DECISION N° 2022-PAC-01 OF 5 SEPTEMBER 2022
RELATING TO PRACTICES
IMPLEMENTED IN THE FUNERAL INDUSTRY

The Polynesian Competition Authority,

Considering the email of 22 October 2020, transmitted on 23 October 2020 by the Director of the Directorate General of Economic Affairs, and the email of 11 December 2020 from the consumer association Te Tia Ara, reporting facts and communicating documents relating to the funeral industry, in connection with the Covid-19 pandemic;

Considering Decision No 21-SO-02 of 9 March 2021 relating to an ex officio referral of facts likely to constitute an anti-competitive practice in the funeral services sector, registered under number 21/0003F ;

Considering the Competition Code, in particular Book II on anti-competitive practices;

Considering the notification of grievances sent to the Government Commissioner and to the companies involved between 28 October and 3 November 2021;

Considering the observations of SARL Funéraires Min Chiu and Funéraires Min Chiu Junior Moorea;

Considering the report sent to the Government Commissioner and to the companies involved, between 8 and 14 March 2022;

Considering the business secrecy decisions 2021-SA-06 of 18 August 2021, 2021-SA-07 of 24 August 2021, 2021-SA-08 of 30 August 2021, 2021-SA-09 of 31 August 2021, 2021-SA-10 of 6 September 2021, 2021-SA-11 of 6 September 2021, 2021-SA-12 of 8 September 2021, 2021-SA-13 of 9 September 2021, 2021-SA-14 of 10 September 2021, 2021-SA-15 of 10 September 2021, 2021-SA-16 of 10 September 2021 2021-SA-17 of 10 September 2021, 2021-SA-18 of 10 September 2021, 2022-SA-05 of 10 January 2022, 2022-SA-06 of 10 January 2022, 2022-SA-12 of 27 April 2022, 2022-SA-13 of 28 April 2022, 2022-SA-14 of 28 April 2022, 2022-SA-15 of 28 April 2022, 2022-SA-16 of 3 May 2022, 2022-SA-17 of 10 May 2022, 2022-SA-18 of 12 May 2022 and 2022-SA-19 of 16 June 2022;

Considering the other documents on file;

The rapporteur, the acting General Rapporteur, the Government Commissioner and the representatives of the companies Funéraire Maraetefau, Funéraire Maruhi Services, Funéraire Tavi, Funéraire Tehei Services, Funéraires Min Chiu, Funéraires Min Chiu Junior Moorea, HPP Funéraire, Loïc Funéraire, Raromatai Funéraire, Vaxelaire Mortuary et Graniterie, heard at the sitting held on 29 August 2021;

Adopts the following decision:

Summary[1]

In this decision, the Authority sanctions twelve companies for having implemented an agreement in the funeral services sector, in violation of Article LP 200-1 of the Competition Code.

These practices were referred to the Authority on its own initiative after an investigation report was sent to the General Rapporteur.

The practices sanctioned consisted in entering into a pricing agreement for funeral services for Covid-19-related deaths between the twelve companies involved. The companies limited their commercial autonomy and restricted competition in the market concerned. The infringement consisted, for all the companies that signed the agreements, in jointly setting the prices charged to bereaved families (artificially favouring their increase).

Such an agreement constitutes, by its very nature, a particularly serious infringement of competition law.

The Authority imposed the following penalties:

XPF 3,069,982 to Funéraires Min Chiu;

XPF 1,823,337 to Funéraire Tehei Services;

XPF 589,842 to HPP Funéraire;

XPF 446,761 to Vaxelaire Mortuary et Graniterie;

XPF 364,589 to Funéraire Maraetefau;

XPF 85,928 to Pompes funèbres Teave Julienne;

XPF 202,500 to Funéraire Matairea;

XPF 101,250 to Funéraire Maruhi Services;

XPF 101,728 to Loïc Funéraire;

XPF 61,560 to Raromatai Funéraire;

48,825 XPF to Min Chiu Junior Moorea.

In determining the amount of the penalties, the Authority took into account the particular gravity of the infringement committed during the Covid-19 health crisis. The joint pricing between competing companies for funeral services for Covid-19-related deaths was intended to distort competition by preventing prices from being set by the free market and by artificially favouring their increase, to the direct detriment of the bereaved families and indirect detriment of the Social Security Fund (CPS).

[1] This summary is for information purposes only. Only the following reasons for decision are binding.

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I. BACKGROUND OF PROCEEDINGS

1. By email dated 22 October 2020, transmitted on 23 October 2020 to the investigation department of the Polynesian Competition Authority (hereinafter "the Authority") by the Director of the Directorate General of Economic Affairs (hereinafter "DGAE"), and then by email dated 11 December 2020, members of the Te Tia Ara consumers' association reported facts and communicated documents relating to the funeral services sector, in connection with the Covid-19 pandemic

2. In an e-mail dated 11 December 2020, the consumer association Te Tia Ara reported that: "For several weeks, a number of consumers have been complaining to my association about the high prices charged by funeral companies for the death of their relatives with Covid 19. Some of them denounce an increase in prices. [...] Twelve funeral companies from Tahiti, Moorea and ISLV signed, by mutual agreement on 21 April 2020, a price list for the management of a Covid 19 death [...] I would like to know your opinion on this price agreement and whether it seems reprehensible to you or whether it is justified by "a particular situation authorising derogations for the benefit of these companies which are able to demonstrate that their practices have contributed to economic progress while allowing consumers to benefit from the positive results obtained." The fact remains that funeral expenses, which are much higher for Covid 19 victims, are a serious concern for disadvantaged families, especially for those whose deceased is not a beneficiary of the CPS and does not benefit from the 150,000 Fcfp payment by the fund."

3. The Authority's investigation department conducted an investigation registered under number 20/0012E concerning the conditions of competition in the funeral services sector in French Polynesia. At the end of the investigation, an investigation report dated 25 February 2021 was sent to the general rapporteur.

4. By Decision No 21-SO-02 dated 9 March 2021, registered under number 21/0003F, the Authority took action on its own initiative on facts likely to constitute an anti-competitive practice in the funeral services sector, on the proposal of the general rapporteur in accordance with Article LP 620-5 of the Competition Code.

II. FINDINGS

A. THE FUNERAL INDUSTRY

1. DESCRIPTION OF THE SECTOR

5. The funeral service comprises the indoor service, the outdoor service and the free services. The internal service is performed inside religious buildings and is the responsibility of the religious services.

6. The external funeral service is governed by the provisions of the general code of local collectivities, as applicable in French Polynesia, and includes various services (transport of the body before and after the placing of the body in the coffin; organisation of the funeral; conservation care; supply of covers, coffins and their interior and exterior accessories as well as cinerary urns; management and use of funeral chambers; supply of hearses and mourning cars; supply of personnel, objects and services necessary for

funerals, burials, exhumations and cremations, with the exception of funeral plaques, religious emblems, flowers, various printing works and funeral marble work).

7. The external service may be provided by municipalities or their delegates, without benefiting from any right of exclusivity, allowing in particular companies to carry out this mission. Thus, even if no municipality currently seems to be directly responsible for this task, the external funeral service constitutes a public industrial and commercial service, because of the origin of its resources, which come from the payments made by families for the services provided, as well as the way in which it is run, in which public or private operators may intervene.

8. The free services depend on the sole initiative of the families of the deceased. They include, for example, the provision of flowers, marble work or the maintenance of graves.

2. THE LEGISLATIVE AND REGULATORY FRAMEWORK APPLICABLE IN FRENCH POLYNESIA

9. The funeral industry is partly governed by the General Code of Local Collectivities, as applicable in French Polynesia. These provisions are supplemented by local regulations.

a) The general framework

10. The General Code of Territorial Collectivities (hereafter "CGCT") applicable in national law has been partially extended and adapted in French Polynesia, for its legislative and regulatory parts. The provisions of Articles L 2223-20 to L 2223-39 relating in particular to professional training, commercial law and the authorisation of operators involved in funeral services have not been extended to French Polynesia as they relate to matters falling within its jurisdiction.

11. In the legislative part, the CGCT, as applicable in French Polynesia, provides in its article L 2223-19 that: *"The funeral service may be carried out by the municipalities, directly or through delegated management. The municipalities or their delegates do not have any exclusive right to carry out this mission."*

12. Funeral regulations are only partially regulated by the CGCT and fall within the competence of the mayor under his police powers.

13. In the regulatory part, the CGCT, as applicable in French Polynesia, covers:
    - conservation of the body of a deceased person (articles R 2213-2-2 à R 2213-4),
    - moulding a corpse (articles R 2213-5 et R 2213-6),
    - transport of the body before placing it in the coffin (articles R 2213-7 à R 2213-14),
    - placing in the coffin and closing the coffin (articles R 2213-15 à R 2213-20),
    - transport of the body after placing it in the coffin (articles R 2213-21 à R 2213-28),
    - temporary storage (articles R 2213-29 à R 2213-30),
    - burial (articles R 2213-31 à R 2213-33),
    - cremation (articles R 2213-34 à R 2213-39-1),
    - exhumation (articles R 2213-40 à R 2213-42),
    - and miscellaneous provisions (articles R 2213-43 à R 2213-43).

b) Local regulations

14. In the absence of applicable local economic regulations, the funeral industry falls within the general regulatory framework. Thus, Order No. 170 CM of 7 February 1992 on consumer information and protection in the territory of French Polynesia is applicable to the funeral services sector.

