

“NATIXIS AND NGAM IN THE UNITED STATES” - SPECIFIC INSTANCE

26 April 2017

Statement by the French National Contact Point

Following its initial assessment, the NCP is offering its good offices to Natixis Group and the US labour organisation UNITE HERE

On 15 September 2016 the French National Contact Point (NCP) for the implementation of the OECD Guidelines for Multinational Enterprises received a specific instance referral from Local 11 of the US labour organisation UNITE HERE concerning Natixis Global Asset Management (NGAM), which manages financial and real-estate assets, and Natixis, a French bank and NGAM's parent company. The referral concerns a labour dispute in a California hotel that is indirectly owned by a US pension fund advised under an advisory agreement for this asset by a US asset manager, which is an NGAM subsidiary and part of the Natixis group.

The NCP endeavours to conclude the initial assessment of a referral within an indicative time-frame of three months following acknowledgment of receipt, but additional time may be granted, if need be, to collect essential information necessary for an informed decision (Art. 29). It then issues a statement announcing the admissibility of the specific instance (Art. 19). If the initial assessment is positive, the NCP analyses the referral and offers its good offices to the parties in order to help them resolve their dispute. It strives to conclude its examination within 12 months of receiving a specific instance (Art. 31) and issues a report or a statement when the procedure is concluded (Art. 35). The NCP may decide to monitor the follow-up to its recommendations (Art. 32).

1. Procedure followed by the NCP according to its bylaws

The NCP received the referral by email on 15 September 2016 and acknowledged receipt on 26 September. On 5 October 2016 it announced that the specific instance was formally admissible and began its initial assessment.

The assessment was complicated because of a decision by the competent NCP to offer its good offices to the parties, since the dispute directly involved several US-domiciled entities (a hotel, its management company, a US pension fund with a majority interest in the hotel-owning entity, and a US asset manager that advises the pension fund and is a subsidiary of a French group), as well as a French group owning one of these stakeholders. Meeting on 14 October 2016 the NCP said that it was willing to consider the referral but that the issue of liaising with its US counterpart should be settled before the initial assessment was finalised. The NCP therefore forwarded the referral to the French group and asked the plaintiff to also refer the specific instance to the US NCP so that the latter would be duly informed of the case.

The two NCPs interacted on several occasions in October and November 2016 to determine which of them would take the lead in the referral (see Commentary 23 and 24 of the Procedural Guidance for the Guidelines, appended). The French NCP considered that the United States ought to lead because of the location of the labour dispute and the direct link between the US firms and the alleged breach of the Guidelines in the hotel. The US NCP concluded that its French counterpart should lead because the referral focused on due diligence by a French group (i.e. Natixis and NGAM). In November and December 2016 UNITE HERE provided additional information, which was forwarded to Natixis and NGAM as well as to the US NCP.

On 5 December 2016 the French NCP decided to extend the initial assessment by one month, until 26 January 2017. It wanted to hold initial discussions with the plaintiff and with the French firms in order to better understand their connection with the labour dispute and with the other firms cited in

the referral. Since UNITE HERE is California-based, the NCP held a conference call on 7 December 2016. It then met with Natixis and NGAM in Paris on 14 December 2016.

Meeting on 30 January 2017 the NCP finalised the initial assessment and instructed the NCP secretariat to draw up a statement announcing its decision. On 15 and 16 February 2017 it offered its good offices to the parties, which accepted them during the period ending 28 February 2017. On 2 March 2017 the NCP began examining the specific instance and, on 31 March, adopted a draft statement on the initial assessment. The draft was submitted for consultation to UNITE HERE, Natixis and NGAM, and also to the US NCP, between 31 March and 12 April 2017. The French NCP gave due consideration to the parties' suggestions and on 26 April 2017 adopted the statement, which it passed along to the parties and its US counterpart for information purposes before publishing the text on its website.

The French NCP will endeavour to finalise its examination within 12 months of receiving the referral, i.e. by September 2017.

2. Overview of the referral

The referral concerns a labour dispute in the Westin Long Beach Hotel in California. The hotel is owned by an entity majority-held by a US pension fund, Utah Retirement System (URS). URS is advised by AEW Capital Management, a Boston-based real-estate asset manager and a subsidiary of NGAM, which in turn is a subsidiary of Natixis. Both NGAM and Natixis are domiciled in France.

