

Unofficial English translation

## **Letter to Norges Bank concerning the Council's recommendation to place Kirin Holdings Company Ltd under observation, 27 November 2020**

On 23 June 2020, the Council issued a recommendation to place Kirin Holdings Company Ltd (Kirin) under observation, pursuant to the war and conflict criterion in the Guidelines for Observation and Exclusion from the GPF. The recommendation rests on the company's contribution to abuses perpetrated by the armed forces in Myanmar through its participation in two joint ventures with the military conglomerate Myanmar Economics Holding Public Company Limited (MEHPCL or MEHL). The two joint ventures are Myanmar Brewery Ltd (MBL) and Mandalay Brewery Ltd (MDL).

On 10 November 2020, the Council received a letter from Norges Bank requesting further clarification of certain aspects of the recommendation, particularly those concerning the links between the Myanmar armed forces and MEHL, Kirin's specific contribution to norm violations and measures the company may implement to prevent norm violations or reduce its risk of contributing thereto.

### **Developments since the recommendation was issued**

On 10 September 2020, Amnesty International published a report on the links between MEHL and the Myanmar armed forces, which refers to Kirin's relationship with these parties.<sup>1</sup> The report rests primarily on two sources. The first is a list of over 50 of MEHL's shareholders, which MEHL has sent to a public body in Myanmar. The second is a shareholders' report from 2010/2011. Amnesty's report details the relationship between the armed forces and MEHL, partly by documenting that military units and troops are among MEHL's shareholders. This is in line with the information contained in the UN report on which the Council based its recommendation.

In its response to the report, Kirin stated, inter alia: *"The matters outlined in the Amnesty International report are at odds with our commitment to human rights and the people of Myanmar, and we have shared this concern with MEHPCL."* It also stated: *"We emphasise that it is wholly unacceptable to Kirin that any proceeds from our Myanmar joint-ventures could be used for any military purposes."*<sup>2</sup>

On 11 November 2020, the Council received an email from Kirin stating that the company had decided that all payments of dividends from the joint ventures *"have been suspended in view of a significant lack of visibility regarding the future business environment for our*

---

<sup>1</sup> Amnesty International, *Military Ltd: The Company Financing Human Rights Abuses In Myanmar*, 10 September 2020, <https://www.amnesty.org/en/documents/asa16/2969/2020/en/>.

<sup>2</sup> Kirin, Statement concerning the Amnesty International Report, 10 September 2020, [https://www.kirinholdings.co.jp/english/news/2020/0910\\_01.html](https://www.kirinholdings.co.jp/english/news/2020/0910_01.html)

*Myanmar joint-ventures, including the ongoing assessment into the destination of proceeds from MBL and MDL and the spread of COVID-19 in Myanmar.”<sup>3</sup>*

The armed conflict in the west of Myanmar (Rakhin State) has continued, with extremely serious consequences for the civilian population. A report published by Amnesty International documents the killing of civilians as recently as September 2020.<sup>4</sup>

### **Overarching considerations – due care and threshold for exclusion or observation in situations of war or conflict**

The issue which the Council must consider in this case is whether there exists an “unacceptable risk that the company is contributing to (...) serious violations of the rights of individuals in situations of war or conflict”, as laid down in section 3(b) of the GPFG’s ethical guidelines. In the Council’s view, any assessment of whether the risk is acceptable or not must be made in light of the nature of the norm violations to which the company risks contributing. In cases where the company operates in a context where there is a known risk of contributing to extremely serious norm violations, the Council takes the position that the threshold for what constitutes an *unacceptable risk* is somewhat lower than in other cases. In the Council’s recommendation, this view was expressed as an expectation to exercise particular care on the part of companies operating in areas of war or conflict.

On the basis of the particular risk of contributing to serious norm violations in areas of war or conflict, a number of international guidelines have been drawn up to ensure that companies which operate in such areas make the necessary due diligence assessments and implement measures to ensure that they do not contribute to norm violations.<sup>5</sup> The heightened standard of care that the Council sets for companies with operations in areas of war or conflict is thus in line with recognised guidelines. Although these guidelines do not directly prescribe the kinds of measures a company must put in place to avoid contributing to serious norm violations, the Council considers that the particular expectation to exercise due care must also apply to the choice of business partners.

This case concerns such serious abuses that the parties responsible have been investigated for war crimes and crimes against humanity, including the murder, torture and rape of civilians. A higher standard of due care therefore also applies to any assessment of Kirin. At the same time, the Council would like to point out that it seldom considers cases relating to such extreme abuses. The few cases where it is relevant to assess whether a company in the GPFG’s portfolio may be contributing to such abuses will largely relate to business activity in situations of war or conflict. This standard of heightened care is therefore restricted to such situations and will normally not be applied in cases that have been assessed under the guidelines’ human rights criterion.

