AUTORITÉ POLYNÉSIENNE DE LA CONCURRENCE

TE MANA TATA'URA'A MĀTETE I PŌRĪNETIA

DECISION NO. 2023-PAC-01 OF MARCH 31, 2023 CONCERNING A REQUEST FOR PRECAUTIONARY MEASURES PRESENTED BY THE COMPANY VITI FOR PRACTICES IMPLEMENTED IN THE TELECOMMUNICATIONS SECTOR, CONCERNING SERVICES ROAMING IN REMOTE ARCHIPELAGOS

The Polynesian Competition Authority,

In view of the letter registered on November 29, 2021 under number 21/0019 F, by which the company Viti (hereinafter "Viti") referred to the Polynesian Competition Authority practices implemented by the company Onati (hereinafter "Onati") in the telecommunications sector, in relation to mobile telephony roaming services, which it considers contrary to the provisions of article LP 200-2 of the Polynesian Competition Code;

Having regard to the letter dated October 3, 2022 by which the company Viti requested that precautionary measures be ordered on the basis of the provisions of article LP 641-1 of the French Competition Code, registered under number 22/0021 M ;

Having regard to the Competition Code, and in particular Book II on anti-competitive practices;

Having regard to the observations submitted by Onati and Viti ;

In view of business secrecy decisions no. 2022-SA-20 Onati dated December 02, 2022, no. 2023-SA-01 Onati dated January 30, 2023, no. 2023-SA-02 Onati dated January 30, 2023 and no. 2023-SA-03 Onati dated February 17, 2023;

Having regard to the notes for deliberation of Viti dated March 13, 2023 and Onati dated March 14, 2023;

Having regard to the other documents in the file;

The rapporteur, the Government Commissioner and the representatives of Onati and Viti were heard at the meeting of February 28, 2023;

Adopts the following decision:

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I. FINDINGS

A. THE SEIZURE

1. By letter registered on November 29, 2021 under number 21/0019F, SAS Viti (hereinafter "Viti") referred to the Polynesian Competition Authority (hereinafter "the Authority") practices implemented by the public establishment OPT and SAS Onati (hereinafter "Onati") in telecommunications-related markets.
2. In particular, according to the complainant, these entities have abused their dominant position on the mobile telephony market by setting excessive and manifestly disproportionate roaming tariffs in remote archipelagos (hereinafter "AE").
3. In a letter registered on October 3, 2022 under number 22/0021M, Viti also requested interim measures under article LP 641-1 of the French Competition Code.

B. THE SECTOR CONCERNED

1. THE LEGAL FRAMEWORK FOR THE TELECOMMUNICATIONS SECTOR

a. GENERAL FRAMEWORK

4. The telecommunications sector in French Polynesia is governed by deliberation no. 99-90 APF of May 27, 1999, as amended, laying down provisions relating to the French Polynesian Post and Telecommunications Code (hereinafter the "CPT")[1] . For a long time, it was organized around the incumbent, public and integrated operator, the Office des Postes et des Télécommunications (hereafter "OPT"). However, the opening up of the sector to competition was initiated by deliberation no. 2003-85 APF of June 12, 2003, as amended, laying down provisions relating to books II and III of the CPT.
5. The new system is based on the following key elements:
    - opening up mobile telephony (voice, SMS and data) and Internet access to competition;
    - a public telecoms service awarded to the incumbent operator, OPT, through its subsidiary SAS Onati, which retains a de jure monopoly on external links (voice and data) and fixed networks (copper and optical fiber);
    - an authorization system for telecommunications operators competing with the incumbent operator, both for mobile telephony and Internet access;
    - the coexistence of a regulatory framework for certain wholesale tariffs (such as interconnection between operators) and tariff freedom for others (such as roaming);
    - regulation under ordinary law by the Council of Ministers, after technical instruction by the Directorate General for the Digital Economy (hereinafter "DGEN") and, in many cases, after consulting or informing a Telecommunications Consultative Committee (hereinafter "CCT"). In particular, the government is responsible for ensuring that the conditions for opening up the market to competition are met. Article D. 212-2 of the CPT stipulates that :

[1] http://lexpol.cloud.pf/LexpolAfficheTexte.php?texte=181953.

"The competent authorities of French Polynesia shall ensure : / (...) 2° The exercise of effective and fair competition between mobile telecommunication service operators (...) for the benefit of users; / 3° the definition of conditions of access to networks open to the public and of interconnection of networks, in particular for mobile telecommunication services, which guarantee the possibility for all users to communicate freely with each other, as well as equal conditions of competition in the field of mobile telecommunication services; (...) / 6° encouraging the shared use between operators of the facilities mentioned in chapter 1er of title III. "

b. ITINERANCE

6. According to article D. 211 of the CPT, mobile roaming is the service *"provided by one mobile telecommunications service operator to another mobile telecommunications service operator to enable the latter's customers to roam on the former's network"*.

