LOCAL GOVERNMENT PENSION SCHEME: INVESTMENTS AND NON-FINANCIAL CONSIDERATIONS

OPINION

1. I am instructed to advise the Local Government Association ("the LGA"). In the course of 2014 I wrote two Opinions for the LGA about certain, related aspects of the administration of the Local Government Pension Scheme ("LGPS"), including the nature and extent of the duties of administering authorities in relation to the investment of funds, and the payment of benefits. I am now instructed to review the content of those previous Opinions in certain respects, and to elaborate on some of the issues to which they give rise in current circumstances.

2. The earlier Opinions are not only familiar to those instructing me, but have been published by the LGA via the website of the LGPS Scheme Advisory Board. So there is no need for me to rehearse their contents in detail here. For present purposes the more relevant of them is my Opinion dated 25 March 2014. The main relevant conclusions of that Opinion were as follows:

   (i) That an administering authority, although not a trustee as such, owed fiduciary duties both to scheme employers and to scheme members. Remedies for breach aside, I considered that those fiduciary duties were likely to be similar in nature to those which would in any event have arisen as a matter of public law; and

   (ii) That the administering authority's power to invest the fund was one which (in the context of choosing between one investment and another) had to be exercised for investment purposes and not for other purposes. Nonetheless, I suggested that broader considerations (what would now often be referred to as environmental, social and governance ("ESG") issues, and can also compendiously be called non-financial

considerations) could be taken into account when making investment decisions, where to do so would not risk significant financial detriment to the fund, and did not involve the administering authority in preferring its own particular interests to those of other scheme employers, or in imposing views of its own which would not be widely shared by scheme employers and members.

Developments since the previous advice

3. I shall address the relevant developments under three broad headings. The first concerns the way in which some of the points raised in my 2014 advice have subsequently been considered by the Law Commission and by the Supreme Court, and how those points are reflected in the current statutory guidance. The second heading identifies the (limited) other relevant caselaw since my 2014 advice. The third heading relates to current government proposals for reform.

The Law Commission report, the Investment Guidance and the Supreme Court's PSC decision

4. My 2014 advice was based primarily upon existing caselaw about trustee and charity investments in other contexts, as well as the terms of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 ("the Investment Regulations"). That caselaw was further discussed in the Law Commission report *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014), which also made reference to my published Opinion for the LGA. The Law Commission reached similar conclusions to my own.

5. The next development was that ministerial guidance was issued in September 2016, under the title *Local Government Pension Scheme - Guidance on Preparing and Maintaining an Investment Strategy Statement* ("the Investment Guidance"). Despite the rubric of "guidance", the

guidance in effect has a mandatory character. Under r.7(1) of the Investment Regulations, an administering 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."

6. Various matters which this investment strategy "must include" are set out in r.7(2), and under r.7(2)(e) they include:

> "the authority's policy on how social, environmental and corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments."

7. The Investment Guidance said (and still says) this about r.7(2)(e) of the Investment Regulations, under the heading "How social, environmental or corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments":

> "When making investment decisions, administering authorities must take proper advice and act prudently. In the context of the local government pension scheme, a prudent approach to investment can be described as a duty to discharge statutory responsibilities with care, skill, prudence and diligence. This approach is the standard that those responsible for making investment decisions must operate.
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> Although administering authorities are not subject to trust law, those responsible for making investment decisions must comply with general legal principles governing the administration of scheme investments. They must also act in accordance with ordinary public law principles, in particular, the ordinary public law of reasonableness. They risk challenge if a decision they make is so unreasonable that no person acting reasonably could have made it.
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> The law is generally clear that schemes should consider any factors that are financially material to the performance of their investments, including social, environmental and corporate governance factors, and over the long term, dependent on the time horizon over which their liabilities arise.
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> Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial

considerations into account provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.

Investments that deliver social impact as well as a financial return are often described as "social investments". In some cases, the social impact is simply in addition to the financial return; for these investments the positive social impact will always be compatible with the prudent approach. In other cases, some part of the financial return may be forgone in order to generate the social impact. These investments will also be compatible with the prudent approach providing administering authorities have good reason to think scheme members share the concern for social impact, and there is no risk of significant financial detriment to the fund.

Summary of requirements

In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority:-

- Must take proper advice
- Should explain the extent to which the views of their local pension board and other interested parties who they consider may have an interest will be taken into account when making an investment decision based on non-financial factors
- Must explain the extent to which non-financial factors will be taken into account in the selection, retention and realisation of investments
- Should explain their approach to social investments."

8. This section of the Investment Guidance originally included further statements to the effect that administering authorities should not pursue policies contrary to UK foreign or defence policy (i.e. even if the general requirements for taking account of non-financial factors were satisfied). The lawfulness of those statements as part of the guidance was challenged, successfully, in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774, which I shall refer to below as the *PSC* case, and they were removed from the published Investment Guidance.

9. The Supreme Court's conclusion in *PSC* was that the challenged statements were outside the powers conferred upon the Secretary of State by the Public Services Pensions Act 2013 ("the PSPA"). My reading of the majority judgments is that they accepted, not just the claimants' narrower argument that matters of foreign and defence policy considerations were extraneous to the 2013 Act, but also their broader argument that the Secretary of State was not entitled to use guidance to usurp the decision-making role of the administering authority. The statutory power to give guidance could be used to address topics such as, for example, what factors the administering authority should take into account when formulating its policies. But that did not extend to dictating the substantive conclusions which the authority should reach, or to preventing the authority from acting upon those conclusions.

10. Since *PSC* was decided, PSPA Schedule 3 (the non-exclusive list of matters for which provision may be made by scheme regulations: see s 3(2)(a)) has been amended[1] to add words to paragraph 12(a), which now reads as follows (with the added words emphasised):

> "The administration and management of the scheme, including – (a) the giving of guidance or directions by the responsible authority [i.e. the Secretary of State, in the case of the LGPS] to the scheme manager [i.e. the administering authority] <u>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</u>"

11. In the light of this amendment, it is very probable that there could lawfully be new guidance to the same effect as the challenged guidance in *PSC* (although it may be that the structure of the PSPA is such that the Investment Regulations would first have to be amended[2]). But no such

[1] By the Public Service Pensions and Judicial Offices Act 2022.

