

To Norges Bank

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UNOFFICIAL TRANSLATION

Recommendation to exclude AviChina Industry & Technology Co Ltd from investment by the Norwegian Government Pension Fund Global (GPFG)

Summary

The Council on Ethics recommends that AviChina Industry & Technology Co Ltd (AviChina) be excluded from investment by the Norwegian Government Pension Fund Global (GPF) due to an unacceptable risk that the company sells weapons to a state that uses weapons in ways that constitute serious and systematic violations of international humanitarian law (IHL). The background for this recommendation is the sale of light combat aircraft to the armed forces in Myanmar.

AviChina is a Chinese company that engages in the development and sale of aircraft and aviation products. At the close of 2021, the GPF owned 0.37 per cent of the company's shares, worth NOK 137 million. The company is listed on the Hong Kong Stock Exchange (HKEX).

In December 2021, several light combat aircraft of the type K-8 were delivered to the armed forces in Myanmar. The aircraft are thought to have been produced by companies which AviChina controls. It has been reported that such aircraft have previously been used in combat in Myanmar.

In February 2021, the armed forces in Myanmar staged a coup d'état. Both before and after the coup, the armed forces have perpetrated extremely serious abuses against the civilian population, relating in part to ongoing armed conflicts in the country. Several UN bodies have reported that the armed forces have deliberately attacked civilian targets. In some cases, this has involved the use of combat aircraft. The attacks have been numerous and constitute, in the Council on Ethics' assessment, serious and systematic violations of IHL. This information has long been in the public domain, and the Council takes the position that anyone selling weapons to Myanmar since 2018 should have understood that they could be used in violation of IHL.

In its assessment of the risk of contributing to new abuses forward in time, the Council has attached importance to the fact that the company supplied aircraft to Myanmar despite the military coup and the information concerning the armed forces' abuses. The delivery in December 2021 is said to be part of a larger contract, which indicates that further deliveries may take place. Although the Council has contacted the company on several occasions, it has not replied to the Council's queries.

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1 Introduction

The Council on Ethics has assessed the Norwegian Government Pension Fund Global's investment in AviChina Industry & Technology Co Ltd¹ (AviChina) against the Guidelines for Observation and Exclusion from the Government Pension Fund Global (the ethical guidelines).² This recommendation relates to the sale of light combat aircraft to the regime in Myanmar.

AviChina is a Chinese company that engages in research, development, production and sale of aircraft and aviation products. This case relates to the sale of aircraft manufactured by Hongdu Aviation Industry and Harbin Aircraft Industry Group. Harbin is wholly owned by AviChina, while AviChina owns 43 per cent of the shares in Hongdu, making it the company's controlling shareholder.³ The Chinese state is AviChina's largest shareholder, with a 56 per cent stake.

At the close of 2021, the Norwegian Government Pension Fund Global (GPF) owned 0.37 per cent of the shares in AviChina, worth NOK 137 million. The company is listed on the Stock Exchange of Hong Kong (HKEX).

1.1 Matters considered by the Council

The Council on Ethics has assessed the GPF's investment in AviChina against section 4(c) of the ethical guidelines: "Companies may be excluded or placed under observation if there is an unacceptable risk that the company contributes to or is responsible for: [...] c) the sale of weapons to states engaged in armed conflict that use the weapons in ways that constitute serious and systematic violations of the international rules on the conduct of hostilities."

This criterion was included in the ethical guidelines in 2021 in accordance with a proposal from the Ethics Commission, which evaluated the GPF's ethical framework in 2019–2020.⁴ The government's white paper to the Norwegian parliament (the Storting) on the government pension fund for 2021 explains that the new criterion is a supplement to and further development of the conduct-based criterion concerning the violation of the rights of individuals in situations of war or conflict.⁵ The new criterion makes it clear that companies which sell weapons to states engaged in armed conflicts may be excluded from the GPF, not merely those which operate in such conflict zones.