7. Article D. 212-26 of the CPT stipulates that *"(...) In the following cases, the mobile telecommunications service operator may be required to comply with a reasonable request for roaming services made by another mobile telecommunications service operator: / a) When roaming is provided between two mobile telecommunications service operators authorized in French Polynesia, they may be required, in the general interest, to enter into a roaming agreement;/ b) A mobile telecommunications service operator wishing to offer its subscribers roaming services in French Polynesia is entitled to enter into such an agreement. / If the parties reach an agreement within two months of the date of the request, the roaming agreement entered into by the operators is communicated to the administration. In the event of disagreement, the latter will ask the parties for their positions, with the aim of reaching an amicable agreement; failing this, the Council of Ministers will set the roaming terms.*

8. Roaming for local operators is therefore a service whose terms are initially freely negotiated between operators, but which, in the event of disagreement, can be mediated and ultimately determined by the government.

2. CELL PHONE ACCESS TECHNOLOGIES

9. The referral concerns access to voice and SMS roaming services provided by the incumbent operator.

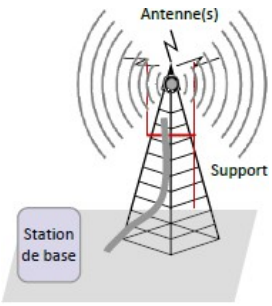
10. When it comes to mobile telephony, different technologies offer different levels of performance:

    - GSM (which requires the deployment of a 2G GPRS or Edge network): this does not allow Internet access or downloading of large files (over 700 Mbits), but essentially voice calls, SMS, MMS and possibly limited access to e-mail.
    - UMTS (3G or 3G+): in addition to voice calls, SMS and MMS, it provides Internet access.
    - LTE (4G): in addition to voice calls, SMS and MMS, this enables high-speed Internet access.
    - 5G is not yet available in French Polynesia.

11. Deploying a[2] local loop on an island first requires interconnection with the backhaul network (transporting data to and from the island in question), then the deployment of sites for transmitting and receiving data to mobile terminals. These sites comprise passive infrastructures

[2] In this case, the local access network, i.e. the part of the telecommunications network between the interconnection point with the backbone network and the end subscriber terminal.

established on a ground or elevated surface on which active elements are installed to generate radio waves, most often in the form of towers and antennas.[3]



Site (radioélectrique)

12. The existence of a separate local network for each operator is not always economically justified. There are various ways of sharing physical networks, where one operator makes its frequencies or certain facilities available to another. Roaming is one of these methods.[4]

13. From the least to the most integrated:

- Passive infrastructure sharing: joint use of all or part of passive infrastructure elements such as masts or coaxial cables linking antennas to base stations. At each shared site, each operator deploys its own active equipment and antennas, and uses its own frequencies.
- Antenna sharing: pooling of radiating elements or antennas in addition to passive infrastructure. However, it still allows each operator involved in sharing to use its own frequencies.
- Sharing of active installations: pooling of active elements such as electronic or optical signal processing devices, with distinct procedures:
    - mutualization of networks without mutualization of frequencies, which are used and operated separately by the operators involved in the sharing ;
    - mutualization of frequencies owned by each operator concerned with a view to their combined use, so that the customers of each of the associated operators can access all the frequencies concerned.
- Roaming: a mobile network operator welcomes the customers of another mobile network operator onto its own network.

14. Roaming is therefore the most integrated form of infrastructure sharing, in which the customer makes full use of the provider's equipment and frequencies. The host operator's investments in the territories concerned may be limited to its core network and interconnection equipment.

[3] ARCEP, Lignes directrices, Partage de réseaux mobiles, May 2016, pages 6 et seq.

[4] Ibid.

C. COMPANIES CONCERNED BY THE REFERRAL

1. THE DEFENDANTS CAUSE

15. OPT is a French Polynesian public body of an industrial and commercial nature, created by deliberation no. 85-1023 AT of March 8, 1985, as amended, and governed by the CPT. OPT's Board of Directors comprises nine members with voting rights[5] , including i) OPT's Managing Director, who chairs the Board, ii) the following seven representatives of French Polynesia: the Minister in charge of posts and telecommunications, the Minister in charge of communications[6] , the Minister in charge of tourism, the Minister in charge of the economy, the Minister in charge of planning, the Chairman of the legislative commission in charge of the economy and the Chairman of the legislative commission in charge of the digital economy, and iii) the employee representative or his/her alternate. The Director General of the OPT is appointed by decree of the Council of Ministers.

16. Before 2011, the only mobile and Internet operators were OPT subsidiaries, notably Tikiphone, which received its first license in 1994, and Mana, taken over in 2013 by SAS Vini, which has since been absorbed by Onati. Since then, the market has opened up. However, OPT still has a legal monopoly on wireline infrastructure and outside telecommunications.