15. In the context of the fight against the Covid-19 pandemic, several specific texts are applicable to the funeral industry:

- Resolution No. 2020-15 APF of 17 April 2020 listing the SARS-CoV-2 infection as a communicable infection and laying down provisions for the management of deceased persons infected or suspected of being infected with the SARS-CoV-2 virus;
- Order No. 1322 CM of 27 August 2020 implementing resolution No. 2020-15 APF of 17 April 2020 listing the SARS-CoV-2 virus infection as a communicable infection and laying down provisions for the management of deceased persons infected or suspected of being infected by the SARS-CoV-2 virus.

16. Pursuant to Articles R 2213-2-2, R 2213-8 and R 2213-8-1 of the CGCT as applicable in French Polynesia, Resolution No. 2020-15 APF prohibits any operation aimed at preserving the body of a person who died of Covid-19 and any transport before being placed in a coffin. For all persons concerned, *"the physician or health professional writing the death certificate must indicate on the certificate the presence of an epidemic or biological risk"*.

17. Order No. 1322 CM completes the provisions of Resolution No. 2020-15 APF. According to this text, persons who die because of Covid-19 *"shall be buried immediately with final closure of the coffin, at least in a single coffin with a watertight casket"*. It is also specified that *"when the deceased is placed in a single coffin with a watertight casket and the latter is not stored in a dedicated refrigerated space, burial must take place within a maximum of forty-eight (48) hours from the date of death"*.

18. In addition to these two texts, although they do not have regulatory value, the French Polynesia Covid-19 crisis unit has published a document entitled *"Health recommendations for the management of a deceased person suspected or confirmed to be Covid-19"*, which has given rise to various versions, including one dated 15 July 2020. The purpose of this procedural document is *"to define the approach to be followed in the management of a deceased person with suspected or confirmed Covid-19"*. These recommendations are disseminated *"for the attention of persons in charge of funeral operations"*.

19. Finally, CPS covers, under certain conditions, the funeral expenses of insured persons and their dependants. To this end, CPS adopts resolutions setting the amounts and funeral services included in this coverage for the three schemes of the fund:

- the solidarity scheme of French Polynesia (RSPF),
- CPS general employee scheme,
- the self-employed scheme (RNS).

20. In 2018, three resolutions (No. 01-2018/CPS, No. 01-2018/RNS and No. 02-2018/CG.RSPF) set the limits of the amounts of coverage at XPF 150,000 for deceased adults and children over 12 years of age or XPF 80,000 for deceased children 12 years of age and under. A list of benefits eligible for reimbursement was also provided:

- supply and delivery of the coffin or urn,
- costs arising from the application of sanitary measures,
- placing in the coffin,
- mortuary costs,
- cremation costs,
- costs of carrying and transporting the body by hearse,
- costs of administrative procedures.

21. In 2020, three new resolutions (No. 27-2020/CPS, No. 47-2020/CG.RSPF and No. 08-2020/RNS) replaced those of 2018. The limits of the amounts of coverage remained the same (XPF 150,000 or XPF 80,000) but several funeral services were added:

- costs of risky interventions,
- costs of complete personal protective equipment,

- protective accessories,
- disinfection of equipment,
- cost of identification plate,
- waterproof body bag.

3. THE COMPANIES IN THE SECTOR

22. In 2020 / 2021, according to the territorial business register (hereafter "RTE") of the Institute of Statistics of French Polynesia (hereafter "ISPF"), funeral directors (NAF code 9603Z) include twenty-four businesses considered as active (i.e. not deleted from the RTE).

23. It is apparent from the information in the file, and in particular from the observations made, that nineteen companies are actually active in the funeral services sector.

24. This sector is mainly composed of very small enterprises (VSEs), with two main companies and two others in an intermediate situation.

B. THE COMPANIES CONCERNED

25. The present case concerns twelve companies in the funeral industry, listed below, which account for almost all the turnover in the sector:

Trade name / sign	Corporate name	Tahiti No.	RCS No.
Funéraire Maraetefau	Maraetefau Raitae Aroul Jérémie	B76120	16 20 A
Funéraire Maruhi Services	Maruhi Igor Hauroa	C98874	18 2395 A
Funéraire Matairea	Tahema Hans Moe	935692	14 1641 A
Funéraire Tavi	Patii Terava Mireille	978114	11 502 A
Funéraire Tehei Services	Tehei Orehau Victor	901496	09 635 A
Funéraires Min Chiu	SARL Funéraires Min Chiu	307082	94 116 B
Funéraires Min Chiu Junior Moorea	Min Chiu Léone (married name: Timau)	806190	07 26 A
HPP Funéraire	Hapipi Hapai Lisa	D13772	19 562 A
Loïc Funéraire	Papa Victor	068809	14 2009 A
Pompes funèbres Teave Julienne	Patii Julienne (married name: Teave)	665166	16 2661 A
Raromatai Funéraire	Papara Floriane Tamahere (married name: Tehei)	B96763	16 1603 A
Vaxelaire Mortuary et Graniterie	Vaxelaire Mortuary et Graniterie	A94323	14 13 B

26. The business under the name "Funéraire Maraetefau" is operated by Mr. Jérémie Maraetefau, as an individual entrepreneur. The company was registered on 6 January 2016. The company's main establishment is registered in the municipality of Paea (island of Tahiti) and began operating on 5 January 2016. No secondary establishment is registered.

27. The business under the name "Funéraire Maruhi Services" is operated by Mr. Igor Hauroa Maruhi, as an individual entrepreneur. The company was registered on 15 October 2018. The company's main establishment is registered in the municipality of Faa'a (island of Tahiti) and began operating on 12 October 2018. No secondary establishment is registered.

28. The business under the name "Funéraire Matairea" is operated by Mr. Hans Moe Tahema, as an individual entrepreneur. The business was registered on 5 September 2014. The company's main

establishment is registered in the municipality of Hitiaa O Te Ra (island of Tahiti) and began operating on 8 September 2014. No secondary establishment is registered.

29. The business under the name "Funéraire Tavi" is operated by Ms Terava Mireille Patii, as an individual entrepreneur. The business was registered on 24 March 2011. The company's main establishment is registered in the municipality of Punaauia (island of Tahiti) and began operating on 8 March 2011. No secondary establishment is registered.

30. The business under the name "Funéraire Tehei Services" is operated by Mr. Orehau Victor Tehei, as an individual entrepreneur. The business was registered on 16 April 2009. The company's main establishment is registered in the municipality of Papara (island of Tahiti) and began operating on 1 August 2009. A secondary establishment is registered in the municipality of Moorea and began operating on 1 January 2013.

31. The business under the name "Funéraires Min Chiu" is operated by the company "SARL Funéraires Min Chiu", whose head office is registered in the municipality of Arue (island of Tahiti). The company is administered by its manager, Mrs. Pauline Teehuariivaiau Min Chiu (née Natua). The company was registered on 21 July 1994. The company's main establishment is registered in the municipality of Arue (island of Tahiti) and began operating on 21 July 1994. A secondary establishment is registered in the municipality of Punaauia and began operating on 1 September 1995.

32. The company under the name "Funéraires Min Chiu Junior Moorea" is run by Mrs. Léone Timau (née Min Chiu), as an individual entrepreneur. The company was registered on 9 January 2007. The company's main establishment is registered in the municipality of Punaauia (island of Tahiti) and began operating on 8 January 2007. No secondary establishment is registered.

33. The company under the name "HPP Funéraire" is operated by Mrs. Hapai Lisa Hapipi, as an individual entrepreneur. The business was registered on 21 February 2019. The company's main establishment is registered in the municipality of Paea (island of Tahiti) and began operating on 20 February 2019. No secondary establishments are registered.

34. The business under the name "Loïc Funéraire" is operated by Mr. Victor Papa, as an individual entrepreneur. The business was registered on 21 October 2014. The company's main establishment is registered in the municipality of Uturoa (island of Raiatea) and began operating on 20 August 2014. No secondary establishment is registered.

35. The business under the name "Pompes funèbres Teave Julienne" is operated by Ms Julienne Teave (née Patii), as an individual entrepreneur. The business was registered on 23 November 2016. The company's main establishment is registered in the municipality of Punaauia (island of Tahiti) and started operating on 22 November 2016. No secondary establishment is registered.

36. The business under the name "Raromatai Funéraire" is operated by Ms Floriane Tamahere Tehei (née Papara), as an individual entrepreneur. The business was registered on 18 July 2016. The company's main establishment is registered in the municipality of Uturoa (island of Raiatea) and began operating on 1 July 2016. No secondary establishment is registered.

37. The business under the name "Vaxelaire Mortuary et Graniterie" is operated by the limited liability company "Vaxelaire Mortuary et Graniterie", whose registered office is in the municipality of Papeete (Tahiti Island). The company is managed by its managers, Mrs. Yolande Victoire Antoinette Vaxelaire (née Guiot), Ms Sonia Vaxelaire and Mr. Ludovic Vaxelaire. The company was registered on 17 January 2014. The company's main establishment is registered in the municipality of Papeete (island of Tahiti) and began operating on 1 January 2014. No secondary establishment is registered.

