

Letter sent to the Ministry of Finance 13 October 2020

# Consultation NOU 2020: 7 Values and Responsibility

The Council on Ethics for the Norwegian Government Pension Fund Global (GPFG) refers to the letter dated 24 June in which the Council is invited to submit its comments on NOU 2020:7 Values and Responsibility.

For the Council, it is important that the guidelines for the observation and exclusion of companies from the GPFG (ethical guidelines) are as clear as possible, and that the preparatory works also provide unambiguous directions for the work undertaken under those guidelines. Furthermore, the guidelines should answer the most important ethical challenges associated with the GPFG's investments. The Council considers that the Commission's report contributes to this. The report also addresses several of the comments which the Council submitted to the Ministry of Finance in its letter of 13 November 2018.<sup>1</sup> While building on the current arrangement, the Commission proposes adjustments to both the guidelines and the interpretation thereof, which reflect new ethical issues and the expansion of the GPFG's investment universe.

In this letter, the Council wishes to give its broad support to the Commission's proposals and illustrate the impact they may have for the Council's work. Furthermore, the Council proposes the clarification of certain points and illustrates some dilemmas that may arise when implementing the guidelines.

## 1. Reintroduction of the objects clause

The Commission proposes the reintroduction of a clause setting out the purpose of the work performed under the GPFG's ethical guidelines. "*The object of the guidelines for the observation and exclusion of companies from the Norwegian Government Pension Fund Global (GPFG) is to avoid the Fund being invested in companies that cause or contribute to serious violation of fundamental ethical norms as determined in sections 3 and 4 of these guidelines*".<sup>2</sup> The Council agrees that the purpose of the arrangement should be stated in the guidelines, and endorses the Commission's proposal.

The proposal will have little practical impact on the Council's work, since this object already underpins its work. When the Council embarks on an evaluation of a company, it is always with the goal of determining whether the company's activities fall within the scope of the guidelines. Nevertheless, the Council's assessment is affected by whether the company shows a willingness to implement measures that can reduce the risk of new norm violations. The GPFG can *avoid* an investment being in breach of the guidelines by selling its investment in

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<sup>1</sup> The Council's letter to the Norwegian Ministry of Finance is available at [https://www.regjeringen.no/contentassets/7fb88d969ba34ea6a0cd9225b28711a9/oppfolging\\_meldingen\\_spu\\_2018.pdf](https://www.regjeringen.no/contentassets/7fb88d969ba34ea6a0cd9225b28711a9/oppfolging_meldingen_spu_2018.pdf).

<sup>2</sup> All references to the guidelines refer to the Commission's proposed revised guidelines.

the company or by the company changing its behaviour, either during the Council's assessment process or a period of formal observation, or while Norges Bank engages in a shareholder dialogue with the company.

## **2. The Commission's assessment of the product criteria**

### ***Extending their scope***

The Commission recommends that the scope of the guidelines' section 3 (the product criteria) be extended from companies that are part of the GPFG's portfolio to also apply to companies that are solely in the reference index. No corresponding extension of the Council's duty to identify relevant companies has been proposed, see section 5(2) which states that the Council monitors the GPFG's "investments". Neither the background for this proposal nor its implications are not clearly expressed in the report.

The Council has understood the matter such that, under the current guidelines, the GPFG, in connection with the expansion of the reference index to new countries, must acquire a stake in tobacco companies, for example, before it is possible to formally exclude those companies and thereby exclude them from the reference index against which the GPFG's return is measured. The Commission's proposal will enable such companies to be excluded without the GPFG first acquiring a stake in them.

Since the Council monitors the GPFG's investments and not the reference index, Norges Bank must, in such cases, ask the Council to assess a company against section 5(3) of its ethical guidelines. A general duty to monitor the reference index would require additional resources, while providing little benefit, since there is no guarantee that the GPFG will acquire shares in a company included in the reference index.