17. Since 2019, wireline and mobile telephone telecommunications and Internet access services, as well as network deployment and management activities for other operators and end consumers, have been the responsibility of a single OPT subsidiary, SAS Onati, created on November 5, 2018.

18. Several local laws[7] made this operation possible. The OPT and Onati have reached the following conclusions:

    a. A partial asset contribution agreement on December 31, 2018, under which OPT contributed its entire telecommunications business to its subsidiary Onati. This agreement took effect on January 1, 2019.

    b. A public service delegation agreement on December 31, 2018 transferring the management of the telecommunications public service to Onati[8] .

19. Onati now operates as a fixed-line and mobile telephony operator, as well as an Internet service provider. It also sets prices for wholesale and retail services, including the roaming services involved in this case.

20. Onati has absorbed the Vini company, but all its retail offers are still offered under the Vini brand.[9]

21. While Onati has a monopoly on the rollout of the backbone network, it is free to roll out the local loop, provided it is recognized as a telecommunications operator and is allocated frequencies by the Council of Ministers. However, thanks to its long history, Onati is the only company to have deployed its network on all the inhabited islands of French Polynesia, at least in part using public funds. It is therefore in a position to offer local loop access (stations, antennas and frequencies) on islands where other operators have not deployed their own networks. Most of this access is via

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5 Order no. 1244 CM of September 2, 2015 amending the rules of governance of the Office des postes et télécommunications.

6 Arrêté n° 215 CM du 2 mars 2017 portant modification de la composition du conseil d'administration de l'Office des postes et télécommunications.

7 Country Law n°2018-37 of November 28, 2018 and Country Law n°2018-42 of December 27, 2018.

8 A new agreement was signed on June 18, 2019, cancelling and replacing the one dated December 31, 2018.

9 In this context, reference will be made to Vini for the 2015-2018 period, then to Onati for the subsequent period.

often using roaming services to initiate or route calls to the end-user.

2. THE STRIKING PART

22. SAS Viti, registered in 2009, initially operated as a fixed-line Internet service provider, after obtaining a license in 2010 and marketing its offerings from July 2011.

23. Viti was granted authorization on July 5, 2018[10] to establish and operate a network open to the public enabling the provision of a mobile communications service. Since early 2020, it has been offering mobile voice, SMS and data services under the Ora brand, based on 4G LTE technology (so-called "Volte" calls), operating in two ways, firstly by providing mobile services (voice, SMS and data) from its network in a limited area of the territory (Tahiti and Moorea), and secondly by providing mobile services (voice and SMS only) using Onati's mobile network under a roaming agreement.

D. Denounced practices

24. In French Polynesia, local roaming is known as "asymmetrical". In fact, Onati is the only operator to have deployed a network across the entire territory. It is therefore also the only provider of this service. There is no so-called "cross-roaming", between equivalent operators with different territorial coverage who wish to benefit from access to their competitor's network, in order to enhance their respective territorial coverage or quality of service.

25. While the first roaming agreement was concluded on November 23, 2018 between Vini (OPT's former telephony subsidiary) and Viti, it did not contain a tariff rider and has been replaced by a new agreement dated June 5, 2019, concluded with Onati.[11]

26. The first tariff rider was signed on June 28, 2019. It provided for separate tariffs for two groups of islands:

    - the Society Islands (Iles-du-Vent and Iles-sous-le-Vent), other than Tahiti and Moorea (where Viti is deployed);
    - islands in remote archipelagos.

27. Each of these tariffs included a fixed annual share of 27 million CFP francs for the Society Islands and 163 million CFP francs for the remote archipelagos, plus a variable tariff of 1.15 francs per minute for voice and one cent of a franc per SMS.

28. The agreement was subsequently amended several times. To begin with, at Viti's request, the fixed tariff was subject to several adjustments, with an initial discount of 75% in the first year and 50% in the second, increased by a second tariff rider dated July 30, 2020, then a third dated August 18, 2021, to a discount of 75% in the first two years and the first six months of the 3e year, and 25% in the last six months of the 3e year. Invoicing without discount will only take place from year 4 onwards.e

29. Later, following Viti's requests of November 29, 2021[12] and January 12, 2022[13] for Onati to revise its tariffs in accordance with the provisions of article 13 of the roaming agreement of June 5, 2019, Onati sent Viti a fourth amendment on January 18, 2022, followed by a fifth amendment on March 28, 2022.

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[10] Order no. 1185 CM of July 5, 2018 granting the company Viti the status of telecommunications operator.

[11] Appendix 2-1 to Viti's referral of October 3, 2022 (precautionary measures).

[12] Appendix 3 to Viti's referral of October 3, 2022 (precautionary measures).