C. THE PRACTICES OBSERVED

38. The evidence in the file reveals the existence of anti-competitive practices in the funeral services sector. These practices consisted of the participation of several companies in the sector in consultation

meetings, the adoption of a common pricing agreement for services related to the Covid-19 and the application of this price agreement by the signatory companies.

1. PARTICIPATION IN CONSULTATION MEETINGS

39. According to the information in the file, the Covid-19 health crisis led funeral operators to take part in consultation meetings that resulted in the adoption of common rates for Covid-19-related deaths.

40. From March 2020 onwards, the companies in question took steps, both with the State administration (High Commission) and French Polynesia (Ministry of Health, Health Directorate, the Environmental Health Office - formerly the Centre for Public Hygiene and Sanitation or CHSP, the Agency for the Regulation of Health and Social Action - ARASS) and CPS, in order to obtain financial coverage of the specific "Covid-19" services, as well as an increase in the lump-sum amount of coverage.

41. However, other active steps have been taken between the funeral directors and, in addition to the health protocol, the aim has been to discuss the rates charged by each of them in order to draw up common rates to be applied for Covid deaths. In particular, meetings were held:

- On 24 March 2020 and 2 April 2020 at Punaauia town hall: Representatives of the following companies were present: Funéraire Maraetefau, Funéraire Maruhi Services, Funéraire Matairea, Funéraire Tavi, Funéraire Tehei Services, Raromatai Funéraire, SARL Funéraires Min Chiu, Funéraires Min Chiu Junior Moorea (represented by Christian Timau and Tahia Timau from Funéraires Min Chiu), Loïc Funéraire (represented by Christian Timau from Funéraires Min Chiu), HPP Funéraire, Pompes funèbres Teave Julienne and Vaxelaire Mortuary et Graniterie;
- On 26 November 2020 at the Fare Amuiraa Oliveta of Outumaoro (annex of the protestant temple next to the university): Representatives of the following companies were present: SARL Funéraires Min Chiu, Funéraires Min Chiu Junior Moorea (represented by Christian Timau and Tahia Timau from Funéraires Min Chiu), Loïc Funéraire (represented by Christian Timau from Funéraires Min Chiu), Funéraire Tehei Services, Raromatai Funéraire, Pompes funèbres Teave Julienne, Funéraire Tavi, Funéraire Maraetefau and HPP Funéraire.

42. These consultation meetings were initiated and organised by the Min Chiu Funeral Company (Christian Timau and Tahia Timau) and HPP Funeral (Maxime Hapipi).

43. During these consultation meetings between the participating companies, each representative communicated the rates currently charged by his company. The discussions then focused in particular on the charges to be applied for funeral services in the event of Covid-19-related deaths. These discussions led the participants to establish common prices, to be applied identically by all the companies concerned. These rates were discussed on the basis of the prices proposed by the participants and submitted to their vote for approval.

44. Thus, Léone Timau, from the Min Chiu Junior Moorea company, declared on 9 February 2021: *"There were several meetings organised with all the signatory companies, including two in the Punaauia town hall at the end of March and beginning of April 2020. There was a representative from all the signatory companies. [...] It was the company Pompes funèbres HAPIPI, Maxime HAPIPI, who took the initiative to bring us all together at the Punaauia town hall in March-April 2020. He contacted everyone by telephone to discuss the Covid deaths, i.e. the attitude to have, the procedure, the prices. During the various meetings that followed, we discussed the prices to be set up. Each operator indicated the prices they charge and we discussed together to set a common price. It was this price list that was discussed and used as the basis for the documents that were signed. There were several meetings, and each time it was to see the prices, the procedure, for everything concerning Covid, more particularly on the care protocols and the special prices to be put in place for these deaths."*

2. ADOPTION OF A PRICING AGREEMENT FOR COVID-19 SERVICES

45. Tahiapitiani Timau (Funeral Min Chiu), considered by her colleagues as the representative of the profession, was asked to draw up a document formalising the agreement of the companies on the common rates.

46. As a follow-up to the meeting of 24 March 2020, Tahiapitiani Timau (Funéraires Min Chiu) formalised a first version of the "Covid" prices agreed between the companies concerned during the consultation meetings: a document dated 24 March 2020, entitled *"Rates for the management of a COVID-19 death"*. is document includes the following mention: *"Prices agreed upon by the above-mentioned companies during the meeting of 24 March 2020 from 10:00 to 12:00 at the Punaauia town hall"*. This document was sent to the companies concerned for validation by e-mail on 24 March 2020, indicating that they should come and sign it.

47. Thus, Pauline Min Chiu (née Natua) of SARL Funéraires Min Chiu stated on 10 February 2021: "*We drew up a draft princing document, which was circulated by e-mail on 24 March 2020. We exchanged information by telephone, then the representatives of the various companies came to our premises in Arue to sign the first version of the document. By e-mail of 26 March 2020, we sent the signed version of the documents to all the companies concerned. Subsequently, we had further meetings which led us to complete the first version. By e-mail of 20 April 2020, we sent the new draft schedule of charges. The representatives of the companies came again to our premises to sign the document, except for two who signed in the hygiene department. We then sent the companies the second signed version of the documents, dated 21 April 2020. [...] By two emails dated 6 October 2020, we again communicated the common prices to the signatory companies."*

48. The document was stamped and signed by nine funeral companies: HPP Funéraire, Funéraire Matairea, Pompes funèbres Teave Julienne, Funéraire Maraetefau, SARL Funéraires Min Chiu (signed for order by Tahiapitiani Timau), Funéraire Tehei Services (signed for order by Floriane Tamahere Papara, wife Tehei), Funéraire Maruhi Services, Funéraire Tavi and Vaxelaire Mortuary et Graniterie.

49. This document mentions the following services and prices, for a total of XPF 234,540 including tax:

DESCRIPTION	**QTY**	**Unit price**	**Price excl. Tax (XPF)**	**VAT 16%**	**TTC (XPF)**
At-risk intervention cost	1	20,000	20,000		20,000
Full PPE cost	1	25,000	25,000		25,000
Protective accessories *sheet, shroud, protective bag*	1	3,500	3,500	560	4,060
Waterproof/tight mortuary bag	1	20,000	20,000	3,200	23,200
Labour for sealing mortuary bag	1	15,000	15,000		15,000
Placing in the coffin	1	6,000	6,000		6,000
Wooden coffin - *basic model 4 handles, moulding, screws*	1	80,000	80,000	12,800	92,800
Transport of the body *place of death - cemetery*	1	15,000	15,000		15,000
Carrying costs *place of death and cemetery*	1	20,000	20,000		20,000
Cords	1	3,000	3,000		3,000
Administrative procedures	1	15,000	15,000		15,000
Disinfection of equipment	1	10,000	10,000		10,000

50. The document dated 24 March 2020 was communicated by email of 26 March 2020 to CHSP (Centre for Public Health and Hygiene) to Mrs. Glenda Melix (Head of Centre), with cc to the companies

concerned. It was also communicated to the Covid-19 Crisis Centre in French Polynesia, with cc to the companies concerned, by email dated 30 March 2020. These communications were accompanied by requests for the French Polynesian government or the French State to pay for the "Covid" services.

51. A second version of the joint pricing agreement was adopted in April 2020. By emails dated 4 April 2020, 8 April 2020, 17 April 2020 and 20 April 2020, SARL Funéraires Min Chiu (Tahia Timau) informed the respondent companies of the changes made to the joint price list and sent the price list documents for validation.

52. Two documents dated 21 April 2020, entitled "*Prices for the management of a death COVID-19*" and "Prices for the management of a death COVID-19 / Burial with temporary deposit 24H min - 48 H max" were stamped and signed by twelve funeral companies: HPP Funeral, Funéraire Matairea, Funéraire Tavi, Loïc Funéraire (no stamp and signature for order by Christian Timau of Funéraires Min Chiu), Funéraires Min Chiu (signature for order by Tahiapitiani Timau), Pompes funèbres Teave Julienne, Funéraire Maraetefau, Funéraires Min Chiu Junior Moorea (signature for order by Tahiapitiani Timau of Funéraires Min Chiu), Funéraire Tehei Services (signature for order by Floriane Tamahere Papara, wife of Tehei), Funéraire Maruhi Services, Raromatai Funéraire and Vaxelaire Mortuary et Graniterie.