In this case, the Council has first assessed whether the products sold by the company fall within the scope of the criterion. The Ethics Commission understood the term 'weapon' to

¹ Issuer ID: 8381275

² Guidelines for Observation and Exclusion of companies from the Government Pension Fund Global (GPF), <https://files.nettsteder.regjeringen.no/wpuploads01/sites/275/2021/11/Guidelines-for-Observation-and-Exclusion-GPF-29-November-2021.pdf>.

³ The company was listed as a "subsidiary" in the company's 2021 annual report, AviChina Annual Report 2021, <https://www.avichina.com/upload/2022/04/202204251740254498.pdf>.

⁴ NOU 2020: 7 Verdier og ansvar — Det etiske rammeverket for Statens pensjonsfond utland, <https://www.regjeringen.no/contentassets/86dac65c22384dda9584dc2b1a052a91/no/pdfs/nou202020200007000dddpdfs.pdf>. (Values and Responsibility – The Ethical Framework for the Norwegian Government Pension Fund Global, English summary available at: <https://www.regjeringen.no/en/dokumenter/nou-2020-7/id2706536/>).

⁵ Meld. St. 24, Statens pensjonsfond 2021 p. 119, <https://www.regjeringen.no/contentassets/524ad2307e424c3b9a9ff52b06569e24/no/pdfs/stm202020210024000dddpdfs.pdf>. (The Government Pension Funds 2021 – Executive Summary in English available at: <https://www.regjeringen.no/en/dokumenter/meld.-st.-24-20202021/id2843255/>).

encompass military equipment that may be used in combat and directly impact civilians.⁶ The Commission considered that the criterion could come to be applied to powerful, high-tech weapons. At the same time, the Commission took the view that the problem lay not with the weapons' inherent properties but their use in violation of IHL. Both the white paper on the Ethics Commission's report,⁷ and the parliamentary Finance Committee's deliberations thereon,⁸ make it clear that the criterion will encompass various military equipment in addition to weapons, such as ammunition. In its white paper, the Ministry of Finance also underlined that "*the key issue is the [weapons'] use and its consequences for civilians*".⁹

The Council has, furthermore, assessed whether the purchaser is a "*state engaged in armed conflict*". From the Ethics Commission's report, it follows that the criterion encompasses conflicts defined in the Geneva Conventions and their supplementary protocols.¹⁰ In relation to this criterion, as for the criterion concerning violation of the rights of individuals in situations of war or conflict (section 4(b) of the ethical guidelines), the Council attaches importance to whether the parties to the conflict or relevant international organisations recognise that an armed conflict is taking place.¹¹ The criterion covers both international and non-international conflicts. With respect to the latter, the Council attaches importance to the existence of a violent situation where organised groups participate in hostilities that go beyond internal turbulence and tense situations. As in previous cases, the Council considers that companies must act with due diligence to avoid contributing to serious norm violations in situations of war and conflict.¹²

The Council has also assessed whether, pursuant to section 4(c) of the ethical guidelines, "*serious and systematic violations of the international rules on the conduct of hostilities*" are taking place in the conflict in Myanmar. According to the Ethics Commission's report, this wording is meant to encompass the following:

*"(...) repeated use of weapons in contravention of humanitarian law, particularly the rules intended to protect civilians. (...) Violations of humanitarian law must be serious and systematic (long-lasting) and reflect systemic failures, for example in the selection of targets, the taking of precautions or the assessment of proportionality. The difficulty of identification of military targets will vary with the nature of the conflict and must be taken into account in the evaluation. The extent to which the reason for serious and systematic violations of international humanitarian law lies in a lack of willingness or in an inability to comply is less important."*¹³

In this assessment, section 4(c) of the ethical guidelines presumes that the company contributes to such serious norm violations through the sale of products and services. Pursuant to the criterion, companies may be considered for exclusion if the purchaser uses the weapons in violation of IHL. On this point, the Council understands the criterion such that there must

⁶ NOU 2020: 7, p. 190.

⁷ Meld. St. 24, Statens pensjonsfond 2021 p. 119 and Innst. 556 S – 2020–2021 (Recommendation from the Storting's Finance Committee concerning the government pension funds 2021) p. 13, <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2020-2021/inns-202021-556s.pdf>.

