

## SPECIFIC INSTANCE

### “A foreign national and a French multinational Group in Poland”

30 June 2022

#### Final Statement of the French National Contact Point

After extensive investigations conducted by the French NCP to verify some responses of the Group, the NCP believes that the Group has complied with the OECD Guidelines in the case at hand. The NCP recommends however that it strengthen in future its Human Rights Due Diligence in real estate acquisitions in areas that may present particular risks in order to reflect changes introduced in the OECD Guidelines since 2011. The NCP closes the specific instance.

The French NCP is a tripartite body for the non-jurisdictional grievance mechanism related to the implementation of the OECD Guidelines for Multinational Enterprises. Its objective is to contribute to the resolution of issues raised to it through its good offices, mediation and conciliation. It shall endeavor to examine the issues raised as soon as possible, if possible within 12 months of receipt of the specific circumstance. It shall publish its decisions on its website.

As noted in the Procedural Guidance to the OECD Guidelines for Multinational Enterprises, following conclusion of a specific instance and after consultation with the parties involved, the NCP will make the results of the procedures publicly available.

As no agreement was reached among the parties in the case at hand], the French NCP is issuing the following statement. This statement describes the issues raised, the reasons why the NCP decided that the issues raised merited further examination, and the actions initiated by the NCP to assist the parties. This statement presents also the analysis of the specific instance and identifies recommendations made by the NCP to the French Group on the implementation of the Guidelines. This statement also includes the reasons that agreement could not be reached.

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## NON-OFFICIAL TRANSLATION

The French National Contact Point for the implementation of the OECD Guidelines for Multinational Enterprises (here after “the NCP”) received on 7 July 2020, a specific instance submitted by an Australian national, supporting a family who lived in Central Europe, concerning a French Group about the acquisition of a building in Poland in the 2000s.

### Summary of procedure followed by the French NCP

The NCP conducted the initial assessment of the referral that it accepted. As the Group refused its good offices, the NCP proceeded directly to the conclusion phase of the referral.

**Initial Assessment Phase (September 2020 – April 2021):** The historical complexity, the legal aspects, the sensitivity of the matter in Poland and the coordination with six other NCPs required important investigations and a lengthy initial assessment. The French NCP finalized the initial assessment of the referral in April 2021. It decided to accept it (see below). Due to said complexities, the initial assessment statement was not finalized. The initial assessment decision of the French NCP was submitted for comments to the Parties and to supporting NCPs. The French NCP offered its good offices to the Parties in compliance with the NCP’s mandate to offer a platform for dialogue to the Parties to contribute to solve issues raised in a specific instance. The French Group refused the good offices offered by the French NCP considering that they were not justified in the case at hand. From then on, its respect of the OECD Guidelines in the case at hand could not be subject of discussions with the Complainant. The NCP regrets this attitude that is opposed to the spirit of the OECD Guidelines that make NCPs platform for dialogue to make it possible for parties to discuss together the Guidelines effectiveness in a case at hand. The French NCP moved directly to the conclusion phase of the procedure, i.e. the preparation of its final decision, as set out in this document.

**Conclusion Phase (May 2021 – June 2022):** During the conclusion phase, the NCP interacted with the parties in order to answer the issues raised by the referral about the Guidelines effectiveness. It sought to facilitate the exchange of information and the search for a solution between the parties. In response to questions from the NCP, the Group finally proceeded with extensive historical investigation, which it informed the NCP in September 2021, indicating that it could not share the supporting documents (historical documents). The NCP then decided to investigate to verify some specific information before informing the Complainant. The NCP requested the support of the Regional Economic Service of the French Embassy in Poland. These actions required an extension of the conclusion phase of the procedure due to administrative constraints and translation difficulties encountered by the NCP. The information received by the NCP led to a review of the perspective of the referral. The Group confirmed that the request for financial compensation raised against it by the Complainant was unsubstantiated. The French NCP noted that there was no agreement between the parties. It decided to close the procedure and to prepare a final statement.

The draft final statement was the subject of extensive consultations with the Parties and the supporting NCPs. The NCP adopted the final statement on 30 June 2022 and forwarded it to the Parties and the supporting NCPs prior to its publication on its website. The NCP Secretariat then notified the referral to the OECD.

This present statement closes the procedure.

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### 1. Summary of the Specific Instance

The specific instance is submitted by an Australian national<sup>1</sup>, who indicates representing the heirs of his family whose goods were plundered in Central Europe as of 1939. The Complainant provided details on that matter about the involvement of a German company and bank<sup>2</sup> during the conclusion of the procedure.