The Council would otherwise like to point out that tobacco is defined as a separate sub-sector in the FTSE's classification system, which one might consider removing from the reference index in its entirety. The change proposed by the Commission should nevertheless be maintained, since there are tobacco-producing companies in other sectors too, and since the provision may also affect the other product criteria, where a specific assessment of each individual company must be performed in any case.

### ***Proposed changes to the weapons criterion***

The Commission proposes that the criterion relating to the exclusion of producers of certain types of weapon be amended such that the weapons types to which the provision applies are included in the criterion itself, and such that it is made clear that both the development and production of key components of such weapons shall lead to exclusion. This is currently only stated in the annual report to the Norwegian Storting on the GPFG's management. The Council agrees that key particularisations should be included in the guidelines rather than being stated in reports to the Storting. The Commission also proposes that lethal autonomous weapons be included in the list of weapons. The Council has previously pointed out that lethal autonomous weapons may contravene fundamental humanitarian principles, and endorses the inclusion of such weapons in the list.

### ***Proposed changes to the interpretation of what may be included in the definition of nuclear weapons and their key components***

The Commission proposes that certain types of delivery platforms should be deemed to be part of a nuclear weapon or its key components. This applies primarily to submarines, but

may also encompass other types of platforms. The Council presumes that such an extension of the criterion's scope is relatively simple to operationalise, and that it would apply to a limited number of companies. This has been a difficult demarcation issue for the Council, and it has not been obvious, based on the guidelines' preparatory works, where the line for what constitutes a nuclear weapon's key components should be drawn. The Council has no objections to the Commission's proposal, and is glad of clarification with respect to this issue.

The Commission points to several further issues that may be raised in connection with the assessment of products that have several applications, so-called *dual use*. To date, the development or production of products that may be used for several purposes, one of which relates to nuclear weapons, have not constituted grounds for the producer's exclusion. The Commission recommends that this practice be maintained, but admits that it may be necessary to make certain exceptions to this general rule if a growing number of dual-use systems and products should materialise going forward. The Council understands the proposal such that exemptions will relate to products where the *dual-use* capability significantly increases the risk of their unintentional use in nuclear weapons. The Council endorses this.

### **3. The Commission's assessment of the behavioural criteria**

#### ***Proposed change to the human rights criterion***

The Council endorses the Commission's proposal to delete the examples from the human rights criterion, and agrees with the Commission's view that a general reference to human rights, without a list of individual rights, constitutes a strengthening of the provision.

#### ***New behavioural criterion – Sale of weapons to certain states***

Some have questioned whether today's criterion relating to serious infringement of the rights of individuals in war and conflict situations could apply to companies that sell weapons to warring states, which use them in violation of humanitarian law. The Council has taken the view that there must be a clear element of contribution to such violations through the sale and later use of these weapons if such a company is to qualify for exclusion under the war and conflict criterion. Thus far, therefore, the Council has not recommended the exclusion of companies on the grounds of the sale of weapons to such warring states. The Commission proposes the introduction of a new behavioural criterion relating to the sale of weapons to states involved in armed conflict, where there is an unacceptable risk that the weapons will be used in military operations that result in serious and systematic violation of humanitarian law. The Commission considers that the criterion should apply to weapons that can cause direct harm to civilians, and that in practice it will probably apply to powerful weapons whose consequences for civilians are extensive when they are used in violation of international law. At the same time, the Commission underlines that the criterion is not meant to apply to companies which sell weapons to warring parties that have established the necessary systems to comply with the rules for distinction, and that the violation of humanitarian law must be serious and lasting before the criterion may be invoked.

