



## SPECIFIC INSTANCE RELATING TO THE TRANSPORT SECTOR IN GABON

18 July 2014

### Statement of the French National Contact Point

#### Following its initial assessment, the NCP has decided to not continue with this referral

On 14 April 2014, the French National Contact Point (NCP) for the implementation of the OECD Guidelines for Multinational Enterprises received a specific instance from three Gabonese non-governmental organisations (Time, SOS Consommateurs and Association Jeunesse Sans Frontières) and their legal representative regarding the activities of a French multinational enterprise and several Gabonese transport enterprises with which it connected. The goal of the referral was to "*call on the OECD, via the French NCP, to condemn the practices*" of this French multinational enterprise.

The referral does not clearly state which recommendations of the Guidelines are involved, but it does include a reference to the chapter on competition (Chapter X), from which it cites portions of paragraph 1. The complainants believe that "*the activities [of the enterprises] are diametrically opposed to the Guidelines concerning corporate governance in terms of competition.*"

*Chapter X.1: "Enterprises should carry out their activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all jurisdictions in which the activities may have anti-competitive effects."*

*Chapter X.2: "Enterprises should refrain from entering into or carrying out anti-competitive agreements among competitors, including agreements to a) fix prices; b) make rigged bids (collusive tenders); c) establish output restrictions or quotas; or d) share or divide markets by allocating customers, suppliers, territories or lines of commerce."*

#### 1. Procedure followed by the National Contact Point:

The NCP acknowledged receipt of the referral on 29 April 2014, and informed the complainants of the various stages of the procedure (reception, admissibility and initial assessment, specific instance process (where appropriate) and publication) and of the timeframe for the initial assessment (3 months<sup>1</sup>) and the specific instance examination (one year).

The NCP began its analysis of the admissibility and initial assessment of the referral. On 19 May 2014, it informed the complainants of the formal inadmissibility of the referral and suggested that it be reformulated. The NCP has not received any additional elements from the complainants. During a meeting on 10 June 2014, the NCP finalised its initial assessment and definitively ruled on the inadmissibility of the referral, which it rejected. The complainants were duly informed, along with the enterprise, which was sent a copy of the file.

Pursuant to Article 20 of the NCP bylaws, this statement presents the issues raised in the referral and indicates the reasons for the NCP's decision, without disclosing the identity of the enterprise(s) in question. The parties were made aware of the statement before it was published.

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<sup>1</sup> Article 26. The NCP should endeavour to conclude an initial assessment within three months of the acknowledging receipt of the referral, although additional time may be granted, if need be, in order to collect essential information necessary for an informed decision. see <http://www.tresor.economie.gouv.fr/File/404282>

## 2. Contents of the specific instance

The referral criticises the "*constitution of a monopoly*" by a French multinational enterprise "*in violation of Gabonese law*". It is based on a contract awarded by the Gabonese government in 2007, which it claims is illegal under Gabonese law. The referral reports anti-competitive practices ("controlling prices", "abuse of monopolistic position") as well as "malfunctioning mechanisms" of price setting and competition in Gabon and the sub-region (CEMAC). Without referring to the Guidelines, the referral claims this has led to impoverishment of the population and delayed infrastructure development.

## 3. Admissibility of the referral and reasoning of the NCP's decision

The initial assessment of a specific instance includes four questions: Have the formal admissibility criteria been met (Article 16)? Is the issue bona fide and relevant to the Guidelines (Article 22)? Is the referral admissible under the criteria listed in Article 23? Could the NCP contribute to resolving the dispute (Article 25)?

### *Admissibility criteria outlined in the French National Contact Point's bylaws<sup>2</sup>*

**Article 16.** *A referral to the NCP must be precise. In this regard, it must stipulate: The identity of the enterprise in question; The identity and contact details of the plaintiff; Details of the facts of which the enterprise is accused; Elements of the OECD Guidelines for Multinational Enterprises in respect of which the referral to the NCP is being made.*

**Article 21.** *A referral shall be declared admissible if it fulfils the formal conditions stated in paragraph 16.*

**Article 22.** *The NCP shall also ascertain whether the issue in question has been raised in good faith and in accordance with the Guidelines.*

**Article 23.** *In assessing the admissibility of a referral to it, the NCP shall consider: The identity of the party concerned and its interest in the case; The significance of the issue and the supporting items provided; The apparent connection between the enterprise's activities and the issue raised in the specific instance; The relevance of the applicable laws and procedures, notably jurisdictional proceedings; How similar issues are being (or have been) examined at the national or international.*

**Article 24.** *A referral submitted by any NCP member shall be presumed admissible if it meets the above conditions. [this article is irrelevant for the purposes of this referral]*

**Article 25.** *The NCP shall strive to ascertain whether, in making an offer of good offices, it could make a positive contribution to the resolution of the issues raised and if this would not create serious prejudice for either of the parties involved in other proceedings, or cause a contempt-of-court situation. It may then decide either to pursue or to renounce its consideration of the specific instance.*

### 3.1 The formal admissibility criteria have not been met (Article 16)

Two criteria caught the attention of the NCP: the identity of the enterprise and the details of the complaint against it.