[2] It seems most unlikely that the current government (whose substantive policy on foreign and defence issues as a factor in LGPS decision-making may not in any case be the same as that of the previous administration) will in fact now issue new guidance without waiting for its

guidance has in fact been issued, so that the Investment Guidance to date remains in its post-*PSC* form. I do not regard the amendment to paragraph 12(a) as being of any legal relevance so long as the Investment Guidance in fact remains unchanged. In any event, outside the particular topic of foreign and defence policy, it is clear that *PSC* remains authority for the proposition that guidance may not be used to dictate the substance of investment decisions.

12. The further relevance of *PSC* lies in the fact that the Supreme Court considered and in effect endorsed the approach to non-financial factors taken in the Law Commission report. This potentially mattered in *PSC* because the Secretary of State argued that his power to address non-financial factors through guidance could be no narrower than the powers and permitted purposes of an administering authority taking investment decisions. The claimants' riposte was that this argument was based upon a misconception of the administering authority's role – as a fiduciary, the administering authority could not pursue its <u>own</u> views of what was or was not desirable or acceptable as an investment from an ESG perspective; by contrast, to give effect to the wishes of scheme <u>members</u> about how their pension funds should be invested was a proper "pensions purpose".

13. In support of this argument based upon fiduciary duty, the claimants invoked the analysis in the Law Commission report, which it contended was both correct, and indeed the obvious basis for an essential part of the Secretary of State's own guidance. Lord Carnwath at [43] expressly endorsed the Law Commission's two criteria for taking non-financial considerations into account, that is:

> "provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision"

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proposed new Pensions Scheme Bill, discussed further below, to pass. Accordingly, there is no need to consider this point in detail.

14. Lord Wilson, who gave the other majority judgment, was less explicit, but he certainly referred to the Law Commission approach without any doubt or criticism, and I think that what he said at [27] and [30] amounts to agreement with it.

15. In short, in the light of *PSC*, the Law Commission approach to non-financial considerations where investments are made by trustees and quasi-trustees can be regarded both as an authoritative statement of the general law, and as applicable to investment decisions made by LGPS administering authorities. It is also consistent with the current Investment Guidance, and (with the exception of the specific provision made for foreign and defence policy) it appears that the Secretary of State's current powers under the PSPA would not permit substantively different guidance to be issued – although she could, if she chose, undoubtedly issue guidance which addressed how authorities should set about applying the Law Commission criteria. Those criteria are themselves closely in line with what I said in my March 2014 Opinion. So the basic legal position has become more certain since I originally advised, but it has not materially changed.

16. I think that both the Investment Guidance and the discussion in *PSC* also implicitly confirm that the concept of "social, environmental and corporate governance factors" in r.7(2)(e) is a broad one, and that the word "social" in particular is broad enough to cover pretty much the whole range of reasons, positive and negative, why someone might wish to invest in one way rather than another on grounds of policy or ethics. For that reason, I shall use the terms or phrases "social, environmental and corporate governance factors", "ESG factors" and "non-financial factors" more or less interchangeably in this Opinion.

17. A final point to make about the state of the law in the light of *PSC* is this. In my Opinion I expressed the view that administering authorities owed fiduciary duties both to scheme members and to scheme employers. In the light of *PSC*, this is undoubtedly correct so far as scheme members are

concerned. The Supreme Court did not say (and did not need to say) anything about duties owed to employers. My own fairly firm view remains that the administering authority does owe a fiduciary duty to employers[3], notwithstanding the emphasis placed on the individual members by Lord Wilson in *PSC* at [30]:

> "The contributions of the employees into the scheme are deducted from their income. The contributions of the employers are made in consideration of the work done by their employees and so represent another element of their overall remuneration. The fund represents their money. With respect to [counsel for the Secretary of State], it is not public money."

18. My understanding is that in making those comments, in particular as to the fund representing "their [i.e. the members'] money", Lord Wilson was contrasting the fund with "public money" in the sense of funds held by public authorities to be used as they saw fit for the purposes of their various functions. The money in an LGPS fund is obviously not the members' money in any literal or legal sense. Rather, it is a fund held for the specific purpose of paying pension benefits to members. Members have a legitimate interest in how that fund is used and invested, partly because there is at any rate a theoretical possibility that, if the fund runs out, they would not get their benefits[4]; and partly because, as Lord Wilson says, they have both made

[3] The point was adverted to in *Croydon LBC v Oasis Community Learning* [2023] EWHC 2 (Ch) at [25-36] but, the issue being an application for permission to amend a statement of case, the court was concerned only with arguability, and the judgment does not assist substantively.

[4] In my 2014 advice I explained my view that the administering authority is only obliged to pay benefits to the extent that there is money in the fund for it to do so, albeit the possibility of the fund running out of money, given that there was always likely to be at least one local authority employer with active members and therefore liable to pay contributions, was in practice remote. In the current climate, the prospect of a local authority defaulting upon its contribution obligations so as to leave the fund unable to pay benefits in full, although still remote, is perhaps less fanciful than it was a decade ago. But the more important point is and has always been that serious financial under-performance by a fund has the potential to impact upon members without matters ever reaching that point – LGPS-wide under-performance would probably lead to benefits (at least those accruing in future) being reduced or employee contributions being increased, whether through the employer cost cap mechanism or through legislative change; and under-performance by a particular fund might cause an employer or the administering authority to be less generous in the exercise of discretions, or (in the case of certain employers) to exit the scheme. That is quite apart from the fact that there is likely in practice to be a considerable overlap between the cohort who are active, deferred or pensioner

their own contributions, and worked in order to have employer contributions paid into the fund. But employers also have a legitimate interest in the financial health of the fund. In their case, the interest is more immediate, because how well the fund performs will translate fairly directly into required contribution rates (or, in the case of an employer for whom exit from the fund is a possibility, into whether there is upon exit a surplus which might potentially be received, or a deficit to be met).

19. Having said that a fiduciary duty is owed to employers as well as to members, I would add that the content of that duty is not necessarily identical in the two cases. It seems to me that the legitimate interest of scheme employers is essentially limited to their financial interest in not having to pay higher contributions than necessary. Employers have not "earned" the contributions which have built up the fund, and so the fund is not "their" money in the sense in which Lord Wilson said it was the members' money. Therefore, I do think that when it comes to consideration of whether a decision to take account of non-financial factors would be "supported", it is indeed the support of scheme members rather than scheme employers which matters. I would not go so far as to say that the views of scheme employers about non-financial considerations, beyond any potential financial impact which taking them into account might have, are necessarily wholly irrelevant, but they are certainly in my opinion very much secondary to the views of the members.