53. The document dated 21 April 2020, entitled "*Fees for the management of a COVID-19 death*" lists the following services and prices:

DESCRIPTION	QTY	Unit price	Price excl. Tax (XPF)	VAT 16%	TTC (XPF)
At-risk intervention cost	1	20,000	20,000		20,000
Full PPE cost	1	25,000	25,000		25,000
Protective accessories *sheet, shroud, protective bag*	1	3,500	3,500	560	4,060
Waterproof/tight mortuary bag	1	20,000	20,000	3,200	23,200
Labour for sealing mortuary bag	1	15,000	15,000		15,000
Placing in the coffin	1	6,000			6,000
Identification plate cost	1	4,000	4,000		4,000
Wooden coffin - *basic model 4 handles, moulding, screws*	1	80,000	80,000	12,800	92,800
Zinc coffin with purifying filter	1	70,000	70,000	11,200	81,200
Labour zinc sealing	1	15,000	15,000		15,000
Transport of the body *place of death - depository*	1	15,000	15,000		15,000
Depository fees *per day*	1	2,400	2,400		2,400
Funeral convoy *place of death/depository – cemetery*	1	20,000	20,000		20,000
Carrying costs *place of death and cemetery*	1	20,000	20,000		20,000
Cords	1	3,000	3,000	480	3,480
Administrative procedures	1	15,000	15,000		15,000
Disinfection of equipment	1	10,000	10,000		10,000

54. The document dated 21 April 2020, entitled "*Prices for the management of a death COVID-19 / Burial with temporary deposit 24H min - 48 H max*" lists the following services and prices:

DESCRIPTION	QTY	Unit price	Price excl. Tax (XPF)	VAT 16%	TTC (XPF)
At-risk intervention cost	1	20,000	20,000		20,000

Full PPE cost	1	25,000	25,000		25,000
Protective accessories *sheet, shroud, protective bag*	1	3,500	3,500	560	4,060
Waterproof/tight mortuary bag	1	20,000	20,000	3,200	23,200
Labour for sealing mortuary bag	1	15,000	15,000		15,000
Placing in the coffin	1	6,000	6,000		6,000
Identification plate cost	1	4,000	4,000		4,000
Wooden coffin - *basic model 4 handles, moulding, screws*	1	80,000	80,000	12,800	92,800
Transport of the body *place of death - depository*	1	15,000	15,000		15,000
Depository/morgue fees *per day*	1	2,400	2,400		2,400
Funeral convoy *place of death/depository – cemetery*	1	20,000	20,000		20,000
Carrying costs *place of death and cemetery*	1	20,000	20,000		20,000
Cords	1	3,000	3,000	480	3,480
Administrative procedures	1	15,000	15,000		15,000
Disinfection of equipment	1	10,000	10,000		10,000
SUBTOTAL before VAT					243,900
VAT 16%					17,040
TOTAL (All taxes included)					260,940

55. Subsequently, personal protective equipment (PPE) charges of XPF 10,000 in the event of death in hospital were agreed between the companies concerned but not formalised. The two documents dated 21 April 2020 were communicated by email on 4 May 2020 to ARASS (Maire Papouin, legal officer, and Yasmina Achille), as well as to the CHSP (Mareva Vigneron, health engineer, and Glenda Melix, head of centre), so that ARASS could intervene with the CPS to integrate the specific "Covid" services into the funeral expenses eligible for financial support.

56. The documents dated 21 April 2020 formalising the pricing agreement between the companies concerned were subsequently transmitted to the signatories by e-mail on 6 October 2020.

3. APPLICATION OF THE PRICING AGREEMENT BY THE SIGNATORY COMPANIES

57. The pricing agreement of 24 March 2020 was communicated by SARL Funéraires Min Chiu (Tahia Timau) on 26 March 2020 to the CHSP, which transferred it on 27 March 2020 to ARASS and the Ministry of Health. The pricing agreement of 21 April 2020 was communicated on 4 May 2020 to ARASS and the CHSP by SARL Funéraires Min Chiu (Tahia Timau).

58. A request for a quote on 9 April 2020 from the funeral home of the French Polynesia Hospital Centre (CHPF) to the funeral companies, for taking charge of the body of a deceased person, gave rise to two emails from SARL Funéraires Min Chiu (Tahia Timau) dated 9 and 14 April 2020 to find out whether it was a Covid death and communicating the pricing agreement for "Covid" services.

59. The broadcast of a report on 14 September 2020 on the Polynesia 1 channel, mentioning a rate of XPF 395,000 for the funeral of a deceased Covid-19, was followed by a message from Tahia Timau (Funéraires Min Chiu) on the same day informing the channel that the rates "approved" by funeral operators are XPF 260,940 and not XPF 395,000.

60. Following the broadcast of this report, during a telephone conversation between HPP Funeral (Hapai Lisa Hapipi) and Funéraires Min Chiu (Tahia Timau), an exchange on the subject of the prices applied

by the former for the first two Covid deaths gave rise to a verbal reminder by the latter of the obligation to respect the prices agreed between the funeral companies.

61. Three days later, on 17 September 2020, SARL Funéraires Min Chiu (Tahia Timau) sent an email to the signatory companies of the pricing agreement to remind them that the rate of XPF 395,000 announced in the press does not correspond to the prices approved by the signatory companies of the 21 April 2020 agreement.

62. On 6 October 2020, SARL Funéraires Min Chiu (Tahia Timau) sent an e-mail to various municipalities informing them of the pricing agreement of 21 April 2020 for distribution to their services and asking them to contact their local funeral provider. On the same day, SARL Funéraires Min Chiu (Tahia Timau) sent an e-mail to the companies in question, informing them of the pricing agreement of 21 April 2020 and informing them that the document had been sent to the municipal authorities.

63. On 22 October 2020, SARL Funéraires Min Chiu (Tahia Timau) sent an e-mail to the companies concerned, reminding them once again of the prices to be applied: *"PRICING based on the common agreement of 21/04/20. […]* ***Last reminder****, it was agreed that the prices would remain the same regardless of the location of the transport or the convoy or the size of the basic model coffin (standard size or large size). [...] To help you, attached are some examples of invoicing (discussed by telephone with those who contacted me: Tehei, Hpp, Vaxelaire, Maraetefau)."*

64. This email of 22 October 2020 contains an attachment with the following services and prices:

EXAMPLE 1 – DEATH AT HOSPITAL

PROVISION OF SERVICES*	**QTY**	**Unit price**	**Before VAT (XPF)**
At-risk intervention cost**	1	20,000	20,000
Transport of the body** *Hospital – home or parish*	1	15,000	15,000
Administrative procedures	1	15,000	15,000
Full PPE cost *Death at hospital*	1	25,000	25,000
Morgue fees A*t hospital*	1	8,500	8,500
Disinfection of equipment**	1	10,000	10,000
Identification plate cost**	1	4,000	4,000
Carrying costs **	1	FAMILY	FAMILY
Hearse** *Home or parish - Cemetery*		20,000	20,000
* *Exemption from VAT on services*			
SUBTOTAL SERVICES before VAT			102,500

SALES	**QTY**	**Unit price**	**Before VAT (XPF)**
Wooden coffin **- *basic model 4 handles, moulding, screws*	1	80,000	80,000
Cords**	1	3,000	3,000
SUBTOTAL SALES before VAT			83,000
VAT 16%			13,280
SUBTOTAL SALES (All taxes included)			96,280
** *Rates based on the agreement of all funeral operators of Tahiti, Moorea and Raiatea of 21 April 2020*			
TO BE PAID INCL. VAT			**198,780**

EXAMPLE 2 – DEATH AT HOME

PROVISION OF SERVICES*	**QTY**	**Unit price**	**Before VAT (XPF)**
At-risk intervention cost**	1	20,000	20,000
Transport of the body** *Place of death – home or parish*	1	15,000	15,000
Administrative procedures	1	15,000	15,000
Full PPE cost *Death at home*	1	25,000	25,000
Placing in the coffin**	1	6,000	6,000
Disinfection of equipment**	1	10,000	10,000
Identification plate cost**	1	4,000	4,000
Carrying costs **	1	FAMILY	FAMILY
Hearse** *Home or parish - Cemetery*		20,000	20,000
* *Exemption from VAT on services*			
SUBTOTAL SERVICES before VAT			115,000

SALES	**QTY**	**Unit price**	**Before VAT (XPF)**
Protective accessories *sheet, shroud, protective bag*	1	3,500	3,500
Waterproof/tight mortuary bag **	1	20,000	20,000
Wooden coffin ** - *basic model 4 handles, moulding, screws*	1	80,000	80,000
Cords	1	3,000	3,000
SUBTOTAL SALES before VAT			106,500
VAT 16%			17,040
SUBTOTAL SALES (All taxes included)			123,540
** *Rates based on the agreement of all funeral operators of Tahiti, Moorea and Raiatea of 21 April 2020*			
TO BE PAID INCL. VAT			**238,540**

65. The information in the file shows that, with the exception of Funéraire Tavi (Terava Mireille Patii), which did not handle any Covid-19-related deaths, the companies concerned applied the rates set out in the agreement of 21 April 2020. However, some of them chose not to invoice all the services agreed upon so as not to penalise the families, considering that the prices adopted jointly were too high in relation to the work actually performed.

66. Two companies (Vaxelaire Mortuary et Graniterie, as well as HPP Funéraire) stated that Tahia Timau (Funéraires Min Chiu) asked them what prices they had charged for the first Covid-19-related deaths and went so far as to request the invoice. It is also clear from the statements made by Min Chiu Funeral Services that customers had provided estimates from other funeral companies, which enabled them to see that different prices were being charged. These observations of non-compliance with the prices in the agreement led to several reminders from Funéraires Min Chiu (Tahia Timau), by telephone or by e-mail.

67. On the basis of the invoices of each of the companies concerned, a census of Covid-19-related deaths leads to the following results:

Company	Number of Covid invoices	Value of sales excluding VAT
Funéraires Min Chiu	38	XPF 9,185,548
Funéraire Tehei Services	33	XPF 6,273,848
HPP Funéraire	23	XPF 4,022,873
Vaxelaire Mortuary et Graniterie	9	XPF 1,537,243
Funéraire Maraetefau	6	XPF 1,254,500
Pompes funèbres Teave Julienne	5	XPF 1,145,660
Funéraire Matairea	5	XPF 943,000
Funéraire Maruhi Services	2	XPF 451,980
Loïc Funéraire	2	XPF 361,700
Raromatai Funéraire	1	XPF 218,880
Min Chiu Junior Moorea	1	XPF 168,000
Funéraire Tavi	0	0 XPF
Total	125	XPF 25,563,232

68. The total value of sales before tax, resulting from the application of the pricing agreement dated 21 April 2020 by the companies concerned, amounts to twenty-five million five hundred and sixty-three thousand two hundred and thirty-two francs (XPF 25,563,232) as at 30 June 2021 (date of the last hearing, based on the invoices taken in copy.