◆ Background to the labour dispute leading to the referral

According to the plaintiff, the Westin Long Beach dispute concerns potential non-compliance with workers' freedom of association, as well as the hotel's anti-union practices and its working conditions. The labour dispute began in February 2015 when workers petitioned the hotel management to conduct a union organising campaign using the "card check neutrality" procedure. This procedure, intended to replace a secret ballot, includes an undertaking by the employer to remain neutral throughout the campaign, the possibility for workers to communicate with UNITE HERE in the workplace, and recognition of the union if the majority of workers sign a card check in favour of UNITE HERE. A company agreement needed to be negotiated to that end but, according to the plaintiff, the hotel management refused to discuss such an agreement and allegedly ran an anti-union campaign.

Between August 2015 and January 2016 UNITE HERE lodged complaints against the hotel operator with the National Labor Relations Board (NLRB) for breaching US labour law. Some of the workers also filed a class action with the Superior Court of California for non-compliance with US legislation on wages and working time. These suits are currently under examination. The labour dispute was reported by the media both in the United States (*Long Beach Post*, *Boston Globe*) and in France (*Les Echos*, *AEF*, *Novethic*, *Mediapart*). In late 2016 the US media reported that plans were afoot to sell the hotel (presstelegram.com, hotelmanagement.net, lbpost.com). On this issue, UNITE HERE criticised the lack of information given to workers as well as the absence of constructive negotiations.

Because of the deadlocked labour-management dialogue in the hotel, UNITE HERE made various representations to the hotel's owner and its adviser, AEW Capital Management – in addition to the NLRB referral – in order to start negotiations on preparing the union organising campaign. Absent any results, UNITE HERE referred the matter in spring 2016 to NGAM and its parent Natixis in order to secure their support in taking the situation forward. UNITE HERE ultimately made a referral to the French NCP.

◆ Content of the referral

The referral relates to due diligence in financial firms' advisory and asset management activities – in the present case, real-estate management – with regard to a potential breach of the OECD Guidelines by enterprises owned by institutional investors. The referral questions the chain of command exercised through direct or indirect equity holdings.

According to the referral, the majority shareholder of URS, the entity that owns the Westin Long Beach, told UNITE HERE to contact its asset management advisor, AEW Capital Management, which is supposedly responsible for overseeing the investment in the hotel on its behalf and supervising the entity owning the hotel, and which contractually employed the hotel's manager. The plaintiff asserts that AEW Capital Management played a decision-making role and turned down the request to arrange the organising campaign. The plaintiff considers that, absent appropriate due diligence measures in relation to their US subsidiary, Natixis and NGAM contributed to the adverse impacts to the hotel and that they failed to carry out the expected due diligence and ensure no further impact to employment and human rights.

Recommendations of the 2011 Guidelines targeted by the referral are as follows:

Chapter I: Concepts and Principles

2. *Obeying domestic laws is the first obligation of enterprises. [...]*

Chapter II on General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

A. Enterprises should:

10. *Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.*

11. *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

12. *Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*

The referral also cites Commentary 14 and 19 on the due diligence of enterprises.

Chapter IV on Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. *Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*

2. *Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

5. *Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*

6. *Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

In addition, the referral cites Chapter IV, Commentary 39.

Chapter V: Employment and Industrial Relations

"Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards:

1a) *Respect the right of workers employed by the multinational enterprise to have labour organisations and representative organisations of their own choosing;*

6. *In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of the workers in their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.*

The referral also cites Chapter V, Commentary 41.

3. Summary of the initial assessment of the specific instance

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 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.

The referral also meets the other admissibility criteria in Articles 21, 22, 23 and 25 of the bylaws. It questions the effectiveness of the Guidelines as regards employment and human rights in the US hotel industry and the due diligence of financial firms in respect of these adverse impacts. The referral is bona fide and relevant to the Guidelines. The parties concerned are identified and have an interest in the case. The referral raises issues that are significant for enforcement of the Guidelines. The NCP has been informed of the relevant national laws and the proceedings underway with the competent US authorities. It will act in accordance with these frameworks. The French NCP has already handled a similar labour dispute involving the Accor group in Canada and Benin. The OECD in February 2017 adopted recommendations for responsible business conduct for institutional investors; these could inform the actions of the NCP and the parties to this referral. UNITE HERE is seeking the good offices of the French NCP to initiate a dialogue with Natixis, which it believes can change the US subsidiary's position on starting on-site negotiations.

Natixis Group agreed to meet with the NCP during the initial assessment. It expressed commitment to corporate social responsibility and provided initial indications about its equity links in the matter at hand, emphasising that Natixis and NGAM had no formal relationship with the hotel operator and that proceedings in the case were underway in the United States. 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.