Other relevant caselaw

20. Apart from *PSC* itself, there are not many decided cases (in fact only two[5], so far as I am aware, neither of them an LGPS case) to which it is relevant to draw attention.

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members assigned to a particular fund, and the cohort who are consumers of local authority services in the local area, and may thus suffer if services are impacted by the need to fund pension contributions.

[5] Leaving aside the *Croydon v Oasis* case mentioned at footnote 3 above.

21. One is the decision of Michael Green J in *Butler-Sloss v Charity Commission* [2022] Ch 371, in which two charities sought the court's approval for a particular investment policy. The case mainly concerns the specific relationship between certain investments, and the claimants' charitable aims, but I shall refer to it on one issue at paragraph 56 below.

22. The other is *McGaughey and Davies v Universities Superannuation Scheme Ltd* [2024] 1 All ER 962 (CA); [2022] EWHC 1233 (Ch) (Leech J). In that case, various scheme members sought but failed to bring a derivative claim against the scheme's trustee company, alleging negligence, breach of fiduciary duty and improper use of powers in various respects. One complaint was that continued investment in fossil fuels was exposing the scheme to long-term financial detriment. The reasons why the claims failed related principally to the proper scope and availability of a derivative claim in the context of a trust scheme, none of which is relevant to this Opinion. But the fossil fuel claim also failed because there was no *prima facie* case that a breach of duty had occurred: see Asplin LJ at [173] on appeal, and Leech J at [186-191] at first instance. The case was, on this point, simply a decision on its facts, based on what seems to have been obvious inadequacies in the claimants' evidence: however, it does perhaps illustrate that it is likely to be difficult to challenge a trustee's (or administering authority's) judgment about matters such as financial risk, if that judgment has been reached after proper consideration of professional advice.

Pooling of LGPS funds, Pensions Investment Review and "Fit for the Future"

23. As a result of what the Investment Guidance says in relation to r.7(2)(d), it has been generally understood that administering authorities are required to "commit to a suitable [investment] pool to achieve benefits of scale", such a pool being one which meets the criteria set out in the November 2015 government publication *Local Government Pension Scheme* -

Investment Reform Criteria and Guidance, including that the pool holds at least £25bn in LGPS assets. The Investment Guidance suggests that an administering authority should invest all its fund assets through the pool, save for possible retention of "a small proportion" of existing investments outside the pool, where that can be said to demonstrate "clear value for money" and is supported by some specific rationale.

24. Central government has for some time expressed dissatisfaction with the extent to which the LGPS (amongst other funded pension schemes) is investing in the UK economy, including UK infrastructure. This has frequently been coupled in policy statements with the suggestion that the pooling of investments has not proceeded far enough or fast enough. In September 2024 the new administration launched a pensions investment review, with a "call for evidence". On 14 November 2024, to coincide with the Chancellor of the Exchequer's Mansion House speech, the government published both an "interim report", and a consultation paper on changes to the LGPS, entitled "*Fit for the future*". The stated intention is to introduce a Pension Schemes Bill during 2025. The Bill will, so far as relevant for the purposes of this Opinion, be the vehicle for whatever amendments to primary legislation the government considers necessary to bring about the changes which it ultimately considers appropriate.

25. Evidently one cannot know at this stage what policy conclusions the government will reach following the *Fit for the future* consultation (which closes on 16 January 2025), still less what the detail of any Bill will say, or in what form it will eventually be enacted (although, given the size of the government's Commons majority, and how early we are in the present Parliament, it is a reasonably safe assumption that any Bill introduced will find its way onto the statute book without drastic alteration). However, *Fit for the future* does provide a reasonable degree of detail about the government's current thinking. I would summarise the aspects of *Fit for the future* which are most material to this advice as follows:

(i) A requirement upon administering authorities to transfer all legacy assets to the management of their investment pool (although *ownership* of legacy illiquid investments might remain with the administering authority), and not to make new investments outside the pool.

(ii) All remaining pools to be established as FCA-authorised investment management companies, themselves possessing sufficient capacity to advise on and implement investment strategies (there is a strong implication that the government anticipates fewer pools going forwards, although paragraph 46 states that it is not seeking to move to a single pool).

(iii) Although administering authorities would continue to set their own investment strategies, they would be required to "fully delegate" the implementation of the strategy of the pool, and also to take "principal advice" on the investment strategy from the pool (initially from an adviser whose services have been procured by the pool, where the pool itself lacks the necessary capabilities, but in due course from the pool itself). Paragraph 28 is worth setting out nearly in full[6], since it shows how the government currently contemplates that the dividing line between setting and implementation of an investment strategy should be drawn:

> "The government is proposing that [administering authorities] retain responsibility for setting a high-level investment strategy for their fund, defined as an investment strategy consisting of:
>
> - The high-level investment objectives including on:
>
> - funding, for example funding level, return, risk, income and stability of contributions

[6] I have adjusted the format of the bullet points slightly as compared with the published document, to reflect what I think is actually intended as the division between bullets and sub-bullets.

- environmental, social and governance (ESG) matters and responsible investment
- local investments, with a target range . . .

- If the [administering authority] wishes to do so, a high-level strategic asset allocation . . ."

(iv) The "target range" for local investment, expressed as a proportion of the fund, would be something which it was mandatory to set out in the investment strategy. Paragraph 74 states that the term "local investment":

> ". . . is used to include investments local to any of a pool's partner [administering authorities], or investments in their region (or in Wales, for Welsh [administering authorities]."

The consultation invites views on how "local investment" should ultimately be defined. Paragraph 76 states that administering authorities:

> ". . . would also be required to take account of local growth plans, including local economic priorities and specific investment requirements, in setting their investment strategies."

26. Section 4 of *Fit for the future* contains some important proposals in relation to LGPS governance (such as the appointment of an officer with overall delegated responsibility for fund management and administration, and a more tentative suggestion of a requirement to appoint an independent pensions professional to a pensions committee). However, these are of less direct relevance to the issues covered by this Opinion.

27. I am not aware that there has been any official announcement as to the likely timetable for the promised Bill. However, paragraphs 56 to 58 of *Fit for the future* propose an indicative timetable under which pools should submit proposals for meeting the new requirements by 1 March 2025, and

the new model of pooling should be in operation by March 2026 (one of the consultation questions invites comments on the viability of this timescale).