[13] Appendix 4 to Viti's referral of October 3, 2022 (precautionary measures).

rider revising tariffs downwards from January 1er 2022, with an annual fixed portion reduced to 3.8 MF CFP for the Society's islands and 85.9 MF CFP for the remote archipelagos, and a variable tariff reduced to 0.424 F (from January to March) then 0.39 F / minute (from March) for voice and one centime of F per SMS (unchanged). It was on this new fixed tariff that the reduction (75% in the first half of the year, then 25% in the second half of 2022) described in the previous paragraph was applied.

30. Finally, in a letter dated October 21, 2022, Onati proposed new roaming rates (the sixth amendment), valid from January 1er 2023. The proposed fixed annual share was now 2 million CFP francs for the Society Islands and 71.5 million CFP francs for the remote archipelagos (down). The variable rate was 1 F centime per SMS (stable) and 0.497 F / minute for voice (up).

31. However, in a letter dated August 30, 2022, Viti informed Onati that it would no longer be entitled to these benefits in the remote archipelagos, with effect from November 1er 2022.

32. As the first roaming agreement came into force on the date on which Viti launched its first mobile telephony offer, i.e. January 8, 2020, it follows from the above that, after benefiting from reductions for three years, Viti was not required to pay the full fixed cost until January 8, 2023.

33. In view of these various developments, the roaming rates offered by Onati to Viti in the remote archipelagos alone can be summarized as follows:

	(from January 8)	2020	2021	2022	2023
Fixed portion	AE coverage rate calculated by Onati	163 MF	163 MF	85.9 MF	71.5 MF
	Rate charged to Viti (after discount)	**40.75 MF** *(- 75 %)*	**40.75 MF** *(-75 %)*	**42.95 MF** *(-75% over 6 months then -25% over 6 months)*	**71.5 MF** (--)
Variable portion	Variable rate voice	1.15 F / min	1.15 F / min	0.424 F/min from January to March 0.39 F/min to From March	0.497 F/min
	Variable SMS rate	0.01 F / SMS	0.01 F / SMS	0.01 F / SMS	0.01 F / SMS
	Sources	*Tariff Rider n°1 of June 28, 2019*	*Tariff rider no. 2 of July 29, 2020*	*Tariff amendments no. 3 of August 18, 2021, no. 4 January 18 2022 and n°5 of 28 march 2022*	*Tariff proposal of 21 october 2022*

34. In its application for interim measures, Viti contests the amount of 71.5 MF, i.e. the fixed portion it must pay for 2023 for voice and SMS roaming in remote archipelagos. The level of the variable usage charge is not contested.

35. The method used by Onati to determine the fixed tariff proposed to Viti, detailed in the November 30, 2022 report by a consultancy firm[14] and specified in the note for deliberation of March 14, 2023, proceeds in stages:

    i. Determination of the total cost of Onati's coverage of the Polynesian islands using the methodology imposed by French Polynesia on operators to determine interconnection tariffs for mobile call termination (a so-called CMILT + model, with a *bottom-up scorched node* long-term incremental average cost)[15] . The total annual cost of coverage thus obtained for the year 2022 for the entire Polynesian territory is [2.5 - 3.5][16] Mds F per year.

    ii. Cost allocation based on geographical segmentation (Society Islands / remote archipelagos). Based on the model, a network cost is determined island by island, according to the associated coverage cost (sites, active equipment, collection links actually deployed, in line with the *scorched node* approach) and technologies, then aggregated by island group. For the islands of the remote archipelagos (AE), this is [500 MF-1 Md F] per year, i.e. [30-40%]) of the total.

    iii. Cost allocation by usage (voice, SMS, mobile data) based on the amount of data actually used, island by island. The cost of the network for voice and SMS usage for AE alone is thus reduced by [70-80] %.

    iv. Three (number of mobile operators) equal shares of the cost of coverage, plus a mark-up of [10-20] %. This results in a coverage rate of 71.5 MF per year for voice and SMS services in the remote archipelagos, allocated to each of the three operators, according to Onati's proposal of October 21, 2022 (for an amendment n°6).

36. In its request for interim measures, the complainant contests Onati's pricing conditions for roaming services in remote archipelagos, which it considers excessive and manifestly disproportionate.

E. Request for precautionary measures

37. In its request for interim measures, the complainant asks the Authority to order Onati: i) to propose, within a maximum of thirty days, a reduction in the fixed voice and SMS roaming tariff for remote archipelagos to MF3.23; ii) failing that, to propose tariffs based solely on actual consumption; iii) to provide a report enabling the objective, transparent and non-discriminatory nature of its tariff proposal to be assessed.

II. DISCUSSION

38. Article LP. 641-1 of the French Competition Code stipulates that: "*The Authority may, at the request of the persons, companies and organizations mentioned in Article LP. 620-5 or on its own initiative and after hearing the parties involved, take any precautionary measures it deems necessary. / Such measures may only be taken if the practice complained of causes serious and immediate harm to the general economy, to the economy of the sector concerned, to the interests of consumers or to the complaining company. / They may include the suspension of the practice.*

[14] Onati comments no. 1, November 30, 2022, appendix no. 10.

