DECISION N°2022-A-03 OF 17 OCTOBER 2022
ON SETTING REFERENCE MOBILE CALL TERMINATION INTERCONNECTION RATES FOR MOBILE OPERATORS PMT/VODAFONE AND ORA/VITI FOR 2022 AND 2023

The Polynesian Competition Authority,

Considering the letter received on 21 September 2022, registered under number 22/0020 A, by which the President of French Polynesia consulted the Polynesian Competition Authority for an opinion on the reference mobile call termination interconnection rates of the mobile telephone operators PMT/Vodafone and ORA/VITI for 2022 and 2023;

Considering the Competition Code, and in particular Article LP. 620-1 thereof;

Considering the other documents on file;

The Rapporteur, the acting General Rapporteur, the Government Commissioner and the representatives of the Directorate-General for Digital Economy (DGEN) were heard on the basis of the provisions of Article LP. 630-5 of the Competition Code at the meeting of 17 October 2022;

Is of the opinion that the request should be answered in the following way:

1. By letter dated 16 September 2022, registered on 21 September 2022 under number 22/0020 A, the President of French Polynesia consulted the Polynesian Competition Authority (hereinafter "the Authority") for an opinion on the reference interconnection rates (hereinafter "RIR") for mobile call termination (hereinafter "MCT") for the mobile telephone operators PMT/Vodafone and ORA/VITI for 2022 and 2023.

2. Consulted on the basis of the provisions of I and 3° of II of Article LP. 620-1 of the Competition Code, the Authority may give its opinion on "*any question relating to competition*", but also, more specifically, "*in the context of regulating a sector where competition is lacking in order to ensure the opening up and proper functioning of the markets concerned for the benefit of the end consumer*", which includes in particular the question of "*setting public rates for connection or interconnection to networks*".

I. BACKGROUND

A. SETTING MOBILE TERMINATION RATES

3. A telephone call, whether fixed or mobile, voice or SMS, is composed of a call origination, carried out by the caller's operator, followed by a call termination, carried out by the called party's operator, responsible for delivering the call.

4. Call termination service means the service of routing calls (voice or SMS) provided by an operator operating a network open to the public to another operator operating a network open to the public to which it is interconnected, where the calls are made between the respective customers of those two operators. It is therefore a reciprocal service provided by the two operators. In concrete terms, the operator charges for incoming calls or SMS (made by the customer of another operator to one of its customers), to compensate for the cost of this call termination which is carried on its network but for which it does not receive any revenue, either from its customer (who receives the call) or from the customer of the other operator.

5. In French Polynesia, this interconnection rate is regulated and set by order of the Council of Ministers. On 17 June 2020, the Authority issued an opinion on the method[1] for setting these rates. It made a number of proposals, which were partially taken up by the government in the National Law No. 2021-4 of 7 January 2021 and Order No. 504 CM of 1 April 2021, amending the Post and Telecommunications Code in French Polynesia (hereinafter "PTC").

6. In the current CPT, Article LP. 212-22-1 provides that "*A reference interconnection rate for networks open to the public shall be set by the Council of Ministers for each holder of a licence.*" Article LP. 212-25-1 specifies that: "*The interconnection rates shall respect the principle of cost orientation of the rates. / An order issued by the Council of Ministers shall set the terms of application of this article. / The Council of Ministers shall also specify the methodology of the technical and economic model used to determine the rates. / This methodology may evolve according to the degree of maturity of the Polynesian telecommunications market with a view to effective and fair competition.*"

[1] Opinion n° 2020-A-02 of 17 June 2020 on a draft law of the country amending the Post and Telecommunications Code (determination of the reference interconnection rate for mobile telecommunications operators and abolition of the approval system for telecommunications installers).

7. In the "Orders" section of the same code, the principles for determining the rates are detailed. Under the terms of Article A. 212-22-1: "*A reference interconnection rate for networks open to the public, provided for in Articles LP. 212-22 and LP. 212-22-1 of this code, is established for each telecommunications operator. / In the case of reciprocal services offered by two operators of a network open to the public within the meaning of the provisions of Article D.211 6°, the reference rate includes: / - The cost of the voice and/or SMS call termination service on the operator's telecommunications network, / - The additional costs incurred for the establishment of interconnection to its network, including in particular: the cost of equipment and connection links*."

8. The provisions of Article A. 212-22-15 state that "*The department in charge of telecommunications shall also base itself on the operator's model, the 'return form', the report of the audit firm, the economic regulation ensuring effective and fair competition for the benefit of users, and the principles laid down in Articles LP. 212-22 to LP. 212-25-2, to propose a reference interconnection rate per call termination for approval by the Council of Ministers*."

9. Thus, the rates of the MCTs must be cost-oriented according to a methodology fixed by ministerial order, a methodology that may evolve in the interests of effective and fair competition.

10. The provisions of Articles A. 212-22-9 to A. 212-22-17 detail the methodology to be adopted by operators to determine the cost of these services. They are supplemented by a methodological guide relating to mobile call termination rates, produced by the DGEN and sent to operators, which details each of the stages in the procedure for setting rates and recalls the main characteristics of the expected model. A standard feedback form is sent by each operator.

11. Although the rates are adopted by the Council of Ministers, it is in fact each operator that produces its own cost model, according to the so-called "CMILT complete bottom up scorched node" methodology. The proposed model is then audited by a single external consultant on behalf of the DGEN and discussed with the operators in order to arrive at a certain degree of homogeneity in the determination of these rates. The result is a theoretical rate, i.e. derived from the model, which may nevertheless differ from the rate finally adopted by the Council of Ministers, as the latter must also ensure that these rates are compatible with the objectives of regulation and in particular the exercise of effective and fair competition for the benefit of users. In other words, within the limits of respect for these principles, the Government has a certain margin of appreciation in determining the rates of each operator.

B. THE REPEAL OF TWO OF THE THREE PRICING ORDERS OF 9 DECEMBER 2021

1. THE JUDGMENT OF 29 MARCH 2022

12. In 2021, following the modification of the texts in January and April 2021, the procedure for developing MCTs was implemented in accordance with these new provisions. Article A. 212-22-12 of the new text, relating to the regulatory cost base, provided in particular that the regulatory cost base, provided in particular that it should include "*all network costs*" but exclude "*<u>any purchase of interconnection</u> or <u>roaming</u> services*".