28. It may very well be that some of the proposed substantive requirements of *Fit for the future* would, in the light of *PSC*, not be matters which the government could lawfully require of administering authorities as the PSPA currently stands. In particular, *PSC* raises a very considerable question as to whether it is currently lawful for pooling to be made mandatory (although this is of course assumed by the existing guidance about pooling[7]).

29. However that may be, there is no real reason to suppose that the government would face any legal obstacle if it were to include, or clearly authorise the imposition of, such requirements in the new primary legislation. Although the accrued pension rights of LGPS members are a form of possession for the purposes of Article 1 of the 1st Protocol to the European Convention on Human Rights, nothing in *Fit for the Future* suggests that there is likely to be an interference with such rights, or at any rate one which would not be capable of being justified, given the broad margin of discretion likely to attach to measures such as this. If there is no breach of Convention rights, there is of course no route by which the lawfulness of Acts of Parliament may be challenged[8].

30. It is not clear at this stage how much of the contemplated new regime will in fact be brought into being by primary legislation, and how much will be left to regulations and guidance. The latter could in principle be challenged if they were outside the powers conferred by the new legislation, or

[7] I am not asked to advise specifically on that issue, and there now seems little practical purpose in doing so (although I have given some relevant advice to individual authorities in the past). Unless it runs into unexpected political difficulties with its Bill, the government is unlikely to seek to enforce current guidance against those authorities who are not in full compliance with it; and it is hardly likely that any administering authority which currently belongs to a pool will seek to withdraw from the pool, or withdraw significant assets from it, when the Bill is relatively imminent.

[8] The UK of course has international law obligations beyond the ECHR, but they cannot normally be relied upon directly by individual litigants, and in any case I am not aware of any such obligations which would be likely to impinge upon these proposals.

potentially on other public law grounds. However, until one sees the detail both of the Bill, and knows precisely what is done or to be done under it, it is impossible to say whether there would be grounds for any such challenge. The working assumption has to be that, with proper drafting of the Bill (including appropriate provisions authorising secondary legislation), the government will be able to put its proposals into effect.

31. In what follows below, I shall seek to indicate where my analysis of the current legal position is or is not likely to be affected by the *Fit for the future* proposals. Of course, this advice can only be provisional until the detail of the working-out of those proposals is known.

What should administering authorities do about non-financial factors?

32. The law as confirmed by *PSC*, and the Guidance, indicate when it is and is not *permissible* for non-financial factors to be taken into account. But that still leaves at any rate three significant issues to be addressed. One is how the dividing line between financial and non-financial factors should be drawn in this context – I shall return to that below, with a particular emphasis upon the important topic of climate change (although it is also relevant to the suggestion that LGPS funds can or should pursue investments of a kind which will stimulate the economy generally).

33. A second issue is how the administering authority should apply the Law Commission criteria – what exactly is meant by significant risk of financial detriment (the "financial criterion"), and by scheme member support (the "member support criterion"). A third issue is to what extent, if at all, the authority is *obliged* to ask itself whether any, or any particular, non-financial factors should be taken into account, or even to take particular factors into account. I think that it is most helpful to locate the second and third issues within the framework of the statutory procedure governing the authority's investment strategy, which I shall now describe.

The statutory requirements for an investment strategy, and their consequences

34. As already noted, the administering authority must formulate an investment strategy. The various matters which the investment strategy "must include" are set out in r.7(2). As well as r.7(2)(e), which I have already set out, they include:

> "(b) the authority's assessment of the suitability of particular investments and types of investments;
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> (c) the authority's approach to risk, including the ways in which risks are to be assessed and managed;
>
> (d) the authority's approach to pooling investments, including the use of collective investment vehicles and shared services"

35. Under r.7(8), any fund money not immediately needed to make payments from the fund must be invested by the authority "in accordance with its investment strategy".

36. Under r.7(3) of the Investment Regulations, the administering authority must "consult such persons as it considers appropriate as to the proposed contents of its investment strategy". The investment strategy is to be reviewed from time to time (and at least triennially): see r.7(7) of the Investment Regulations.

37. In my opinion, it follows from these provisions that:

(i) An investment strategy ought to say something about social, environmental and corporate governance considerations, because r.7(2)(e) requires that the authority should state its policy on those matters. That policy might involve, for example, stating that the authority will not make new investments in a particular sector, or in particular specified undertakings. It might set some sort of indicative target for increasing or decreasing investments of a particular kind over

the lifetime of the strategy[9]. It might state that the current policy is not to take any account of such considerations when making investment decisions[10]. There are many other possibilities.

(ii) All investment decisions should be consistent with the investment strategy for the time being in force. Obviously some policies may be more prescriptive of individual investment decisions than others. But if the investment strategy has not identified any respect in which non-financial factors are to be taken into account, then in my view they should not, at least normally, be taken into account without the strategy first being reviewed and amended.

(iii) When the authority comes to formulate or to review its investment strategy (so, at least once every three years) it should give specific thought to what the policy on non-financial factors ought to be.

38. Although r.7(3) is not prescriptive about who should be consulted in formulating an investment strategy, and nor does the Investment Guidance say anything about that, the statutory consultation process strikes me as by far the most obvious mechanism for identifying whether there is a reason to think that scheme members would support a particular policy on the use of non-financial factors (and therefore the investment decisions flowing from that policy).

[9] I am not in this Opinion seeking to suggest precise forms of wording which might be suitable for inclusion in a strategy. The strategy will of course need to allow for the requirement not to run a significant risk of financial detriment, but there may be various ways of doing that. The policy might say that individual decisions made pursuant to the policy on non-financial factors would all be subject to that requirement. Or the authority might feel that, having regard to the anticipated duration of the strategy until its next review, it could be satisfied in advance that a particular policy did not entail such a risk.

[10] Probably that would also be the inference if the strategy was simply silent on the matter. But leaving the matter as one of inference would, in my view, not be good practice, and might lead to legitimate questions as to whether the authority had in fact followed a lawful decision-making process (including having regard to all relevant considerations) when arriving at the strategy.

39. I should be very surprised if an administering authority, considering under r.7(3) whom it was appropriate to consult, did not feel it necessary to include some element of consultation with persons or bodies likely to represent or be informed about the views and interests of members. That does not necessarily mean, of course, consulting all the individual members, although in circumstances in which the authority should know who those members are, and consultation can be conducted online, it may be that some authorities will think that consultation of members generally is as good a way to proceed as any.

