

NORGES BANK

National Contact Point Norway
The OECD Guidelines for Multinational Enterprises
P.O. Box 8114 Dep
NO-0032 Oslo

Date: 13 January 2015
Your ref.:
Our ref.:

Request for opinion on two specific instances

1. Introduction

Reference is made to the email of 12 December 2014 from the National Contact Point Norway (NCP), in which Norges Bank was asked to provide its opinion in connection with the NCP's consideration of two specific instances under the OECD Guidelines for Multinational Enterprises.

The background to the matter consists of two incoming cases concerning the US enterprise Crown Holdings Inc., and the two South-Korean enterprises Daewoo International Corporation and POSCO, the latter being one of the dominant shareholders of Daewoo International Corporation. The trade union United Steelworkers and the NGOs KTNC Watch, the Cotton Campaign and Anti-Slavery International have filed a complaint with the NCP against Norges Bank due to its role as a minority shareholder in the enterprises.¹ As far as we know, no complaints have been filed against any of the other international owners with their respective national contact points.

Complaints have been filed against the enterprises with the national contact points in the USA and South Korea, respectively. The specific instance in the USA concerns alleged breaches of the Guidelines' recommendations on employee rights relating to Crown Holdings' operations in Canada and Turkey. The specific instance in South Korea concerns alleged breaches of the Guidelines' recommendations on child labour and forced labour relating to Daewoo International's operations in Uzbekistan. The complainants request that Norges Bank contact the enterprises with a view to getting them to stop the alleged undesirable activity.

¹ The bank has ownership interests of 0.76%, 0.12% and 0.91%, respectively, in Crown Holdings, Daewoo International and POSCO. The ownership interests are as of 30 September 2014.

In the above-mentioned email, the NCP requested the following from Norges Bank:

The first step in our case processing is to consider whether the issues merit further examination. In accordance with our procedural guidelines, we will then consider:

- *Whether the Norwegian NCP is the correct entity to assess the alleged violation.*
- *Whether the subject of the complaint is a multinational enterprise.*
- *The identity of the party concerned and its interest in the matter.*
- *Whether the complaint is material and substantial. The complaint must be significant and concern matters covered by the Guidelines.*
- *Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.*
- *The relevance of applicable laws and procedures, including court rulings.*
- *How similar issues have been, or are being, treated in other domestic or international proceedings.*
- *Whether the consideration of the specific instance would contribute to the purpose and effectiveness of the Guidelines.*

We ask Norges Bank Investment Management (NBIM) to submit by 15 January any views it may have on whether the NCP should accept or reject the instances.

Norges Bank comments on some of the points below. In the bank's view, the NCP's procedural guidelines mean that the two specific instances should be rejected by the NCP. We find it appropriate to start by clarifying how Norges Bank views the OECD Guidelines for Multinational Enterprises.

2. Norges Bank's exercise of ownership

Norges Bank regards the OECD Guidelines as an important contribution to promoting responsible business conduct internationally. Since 2004, the Guidelines have been part of the fundamental principles for responsible practice in the management of the Government Pension Fund Global (GPFG). This is also reflected in the management mandate the Ministry of Finance has given Norges Bank for the GPFG, where the following is stated in Section 2-2, first and third paragraphs:²

(1) The bank shall stipulate a wide-ranging set of principles for responsible management of the investment portfolio.

[...]

(3) The principles shall be based on consideration for good corporate governance and environmental and societal factors in accordance with internationally recognised principles and standards, such as the UN Global Compact, the OECD Principles of Corporate Governance and the OECD Guidelines for Multinational Enterprises.

Work on following up the recommendations in the OECD Guidelines for Multinational Enterprises is therefore an important part of the bank's management of the Fund. Norges Bank expects the companies that the GPFG invests in to act in compliance with these international standards. In that connection, the bank seeks to influence the companies, among other things through voting

² Adopted by the Ministry of Finance on 8 November 2010 with subsequent amendments, most recently on 19 December 2014.

and contact with the companies.

Considerations for corporate governance and environmental and societal factors are also an integral part of the investment process and our risk management of the Fund. The investment analyses that form the basis for the bank's management of the GPFG include analyses of countries, markets and companies and they include risk assessments of issues relating to corporate governance and environmental and societal factors.