### **Connection between MEHL and the Myanmar armed forces**

According to the UN’s fact-finding mission, MEHL is owned by serving and former officers, regiments and military units, as well as organisations led by former members of the armed

---

<sup>3</sup> Kirin, Progress Report Regarding Kirin’s Operations in Myanmar and Suspension of Dividend Payments from Joint Ventures, 11 November 2020, [https://www.kirinholdings.co.jp/english/news/2020/1111\\_02.html](https://www.kirinholdings.co.jp/english/news/2020/1111_02.html)

<sup>4</sup> Amnesty International, *Myanmar: Villages burned, civilians injured and killed as Rakhine State conflict escalates*, 12 October 2020, <https://www.amnesty.org/en/latest/news/2020/10/myanmar-villages-burned-civilians-injured-rakhine-state-conflict/>

<sup>5</sup> See, for example: Report of the working group on the issue of human rights and transnational corporations and other business enterprises, *Business, human rights and conflict-affected regions: towards heightened action*, <https://undocs.org/en/A/75/212>; Australian Red Cross, *Doing Responsible Business in Armed Conflict Risks, Rights and Responsibilities*, <https://www.redcross.org.au/getmedia/7ef922ac-7360-4bd9-97f9-fb9517547eba/Doing-Responsible-Business-in-Armed-Conflict-final-publication-WEB.pdf.aspx>; and Global Compact/PRI’s *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors*, [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2FPeace\\_and\\_Business%2FGuidance\\_RB.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf).

forces. Since the Council's recommendation, this information has been confirmed and expanded on in Amnesty International's report from September 2020. Among other things, it is revealed that around one third of MEHL is owned by military units and veterans associations. Among these is the Western Command, which is one of the parties responsible for acts of extreme violence against the Rohingya in 2017. The rest of the company is owned by individuals who are serving or have served in the armed forces. MEHL's CEO and its board of directors are also high-ranking military officers.

Norges Bank's letter asks about the link between MEHL and the Myanmar armed forces. Reference is also made to the fact that responsibility for norm violations does not lie with controlled entities, which have not themselves been complicit in the norm violations. In principle, the Council agrees that subsidiaries cannot be "held responsible" for norm violations perpetrated by their parent company. However, the Council does not consider this approach to be pertinent in the present case, since the Myanmar armed forces are not, nor should they be treated as, an ordinary company. The present case concerns state-backed military forces, which have been responsible for extremely serious abuses and which are using a business enterprise as a tool to obtain funds that enable them to carry out such operations through revenue streams which are not subject to civilian oversight. The link between MEHL and the Myanmar armed forces will not affect the Council's practice with respect to the identification between companies within ordinary corporate structures.

### **Kirin's contribution to the norm violations**

As the Council's recommendation points out, not all unethical actions carried out by a business partner constitute grounds for exclusion from the GPF. At the same time, there is no doubt that a company in which the GPF is invested may contribute to a business partner's norm violations under the ethical guidelines. With respect to the war and conflict criterion, the report to the Norwegian Storting NOU 2020:7 *Values and Responsibility - The ethical framework for the Government Pension Fund Global states*, inter alia:

*Furthermore, the criterion is intended to cover contribution to serious abuses perpetrated by parties other than the company. Companies may be said to contribute to abuses through, for example, the provision of goods or services to or the establishment of business relationships with parties to a conflict who commit serious abuses.*

The Council rests its recommendation on the UN's fact-finding mission, made up of well-respected experts on international law and human rights. The fact-finding mission concludes that participation in joint ventures, such as those in which Kirin is involved, confers a high risk of contributing to human rights abuses and the violation of international humanitarian law. The fact-finding mission points out that the military, through its business partnerships, "*substantially enhances its ability to carry out gross violations of human rights with impunity*".<sup>6</sup> It is this bolstering of the armed forces' financial capacity that, in the Council's view, may constitute Kirin's contribution. The fact-finding mission's conclusion rests on a thorough investigation of the armed forces' financial interests and business partnerships. Through its joint ventures, the Myanmar armed forces obtain funds that can be used to perpetrate abuses against the civilian population. Since MEHL is an extremely opaque organisation, it is not possible to document that revenues from the joint ventures are channelled directly into military purposes. Nevertheless, in light of the information that is available – particularly that concerning MEHL's shareholders – the Council considers that this is likely. In addition to boosting the armed forces' financial capacity, the business partnership could, in the Council's view, also help to legitimise, both nationally and internationally, the military's actions. Given the heightened level of care that a company

---

<sup>6</sup> OHCHR, *UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes*, 5 August 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>

ought to exercise in situations of war or conflict, the Council considers that there is an *unacceptable risk* of contributing to norm violations in this case.

### **Steps taken by Kirin**

Kirin has been aware of the risk that revenues deriving from the joint ventures could be used for military purposes from the moment it entered into the joint venture. This was also the reason it included a clause covering this issue in its agreement with MEHL. It is the Council's understanding that Kirin did not investigate whether this clause was being complied with, even after the extreme violence to which the Rohingya were subjected came to light in 2017 and 2018. Since the UN report on the Myanmar military's financial interests was published in August 2019, Kirin has initiated such an investigation. In a meeting with the Council, the company disclosed that it had not been given the access it needed to be certain that revenues from the joint ventures were not being used for military purposes.

Kirin has taken several steps to try and avoid contributing to norm violations. These include amendments to its guidelines for donations and the initiation of an investigation to discover whether dividends from the joint ventures are used for military purposes. In November 2020, the company also reported that no dividend would be paid by the joint ventures, partly due to the uncertainty surrounding whether dividends would be used for military purposes. The Council presumes that Kirin does not have sufficient influence to prevent the armed forces from abusing the civilian population. The Council therefore considers that the only possibility open to the company to ensure it does not contribute to norm violations is to withdraw from its partnership with MEHL, either by selling its share of the joint ventures or bringing in a new business partner. Kirin itself is also considering these options. Kirin's continued business partnership with MEHL will be the issue that determines the outcome of any observation process. In the Council's opinion, if Norges Bank accepts its recommendation to place Kirin under observation, continued collaboration with MEHL should lead to Kirin's exclusion from investment by the GPF, while termination of the partnership should result in observation being brought to an end.

Yours faithfully,

Johan H. Andresen  
Chair of the Council on Ethics

|