The Council endorses the Commission's proposal for the introduction of a new criterion in the guidelines. The Council notes that the threshold for exclusion under the proposed criterion is intended to be extremely high. Nevertheless, the Council considers that the threshold for exclusion is not as high as that applied by the Council when such weapons sales have been assessed under the existing war and conflict criterion, with respect to the extent of a company's contribution to the underlying norm violations. A new criterion will enable the maintenance of the contribution-based approach applied under the existing war and conflict

criterion, while introducing a more tailored and specific criterion for weapons sales. An individual assessment must nevertheless be performed, in which the products the company actually sells and the company's risk-reducing plans will play a role. The Council will facilitate the same type of dialogue with companies being assessed under this criterion as for other behavioural criteria.

The main challenge to operationalising this criterion will be access to relevant, reliable and up-to-date information. The Commission presumes the existence of suitable references that the Council may make use of to identify which conflicts the criterion shall apply to. The Commission also presumes that when an armed conflict develops such that one or more parties commit serious or systematic violations of humanitarian law, this will be reflected in their treatment by international and national bodies, such that in some cases it may be possible to obtain information from these. The Council considers that descriptions of lasting and systematic violations of humanitarian law should be based on a wide body of international sources from state and non-state institutions. The Council is aware of the existence of recognised, open databases that the Council may consult, in addition to reports from well-reputed civil society organisations. Relevant sources of information may, for example, also include reports to the UN Security Council, independent reports from expert or investigative commissions established under the auspices of the UN Human Rights Council or similar bodies, annual reports published by the International Committee of the Red Cross or court papers prepared for international tribunals such as the International Court of Justice in the Hague and the International Criminal Court or national court systems.

As the Commission points out, it could be difficult in certain types of cases to draw a sharp distinction between companies' operations and states' actions. The link between companies and states will be particularly strong in connection with the sale of military weapons. The Council's task has always been to assess the GPF's investments in companies against its ethical guidelines, not to assess the actions of states. In the Council's view, it is important that this remains the case, even though recommendations to exclude companies under this criterion may be perceived as criticism of government authorities.

### ***Corruption and other serious financial crime***

The Council endorses the Commission's proposal to expand the corruption criterion to also encompass other serious financial crime. Firstly, the Council agrees with the Commission that, as a matter of principle, it would be inconsistent if in the area of finance only corruption were to lead to exclusion, since other forms of financial crime can have an equally harmful impact on society as corruption. Secondly, the Council has observed a growing number of cases relating to financial crime, particularly money laundering. This may be because banks and financial institutions are among the largest sectors in the GPF.

Assessing corruption risk has been challenging for the Council, and only two companies have been excluded from the GPF on this basis, despite many more having been involved in corruption. This may also be the case with respect to other financial crime. A prerequisite for assessing the exclusion of a company under the corruption criterion is that the company's involvement in corruption is well documented. As the Commission points out, companies involved in corruption generally go to great lengths to conceal the fact. Enforcement of corruption laws varies substantially from country to country, and it may be a matter of pure chance *whether* and *when* information concerning corrupt acts comes to light. According to the Commission, such considerations mean that the probability of a company committing *new* corrupt acts should not have to meet such strict standards when assessing its exclusion. The

Council understands this to mean that previous corrupt acts in and of themselves could be indicative of future risk, but that other factors may also be taken into account. The Council considers that all cases of financial crime that a company is involved in must be seen in conjunction, since they may in sum indicate that the company does not have systems in place to avoid becoming involved in such norm violations.

When assessing the risk of corruption, the Council attaches considerable importance to the measures that companies implement to avoid becoming involved in corruption once again. However, although companies that have been involved in financial crime often improve their formal compliance frameworks, by implementing codes of conduct, training programmes, third-party assessments, whistleblowing systems, etc, they may differ substantially in the degree to which the guidelines are complied with in practice. The Council's ability to make an accurate assessment depends on companies sharing detailed information. The Council therefore supports the Commission's proposal that companies' willingness and ability to cooperate in the elucidation of a case being assessed under this criterion should be given greater weight than before.

The Council agrees with the Commission's view that assessments of other types of financial crime may to some extent be based on the same approach as for corruption cases. Nevertheless, such assessments will require different competences and methods, as well as greater capacity than the Council currently has at its disposal. An increased effort in this area therefore presumes that the Council's secretariat is furnished with additional capacity and competence in the field of financial crime, which will necessarily take some time to organise.