69. One hundred and twenty-five (125) invoices have been copied as at 30 June 2021, out of a total of one hundred and forty-two (142) Covid-19 related deaths as at the same date, which represents a share of 88% over the period from September 2020 (first Covid deaths) to June 2021.

4. THE ADMINISTRATION'S POSITION

70. In order to obtain the payment of invoices by the country or the State in the case of Covid-19-related deaths, Tahia Timau (Funeral Min Chiu) contacted the administration, which did not follow up on requests to increase the ceilings for covering the costs of Covid-19-related deaths.

71. On 26 March 2020, Tahia Timau (Funéraires Min Chiu) communicated the funeral companies' pricing agreement of 24 March 2020 to the CHSP (which transferred it to ARASS and the Ministry of health) and to the French Polynesia Covid-19 Crisis Centre. Tahia Timau (Funéraires Min Chiu) also sent a reminder on 2 April 2020, again concerning the payment of invoices, to ARASS, the CHSP and the French Polynesia Covid-19 Crisis Centre. On 20 April 2020, Tahia Timau (Funéraires Min Chiu) sent the second (unsigned) version of the funeral company pricing agreement to ARASS, also informing it of its approach to the CPS aimed at obtaining the coverage of the additional costs. On 4 May 2020, Tahia Timau (Funéraires Min Chiu) sent the second (signed) version of the funeral directors' pricing agreement to ARASS and the CHSP.

72. The main focus of the CHSP and ARASS work was on the Covid-19 health protocol.

73. With regard to these requests from funeral companies to increase the ceilings for financial coverage, the CHSP did not take a position on the request to re-evaluate the costs eligible for financial coverage by the CPS, as this is a subject that does not fall within its jurisdiction. However, on 17 April 2020 the CHSP pointed out to ARASS that, while specific services are indeed required in the case of a Covid death, other services usually performed (e.g. thanatopraxy) are no longer performed in this case. There was also the question of the billing by the companies of personal protective equipment (PPE) and body

bags, possibly provided by the Health Directorate. ARASS then indicated that it intended to ask funeral companies to justify their costs.

74. On 18 September 2020, ARASS indicated to the Ministry of Health that the "*reflection on the revaluation has not been pursued*".

75. On 7 April 2020, Tahia Timau (Funéraires Min Chiu) sent an email to CPS requesting that Covid-19 specific funeral services be added to the list of services eligible for financial coverage of funeral expenses.

76. CPS integrated the Covid-19 specific services but the financial assistance ceilings remained unchanged. According to CPS, this financial assistance is a lump sum and is not intended to cover all the expenses incurred by the families of the deceased.

77. The Ministry of Health did not intervene on these subjects, which were dealt with by ARASS, and did not adopt an official position.

D. THE NOTIFIED GRIEVANCE

78. The notification of grievances of 26 October 2021 was sent between 28 October and 3 November 2021 to the companies involved.

"The following companies are complained about:

- *Funéraire Maraetefau, in the person of Mr. Jérémie Maraetefau, as an individual entrepreneur;*
- *Funéraire Maruhi Services, in the person of Mr. Igor Hauroa Maruhi, as an individual entrepreneur;*
- *Funéraire Matairea, in the person of Mr. Hans Moe Tahema, as an individual entrepreneur;*
- *Funéraire Tavi, in the person of Ms Terava Mireille Patii, as an individual entrepreneur;*
- *Funéraire Tehei Services, in the person of Mr. Oruehau Victor Tehei, as an individual entrepreneur;*
- *Funéraires Min Chiu, operated by SARL Funéraires Min Chiu, in the person of its manager, Ms Pauline Teehuariivaiau Min Chiu (née Natua);*
- *Funéraires Min Chiu Junior Moorea, in the person of Mrs. Léone Timau (née Min Chiu), as an individual entrepreneur;*
- *HPP Funéraire, in the person of Ms Hapai Lisa Hapipi, as an individual entrepreneur;*
- *Loïc Funéraire, in the person of Mr. Victor Papa, as an individual entrepreneur;*
- *Pompes funèbres Teave Julienne, in the person of Ms Julienne Teave (née Patii), as an individual entrepreneur;*
- *Raromatai Funéraire, in the person of Ms Floriane Tamahere Tehei (née Papara), as an individual entrepreneur;*
- *Vaxelaire Mortuary et Graniterie, operated by SARL Vaxelaire Mortuary et Graniterie, in the persons of its managers, Mrs. Yolande Victoire Antoinette Vaxelaire (née Guiot), Mrs. Sonia Vaxelaire and Mr. Ludovic Vaxelaire;*

participating in an agreement prohibited by Article LP 200-1 of the Competition Code, by deciding on and implementing a common pricing system for funeral services for Covid-19-related deaths. The object and effect of this practice was to distort competition in the funeral services market in the Society's archipelago (Windward Islands and Leeward Islands), by preventing prices from being set by the free market and by artificially encouraging price increases.

This agreement was implemented from 24 March 2020 until the date of this Statement of Grievances."

III. DISCUSSION

A. ON THE RELEVANT MARKET

79. The practices identified concern the provision of funeral services (funeral directors) in the Society Islands (Windward Islands and Leeward Islands)[2].

80. Insofar as the practices in this case are examined under the prohibition of anti-competitive agreements, it is not necessary to define the market with any further precision, since the sector has been sufficiently identified to qualify the practices observed and to enable them to be attributed to the operators who implemented them[3].

B. ON THE MERITS OF THE NOTIFIED GRIEVANCE

1. REMINDER OF THE APPLICABLE PRINCIPLES

a) On the agreement of wills

81. Article LP 200-1 of the Competition Code prohibits concerted actions, agreements, express or tacit understandings or coalisations between companies when their purpose or effect is to prevent, restrict or distort competition on a market in French Polynesia.

82. The existence of an agreement is established when the companies have expressed their joint intention to behave on the market in a certain way[4], without the need for a written document, a particular formalism, contractual sanctions or other coercive measures.

83. By agreeing on the terms of an action plan, companies know that they are in agreement and are aware of the expected consequences (on market shares, prices etc.).

b) On the restriction of competition

84. Agreements that have as their object the restriction of competition are those whose implementation necessarily leads to such a restriction, so that it is secondary to demonstrate their concrete effects on the market, taking into account the economic context in which it must be applied[5]. The distortions of competition must result from all or part of the terms of the agreement itself.

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2 Competition Authority, Decision No. 04-D-70 of 16 December 2004 concerning practices implemented in the funeral services sector in the Saint-Germain-en-Laye area, point 54.

3 See in particular judgment of the European Court of First Instance of 12 September 2007, William Prym v. Commission, T-30/05, paragraph 86; Competition Authority, Decision No. 15-D-03 of 11 March 2015 concerning practices implemented in the fresh dairy products sector, paragraph 181.

4 See in particular, judgment of the Court of Justice of 8 July 1999, Anic Partecipazioni SpA, C-49/92, ECLI:EU:C:1999: 356, paragraph 40; see also Decisions No. 19-D-24 of 17 December 2019 on practices implemented in the sector of fruit sold in cups and gourds, paragraph 358 and No. 21-D-20 of 22 July 2021 on practices implemented in the sector of eyeglasses and eyeglass frames, paragraph 566; Judgments of 15 July 1970, ACF Chemiefarma v Commission, C-41/69, EU: C:1970:71, paragraph 112, and of 26 October 2000, Bayer v Commission, T-41/96, EU:T:2000:242, paragraph 67; CA Paris, 28 January 2009, Epsé Joué Club, No 2008/00255, p. 9, which became final after Cass com. 7 April 2010.

5 Competition Authority, Decision No. 19-D-24, § 364; CB v Commission, C-67/13 P, EU:C:2014:2204, paragraphs 49 to 51 and case law cited.

85. As regards horizontal price agreements, it should be noted that, according to the case law and consistent decision-making practice, they constitute restrictions of competition by object[6].

2. APPLICATION TO THE CASE IN QUESTION

a) On the agreement of wills

86. On the initiative of Mr. Maxime Hapipi (HPP Funéraire) and Mrs. Tahiapitiani Timau (Funéraires Min Chiu), nine (9) competing funeral companies signed a document on 24 March 2020 entitled "*Pricings for the management of a death COVID-19*", setting out a list of funeral services and the corresponding prices. This document includes the following information: "*Prices agreed by the above-mentioned companies at the meeting of 24 March 2020 from 10:00 to 12:00 at the Punaauia town hall*" and "*We hereby undersign, by mutual agreement, the validity of these rates for Covid-19-related deaths*".

87. On this occasion, Mrs. Tahiapitiani Timau (nicknamed Poussy) was appointed by the signatory companies as the profession's representative to the public authorities and as an intermediary between the funeral operators. She was also responsible for drafting the common prices.

