

“Natixis and NGAM in the United States of America” – Specific Instance

5 December 2017

Detailed Report from the French National Contact Point

The French NCP’s good offices between the US trade union Unite Here and Natixis/NGAM directly contributed to solving the two-year long labour dispute at the Westin Long Beach Hotel thanks to Natixis’s and NGAM’s commitment and due diligence vis-à-vis their American subsidiary, AEW Capital Management.

On 15 September 2016, the French NCP for implementation of the OECD Guidelines for MNEs received a referral from the North American trade union Unite Here Local 11 that targeted the French bank Natixis and one of its asset managers, Natixis Global Asset Management (“NGAM”). The referral concerned the activities of their American subsidiary, the real estate management company AEW Capital Management, in relation to a hotel property in California owned by one of its American clients, a Utah pension fund called Utah Retirement System (“URS”). In February 2015, a labour dispute broke out at the Westin Long Beach Hotel in California when workers wanted to unionise. Unite Here raised a claim in the USA against the hotel’s operator which is also subject to a class action. Furthermore, Unite Here took action vis-à-vis the hotel’s operator, the hotel’s owner and its asset management advisor AEW. As it considered the situation as a violation of freedom of association and the collective bargaining rights of workers, and as representing anti-union practices, Unite Here submitted a specific instance to the French NCP in order to enter into contact with the Natixis Group and its subsidiary NGAM to curtail the alleged adverse impact in the hotel.

The French NCP is a tripartite body and a state-based non-judicial grievance mechanism concerning implementation of the OECD Guidelines for MNEs. It aims to help resolve issues submitted to it through its good offices, mediation or conciliation. It endeavours to examine issues raised in the specific instances within reasonable deadlines and if possible within 12 months of receipt of the submission. It publishes its decision on its website.

1. Presentation of the specific instance

The specific instance is about the due diligence of enterprises in the financial sector concerning their advisory and asset management activities, in this case, a real estate investment, in light of allegations of OECD Guideline violations committed in an asset owned by an institutional investor. It questions the chain of command through direct and indirect equity holdings.

The labour dispute began in 2015 when workers asked the hotel’s operator to organise a unionisation drive under the “card check /neutrality” system. Under this system, the employer undertakes to remain neutral during the unionisation drive, workers can communicate with Union Here in the workplace, and the union is recognised if a majority of workers sign Unite

Here's authorisation card ("card-check"), after confirmation by a joint agreement and by an arbitrator. As this procedure is an alternative to a procedure with secret ballot, this required the negotiation of a company-wide agreement. However, according to Unite Here, the hotel's operator refused to negotiate such a collective agreement and it launched an anti-union practices campaign. Between August 2015 and January 2016, claims were submitted to the National Labor Relations Board against the hotel's operator for violation of American labour law and a class action was also submitted to the Superior Court of California for non-compliance with American law on salaries and working hours. These claims are still under review. With a SI addendum dated 28 November 2016, Unite Here informed the NCP about the potential sale of the hotel and added lack of worker's information and absence of constructive negotiations to issues raised by the submission. In late 2016, the American press mentioned the hotel's potential sale and alluded to foreign enterprises¹.

Faced with the continued blockage of social dialogue, Unite Here made a number of approaches vis-à-vis the hotel's owner, URS, and its asset manager, AEW Capital Management, in order to obtain the opening of negotiations to prepare a unionisation drive. Owing to the lack of results, in spring 2016, Unite Here referred the case to NGAM and to its parent-company Natixis to obtain their support to change the situation. Finally, Unite Here submitted a specific instance to the French NCP.

The list of OECD Guideline recommendations targeted by the SI are appended hereto.

2. Procedure followed by the French NCP in the specific instance

The French NCP endeavours to conduct a submission's initial assessment within three months of the acknowledgment of receipt and it publishes a statement explaining its decision. When this assessment is positive, it offers it good offices to the parties and examines the case. It endeavours to finalise its action within twelve months of receipt of the submission. It then concludes the referral by preparing and publishing a statement.

The NCP secretariat shared information between the parties during the entire procedure (specific instance and appendices, several additional notes and information from Unite Here, several responses from Natixis/NGAM) and informed the parties regularly about the content of NCP discussions and the progress of the procedure. Additional information provided by the complainant and summaries of NCP discussions were regularly forwarded to the US NCP which was able to inform the US entities about the progress of the procedure.

