

APPENDIX 1

ITEM 9 - Summary of key legal points

Legal advice has been taken from external solicitors and counsel (Nigel Giffin KC), to ensure that whatever decisions are taken by the Pension Committee are in accordance with its legal obligations and duties towards the Fund and its employers and members. The full legal advice, which discusses the particular facts under consideration here, is privileged and confidential in the normal way, and is not intended to be published. However, in the interests of the fullest possible public understanding of what the Pension Committee now has to decide, this summary of key legal points has been prepared, with the involvement of the Fund's lawyers, for the purposes of publication. Publication of this summary is not intended to waive privilege in any other legal advice or communications relating to this issue.

1. The Pension Committee is considering a proposal to exclude from the Fund's investments all aerospace and defence companies, on grounds which are social or ethical rather than financial.
2. The legal position is that the Authority (i.e, Bath & North East Somerset Council acting as the administering authority of the Fund, and here acting through its pension fund committee) may only base investment decisions upon non-financial factors if two conditions are satisfied:
 - (a) That to do so would not involve significant risk of financial detriment to the Fund ("the financial condition"); **and**
 - (b) There is good reason to think that scheme members would support the decision ("the member support condition").
3. Both these conditions must be individually satisfied. If either condition is not met, it would be unlawful to proceed on these non-financial grounds. This means it is not a question of, for example, balancing the degree of support against the degree of financial detriment. If both conditions in paragraph 2 are met, it is then for the Authority to make an overall judgment about the right course of action, taking account of all the relevant circumstances.
4. The Authority's investment strategy must include its policy on how social, environmental and corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments; and the Fund must be invested in accordance with that investment strategy. Excluding aerospace and defence companies from the Fund's investments would amount to (part of) such a policy, and it would therefore need to be included in the investment strategy if it were adopted.

5. When formulating or reviewing the investment strategy, the Authority must consult such persons as it considers appropriate on the proposed content of the strategy. It must also take “proper advice”.
6. Whether the financial and member support conditions are in fact met here is a matter for the Authority to judge, provided that it takes a legally correct approach, takes account of the considerations which are legally relevant and reaches a rational conclusion.
7. In relation to the financial criterion, the essential point is that the Authority, acting as a prudent custodian of the Fund, ought not to pursue 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. This requires consideration both of the likelihood of financial detriment arising, and the anticipated or potential scale of such detriment if it did arise.
8. In relation to the member support criterion, this probably requires something effectively equivalent to consent given by the body of members as a whole. That is likely to mean both that a high proportion of those members with a view would support the proposed policy (not necessarily near-unanimous, but not just a bare majority either), and that there is substantial positive support for that policy (as opposed e.g. to an overwhelming indifference amongst the membership).
9. There may be a variety of ways, formal or informal, in which the Authority could legitimately assess the extent of member support for a particular policy, but some rational positive basis is required for determining that the member support criterion is met. Where, as here, an organised survey of member opinion has been carried out, that is likely to represent the best evidence of member views, and some specific reason would be required for departing from what the survey shows.