88. On 21 April 2020, twelve (12) competing funeral directors signed two documents entitled "*Rates for the management of a COVID-19 death*" and "*Rates for the management of a COVID-19 death / Burial with temporary deposit 24H min - 48 H max*", establishing a list of funeral services and the corresponding rates. These documents include the following statement: "*We underscore, by mutual agreement, the validity of these rates for Covid-19-related deaths*".

89. The signatories all confirmed that the adoption of these uniform prices was preceded by preparatory meetings designed to neutralise price competition in the case of Covid deaths, as is clear from the statements made by the interested parties:

"We discussed together to set a common price"[7] *;* "*We decided to charge common prices, in particular for specific Covid-related services"*[8] *; "We all gave our rates and then voted unanimously"*[9] *;* "*In order to set the prices for Covid-related services"*[10] *; "We also discussed our rates in order to align our rates for Covid cases"*[11] *; "We consulted each other to choose the rates […] we wanted to charge the same prices"*[12] *; "We only discussed the Covid rates to be implemented. We discussed the prices we usually charge and on that basis we decided on the rates we would charge in case of a Covid death"*[13] *; "We agreed to apply the same rates to all companies in the event of a Covid death"*[14] *; "The companies discussed the rates to be adopted for Covid death management"*[15] *; "We have consulted with other*

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6 See for example: Judgment of the Paris Court of Appeal of 16 May 2013, Kontiki, 12/01227; Judgment of 26 January 2012, Beauté Prestige International, 10/23945, page 86, not challenged on this point by the judgment of the Court of Cassation of 11 June 2013, Beauté Prestige International, Y 12-13. 961 - B 12-14.401 - A 12-14.584 - N 12-14.595 - Q 12-14.597 - R 12-14.598 - U 12-14.624 - V 12-14.625 - C 12-14.632 - V 12-14.648, page 10; Judgment of the Court of Justice of 25 October 1983, AEG v Commission, C-107/82, EU:C:1983:293, paragraph 43.

7 Min Chiu Junior Moorea (Léone Timau) statements of 9 February 2021.

8 Vaxelaire Mortuary et Graniterie (Sonia Vaxelaire) statements of 9 February 2021.

9 Funéraire Tehei Services and Raromatai Funéraire (Floriane Tamahere Papara, married name Tehei) statements of 9 February 2021.

10 Pompes funèbres Teave (Julienne Patii) statements of 9 February 2021.

11 SARL Funéraires Min Chiu (Pauline Min Chiu, née Natua) statements of 10 February 2021.

12 HPP Funeral (Hapai Lisa Hapipi) statements of 10 February 2021.

13 Funeral Matairea (Hans Moe Tahema) statements of 19 April 2021.

14 Funéraire Maruhi Services (Igor Hauroa Maruhi) statements of 21 April 2021

15 Funéraire Tavi (Terava Mireille Patii) statements of 01 June 2021

funeral companies to set these rates"[16] *; "We discussed our usual prices and voted to set the Covid special prices"*[17].

b) On the anti-competitive object

90. The fixing of common prices to be applied by directly competing companies constitutes a concertation with a necessarily anti-competitive object. Horizontal agreements (i.e. between direct competitors on the same market) consisting of price fixing are, by their very nature, the most serious infringements of competition law[18].

91. By deciding to set common prices for their services, the signatories did not allow market prices to be determined autonomously by the competing companies.

92. Such an agreement is directly covered by Article LP 200-1 of the Competition Code, which refers to *"agreements [...] in particular where they tend to [...] 2°) hinder the free determination of prices by the market by artificially favouring their rise or fall »*.

93. In the case of an agreement which necessarily has an anti-competitive object, it is not necessary to investigate whether such concertation had any effects. However, it is important to stress in this case that the agreement gave rise to an effective implementation of the agreed prices and that the signatories received regular reminders, in various forms, concerning the need to charge the prices resulting from the joint agreement[19]. The call to order was sometimes prescriptive:

"Following Dany's call, I am coming to you to remind you of the procedure for dealing with a covid-related death and billing. […] RATE based on the joint agreement of 21/04/20. […] ***Last reminder****, it was agreed that the prices would remain the same regardless of the location of the transport or the convoy or the size of the basic model coffin (standard size or large size). […] To help you, attached are examples of invoicing (discussed by phone with those who contacted me: Tehei, Hpp, Vaxelaire, Maraetefau)."*[20]

94. The agreement was therefore particularly stable from March 2020 until the notification of grievances (dated 26 October 2021). No participant deviated or attempted to deviate significantly from the agreement, apart from the few one-off initiatives referred to above that gave rise to a reminder of the joint agreement signed by all. Adherence to the practices was such that no retaliatory measures were necessary.

95. It does not matter whether the signatories of the agreement had any other intention than to neutralise price competition, such as "*facilitating the care of the Covid deceased*"[21], *"to be able to obtain financial support from the CPS for all the services invoiced to families"*[22], *"so that families do not have to travel too far to meet their funeral director and so that the local funeral director can intervene quickly"*[23], "*encourage families to go to the operator closest to the deceased's home, thanks to identical prices"*[24], as claimed by some of the companies involved.

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16 Funéraire Maraetefau (Jérémie Maraetefau) statements of 02 June 2021.

17 Pompes funèbres Teave (Julienne Patii) of 07 June 2021

18 Competition Authority, Decision 15-D-03 of 11 March 2015, § 289 ; Court of Cassation, Commercial Chamber 22 Nov.2005, n°04-19.102; Paris Court, 21 Dec.2017, n° 2015/17638, § 54.

19 *Supra*, § 63 and Vaxelaire Mortuary et Graniterie (Sonia Vaxelaire) statements from 9 June 2021; HPP Funeral (Hapai Lisa Hapipi) statement of 17 June 2021; Raromatai Funeral (Floriane Tamahere Papara, épouse Tehei) statements of 21 June 2021.

20 Email of 22 October 2020 from SARL Funéraires Min Chiu (Tahia Timau).

21 SARL Funéraires Min Chiu (Pauline Min Chiu, née Natua) statements of 24 June 2021.

22 Pompes funèbres Teave (Julienne Patii) statements of 7 June 2021.

23 Funeral Maraetefau (Jérémie Maraetefau) statements of 2 June 2021.

24 SARL Funéraires Min Chiu (Pauline Min Chiu, née Natua) statements of 10 February 2021.

96. The participants were fully aware that setting a joint charge accepted by all companies would inevitably lead to higher prices:

"More than 50% of the covid rates, compared to our usual rates, are very high. For example, the hospital charges 8,500 francs for a body bag, while our usual rate is 8,000 francs. But following the agreement on the Covid tariffs, the price has risen considerably, it has been fixed at 23,200 francs (including tax). To fix them, we went round and voted together on what suited everyone. Another example: for transport our usual rate is 8,000 francs, whatever the distance. After the meetings it was fixed at 20,000 francs for transport from the hospital. Usually our company is a bit cheaper than our competitors located near the hospital. But with Covid we were able to increase our prices."[25]

"The oldest funeral companies charge the highest rates. The new companies that were created in recent years charge lower rates. For the Covid case management, knowing that we would have additional costs (PPE, disinfection, at-risk intervention costs, etc.), we wanted to charge the same prices. In my opinion, the aim was to avoid certain companies charging lower prices than others. Moreover, the new companies agreed to charge identical prices."[26]

97. The price increases were all the more penalising for families as some of the services charged (and ultimately paid for by CPS) were not even provided by the providers as the Covid health protocol required them to be carried out at the hospital. As one informant observed, the signatories are "*well paid for the service provided*":

"I find these prices too high for the work done. Almost all the deaths occurred at the Taaone hospital. In this case, most of the work is done by the hospital staff: putting the body in a watertight cover, placing it in the coffins that we had deposited, disinfecting the coffin and placing it in a refrigerated container. The coffins are collected for burial. We are therefore well paid for the service provided. About half of the rates agreed between the funeral operators are higher than our usual rates. For transport, our company's usual rate is XPF 8,000, regardless of the distance travelled, but our joint rate was set at XPF 15,000 for transport from the Taaone hospital to the burial site and XPF 20,000 from the burial site to the cemetery."[27]

98. One of the providers said: "*I consider that the rates adopted jointly with my colleagues are too high for low-income families."*[28]

99. These practices are by nature very serious. By agreeing on prices, the targeted funeral operators (who account for almost all the turnover of the market) have impeded free competition. They were thus able to set their prices at a higher level than would undoubtedly have resulted from the absence of a concerted strategy, without fearing retaliation from their competitors and the obligation to lower their prices until the efficient level of competition was reached.

100. The seriousness of these practices is increased by the fact that the applicable regulations are poorly understood by the families of the deceased who, at the time they place their trust, find themselves in a state of dependence linked to the need to organise the funeral quickly and to the distress that bereavement is likely to cause. This vulnerability of bereaved families is general, but it is aggravated in a pandemic situation.

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25 HPP Funeral (Hapai Lisa Hapipi) statements of 10 February 2021.

26 HPP Funeral (Hapai Lisa Hapipi) statements of 17 June 2021.

27 HPP Funeral (Hapai Lisa Hapipi) statements of 17 June 2021.

28 Funéraire Tehei Services (Victor Oruehau Tehei) statements of 21 June 2021.

C. IMPUTABILITY OF PRACTICES

1. REMINDER OF THE APPLICABLE PRINCIPLES

101. The prohibition of anti-competitive agreements in Article LP 200-1 of the Competition Code is aimed at infringements committed by companies, understood as entities carrying out an economic activity. Grievances must be notified and then imputed to a legal person[29], regardless of the legal form used as a support for the company (legal person or natural person).