The Complainant states that his family owned, inter alia, an Austrian holding company which owned itself a Polish company pursuing an industrial activity in Upper Silesia in Poland as of 1923. The production of that site would have stopped in 1933 and the site would have been transformed in a market place. The Complainant states that his family would have owned the land on which the plant was located and would have also owned that plant.

A building is now located on this plot. The land and building are owned since 2007 by a Polish subsidiary of a French multinational company. The Complainant questions the Group's due diligence at the time when the acquisition of this land took place and requests the good offices of the NCP to negotiate the return of the land in the form of financial compensation.

### 2. Initial Assessment of the Specific Instance by the French NCP

The initial assessment phase of the specific instance started in September 2020. The historical and legal complexity of the case and its sensitivity led to the extension of the initial assessment phase until April 2021.

#### The Initial Assessment concerns two issues:

**1. The French NCP found that the referral met the formal admissibility criteria set out in Article 16 of the NCP's Bylaws.** The specific instance details the identity of the companies concerned; the identity and contact details of the applicant; details of the facts alleged against the Company; elements of the OECD Guidelines for Multinational Enterprises that are grounding the referral to the NCP. **The French NCP noted that the other admissibility criteria set out in Articles 18, 22, 23 of its Bylaws were met.** The specific instance is sufficiently precise and sufficiently documented for consideration by the NCP (art. 23). The referral appears to be in good faith (art. 22). The Complainant is properly identified and has an interest in submitted the referral (art. 23). On the merits, the referral concerns the responsible conduct of the French Group on whether its real estate acquisition's policy took and takes into account risks to human rights in geographical areas at risks. The referral is therefore related to the OECD Guidelines of 2000 and of 2011 (art. 22 and 23). The French NCP has jurisdiction to handle it with the support of the six foreign NCPs concerned. The NCP forwarded its draft initial assessment decision to the Parties and the supporting NCPs and organised several exchanges with each Party and with the supporting NCPs as of September 2020. These bilateral discussions highlighted orthogonal positions of the Parties that made extremely difficult to reach a convergence among the Parties about the admissibility of the referral. The French NCP confirmed in April 2021 that it considered that the issues raised by the referral merited a thorough examination. The Parties and supporting NCPs were informed of this decision.

The NCP offered its good offices to the parties. The Group agreed to engage in a dialogue with the NCP. But on the contrary, the Group has repeatedly stated that it considered the referral inadmissible and that as a consequence it declined the offer of good offices of the French NCP and refused any direct dialogue with the Complainant. The French NCP regrets this attitude which is contrary to the spirit of the

<sup>1</sup> The complainant and several members of his family reside in Australia have acquired dual Austro-Australian nationality during the procedure following the Austrian decision of 2022.

<sup>2</sup> He states that from 1939 on the basis of the decision to plunder their goods, a German company would have taken over the control of his family's Company that operated that plant. It states that a German bank would have been the majority shareholder of that German company.

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Guidelines because it doesn't enable the NCP to facilitate a direct engagement between the Parties on issues raised regarding the Guidelines effectiveness. As the good offices phase was not possible, the NCP decided to move directly to the conclusion phase of the referral.

### **2. NCPs examine the implementation of the OECD Guidelines for multinational enterprises. In the case at hand, several issues which are important for the Complainant do not fall within NCP's jurisdiction.**

The OECD Guidelines are recommendations that adhering Government's address to multinational enterprises. NCPs have not the jurisdiction to examine the conformity of decisions taken by public authorities with the OECD Guidelines. This applies for the present case, on the one hand to spoliation raised in the referral and, on the other hand, to decisions taken by Polish authorities in response to the Complaint restitution's requests.

**Thus, in the case at hand, several issues linked to State's decisions do not fall within the jurisdiction of NCPs:**

- Any request for financial compensation for the restitution of the company owned by the Complainant's family that was plundered falls under the jurisdiction of competent national authorities.
- The Polish NCP stated that in Poland issues related to compensation arising from decisions on nationalisation and "re-privatisation" of goods in Poland after 1945 are strictly under the jurisdiction of the Polish judicial authorities. The Complainant thinks that "the land would have been subject of forced expropriation decided by the Polish Government".
- According to the Complainant, there would not exist Polish Law governing the restitution of goods spoliated during World War II in Poland. He stresses that Poland signed the 2009 Terezin Declaration on goods confiscated during the second world war<sup>3</sup> but that Poland does not adhere to the 2010 Terezin Declaration' Guidelines. He precises that these Guidelines provide for restitution or compensation including of "other legal titles registered in property books prior to the second world war"<sup>4</sup>.
- The question about the Polish legislation on the restitution of spoliated properties in Poland does not fall under NCP's jurisdiction.