40. Whether the consultation is general, or limited to representative bodies[11], it ought to extend to the policy on non-financial factors, since that is a mandatory element of the investment strategy. Once again, there are of course many possible ways in which such a consultation might be approached. Probably it would be helpful to consultees to be reminded of the existing policy, and also about the legal test for it being permissible to take account of such factors. Beyond that, some authorities might prefer simply to ask in an open-ended way for views on what the policy on using such factors should be; others might specifically canvass high level views on topical issues thought to be serious potential candidates for being made the subject of a policy; others might make specific proposals, and provide information about the reasons for them, or the authority's current assessment of their likely financial impact.

41. Depending on what work had been done prior to, and what level of detail had been included in, the consultation, an authority might, following the

[11] If an authority were to consult through representative bodies, and took the view that those should be or include (for example) relevant trade unions, it would probably make sense to remind the consultees that what is really being looked for is their knowledge or judgment of what members (including pensioner and deferred, as well as active members) would be likely to support, rather than the body's own policy on fossil fuels, or boycotts against a particular state, or whatever the issue might be.

consultation, be able to move straight to a decision about the content of the policy, or further analysis might be required[12].

42. Employer interests will certainly fall to be consulted upon a proposed investment strategy, because of employers' interest in the financial performance of the fund and the level of contributions. It would also be appropriate to consult them about the policy on non-financial factors, because employers might have views about whether particular policies posed a risk to the financial performance of the fund. It is also possible that employers might have something to contribute about what policies members would or would not be likely to support[13], especially if the consultation was not taking place on a general basis. But, for the reasons given at paragraph 19 above, I regard employers' own views about any underlying ethical or social policy considerations as being of only marginal significance, and I do not think that an administering authority is obliged to solicit such views.

43. If, following due consultation, an investment strategy including a policy on the use of non-financial factors is adopted, then that is the policy which should be pursued until such time as the strategy is reviewed and amended. It is of course open to an administering authority to decide to review its investment strategy before the 3 year maximum period is up, and it should not fetter its discretion by determining absolutely that it will not do so. Such

[12] Thus, for example, the authority might already have taken appropriate advice on the financial implications of a particular proposal, so that what was left was simply to consider the views of members. But if it was only through consultation that a particular suggested policy emerged, and the extent of any associated risk of financial detriment was unclear, it is likely that further work and advice would be required before taking a final decision about the policy. Again, if a particular policy had not been the subject of specific consultation, but a significant level of member support for it emerged as part of the consultation process, it might be necessary or appropriate to seek views about that specific policy in order to gauge the real depth of support, and whether there was countervailing opposition. Clearly, therefore, there may be something to be said for not leaving consultation in connection with the triennial review of the investment strategy to the last moment. Alternatively, there is no reason why an exercise in seeking to establish members' views about the use of non-financial factors should not take place separately from, and in advance of, consultation on a proposed investment strategy.

[13] Conceivably also an employer might have views as to the extent to which certain policies might or might not have a divisive effect within the workforce.

an "early" review might be limited to a specific issue, such as whether to add to the investment strategy a policy of abstaining from investments of a particular kind, or it might be more general.

44. However, the expectation underlying the Investment Regulations is evidently that triennial review will normally be sufficient. I think that if an administering authority is approached prior to the normal review date with a request to adopt a new approach to non-financial factors, it will normally be perfectly legitimate to say simply (if the authority so chooses) that it does not think it necessary to devote time and cost to a consultation and review until that is due to occur on the normal timetable[14]. Exceptional cases where it might be necessary to think in more detail about such a request could include ones where a particular issue has only newly emerged as a significant concern, and/or where there is good evidence of a high level of member demand for action on a particular issue, or that the facts have changed very materially since the issue was last considered. But ultimately it is for the judgment of the administering authority whether early review of the investment strategy is appropriate.

45. In summary, the triennial review of the investment strategy requires at least some level of consultation about the authority's policy on non-financial factors, and it therefore also represents a logical and convenient point at which to assess whether the requisite scheme member support exists for a particular policy to be lawfully adopted. The authority must be open, at any rate in exceptional cases, to reviewing the policy before the next 3 year deadline, but it will not normally be under any positive legal obligation to consider policy changes outside the triennial cycle.

[14] It is unclear whether the *Fit for the future* proposals might entail an initial "re-set" of investment strategies, or (if so) when that might occur.

Pooling and the ESG aspects of the investment strategy

46. All the LGPS administering authorities are, so far as I know, currently members of one of the existing investment pools, and the great majority have pooled at least some of their investments. Whether investments are pooled or not, day to day investment decisions are very often in the hands of external investment managers appointed under contract.

47. Looked at from a strict legal, this in theory makes very little difference to the issues which I have just discussed. Where ESG factors are taken into account, that should be in accordance with the investment strategy, and it is clear that it is for the administering authority to determine the investment strategy. Although the function of making and reviewing the investment strategy is one which could in principle be delegated in the same way as other non-executive functions[15], I am not aware that it is normal for this to occur in practice. In any event, not all of the current investment pools would be permissible delegates (those structured as joint committees might be).

48. In practice, however, the fact that day to day investment is often not in the hands of the administering authority, and indeed may sometimes be at two removed from it (e.g. if the relevant investments are pooled, and the pool engages an investment manager under contract) does create a real issue when it comes to the treatment of non-financial factors. The separation between the making and the implementation of the investment strategy for a particular fund means that the strategy really does need to say exactly what it means – how else can the pool or the investment manager know

[15] There is a very general power to delegate administering authority functions under the Local Government Pension Scheme Regulations 2013 (see r.105(2)), which is not limited to those persons and bodies who may properly be the recipients of delegated power under s 101 of the Local Government Act 1972. However, the making of the investment strategy, and investment of the fund in accordance with it, are functions under the Investment Regulations, not the 2013 Regulations.

what they should or should not do, without what is likely to be impermissible delegation?

49. Although those who read this Opinion are likely to have significantly greater familiarity than I do with the practical reality on the ground, my own experience leads me to wonder whether close attention is always paid in practice to the drafting of ESG provisions in the investment strategy, and the consultation process in respect of them. This may be of limited significance for those administering authorities who elect not to take account of non-financial factors at all, but for those who do, it is (or ought to be) an important issue.

