest that if the Regulator had concerns as to the treatment of a relevant scheme, the appropriate action would be to submit those concerns as part of the proceedings.

**Question 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? (Yes/No)**

**Answer: Yes.**

Please give your reasons below:

14. The guidance helpfully identifies 3 key factors for testing the availability of a reasonable excuse. While some of them do contain subjective judgements (and we comment on that above) the overall effect is a helpful set of principles.
15. We do have one concern that two of the examples seem contradictory.

*(1) 'An example of a scenario in which the detrimental impact might be considered a central, rather than an incidental, consequence of the act or omission, would be where a key supplier terminates a supply contract with the employer with the purpose of bringing about its insolvency so they can buy the whole of the employer's business out of insolvency apart from the scheme.'*

*(2) 'An employer faces a liquidity crisis and approaches its lending syndicate to increase the employer's unsecured facilities. The members of the lending syndicate, who are under no obligation to do so, decline to lend further sums, which triggers an insolvency process.'*

16. In case (1) is the lack of reasonable excuse caused by a specific intention that the supplier knows that there is a pension scheme and plans in advance of the insolvency to buy the business without the scheme; or does the supplier's role in the business's insolvency put it at special risk of prosecution if it buys the business without the scheme from the insolvency practitioner? If the supplier in case (1) has a legal right to terminate the supply contract why is it not reasonable for it to use its legal right, in the same way as the lending syndicate in case (2) exercises its legal right not to lend. Otherwise case (1) suggests that suppliers (and other commercial counterparties) might be best advised to avoid future contracts with sponsors of defined benefit pension schemes. It would also suggest that any commercial contractor needs to know the pension arrangements of its counterparties.

**Question 5. Do you have any other feedback?**

We have no further comments.

## APPENDIX

Extract from the **FCA's enforcement guide** referred to at Q2 above

### EG 12.3.2 01/03/2016

The factors which the **FCA** may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:

- (1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
- (2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;
- (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
- (4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;
- (5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;
- (6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;
- (7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;
- (8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;
- (9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the **FCA** may decide that criminal proceedings are not appropriate;
- (10) whether the *person* is being or has been voluntarily cooperative with the **FCA** in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;

(11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;

(12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;

(12A) where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the *FCA's* prosecution of the other(s), the *FCA* will take this co-operation into account when deciding whether to prosecute the individual who has assisted the *FCA* or bring market abuse proceedings against him;

(13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

**EG 12.3.3 01/03/2016 *RP***

The importance attached by the *FCA* to these factors will vary from case to case and the factors are not necessarily cumulative or exhaustive.