◆ 1st step: formal admissibility and initial assessment of the specific instance (September 2016 – February 2017)

The NCP received the specific instance electronically on 15 September 2016 and acknowledged receipt on 26 September 2016. It noted that it was formally admissible on 5 October 2016² and began the initial assessment.

¹ <http://presstelegram.com>, <http://www.hotelmanagement.net>, Long Beach Post <http://lbpost.com/news>

² See French NCP statement of 26 April 2017: "The referral meets the formal admissibility criteria set forth in Article 16 of the bylaws. It is precise and detailed; it stipulates the identity of the enterprises in question, the

On 14 October 2016, the NCP stated that it was ready to examine the SI but wanted coordination with the US NCP to be agreed upon before the finalisation of the initial assessment as allegations concerning the Westin Long Beach Hotel were being made in the United States and because several enterprises concerned by the case were headquartered or active in the US. It sent the SI to the Natixis Group and its subsidiary NGAM. It invited Unite Here to also submit the SI to the US NCP to inform it of the submission and its content. The French NCP wanted its American counterpart be duly informed of the case by the complainant due to its American dimension. The French and US NCPs consulted each other in October and November 2016. They decided that the French NCP would lead the specific instance as the complainant requested in its submission that both French enterprises, Natixis and NGAM, use their influence to move things forward with their American subsidiary. Natixis and NGAM acknowledged receipt of the SI at the end of November and agreed to the discussions proposed by the NCP as from the initial assessment step.

On 5 December 2016, the French NCP extended the initial assessment deadline by one month, until 26 January 2017, in order to analyse the relationships between the different enterprises concerned by the case, and to identify and distinguish both the French and American dimensions of the submission. In order to clarify the nature of existing links between Natixis, NGAM and its asset managers, URS and the hotel's operator, the NCP wanted to have an initial meeting with each party separately. It organised a conference call with Unite Here Local 11, based in California, on 7 December 2016. It met with Natixis and NGAM at the Ministry for the Economy and Finance in Paris on 14 December 2016. They provided the NCP with some initial answers and stated that they were prepared to send a general message to their subsidiary AEW. At the end of the year, Unite Here informed the NCP of a rumour about the potential sale of the hotel conveyed by the American press.

The NCP finalised its initial assessment, which was positive, at its meeting on 30 January 2017. It proposed its good offices to Natixis/NGAM and to Unite Here on 15 and 16 February 2017. Both parties accepted its good offices before the deadline of 28 February 2017. The NCP adopted a draft initial assessment statement on 31 March 2017 and consulted both parties and the US NCP. The NCP then unanimously adopted the initial assessment statement on 26 April 2017 and published it on its website³.

◆ 2nd step: Good offices in the specific instance (March 2017 – September 2017)

The NCP began its good offices and the case examination on 2 March 2017. It met with Unite Here on 27 March 2017 via a conference call (Paris-Los Angeles). It met with Natixis and NGAM on 28 March 2017 at the Ministry for the Economy and Finance in Paris. On this occasion, Natixis and NGAM provided details of their commitment to write to their subsidiary AEW in order to demonstrate their attachment to the OECD Guidelines, to the new OECD recommendations on responsible business conduct in the financial sector and to

identity and contact details of the plaintiff, the details of what the enterprises are accused of, and the elements of the OECD Guidelines in respect of which the NCP referral is being made”.

<https://www.tresor.economie.gouv.fr/Ressources/File/437488>

³ <http://www.tresor.economie.gouv.fr/File/436248> (FR) &

<https://www.tresor.economie.gouv.fr/Ressources/File/437488> (EN)

suggest holding further discussions about their CSR policies. After discussions with the NCP and with the complainant, this message would finally also refer to the specific instance.

In April 2017, the US NCP forwarded the SI to the American enterprises, AEW and URS, and informed them about the practices and procedures of the French NCP for handling specific instances. Between April and June 2017, the NCP had many exchanges with the parties about the nature of Natixis's commitment and American regulations on asset management. In order to protect sensitive information, as provided for in the NCP's Bylaws⁴, it asked the complainant to sign a confidentiality agreement concerning a specific element of the file. Unite Here accepted immediately and confirmed this as discussions progressed.

In early July 2017, the NCP reviewed the specific instance and took several decisions aimed at moving the situation forward by September 2017, the potential date for closing the good offices. It validated Natixis's/NGAM's message to AEW and asked for the message to be sent. It carried out a preliminary analysis of the SI, drew up a schema of potentials links between the different enterprises and the alleged adverse impact, and drafted a list of specific questions for the American enterprises. These three documents were forwarded to Unite Here and Natixis/NGAM on 13 July 2017. The NCP invited them to have direct dialogue or dialogue through Natixis's American subsidiary and asked them to report back to the NCP on progress achieved by the end of August 2017. In parallel, the list of questions (written in English) was sent to the US NCP to be forwarded to the American enterprises, AEW and URS. It informed the parties and the US NCP that it would assess the situation at the beginning of September 2017.