[15] CMILT: long run average incremental cost (LRAIC).

[16] Some figures have been replaced by ranges, to protect business secrecy.

concerned, as well as an injunction to the parties to return to the previous state. They must be strictly limited to what is necessary to deal with the emergency.

A. ON THE RELEVANT MARKETS

39. Since a dominant position is defined in terms of a specific product or service market, the assessment of such a position inevitably requires a prior definition of the relevant market[17] .

40. The Metropolitan Competition Authority (hereinafter "ADLC") considers that *"The market, as understood in competition law, is defined as the place where supply and demand for a specific product or service meet* [...] *As perfect substitutability between products or services is rarely observed, the Council considers as substitutable and as being on the same market those products or services for which it can reasonably be thought that the demanders consider them as alternative means between which they can arbitrate to satisfy the same demand."*[18] .

41. It is on the same conceptual basis that the Autorité assesses the delimitation of relevant markets.

42. There are three mobile operators in French Polynesia: Onati under the Vini brand, PMT (Pacific Mobile Telecom) under the Vodafone brand since 2013, and Viti under the Ora brand since 2020. Neither PMT nor Viti has a network on the AEs. On the other hand, the public operator OPT, through its subsidiary Onati, has the largest mobile network, covering 66 islands, i.e. almost all the inhabited islands of French Polynesia (with 2G, 3G or 4G technologies).

43. In this case, several services linked to the practices are concerned: upstream, the provision of operators' access services to mobile telephony networks (including roaming) and, downstream, the provision of consumers' access services to mobile telephony (voice and SMS).

1. THE DOWNSTREAM MARKET

44. Mobile voice and SMS services can be segmented, for example according to whether the customer base is residential or business. In this case, however, the potential consequences of the practice apply equally to these two segments. While Onati maintains that Viti does not target professional customers, there is no evidence to support this claim, and Viti has shown an interest in professional tenders such as that of the army, for which it already holds lot 2 for the provision of Internet access, and lot 1 for voice and SMS services.

45. The geographic market covers the entire territory of French Polynesia, although Onati does not dispute this point. Although not all operators are deployed on all the islands, they are required to operate throughout the whole of French Polynesia, with roll-out obligations, if necessary through roaming services, specified in the specifications and covering more than 90% of the Polynesian population. Mobile telephony offers cover the entire Polynesian territory, with identical tariffs regardless of place of residence (principle of equal treatment of users as set out in article LP 212-10 of the CPT).

46. The relevant retail market for examining the impact of the alleged practices is therefore the Polynesian market for the retail sale of voice and SMS mobile telephony services.

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[17] See for example: ADLC, decision no. 21-D-03 of February 18, 2021 concerning a request for protective measures in the electricity supply sector in France, § 36, citing European Court of Justice, July 6, 2000, case T-62/98, Volkswagen AG / Com. at paragraph 230.

[18] ADLC, Decision no. 10-D-19 of June 24, 2010 concerning practices in the markets for gas supply, heating installations and the management of heating networks and collective boiler rooms, § 158 to 159.

2. THE UPSTREAM MARKET

a. THE SERVICE MARKET

47. To date, in order to offer their subscribers (households and businesses) telephony services (voice and SMS) throughout the Polynesian territory, Viti and PMT use Onati's roaming services in the islands where they are not deployed. This applies in particular to AE. In its tariffs, Onati makes a distinction between roaming covering islands in the Société archipelago and roaming covering the AEs. This raises the question of whether the provision of voice and SMS roaming services for AEs forms a relevant product market.

48. To define the relevant market, we need to determine whether it is economically feasible for demand to substitute roaming with other means of offering the same services to end customers.

49. In order to offer mobile telephony services, an operator must :

- obtain access to the regional data collection network to the islands concerned (by submarine cable, satellite or microwave), which is the sole responsibility of Onati under its 10-year public service delegation, which comes into effect on June 18, 2019. Except in special situations (between Tahiti and Moorea, for example), alternative operators are not expected to deploy their own physical collection network. They therefore use the infrastructures of the incumbent operator;
- have access to a local service network through :
  i. deployment by the operator of its own local loop;
  ii. shared access to local loop infrastructure, which can be provided in various ways, as described in § 13 et seq;
  iii. Obtaining a service to welcome customers on the network deployed by another operator (roaming in the *strict sense of the term*).

50. In the first two cases, physical access enables the alternative operator to use the mast and, where applicable, the antennae, on its own behalf, and remains responsible for routing the signal, on a separate frequency if necessary, to its own customers. With roaming, on the other hand, the host operator provides all telephony services for the customers of the client operator, who is then responsible for the transmission of the signal.
The operator can then "guest" on its own network. Roaming is therefore an integrated service whereby one mobile network operator provides wholesale access and communication volumes (voice and SMS) to another network operator, enabling the latter to offer its customers the possibility of receiving and making calls and using services while on the first network.