50. If and when the *Fit for the future* proposals are implemented, this issue is likely to become (even) more acute. The separation between formulation and implementation of the investment strategy will become a formal legal requirement (although precisely where the line between the two is drawn may depend on how the government ultimately formulates in legislation or guidance what is meant by "high level" matters for the strategy, or whether all matters of ESG policy are treated as being of that nature[16]). Whereas I suspect that, under the current regime, any uncertainties about how the administering authority wishes to proceed may in practice often be dealt with by informal dialogue between the authority and its pool or its investment manager, that will become much harder under the new regime.

51. So any introduction of ESG factors into the investment strategy needs to engage with, for example, clear definition of the type of investments which are or are not to be made; where the policy is a negative one (i.e. not to invest in some specified category), whether it is calling for disinvestment from existing investments (and on what timescale, and within what

[16] What, if any, new or additional powers of delegation are included in the new regime will also be of importance, as will the question of whether it will be permissible for an investment strategy to say (for example) that the fund is not to be invested in companies with known armaments-related activities without the express agreement of the administering authority, so permitting a little more case by case flexibility than if everything has to be spelled out in the investment strategy.

parameters as to the disposal price), or merely for new investments of that kind not to be made; and how the policy applies where the fund is invested in some collective investment vehicle (such as a unit trust), which then in turn selects particular investments.

52. I shall now turn to address the financial criterion and the member support criterion. I note at the outset that there is nothing in *Fit for the future* which directly addresses these criteria, or suggests an intention to change them. I suspect that nothing will in fact change so far as the financial criterion is concerned. In relation to the member support criterion, this will probably also not change in relation to ESG factors generally, but it is possible that it will be explicitly or implicitly modified in relation to the topic of "local investments" – however, I do not think that it is sensibly possible to say anything more about that in the current state of the proposals.

Applying the financial criterion

53. The test set out in the Investment Guidance is whether a decision based upon non-financial factors would involve a "significant risk of financial detriment to the scheme." Elsewhere in the section of Investment Guidance I have quoted above, and in the context of "positive social impact", the phrase used, which more accurately reflects the language of the Law Commission report, is "risk of significant financial detriment". The author of the Guidance evidently regarded the two forms of words as meaning the same thing, despite the apparent shift in the placing of the word "significant" so that it qualifies "risk" rather than "detriment"; and Lord Wilson in *PSC* at [17] must have taken the same view, since he referred to the Guidance having adopted the Law Commission approach "almost word for word".

54. The "significant financial detriment" phrase seems to have been first used in this context by Sir Donald Nicholls V-C in *Harries v Church Commissioners for England* [1992] 1 WLR 1241. The underlying idea must be that the

administering authority ought not to be pursuing a policy which, for non-financial reasons, creates a realistic possibility of the fund suffering financial detriment which is material in the context of the fund's size and nature. The standard is ultimately one of prudence, bearing in mind that the ultimate purpose of the power of investment is to generate returns and not to pursue wider objectives. In that context, both the likelihood of the financial disadvantage materialising, and its potential scale if it does, are relevant to whether the policy is one which it is legitimate to adopt. But it is worth emphasising that it is not for the administering authority to balance the risk of significant financial detriment against the perceived advantages of, or the strength of member support for, a particular investment policy – such a risk is simply not to be undertaken, on non-financial grounds, however much members might support it.

55. The judgment as to whether a policy based on non-financial factors carries a risk of significant financial detriment is ultimately one for the administering authority to make. It is possible to conceive of cases in which it is obvious that there is no such risk (perhaps where the decision is not to make future investments of some narrow class, and that decision is clearly not going to make any real difference either to the diversity or to the profitability of the fund's investments, given the alternatives available). But I strongly suspect that in most cases professional advice (whether in-house or external[17]) will be needed before the administering authority, acting presumably in most cases through its pensions committee, will be able to conclude that there is no such risk.

[17] The required or permissible source of advice may be affected by *Fit for the future*, but it is neither necessary nor possible to consider that in detail at this stage.

The member support criterion

56. Although there is no caselaw on precisely what level of perceived[18] support is required, the analysis of Michael Green J in the *Butler-Sloss* case[19] at [52] tends to suggest that one is looking in effect for something tantamount to consent given by the body of members as a whole. This must mean, I would think, that a very high proportion of members would either positively support the reliance placed upon the non-financial factor in question, or at any rate have no objection to it[20]. Although it cannot be the case that the authority needs to be convinced that there is no one at all amongst the membership who would raise any objection to what is proposed, I do not believe that it would be consistent with the Guidance to take account of a non-financial factor in a way that was likely to be significantly controversial amongst members, simply because it was believed that a bare majority would support the decision.

57. From a more substantive perspective, the present caselaw does not appear to support any proposition that trustees or an administering authority are obliged to give effect to the widely held non-financial views of scheme members, even where they could properly do so because that would not create financial risk. In theory the position might be different if the members could be shown to share a virtually unanimous and strongly held view on a particular matter – but in practice it is hard to imagine such a

[18] I say "perceived", because it is clear that whether the necessary support exists is a matter left to the authority's judgment – there is no requirement to carry out any sort of poll.

[19] See paragraph 21 above.

[20] Although I suggest here that it should not matter that a proportion of members would be simply indifferent to the investment policy in question, I think that there would need to be at any rate a substantial groundswell of positive support for it. If the vast majority of the scheme members simply had no opinion on the subject one way or the other, any reliance upon the non-financial factor in question would seem to represent the administering authority (or the pensions committee members) using the fund as a vehicle to advance their own personal views, which in my view would not be a correct use of their fiduciary position.

scenario of near-unanimity arising in relation to very many investment issues.

58. I think the furthest one can go is to say that, if it was positively demonstrated that there was wide support amongst members for fossil fuel divestment, that this concern stood out as a particularly pressing one, and that there did not appear to be significant opposition to such a policy, then the authority might need on *Wednesbury* grounds to ask itself specifically whether effect should be given to that concern, and to have at least some legitimate reason if it decided not to act upon that concern. The range of legitimate reasons might, however, be wide – they could include, for example, practical difficulties in formulating and implementing the precise policy to be followed, within the framework of pooling and of investment mandates.