During the summer of 2017, the parties informed the French NCP (including via the US NCP) about the actions they had taken, including the results obtained: the hotel had been sold to another American group in the hospitality sector and the hotel's staff would be unionised in one month's time thus bringing an end to a labour dispute that had lasted for more than two years in the United States. The parties no longer required the good offices of the French NCP. By email dated 8 September 2017, Unite Here informed the NCP about the very satisfactory resolution of the submission, congratulated the French NCP for its work and underlined the importance of coordination with the US NCP. It requested the end of the good offices.

On 11 September 2017, the French NCP welcomed the results obtained. It closed its good offices. It asked the NCP Secretariat to inform the parties, the US NCP and the OECD and to prepare a report explaining how the dispute had been resolved⁵.

◆ 3rd step: Conclusion of the specific instance

On 14 September 2017, the NCP Chair suggested that the parties agree on a joint declaration that would be added to the NCP Report. Unite Here accepted whereas Natixis/NGAM did not wish to make a joint declaration. The NCP adopted a draft report and a draft detailed report on 20 October 2017, including Unite Here's declaration and consulted both parties and the US NCP on these drafts between 23 October and 7 November 2017. Then the NCP finalised and

⁴ Article 39: In order to facilitate resolution of the issues raised, the NCP shall take appropriate measures to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance.

⁵ In conformity with its Bylaws (Art. 35) and the OECD's procedural guidelines (Art. 34), the French NCP drafts and publishes a "report" when parties reach an agreement at the end of the good offices procedure.

adopted the report and the detailed report on 5 December 2017 and forwarded them to the parties and to the US NCP for information before publication on the NCP's website and transmission to the OECD.

3. The NCP's substantive analysis of issues raised in the specific instance and the NCP's decision

This specific instance highlights the scope of due diligence and of responsible business conduct within the financial sector all along the investment chain. The case questions Natixis Group's and its subsidiary NGAM's due diligence regarding the asset management advisory activities of its US subsidiary AEW Capital Management for the Westin Long Beach Hotel.

The NCP examined existing links between the enterprises within the investment chain and the alleged adverse impact in the hotel in order to determine whether they were causing, contributing or were directly linked to it according to the OECD Guidelines and whether adequate due diligence measures were being taken by the Natixis Group and its subsidiary NGAM. It firstly identified the enterprises in the investment chain and their potential implication in the negative repercussions and consequences in terms of due diligence according to the OECD Guidelines, and finally it noted the real impact of its action.

◆ The NCP firstly analysed the business relationships between Natixis, AEW and the investment chain

AEW acted as a financial institution involved in real estate investment consulting. It is fully-owned by NGAM which is held by Natixis; both (AEW and NGAM) are members of the Natixis Group. At the time of the NCP's good offices, the Westin Long Beach Hotel's investment chain was comprised of two American investment funds, two American financial institutions, an American holding company and an American operator:

- **An American investment fund (URS, Utah Retirement System), the majority shareholder of all the financial entities and the Westin Long Beach Hotel's indirect owner.** Being AEW's "instructing party", it authorised AEW through a non-discretionary contract to manage real estate investments, including this hotel. The NCP does not know the nature of the advice given by AEW to URS within the framework of this contract. AEW has a business relationship with URS.
- **An investment fund specialised in the hospitality sector,** Noble Parallel Investment Fund LLC, a minority shareholder. The NCP does not have information enabling it to determine whether it is involved in supervising this investment nor if there is a link between this investment fund and the hotel's operator.
- **A joint-venture,** Noble-Utah Holdings LLC, held by these two investment funds, and which owns the holding company owning the Westin Long Beach Hotel real estate asset.
- **A holding company,** Noble/Utah Long Beach LLC which is thought to have hired the hotel's operator.

- **An American enterprise from the hospitality sector**, in charge of the hotel's operational management, Noble – Interstate Management Group California LLC. The operator, which is contractually bound to the holding company, employs the workers. It is responsible for working conditions within the hotel. Several complaints have been instituted against it in the United States for violation of American labour law. According to Unite Here, it is also thought to have been at the origin of the alleged adverse impact in the hotel in respect of human rights and industrial relations in light of the OECD Guidelines⁶.