Based on such analyses, we adapt the Fund's portfolio within the limits that apply to the management. Among other things, Norges Bank has assessed the risk in sectors with major environmental challenges, and we have sold our interests in a number of companies as a result of such risk assessments.

The Fund's property investments are subject to a requirement set out in the mandate from the Ministry of Finance that the bank shall ensure due diligence reviews prior to each investment. Norges Bank also works in general to promote the development of international principles and standards that are relevant to the Fund's interests.

3. Observation and exclusion of companies from the GPFG

The Norwegian management framework for the GPFG was adopted by the political authorities. Norges Bank's exercise of ownership cannot be seen in isolation from the role played by the Council of Ethics in promoting responsible investment practices. Management of the Fund is subject to separate guidelines issued by the Ministry of Finance concerning the exclusion and observation of companies. The guidelines are intended to ensure that the Fund does not invest in the most serious forms of unethical activity or products. One of the criteria [for exclusion] in the guidelines is serious or systematic human rights violations or other particularly serious violations of fundamental ethical norms.

From 1 January 2015, Norges Bank's Executive Board has been assigned the task of making decisions on the observation or exclusion of companies based on the Council of Ethics' recommendations. The goal is to establish a chain of measures in the work on promoting responsible investment practices. The amendments to the framework that entered into force from the turn of the year now facilitate improved coordination of different measures and closer cooperation between the bank and the Council of Ethics.

The following is stated in Section 5(2) of the Guidelines for Observation and Exclusion from the Government Pension Fund Global:³

The Council may investigate matters on its own initiative or at the request of the Bank.

This means that, pursuant to the framework, Norges Bank can submit cases to the Council of Ethics for review on a more systematic basis if the bank has received information about possible serious matters warranting criticism seen in relation to, for example, the OECD Guidelines for Multinational Enterprises.

4. Assessments relating to the NCP's consideration of two specific instances

In Norges Bank's view, there is a considerable difference between expressing expectations of compliance with the recommendations in the OECD Guidelines to the companies that the GPFG invests in, on the one hand, and being covered by the Guidelines as a minority shareholder, on

³ Issued by the Ministry of Finance 18 December 2014.

the other.

Norges Bank is aware that, in March 2014, agreement was reached by the OECD Working Party on Responsible Business Conduct on how some key principles and concepts in the Guidelines should be understood. It has not been clarified at the central OECD level what it is reasonable to expect of different players in the financial sector, including minority shareholders. The OECD has itself pointed out that the choice of investment strategy for financial investors, including index management, raises complex issues and that more practical guidance is needed on what the Guidelines recommend in such situations.⁴ As far as we know, work on clarifying this issue is still at an early stage in the OECD.

We believe that several question and assessments need clarification, including how the process relating to the consideration of specific instances is to be operationalised and coordinated with the many potentially affected parties and local contact points. In the bank's view, for example, it is not obvious how the contact points can facilitate mediation in a situation where complaints have been filed against both an enterprise, its sub-suppliers and its different (and often very numerous) minority shareholders on the grounds of inadequate follow-up of the recommendations in the Guidelines – often independently of each other and in several different countries. Nor is it clear what should be the criteria for considering a complaint. Moreover, questions can be raised about what facts should be substantiated by the complainant in order for the complaint to be considered relevant. We also refer to a research report prepared on behalf of the OECD in May 2013 on the use of the Guidelines in the financial sector, which finds that the Guidelines are unclear and that the recommendation concerning due diligence reviews is little used.

It has also been argued that the OECD Guidelines only express non-judicial and voluntary recommendations on how enterprises should display responsible business conduct. Norges Bank, on its part, believes that the Guidelines express actual requirements and expectations even though they cannot be sanctioned in the legal sense. We note in this connection that several parties still use terms such as 'breach' or 'failure to comply'.

In the following, Norges Bank will limit its comments to some of the points listed in the NCP's email of 12 December.