59. As to *how* member support, or the lack of it, for a particular use of ESG factors should be assessed, neither the current Investment Guidance nor (in my view) the general law are prescriptive about that. At paragraphs 38 to 40 above, I have suggested that the most obvious way to ascertain member opinion is through the required statutory consultation on the investment strategy, especially if the consultation is conducted in such a way as to allow for the expression of individual views on the use to be made of ESG factors. However, the views of trade unions or other representatives of employee or member opinion about what the members think may well be relevant, and I think that councillors on a pensions committee (who are, after all, elected to represent their local communities, and are likely to have significant contact with their authority's workforce) are entitled to have regard to their own sense of what are the prevailing opinions and their strength. But members need to be careful not, by this means, to fall into the trap of giving effect to their *own* views about what is morally or socially right.

60. By way of qualification to some of what I have said in the preceding paragraph, it is also necessary to bear in mind that the membership of the LGPS is not co-terminous either with the workforce of the administering authority, or with the public generally. There are deferred and pensioner members to consider; not everyone works for a local authority, and not all who do are LGPS members; and members may include the past and present employees of other public bodies, or of contractors with admission agreements. All that said, however, the administering authority's current employees are likely to account for quite a high proportion of the scheme's members in the relevant fund, and if they are a large and diverse workforce, they may not overall be very different in make-up and views from the local population more generally. By the same token, if a high proportion of the scheme membership are or have been trade union members, that may mean that the unions' views about member opinion should carry weight.

61. On normal *Wednesbury* and *Tameside* principles, it is for the administering authority to judge (subject to rationality, and consideration on a legally correct basis) whether it has enough information to reach a decision about member support, and what weight to give to particular items of information. The sort of points I have made in the preceding paragraph should be considered when forming that judgment.

62. This is probably the appropriate point at which to note that the formulation of an investment strategy is in principle subject to the public sector equality duty. How far equalities considerations in fact have any relevance, one way or another, to the potential taking into account of ESG factors will very much depend on what those factors are. Concerns about community cohesion were amongst the last government's stated policy reasons for introducing the guidance which was struck down in *PSC*, and community cohesion may often be linked to groups with protected characteristics within the community. However, an approach which was likely to lead to serious

community dissent might well in practice in any case be one which failed the member support test (see paragraph 56 above).

The distinction between financial and non-financial factors

63. The Investment Guidance, and to an extent the caselaw, tend to assume that there is a sharp divide between financial and non-financial factors when it comes to decision-making. Very often that will indeed be true. However, under this heading I will address two particular contexts where the distinction may be less easy to draw.

Promoting economic growth

64. The first is what might be characterised as using the pension fund to deliver an economic boost, either to the local economy or to the national economy as a whole.

65. Clearly the government, as set out in *Fit for the future*, is distinctly sympathetic to the use of LGPS funds in this way. It is possible, as I have already noted, that the Pension Schemes Bill may bring about some change to the law in this respect. However, as matters stand, I do not see that truly[21] local investment is likely to represent a financial factor in most cases. I fail to see why the performance of fund investments would in any normal scenario be positively enhanced by investing in the local area simply because it was local. Accordingly, my view is that in relation to any policy of local investment, the normal financial and member support criteria will need to be satisfied. Were the new legislation to introduce a requirement to state a target range for local investment, without otherwise changing the law, I think that in setting a target, and in laying down in the investment

[21] I use that word because the combined effect of the probable reduction in the number of investment pools, and of the broad definition of "local investment" contemplated by *Fit for the future* (see paragraph 25(iv) above), seems to me to make it likely that much of what technically counted as "local investment" might not in fact be at all local to the administering authority's area.

strategy how far efforts towards meeting that target should go, the administering authority would have to act consistently with those criteria.

66. Having said that, I imagine that it would often be fairly straightforward to show that there was general member support for local investment which did not entail significant financial risk. The key question in practice is therefore likely to be whether a policy of local investment is properly judged not to be materially financially detrimental to the fund.

67. When it comes to the national economy, I can see that it might be contended that growth in the UK economy was normally likely to be of particular benefit to LGPS funds (I do not know whether LGPS funds are typically more heavily invested in the UK than in other jurisdictions, although it would be unsurprising if they were), and that accordingly choosing investments which would boost the UK economy would represent the pursuit of an enhanced financial return for the fund, rather than a non-financial consideration. However, I very much doubt that it is plausible that the investment of an individual LGPS fund, especially if properly diversified, would have any material impact upon the national economy. The position might possibly be different if the administering authority in question was setting its strategy in co-ordination with other LGPS funds. Nonetheless, I think it will generally be more prudent to assume that in this context also one is dealing with a non-financial factor.

68. I should briefly mention the Subsidy Control Act 2022. In my view it is likely that an LGPS fund constitutes "public resources" for the purposes of that Act. However, a general approach of seeking to invest locally is unlikely in itself to create the element of selectivity necessary for a subsidy to arise: see s 2(1)(c) of the Act. Individual investment decisions involving significant value could potentially raise subsidy control issues, but I think that would have to be addressed more specifically on particular facts.

Climate change

69. The particular (and pervasive) nature of the climate crisis means that the dichotomy between financial and non-financial motivation may be much less straightforward to apply. The point lies in the systemic nature of the risks posed by climate change, and is clearly summarised in (for example) *Climate scenario analysis: an illustration of potential long-term economic and financial market impacts*, a June 2020 paper produced by an Institute and Faculty of Actuaries (IFoA) working party in collaboration with Ortec Finance Ltd[22] (see page 7 of the paper):

> "Climate change will almost certainly fundamentally impact how economies perform as a whole. It will affect macro-economic variables such as GDP growth, and in turn have significant influence over the resulting performance of asset classes and industry sectors. Since the risks associated with climate change are systemic in nature, they will affect all assets to some extent and so cannot be avoided completely through careful selection of investments."

70. Putting the point a little more crudely, climate change has the potential to cause economic disruption so profound that no pension scheme, whatever its specific investments, could hope to escape the adverse impact upon its ability to fund its commitments to pay benefits (or the cost in contributions of doing so). Accordingly, a decision not to invest in particular assets could in principle be characterised as a financially-motivated decision, even though the immediate purpose of the decision is to encourage a behavioural change by relevant undertakings, rather than to avoid the risk that those assets will represent a poor investment. More crudely still, if a pension scheme believes that its divestment from fossil fuels will contribute towards encouraging the energy sector to leave such fuels in the ground, and that this will in turn contribute towards keeping climate change under control,

[22] I believe that a further Ortec has recently been published (November 2024), although I have not studied it in detail, and there will be many other publications as well. The state of knowledge and thought on this topic is changing and being added to all the time, and it is not the intention of this Opinion to review all the currently available information, as opposed to addressing the points of principle.

that could be regarded as something done to promote the long-term financial health of the pension fund, and not simply because of a political or moral belief that it is wrong to jeopardise the Earth's environment.