◆ **The NCP then made assumptions about relations between the enterprises and adverse impact allegations and their due diligence consequences**

The NCP examined the nature of relations between the enterprises and the allegations of adverse impact in order to determine whether they caused it, contributed to it or were directly linked to it according to the OECD Guidelines. It noted that according to the OECD Brochure on the Guidelines, *“Contributing to an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates, or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. How enterprises address adverse impacts depends on the degree by which the adverse impacts are linked to the enterprise”*⁷.

In July 2017, the NCP noted the continuation of the dispute despite its good offices having opened. It noted that the specific instance also raised the question of a potential conflict between the OECD Guidelines and a local American regulation on asset manager autonomy (AEW) vis-à-vis its parent company (NGAM) which is deemed to forbid a parent company's interference in individual cases and thus to forbid interference in investment advice given by the subsidiary to its instructing party.

The substantive analysis of the complainant's allegations regarding the Westin Long Beach Hotel does not come under the French NCP's competence as they are located in the United States and as they are thought to have been caused by an American enterprise against which other complaints have been made before the American courts. On this basis, and according to available information, the NCP then raised a number of assumptions in order to enable the determination of the due diligence measures which should be taken in order to remedy the adverse impact, and which it presented to the parties:

“CAUSING”: The hotel's operator might be causing a labour-related adverse impact at the hotel. → *If established, it should remedy the adverse impact, make it stop or prevent it.*

“CONTRIBUTING”: Both investment funds, and the holding company they own, have probably contributed to the adverse impact, either by decision or by omission as they are said to exercise control over the holding company supervising the hotel's operator, the latter being probably responsible for the alleged adverse impact. If AEW Capital Management did play a

⁶ Enterprises' due diligence and due diligence measures are provided for by Articles 10, 11 and 12 of Chapter II of the OECD Guidelines and they are explained in the commentary on said chapter (notably paragraphs 14, 15 and 19). The OECD also published key considerations for responsible business conduct in the financial sector for institutional investors which contain, inter alia, a section on due diligence (see “Addressing adverse impact” on page 35).

⁷ See page 8 RBC Matters, OECD's brochure, http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf

role in the hotel's acquisition through the identification of financial and operational partners, and in the event that its advice related to operational aspects – going beyond financial aspects – (question under the US NCP's competence), then AEW could have been in a position to contribute to the adverse impact by decision or omission. → *If established, the investment funds, and possibly AEW, should act and should have acted to stop and prevent the adverse impact and used their leverage over the operator to mitigate the adverse impact, for example by asking the operator to engage with the complainant or meet it directly ("stakeholder engagement").*

“DIRECTLY LINKED”: Given its equity interest and its position within the investment chain, the pension fund URS is perhaps, at the very least, directly linked with entities causing the alleged adverse impact. According to elements submitted by Unite Here, AEW Capital Management could be considered as directly linked with entities responsible for the impact or with those contributing to it; this was rejected by Natixis and NGAM during their discussions with the NCP. According to the OECD's recommendations for institutional investors, AEW's potential leverage would nonetheless depend upon the nature of the management contract granted by its instructing party (strictly financial or also operational), of its possible role when the acquisition was made, and of its possible business relations with the other investment fund. According to the OECD, in cases of 100% ownership, a parent company is linked to its subsidiary's activities. Therefore, NGAM is directly linked to the impact related to the activities of its company, AEW. As Natixis fully consolidates and owns them, it is also linked to the impact of its two subsidiary's activities. The French NCP reiterates that the direct link between the enterprise's activities and the adverse impact must not be interpreted as shifting responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. In this specific case, the hotel's operator would remain responsible for allegations of violations of the OECD Guidelines' Human Rights and Labour chapters. → *If established, URS and AEW should use their influence towards the entity (entities) causing the alleged adverse impact in order to prevent and mitigate it. In addition, NGAM and Natixis should use their influence towards their subsidiary AEW to make sure that it conducts due diligence in this specific case, and in its activities generally.*

◆ Finally, the NCP noted the impact of its good offices with the support of the US NCP

After having forwarded the preliminary analysis and the questions for American entities to Natixis/NGAM and to Unite Here, and after having invited them to have direct discussions or discussions through Natixis's American subsidiary during the summer of 2017, the NCP noted that, as of the end of August 2017, the situation had dramatically changed. At its 11 September meeting, it noted the positive outcome of its good offices between Natixis/NGAM and Unite Here: the hotel had been sold to another American group in the hospitality sector and unionised within a month, thus bringing an end to a labour dispute that had lasted for more than two years in the United States at the Westin Long Beach Hotel.