Whether the Norwegian NCP is the correct entity to assess the alleged violation

Norges Bank believes that any specific instance under the Guidelines that concerns allegations against a multinational enterprise of conduct warranting criticism must first be assessed and clarified by the contact point in the enterprise's home country. We also perceive this to be in line with the NCP's mandate issued by the Ministry of Foreign Affairs of 24 June 2014.⁵ In the present case, this means that the two specific instances must first be considered by the US and the South Korean contact points, respectively.

As pointed out above, the OECD has not, as far as we know, provided any more detailed clarification that ensures that the Guidelines will be practised in a predictable, uniform and robust manner by minority shareholders in the whole OECD area. The bank believes that it is important to ensure a uniform practice across all national contact points for how the Guidelines are practised. This will also

⁴ See <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-1.pdf>

⁵ The NCP's mandate stipulates that, in specific instances that concern contact points in several countries, the affected contact points shall seek to agree on which contact point should lead the work of providing advice and guidance, and the decision shall be based on the understanding that the contact point in the affected enterprise's home country is the most natural choice.

contribute to what is referred to as 'functional equivalence'.⁶ If a situation arises whereby the Guidelines are practised differently across countries and contact points, this can undermine the equal treatment of enterprises (and their minority shareholders).

Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance

In Norges Bank's view, the complainant in the two specific instances has not substantiated why it claims that there is a link between the allegation of conduct warranting criticism relating to the enterprise and Norges Bank in particular in its capacity as minority shareholder in the enterprise.

Norges Bank also wishes to point out that the OECD Principles of Corporate Governance state that it is primarily the board of directors that is responsible for an enterprise's activities and for handling matters relating to the operation of the enterprise. The reason for this is that the board is required to have an independent control function in relation to the enterprise's management on behalf of all the owners. This is also underlined by the fact that it is the general meeting that is the most important platform for making decisions on behalf of the owners. This common platform shall ensure that all owners are taken into account and ensured a voice. As an owner, we must endeavour to comply with the principles for corporate governance and respect the division of roles and responsibilities that follows from these principles. If individual investors use their position as owner to undermine formal governance structures and platforms, this could be a breach of company law and established practice. Such principles and governance structures in enterprises (and in society at large) were established to ensure equal rights and balanced, well-informed decisions on important matters. This does not mean, however, that we cannot seek to influence individual cases through dialogue with enterprises, but the division of roles and responsibilities must be respected when considering what can be expected of a minority shareholder.

How similar issues have been, or are being, treated in other domestic or international proceedings

To Norges Bank's knowledge, the POSCO case is the only instance so far that has concerned minority shareholders in multinational enterprises – by the Norwegian and Dutch contact points, respectively. In our opinion, this instance neither can nor should have a guiding role in relation to whether these two or other similar instances should be accepted for consideration by the NCP.

In connection with the above-mentioned matter, on 27 May 2013, the NPC concluded that Norges Bank had breached the Guidelines in its role as minority shareholder. This was the background to why Norges Bank chose to send a formal enquiry in a letter of 21 June 2013 to the OECD Investment Committee concerning the interpretation of the Guidelines and a later corresponding enquiry from the Ministry of Foreign Affairs on 12 September 2013. Norges Bank also points out that the procedure for coordination between the two national contact points in the above-mentioned case was not followed, and how the Norwegian NCP chose to consider the matter and conclude before consideration of the case against the enterprise POSCO (in South Korea) had been concluded. The South Korean contact point rejected the complaint against POSCO.

Whether the consideration of the specific instance would contribute to the purpose and effectiveness of the Guidelines

Norges Bank does not believe that it will contribute to the purpose and effectiveness of the Guidelines if the NCP decides to take the two instances under consideration. In our view, it is

⁶ This point was also made by the Ministry of Foreign Affairs in a letter to the OECD Investment Committee of 12 September 2013.

important to await the conclusion of the clarification work that is to be carried out under the auspices of the OECD with a view to defining more specific expectations of what, in practice, it is reasonable to expect of different players in the financial sector. Norges Bank is concerned with ensuring broad support across OECD countries, as well as the participation of a representative selection of market players from the financial market, in the work of defining more concrete expectations of different players in the financial sector.

In line with the views presented above, Norges Bank believes that the two specific instances against Norges Bank in its capacity as one of a large number of minority shareholders must be rejected by the NCP.

Yours sincerely,

Øystein Olsen (sign.)
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