

Pension Fund Committee

15 September 2022

Border to Coast Pensions Partnership Governance Arrangements



Report of Paul Darby, Corporate Director of Resources

Purpose of the Report

1. To provide the Pension Fund Committee an overview of the governance arrangements of Border to Coast Pensions Partnership and highlight changes proposed to strengthen the company's governance arrangements.

Executive summary

2. It is five years since the council and eleven other local authority partners established Border to Coast Pensions Partnership to meet the requirement of pooling LGPS Pension Fund assets. In 2022, the Border to Coast Governance Review was instigated to understand whether there are any changes to the governance arrangements established at the company's inception, that should be considered by Partner Funds and the Border to Coast Board.
3. The review was conducted with the assistance of law firm Squire Patton Boggs, and includes the operation of the Joint Committee, a review of shareholder governance and a review of the governing documentation (including the Inter Authority Agreement, Shareholder Agreement, and the Company's Articles of Association).
4. Key changes proposed, include a reduction in the threshold for shareholder majority reserved matters and a reduction to the quoracy of the Joint Committee. At the same, there is an opportunity for the Fund to consider its own governance in respect of BCPP, in particular the role of shareholder representative.

Recommendation

5. The Committee is recommended to:
 - (a) note the work undertaken in reviewing the company's governance arrangements and the summary of changes proposed,
 - (b) note the intention of the Corporate Director of Resources to approve the changes to the Border to Coast governance documents upon completion of the review; and
 - (c) agree to amendment of the council's BCPP shareholder representative from the Chair of the Pension Fund Committee to the Head of Pensions.

Background

6. In the summer budget 2015, the Chancellor announced the intention for administering authorities to bring forward proposals for pooling Local Government Pension Scheme (LGPS) investments, to deliver reduced costs while maintaining overall investment performance. Subsequently, the Department for Communities and Local Government issued 'Investment Reform Criteria and Guidance', inviting proposals for LGPS asset pooling.
7. The guidance required administering authorities to submit detailed proposals to the Government by 15 July 2016. At a special meeting on 6 July 2016 the Pension Fund Committee agreed to provisionally join a pooling arrangement named the Border to Coast Pensions Partnership (BCPP), on the basis that this pool represented the best fit for the Durham County Council Pension Fund (The Fund). With the agreement of the Pension Fund Committee, the Fund became a joint signatory to the proposals that were presented to government.
8. Following the submissions of proposals for eight separate LGPS asset pools, the Local Government Pension Scheme (Management and Investment of Funds) Regulation 2016 came into force on 1 November 2016. Under the Regulations, each administering authority was required to formulate and publish an Investment Strategy Statement (ISS), which was to include the approach to asset pooling including the use of collective investment vehicles. On 12 December 2016 the Secretary of State wrote to the Fund and its pooling partners, approving the proposals for BCPP.

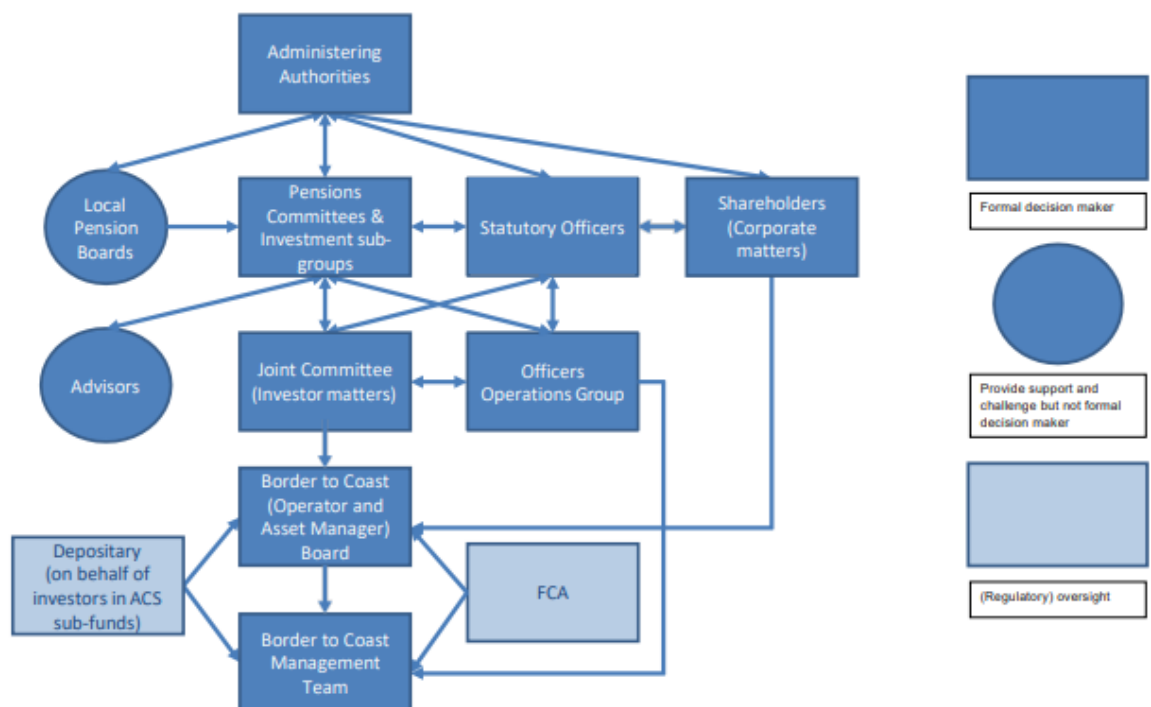
Establishment of Border to Coast Pensions Partnership