**The French NCP recalls that acceptance of a specific instance does not determine whether or not the Company acted in accordance with the OECD Guidelines.**

### **3. Coordination with foreign NCPs**

The Complainant submitted the referral to the French NCP without seeking coordination with its peers. The Secretariat of the French NCP considered it necessary to inform six NCPs concerned by this specific instance. These are the NCPs of Poland (place of the disputed land), the Netherlands (origin of an enterprise), Austria (origin of the holding company which owned the factory), Germany (decision of spoliation), the United States (specific instance in 2017, origin of an enterprise) and Australia (Complainant's origin, specific instance in 2019).

The NCPs decided that the French NCP would lead the referral because of the nationality of the Group, whose due diligence is being questioned. The Secretariat of the French NCP regularly informed and consulted the 6 supporting NCPs on the progress of the procedure and the issues raised on the merits of the case. Supporting NCPs were consulted on the preparation of the statement.

<sup>3</sup> [4297655\\_2634845\\_Terezin\\_Declaration\\_FullText.pdf \(mzv.cz\)](#)

<sup>4</sup> See Criteria for Best Practices. C).

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This specific instance has been the subject of detailed investigation and detailed analysis, which have been regularly discussed with the Parties and with the supporting NCPs.

The French NCP thanks the 6 supporting NCPs for their contribution to the handling of the referral. This coordination is in line with the practice of the French NCP and [the OECD Guidance on NCP Coordination](#).

### 4. Examination of the Specific Instance by the French NCP

The information gathered during the conclusion of the referral makes it possible to close the procedure and to answer issues about the implementation of the Guidelines in the case at hand. The Group provided confidential responses to the NCP, which it could explain in part to the Complainant. The Complainant then changed his reasoning while maintaining his initial requests.

In its action based on the OECD Guidelines, the NCP examines elements that go beyond law and derive from the 2000 and 2011 editions of the Guidelines applicable to the case at hand.

#### ♦ About the Complainant's request for financial compensation:

The Group states that it appears from its information that the referral concerns a land which never belonged to the company of the Complainant's family and that it was nationalised by the Polish State in 1950. The information provided by the Group - and verifications carried out by the French NCP - show that the company of the Complainant's family rented the factory but did not own the disputed land. The Group therefore considers that the request for financial compensation is not admissible. The NCP notes the lack of agreement between the parties on this matter.

#### ♦ About the acquisition of the building by the French Group in 2005-2007 regarding the 2000 OECD Guidelines:

In response to the specific instance and in response to questions of the NCP, the Group provided the NCP with the diligences it had carried out to complete the acquisition of the building. It shows that:

- The investigations carried out in the course of the procedure indicate that the Complainant's family didn't own neither the disputed land nor the factory but that the family's company rented this factory. After he had mentioned the ownership of the property, the Complainant said that it was a "long-term commercial contract" and possibly "renewable". The Complainant states that he has taken actions towards the competent Polish authority to obtain this document.
- The French Group was not the first purchaser of the land on which the building was built. The history of the property was reconstructed during the procedure.
- The French Group presented to the NCP the diligences it carried out during the 2000s to complete the acquisition of the building and the land. It indicated that it had followed its real estate acquisition's procedure based on the principle of land publicity and real estate acquisition law. It requested that an audit was carried out by a third party to verify the property titles of all the concerned plots and to ensure that no claims were included in the local land register. These verifications were carried out twice. It states that no claims were recorded in the land register at the time of these two verifications.
- The Complainant lodged in 1991 requests for restitution to the competent Polish authorities (Voivodship, Court, Ministry of Property Transformation, and Ministry of Finance). The Complainant indicated that these requests did not succeed. According to the documents in the file transmitted by the Complainant, those requests were not written-down in the land register. Therefore, the NCP deducts that the Group could not have been aware of it at the time of the acquisition.