⁸ Innstilling fra finanskomiteen om Statens pensjonsfond 2021 (Recommendation from the Storting's Finance Committee concerning the government pension funds 2021), <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2020-2021/inns-202021-556s/>.

⁹ Meld. St. 24, Statens pensjonsfond 2021 p. 120.

¹⁰ NOU 2020: 7, p. 191.

¹¹ For example, see the recommendation relating to Kirin Holdings Co Ltd, <https://etikkradet.no/kirin-holdings-co-ltd/>.

¹² For example, see the recommendation relating to Kirin Holdings Co Ltd.

¹³ NOU 2020: 7, p. 191.

be a clear link between the type of weapons/military equipment sold and the violation of IHL. It may, for example, be known that the type of weapon sold has been used in attacks on civilians. The Council does not require documentation linking specific weapons to specific violations. With respect to the company's knowledge of the weapons' use, the Ethics Commission's report states that it must be possible "*with a reasonable degree of certainty to substantiate that the company had knowledge of or should have been able to foresee use that constitutes a violation of international humanitarian law*".¹⁴

In keeping with the ethical guidelines as a whole, exclusion under this criterion is not intended to punish companies but to sever the GPFG's association with unacceptable conditions that are ongoing or may occur in the future. In other words, the decisive factor is the risk of norm violations forward in time.

According to the 2021 report to the Storting on the government pension funds, importance may be attached to risk factors at the country and sectoral level when assessing individual cases where access to information is limited.¹⁵ The report to the Storting also established that importance may be attached to companies' failure to reply to the Council on Ethics' queries.

1.2 Sources

In this recommendation, the Council has made use of publicly available sources from international courts, UN organisations, the media, civil society and official public bodies.

2 Background

Following decades of successive military regimes, Myanmar adopted a new constitution in 2008, which established a hybrid form of government, combining civilian and military elements. After 13 years of such semi-civilian government, the armed forces staged a coup d'état in February 2021 and declared that Commander-in-Chief Min Aung Hlaing and the *State Administrative Council* had taken power. The armed forces had carried out extremely serious abuses against the country's civilian population both before and after the coup.¹⁶ Many of the abuses have taken place in connection with ongoing armed conflicts in which the security forces are fighting armed ethnic groups, for example in the states of Kachin, Rakhine and Shan. In a report to the UN Human Rights Council, the UN High Commissioner for Human Rights stated that, since the coup, new armed groups have been established to fight the military, at the same time as existing conflicts have intensified.¹⁷ The High Commissioner wrote:

"Myanmar is caught in a downward spiral of violence characterized by the increasingly brutal repression of individuals actually or seemingly opposed to military rule, by violent resistance to the coup and by several active non-international armed conflicts. Tatmadaw forces target civilians and continue to use explosive weapons with

¹⁴ NOU 2020: 7, p. 191.

¹⁵ Meld. St. 24, Statens pensjonsfond 2021 p. 139.

¹⁶ For example, see Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, 12 September 2018, <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/reportofthe-myanmar-ffm> and *Situation of Human Rights in Myanmar since 1 February 2021 – Report of the UN High Commissioner for Human Rights*, 15 March 2022, <https://reliefweb.int/report/myanmar/situation-human-rights-myanmar-1-february-2021-report-un-high-commissioner-human>.

¹⁷ Human Rights Council, 15 March 2022.

wide-ranging effects in populated areas. They are also increasingly reliant on air power, including helicopter gunships and air strikes. Over 440,000 persons have been displaced by armed clashes since 1 February and as many as 14.4 million people are now urgently in need of humanitarian assistance."¹⁸

The High Commissioner concluded by saying that *"in the conduct of hostilities, deliberate attacks against civilians and civilian objects, the use of human shields and forced displacement, which have occurred in Myanmar, constitute serious violations of international humanitarian law possibly amounting to war crimes"*.¹⁹

In the report *"Enabling Atrocities: UN Member States' Arms Transfers to the Myanmar Military"* (February 2022), the UN's Special Rapporteur on the Situation of Human Rights in Myanmar described how states enable abuses in the country by permitting weapons exports.²⁰ The Special Rapporteur wrote:

"To carry out its attacks, the junta has utilized internationally acquired jet aircraft, combat helicopters, armored personnel vehicles, and missiles to target civilians in violation of humanitarian law and international criminal law. Attacks against civilians, and the indiscriminate bombing of homes and villages, are escalating.