2. APPLICATION TO THE CASE IN QUESTION

102. In the present case, the signatories of the agreement in question are the legal representatives (or signatories to order) of the companies concerned, to which the objections have been notified.

103. The grievances in the Statement of Objections were raised against the following companies:

- Funéraire Maraetefau, in the person of Mr. Jérémie Maraetefau, in his capacity as an individual entrepreneur;
- Funéraire Maruhi Services, in the person of Mr. Igor Hauroa Maruhi, in his capacity as an individual entrepreneur;
- Funéraire Matairea, in the person of Mr. Hans Moe Tahema, in his capacity as an individual entrepreneur;
- Funéraire Tavi, in the person of Ms Terava Mireille Patii, in his capacity as an individual entrepreneur;
- Funéraire Tehei Services, in the person of Mr. Oruehau Victor Tehei, in his capacity as an individual entrepreneur;
- Funéraires Min Chiu, operated by SARL Funéraires Min Chiu, in the person of its manager, Ms Pauline Teehuariivaiau Min Chiu (née Natua);
- Funéraires Min Chiu Junior Moorea, in the person of Ms Léone Timau (née Min Chiu), in her capacity as an individual entrepreneur;
- HPP Funéraire, in the person of Ms Hapai Lisa Hapipi, in her capacity as an individual entrepreneur;
- Loïc Funéraire, in the person of Mr. Victor Papa, in his capacity as an individual entrepreneur;
- Pompes funèbres Teave Julienne, in the person of Ms Julienne Teave (née Patii), in her capacity as an individual entrepreneur;
- Raromatai Funéraire, in the person of Ms Floriane Tamahere Tehei (née Papara), in her capacity as an individual entrepreneur;
- Vaxelaire Mortuary et Graniterie, operated by SARL Vaxelaire Mortuary et Graniterie, in the persons of its managers, Ms Yolande Victoire Antoinette Vaxelaire (née Guiot), Ms Sonia Vaxelaire and Mr. Ludovic Vaxelaire;

  as authors of the practices.

[29] Judgments of the Court of Cassation of 22 November 2016, Euro cargo rail, n° 14-28224 and of the Court of Appeal of Paris of 26 October 2017, Caisse des dépôts et consignations, n° 17/01658, pp. 9 and 10

104. In conclusion, the Authority considers that the practices identified are qualified under Article LP 200-1 of the Competition Code.

105. The twelve companies concerned took part in a prohibited agreement by deciding on and implementing a common pricing system for funeral services for Covid-19-related deaths. The object and effect of this practice was to distort competition in the market for funeral services in the Society's archipelago, by preventing prices from being set by the free market and by artificially encouraging price increases. This agreement was implemented from 24 March 2020 (for the companies that signed the first pricing agreement) and from 21 April 2020 (for the companies that signed the second pricing agreement) to 26 October 2021 (date of the notification of grievances).

D. ON SANCTIONS

1. ON THE PRINCIPLES FOR DETERMINING SANCTIONS

106. The third paragraph of I of Article LP 641-2 of the Competition Code, relating to the criteria for determining financial penalties, states: "*Financial penalties shall be proportionate to the duration and seriousness of the acts complained of, and shall take into account, in particular, the extent of the damage caused to the economy, the distortion caused on the market or markets concerned, the actual and potential effects on consumers, in time and space, the situation of the sanctioned organisation or company or of the group to which the company belongs and the possible repetition of the prohibited practices mentioned in Articles LP 200-1 and LP 200-2. They are determined individually for each sanctioned company or entity and with reasons for each sanction."*

107. According to the well-established case law of the Paris Court of Appeal and the Court of Cassation for the application of a similar text (Article L 464-2 of the French Commercial Code), although the Competition Code provides that financial penalties are proportionate to the seriousness of the acts complained of, to the importance of the damage caused to the economy, to the situation of the company or the group to which it belongs and to the possible repetition of the prohibited practices, it does not impose on the Polynesian Competition Authority any particular method of determining these penalties and only sets the maximum amount[30].

2. ON THE DETERMINATION OF THE BASE AMOUNT OF THE SANCTIONS

a) On the method used to determine the base amount

108. Article LP 641-2 of the Competition Code empowers the Polynesian Competition Authority to impose pecuniary and non-pecuniary sanctions on companies and organisations that engage in anti-competitive practices prohibited by articles LP 200-1 and LP 200-2 of the same code.

109. In order to ensure consistency between the infringement committed and the fine imposed, the Authority considers that it is appropriate to establish a basic amount of the fine corresponding to the value of the sales of the products and/or services related to the infringement made by each company or entity concerned, in so far as the value of such sales constitutes an appropriate and objective reference. It makes it possible to proportion the basis for the penalty on a case-by-case basis to the economic reality of the infringement, its scale and duration, and the relative weight of each of the companies participating in it in the sector concerned.

[30] CA Paris, 21 January 2016, Inéo Réseaux Sud-Ouest SNC e.a., n° 2014-22811 ; Cass.Com., 27 September 2017, Spie Sud-Ouest e.a., n° 16-12907.

110. In the present case, the value of sales corresponds to the amounts invoiced by the companies in question, in the context of funeral services for the Covid-19 deceased carried out between 24 March 2020 for the companies that signed the first version of the joint pricing agreement and 24 March 2020 for companies that signed the first version of the joint pricing agreement and 21 April 2020 for companies that signed only the second version of the agreement, until the notification of grievances, i.e. 26 October 2021:

Company	Number of Covid invoices	Value of sales excluding VAT
Funéraires Min Chiu	38	XPF 9,185,548
Funéraire Tehei Services	33	XPF 6,273,848
HPP Funéraire	23	XPF 4,022,873
Vaxelaire Mortuary et Graniterie	9	XPF 1,537,243
Funéraire Maraetefau	6	XPF 1,254,500
Pompes funèbres Teave Julienne	5	XPF 1,145,660
Funéraire Matairea	5	XPF 943,000
Funéraire Maruhi Services	2	XPF 451,980
Loïc Funéraire	2	XPF 361,700
Raromatai Funéraire	1	XPF 218,880
Min Chiu Junior Moorea	1	XPF 168,000
Funéraire Tavi	0	XPF 0
Total	125	XPF 25,563,232

111. It should be noted that this assessment of the value of sales is made as of the date of the latest findings, 30 June 2021, when there were 142 Covid-19-related deaths. At the end of the 'Delta' wave of the pandemic, as of 27 October 2021, there were 636 deaths, an additional 444 deaths.

112. The value of sales used corresponds to the value of sales realised by each of the companies concerned at the date of the latest findings. As these findings concern only the first wave of the Covid-19, it should be noted that the value of sales used is much lower than the real value of sales that would result from updating the amounts invoiced by the companies involved.

b) On the seriousness of the practices

113. It is settled case law that, in assessing the seriousness of an offence, account may be taken of the following elements, depending on their relevance [31] :

- the nature of the infringement(s) in question and the facts used to characterise it/them, as well as the nature of the competition parameter(s) concerned;
- he nature of the activities, sectors or markets concerned;
- he nature of the persons likely to be affected;
- and the objective characteristics of the infringement or infringements.

114. As regards, first, the nature of the infringement in question, it should be recalled that agreements between competing companies are among the most serious of anti-competitive practices, in so far as they can only aim to confiscate, for the benefit of the perpetrators of the infringement, the benefit which consumers are entitled to expect from the competitive functioning of the economy.

[31] See in particular, CA Paris, 23 mars 2010, Gas and Electricity of Grenoble, n° 2009-09599.

115. The joint pricing between competing companies for funeral services for Covid-19-related deaths was intended to distort competition by preventing prices from being set by the free market and by artificially favouring their increase, to the direct detriment of bereaved families and indirectly to the detriment of the Social Welfare Fund (CPS).

116. This practice has been implemented by almost all operating companies, including the largest players in the funeral industry, with the aim of keeping prices artificially high.

117. Secondly, with regard to the nature of the activities, the sector concerned and the nature of the persons likely to be affected, this practice, which was carried out to the detriment of bereaved families, who were faced with a situation of distress that made them particularly vulnerable, and to the detriment of a legal person governed by private law and entrusted with a public service mission (CPS), was of an additional serious grievance.

118. Furthermore, more specifically, the Authority agrees with the national competition authority that practices in the health and social care sector, where competition is already reduced due to the existence of regulations designed to ensure the best service for the population while preserving the budgetary balance of the health insurance system, are, in general, particularly serious.[32].

119. Third, as regards the objective characteristics of the infringement, the absence of secrecy and the duration of the infringement should be taken into account. The infringement started on 24 March 2020 for the companies that signed the first version of the joint pricing agreement and on 21 April 2020 for the companies that signed only the second version of the agreement. The infringement was found to continue until the date of signature of the notification of grievances, i.e. 26 October 2021.

c) Conclusion on the determination of the base amount

120. In view of its assessment above of the seriousness of the facts in the sector concerned, the Authority will apply a proportion of 25 % of the value of the sales of the companies involved in the infringement to determine the base amount of the fine, followed by a coefficient of 1,3 for the duration of the infringement.