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The region of Upper Silesia is exposed to the risks of restitution' requests of property seized during the second world war or nationalized after the war. Enterprises who established activities there in the 2000s had to pay particular attention to these risks. The NCP asked whether, beyond consulting the local land registry, the Group had sought further information on the land and its history, for example from the municipality. The Group indicated that it *"consulted and analysed land publicity, which has never been alleged to have been fraudulently or incorrectly managed and whose purpose, legally, is to trace the chain of land ownership of an asset"*. The NCP questioned itself about this lack of engagement with the municipality that could have enabled to complement the information about the history of the property.

→ *The NCP notes that, in the light of the information available in the 2000s, well before the Complainant's expression of interest, the French Group acted in accordance with the recommendations of the 2000 Guidelines, which were less comprehensive than today (see annex). The 2000 Guidelines did not include recommendations about risk-based due diligence, the concept of business relationships nor the human rights chapter.*

### ♦ About the Group's due diligence today and its response to the specific instance regarding the 2011 OECD Guidelines:

In response to the specific instance and to the NCP's question, the Group conducted major new investigation during 2021 that reconstructed the entire history of the land ownership of said plots from 1900 to the present days. These investigations, and the verifications carried out by the French NCP, revealed that the Complainant's family would never have owned the disputed land. It appears that the company of the Complainant's family would have rented this plant. The Group states that it is apparent from this information that the land was sold by its owner to the city in July 1946, and that it was nationalised by the Polish State in 1950 and then the ownership of the land was transferred to the Polish Treasury in 1950 and then returned to the municipality in 1991.

→ *By conducting new investigations into the history of land ownership of said land and by agreeing to inform the Complainant of the outcomes of these investigations, the Group carried out its human rights due diligence in compliance with the Guidelines. The NCP regrets, however, the lateness of these investigations. The NCP also regrets the refusal of the Group to forward documents directly to the Complainant who maintains its allegations of the violations of the Guidelines and its request for financial compensation.*

## 5. Positions of the Parties expressed during the Conclusion Phase

### ♦ During the referral conclusion phase, the Complainant expressed the following positions:

The Complainant considers that *"the Group did not respond to his request for financial compensation"* and *"refused to provide him with archival documents showing the history of the building's property"*. The Complainant considers that the lease agreement is *"a long-term registered commercial lease"* that covered the period *"1923 to 1957"* and *"could be renewed after 1957"*. He deducts similar effects to those of ownership. He considers that errors were made by Polish administration in writing-down the hand-written archives into the electronic register in 2001. He considers that *"the "sale" of property to the Town Hall in 1946 was a "forced expropriation by the Polish government"*. He deducts permanent ownership rights of the Company of his family.

In May 2022, the Complainant was able to consult archival document (see above-mentioned leases). He then recognised the existence of the rent of the building and referred to business relations links between the building's owner and the Polish companies of his family. He deducts that their *"business relationship was a joint venture"* which *"benefited both parties: his family who brought the technology, expertise and capital and the owner who supplied the building"*.

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The Complainant considers that Austro-Polish Treaties of 1955 and 1970 did not apply to the case at hand as they were restricted to Austrian citizens meanwhile his family members were Australian at that time.

The Complainant considers that the Group *“failed to comply with the due diligence obligations for human rights under the 2000 OECD Guidelines”* including *“the European Convention on Human Rights”* when the building was acquired in 2005-2007 meanwhile *“the Group and its majority shareholder and parent company at the time were aware of the risks associated with the second world war and the nationalisations of the Polish communist regime”*. The Complainant considers that *“if the Group had conducted appropriate due diligence in 2005-2007, it would have found that there was a long-term commercial lease for the benefit of the Company of his family”*. He considered that the Group *“would have discovered which family was “behind” the company in question and that it could then have taken further steps with the seller, i.e. the Town Hall, in order to restore the interest of the previously registered owner [i.e. the Company of his family]”*. He maintains his request for financial compensation.

### ♦ During the referral conclusion phase, the Group expressed the following positions:

The Group refers to diligences carried out in the acquisition of the property and to documents it transmitted to the NCP, which leads it to reiterate that the specific instance is inadmissible and that the Complainant misappropriated the NCP. It states that it *“had consulted and analysed the land publicity, which was never alleged to have been fraudulently or incorrectly managed and whose purpose, legally, is to trace the chain of ownership of an asset”*. The Group strongly opposes the lifting of the anonymity of the NCP statement which it considers to be unjustified and which could be detrimental to itself.