9. The proposals set out for BCPP were for 12 LGPS Funds, with combined assets in excess of £35bn, to pool their assets. The value of the Partner Funds at the time of the proposals to government are set out in the table below

BCPP Partner Fund	Fund Value at 31/03/2015 (£bn)
Bedfordshire Pension Fund	1.7
Cumbria Pension Fund	2.0
Durham Pension Fund	2.3
East Riding Pension Fund	3.7
Lincolnshire Pension Fund	1.8
North Yorkshire Pension Fund	2.4
Northumberland Pension Fund	1.1
South Yorkshire Pension Fund	6.5
Surrey Pension Fund	3.2
Teesside Pension Fund	3.2
Tyne and Wear Pension Fund	6.4
Warwickshire Pension Fund	1.7
Total	35.9

10. In developing the proposals for BCPP, specialist legal advice and that of cost consultants concluded that the most suitable vehicle for the BCPP pool was a wholly owned company regulated by the Financial Conduct Authority (FCA). Work carried out by cost consultants CEM Benchmarking, indicated at the time that following initial set-up costs, the DCC Pension Fund could expect realise savings by 2028.
11. BCPP limited was subsequently established, with the support of two sets of external lawyers. Eversheds were commissioned to advise the newly constituted company, whilst Squire Patton Boggs were appointed to advise the Partner Funds with input from Monitoring Officers and s151 Officers.
12. The conclusion of the legal assessment resulted in the formation of a Shareholder Agreement and Inter Authority Agreement. Squire Patton Boggs ultimately advised that the proposals for the Fund's participation in BCPP and for the council to subscribe to shares in BCPP Limited, were in compliance with statutory obligations and that there were no obstacles to the proposed structure.

13. The legal assessment highlighted the need for each Partner Fund to distinguish between its role as a shareholder versus its customer role as an investor in a collective vehicle. Shareholder functions are subject to company law and key company documents. It was identified that as the council as a corporate body cannot exercise its rights as a shareholder directly, it would therefore need to act through a nominated shareholder representative.
14. At a meeting of Full Council of 22 February 2017, nomination of the shareholder representative was delegated to the Pension Fund Committee, with the Chair of the Pension Fund Committee nominated at that time.
15. Addressing the Fund’s investor rights in its capacity as a customer, a Joint Committee was formulated to provide a collective forum to discuss common BCPP investor issues. Each Partner Fund would be represented on the Joint Committee, and Full Council agreed in February 2017 that this customer role also be carried out by the Chair of the Pension Fund Committee. The Joint Committee was formally established by all Partner Funds signing the Inter Authority Agreement. Shareholders are also represented on the BCPP Board by representatives nominated by the Joint Committee.
16. The Joint Committee’s position within the BCPP governance arrangements are summarised in the diagram below.