13. On this basis, orders were issued on 9 December 2021 to set the rates applicable to each operator.[2]

14. However, the French Polynesian Administrative Court, in its ruling No. 2100234 of 29 March 2022, partially repealed the order, in response to an appeal for the repeal of Order No. 504 CM on the determination of rates. It considered that operators' roaming costs should not be excluded from the regulatory basis of the interconnection rate in order to guarantee that "*competition is effective and fair between, on the one hand, the operator that has control over the essential infrastructure that is the*

[2] Order No. 2712 CM for the rates of Onati-Vini, No. 2807 CM for the ones of PMT-Vodafone and No. 2713 CM for the ones of Ora-Viti.

network and, on the other hand, the service operator that does not". This service has therefore been removed from the exclusions from the regulatory cost base.

15. It is clear from the administrative court's reasoning that the applicant relied in particular - in seeking the repeal of the contested provision - on a proposal made by the Polynesian Competition Authority in its opinion No. 2020-A-02 of 17 June 2020.

16. The judgement of 29 March 2022 mentions in point 6 thereof that:

> *« This authority [the APC] states that the model chosen by French Polynesia for mobile telephony presents a competitive advantage for Onati, which will be able to "integrate the costs of coverage" and "the investments made by the public operator in the remote islands, according to the existing topology of the network, even when this is not optimal in terms of coverage or technology". The authority specifies that this model "penalises operators with poor network coverage, especially as the expenses they pay for roaming, which are intended precisely to compensate for the costs of coverage of remote islands by the public operator, are excluded from the cost base adopted by the order. The practical result is that only the incumbent operator can charge the cost of covering the archipelagos to its MCT (mobile call termination) rate". The authority goes on to say that this modelling "has an impact on retail prices and penalises customers of operators competing with the incumbent". The MCT base should therefore, according to the Authority, include the cost of roaming, since "the cost of roaming appears to be a network cost, in the same way as if the customer operator had developed its own network". The Authority proposes to modify the model provided for in Article A 212-22-12 of the French Post and Telecommunications Code, which "should reintegrate into the cost base a share of the roaming charges paid by Onati's competing operators".*[3]

2. REPEAL OF THE PRICING ORDERS

17. According to Article D. 211 of the Polynesian Telecommunications Code (PTC), mobile roaming is the service "*provided by a mobile telecommunications service operator to another mobile telecommunications service operator with a view to enabling the latter's customers to use the former's network*".

18. Today, two of the three operators, PMT and Ora, pay local roaming fees to Onati in all islands not covered by their own mobile networks. As the method was partially invalidated, the government had to draw the consequences. As a result, Order No. 685 CM of 12 May 2022 repealed Orders No. 2713 CM and No. 2807 CM of 9 December 2021 approving the reference interconnection rates for the years 2022-2023 of mobile operators Viti (Ora Mobile) and Pacific Mobile Telecom (PMT Vodafone).

C. THE REQUEST FOR AN OPINION

19. The procedure for setting mobile termination rates consists of different steps as shown in the following diagram:

Diagram for determining the rates of mobile operators' MCTs

[3] Administrative Court of French Polynesia, judgment No. 2100234 of 29 March 2022.

The PTC defines general principles (in particular the principle of cost orientation of rates), but also the model to be used and its components (CMILT model + *bottom-up scorched node*, calculation of the weighted average cost of capital, cost base, flat rate mark-up etc.)

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The operator carries out the modelling according to the rules laid down and sends it to the DGEN together with a report form

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The audit of the model is carried out by an external consultant (Mazars for the 2022-2023 rates) supervised and financed by the DGEN

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An IRR per operator is proposed by the DGEN based on the theoretical IRR from the model and the principles set by articles LP. 212-22 to LP. 212-25-2, including the principle of effective and fair competition between operators for the benefit of Polynesian users

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The rate is presented for information to the Telecommunications Advisory Committee

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The rate is approved by the Council of Ministers

20. Following the judgment and the repeal of the pricing orders, the DGEN proceeded to determine new rates, taking into account the integration of local roaming services into operators' costs. It has therefore resumed the whole process on this new basis. To date, the DGEN has determined new rates for the operators PMT-Vodafone and Ora-Viti on the basis of the models submitted by the operators.

21. Before presenting these rates to the operators, within the framework of the next Telecommunications Advisory Committee, and then adopting them by the Council of Ministers, the government wished to obtain the opinion of the Authority on these rates, as the Competition Code allows.

22. This opinion only deals with voice call termination rates, not SMS rates, the pricing of which has also been the subject of an appeal, still pending before the Administrative Court of French Polynesia.

II. COMPETITIVE ANALYSIS

A. THE COMPETITIVE ISSUES OF MOBILE TERMINATION RATES

23. The mobile telecommunications markets are platform or "two-sided" markets: an operator may charge services to competing operators (interconnection or roaming) or to its subscribers (retail offers).

24. A telephone call, whether fixed or mobile, voice or SMS, is composed of a call origination, provided by the caller's operator, and a call termination, provided by the called party's operator, which is responsible for delivering the call. The call therefore uses an originating local loop and a terminating local loop.

25. For an operator, there are three possible types of calls:

- *on-net* calls or SMS, internal to the operator;

- outgoing *off-net* calls or SMS to another operator;
- incoming *off-net* calls or SMS from another operator.

26. n the case of an *off-net* call (between two operators), the calling operator charges its customer the retail price of the call to the network of the called operator. At the same time, it pays the called party's operator directly the wholesale interconnection price, i.e. the call termination service using the called party's operator's network. The call termination rate is therefore the price that the calling operator pays to the called operator. It remunerates the called party's operator for routing the call on its own network.

27. From a competitive point of view, no other service is substitutable for call termination services on mobile networks. Each operator is thus in a monopoly position on the market for voice and SMS call termination to the numbers it manages and, *a priori*, there is no countervailing buyer power to offset this market power. On several occasions, the Council and then the National Competition Authority have considered that call termination services have the characteristics of an essential facility (see for example opinion No. 05-A-10 of 11 May 2005, § 26).

28. It is this monopoly character that justifies regulation. The issue at stake in this regulation is essentially rates and does not concern the conditions of access. Indeed, as this is a reciprocal service between the operators, there is no interest for them to cut off access completely. On the other hand, in the absence of interconnection rates, the operator could be tempted to overcharge its competitors for the service, with detrimental effects on the level of rates and market shares not resulting from the operators' merits alone. Rate regulation aims to force operators to charge for these services according to their costs, and to make their margin on the retail side alone, which is in the interest of consumers and competition, since it simplifies the comparison of offers.

29. The Authority's Opinion No. 2020-A-02 has already recalled the main principles and objectives on which the regulation of these rates should be based: cost orientation; absence of distortions between *on-net* and *off-net* calls; emergence of new operators, in particular through asymmetrical rates based on respective market shares; preservation of operators' investment capacities. It then examined the various models in the light of these objectives and their competitive implications, and concluded that the choice of a "CMILT +" model was certainly suited to the competitive situation in the sector, in that it allowed the asymmetrical situation of the operators to be taken into account, but that it led to a high overall level of rates and should eventually undergo changes.