51. These different services are distinct, yet complementary. The service differs according to whether one is accessing an interconnection to the backbone infrastructure, the infrastructure making up the mobile telephony local loop, or roaming, which integrates additional services and exempts the guest operator from any physical presence in the territory concerned. Roaming is upstream of the retail market, but downstream of direct access to the physical infrastructure (site sharing), which is itself downstream of the market for interconnection to the backbone network (which enables the deployment of one's own local loop).

52. In a different sector, but with similar characteristics - the provision of Internet access - the ADLC proposed the following typology of wholesale markets: *"At the wholesale level, the decision-making practice distinguishes between passive offers, which enable operators to build their offers by unbundling subscriber connection nodes ("NRAs"), in line with a logic of infrastructure-based competition, and so-called "activated" wholesale offers on the infrastructures of third-party operators, in line with a logic of service-based competition. Decision-making practice has shown that the choice between one or the other of these solutions is a matter of logic.*

In a similar case, the European Court of First Instance confirmed the Commission's market segmentation.[19] In a related case, in 2006 the European Court of First Instance confirmed the Commission's market segmentation, which distinguished *"on the one hand, the market for sites and site infrastructure for digital mobile radio equipment and, on the other, the market for wholesale access to national roaming for 3G communications services.*"[20]

53. Roaming therefore constitutes a relevant upstream market. This interpretation is confirmed by the regulations, which establish a specific regime for national roaming, with a freely negotiated tariff, but mandatory access and the possibility of arbitration on roaming terms by the government (see § 7 et seq.).

54. As a result, the relevant service market is that for wholesale voice and SMS roaming services.

b. THE GEOGRAPHIC MARKET

55. In its geographical dimension, the market is constituted by *"the territory in which the undertakings concerned are engaged in offering the goods and services in question, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographical areas because, in particular, the conditions of competition there differ appreciably*"[21] .

56. In concrete terms, the ability to supply and acquire wholesale services depends on the presence of specific local collection and service infrastructures, which are essential to reach customers. In French Polynesia, the insular nature of the territory and the heterogeneous levels of local network coverage could lead to the conclusion that this market does not necessarily have a Polynesian dimension, as it relies on the deployment of heavy infrastructures, making it difficult to make comparisons between the different archipelagos.

57. However, Onati, which is deployed throughout the Polynesian territory, has divided its roaming services into two zones, making a distinction between the Société archipelago, which as a whole benefits from long-standing broadband access (via the Honotua cable), and the remote archipelagos, for which this access is only recent (the Natitua cable has been operational since 2019) and partial (the least populated islands and certain archipelagos such as the Australes and the Gambier have no such access). Although Onati argues in its written submissions that the relevant market is in fact divisible between islands with and those without broadband access, it has not modified its offer accordingly.

58. As a result, two distinct markets can be distinguished on the supply side. Viti's request concerns only the second, i.e. voice and SMS roaming services for the remote archipelagos (Tuamotu, Gambier, Australes and Marquises).

3. RELATED MARKETS CAUSE

59. Connectedness between two markets may result in particular from a vertical link. Such links can enable a company present on one market and with significant market power to exploit leverage in order to expand into another market and, possibly, to adopt behaviors there that do not fall within the scope of competition on the merits.

60. In this case, the alleged practice concerns a wholesale market, but its effects are felt on a downstream retail market.

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[19] ADLC, decision no. 14-DCC-160 of October 30, 2014 on the acquisition of exclusive control of SFR by the Altice group.

[20] Case T-328/03, Judgment of the Court of First Instance (Fourth Chamber), May 2, 2006, O2 (Germany) GMBH&co.

[21] Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, December 9 1997, pages 5 to 13, point 8.

61. The opening up of the sector to competition has led to the creation of wholesale markets in which the incumbent operator offers new entrants access and interconnection to its infrastructures, so that the latter can develop by offering services on retail markets. The revenues they receive on retail markets then enable them to invest in their own networks, with a view, where possible and relevant, to reducing their dependence on the incumbent's wholesale offers (by climbing what is commonly known as the "investment ladder") or even freeing themselves from them, in the absence of essential infrastructures or those legally reserved for the incumbent.

62. In this case, the market in which the practices are denounced is a wholesale market for access to a service provided by a network operator who competes on the retail mobile telephony market with its operator customers. The alleged effects of the practice concern the retail market for mobile telephony.

