

Phil Aspin  
Chairman  
The 100 Group Pensions Committee

E-mail:  
[pensions@the100group.co.uk](mailto:pensions@the100group.co.uk)



*Pensions Committee*

The Pensions Regulator  
Criminal Offences Consultation

[criminaloffencesconsultation@tpr.gov.uk](mailto:criminaloffencesconsultation@tpr.gov.uk)

20 April 2021

Dear Sir/Madam

**Consultation on TPR's approach to the investigation and prosecution of the new criminal offences**

I am writing on behalf of the Pensions Committee of the 100 Group of Finance Directors with regard to the above-named consultation.

**About the 100 Group**

The 100 Group represents the finance directors of the FTSE 100, several large UK private companies and some UK operations of multinational groups. Our member companies represent the vast majority of the market capitalisation of the FTSE 100, collectively employing 6% of the UK workforce, and in 2019 paid, or generated, taxes equivalent to 12% of total UK government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

The 100 Group represents companies sponsoring defined benefit (DB) pension schemes with assets of approximately £590bn and membership of 3.5m (around a third of the overall DB universe).

We are happy for the 100 Group to be included on the list of respondents. Whilst this letter expresses the views of the 100 Group of Finance Directors as a whole, these views are not necessarily those of our individual members or their respective employers.

As our answers to some of the questions are more extensive than a single page, we have been unable to use the template response form on your website.

We hope that you find these comments useful. Please do not hesitate to contact me if you would like to discuss any of the points raised.

Yours faithfully,

Phil Aspin  
Chairman  
The 100 Group Pensions Committee

## APPENDIX: ANSWERS TO QUESTIONS

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

YES

We share TPR's understanding that "the intent is not to fundamentally change commercial norms or accepted standards of corporate behaviour in the UK". In broad terms, we agree that TPR's approach is consistent with that policy intent.

However, the 100 Group is one of the many groups of stakeholders that remain concerned about the potential breadth of these powers despite the apparent reassurances from Ministers, and the content of the draft policy. Whilst the policy goes some way towards allaying those concerns (and we would rather have this policy than no policy at all), it does not go as far as it could in putting beyond doubt the range of normal business activity that could never be caught by these new criminal offences, and is therefore likely to have a damaging effect on companies sponsoring defined benefit pension schemes, impeding the ability of senior decision-makers to take decisions in relation to activities such as dividend policy, refinancing and restructuring. We would observe that there appears to be a considerable amount of corporate activity at present, and there is likely to be more over the next year or so, in part as a result of changes to business models and/or cashflows arising from the pandemic. This context emphasises the need for TPR's policy with regard to its new powers to be as clear as possible.

It is worth bearing in mind that many of the UK's largest companies (including those represented by the 100 Group) are multi-national organisations, in which the UK subsidiary may not be the largest company nor the UK pension scheme the largest pension scheme supported by the sponsor. In the absence of clearer guidance that normal business activity will not be affected, there are significant risks of companies withdrawing from DB pension provision altogether to the extent that this has not already happened, and also of companies withdrawing business from the UK because DB pensions regulation is simply seen as imposing too much of a stranglehold on routine corporate decision-making.

### 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?

NO

There are a number of areas in which the policy could be clearer in its overall approach. These include:

#### a. The interaction with contribution notices

A substantial part of the policy consists of a comparison between the details of the existing contribution notice provisions and the new criminal sanctions. Whilst this is helpful background information, it is not wholly clear why it is positioned so prominently in the policy, given that the draft does not then go on to bring out particularly clearly the significance of all the points of comparison for TPR's approach to the exercise of its new powers versus its approach to the exercise of its existing powers. It would be helpful for the policy to consider in more detail the relationship between the contribution notice regime and the criminal sanctions regime, and the implications for the criminal sanctions regime.

In particular, the draft policy notes that: "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." This is a helpful statement; however, it would be more

helpful if the policy could also state that, where an employer has received clearance for a Type A event, TPR would not normally expect to prosecute using these new powers (absent evidence that their application for clearance had been deliberately misleading). This would give employers in this position confidence to pursue a planned transaction once clearance had been obtained.