30. While it is not the role of the Authority, which is not the regulator of the sector and whose mission it is not, to give an opinion on the pricing proposals made by the DGEN, it is, on the other hand, its role to assess compliance with the principles of free competition in the procedure for setting prices (B), as well as the competitive consequences of the rates thus determined and the possible changes (C).

B. ABOUT THE METHOD USED TO DETERMINE THE 2022-2023 RATES

31. While the Authority is not in a position, nor does it have the competence, to verify the validity of the amount chosen for the new rates, it has assessed the competitive nature of the method used, and in particular the following three points: the principle and methods of including roaming services in the cost base (1), the question of traffic forecasts (2) and the question of the date on which roaming charges are taken into account (3).

1. THE JUDICIOUS CHOICE OF INTEGRATING LOCAL ROAMING SERVICES INTO THE COSTS

a) The principle of integration

32. Article A. 212-22-12 of the PTC no longer excludes roaming charges from the cost base, and the methodological guide sent to operators stipulates that they are to be taken into account in the following form:

> *Roaming and interconnection costs:*
>
> *Roaming-related purchases are included in the regulatory base. They must be broken down between the various services by means of a relevant traffic allocation (in particular between voice, SMS by type of call and data).*
>
> *The amounts of the purchases are included in the total base for calculating the MCT rate in proportion to the relevant traffic (incoming voice and SMS, i.e. voice and SMS call terminations).*

33. As recommended by the Authority in its opinion No. 2020-A-02, this reintegration of roaming services into the costs of alternative operators appears to be favourable to undistorted competition. Indeed, the previous model penalised operators with low network coverage, in particular new competitors, whose roll-out obligations are progressive, because the expenses they paid for roaming, which were intended precisely to offset the costs of coverage of remote islands by the public operator, were excluded from the cost base adopted by the Order. In practice, this meant that only the incumbent operator could charge the cost of covering remote islands to its rates, while all of them were subject to this cost.

34. For example, if a call is made by an Onati customer to a Vodafone or Viti caller on an island where its operator has not deployed a physical network. Prior to the Administrative Court's ruling, the operator receiving the call would have to pay local roaming charges for the use of Onati's network (the only operator physically deployed on that island), but the billing of mobile call termination to Onati excluded the inclusion of this cost. In contrast, in the symmetrical case of a call received by an Onati customer on the same island from a Vodafone or Viti subscriber, this network cost was taken into account and charged. Thus, the cost of call termination for this operator was directly impacted by the roaming price, but it was not able to pass it on in its billing. This exclusion was likely to have an effect on retail prices, penalising the offers of operators competing with the incumbent, or on the investment capacity of these operators, which is crucial for their deployment in the years following their entry into the market.

35. The government has justified the exclusion of this expenditure by the desire to develop infrastructure competition throughout the country. However, although the question of the operators' deployment obligations and infrastructure competition may legitimately arise, even if the Authority considers that it is not always economically justified (see § 94 et seq. on this point), it cannot have the effect of disregarding the principle of making rates cost-oriented, at the risk of penalising the emergence and development of new operators.

b) The modalities of integration

36. These roaming charges have a dual component: a variable part based on consumption (price per minute or per SMS) and a flat rate part to compensate for network coverage, with an annual network access price. From now on, they are no longer excluded from the cost base by nature.

37. The result is a higher rate for both operators, but more in line with their actual costs.

MCT (voice) rates since the opening to competition

In francs per minute	2014	2015	2016	2017	2018	2019	2020	2021	Repealed rates		New proposal	
									2022	2023	2022	2023
Vini	7,50	7,50	7,50	7,00	7,00	6,60	6,60	6,60	3,50	3,50	3,50	3,50
PMT	9,00	9,00	9,00	9,90	9,90	9,50	9,50	9,50	~~5,35~~	~~5,68~~	5,85	6,16
											9%	*8%*
											variation from the repealed rate	
Viti						10,80	10,80	10,80	~~11,54~~	~~7,60~~	14,90	11,90
											29%	*57%*
											variation from the repealed rate	

38. This new rate reinforces the pricing asymmetry between operators to the benefit of the latest competitors. Indeed, the less extensive an operator's network is, the more it needs to resort to roaming to enable it to offer services to its customers throughout the Polynesian territory. This asymmetry - which is intended to be temporary - should make it possible to maintain the investment capacity of new operators and to reinforce, in the long term, competition on the basis of merit alone.

39. It is also clear from the data provided by the Government that roaming has been taken into account in determining rates in the same way as other network costs, i.e. in proportion to the share of roaming involved in mobile call termination. Thus, as with other network elements, roaming costs were distinguished between voice and SMS, and then retained only up to the amount of the costs allocated to so-called "incoming *off-net* calls", i.e. those originating from another operator to the network of the operator concerned. This total amount was then divided by the number of minutes concerned from the "traffic" data, in order to obtain a rate per minute.

40. In summary, both the principle and the method of including roaming charges in costing models appear to be in line with the text and the spirit of the text, in that they reinforce the exercise of undistorted competition between operators.

2. THE ISSUE OF TRAFFIC FORECASTS AND OPERATORS' MARKET SHARES

a) The challenge of traffic forecasting

41. Article A. 212-22-10 states that the model used must "*contain the following steps: / 1. Simulation of the operator's traffic on the basis of business models and traffic development projections for the territory of French Polynesia*".

42. The methodological guide specifies that: "*Operators should perform the following steps in their Operator Models: / Traffic estimation. This estimate should be based on business models and projections (including future commercial offers) to determine the traffic for each group of services (Voice, SMS, Data) and each call case (On-net, Incoming-In, Outgoing-Out, Other including Roaming, Special numbers etc.)*"

43. This forecast traffic data is the denominator of the pricing formula, which consists in dividing the costs allocated to " incoming " calls (those coming from another operator) by the total duration of the calls under consideration.

$$Theoretical\ rate\ of\ an\ operator's\ MCT = \frac{Cost\ of\ MCTs\ (according\ to\ the\ model)}{Forecast\ incoming\ traffic}$$

44. Traffic data are also indirectly included in the numerator of the formula. On the one hand, they have an effect on the variable costs included in the model. On the other hand, even with regard to fixed costs, the methodological guide specifies that the estimation of the size of the network is carried out on the basis of the estimated traffic for the years under consideration.