#### **4. Access to information and companies domiciled in countries with repressive regimes**

The Commission's report addresses several of the concerns that the Council communicated to the Ministry of Finance in its letter of 13 November 2018. In this letter, the Council pointed out that some emerging markets are more challenging for the Council to deal with than others, and that this is in large measure due to a lack of access to information in closed countries with repressive regimes, where the human rights situation is also a matter of general concern. In such countries, the media and civil society are often unable to document and report on norm violations, the authorities themselves lack effective control mechanisms, and it can be positively dangerous to undertake independent field studies.

The Council considers that the Commission's proposals relating to these issues could be of help in working with such companies, even though many of the same challenges will remain, since the Commission does not propose any form of "prior filtration" of countries, sectors or companies. The Council has otherwise noted the Commission's highlighting of the fact that when approving new markets, Norges Bank must be expected to attach importance to the possibility of following up its mandated obligation to engage in responsible investment. In the Council's view, this could have a major impact on whether the GPFG invests in companies that are domiciled in countries and engage in business sectors where the risk is particularly great.

##### ***Companies domiciled in countries with repressive regimes***

The Commission raises issues that arise when the GPFG has invested in companies domiciled in countries whose legislation and underlying values deviate substantially from the norms on which the GPFG's ethical guidelines rest. The Council understands that these will primarily

be countries with repressive regimes. Having concluded that the challenges pursuant to the GPFG's investments in such countries are difficult to resolve by means of a blanket avoidance of investing in, for example, specific countries or business sectors, the Commission discusses how individual companies in such countries may be handled.

The Council agrees with the Commission's view that the starting point for assessing such companies must be that all companies are assessed against the same ethical standards. Furthermore, the Council understands the Commission to mean that the tools the Council has at its disposal are not entirely suitable for dealing with such cases. The Commission therefore proposes two initiatives that are intended to mitigate this problem.

Firstly, the Commission proposes that, with respect to such companies, there should be particularly close communication between the Council and Norges Bank. As part of this dialogue, the Bank may decide whether shareholder dialogue or other mechanisms should be used with respect to the company. This may also include risk-based divestment. In the Bank's assessment of which measures should be implemented, the company's freedom of action may play a role. This means that engaging in shareholder dialogue will be effective only where there is real room for improvement. The Council therefore presumes that the Bank will, in practice, be obliged to consider risk-based divestment.

The Council supports this proposal partly because it may be difficult for it to assess a large number of such cases individually. Since this issue is mostly relevant for some individual countries, a large number of recommendations on such cases could also give the impression that the Council's assessments are directed against countries and not companies.

In the Council's opinion, the close communication between the Bank and the Council that the Commission recommends in such cases largely corresponds with the coordination that the Commission proposes in Chapter 16 for all cases. The Council's reservation with respect to such a general, formalised coordination is explained below in Section 6 *Coordination between the Council and Norges Bank*.

Secondly, the Commission proposes that recommendations to exclude companies domiciled in countries with repressive regimes may be given a slightly different form and orientation than other recommendations. In such cases, it is proposed that greater emphasis be placed on assessments of risk for countries and business sectors. Although the Council supports this approach, it will nevertheless base its assessment on tangible information relating to the individual company and will strive to perform those investigations that reasonable exertions permit. The Council will also be candid about the risk assessments that underpin its recommendations and will ensure that risk assessments at the country and business sector level are based on authoritative sources.

Thus, the Council supports these proposals, which enable companies domiciled in countries with repressive regimes to be excluded from investment by the GPFG following a slightly simplified process and with a slightly lower requirement for documentation than for other companies. Nevertheless, the Council considers that it would be best if the GPFG already at the outset could avoid investments where it is known that the level of ethical risk is extremely high. Even though, as the Commission points out, it is difficult to apply different forms of ranking or ethical indices to exclude entire countries or business sectors from the GPFG's benchmark index, due diligence assessments may nevertheless be used to identify individual

companies or groups of companies where the risk of norm violations covered by the ethical guidelines is high.