71. Of course, any decision to divest on what one might label as "macro-financial" grounds of this nature, as opposed to a more conventional "micro-financial" analysis of whether a particular investment was expected to produce a good return, diversify and balance the portfolio and so on, would need to be properly reasoned and evidenced. It would not be enough for an administering authority to believe that fossil fuel extraction and burning was a significant contributor to global warming. The authority would need to ask itself how realistic it was to suppose that divestment on its part would have any direct or indirect influence on how the undertakings in question behaved. It would also need to ask why divestment, as opposed to other measures of stewardship and engagement, should be considered to be more effective in altering behaviour (and not just an exercise in transferring assets from a concerned investor to an unconcerned one).

72. Nonetheless, it is not fanciful to suppose that there could be good answers to those questions. Indeed, the potential for macro-financial factors to be relevant in this context seems to be implicit in the government guidance *Governance and reporting of climate change risk* (DWP, June 2021), albeit that is principally statutory guidance directed at trust schemes subject to statutory obligations which do not currently apply to the LGPS. That guidance suggests that trustees' legal duty to consider financially material matters extends not just to the kinds of financial risks which might affect investments, but also to how action to address climate change "might contribute positively to anticipated returns or to reduced risk." I would also draw attention to what is said about climate change and risk in CIPFA's (non-statutory) *Managing Risk in the LGPS*.

73. In the LGPS context, it is apparent from rr.7(2)(b) and (c) of the Investment Regulations that an administering authority is positively bound to think

about suitability of investments, and about risk, when it comes to formulating its investment strategy. However, it cannot be the case that these provisions oblige an authority to think specifically about the particular risks posed to its fund by each and every potential sector in which fund monies might potentially be invested – that would be wholly impractical. In many, and probably most respects, it must be sufficient for the authority to consider and adopt some general or overarching approach to risk assessment and management, e.g. by saying something in the strategy about the extent of the fund's appetite for risk, or by having general procedures for risk assessment and reporting by the pool and/or by investment managers, or for particularly material risks to be the subject of specific reporting to the administering authority for decision.

74. The view which I have just expressed is consistent with the extremely general terms in which the Investment Guidance discusses rr.7(2)(b) and (c). The Guidance does say in relation to r.7(2)(e) that "The law is generally clear that schemes should consider any factors that are financially material to the performance of their investments, including . . . environmental . . . factors". But this cannot be taken literally, as suggesting that an administering authority must take account of every single financially material factor when setting its strategy – rather, the word "any" must be intended to make clear that there is no limit to the type of financially relevant factor that it is appropriate to take into account; and the word "material" takes one back to the fact that it is for the administering authority to judge what is sufficiently material to be taken into account (or be made the subject of further enquiries).

75. The Investment Guidance also draws attention to the statutory obligation to have regard to relevant CIPFA guidance when formulating a funding strategy (as opposed to an investment strategy), and in substance incorporates by reference what is said in that statutory CIPFA guidance about risk measurement and management. However, whilst I do not at

present have access to the current version of that guidance, what is said in past versions is again couched at a very high level of generality.

76. It follows that whether an authority needs to pay specific attention to what can for shorthand be called "fossil fuel risk" must be a matter for its own judgment, subject to that judgment being a reasonable one in the public law sense[23]. As I have already noted at paragraph 6 above, the investment strategy must be formulated "after taking proper advice". When it comes to financial risk, the reality of the situation is almost certainly that it is the professional advice given to the authority about risk factors that will most matter. If an authority obtains advice from a suitably qualified advisor, and that advice contains no suggestion that the authority ought to think specifically about any particular risks associated with investments related to fossil fuels, then trying to persuade a court that not having done so represented a breach of the authority's public law duty might be an uphill struggle (certainly if the authority has asked that the advice should cover any climate-related financial risks). On the other hand, an authority which is professionally advised that it should consider or act upon particular risks, yet fails to do so, is likely to be in a position of some difficulty if challenged.

CONCLUSIONS

77. The Supreme Court in the *PSC* case, and the current Investment Guidance, have effectively confirmed the advice which I gave in my 2014 opinion: to take account lawfully of non-financial factors when investing an LGPS fund,

[23] I doubt that an administering authority would be entitled to say simply that there was no need for it to consider these issues, simply because a deliberate decision had been taken that the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 should not apply to the LGPS at this stage. The Schedule to the Regulations lays down a relatively prescriptive, metric-based approach (designed, I think, to reflect recommendations made by the Task Force on Climate-related Financial Disclosures). The fact that the LGPS is not (yet) subject to that regime would not be inconsistent with a conclusion that the relevant risks were significant enough that any reasonable authority would be paying some attention to them, even if not in the manner or at the level required by the Regulations.

an administering authority must satisfy both the financial criterion, and the member support criterion, as summarised by Lord Carnwath at paragraph 13 above.

78. I have discussed the meaning and application of the financial criterion in more detail at paragraphs 53 to 55 above, and the member support criterion at paragraphs 56 to 62 above.

79. It does not appear that the government's current proposals will necessarily change those two basic criteria, although that may depend upon the eventual detail of the legislation.

80. The key point which I would emphasise, so far as non-financial factors are concerned, is the desirability of addressing these issues through the process of making and reviewing the authority's investment strategy, including the required consultation: see paragraphs 34 to 45 above, where I suggest that an authority will not *normally* be *obliged* to review its strategy with a view to the introduction of new ESG policies outside the statutory triennial cycle.

81. I would also emphasise the importance of proper drafting of the investment strategy in this respect, something which is likely only to become more important under current proposals: see paragraphs 46 to 51 above.

82. I think that a policy of investing so as to boost the local or national economy will normally represent taking account of non-financial factors: see paragraphs 64 to 68 above.

83. Climate-related factors may certainly be non-financial in nature, but they might also be financial, and certainly an authority probably needs to have advice, when setting its investment strategy on how far climate issues need to be considered from a financial perspective: see paragraphs 69 to 76 above.

84. I shall be happy to advise further on any of these or other related issues if required.

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13 January 2025

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IN THE MATTER OF
THE LOCAL GOVERNMENT
PENSION SCHEME

AND IN THE MATTER OF
INVESTMENTS AND NON-
FINANCIAL CONSIDERATIONS

OPINION

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