17. The Inter Authority Agreement set out the role, Terms of Reference, and Constitution of the Joint Committee. The Agreement also established an

Officer Operations Group to support the Joint Committee, in which all Partner Funds are represented. The Inter Authority Agreement also provided for one Partner Fund to act as Host Authority for the Joint Committee which does not otherwise have a separate legal identity. The Agreement contained a clause however, to ensure that the liability for the Joint Committee is shared between Partner Funds.

18. The BCPP Shareholder Agreement set out a number of shareholder reserved matters, which can only be decided with the approval of all of the shareholders (unanimous reserved matters), or, with a shareholder majority defined as 75% of shareholders (shareholder majority reserved matters). A summary of unanimous reserved matters and shareholder majority reserved matters is included in Appendix 1.

Governance Review

19. Five years have now passed since BCPP was established and the governance model was approved by Partner Funds. Since then, the company has matured and as of the end of 2021 is responsible for managing c£34bn of Partner Fund assets. Additionally, the composition of the shareholders has changed with the merger of Tyne and Wear and Northumberland Pension Funds, whilst there has also been wider best practice and regulatory change.
20. It was therefore agreed that it would be timely to review the governance of BCPP with a view to understanding whether there are any changes that may be recommended for consideration by Partner Funds (as both customers and shareholders) and the Border to Coast Board. A four-stage review process has been undertaken, resulting in a review of the key BCPP governance documents and a number of proposed changes by external legal advisors appointed on behalf of the Partner Funds. A summary of the scope of the review is included in Appendix 2.

Summary of Proposed Governance Amendments

Inter Authority Agreement

21. It is proposed that the Inter Authority Agreement is brought up to date to reflect changes in legislation since the original drafting, the withdrawal of Northumberland County Council as a shareholder, and housekeeping such as the change of address of two of the shareholders. The Agreement is also amended to reflect that private market vehicles have been established to deal with unlisted assets.
22. The quoracy of the Joint Committee was addressed through the review, brought into particular focus in light of recent Joint Committee meetings

which were not quorate. The original quorum of the Joint Committee required that 8 voting members be present at the meeting, with the need to be physically present. Following discussions with the Joint Committee themselves, it is proposed to amend the Inter Authority Agreement to establish a revised quoracy of 60% - better reflecting the geographically diverse Committee. It is also proposed that the Agreement is amended to include a mechanism to allow a decision on a matter within the Joint Committee's remit outside of the Committee's normal meeting schedule.

23. The Joint Committee's Terms of Reference are to be amended to better reflect the progression of Border to Coast into its "post establishment and commencement of operations" phase. This will remove items relating to the period before Border to Coast became operational or are now considered to be shareholder matters.
24. The Inter Authority Agreement originally allowed for a Chair and Vice Chair term of one year, with each allowed to serve only two consecutive terms. It is proposed that the length of term of the roles is amended to two consecutive terms of two years, with elections consistent with the Annual Meetings of the shareholding councils to avoid the possibility that a Chair or vice Chair is not re-elected during their Joint Committee term.

Shareholder Agreement

25. In addition to the Inter Authority Agreement, the review also considered the BCPP Shareholder Agreement, including 'housekeeping' of the Agreement to remove provisions relating to the formation of the company which are no longer relevant.
26. The proportion of shareholders required to give consent in the case of majority reserved shareholder matter (see Appendix 1) outlined in the Shareholder Agreement was reviewed. Upon establishment of BCPP, such a majority was established at 75%. Advice received by Partner Funds indicates that reducing the 75% (i.e., 9 of 11) threshold is consistent with the requirement of Teckal¹ that Partner Funds must be able to "jointly exert decisive influence over the strategic objectives and significant decisions". It is desirable to reduce this majority to avoid the potential impact of a "blocking minority". A proposed reduction to a 66.67% majority (i.e., 8 of 11) will achieve this, whilst protecting the interests of minorities.
27. In reviewing the Shareholder Reserved Matters, the appropriateness of litigation remaining a Reserved Matter (in particular where BCPP needs

¹ Teckal establishes an exemption from public procurement for the award of contracts by public authorities, to a separate entity provided certain requirements are met. For the exemption to apply, public authorities must exercise sufficient control over the separate entity, and, the separate entity must carry out the essential part of its activities for its public authority owners.

to move quickly) was considered. Advice received by Partner Funds however, indicates that major litigation both by BCPP or against BCPP is within legitimate scope of a reserved matter, and it is therefore proposed that matter remains reserved for Shareholders.