45. It follows from these provisions that, during the price-setting process, operators were expected to make a realistic estimate of their traffic forecasts for the years 2022 and 2023, the date of application of the prices, and the DGEN was expected to validate or correct these estimates.

46. However, it appears from the referral that although the various operators did submit traffic forecasts for the years 2022 and 2023, these proved to be too heterogeneous to be used.

47. As a result, the DGEN chose to use the most recent real traffic data for 2020 as the basis for setting the rates.

48. It is necessary to determine whether or not this default choice is likely to jeopardise the fairness of treatment between operators and consequently competition.

b) Operators' forecasts too heterogeneous to be retained

49. During the initial pricing process in 2021, difficulties arose. According to the information provided, although each operator had produced forecasts for mobile voice and SMS services in 2022 and 2023, both in terms of the number of subscribers and traffic, "*these projections showed some major inconsistencies*", sometimes ranging from simple to double, for example, between the incoming traffic estimated by one operator and that estimated by its competitors.

50. These inconsistencies underline the difficulty of the projection exercise. Indeed, the opening of the Polynesian market is still relatively recent, and the market is still far from being stabilised.

51. Therefore:

- The third operator, Viti, only launched its first offers in 2020. Its market share is therefore necessarily small and its development uncertain.
- While a priori there is a trend towards a gradual increase in the market share of new operators, certain disputes - such as the one concerning mobile data roaming services in remote archipelagos - may, on the other hand, have negative effects on the growth of operators wishing to use these services. Thus, when PMT filed a request for interim measures, the Authority wrote that: "*the*

seriousness of the practices is amplified by the fact that they have an impact on the competitive structure of the sector, by having the effect of depriving a competing player of all access to a market segment, or at least delaying access to it, and reducing its prospects for development and consequently for investment in the networks. Consequently, part of the customer base is deprived of the recent opening up to competition desired by the legislator and in particular of the possibility of choosing one's operator".[4]

- Changes in business strategy are underway, including by the main operator, which may potentially lead to a stabilisation of market shares, or at least to unpredictable developments.

52. For this reason, traffic forecasts for the coming years are extremely delicate and would inevitably be questionable.

53. It therefore seems consistent to use the traffic base for the 2022-2023 rates from the last known year, i.e. 2020. However, there is a risk of not taking account of changes in market share since that date and in particular of reducing the market share of new operators, which can be expected to grow. However, this choice is not inconsistent with the principle of temporary price asymmetry applied by most regulators, especially since the text explicitly provides that the regulator has a margin of discretion to deviate from the so-called theoretical rates in order to promote, in particular, "*effective and fair competition for the benefit of users*" (Article A. 212-22-15 of the CPT).

54. This choice also has the advantage of bringing greater consistency between operators. Indeed, it is the 2020 traffic data that were also used to draw up Onati's rates, which are still in force (since Onati does not use local roaming, the administrative court's ruling had no effect on its rates adopted on 9 December 2021). This choice therefore respects the principle of proportionality of changes between operators, as highlighted in particular by Arcep for metropolitan France.[5] It thus limits the distortions that would have arisen from taking a different basis for each operator.

55. Moreover, the effect on the price per unit is likely to be relatively limited, because while traffic has a direct impact on the denominator (number of forecast minutes of incoming traffic), it also has a similar, albeit smaller, impact on the numerator, given the fixed costs unrelated to network sizing.

56. In the end, although approximate in nature, this choice is therefore consistent with competitive principles, it being understood that the rates thus defined will of course only apply to incoming calls actually made and routed during the years 2022 and 2023.

3. THE QUESTION OF WHEN ROAMING COSTS SHOULD BE TAKEN INTO ACCOUNT

57. One issue that was debated between the operators and the DGEN during the preparation of these new prices was the date on which roaming prices were taken into account. The question arose as to whether the roaming rates known at the time of the adoption of the decree determining the calculation methods (April 2021) should be taken into account - as was the case during the initial pricing process - or whether they should be taken into account in 2022, following the partial repeal of this order by the administrative court and the repeal of the initial pricing orders?

58. In this case, the two operators took a different position, one in favour of taking into account the rates known in 2021 and the other in favour of the rates known in 2022, presumably because following the renegotiation of roaming contracts, each saw its advantage in this: one had seen its rates fall and the other had not, between these two years.

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[4] PCA, Decision No. 2021-PAC-01 of 8 December 2021 on a request for interim measures submitted by Pacific Mobile Telecom in the telecommunications sector, concerning the provision of roaming for mobile data access.

[5] See for example for metropolitan France ARCEP, decision NO. 2010-0211 dated 18 February 2010.

59. While the debate is primarily legal, it is not without consequences for competition. A year has passed between the two periods, and the terms of the roaming agreements concluded by the operators with Onati have been substantially modified.

60. In his referral, the President of French Polynesia states that, according to the position taken by the Conseil d'Etat in a decision of 9 June 1990, the obligation to act is not assessed on the basis of the law in force at the time the annulled decision was taken, but that the consequences of the res judicata must be assessed in the light of the legal and factual circumstances existing at the date when the new decision is to be applied. The decision cited relates to a civil service competition that has been cancelled by litigation. The Conseil d'Etat considered that "*in order to organise, on 22 May 1985, a new competition for the recruitment of assistants in odontology following the annulment of the deliberation of the jury of the competition dated 6 December 1983, the University of Clermont-Ferrand I was obliged to apply the regulations in force on the date of the new competition; that it therefore had to take into account, in the title given to the tests, the modification that had occurred between these two dates in the regulatory name of the discipline concerned*". If this interpretation is followed, the roaming costs to be taken into account were those known at the date when the operators drew up the new rates (and not at the date of the judgment of 29 March 2022), i.e. 5 May 2022, the date on which the DGEN sent a letter to the operators asking them to update their technical and economic model to take account of the possibility of integrating roaming into their models. "

61. In support of this interpretation, it may also be mentioned that the new price-setting procedure is not a direct result of the Administrative Court's judgment, but rather of the repeal by Order No. 685 CM of 12 May 2022 of two other regulatory acts (Orders No. 2713 CM and No. 2807 CM of 9 December 2021 approving the reference interconnection rates for the years 2022-2023 of the mobile telephone operators Viti and Pacific Mobile Telecom). This repeal did not take the form of a consequential annulment in the judgment of 29 March 2022, which only concerned the order of April 2021. It was a separate decision, taken by the Council of Ministers, which itself drew the consequences of the fact that these regulatory acts had undergone a change in their legal basis.