At the end of its action:

- The NCP noted that according to available information at the time of the specific instance's submission in September 2016, Natixis and NGAM had not taken due diligence measures in compliance with the OECD Guidelines vis-à-vis their

American subsidiary AEW Capital Management. As it did not have access to the URS management contract granted to AEW, the NCP factored in AEW's advice activity to the hotel's indirect owner (URS) and its role during the hotel's acquisition. The NCP assumed that, on one hand, AEW did know that American enterprises were causing, contributing to, or that their activities were directly linked to, the adverse impact alleged by Unite Here, and that, on the other, AEW's activities were potentially linked or contributed to the adverse impact alleged by Unite Here since it did not act to remedy the situation.

- The NCP noted the positive evolution of Natixis's and NGAM's position during the initial assessment which resulted in a high level commitment to send a general message to its American subsidiary⁸ concerning the OECD Guidelines, the OECD new recommendations for RBC in the financial sector and CSR issues. Following the discussions between the NCP and Unite Here, this message finally made reference to the specific instance.
- Natixis and NGAM put in place appropriate due diligence measures in engaging with their American subsidiary AEW so that the latter integrated the new OECD recommendations for institutional investors published in March 2017 into its activities, and in particular as part of its management contract concerning the Westin Long Beach Hotel.
- The hotel's sale conducted by AEW Capital Management on behalf of its client URS obviously took due consideration of the OECD Guidelines and notably the importance of social dialogue on one hand, in the choice of new buyer and, on the other, in the choice of the new operator made by the new owner. Indeed, the new operator of the hotel and the workers' employer, HighGate Hotels, which operates in the American hospitality sector, immediately negotiated the organisation of the unionisation vote for the workers with Unite Here. On 8 September 2017, Unite Here announced at a press conference, with the Long Beach Mayor and a County Supervisor of Los Angeles, that the hotel is now unionised.

The NCP welcomes the results obtained, the end of adverse impact and the remediation achieved. The Natixis Group and its subsidiary NGAM used their influence vis-à-vis their business relationships and thus helped end an adverse impact in the field. Building a trust-based relationship with the parties allowed for high quality dialogue and full transparency throughout the procedure, thus contributing to the success of the French good offices. The French NCP thanks the US NCP for its interaction with the American enterprises concerned by the specific instance. This coordination was key to obtaining these results.

4. Unite Here's declaration (see next page)

⁸ Abstract of the French NCP's initial assessment statement, 26 April 2017: "Natixis Group agreed to meet with the NCP during the initial assessment. (...) Natixis Group informed the NCP of the constraints arising from Securities and Exchange Commission regulations and said it was willing to send a general message to its US subsidiary". <https://www.tresor.economie.gouv.fr/Ressources/File/437488>

4. Unite Here's declaration

“Unite Here expresses its satisfaction at the positive outcome of the labour dispute at the Westin Long Beach Hotel which was the subject of a specific instance submitted to the French NCP in September 2016.

It thanks the French NCP for its commitment, availability and expertise, and for having conducted its good offices while demonstrating broad transparency towards the parties. It welcomes the French and American NCPs' coordinated action which allowed for the involvement of all the stakeholders which are part of a complex business relationship chain in France and in the United States of America.

It agrees that the due diligence measures taken by Natixis Group and by NGAM, result from the French NCP's good offices, and that Natixis and NGAM's engagement vis-à-vis their American subsidiary AEW Capital Management contributed to an agreement being reached between Unite Here and the hotel's new operator which brought an end to the specific instance. It considers that the sale of the Westin Long Beach Hotel that was carried out by AEW Capital Management, on behalf of its client URS, was done in compliance with the OECD standards for responsible business conduct and, in particular, social dialogue. The new operator immediately negotiated an agreement with Unite Here enabling the unionisation drive to be organised. The hotel duly became unionised on 6 September 2017 thus providing freedom of association for workers as recognised by the OECD and by the ILO”.

This specific instance shows the entire scope of due diligence of stakeholders in the financial sector towards their business relationships all along the value chain and that due diligence is essential to remedy OECD Guideline violations within the value chain, and that it can take the form of a disinvestment when conducted with diligence as recommended by the OECD.

For further information on the OECD recommendations for responsible business conduct in the financial sector: *“Responsible business conduct for institutional investors. Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises”*

 <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>