Public Bill Committee
scrutiny@parliament.uk

21 September 2023

Draft Economic Activity of Public Bodies (Overseas Matters) Bill SLGPSAB Response

The Scottish Local Government Pension Scheme Advisory Board (**SLGPSAB**) was established under the Public Service Pensions Act 2013 to provide advice to Scottish Government Ministers on the desirability of changes to the design of the scheme and the implication of other policy issues.

The SLGPSAB wishes to raise concerns relating to the Economic Activity of Public Bodies (Overseas Matters) Bill (the **Bill**). The SLGPSAB is a bi-partite body made up of equal numbers of Employer (Local Government and admitted bodies) and Employee members, and it is the view of that body which is provided in this response.

General Comments

The Bill intends to prevent public bodies, including the SLGPS, from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state, when making decisions about procurement and investment.

The SLGPSAB considers the drafting of the Bill to be vague and it appears to conflict with other well-established legal obligations applicable to the SLGPS, notably / including fiduciary duty. There are also some practical issues which could make parts of the Bill unworkable.

Conflict with Fiduciary Duty

SLGPS funds have a fiduciary duty to invest in the best interest of members and beneficiaries. Our guidance on how this should be exercised is based on legal advice, details of which are available at: https://lgpsab.scot/fiduciary-duty-guidance/.

Discharging the fiduciary duty may require non-financial issues to be considered where the financial performance of that investment may be adversely impacted as a result of such issues. This is supported by legislation including The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018, which defines financially material factors as including, but not limited to, ESG considerations.

The Bill creates confusion as to what is acceptable and what is not acceptable when considering investment risk. Non-financial issues such as environmental, social and governance (ESG) risks are frequently proven to be financially material risks, as can ethical, moral or political risks.

SLGPS funds must be permitted to take such risks into account, regardless of the UK Government's foreign policy at any particular time.

Whilst the Bill does not directly prevent the consideration of such matters, it puts legitimate and justifiable investment and procurement decisions of SLGPS funds at significant risk of challenge from any number of lobbyists. We are concerned that such basis for challenge could be misused by pressure groups as the Bill does not state who has standing to bring a challenge under it.

We note that the Bill contradicts the 2020 Supreme Court decision in the Palestinian Solidarity Campaign case. The court's decision considered that government influence may become available under new legislation (like the Bill) but would remain subject to the wider duties that SLGPS funds owe to members, unless these duties are themselves overridden (which the Bill does not do). It is noted that an attempt to override fiduciary duties could be seen as removing basic member protections which would be extremely politically sensitive.

Practical Constraints

The Bill seeks to confer enforcement powers on The Pensions Regulator (TPR). We note that the TPR's role to date has involved supervising good governance and not policing investment decisions in the manner described in the Bill. The enforcement powers mark a major change in the role of the TPR, far beyond its current remit. However, we recognise that oversight by the TPR would be preferable as compared to the risk of judicial review of compliance with the Bill, with a lack of clarity around how that might operate.

The Secretary of State (SOS) can issue guidance or direct investors including the SLGPS to act in a certain way which would affect their investment decisions, for example to divest because of a change in foreign policy. The Bill seems to restrict the SLGPS from divesting in the absence of an SOS order (where divesting could indicate political or moral disapproval of a foreign state). Therefore, the speed of SOS action could contribute to the financial risks stemming from political risk in any such scenario.

Unintended Consequences

The Bill prohibits making public statements that include any perception of disapproval of foreign state conduct. This is at odds with the wider expectations of the SLGPS, as asset owners, in relation to stewardship, such as the principles set out in the UK's Stewardship Code 2020. Effective stewardship may involve making public statements as an escalation tool and reporting publicly with examples of stewardship in action (including the rationale for actions or decisions and the associated outcomes). SLGPS investors may be forced to limit their stewardship activities in relation to certain issues or stocks if doing so may be perceived to be incompatible with this Bill.

Conclusion

In this short letter, we highlight a number of important issues that we believe need to be clarified / re-drafted before this bill is enacted. We respectfully request that our points be given due consideration.

Yours sincerely

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The Joint Secretaries of the Scottish Scheme Advisory Board