Aside from formal clearance under the contribution notice regime, it would also be helpful if TPR were able to offer informal engagement to corporates seeking a level of non-binding comfort.

b. The interaction between criminal prosecution powers and the civil penalty regime

It would also be helpful for the policy to spell out more clearly how TPR proposes to use these criminal prosecution powers alongside its civil penalty regime, and whether TPR would expect to select one or other of these powers, or to pursue both approaches at the same time, and if the latter how this would work in practice. It would also be useful to have guidance on the factors that TPR will take into account when deciding whether to impose civil or criminal sanctions and at what stage in an investigation it would anticipate making this decision. We would also observe that if a party believes that they may be subject to criminal sanctions, they may be more likely to rely on the privilege against self-incrimination which could hamper any investigation.

c. The interaction with potential prosecutions by the Secretary of State and the DPP

We also note that under the Act not only TPR has powers to impose criminal sanctions. They can also be brought by the Secretary of State or by or with the consent of the Director of Public Prosecutions. As the draft policy does not relate to actions by these other entities, it would be useful to have some understanding of when it would be left to TPR to bring a prosecution and when other entities would be involved. In the absence of this, any policy which relates to TPR alone will give little comfort.

It would be helpful as a minimum if the other potential prosecution bodies could provide some endorsement of TPR's policy. What would, however, be more valuable would be a formal Memorandum of Understanding between TPR and the other entities with the same or overlapping prosecutorial powers, so that businesses have full clarity as to which entity/entities they need to be engaging with in relation to any particular transaction or activity, and what principles the relevant entity/entities will be applying to determine whether prosecution is appropriate. Nothing which TPR unilaterally puts into its own policy or guidance will provide the necessary degree of reassurance on its own.

d. The interaction with action by other regulators

Many large companies with defined benefit pension schemes are also subject to scrutiny by other industry regulators, including the FCA, some of which may also have criminal prosecution powers. This raises the prospect of sponsors of pensions schemes potentially finding themselves being targeted by two regulators, potentially each with the power to impose both criminal and civil sanctions. It would be helpful for the guidance to explain how TPR expects to use its new powers where other regulators are involved, and how TPR is liaising with other regulators in developing its policy.

As above, it would be helpful to have a formal MOU between the TPR and the FCA (and potentially other industry regulators with criminal prosecution powers as well).

e. The application of the policy to trustees

The draft policy has virtually nothing to say about the circumstances in which TPR might consider using these powers against the trustees of pension schemes, although it does talk about the circumstances in which it might use them against advisers. We suspect

that this is because TPR does not envisage using these powers against trustees in any but the most exceptional circumstances. If this is so, then it would be helpful to state it explicitly in the policy. Equally, it would be helpful to provide examples of where TPR could conceive of using these powers against trustees.

Whilst it is likely to be sponsoring employers who are driving the transaction or corporate activity under scrutiny, the trustees will need to be reassured that their agreement to any employer proposals will not expose them to any risk of these new sanctions. The policy needs therefore to be more explicit about the circumstances in which TPR would consider using these powers against trustees. Without this, trustees may decide to veto reasonable and viable business proposals because the regulatory implications are unclear, and they are unable to make themselves comfortable that they are outside the scope of the criminal sanctions.

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

NO

The draft policy remains unclear about the extent to which the new powers will be retrospective. Whilst the Minister has said that the powers will not be retrospective, the draft policy notes that evidence pre-dating the commencement date may be relevant to any subsequent prosecution. This vagueness is unhelpful. It raises the prospect of activity before the date of commencement being caught by the new powers, but it also raises a potential issue given that we know (and the policy reinforces) that the strength of a person's defence will often depend on the strength of the records they have evidencing the process. Potential targets could be vulnerable simply because they will find it practically very difficult to demonstrate a reasonable excuse in relation to events from many years ago, perhaps even more so given the increasing trend to delete legacy documents, data and other records.

It would be helpful to have a more detailed set of principles setting out what TPR will look at when deciding to prosecute a case.

In addition, see the response in relation to 2(b) above – clarity on when other entities could prosecute an offence instead of TPR would be helpful.

**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

Whilst it is helpful to have examples, it is equally important that all parties should understand clearly what principles TPR will use to decide whether prosecution is appropriate. Examples are inevitably fact-specific; principles have a greater level of generality and so are easier to apply to situations which are not on all fours with the particular example. For instance, the FCA Handbook sets out 14 principles to which the FCA will have regard when deciding whether to seek criminal rather than civil sanctions in the context of market abuse; and TPR's existing monetary penalties policy has both overarching high-level principles (section 8) and also a list of considerations (section 9.2) and aggravating / mitigating factors (section 9.4) which TPR will use to determine the appropriate penalty band and the level of the penalty within that band. Whilst there are some examples as well (section 9.1), the principles-based approach used here makes it easier to understand and predict the likely approach that TPR will take in any

individual case which differs from the handful of examples given. A similar approach would be useful here.

