

# PENSIONS REGULATOR ISSUES FINAL POLICY ON ENFORCING PENSIONS CRIMINAL OFFENCES

29 September 2021 | London  
Legal Briefings

---

The Pensions Regulator has today published its [final policy](#) on investigating and prosecuting the new pensions criminal offences of causing a material detriment to a defined benefit (**DB**) pension scheme and avoiding an employer debt, which come into force on 1 October 2021. Following criticism that its draft policy did not provide sufficient clarity on the circumstances in which the new offences would be engaged, the Regulator has included more examples to illustrate the types of corporate activity that might be caught by these offences.

While the final policy reiterates that the Regulator does not intend to prosecute behavior which it considers to be ordinary commercial activity, the examples given will cause some concern for companies and groups with DB schemes and for other parties such as lenders and investors. Going forwards, parties to corporate transactions, finance arrangements and other activity which may negatively impact a DB scheme will need to tread carefully and ensure they have fully considered the potential impact on the scheme and the extent to which this could be avoided and/or mitigated.

## **BACKGROUND**

From 1 October 2021, a person may be guilty of a criminal offence where they are party to an act or failure which risks accrued benefits under a DB scheme or which is intended to avoid or reduce a section 75 employer debt (which may arise, for example, where a DB sponsor is sold out of a group or becomes insolvent or where a DB scheme is wound up). These offences carry a maximum penalty of **up to seven years imprisonment** and/or an **unlimited fine**.

The new offences are very widely drawn and could potentially be imposed in a wide range of circumstances. In particular, a criminal offence will be committed where a person does an act or fails to act or engages in a course of conduct:

- that ***detrimentally affects in a material way*** the likelihood of accrued benefits under a DB occupational pension scheme being received
- the person ***knew or ought to have known*** that it would have that effect, and
- the person ***did not have a reasonable excuse*** for the act, failure or for engaging in the course of conduct.

A criminal offence will also be committed where a person does an act or fails to act or engages in a course of conduct:

- that ***prevents the recovery of a debt that is due and payable under section 75*** of the Pensions Act 1995, prevents such a debt becoming due or compromises, settles or reduces such a debt
- the person ***intended*** the act, failure or course of conduct to have that effect, and
- the person ***did not have a reasonable excuse*** for the act, failure or for engaging in the course of conduct.

In most instances, it is expected any prosecution would be brought by the Pensions Regulator. However, a prosecution may also be brought by other persons and bodies including the Secretary of State for Work and Pensions and the Director of Public Prosecutions.

Unlike the Regulator's powers to issue contribution notices and financial support directions, which can only be used against sponsoring employers and "connected" or "associated" persons, these new offences can be committed by ***any person*** who is party to a relevant act, failure to act or course of conduct (other than an insolvency practitioner acting in their capacity as such). This includes sponsors of DB schemes, directors of scheme sponsors, other group companies and the directors of those companies as well as investors, lenders, trustees and advisers.

A criminal prosecution could also be brought against any person who aids or abets the commission of a relevant act, failure to act or course of conduct.

There is also no time limit on when the Regulator can bring a prosecution for these new offences, unlike its power to issue contribution notices which it can only exercise for up to six years after a relevant act or failure.

## **REASONABLE EXCUSE**

One of the key elements of the new offences is the concept of "*reasonable excuse*". Where a person has a reasonable excuse for their actions this will mean they have not committed an offence, even if their actions have caused a material detriment to a DB scheme or avoided or reduced the payment of a section 75 debt. In its final policy, the Regulator repeats three factors which it says will be significant when assessing whether a person has a reasonable excuse, namely:

1. the extent to which the detriment to the scheme was an incidental consequence of the act or omission
2. the adequacy of any mitigation provided to offset the detrimental impact, and
3. where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact.

The final policy indicates that when considering whether a person has a reasonable excuse the Regulator will also take account of:

- a person's reasons for acting in the way they did, and the reasonableness of them
- the circumstances in which the act took place
- the person's own circumstances, including their duties, skills and experience and other relevant attributes
- the extent of communication and consultation with the trustees of the scheme before the act took place
- in the case of a person who owes fiduciary duties to the scheme, whether they complied with those duties when doing the act or carrying out the course of conduct, and

- where the person was acting in a professional capacity, whether they acted in accordance with the applicable professional duties, conduct obligations and ethical standards.

### **WAS ANY DETRIMENT TO THE SCHEME CENTRAL OR INCIDENTAL?**

In the context of assessing whether a person has a reasonable excuse, the Regulator gives the following examples of circumstances where the detriment to a DB scheme would be considered central to the parties' purpose:

- A key supplier terminates a supply contract with the employer with the purpose of bringing about its insolvency, so the supplier can buy the whole of the employer's business out of insolvency apart from the scheme.
- A sponsoring employer can only afford to pay minimal dividends due to the funding requirements of its scheme. Its parent instructs the employer to direct new business to a new group company, which is not a sponsor in relation to the scheme, rather than conduct it through the employer. The employer becomes unable to properly fund the scheme as a result.