62. Therefore, <u>from a legal point of view</u>, it seems - subject to the interpretation of the judge - that in assessing the cost models submitted by the operators, the DGEN did not incorporate the roaming costs known at the time of the initial rates, from April 2021, but rather those known at the time of the new rates in May 2022.

63. <u>From a competitive point of view</u>, this interpretation also appears preferable. In fact, sticking to the costs known in April 2021, the date of the initial text, for a price list drawn up from May 2022 would be likely to lead to distortions, to the benefit or detriment of the operators concerned, depending on whether the cost of roaming has increased or decreased. It is therefore much more consistent to use the latest known prices, bearing in mind that this has no effect on the prices of Onati (already adopted), which does not pay any local roaming charges.

64. As a result, the <u>competitive analysis</u> is in line with administrative case law, since it is much more coherent to calculate rates with all the data known at the time the calculations are made. This is what the DGEN has done, by correcting the operators' proposals with the help of the Mazars firm, on the basis of the roaming agreements and the latest price amendments known at that date (i.e. April 2022 for one operator and March 2022 for the other).

65. The DGEN therefore appears to have chosen the interpretation most in line with the law but also with the preservation of fair and effective competition.

66. It results from all these elements that the DGEN, in determining its price proposal for the 2022-2023 rates, has carried out an assessment of the rates of the two operators in accordance with the principles of fair and effective competition.

C. ON POSSIBLE CHANGES IN THE METHOD FOR DETERMINING RATES

67. In its opinion No. 2020-A-02, the Authority made a number of proposals to amend the texts, only some of which were adopted. While the purpose of this opinion is not to re-examine the texts adopted, which are now final, it may be relevant to remind the government of certain developments concerning possible medium-term changes in the determination of rates, provided that they remain fully relevant.

68. Indeed, this first exercise of standardised determination of MCT rates, although based on texts adopted at the beginning of 2021, is still unfinished, both for voice rates (the subject of this opinion) and for SMS rates (for which litigation is still pending). These delays reflect several types of difficulties, some of which were anticipated by the Authority in 2020. Firstly, the development of the chosen model is cumbersome and complex and requires the use of costly external consultants. Secondly, the model leads to relatively high rates for the MCTs, including for the incumbent operator, with the result that - even though the standardisation had been requested by the alternative operators - they challenged the results before the courts.

69. For this reason, it seems to the Authority that this first exercise could be an opportunity to take stock of the regulation of rates (1), so that thought can be given to certain changes in the model, particularly with regard to the predictability of downward rate changes (2), renewed thought given to the question of infrastructure competition in sparsely populated areas of the territory (3) and priority given to the transmission and use of information on operators (4).

1. THE PRINCIPLE OF GRADATION AND FLEXIBILITY OF ECONOMIC REGULATION MEASURES

70. The setting of regulated prices for access to certain telephone services is a matter for economic regulation. While economic regulation is justified in the face of certain market failures, particularly in the case of monopoly services, it must be flexible. In other words, it is important to use the least intrusive instruments in order to limit market distortions and only as a last resort measures such as price-setting, when other instruments are not likely to guarantee effective competition. The lightest and most flexible tool available should also be preferred (the principle of efficiency or resource saving).

71. For example, some competition and regulatory authorities in the Pacific are doing this.

72. In Australia, the ACCC, which has both competition and regulatory powers, is responsible for ensuring access to regulated networks (electricity transmission, mobile call termination, access to fixed networks, etc.). The idea is always the same: to ensure that access is provided to downstream operators under conditions equivalent to those that the holder applies or would apply to itself, and that interconnection is provided between equipment. However, a gradation of measures according to each situation is implemented.

73. Thus, the first step is to find out for each service under consideration whether it is likely to raise competition issues. If this is the case, and regulation is therefore desirable, the second step is to rank the instruments.

74. Preferred in order of priority:

- Commercial agreements between companies on access, which are communicated to the ACCC.
- Commitments made by the infrastructure manager on access conditions.
- Only as a last resort does the ACCC proceed to the direct determination of access conditions or prices, as this is a cumbersome procedure that requires the use of expensive consultants. And in the latter case, it will always favour the tool that requires the least human and financial resources.

75. The ACCC therefore only intervenes directly where necessary. It may also decide on only part of the access conditions, if some of them have already been the subject of commitments or trade agreements higher up in the hierarchy.

76. In New Zealand, the Commerce Commission, which is also competent for both competition and regulation, has at its disposal different regulatory regimes with - as in Australia - a scale from least to most intrusive.

- Some natural monopolies are not regulated, as the cost of regulation would outweigh the benefits (e.g. ports).
- A first regime is called "information disclosure". This involves obtaining very detailed information about the sector and companies, their costs and revenues, and publishing some of it. In many cases, this information alone is enough to discipline companies.
- Then there are arbitration, negotiation and commitment procedures. This is the case, for example, in telecommunications infrastructure shared between operators, where the negotiation is commercial (between operators), but with the regulator acting as arbitrator in the absence of agreement.
- Secondly, the regulator can impose non-price measures (e.g. network access conditions, etc.).
- Finally, it is only as a last resort that the commission resorts to price-setting, as far as possible by using the lightest tool at its disposal (e.g. using comparative studies or benchmarking rather than building a cost model if this approach is validated by the court).

77. And the choice of instruments is regularly reviewed - at least every five years - to see whether the regime chosen remains relevant, whether it can be reduced or whether it should be tightened. The government nevertheless retains the ability to require the Commerce Commission to opt for price regulation if it so wishes.

78. In the experience of these authorities, the mere ability to move towards a more coercive regime is sufficient to influence behaviour, and is much lighter and less costly, since the lightest and most flexible mechanism is always chosen to achieve the desired goal.

79. Both authorities also emphasise that transparency of information is an effective way of reducing barriers to market entry and helps public authorities in their policy-making. Sometimes, the simple transmission of information by operators and its publication by the regulator is even sufficient to discipline operators, and avoid the need for more coercive measures.

Recommendation:
Similarly, in the context of the regulation of the Polynesian telecommunications sector, the Polynesian regulator must regularly reflect on the relevance of the tools used, and their possible mitigation over time, as the markets recently opened to competition normalise.

2. AN EVOLUTIONARY MODEL THAT SHOULD ALLOW FOR THE PROGRESSIVE DECREASE IN RATES

80. In telecommunications, especially in a context of market opening, developments are rapid and permanent and require regular adaptations of the regulatory framework and the actions of the regulator.

a) The current model leads to asymmetric but high rates

81. The choice of cost model and cost base has obvious competitive implications. The PTC (Article A 212-22-11) provides for the use of the *bottom-up scorched node* long-run average incremental cost (LRIC) model. This model uses a broad cost base, incorporating the variable and fixed costs of the service, including network coverage costs, operating costs, joint costs related to the service and common costs allocated to the network. It results in a much higher price than in most territories where the sector has been open to competition for a longer period of time, even if it has the advantage of allowing a real asymmetry between operators.