Although the examples presented in the draft policy are quite helpful, they tend to be at the extremes, which makes them less informative than they might otherwise be. It would be more useful to provide further examples that are less 'black and white' and based on real-life situations. In particular it would be useful for examples to demonstrate how particular factors are more or less likely to meet the definition of reasonable excuse, and to provide more detail on what level of mitigation is likely to be sufficient to rebut a presumption of criminal liability.

We think that the examples could be made much more extensive and we would urge TPR to work closely with stakeholders to understand the full range of normal corporate activity being undertaken and the ways in which this policy could inhibit that.

Some additional areas that could be covered by further examples include:

- It is surprising that none of the examples refers to the payment of dividends, although this has been an issue of much discussion. At the least, it would be helpful to provide guidance addressing the difference between regular dividends (i.e. in line with recent history and any public statements) on the one hand, and one-off or special dividends or share buybacks on the other. It would also be helpful to have examples related to shareholder distributions for the ultimate group entity, assuming that entity is not an employer to the scheme, and one for shareholder distributions for the scheme employers.
- The example on intra-group loans/cash transfers to treasury companies should be broader, first to include general intra-group loans, not just cash being swept to treasury companies. Secondly, the example seems to suggest the position is different where the scheme is "strong and stable". So the example is grounded in the position of the scheme, rather than the position of the employers/group companies. It would be useful to have an example that suggests intra-group loans/ cash sweeping are part of the normal course of business and so where the companies are expected to continue trading and repay the loans then that would be a reasonable excuse.
- An example related to a company proposing, and trustee agreeing to, a Flexible Apportionment Arrangement would be helpful. The concern here is a trustee no longer agreeing to an FAA for fear of the new sanctions and this then preventing normal business restructuring. It would be helpful if the policy could confirm that, where the funding test is passed and covenant strength maintained or appropriate mitigation obtained where the covenant strength is reduced, trustees should not expect to run the risk of criminal sanctions.
- Under the heading "Statutory exception – reasonable excuse", the draft policy states: "Where the detrimental impact has been fully mitigated the person is more likely to have a reasonable excuse". The use of "more likely" is surprising. If it is genuinely the intention that even where any detriment to the scheme has been fully mitigated criminal sanctions may still come into play, then it would be helpful for examples to set out circumstances in which full mitigation would not be considered a reasonable excuse.
- The example on secondary liability by an investment manager seems to capture much slighter failures than the examples given in respect of other advisers, where there appears to be evidence of clear dishonesty and/or extremely unprofessional behaviour. The wording might appear to apply to any investment adviser giving advice to increase the level of risk in the scheme, which may have been reasonable advice at the time, but appeared to be less so when viewed with the benefit of the hindsight. The example would need to be expanded to make clear why the

adviser/manager in this case might be viewed as criminally liable i.e. that it was clear that this was not an investment strategy that any reasonable adviser would have recommended, and that it was recommended solely in order to generate a fee.

We would be very happy to work with TPR over the spring and summer following the closure of this consultation to help in developing further examples of cases where TPR might be able to give comfort that it would not use its powers.

The more extensive the examples, the more helpful the policy will be in reaching decisions in individual cases, and therefore the less damaging to normal corporate activity.

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

Given the significance of this policy for the conduct of corporate activity in the UK, we are disappointed that the consultation is for only six weeks, in particular as this six-week period includes the Easter holidays (and is during a period when both corporate sponsors and trustees of pension schemes are likely to be otherwise occupied).

For TPR's policy to be helpful, it needs to take account of the broadest range of examples of corporate, trustee and adviser activity that might be caught by these new criminal powers, and so we would urge TPR to continue to engage with individual stakeholders after the closure of the formal consultation. As indicated above, we would be happy to work with TPR to discuss further examples of how business activity could be affected by these new powers, which could usefully be reflected in the guidance.

The policy also needs to be considered alongside the new civil sanctions and investigatory powers regime and it would have been helpful to understand how they would work at the same time.