### **ANY VIABLE ALTERNATIVE?**

In assessing whether a person has a reasonable excuse, the Regulator will also consider whether a person had a viable alternative which would have caused less detriment to the DB scheme. Where there is a viable alternative the policy indicates that this would suggest the absence of a reasonable excuse.

Examples given of scenarios where there was a less detrimental viable alternative are where:

- An employer has breached its banking covenants, entitling its lender to withdraw facilities immediately, but an extension of facilities by one month is highly unlikely to risk the lender's interests because the employer is entitled to significant payments from debtors over that period. The one-month extension is likely to be a viable alternative.
- A parent company and its subsidiary (a DB scheme employer), each owning 50% of another group company, X, sell X to a third party. The entirety of the sale proceeds is remitted to the group treasury company to reduce the group's debt, with no mitigation provided to the scheme. The employer was dependent on income from X for its viability, and subsequently becomes insolvent. There is no pressing need to reduce the group's debt - the motivation is to maximise the group's liquidity ahead of a possible bid for

another company, however other sources of finance are available. The viable alternative is that the group could have sourced the funds from elsewhere.

- An employer is facing imminent insolvency, but its directors choose to declare a dividend shortly before appointing administrators. In administration, the scheme receives 20p in the £, as do the other unsecured creditors. The directors have breached their duty to have regard to the interests of the company's creditors as a whole. There was a viable alternative of not declaring the dividend, which would have been less detrimental to the scheme. However, we would not assert that a viable alternative involved paying the scheme a higher rate of recovery in administration than other unsecured creditors.

## **MITIGATION**

The final policy also includes examples of scenarios where the mitigation might be considered adequate. These are where:

- An employer that is legally supported by the covenant of a wider group of companies is sold to a buyer, terminating the wider support arrangements. A combination of part of the sale proceeds being paid to the scheme and the provision of guarantees from suitably strong entities in the new employer group fully compensate for the loss of the seller group support.
- An employer grants security for the benefit of entities outside the direct covenant, but the security provided is subordinated to all present and future liabilities of the scheme.
- An employer makes cash transfers to a treasury company within its wider group as part of a routine cash sweep arrangement, but the employer is given an enforceable right to demand repayment at any time, and the treasury company is suitably strong enough to meet any such demands.

It is concerning that the policy leaves open the prospect that the mitigation provided in these examples might *not* be considered adequate.

The policy also indicates that "*mitigation provided at an early stage is more likely to provide a reasonable excuse than mitigation after a lengthy period*". It is unclear why this should be so.

## **CLEARANCE**

The final policy goes a little further than the draft in explaining how clearance interacts with the new offences, in particular, noting that the addressee of a clearance statement might seek to rely on the mitigation described in their clearance application as part of their basis for saying that they have a reasonable excuse in relation to potential criminal liability. However, it stops short of saying that a person who has obtained clearance is likely to have a reasonable excuse for their actions.

## **THE REGULATOR'S OTHER POWERS**

Depending on the circumstances, as well as prosecuting a person for their actions (or inaction), the Regulator might also be in a position to use its other regulatory powers, including the power to impose a fine of up to £1 million under new section 88A Pensions Act 2004 or its powers to issue a contribution notice. The final policy on the new criminal offences links to a draft [Overlapping Powers Policy](#) which outlines how the Regulator will determine which power to exercise where it has the option of using more than one of its powers.

The criminal offences policy also links to the Regulator's draft updated [Monetary Penalties Policy](#) which sets out how and when it might issue a fine under section 88A.

## **COMMENT**

The Regulator has clearly attempted to provide greater clarity regarding the types of circumstances in which a company or an individual may be prosecuted for one of these new criminal offences. However, the final policy still leaves rooms for significant uncertainty. In particular, lenders and other third parties will be concerned that even though they have no direct relationship with a counterparties' DB scheme there may be circumstances where the Regulator may not consider it appropriate for them to act in their own commercial best interests where this may cause a material detriment to the scheme. Directors of companies and groups with DB schemes will also be concerned about the scope of these new offences which could potentially be engaged by a wide range of corporate activity.

Going forwards, parties to corporate transactions, finance arrangements and other activity which may negatively impact a DB scheme will need to tread carefully. As well as assessing the potential impact of their actions on the scheme they will also need to consider:

- whether there are any viable alternatives which might have a less detrimental impact,
- what, if any, mitigation should be provided to the scheme, and
- when and how to engage with the scheme's trustees and/or the Pensions Regulator.

Written records will need to be retained of these deliberations and discussions and the reasons for any actions that are taken.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**SAMANTHA BROWN**  
REGIONAL HEAD OF  
PRACTICE (UK) -  
EMPLOYMENT  
PENSIONS AND  
INCENTIVES, LONDON  
+44 20 7466 2249  
Samantha.Brown@hsf.com



**MICHAEL AHERNE**  
PARTNER, LONDON  
  
+44 20 7466 7527  
Michael.Aherne@hsf.com



**RACHEL PINTO**  
PARTNER, LONDON  
  
+44 20 7466 2638  
Rachel.Pinto@hsf.com



**TIM SMITH**  
PROFESSIONAL  
SUPPORT  
CONSULTANT,  
LONDON  
+44 207 466 2542  
tim.smith@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE**

Close