## 6. Conclusion of the Specific Instance and Recommendations of the French NCP

The NCP note the engagement of the parties throughout the procedure which dealt with complex, sensitive and difficult issues. It notes that the behavior of both Parties complicated and slowed down its action. The NCP notes that the Parties' positions remained diametrically opposed throughout the procedure. It noted that although the Group refused its good offices, the Group agreed to respond to the NCP's questions and had carried out appropriate investigations to address its questions.

### 1. As a preliminary remark, the French NCP notes that the Complainant states to be facing since a long-time difficulties in obtaining restitution of his family's property located in Upper Silesia.

The Complainant expected from the NCP procedure to obtain remediation in the form of recognition of his rights and the negotiation of financial compensation. → *Nothing prevents the Complainant from continuing his actions vis-à-vis competent national authorities to seek financial compensation link to the loss of their company.*

2. The Group expressed to the NCP and the Complainant its sincere compassion for the Complainant and his family. The Group did not wish to engage in a direct dialogue with the Complainant because, in its view, any request for financial compensation falls under the jurisdiction of the Polish authorities, not the Group. → *The NCP found that, following on its advice, the Group wrote to the Complainant at the end of May 2021 and agreed that the NCP inform him orally of specific results of investigations carried out in response to its referral.*

3. The French NCP considers that the French Group has complied with the Guidelines in the case at hand. Nevertheless, it remains that because the Group refused the NCP's good offices, the discussion with the Complainant about the Group's compliance with the Guidelines in the case at hand could not materialized. The NCP regrets this attitude, which is contrary to the spirit of the Guidelines because it couldn't facilitate engagement among the Parties on issues raised about the Guidelines effectiveness.



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**4. The referral concerns a real estate acquisition in an area where massive and repeated human rights violations have taken place and where legal complexities of land ownership exist.** Any investment project or land acquisition project in this type of area must include appropriate measures under the risk-based due diligence policy as recommended by the OECD Guidelines and UN Guiding Principles into force since 2011. → *The NCP notes that the French Group's land and real estate acquisition policy does not explicitly provide for appropriate measures for risky areas. The NCP makes the following recommendation to update its land and real estate acquisition policy:*

→ *Recommendation n°1: In accordance with the general principals of the 2011 OECD Guidelines, the NCP recommends that the French Group update its acquisition policy in order to verify that it includes appropriate measures specific to "carry out risk-based due diligence" in particular with respect to human rights (see Chapter II A10-14 and Chapter IV).*

→ *Recommendation n°2: In compliance with the general principals of the 2011 OECD Guidelines, the NCP recommends that the Group draw on the due diligence measures it has undertaken in the case at hand in order to review its current real estate acquisitions located in particularly risky geographical areas and to strengthen the identification of human rights risks for its future projects.*

**5. The NCP procedure is confidential.** In accordance with its Bylaws and the Procedural Guidance established by the OECD and in order to build confidence and serenity with the Parties, the NCP has taken appropriate measures to protect sensitive, commercial or other information, as well as to protect the interests of other stakeholders involved in this specific instance. Thus, information brought to its attention was subject to confidentiality.

The NCP considered it necessary to protect the interests of stakeholders involved in the specific instance, including the NCP itself. It therefore decided, on a very exceptional basis, to make the final statement anonymous pursuant to Article 39 of its Bylaws, which provides that: *"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"*.

The NCP recalls 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 opinions provided during the procedures by another party involved shall remain confidential, for the parties and for the NCP members, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law."*

**The NCP closes the procedure of this specific instance. It invited the French Group to keep it informed of the follow-up of its recommendations.**

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**This specific instance has been the subject of detailed investigation and detailed analysis, which have been regularly discussed with the Parties and with the supporting NCPs. This information is included in a confidential annex.**

### Annexes:

- 1. Recommendations of the 2000 and 2011 Guidelines referred to in the specific instance.
- 2. Outline of the procedure for handling a specific instance by the French NCP.

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**Annex 1: OECD Guidelines referred in the Specific Instance**

**Annex 1. Recommendations of the Guidelines referred to in the referral**

**OECD Guidelines for Multinational Enterprises, 2000**

**II. General principles**

*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, enterprises should:*

*2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*

*10; Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.*

**OECD Guidelines for Multinational Enterprises 2011**

**Chapter II on general principles:**

**II. 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.

**13.** In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

**14.** Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

**IV. 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.

**3.** Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.

**4.** Have a policy commitment to respect human rights.

**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.

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Annex 2 Specific Instance Procedure of the French NCP (outline)

Outline of the procedure for handling with a specific instance by the French NCP

For more information on the procedure and specific instances handled by the French NCP:

- **French NCP Bylaws of 5 February 2019**

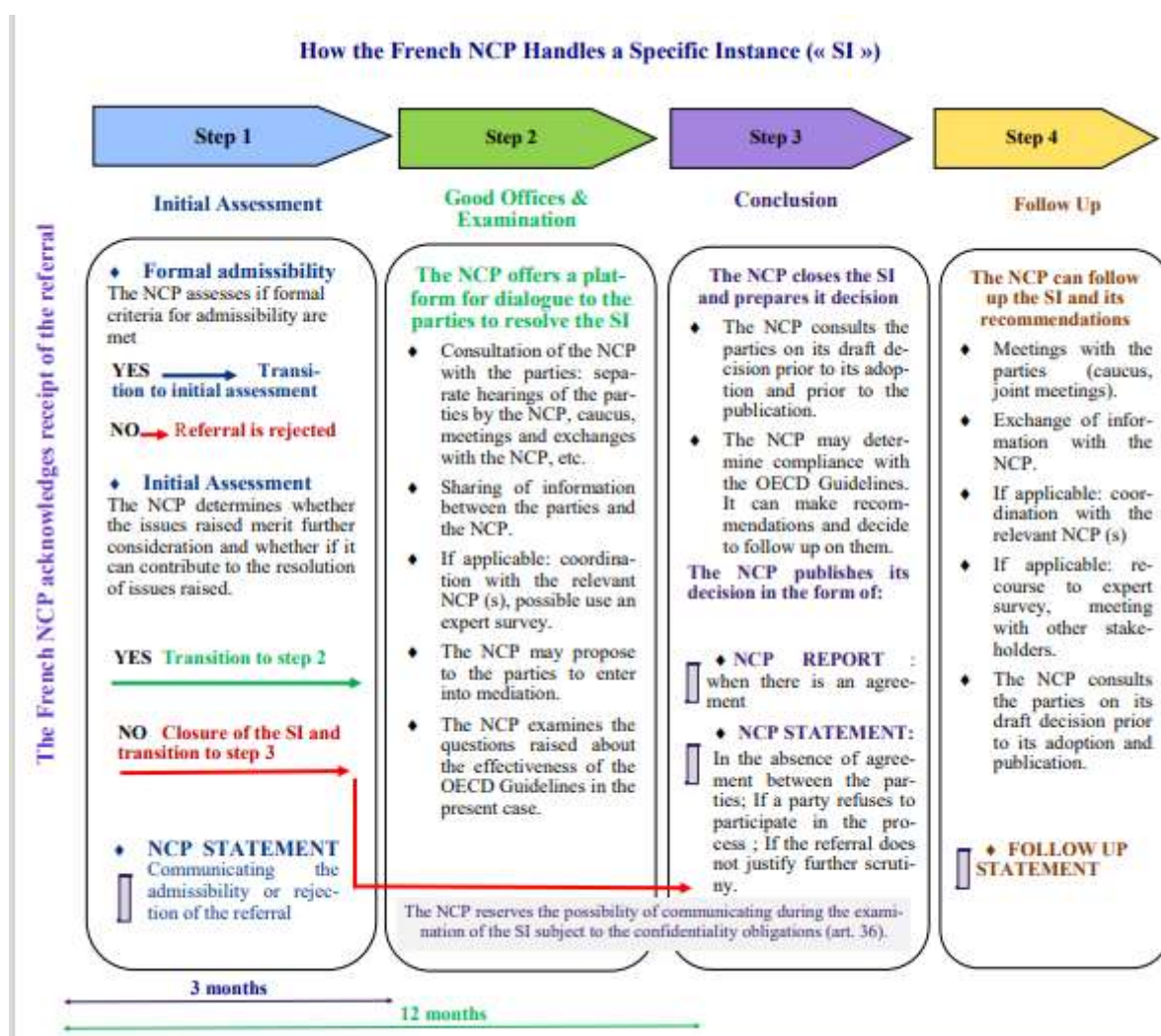
[Français](#) | [in English](#)

- **'How to submit a Specific Instance to the French NCP':**

<https://www.tresor.economie.gouv.fr/tresor-international/pcn-france/comment-saisir-le-pcn-francais>

- **Decisions of the French NCP in Specific Instances:**

<https://www.tresor.economie.gouv.fr/tresor-international/pcn-france/decisions-du-pcn-francais-dans-les-circonstances-specifiques>



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