As far as the Council understands, the GPFG – when it invests in countries not included in the reference index – does to some extent restrict investments in market segments where the ethical risk is extremely high. When investing in countries that are included in the benchmark index, it is more difficult for the GPFG to make such adjustments on its own. It is outside the Council's remit to assess which factors are relevant when determining the GPFG's reference index. However, the Council would like to point out that the ability to adjust the reference index should be assessed in more detail. The Council could also participate in such a process if desired.

### ***Criticism of government authorities***

The Council agrees with the Commission's view that direct criticism of other countries' governing authorities should be avoided as far as possible in connection with the Council's work, to avoid the appearance of being a foreign policy tool. At the same time, there are, in the Council's view, some cases where it will be necessary to describe circumstances under other authorities' control that breach the norms on which the GPFG's ethical guidelines rest. Examples include situations where companies in which the GPFG is invested contribute to serious norm violations perpetrated by the authorities, where the company is itself partly state-owned, or where the company operates within a national legal framework that infringes fundamental human rights.

### ***Lack of access to information***

A lack of access to information is not a problem restricted to countries with repressive regimes. For example, certain business sectors practise strict secrecy due to the nature of their operations. This applies to the defence industry and high-tech sectors, including companies that develop surveillance technology. Another cause of poor access to information may be the authorities' failure to implement and enforce existing regulations, for example in the area of anti-corruption.

The Commission proposes that a more purely risk-based approach be applied in such cases as well, while emphasising that this must be restricted to exceptional cases. The Council agrees that it is expedient to apply a risk-based approach in cases where access to information is limited. In the Council's view, this is most appropriate for extremely serious norm violations. The Council also agrees that the risk is heightened if the company itself does not reply to or share information with the Council. In the Council's view, a lack of cooperation on the part of a company is an even more important factor today than it was ten years ago. This is because the risk of norm violations has increased and the opportunities to obtain information have decreased, partly due to the expansion of the GPFG's investment universe. At the same time, general expectations have increased with respect to how companies handle ethical risks and how open they are about them.

A similar country and risk-based approach as the Commission proposes has already been trialled in the Council's recommendations relating to so-called *beaching* (a method involving extremely poor working conditions and serious environmental harm, by which ships are broken up on shallow beaches). When assessing such cases, the Council's starting point has been that beaching, as currently practised in Bangladesh and Pakistan, is nowhere undertaken in an acceptable manner. If the Council learns that companies in which the GPFG is invested dispose of ships for breakup in these countries it is not necessary to obtain more detailed

knowledge of the specific working or environmental conditions where the individual ship is being broken up. The Council has engaged in dialogue with the companies concerned in these cases too, though primarily for the purpose of clarifying whether they intend to continue disposing of ships for breakup in these countries.

## **5. Other matters affecting work with respect to the guidelines**

### ***Underpinning norms***

The Commission discusses the norms underpinning the management of the GPFG in general and its ethical guidelines. Since the ethical guidelines were established in 2004, there has been a significant development with respect to companies' social responsibility, particularly through the UN's Guiding Principles on Business and Human Rights. These principles have subsequently been incorporated into the OECD Guidelines for Multinational Enterprises, not just in the area of human rights, but also as a working method that companies should use to reduce the risk with respect to environmental harm and corruption. In overall terms, this means that companies should perform due diligence assessments, halt the norm violations they themselves have caused, remedy the harm they have caused, and use their influence to reduce the risk of norm violations to which they contribute or are related through their business associates.

