



The Pensions Regulator
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By email: [mailto: criminaloffencesconsultation@tpr.gov.uk](mailto:criminaloffencesconsultation@tpr.gov.uk)

22 April 2021

Dear Sir, Madam

Re: BVCA response to consultation of the Pensions Regulator Re. approach to the investigation and prosecution of the new criminal offences

We are writing on behalf of the British Private Equity and Venture Capital Association (“BVCA”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2015 and 2019, BVCA members invested over £43bn into nearly 3,230 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 972,000 people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

Introduction

We write further to the consultation on the Pensions Regulator’s approach to the investigation and prosecution of the new criminal offences under section 107 of the Pension Schemes Act 2021 (the “Consultation”).

General comments

We note the statement in the consultation document by David Fairs, the Pensions Regulator’s Executive Director of Regulatory Policy, that: “The intent of the new criminal offences is not to change commercial norms or accepted standards of corporate behaviour. Rather it is to tackle the more serious examples of intentional or reckless conduct that puts members’ savings at risk” and that “It is important our approach is clear and understood.”

The BVCA is appreciative of this intent and the assurance that these criminal offences should not change commercial norms or accepted standards of corporate behaviour and strongly supports the notion that the Pensions Regulator’s approach should be clear and understood.

However, the BVCA considers that a lack of clarity remains both:

- as to the scope of the offences, i.e. what is or is not criminal conduct, principally because there is not sufficient clarity as to what would be a “reasonable excuse” in the context of these provisions and the conduct that is otherwise criminalised is not narrowly defined, and

- as to the Pensions Regulator’s policy.

In a rule-based system of law, it is critical that that there is clarity as to when an offence will be committed. Indeed, it should be clear when an offence will be committed, not just whether or not it is likely to be prosecuted, as reasonable people would wish to conduct themselves so as to commit no offences irrespective of the likelihood of any prosecution.

We acknowledge that the Pensions Regulator cannot itself clarify the law and can only define its own prosecution policy, but we would expect the Pensions Regulator to have or demand from legislators or the courts a clear explanation of the scope of the laws that it is required to enforce and to communicate that to the public. We think the Consultation fails to do this sufficiently.

The concepts used in defining the new offences in section 107 of the Pension Schemes Act 2021 (the “New Offences”) are familiar in that they are largely aligned to the provisions for contribution notices, albeit they are still significantly uncertain. To address the uncertainty in relation to contribution notices, the Pensions Act 2004 provided the clearance process to enable commercial parties to gain the certainty that was not available from the legislation itself. In relation to the New Offences, there is no provision for clearance or any equivalent authorisation process that would give certainty that a course of conduct is not criminal. As such, it is all the more important that the principles for determining whether each element of the New Offences is met are abundantly clear.

We note there have been numerous statements by Therese Coffey and Guy Opperman that the New Offences are intended to target only the most extreme conduct and not to “interfere with routine business activity” or “legitimate corporate behaviour and accepted commercial practices” and yet, subject to establishing a “reasonable excuse”, routine business activity would appear to be potentially criminal under the New Offences where it foreseeably harms the scheme in the sense of materially reducing the likelihood of scheme benefits becoming fully funded. This appears to capture any activity that foreseeably weakens the ability of the employer or a guarantor to fund the pension scheme.

As such, the narrow policy intent appears to be at odds with the scope of the legislation, unless “reasonable excuse” is given a wide meaning. Clarity as to the principles for determining what is a “reasonable excuse”, and as to the other elements of the New Offences, should be sought by the Pensions Regulator, in conjunction with the other prosecutors, the Secretary of State and the Director of Public Prosecutions, and published.

Consultation Questions

Q1. Given that the offences have now been set in law, is our overall approach consistent with the policy intent?

We understand the policy intent is not to “interfere with routine business activity” and “not to change commercial norms or accepted standards of corporate behaviour” but “to tackle the more serious examples of intentional or reckless conduct that puts members’ savings at risk” and to be “clear and understood”.

We think that the Regulator’s proposed approach may achieve the policy intent but is not sufficiently clear.

Achieving the policy intent depends materially on identifying a reasonable excuse. In particular, since any participation or advice or assistance in connection with a course of conduct that foreseeably weakens the ability of the employer or any other sponsor of a defined benefit pension scheme to fund that scheme such that the benefits can be received in full may be criminalised under the New Offences (unless there is a reasonable excuse) routine business activity could be criminalised if it not generally deemed to be covered by a reasonable excuse.