Comparison of "voice" MCT rates (2019)

in XPF / minute	2019 MCT "voice" rates
French Polynesia (average)	7.77
France	0,88
Antilles-Guyana	0,88
Reunion-Mayotte	0,88
European Union (average)	0,93

Sources: Lexpol, Berec, ARCEP

82. This choice would be likely to penalise small operators very heavily with identical rates. Today, the largest operator receives a priori more calls within its own network (*on-net* calls). It also receives more inbound calls from smaller operators - about 60% - than outbound calls to smaller operators - about 40%. If the rates were the same, its interconnection flow would therefore be very positive, while also representing a relatively small proportion of its turnover. Conversely, small operators have few *on-net* calls (their network is not very developed) and the proportion of outgoing calls, which are charged at the MCT rate, is significant. At identical prices, the balance of the small operators would therefore be very negative and would also weigh proportionally more heavily in their operating costs.

83. But the rates are not identical for two reasons:

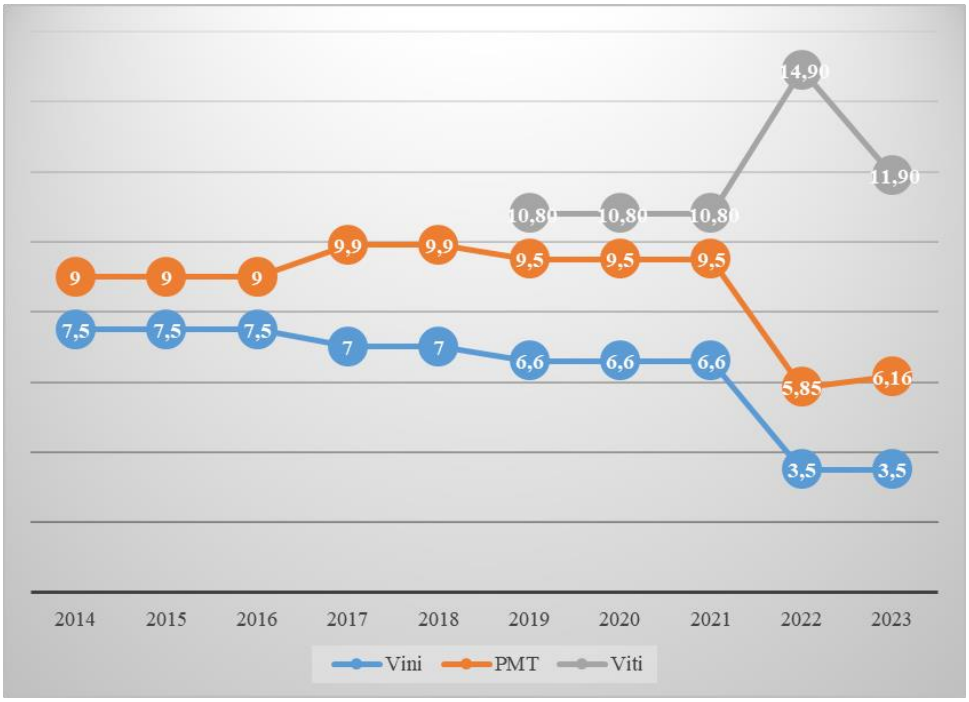
- On the one hand, because of the parameters of the model. The incumbent's network is more amortised and benefits from significant economies of scale. This results in a lower cost per call than for newcomers. In other words, the economies of scale enjoyed by the majority operator are partially reflected in the MCT rates, leading to an asymmetry favourable to the minority operators, whose rate and therefore unit revenues will be higher.

- On the other hand, because the CPT provides for the possibility for the regulator to depart from the so-called "theoretical" rates, i.e. those set by the model, in order to take account of the maturity of the market and competitive conditions[6].

84. The overall balance is therefore relatively uncertain, depending on whether the incumbent's lower per-unit cost offsets the physical interconnection balances, which are in its favour.

85. Thanks to this mechanism, MCT rates should ensure a balance between the various objectives sought: lowering prices, developing competition, fair remuneration for operators and encouraging investment in modernisation (4G for example) and coverage (remote archipelagos).

Evolution of "voice" MCT rates in French Polynesia



86. Thus, as in 2020, the Authority considers that the principle of a single model has the advantage of homogenising the conditions for calculating MCT rates and that the choice of the CMILT + model is consistent with the maturity of the Polynesian market, but that it carries the risk of not pushing rates downwards (CILT-type models would, for example, result in much lower rates while also allowing rate asymmetry). The question of its future development is therefore a pressing one, especially as the asymmetry is only intended to be temporary and to disappear progressively as the newcomers become established and begin to amortise their initial investments.

b) The evolving nature of rates has been included in the texts

87. In its opinion 2020-A-02, the Authority made the following proposals on the evolution of rates over time, in order to ensure that they are in line with the conditions of competition on this market:

- *Explicitly provide for the evolutionary nature of the model, towards a model known as "CILT" (long-term incremental cost) or "pure CMILT" (long-term incremental average cost) as the Polynesian market matures, progress is made in network coverage and other projects are carried out, in particular that relating to the determination of dense and less dense areas.*

[6] For the record, the Conseil d'Etat has already recognised the ability of a regulator to impose asymmetrical rates between different operators, notably on the basis of effective and fair competition, a principle which is precisely included in the Polynesian text (CE, decisions No. 324642 and 324687 of 24 July 2009).