28. The formation of a subsidiary of BCPP was originally a matter reserved for shareholders, though the review considered whether this could be relaxed in scenarios such as the establishment of vehicles to support Private Markets investment (which is one of the intended benefits of pooling). It is considered that it makes commercial sense for such a relaxation provided that any subsidiaries are consistent with Teckal¹. As such, it is intended that this is relaxed where such an action has already been approved as part of the BCPP Strategic Plan.
29. It is proposed that the requirement to approve Border to Coast's conflicts of interest policy is removed. It is considered unusual for Shareholders to be involved in approving a company's conflicts policy, however shareholders will still be required to approve any conflict or potential conflict of interest any director may have.
30. The proposed revisions to the Shareholder Agreement incorporate a supplemental agreement entered by Partner Funds in October 2020, related to liabilities arising within the ACS². The supplemental agreement outlined the provisions agreed by Partners to address the financial consequences of an error within the ACS. Consideration is currently being given to a supplemental agreement in relation to assets invested outside of the ACS (i.e., Border to Coast's Alternatives programme).
31. It is also proposed through the Articles of Association that the maximum number of Border to Coast Directors is increased from eight to ten in order to ensure that the company's board has sufficient expertise and diversity to properly function. The appointment of any directors will remain a shareholder reserved matter.

Shareholder Representative

32. As noted previously, the Fund's current shareholder representative is the Chair of the Pension Fund Committee. The legal advice received by Partner Funds makes clear that it is for each administering authority to determine who takes this role, and whether it should be an Officer or Member. Of the other 10 Partner Funds, at 8 funds the shareholder representative is an Officer, at only 2 funds is the representative is an Elected Member. The position at the time of writing is summarised in the table below:

² Authorised Contractual Scheme – A type of tax transparent collective investment vehicle authorised by the FCA, created to hold, and manage assets on behalf of several investors who are the co-owners of the assets.

Partner Fund	Shareholder Representative		
	S151 Officer	Senior Pensions Officer	Elected Member
Bedfordshire Pension Fund	✓		
Cumbria Pension Fund	✓		
East Riding Pension Fund		✓	
Lincolnshire Pension Fund	✓		
North Yorkshire Pension Fund			✓
South Yorkshire Pension Fund		✓	
Surrey Pension Fund	✓		
Teesside Pension Fund			✓
Tyne and Wear Pension Fund		✓	
Warwickshire Pension Fund	✓		

33. There can arise an irreconcilable conflict between a Councillor's statutory duty to act in the best interests of the Council and the duties on Directors to act in the best interests of the company. As such, Directors of council owned companies, are usually Officers. In the same way, the Pension Fund Committee Chair's duty to act in the best interests of the Council may conflict with the role of Border to Coast shareholder.
34. Following consultation with the Pension Fund Committee Chair, and in line with the council's usual practice, it is proposed that an Officer is named as the shareholder representative. It is intended that the Head of Pensions represents the council's shareholding in Border to Coast and provides periodic reporting to the Committee on the outcome of any shareholder resolutions, in order to maintain appropriate overview and scrutiny.
35. The proposal to amend the council's BCPP Shareholder representative will resolve the conflict outlined in paragraph 32, and should better ensure continuity in the undertaking of the role of BCPP shareholder. The proposed change also make more clear the distinction between the

Pension Fund Committee's role representing the Pension Fund as a customer of BCPP, and the council's role as a shareholder of BCPP.

Next Steps

36. There remains additional work ongoing which may require further updates to the company's governance documents. This includes a review of Border to Coast's Funding Model, a review of the provisions underpinning the company's 'B' Shares and the extension of the compensation agreement outlined previously.
37. Border to Coast 'B' Shares are used to raise capital to support the company, and following discussion with the Financial Conduct Authority (FCA) there is a question as to whether the way in which these shares are structured could be eligible for capital adequacy. The FCA have now indicated that they would like a change to be made to the terms of the 'B' Shares. It is not anticipated that the necessary change would materially impact shareholders' rights.
38. The Joint Committee received an update on the Governance Review at its meeting of 20th June 2022. It was outlined to the Committee that advice from Squire Patton Boggs makes clear that how the changes are approved is a matter for each administering authority. Each Partner Fund was asked to consider the route that it would follow to approve the governance changes, in line with their own constitution. It is expected that some Partner Funds will seek approval through Full Council, whilst other partners will utilise authority delegated to officers. It will be necessary for all Partner Funds to agree to the governance changes.
39. Whilst the original governance model for BCPP was approved by Full Council, the Corporate Director of Resources has delegated authority to exercise the rights in any company or other form of corporate body of which the Council is a shareholder. Given the consultation with the Joint Committee, on which the Council is represented by the Chair of the Pension Fund Committee, and the delegated authority of the Corporate Director it is therefore intended that the Corporate Director upon completion of the review be asked to finalise the approval and execution, where required, of all legal documents necessary to give effect to the proposed governance changes.