In light of the fact that, in recent years, several reports from civil society organisations and research institutes have taken the position that failure to exclude companies linked to various norm violations constitutes a violation of the OECD guidelines, the Council finds it useful that the GPFG's ethical guidelines are being clarified. The Commission considers that responsibility for complying with the OECD guidelines lies with Norges Bank. The Commission also proposes the inclusion of the UN's Guiding Principles on Business and Human Rights in the Bank's investment management mandate, in the same way as the OECD guidelines, which have always been mentioned therein. The Council concurs.

The Council also agrees with the Commission's view that the GPFG's ethical guidelines should stand independently and not be linked closely to other guidelines. However, the Council notes that the Commission considers that such guidelines can guide the exercise of the Council's discretionary judgement. In 2019, the Council performed an evaluation of its work under the human rights criterion. One result of this evaluation was that the Council now uses definitions and approaches from the UN's Guiding Principles on Business and Human Rights when, for example, selecting which cases to assess. Here, the Council attaches importance to the gravity and scope of the norm violation, and whether the abuses lead to irrevocable harm. When assessing whether a company should be excluded from investment by the GPFG, the Council attaches importance to whether the company has caused the norm violation. Furthermore, the Council also examines what companies have done to remedy the harm they are responsible for. The Council agrees with the Commission's view that this provides a more consistent application of the guidelines.

### ***Companies' contribution to norm violations in their supply chains***

The Commission points out that many of the most serious norm violations related to companies in which the GPFG is invested occur some way down their supply chains. The Council agrees with the Commission's view that there is nothing, in principle, to stop lengthy supply chains being assessed against today's ethical guidelines, as long as the company's contribution to the norm violation is clear.

At the same time, investigations into supply chains are often extremely resource intensive, while lines of responsibility can be fairly opaque. The Council supports the Commission's view that serious norm violations in complex supply chains may best be handled through structural changes that may require the efforts of several players at the same time, for example in the form of joint industry initiatives. The Council considers it important for the GPFG's legitimacy as a responsible investment manager that also these norm violations are handled using the tools that the GPFG as a whole has at its disposal. In this respect, there may be room for better coordination between the Council and Norges Bank than exists today.

***Contribution to norm violations through project financing***

The Commission discusses contribution by means of financing, since this is an issue that is much debated and that the Commission also received some feedback on. The Commission takes the view that it would take a lot for banks to be excluded from investment by the GPFG on the grounds of their lending activities or similar business practices, where the risk of norm violation springs from the client's behaviour without there being more tangible circumstances linking the banks' own behaviour more closely to the norm violation. The Council notes the Commission's view that project financing is a form of financing involving a closer link between bank and borrower than ordinary lending activities, and may therefore constitute grounds for exclusion from investment by the GPFG on certain conditions. The Council concurs. In its assessment of whether the threshold for exclusion has been reached, the Council attaches importance to both the seriousness of the norm violation and the company's proximity to it.

The Commission attaches importance to the fact that project financing will often make a material contribution to a project. The Commission further points out that the lender will have a complete overview of the plans for the project and the opportunity to make demands through specific clauses in the terms of lending. The Commission therefore considers that: "Overall, it may speak to the bank contributing to the harm the client causes if the bank has not made demands in a situation where it had the opportunity to do so, and a normal duty of care would indicate the necessity thereof."

The Commission also opens the possibility that an entity which finances a project may, in extremely serious cases, be excluded from investment by the GPFG even if it has no influence over how the project is executed. This refers to projects that will inevitably cause serious harm. In this context, the Commission also considers the extent to which the bank concerned's funds may be replaced by other financing to be relevant.

In addition, the Commission points out that the assessment must be forward looking, also as regards financing. Thus, it will not be sufficient to document that a bank has financed a project that has caused serious harm. It will also be necessary to consider whether the bank has subsequently implemented measures to reduce the risk of doing so again.

To date, the Council has not recommended the exclusion of any financial institutions. Based on the contents of the guidelines and the preparatory works, it has been difficult for the Council to determine at precisely what point a financial institution can be said to contribute to norm violations that their clients are responsible for or contribute to. Based on the Commission's proposed delimitations, it will be possible for the Council to consider such cases, and the Council agrees with the Commission's delimitations.

