

Extract from <https://lgpsboard.org/index.php/structure-reform/bds-main>

(last updated 23 February 2022)

## Guidance on investments which conflict with UK foreign and defence policy

### Background

After failing to defend previous LGPS investment guidance in the Supreme Court (see [board summary of judgment](#)) the government undertook to bring it before Parliament through legislation.

The Boycotts, Divestment and Sanctions (BDS) Bill was announced in the Queen's speech for this Parliament (see the article below this one on this page). Although no timetable for the Bill is available it was expected to be the primary measure to bring about the restrictions in the original guidance plus other measures to restrict expenditure and procurement decisions made by public bodies.

### The current position on divestment

It is the Board's understanding that it is for LGPS funds to make prudent divestment decisions based on an assessment of the financial consequence of a number of matters, including those relating to Environmental, Social and Governance (ESG) factors. Where such decisions are based on non-financial factors LGPS funds should follow the Law Commission's direction that any financial impact should not be significant and that the decision would likely be supported by scheme members.

### PSPJO Bill

In advance of the BDS Bill Robert Jenrick MP raised, at second reading in the Commons, the possibility of amending the PSPJO Bill to include a power for the Secretary of State to make guidance in this area. Support from government was not forthcoming in terms of its own amendment, however he subsequently tabled an amendment (listed as NC1) which was debated on 22nd February at report stage.

Following an at times heated debate and – importantly – a change of stance by the government to support the amendment it passed by 299 votes to 81. On the same day (22nd February) the Bill passed its third reading and will now return to the Lords for consideration of amendments prior to royal assent.

### The Amendment NC1

*Guidance to public service pension scheme managers on investment decisions*

*(1) The Public Service Pensions Act 2013 is amended in accordance with subsection (2).*

*(2) In schedule 3, paragraph 12(a), at end insert "including guidance or directions on investment decisions which it is not proper for the scheme manager to make in light of UK foreign and defence policy."*

*Member's explanatory statement*

*This new clause would enable the Secretary of State to issue guidance to those authorities that administer public sector pension schemes, including the local government pension scheme, that they may not make investment decisions that conflict with the UK's foreign and defence policy*

### Effect of the amendment

The amendment would alter the Public Service Pensions Act (PSPA) 2013 as follows – amendment in square brackets:

#### **3 Scheme regulations**

*(1) Scheme regulations may, subject to this Act, make such provision in relation to a scheme under section 1 as the responsible authority considers appropriate.*

*(2) That includes in particular—*

(a) provision as to any of the matters specified in Schedule 3;

.....

### **SCHEDULE 3**

*Scope of scheme regulations: supplementary matters*

*12 The administration and management of the scheme, including—*

*(a) the giving of guidance or directions by the responsible authority to the scheme manager (where those persons are different); [including guidance or directions on investment decisions which it is not proper for the scheme manager to make in light of UK foreign and defence policy].*

#### **Next steps**

The above changes to the PSPA 2013 will not occur until the PSPJO Bill gains royal assent which is expected sometime in March. Prior to it gaining assent the Bill will return to the Lords for consideration of amendments ('ping pong') at which time the amendment may be subject to further debate.

Guidance under this provision, should it be forthcoming, would be expected to be drafted under Investment Regulation 7.

*7.—(1) An authority must, after taking proper advice, formulate an investment strategy which must be in accordance with guidance issued from time to time by the Secretary of State.*

Such guidance would also be expected to be subject to a period of consultation which would provide an opportunity for interested parties, including the SAB, to comment on its potential impact. Furthermore, as this will be guidance and not primary legislation further legal action cannot be ruled out. Although the courts could this time be assured it was the intention of Parliament to provide a power to the Secretary of State in this area, a challenge could still be made on the grounds that the guidance was seen to go beyond that intention.

#### **Questions**

There are many questions around this provision, most of which cannot be answered until the exact wording of any guidance made under it is available. These include:

- Will the guidance be specific in nature, for example, singling out a particular instance of divestment or be broader, for example banning divestment unless specific government sanctions are in place?
- Will the guidance only cover decisions made for non-financial reasons?
- Will the guidance require immediate divestment upon the imposition of government sanctions on a business or country?
- Will pension funds still be able to make divestment decisions based on a prudent assessment of the impact on long term returns of ESG matters where no sanctions are in place?
- How will 'in the light of' be interpreted by any guidance?

The Board will seek answers to these and other questions from DLUHC and HMT.

#### **Other amendments tabled**

There were two other amendments tabled (NC2 and NC3) which potentially would have had an impact on the LGPS in respect of investments to be made in line with the Glasgow 2021 Climate Pact and a requirement to divest from fossil fuels by 2030. Neither of these amendments were put before the House at report stage so they will not be included in the Bill.

Today the government's legislative programme was laid out and includes a [Boycotts, Divestment and Sanctions Bill](#) the purpose of which will be to stop public bodies from taking a different approach to

UK Government sanctions and foreign relations and will cover purchasing, procurement and investment decisions. The gov.uk website includes a [briefing note](#) on the full programme.

The [legal opinions and summaries page](#) has been updated with a link to a summary of the judgment of the Supreme Court in the LGPS investment guidance boycotts and divestment case.

*'The SAB welcomes the clarity brought by the judgment of the Supreme Court in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent). In seeking to restrict the outcome as well as the considerations taken account of by an LGPS administering authority when developing its responsible investment policy, the government has been judged to have overstepped its powers. It is the Board's view that Responsible Investment policy decisions belong at the local level reflecting: the need to pay pensions both now and in the future; local democratic accountability and the views of scheme members; and that outcomes of policy developments should not be subject to restrictions based on unrelated matters'*

The Board's secretariat and legal advisor have commenced work on a draft summary of the judgment which will be published on this site as soon as it is available.

The Supreme Court today handed down its judgment in the case of [R \(on the application of Palestine Solidarity Campaign Ltd and another\) Appellants\) v Secretary of State for Housing, Communities and Local Government \(Respondent\)](#) which was originally heard on 20th November 2019. The court found in favour of the appellants and would appear to take the position that the Government has the power to direct authorities on the approach they take to investment decisions, but not the investments they make.

A [Summary of the judgement \(PDF 2 pages 180kb\)](#) published by the practice at [11KBW](#) is available - please note this summary is the view of 11KBW not necessarily the Board which has yet to consider the implications of the judgment for itself.