4. Conclusion of the initial assessment and next steps

After a preliminary analysis and discussions with the parties and the US NCP, the French NCP successfully concluded its initial assessment on 30 January 2017. The issues raised by the referral merit further examination. The French NCP agreed to lead the referral and offered its good offices to Natixis, NGAM and Local 11 of UNITE HERE, all of which accepted. It welcomes the high-level commitment by Natixis and NGAM to join in the dialogue. Accepting the referral does not determine whether the firms acted in accordance with the Guidelines.

When examining the specific instance in this referral¹, the NCP will hear the parties and examine the feasibility of mediation. It may seek the opinion of competent authorities, including the OECD, on some of the issues raised by the referral concerning responsible business conduct in the financial sector. The NCP will handle the French side of the case only; it has no jurisdiction to interact with US firms. For that reason, given that the labour dispute is taking place in the United States, which adheres to the Guidelines, and that US firms are involved, it will act in coordination with the US NCP. On 16 February 2017 it asked the US NCP to inform the American companies in question about the referral and to keep it informed of developments. The French NCP hopes to make a positive contribution to resolving the issues raised by this specific instance.

In accordance with its bylaws and the Procedural Guidance defined by the OECD, to facilitate resolution of the issues raised and comply with applicable laws, the NCP shall take appropriate measures to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance. Some elements brought to the NCP's attention may be kept confidential.

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¹ See Articles 27 to 40 of the French NCP bylaws.

C. IMPLEMENTATION IN SPECIFIC INSTANCES

(...). In providing this assistance, the NCP will:

1. *Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.*
2. *Where the issues raised merit further examination, the NCP shall offer its good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:*
 - b) *consult the NCP in the other country or countries concerned;*

Commentary on Procedural Guidance (§ 23 and 24):

Coordination between NCPs in Specific Instances

23. *Generally, issues will be dealt with by the NCP of the country in which the issues have arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues. The NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.*

24. *When issues arise from an enterprise's activity that takes place in several adhering countries or from the activity of a group of enterprises organised as consortium, joint venture or other similar form, based in different adhering countries, the NCPs involved should consult with a view to agreeing on which NCP will take the lead in assisting the parties. The NCPs can seek assistance from the Chair of the Investment Committee in arriving at such agreement. The lead NCP should consult with the other NCPs, which should provide appropriate assistance when requested by the lead NCP. If the parties fail to reach an agreement, the lead NCP should make a final decision in consultation with the other NCPs.*

Extracts from the bylaws of the French NCP

IV – REFERRALS TO THE NCP – INITIAL ASSESSMENT

- **Article 18.** *In examining the admissibility of a referral, the NCP shall begin by assessing the importance of the issues raised to ascertain whether they merit further examination.*
- **Article 19.** *Following its initial evaluation, the NCP conveys its response to the parties involved. The NCP shall issue a statement announcing the admissibility of the specific instance, which shall stipulate the identity of the parties, the country or countries concerned by the referral and a summary of its initial evaluation. With due regard to the confidentiality incumbent on the NCP, the plaintiff may inform its principal(s) of the decision taken by the NCP with regard to admissibility.*
- **Article 26.** *The NCP should endeavour to conclude the initial assessment within three months of the acknowledgment of receipt of the referral, although additional time may be granted, if need be, in order to collect essential information necessary for an informed decision.*
- **Article 31.** *The NCP shall strive to examine the issues raised within the best timeframe, if possible within 12 months of receipt of a specific instance, it being understood that this timeframe may be extended if circumstances so warrant, e.g. if the issue raised involves a country that has not adhered to the Guidelines, or in the event of parallel procedures.*

V – EXAMINATION OF SPECIFIC INSTANCES

- **Article 27.** *Where the issues raised merit further examination, the NCP shall offer its good offices to help the parties involved to resolve them. For this purpose, the NCP shall consult with these parties and, where appropriate: seek advice from competent authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and experts; consult the NCP(s) in the other country or countries concerned; seek the opinion of the OECD Investment Committee if it has doubts about the interpretation of the Guidelines in the particular circumstances; propose, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in resolving the problems.*
- **Article 28.** *The examination of a specific instance shall take the form of a series of consultations between the enterprise involved, the party or parties having made the referral to the NCP and all NCP members. These consultations shall enable the referring party or parties to set forth the grounds for the referral in detail and allow the enterprise concerned to respond thereto.*

Confidentiality

- **Article 38.** *NCP members are bound to respect the confidentiality of a referral while its examination is not closed.*
- **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.*
- **Article 40.** *When closing the procedures, if the parties involved have not agreed on the resolution of the issues raised, they shall be free to communicate about and discuss these issues. However, information and opinion provided during the procedures by another party involved shall remain confidential, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law.*

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