- *Include in the text the principle of a gradual reduction in rates ("glide path") and temporary asymmetry in rates between operators, for example by adding a fourth paragraph to the new Article LP. 212-22-1 ("The regulator may impose a multiannual rate path on operators") and by adding a third and fourth paragraph to the new Article A 212-22-15 ("By way of derogation from the previous paragraph, the Council of Ministers may determine a gradual reduction in MCT rates within the framework of a multiannual rate path in order to achieve a gradual move towards a zero rate or a reduced cost base. This trajectory may be differentiated according to the operators, in order to ensure effective competition between them").*
- *Make public the multiannual trajectory desired by the regulator in this area, in order to provide operators with greater visibility.*
- *In the medium term, once the starting price of the MCTs has been determined on the basis of the technical-economic model and the regular and asymmetrical price reduction path has been initiated, the biennial revision of the technical-economic model could be replaced by a crystallization of rates at a low or even zero level.*

88. These suggestions have been partially taken up in the country's law, since the PTC takes up the evolving nature of the model according to competition considerations, but without further details on how it will evolve:

> *PTC, article LP. 212-25-1 (inserted by the Law of the Country n°2021-4 of 7 January 2021 art. LP. 7)*
>
> *Interconnection rates shall respect the principle of cost orientation of rates.*
>
> *An order issued by the Council of Ministers shall set out the terms and conditions for the application of this Article.*
>
> *The Council of Ministers shall also specify the methodology of the technical and economic model used to determine the rates.*
>
> ***This methodology may evolve according to the degree of maturity of the Polynesian telecommunications market with a view to effective and fair competition.***

89. It would appear - in the light of the difficulties encountered by the DGEN in drawing up the rates - that it is still appropriate to contemplate, at least in the medium term, a clarification of the objectives pursued and a simplification of the method.

c) In the medium term, these developments could lead to a simplification of the model and an alignment of rates at a much lower level

90. When the market grows, the gradual emergence from asymmetry is usually accompanied by a gradual but significant reduction in prices. Initially, prices are likely to fall as a result of the model, particularly as the business develops (economies of scale) and newcomers' assets are depreciated. However, this decrease may also be encouraged by the regulator, in order to promote the development of abundance offers, which are favoured by low prices. Thus, interconnection balances should gradually balance out and prices should approach zero

91. Moreover, it can be seen that the regulator often aims, in setting MCT rates, to obtain relatively balanced interconnection balances, in particular so as not to penalise the development capacities of small operators (which would be the case if their balance were very negative), without having the incumbent operator finance this development (which would be the case if their balance were positive). In reality, if the objective is to obtain relatively homogeneous balances, i.e. close to zero for each operator, one could even consider setting a zero mobile termination rate, with the cost of routing an operator's incoming calls being compensated for by the fact that the cost of its outgoing calls to other

operators is not charged[7]. Without going to this extreme, which in a market in the process of opening up could lead to distortions by pushing operators to favour outgoing calls to other operators and to artificially modify the architecture of offers, there is a universal trend towards a very low level of prices.

92. Developments in this direction will therefore be necessary in French Polynesia. For example, in 2008 (Decision No. 08-0176 of 2 December 2008), ARCEP decided to move from a full cost model to a purely incremental model, taking into account only the network growth required by MCTs, but not the costs of territorial coverage, in order to take into account the maturity of the networks and the convergence of operators. ARCEP then "*pursued its policy of gradually and proportionately lowering price caps*"[8]. Prices still remained asymmetric for some years, but less and less so. Indeed, after a while, even if market shares do not necessarily have to balance out, market maturity should allow for competition on the basis of the operators' merits alone (in terms of network coverage, quality of service and price offer).

93. This downward convergence could be gradual and explicit, in order to encourage operators to prepare for the end of asymmetry, both in terms of investment and the development of their price lists (one can imagine the development of abundance offers). Once convergence has been achieved, rates would be crystallised at a very low level, in order to exempt the country from the regular audit of technical and economic models, which is cumbersome and costly, except in the event of the arrival of a newcomer, whose rates could be temporarily higher in line with its costs. The advantage of such a choice would also be to limit litigation.

Recommendation:
In order to limit litigation and encourage the development of uses and competition on the merits, the Polynesian regulator could - on the occasion of future price-setting exercises (starting with the 2024-2025 prices) - take different paths:

- Deviate further from the "theoretical" rate derived from the model to establish asymmetrical, but lower, rates in order not to excessively penalise operators with a deficit balance and to favour abundance offers
- Choose a model allowing lower costs (of the CILT type, i.e. without taking fixed costs into account)
- Move away from the cost model and opt for an explicit approach of progressive rate reduction, based on rates in equivalent markets (benchmarking)

Reference is made to the Authority's opinion 2020-A-02 for details on these different scenarios.

3. THE ISSUE OF INFRASTRUCTURE COMPETITION IN THE SPARSELY POPULATED AREAS OF FRENCH POLYNESIA

a) A priority project

94. The issue of telephone coverage of all the Polynesian islands, some of which are both remote and sparsely populated, is crucial. In several opinions, the Authority has already considered that it was probably illusory for several mobile operators to be able to achieve economic balance by deploying their own network throughout the territory, unless they charged very high rates, to the detriment of usage. This is because the deployment of a telephone network requires heavy investment, but duplication is not necessary for reasons of covering local needs when the population is small and scattered, or for reasons of environmental protection.

[7] This billing method, known as "bill and keep", is used in the United States, for example. It limits competition to retail supply and encourages productive efficiency.

[8] ARCEP, decision n°2010-0211 dated 18 February 2010.

95. This raises the question of determining a "dense" area, where the three operators would be physically present and could compete on the basis of infrastructure (e.g. on the quality of territorial coverage, links, etc.), and a "sparse" area, where the pooling of coverage infrastructure would be the norm (these are islands currently covered only by the OPT/Onati group, which offers local roaming services to its competitors) and where there would be only competition on the basis of services between the various operators. It is very unlikely that on islands other than Tahiti, and possibly Moorea and Bora Bora, there will be genuine competition on the basis of infrastructure (for example, network coverage generally targets the same areas, the centres of the main towns, and the masts or antennas of the various operators are located in close proximity to each other).

96. However, the Polynesian regulatory framework still imposes the deployment of all operators on all the archipelagos and no "private initiative deficiency zone", where a rational economic actor will not invest alone or without public aid, has been defined at this stage. Such areas do exist, however. Moreover, even the dominant operator, while it has the possibility of offsetting part of its deployment costs through roaming services, needs subsidies to deploy the 4G network in remote archipelagos (250 million XPF, for example, was granted to it for this purpose in July 2022)[9]. Under these circumstances, it seems delicate to require the deployment of other operators on these islands, especially if the latter do not receive subsidies.

b) Insufficient consideration

97. It is clear from the Administrative Court's judgment of 29 March 2022 that the main arguments put forward by the Government against PMT-Vodafone to justify not taking roaming costs into account in the MCT pricing base were precisely to create an incentive for recent operators to roll out their own network in the areas in which they currently rely on Onati's network, and to develop this infrastructure-based competition.

98. To be valid, this argument assumes that by roaming PMT and Viti are deterred from developing their own network and therefore that roaming is a bargain for them. This is not necessarily the case, or it is the case for the wrong reasons, as such an interpretation assumes:

- that Onati charges a local roaming rate that is lower than its costs, which is highly unlikely insofar as this rate is the result of a commercial negotiation, that the text provides for a cost orientation, and finally that the level of roaming costs is precisely a point of contention between the newcomers and Onati, on the grounds that they are too high and therefore dissuasive (see for example, with regard to mobile data roaming, the Authority's decision No 2021-PAC-01 of 8 December 2021);
- or that, indeed, it is advantageous for alternative operators to use roaming rather than deploying their own network, but if this is the case, it is precisely because there is no economic rationale for duplicating a network, which is currently sufficient to ensure all communications on these islands, and that this duplication (or even triplication) would lead to increasing costs for operators and consequently for consumers (individuals and businesses).