Violent conflict between the military and armed groups existed in Myanmar for many years before the coup. The majority of the conflicts have taken place in the north and east of the country. Since 2012, there has also been conflict in the west of the country, which has had a particular impact on the Rohingya minority. The Rohingya are a stateless, largely Muslim, group of people. Due to allegations of serious abuses against the civilian population in Myanmar, the UN Human Rights Council established an independent fact-finding mission in April 2017 to investigate human rights violations in the country. Shortly afterwards, in August 2017, the situation escalated. The armed forces launched so-called 'clearance operations' targeting the Rohingya, which led to thousands being killed, while at least 700,000 Rohingya were driven from their homes.

The Independent International Fact-Finding Mission on Myanmar (IIFMM) submitted its first report to the Human Rights Council in September 2018. The IIFMM stated that the armed forces' operations *"are based on policies, tactics and conduct that consistently fail to respect international law, including by deliberately targeting civilians"*.²¹ The report concluded that norm violations could constitute crimes against humanity and amount to war crimes, and that there were indications of genocide. Referring to the IIFMM's investigations, the Special Rapporteur stated in 2021 that:

"The Myanmar military's systemic violation of the Geneva Conventions and perpetration of atrocity crimes have been reported by a variety of organizations for over three decades. Despite the longstanding evidence, the Special Rapporteur submits that at a minimum by 2018 all Member States knew, or would have expected, that arms

¹⁸ Human Rights Council, 15 March 2022, p. 13.

¹⁹ Human Rights Council, 15 March 2022, p. 12.

²⁰ Human Rights Council, *Enabling Atrocities: UN Member States' Arms Transfers to the Myanmar Military*, conference room paper of the Special Rapporteur on the Situation of Human Rights in Myanmar, 22 February 2022, <https://reliefweb.int/sites/reliefweb.int/files/resources/Enabling%20Atrocities%20UN%20Member%20States%20Arms%20Transfers%20to%20the%20Myanmar%20Military.pdf>.

²¹ Human Rights Council, 12 September 2018, *Summary*.

*transferred to Myanmar would be used in attacks against civilians in violation of international law.”*²²

The atrocities, particularly those targeting the Rohingya, have led to the initiation of legal proceedings in the International Court of Justice (ICJ) for violation of the Genocide Convention²³ and in the International Criminal Court (ICC) for crimes against humanity.²⁴ Myanmar has argued in the ICJ that there is no evidence of any intent to commit genocide, although it cannot be ruled out that the military may have used disproportionate force and has not distinguished clearly between armed combatants and the civilian population. Myanmar acknowledges that some violation of IHL may have taken place.²⁵

3 Sale of weapons to Myanmar

It has been claimed that Hongdu Aviation supplied light combat aircraft of the type Karakorum-8 (K-8) to the armed forces in Myanmar in the period 2011–2015.²⁶ The deliveries are thought to be part of a larger contract signed in 2009, which covers around 50 K-8 aircraft.

Military-controlled media report that the K-8 can be used in “*air to air warfare, air to surface warfare, close aviation supporting fire, interception fighting, armed reconnaissance, and training of transfer*”.²⁷ It has been reported that K-8 aircraft were actively deployed in the armed conflict in Kachin in 2013.²⁸ In 2018, the IIFFMM said that in this conflict the armed forces had committed abuses against the civilian population that “*undoubtedly amount to the gravest crimes under international law*”.²⁹

In December 2021, information concerning the delivery of four K-8 and four Y-12 aircraft became known.³⁰ This latter is a transport aircraft produced by Harbin Aircraft Industry Group. Both the K-8 and the Y-12 are mentioned in AviChina’s annual report under the heading “Principal Products of the Group”.³¹

²² Human Rights Council, 22 February 2022.

²³ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, <https://www.icj-cij.org/en/case/178>.