The Council does not have an overview of where information concerning project financing may be obtained, nor does it have any experience of asking banks for information about clauses in their loan agreements. The Council presumes that it could be difficult to obtain such information, though this is no different from many other cases that the Council assesses. However, notwithstanding the bank-client confidentiality issues that may play a larger role here than in other cases, it must be possible for a bank to document that it has implemented effective measures if the Council is to attach importance thereto. The Council points out that some companies publish reports from monitoring programmes that have been undertaken at the behest of financial institutions. It should therefore be possible for banks to insert clauses requiring transparency with respect to such issues.

The Council presumes that the number of projects where it may be relevant to assess whether such delimitations apply will not be great. Nevertheless, it will increase the workload and require a competence that the Council does not currently possess. If the Council is to be able to thoroughly address this issue, its secretariat will therefore require reinforcement.

***Proposals that can help to rationalise the work***

The Commission points out that the current arrangement, involving an annual review of whether grounds for observation and exclusion still exist, is resource intensive and, in many cases, serves little purpose. The Commission proposes a change in the guidelines that softens up the provision relating to regular reviews, allowing a slightly more pragmatic approach to how often such cases should be reassessed.

The Council considers that the proposed change will lead to more efficient use of resources. The Council therefore endorses this Commission's proposal.

## **6. Coordination between the Council and Norges Bank**

***The Commission's proposal on coordination and information sharing***

The Commission proposes a clarification of the guidelines' requirement for coordination to underline the importance of good coordination and information sharing in all phases of the work performed by Norges Bank and the Council. The Council concurs, but also underlines the importance of independent expertise and transparency with respect to ethical considerations. A fundamental aspect of the division of labour set out in the guidelines is that the Council performs its professional assessments independently of Norges Bank and the Ministry of Finance. The Council's public recommendations make it clear how ethical considerations have been assessed. Norges Bank's decisions, based on these recommendations, are also made public. The Commission has highlighted the importance of this, pointing out, inter alia, that the publication of the Council's in-depth assessments contributes to an openness that is unique internationally and must be preserved. The Council therefore considers that the Commission, in certain areas, goes too far in suggesting that the Council automatically cut its cloth according to Norges Bank's planned activities.

The Commission says that the tools available under the guidelines shall remain unchanged, and that the tools are observation, exclusion or the exercise of active ownership based on the Council's recommendation to exclude or place a company under observation. At the same time, the Commission suggests that Norges Bank, as a general principle, shall consider whether it wishes to initiate measures early in the Council's assessment process. Here, "measures" may mean risk-based divestment or shareholder dialogue. If the Bank does so

wish, the Commission is of the opinion that the Council ought to await the outcome of the Bank's initiatives.

A division of labour of this type could mean that many of the cases that the Council looks into would, in practice, be decided without the Council issuing any formal recommendation to exclude or place a company under observation. That would lead to less openness about the work being done under the guidelines and could also mean that Norges Bank has, in practice, the ability to restrict which cases the Council may consider. In the Council's view therefore, the Commission's statement to the effect that the Council "ought" to await the Bank's initiatives should be moderated such that the Council *should consider* conforming to Norges Bank's plans. In that case, although the Council would not automatically adapt its plans to the Bank's activities, a specific and comprehensive assessment of the situation might result in this being deemed an appropriate outcome.