3. ON THE INDIVIDUALISATION OF THE PENALTY

121. The Authority will adjust the base amounts in the light of the legal criterion of taking into account the individual situation of each of the parties involved. To this end, and depending on the circumstances of each case, it may take into account various mitigating or aggravating circumstances characterising the conduct of each company in the context of its participation in the infringement, as well as other relevant objective factors relating to its individual situation. Each of these elements may lead to an adjustment of the penalty both upwards and downwards.

a) Aggravating or mitigating circumstances

122. Aggravating circumstances on the basis of which the Authority may increase the base amount of the financial penalty may include the fact that the company acted as a leader or instigator, or played a particular role in the design or implementation of the infringement, the fact that the company took steps to coerce others to take part in the infringement or retaliated against them in order to obtain compliance, the fact that the company has a particular capacity to influence or moral authority.

123. In this case, HPP Funéraire (through Maxime Hapipi) and SARL Funéraires Min Chiu (through Christian Timau, known as “Sio”) initiated the initial contacts with a view to exchanging information on the rates to be charged for Covid-19-related deaths and to organising the consultation meetings

[32] Competition Authority, Decision No. 20-D-11 of 9 September 2020 concerning practices implemented in the age-related macular degeneration (AMD) treatment sector, paragraph 1133.

between the funeral companies that led to the adoption of the joint pricing agreement. In addition, SARL Funéraires Min Chiu (through Tahiapitiani Timau) was responsible for coordinating the exchange of information between the companies, as well as drafting the various versions of the joint pricing agreement, which were signed on the company's premises and then distributed to all the signatories. Finally, SARL Funéraires Min Chiu (again through the intermediary of Tahiapitiani Timau) was responsible for supervising the application of the pricing agreement and sent warnings (oral or written) when it was noted that a company was not applying the agreed prices correctly, an action that constitutes a "price police". These different elements are likely to be retained as aggravating circumstances against the companies SARL Funéraires Min Chiu and HPP Funéraire.

124. Mitigating circumstances on the basis of which the Authority may reduce the base amount of the financial penalty may include the fact that the company proves that it has engaged in competitive behaviour over a substantial period of time in respect of a substantial proportion of the products or services in question, to the extent that it has disrupted, as a maverick, the very functioning of the practice in question, the fact that the company proves that it was forced to participate in the infringement, the fact that the infringement was authorised or encouraged by the public authorities.

125. In this case, there is nothing in the file to suggest that there are any mitigating circumstances. Although various administrative departments in charge of managing the health crisis were informed of the adoption of common rates by the funeral companies, these departments did not, at the very least, take a position or expressed the view that the request for an increase in the ceiling on costs was not justified. It should be recalled that, according to established case law, incentives or encouragements[33], tolerances [34] or approvals [35] given by administrative authorities do not constitute a basis for exemption from anti-competitive behaviour[36]. *A fortiori*, mere information brought to the attention of the administration and its passive attitude, as in the present case, cannot exonerate or constitute a mitigating circumstance for an anti-competitive agreement.

126. Furthermore, it is settled case law that, in the case of anti-competitive agreements, negligence or unintentionality cannot be taken into account insofar as, as mentioned above, the participating companies could not be unaware of the restrictive nature of their practice.

127. There are therefore no grounds for taking this or any other mitigating circumstances into account in this case.

b) Other elements of individualisation

128. In the present case, the Authority considers that the file does not contain any elements of individualisation concerning the companies concerned which should be taken into account in adjusting the penalty.

129. In view of the above developments, the Authority decides to apply:

- an increase of 5% in the base amount of the penalty for Funéraires Min Chiu and HPP Funéraire, for having initiated the first contacts and for having initiated the consultation meetings between the funeral companies;
- an increase of 5% to the basic amount of the penalty for Funéraires Min Chiu, for having coordinated the exchange of information between the companies and for having drafted the various versions of the joint pricing agreement;

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[33] Competition Council, Decision 96-D-14 of 12 March 1996 concerning practices observed in the supply of domestic fuel to the town of Lavelanet.

[34] Competition Council, Decision 90-D-20 of 12 June 1990 on practices in the banana market, Court of Cassation, Commercial Chamber, 30 May 1995, Bedel company.

[35] Competition Council, Decision 92-D-44 of 7 July 1992 concerning practices observed at the 20th Velay-Auvergne exhibition fair.

[36] See also European Commission [2003] OJ L200/1 paragraph 320; and TPI T-38/02 Groupe Danone vs. Commission [2005] ECR II-4407 paragraphs 404-409.

– an increase of 5% to the base amount of the penalty for Funéraires Min Chiu, for having supervised the application of the pricing agreement and for having sent warnings to companies that did not apply the agreed prices correctly, an action that constitutes a price police.

4. ON THE FINAL ADJUSTMENTS OF THE PENALTY

a) The ceiling of the applicable penalty

130. Pursuant to the fifth paragraph of Article LP 641-2 I of the Competition Code, the financial penalty that may be imposed on a company that has committed an anti-competitive practice may not exceed 5% of the amount of turnover excluding tax achieved in French Polynesia during one of the last three financial years.

131. In order to determine the maximum amount of the fine for each respondent, the Authority relies on the turnover declarations submitted at the request of the Rapporteur-General.

132. It should be noted that, despite several reminders in the file, five companies did not provide their financial data or provided incomplete data: Pompes funèbres Teave Julienne, Funéraire Matairea, Funéraire Maruhi Services, Loïc Funéraire and Funéraire Tavi.

133. The Authority would point out that failure to comply with a request for documents or information may constitute an obstructionist offence within the meaning of Article LP 641-2 IV of the Competition Code, punishable by a fine of up to 1 % of the highest turnover (excluding tax) in French Polynesia in any financial year since the year preceding that in which the practices were carried out.

134. The turnover of these five companies was therefore estimated on the basis of the statements made in the minutes of the hearings.

135. In this case, the financial penalty is lower for each of the offending companies than the legal ceiling, i.e. 5% of the highest known turnover excluding tax achieved in French Polynesia during one of the last three financial years.

b) No objection to the grievances

136. Article LP 641-2 III of the Competition Code provides that *"Where a company or entity does not contest the reality of the objections notified to it, the Authority may impose the financial penalty provided for in Article I of this Article, taking into account the absence of a contest. In this case, the maximum amount of the penalty shall be reduced by half."*

137. As none of the companies concerned contested the objections notified during the investigation, it is appropriate to apply these provisions, reducing by half the maximum penalty incurred. Moreover, in view of the circumstances of the case (in particular the size of the companies concerned and the fact that this was a first infringement of competition law, which occurred in a particular context of a health crisis), the Authority grants an additional 10 % reduction in the calculation of the penalties.

c) The financial situation of the companies involved

138. The Authority may take into account the financial situation of the companies concerned which may reduce their ability to pay, provided that the parties invoke and justify the existence of such a situation.

139. The companies in question were given the opportunity to state their position by sending the Authority any evidence of particular difficulties. Only Pompes funèbres Teave Julienne submitted a declaration of no turnover for the year 2021. However, the same company did not communicate its turnover data for the years 2019 and 2020, despite several reminders. It does not therefore seem appropriate to take account of the only document transmitted.

DECISION

Article 1: It is established that the companies Funéraire Maraetefau, Funéraire Maruhi Services, Funéraire Matairea, Funéraire Tavi, Funéraire Tehei Services, Funéraires Min Chiu, Funéraires Min Chiu Junior Moorea, HPP Funéraire, Loïc Funéraire, Pompes funèbres Teave Julienne, Raromatai Funéraire, Vaxelaire Mortuary et Graniterie have infringed the provisions of Article LP 200-1 of the Competition Code, by deciding on and implementing a common pricing system for funeral services in relation to Covid-19 deaths. The object and effect of this practice was to distort competition in the funeral services market in the Society's archipelago (Windward Islands and Leeward Islands), by preventing prices from being set by the free market and by artificially encouraging price increases, from 24 March 2020 to 26 October 2021.

Article 2: The following financial penalties are hereby imposed for the practices referred to in Article 1:

XPF 3,069,982 to Funéraires Min Chiu, i.e. [0-3] % of its turnover;

XPF 1,823,337 to Funéraire Tehei Services, i.e. [0-2] % of its turnover;

XPF 589,842 to HPP Funéraire, i.e. [0-3] % of its turnover;

XPF 446,761 to Vaxelaire Mortuary et Graniterie, i.e. [0-2] % of its turnover;

XPF 364,589 to Funéraire Maraetefau, i.e. [0-1] % of its turnover;

XPF 85,928 to Pompes funèbres Teave Julienne, i.e. [0-3] % of its turnover;

XPF 202,500 to Funéraire Matairea, i.e. [0-3] % of its turnover;

XPF 101,250 to Funéraire Maruhi Services, i.e. [0-3] % of its turnover;

XPF 101,728 to Loïc Funéraire, i.e. [0-2] % of its turnover;

XPF 61,560 to Raromatai Funéraire, i.e. [0-1] % of its turnover;

XPF 48,825 to Min Chiu Junior Moorea, i.e. [0-1] % of its turnover.

Deliberated on the oral report of Christophe Venture, Rapporteur, and the intervention of Matthieu Pujuguet, acting General Rapporteur, by Johanne Peyre, Chair, Aline Baldassari, Marie-Christine Lubrano, Christian Montet and Youssef Guenzoui, members.

Johanne Peyre,

Chair