99. Deployment obligations therefore appear to be unconnected with any economic logic. Constrained by their specifications, operators must reinvest their profits in excessive investments to the detriment of other investments (in quality of service or technological innovation) or a significant reduction in prices. Such a requirement is likely to have consequences on the conditions for the development of competition and to burden the benefits expected from it, to the detriment of Polynesian consumers and the development of uses.

[9] https://www.presidence.pf/conseil_ministres/conseil-des-ministres-du-4-juillet-2022/.

Recommendation:
The Polynesian regulator should focus on the question of market segmentation in dense areas - where infrastructure competition could possibly be exercised (subject to its economic and ecological rationality) - and less dense areas (areas where there is a lack of private initiative) - where competition should only be exercised through services.
Once these areas have been determined, it should draw the consequences and take on a more active role in determining the methods of sharing the infrastructures concerned or determining roaming charges, at the very least as an arbitrator with the capacity to decide between operators (as is already permitted by Article D. 212-26 of the PTC but not implemented), or even by directly regulating the charges.

4. THE QUESTION OF INFORMING THE REGULATOR

100. The use of a particular instrument at the disposal of the regulator is highly dependent on the situation and maturity of the regulated markets, the respective positions of the players in the sector, the architecture of existing packages and the use of digital tools by businesses and individuals. In particular, the regulator must make a fine trade-off between the need to keep prices down for users (thanks to productive efficiency and the competitive incentive), to maintain a competitive balance between operators (thanks to the regulation of access to certain services) and to guarantee their ability to balance their accounts (thanks to the cost-orientation of prices), while ensuring that everyone has the same operating conditions. This is the condition for a widening of digital uses, necessary for the economic dynamism of French Polynesia.

101. This assumes that the regulator has satisfactory regulatory tools at its disposal, but also that it has sufficient relevant data to understand the state of the market and the network. However, it appears that the DGEN does not have all of this information up to date and on a regular basis (intra-annually).

102. The issue is not so much legal as it is one of means.

103. Indeed, the PTC already allows a certain amount of information to be requested from operators. In the general provisions of the code, Article D. 212-3 provides that "*In order to carry out their duties, the competent authorities of French Polynesia may collect from telecommunications operators the information or documents necessary to ensure that these persons comply with the principles defined in Articles D. 212-1 and D. 2 12-2, as well as the obligations imposed on them by the texts in force in French Polynesia or by the authorisation issued to them. / The competent authorities of French Polynesia shall ensure that the information gathered pursuant to this article is not disclosed*." The recent amendments to the PTC also allow the DGEN to obtain all the information used by operators to draw up their cost models and ensure their obligations to separate the accounts of activities subject to interconnection (Article LP. 212-25-2: "*Within the framework of the control by the competent authorities of French Polynesia, telecommunications operators shall transmit regular and precise data to the department in charge of telecommunications in accordance with the procedures defined by order of the Council of Ministers*"). Other regulatory measures are also accompanied by the obligation to transmit data (use of frequencies, number resources, flow rates on submarine cables, quality of service indicators, etc.)

104. However, not all of this information is actually collected or processed due to a lack of resources. As early as 2020, the DGEN informed the Authority of its desire to set up a telecommunications observatory, which would provide precise and up-to-date market data (on market shares, operator revenues, investments, network deployment, the number of subscribers, actual use of the network, etc.). This observatory was initially intended to be an internal tool for the DGEN, before being made into an official version for use by the public authorities, operators and consumers. The process has been initiated, 41 priority indicators have been defined and data have been collected, but they have not yet been processed due to lack of resources.

105. The Authority believes that the full deployment of this observatory is a priority if the regulator is to have the means to carry out its supervision and guarantee the development of effective and fair competition.

Recommendation:
The Polynesian regulator, in order to provide itself with the means for effective and appropriate control, should implement a system for transmitting regular and accurate information from operators on flows, uses and their position on the market, and ensure the effective implementation of an observatory within the DGEN to ensure their processing and, if necessary, their publication.

Deliberated after the oral report of Mr. Antoine Callot, General Rapporteur by delegation, by Mrs. Johanne Peyre, Chair, Mrs. Aline Baldassari, Mr. Youssef Guenzoui, Mrs. Marie-Christine Lubrano and Mr. Christian Montet, members.

The Chair

Johanne Peyre

SUMMARY OF RECOMMENDATIONS:

The Authority considers that the DGEN has, in determining its proposed rates for the 2022-2023 rates, carried out an assessment of the rates of the two operators that is in line with the principles of fair and effective competition.

However, it considers that - for the future - certain changes could be considered. The telecommunications regulator must regularly review the relevance of the tools used and their possible adaptation over time, as the markets recently opened to competition become more normalized.

These developments could be as follows:

1. In order to limit litigation and encourage the development of uses and competition on the merits, the Polynesian regulator could - on the occasion of future price-setting exercises (starting with the 2024-2025 prices) - take different paths:

    - Deviate further from the "theoretical" rate derived from the model to establish asymmetrical, but lower, rates in order not to excessively penalise operators with a deficit balance and to favour abundance offers
    - Choose a model allowing lower costs (of the CILT type, i.e. without taking fixed costs into account)
    - Move away from the cost model and opt for an explicit approach of progressive rate reduction, based on rates in equivalent markets (benchmarking)

Reference is made to the Authority's opinion 2020-A-02 for details on these different scenarios.

2. The Polynesian regulator should focus on the question of market segmentation in dense areas - where infrastructure competition could possibly be exercised (subject to its economic and ecological rationality) - and less dense areas (areas where there is a lack of private initiative) - where competition should only be exercised through services.

    Once these areas have been determined, it should draw the consequences and take on a more active role in determining the methods of sharing the infrastructures concerned or determining roaming charges, at the very least as an arbitrator with the capacity to decide between operators (as is already permitted by Article D. 212-26 of the PTC but not implemented), or even by directly regulating the charges.

3. The Polynesian regulator, in order to provide itself with the means for effective and appropriate control, should implement a system for transmitting regular and accurate information from operators on flows, uses and their position on the market, and ensure the effective implementation of an observatory within the DGEN to ensure their processing and, if necessary, their publication.