The referral mentions a French multinational, one of its entities based in France, along with Gabonese subsidiaries and partner enterprises. Nevertheless, **it does not clearly identify which is the enterprise or enterprises targeted by the referral.**

Moreover, **the referral is insufficiently detailed and does not provide elements in support of the claims it makes.** The supporting material in the file consists of old, very general articles, mostly taken from websites. The articles do not deal with Gabon, nor with the sector in question or the business activity of the enterprises in question, and they do not describe the facts listed in the referral letter. The business activity of the enterprises in question, as well as the complaints made against them are neither documented nor demonstrated. The complainants also provided certain Gabonese legal bases (acts, constitution, and decrees) mentioned in the referral. On the other hand, the file does not include any elements illustrating the supposed existence of a

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<sup>2</sup> Available from the NCP's website: <http://www.tresor.economie.gouv.fr/File/404282>

monopoly, anti-competitive trade practices or delays in investment. The contract upon which the referral is based is not included in the file. Moreover, the NCP observes that the allegations contained in the referral are partially contradicted by publicly-available information on the way the sector in question operates. Finally, the file contains no information about poverty in Gabon and its alleged connection to the enterprises. It should be pointed out that, certain documents of the file diminish the complainants' argument, by explaining that the development of the sector in question contributes to the development of African countries, even given the limited number of operators.

Therefore, the referral is not admissible because it does not clearly specify the enterprise(s) being targeted, and because it provides no tangible evidence that could be used as a basis for examining the file, whose reasoning is contradicted by the state of the sector. On 19 May 2014, the NCP informed the complainants (see above), stating that the referral did not comply with the other admissibility criteria, and invited them to reformulate the file. **Failing any additional material, under the terms of Article 21 of the NCP's bylaws, the referral is not admissible.**

### **3.2. Several other admissibility criteria were not met (Articles 22, 23 and 25).**

Over and beyond the inadmissibility of the referral on the basis of the formal criteria, the NCP examined the other admissibility criteria in order to complete the initial assessment.

- *Article 22: Is the referral bona fide and relevant to the Guidelines?*

The referral does not describe the area of activity in question in Gabon. It shows a poor grasp of the facts that contradict its reasoning. It provides no proof of the anti-competitive practices that it criticises, nor of their illegality with respect to Gabonese competition law. These elements elicit genuine doubt as to whether the referral is bona fide. Moreover, the NCP deems that the issue raised is primarily connected with national competition regulations. A connection between the facts set out in the referral and the Guidelines was not established due to the lack of proof of their illegality as regards local legislation. **Therefore, the admissibility criteria of Article 22 were not met.**

- *Was the referral admissible with respect to Article 23?*

The NCP was not given sufficient information about the complainants, their legal representative and the enterprises in question. It cannot rule on the interests of the parties, which is critical in referrals dealing with competition issues. In addition, the elements appended to the referral are neither significant nor sufficient to support the complainants' allegations (see above), such that the NCP is unable to begin processing the file. Moreover, the connection between the enterprise(s) in question and the issues raised by the referral has not clearly been established (see above). Finally, it would appear to be more appropriate to use national or regional procedures to deal with issues relating to Gabonese competition law. Similar issues have been dealt with in Gabon and other countries by the relevant national, regional or international judicial or governmental bodies. NCPs are not competent to rule on these types of competition issues, nor can they rule on the illegality of procedures or activities with respect to local law. **Therefore, the admissibility criteria of Article 23 were not met.**

- *Article 25: Can the NCP help to resolve the dispute?*

The French NCP is particularly focused on its primary objective, defined by the OECD, which is to contribute to the resolution of the issues raised through an offer of good offices. In this particular instance, the complainants did not call on its good offices, which limits its ability to intervene. **As a result, pursuant to Article 25, the NCP has decided to not continue the examination of this specific instance.**

### 3. Conclusion: the initial assessment of the referral is negative (Articles 18 & 20).

#### Assessment of admissibility and initial assessment of a referral<sup>3</sup>

**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 20.** *Should it decide that the issue does not merit further examination, the NCP shall inform the parties of its reasons and issue a statement. In this statement, the NCP shall outline the issues raised and set forth the reasons for its decision. The statement shall not disclose the identity of the enterprise in question.*

Considering the admissibility of this referral, the NCP made an initial assessment of whether the issues raised merited further examination. The NCP has decided that the referral is not admissible. It believes that the issues do not merit further examination. Moreover, certain issues having to do with competition law are matters for national and/or regional bodies. The complainants did not call on the NCP's good offices.

On 10 June 2014, the NCP closed the case and rejected the referral, which did not meet the admissibility criteria as defined in the NCP's bylaws. It informed the parties of the reasons for its decision and sent them a draft of the statement.

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