²⁴ International Criminal Court, *Bangladesh/Myanmar, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, <https://www.icc-cpi.int/bangladesh-myanmar>.

²⁵ International Court of Justice, p. 16.

²⁶ ISS ESG, *AviChina Industry & Technology Co. Ltd. Norm-Based Research Company Report*, based in part on data from the Stockholm International Peace Research Institute (SIPRI Arms Transfers Database), <https://www.sipri.org/databases/armstransfers>.

²⁷ The Global New Light of Myanmar, Only when all officers and the rank and file of mechanical engineering, navigation, radar and meteorological sectors work in concert will they successfully perform all military operations, Senior General stresses, 16 December 2021, <https://www.gnlm.com.mm/only-when-all-officers-and-the-rank-and-file-of-mechanical-engineering-navigation-radar-and-meteorological-sectors-work-in-concert-will-they-successfully-perform-all-military-operations-senior-gene/>.

²⁸ Al Jazeera, *Myanmar airstrikes reopen ethnic wounds*, 10 January 2013, <https://www.aljazeera.com/features/2013/1/10/myanmar-airstrikes-reopen-ethnic-wounds>.

²⁹ Human Rights Council, 12 September 2018, p. 19.

³⁰ Janes, *Myanmar Air Force inducts new aircraft*, 17 December 2021, <https://www.janes.com/defence-news/news-detail/myanmar-air-force-inducts-new-aircraft> and SIPRI Arms Transfers Database.

³¹ AviChina, Annual Report 2021, p. 3.

4 Information from the company

The Council on Ethics contacted the company several times in the period January to May 2022. The company has not replied to the Council's queries.

5 The Council's assessment

The Council on Ethics has assessed the GPFG's investment in AviChina against the ethical guidelines' criterion on the sale of weapons to states engaged in armed conflicts, see section 4(c). The Council rests its assessment on the Norwegian Ministry of Finance's understanding that the new criterion is a supplement to and further development of the conduct-based criterion applying to the violation of the rights of individuals in situations of war or conflict. As in previous cases, the Council also takes the position that companies must act with particular care and due diligence to avoid contributing to serious norm violations in areas of war or conflict.

The first question in this case is whether the K-8 aircraft is a weapon encompassed by the criterion. Since such aircraft can be used in combat and it has been reported that such planes have previously been used in this way, the Council concludes that the aircraft does fall within the scope of the criterion. The damage potential is substantial and attacks made using this type of aircraft could impact civilians. The Council further notes the sale of transport aircraft to the armed forces, but does not attach decisive importance to this fact.

Authoritative sources have recognised that numerous non-international armed conflicts have been underway in Myanmar for many years. Extremely serious abuses against the civilian population have long been reported in connection with these conflicts. Several bodies, including the Independent International Fact-Finding Mission on Myanmar (IIFMM), the UN High Commissioner for Human Rights and the UN's Special Rapporteur on the Situation of Human Rights in Myanmar, have reported that the armed forces have deliberately attacked civilian targets. Such attacks have also been made using combat aircraft. Based on the extensive documentation of these abuses, the Council finds that serious and systematic violations of the international rules on the conduct of hostilities are taking place in Myanmar. This information has been widely known for a long time. The Council concurs with the UN Special Rapporteur's position that anyone selling weapons to Myanmar since 2018 should have understood that they could be used in violation of international law. In this case, it has been further disclosed that, as far back as 2013, K-8 aircraft were deployed in combat in Kachin, where extremely serious abuses against the civilian population have subsequently been documented.

When assessing the risk of the company's potential contribution to new abuses forward in time, the Council has attached importance to the fact that aircraft were as recently as in December 2021 delivered to Myanmar, despite the military coup and the wealth of information concerning the armed forces' abuses. The delivery is also said to be part of a larger contract, which indicates that additional deliveries may be made. Although the Council has contacted the company on several occasions, AviChina has not responded to its queries. On this basis the Council recommends that AviChina be excluded from investment by the GPFG.

6 Recommendation

The Council on Ethics recommends that AviChina Industry & Technology Co Ltd be excluded from investment by the Norwegian Government Pension Fund Global (GPF)

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