B. ON THE RESPONDENT'S DOMINANT POSITION ON THE RELEVANT MARKETS

63. The notion of a dominant position is not defined in law. However, case law in metropolitan France has enshrined a definition drawn up by EU authorities and courts: "*a dominant position concerns a position of economic strength held by an undertaking which gives it the power to hinder the maintenance of effective competition on the relevant market by affording it the possibility of behaving to an appreciable extent independently of its competitors, its customers and, ultimately, of consumers*".[22]

64. The first criterion is the level of market share held by the company in question. However, the mere existence of a high market share does not in itself lead to the conclusion that a dominant position exists. A number of other criteria need to be examined, such as the existence of barriers to entry, a strong reputation and privileged information stemming from the particular situation of a former incumbent operator[23] , or countervailing power on the part of current competitors and customers.

1. THE UPSTREAM MARKET

65. To date, only Onati has deployed local loops enabling access to mobile telephony on all the inhabited islands of French Polynesia, particularly in the remote archipelagos. Viti is deployed only in Tahiti and Moorea. Lastly, PMT-Vodafone, which could theoretically provide roaming services as an alternative to the Onati network, has not been deployed in the remote archipelagos, with the exception of a few isolated sites.

66. As the only company with this infrastructure, Onati is also the only one able to offer roaming services on this network. Moreover, there is no credible alternative to these services, at least in the short term on islands linked by the Natitua cable, given the cost and time required to deploy an alternative coverage network, and in the long term on islands not linked by the Natitua cable but by satellite links.[24]

67. Onati is therefore in a dominant, even monopolistic, position on the market for the provision of roaming services in the AEs.

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[22] Judgment of February 14, 1978, United Brands v. Commission (27/76, Rec._p._00207).

[23] See for example ADLC, Decision No. 16-D-11 of June 6, 2016 concerning practices implemented in the terrestrial hertzian television broadcasting sector, not challenged on this point by CA Paris, Judgment of December 21, 2017 § 42.

[24] On this last point, see Onati's comments no. 1 of November 30, 2022, pages 31 et seq.

2. THE DOWNSTREAM MARKET

68. Case law does not require the integrated operator to be dominant in the downstream market, in order to assess the behavior of a dominant player in an upstream market in terms of competition law.

69. In Decision no. 15-D-10, the ADLC points out that *"the integrated operator must be dominant on the upstream wholesale market (CJEU judgment of February 17, 2011, TeliaSonera Sverige AB v. Commission, C-52/09), without it being necessary to demonstrate the existence of a dominant position on the downstream market (CFI judgment of November 30, 2000, Industrie des Poudres Sphériques, T-5/97 and Commission decision of July 4, 2007 Telefonica, COMP38/784, point 284). Indeed, the Court's case law accepts that the particular circumstances, taken as a whole, which justify the application of Article 102 TFEU to conduct found on a market which is not dominated, but which is related to the dominated market and produces effects on the non-dominated market (ECJ judgment of November 14, 1996, Tetra Pak v. Commission, C-333/94, points 27 to 31) is applicable in the case of price squeeze practices. Such practices "have their source upstream and their effects downstream. The causal link between the practice and the eviction effect downstream stems from the vertical integration of the dominant operator and the need for the intermediate good to build attractive retail offers" (thematic study in the 2008 annual report, p. 158)*.[25]

70. However, it is clear from the notes for deliberation that, while these estimates are approximate because they have not been collected on the basis of a harmonized definition of the nation of "active customers", Onati has market shares of between 55% and 60%, PMT between 40% and 45% and Viti between 0.7% and 0.82% (i.e. less than 1%)[26] .

3. CONCLUSION ON THE DOMINANT POSITION OF THE ENTITY CONCERNED

71. Onati has a dominant position on the wholesale roaming market in the AE. It also has a dominant position on the Polynesian mobile telephony retail market.

C. ON THE ANTI-COMPETITIVE CHARACTER POTENTIALLY OF DENOUNCED PRACTICES

72. According to the jurisprudence of the French Supreme Court (Cour de cassation), in relation to the metropolitan text, drafted in terms very similar to those applicable in French Polynesia, *"precautionary measures may be decided (...) within the limits of what is justified by urgency, in the event of serious and immediate harm to the general economy, to the sector concerned, to the interests of consumers or to the complainant company, as soon as the case has been settled.) within the limits of what is justified by urgency, in the event of serious and immediate harm to the general economy, to that of the sector concerned, to the interests of consumers or to the complainant company, when the facts denounced, and covered by the investigation, in the proceedings on the merits, appear likely, on the basis of the evidence presented in the debates, to constitute a practice contrary to articles L. 420-1 or L. 420-2 of the French Commercial Code, a practice which is the direct and certain cause of the harm noted*".[27]

73. In French Polynesia, therefore, it is necessary to establish whether, on the basis of the evidence presented, the facts complained of appear likely, as the plaintiff maintains, to constitute a practice contrary to articles LP. 200-1 or LP. 200-2 of the French Competition Code.