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Appendix 1: Matters Reserved for the BCPP Shareholders

Reserved Matters

PART A – Matters for approval by all the Shareholders (unanimous consent required)

1. subject to FCA rules, extend the activities of the Company outside the scope of the Business or close down any operation of the Business;
2. subject to FCA rules, give any guarantee or indemnity outside the ordinary course of the Business to secure the liabilities of any person or assume the obligations of any person (other than a wholly owned subsidiary) (e.g. guaranteeing a lease that does not relate to the Business of the Company);
3. subject to FCA rules, enter into or vary any contracts or arrangements with any of the Shareholders or any person with whom any shareholder is connected (whether as director, consultant, shareholder or otherwise) on terms which could give preferential rights to a specific Shareholder;
4. enter into any agreement not in the ordinary course of the Business and/or which is not on an arm's length basis;
5. enter into or vary any agreement for the provision of consultancy, management or other services by any person which will, or is likely to result in, the Company being managed otherwise than by its directors;
6. change the name of the Company;
7. pass a resolution or present a petition to wind up the Company or apply for an administration order or any order having similar effect in a different jurisdiction in relation to the Company unless in any case the Company is at the relevant time unable to pay its debts within the meaning of section 123 Insolvency Act 1986;
8. reduce or cancel any share capital of the Company, purchase its own shares, hold any shares in treasury, allot or agree to allot, whether actually or contingently, any of the share capital of the Company or any security of the Company convertible into share capital, grant any options or other rights to subscribe for or to convert any security into shares of the Company or alter the classification of any part of the share capital of the Company (in each case other than as expressly permitted by this Agreement and/or the Articles where no prior consent shall be required including, without limitation, pursuant to either **clause 4 (Finance & Regulatory Capital)** and/or **clause** Error! Reference source not found. **(Consequences of Breach)** and/or **Article 26** of the Articles **(Issue of Shares and Pre-Emption Rights)**);
9. other than as expressly permitted by this Agreement and/or the Articles, redeem or buy any existing Shares or otherwise reorganise the share capital of the Company;
10. admit any person as a member of the Company or an investor in the BCPP pool;
11. enter into any partnership, joint venture or profit sharing arrangement with any person (excluding entering into any investment or investment vehicle);

12. subject to FCA rules, alter any of the provisions of the Articles or any of the rights attaching to the Shares;
13. amalgamate or merge with any other company or business undertaking;
14. sell, lease (as lessor), license (as licensor), transfer or otherwise dispose of any of its material assets otherwise than in the ordinary course of the Business;
15. commence, settle or defend any claim, proceedings or other litigation brought by or against BCPP, except (i) in relation to debt collection (not exceeding £500,000) in the ordinary course of the Business and (ii) in relation to any investment related claims or proceedings relevant [to the investment sub-funds or other] collective investment vehicles established by BCPP; or (iii) in respect of non-material claims, proceedings or other litigation which involve actions for losses of less than £1,000,000 or such lower amount as the Shareholders may determine from time to time.
16. take out any third party loan(s) in respect of BCPP which (in aggregate) exceed the sum of £5,000,000;
17. form any subsidiary of BCPP, or acquire any shares in any other company, whether through subscription or transfer, such that the company concerned becomes a subsidiary of BCPP; other than where such action is taken in accordance with the Initial Strategic Plan or any Subsequent Strategic Plan.
18. determine the composition, governance arrangements and limits of authority of any and all subsidiaries of BCPP in such a way that will not invalidate the continued application to BCPP of the "Teckal exemption" codified under Regulation 12 of the Public Contracts Regulations 2015;
19. make any capitalisation, repayment or other distribution of any amount standing to the credit of any reserve of the Company or pay or declare any dividend or other distribution to the Shareholders save that no consent will be required to pay the B Share Dividend.