While the factors and examples provided for a reasonable excuse in the Consultation are helpful, it is difficult to elicit principles that could be applied in other scenarios and the factors appear to overlap with other elements of the New Offences. In particular:

- The “extent to which a detriment to the scheme is an incidental consequence of the act or omission, as opposed to a fundamentally necessary step to achieve the person’s purpose” appears to address the question of whether the person had the required intent for the offence. This suggests having a reasonable excuse is not distinct from having the required intent. The legislation however suggests that it is a separate element of the offence.
- The adequacy of mitigation to offset any detriment also overlaps with the core requirement of material detriment: if the detriment is fully mitigated, there may be no “net” detriment and therefore there should be no offence.
- The third factor (“where no, or inadequate, mitigation is provided [i.e. there was some “net” material detriment], but there was a viable alternative which would have avoided or reduced the detrimental impact appears to require a “least harm” approach: i.e. by not choosing the “least harm” approach there may be criminality where there would be none if the “least harm” approach had been chosen. The guidance however does not state this clearly and this routine business activity does not normally require a “least harm” approach to commercial counterparties. In analysing the examples provided in respect of lenders, the consultation appears to suggest that the rationale is that the Regulator “would not expect [the lenders] to act materially against their interests”. While we support this proposition and it appears consistent with the policy intent, it does not clearly emerge as a principle from the statement of the factor.

We think greater clarity is required to ensure routine business activity will be unaffected and to ensure there is clarity as to the principles the Regulator intends to apply to deliver the policy intent and to ensure criminal conduct can be readily identified.

Q2. Is the policy clear on our overall approach to the new offences? If not, how could we make it clearer, without constricting the powers?

No. As stated above, there is a failure to state clear principles that will govern the Regulator’s overall approach and there is some inconsistency between the factors and rationales provided and some overlap between criteria for a reasonable excuse and other elements of the offences.

Clear principles for determining what is a reasonable excuse in the context of the New Offences are required. Such principles should also cover secondary liability recognising if need be that the principles may differ for primary and secondary liability (e.g. whether the person was acting pursuant to a fiduciary duty).

It would be helpful to have a clear statement that the Regulator would not prosecute where clearance has been obtained (and not invalidated) and/or the statutory defence for contribution notices has been established (subject if need be to clearly defined exceptions). It seems difficult to see how the primary elements of the New Offences could be made out where these conditions are met and even harder to see how the Regulator's prosecution policy could lead to prosecution in such cases.

Q3. Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer?

Yes, we think the policy is reasonably clear.

It would be helpful to explain how the examples given relate to the principles provided.

It would be helpful for the policy to be agreed with the other prosecuting authorities.

Q4. 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?

Having examples is useful but the examples used do not clearly illustrate the factors being taken into account or the principles for determining what is a reasonable excuse.

They would be more useful if there were clear analysis of the reasons why the factors or principles adopted by the Regulator are demonstrated in the examples, distinguishing between features that relate to each element of the New Offences and each factor or principle adopted by the Regulator.

Less extreme examples would be more useful, i.e. examples where the conduct does cause material detriment and the parties knew or ought to have known that it might or even would but have a reasonable excuse. This would demonstrate more clearly what constitutes a reasonable excuse. An example of circumstances where payment of a material dividend or an increase in leverage otherwise than in response to a liquidity crisis would not be considered criminal would be helpful in illustrating what could be a reasonable excuse.

Q5. Do you have any other feedback?

See our introductory comments.

It is in the nature of business that risks may need to be taken and that normal business transactions may harm counterparties. It is important for defined benefit pension schemes that their employers and sponsors are able to access finance and transact business. Some transactions may be legitimate without being routine. Clarifying what is and will remain legitimate for parties that have otherwise no duty to the employer or to the pension scheme is essential to enable businesses to interact normally with employers that sponsor defined benefit pension schemes.

Responsible individuals, including those with fiduciary duties, will not wish to take any action that could potentially be criminal. As such, very clear rules and principles are required. Those clear rules and



principles need to be sufficiently tight to give effect to the policy intent of only criminalising the most serious conduct intentionally or recklessly harming pension scheme benefits.

We would be very keen to discuss the contents of this letter with you and look forward to hearing from you in order to establish whether a meeting of this sort is possible.

Yours sincerely,

A handwritten signature in purple ink, appearing to read 'Amy Mahon'.

Amy Mahon
Chair, BVCA Legal & Accounting Committee