Primarily, the guidelines should, in the Council's view, provide an overall framework for cooperation between Norges Bank and the Council. The Council therefore proposes this new first sentence in the Commission's proposed wording for the guidelines' section 7: "*Norges Bank and the Council on Ethics shall share information and coordinate their efforts with the aim of achieving effective interaction between the various measures and the best possible utilisation of the information obtained, and ensuring that the overall effort is perceived externally as being coordinated.*" The question is then whether there is a need to specify which information shall be shared or how this shall be achieved. If the specification of relatively detailed directions is required, as is the case in the current guidelines and as the Commission also suggests, the Council proposes the removal from the proposed section 7(2) the proviso "such that the bank can consider relevant measures". The proposal's section 7(2) will then read: "*The Council provides the Bank with information about companies it has identified for an initial assessment under these guidelines. The Bank provides the Council with an overview of the companies it is working with and company information that may be relevant for the Council's assessments.*" In the Council's opinion, this will give greater room to perform concrete assessments of individual cases, such that consideration for the Council's independence and the need for transparency with respect to how the ethical guidelines are practised, as discussed above, are met.

Over the past year, considerable progress has been made with respect to greater information sharing between Norges Bank and the Council. However, the Council still feels that there is much to be gained from increased coordination. For example, it could be envisaged that the Council and Norges Bank jointly decide to work with companies at each end of a supply chain, with the Bank working with companies linked or contributing to a norm violation via a business associate, while the Council assesses companies directly responsible for norm violations. Norges Bank and the Council should have the freedom to develop their collaboration in line with the assumptions on which the guidelines rest. It is therefore important that neither the guidelines nor the preparatory works contain directives that restrict opportunities for further developing the collaboration or learning from experience.

***New assessment when the exercise of shareholder influence is unsuccessful***

The Commission also proposes procedures for cases where Norges Bank has elected to exercise its influence as a shareholder on the basis of a recommendation to exclude or place a company under observation. If the dialogue's objectives are not achieved, the Commission takes the view that Norges Bank must reconsider the Council's original recommendation. The Council believes that this is a good arrangement, since in that case it will be the Bank that will

have followed up the company and is familiar with the company's efforts to prevent new norm violations. Since shareholder dialogues can take several years, the Council's knowledge of the company will be outdated, such that the Council would have to start a new assessment from scratch. The Council notes the Commission's view that in certain circumstances the Bank should be able to ask the Council for an updated recommendation. Although this may be expedient in some cases, the Council considers that Norges Bank must base its decisions primarily on the original recommendation and the information the Bank has itself obtained during the shareholder dialogue period.

***Other provisions of importance for the work performed with respect to the guidelines***

Other laws, regulations and guidelines also have an impact on the ability to comply with the GPF's ethical guidelines. For example, when the amended Norges Bank Act went into force at the start of the year, the Council was made subject to a duty of confidentiality with respect to "matters relating to the Bank or other commercial third parties". This may impose restrictions on the information the Council can include in its recommendations. The Council considers that there are grounds to examine more closely the provisions that it is subject to, both pursuant to the Norges Bank Act and the general statutory framework set out in the Public Information Act and the Public Administration Act. It must be possible for Norges Bank and the Council to share information with each other in confidence. The Council must also be able to obtain information from the companies concerned in confidence, but such that information about and from the company may be used and published in the Council's recommendations to exclude or place companies under observation.

## **7. The Council's competence and resources**

Thus, the Council considers that the Commission answers several of the challenges posed by the significant expansion of the GPF's investment universe, new ethical issues and deficient access to information. The task of identifying companies that should be excluded from the GPF will nevertheless remain challenging. The Council presumes that its secretariat will be allocated adequate resources, but would also like to point out that the Council's own competence is important for the effective performance of its tasks. The Council considers that the number of council members should remain at the current level of five, but that it will be even more important to have robust processes in place to ensure the appointment of members who furnish the council with a body of competence that encompasses the full breadth of its mandate. It will be increasingly important for council members to develop their own competence, by means of subject-specific seminars for example. The Council hopes that collaboration with Norges Bank can make a significant contribution in this area as well, both because the Council needs a knowledge of investment management in order to perform its tasks and because the Bank has a high level of competence on issues that are relevant for the Council's assessments.

Yours faithfully,

Johan H. Andresen  
Chair of the Council on Ethics