PART B – Matters for approval by a Shareholder Majority only

1. enter into or materially vary any licence or other similar agreement relating to intellectual property to be licensed to or by the Company which is otherwise than in the ordinary course of the Business;
2. appoint or remove the auditors of the Company;
3. alter the Company's accounting reference date;
4. make any significant change to any of the Company's accounting or reporting practices other than conforming with any changes made to the accounting standards adopted by the Company;
5. approve the annual accounts of the Company;
6. determine the amount of, or any increase in, remuneration payable to any directors from time to time;
7. establish any pension scheme (i.e. for employees of the Company);
8. subject to FCA rules, enter into any agency, distribution or similar agreement which confers or is expressed to confer any element of exclusivity as regards any goods or services the subject of such agreement or as to the area of the agreement or vary such an agreement to include any such exclusivity;
9. incur in any financial year any item or series of items of capital expenditure including finance leases (but excluding operating leases) of more than £5,000,000 (unless provided for in the Initial Strategic Plan or any Subsequent Strategic Plan);
10. enter into or vary any operating lease either as lessor or lessee, of any plant, property or equipment of a duration exceeding 5 years or involving aggregate premium and annual rental payments in excess of £500,000 (unless provided for in the Initial Strategic Plan or any Subsequent Strategic Plan);
11. [adoption of (and any amendment of) any written conflicts policy;]
12. approval of any conflict or potential conflict of interest any director may have which would preclude him or her from being included in the quorum of any meeting of the directors;
13. appointment of the Chair and any director, any alternate director (who is not at the time a director of the Company) and including, for the avoidance of doubt any subsequent Chair in accordance with the Companies Act 2006 or otherwise; and
14. removal of any director and, for the avoidance of doubt, the Chair in accordance with the Companies Act 2006 or otherwise.
15. approving and adopting a Strategic Plan (including the Annual Budget) and / or amending any such plan.

Appendix 2: Scope of Review

Overarching principles for the Review

Any changes to governance need to take account of:

- any control issues arising as required under “teckal”
- FCA requirements regarding business control / independence (to which consideration will need to be given about whether any consultation with either the FCA or Depo will be required)
- Companies Act
- Corporate Governance Code (recognising the Company’s size and ownership structure whilst noting the Company’s position in holding to account companies in which it invests on behalf of Partner Funds)
- The guiding principles agreed when establishing Border to Coast

Areas to Cover as part of the Review

Joint Committee

- Periods for the appointment of Chair and Vice Chair and how many terms they can serve. Currently, the appointment is one year and they can only serve two terms.
- Quorum for the Joint Committee. This is currently 8 out of 11.
- Review the overall terms of reference to see if they are fit for purpose and reflect the actual arrangements in place. These are set out in the Inter Authority Agreement and are also included in Appendix I of the Governance Charter. This will involve:
 - o A line by line review of each point, including whether items should be removed or amended
 - o Consideration of whether any of the items in the pre-operational phase should be carried forward to the operational stage
 - o Consideration as to whether any items should be added

Shareholder Agreement

- A review of the Matters reserved for Decision by Shareholders. This is contained in Appendix II of the Governance Charter. This will involve:
 - o A line by line review of each item, including whether items should be removed (especially those in relation to the initial set up)
 - o Consideration of other areas that should be added to the list of Reserved Matters
 - o Consideration of which items require 100% approval from shareholders
 - o Consideration of which items require majority approval (currently 75%)
 - o Consideration of the level of majority required.

Articles of Association

- Consideration as to whether the minimum (4) and maximum (8) number of directors is correct
- The removal of any terms that no longer apply now that the company is operational.
- The rights and obligations underpinning the Class B share issuance may need to be reviewed pending current FCA review of another pool's arrangements (the fact pattern may be different).

Other

- In 2018 it was agreed that two NEDs would be nominated by the Partners Funds. At this time it was agreed that they would serve for two years and only be able to serve for two further terms as a maximum (but not 3 concurrently). Consideration should be given to these restrictions and whether changes should be made.