74. It should also be remembered that the fact that a company belongs to the public sector does not place it outside the scope of competition law, as stipulated in article LP. 100-1 of the French

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[25] ADLC, Decision no. 15-D-10 of June 11, 2015 concerning practices implemented by TDF on the Eiffel Tower site.

[26] See Viti's memorandum of March 13, 2023 and Onati's memorandum of March 14, 2023.

[27] Court of Cassation, Commercial Chamber, November 8, 2005, 04-16.857, Published in the bulletin.

competition law: "*the rules defined in the present code apply to all production, distribution and service activities, whether carried out by public or private entities*". Furthermore, the existence of a specific regulatory framework for regulating a sector open to competition does not place it outside the scope of competition law, nor does it constrain the solutions that might be adopted by the Autorité when the company in question has, within this regulatory framework, sufficient autonomy to decide to commit or participate in the implementation of an anti-competitive practice.[28]

75. Competition law[29] considers that while any company in a dominant position must take care not to abuse its market power, this responsibility is greater when this position is inherited from a former legal monopoly and the practice in question is linked to this former status.

76. In the case in point, Onati's status as the incumbent operator and sole manager of the networks serving the islands means that it is the only operator to have deployed a local loop and a mobile telephony network on all the inhabited islands of French Polynesia. It is therefore required to take special precautions to avoid hindering the development of competitors on the mobile telephony services market by refusing access or by unfair or discriminatory pricing conditions.

77. The practices mentioned in the referral can be classified according to the following typology, even if some of them may have a mixed qualification:

- abuse of predation (refusal of access to essential infrastructure; m a r g i n squeeze);
- operating abuses (discriminatory pricing; unfair trading conditions).

1. DENIAL OF ACCESS TO ESSENTIAL INFRASTRUCTURE

a. PRINCIPLES

78. In a thematic study entitled "*L'orientation des prix vers les coûts*" *(Cost orientation of prices)*[30] , the ADLC examines the question of pricing access to essential infrastructure. It points out that the qualification of essential infrastructure is the fruit of well-established decision-making practice and case law[31] , which requires five cumulative conditions:

- the infrastructure is owned by a company with a monopoly or dominant position;
- access to the infrastructure is strictly necessary (or indispensable) to carry out a competitive activity on a market upstream, downstream or complementary to that on which the infrastructure holder holds a monopoly (or a dominant position);
- the infrastructure cannot be reproduced under reasonable economic conditions by competitors of the company that manages it;
- access to this infrastructure is refused or authorized under unjustified restrictive conditions;
- access to this infrastructure is possible.

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[28] See, for example, ADLC No. 16-MC-01 of May 2, 2016 concerning a request for precautionary measures submitted by Direct Energie in the energy sector.

[29] See in particular CA Paris, December 12, 2006, Monnaie de Paris, no. 2006/01743.

[30] *"Étude thématique : l'orientation des prix vers les coûts*", Annual Report of the French Competition Authority, 2002.

[31] These five conditions were laid down by the Court of Justice in its judgment of November 26, 1998 (C-7/97, known as the "Bronner judgment", EU:C:1998:569).

79. The French Supreme Court has specified that the demonstration of "essential character" implies, for the competitor claiming access, the absence of "*economically reasonable alternative solutions, even if they are less advantageous*"[32] .

b. ON THE CLASSIFICATION OF ROAMING SERVICES AS ESSENTIAL INFRASTRUCTURE

80. In their written submissions, the parties dispute whether the roaming services offered by Onati qualify as essential infrastructure. In particular, they dispute whether or not these services are essential to enable Viti to operate in the retail market. While Onati considers that there are alternatives, in particular the deployment by Viti of its own network or infrastructure sharing, Viti maintains that these are not realistic and that, in particular, as regards infrastructure sharing, Onati has never made an acceptable proposal to Viti.

81. However, the Authority considers that it is not necessary in this case to determine whether these services fall within this hypothesis.

82. Firstly, Onati does not refuse Viti access to roaming services, but offers it access at a rate that Viti considers excessive. In a similar case, the Court of Justice of the European Union ruled that in this instance, the demonstration of the indispensable nature of the service required by previous case law was not required[33] . Thus, the Court held that when a dominant undertaking grants access to its infrastructure but subjects this access to unfair conditions, the conditions set out by the Court in Bronner do not apply.[34] While such conduct may be abusive in that it is liable to create anti-competitive effects on the markets concerned, it cannot be equated with a refusal by the dominant undertaking to grant access to its infrastructure, which could require such access to be imposed on it. Consequently, the Court considers that the standard of proof for abuse of a dominant position may be less stringent in the absence of a genuine refusal.

83. This approach was taken up again in a recent communication from the European Commission[35] amending its 2008 guidelines on abuse of predatory pricing, in the light of decision-making practice and case law. It draws a distinction between outright refusals of access and so-called "constructive" refusals, exercised through unfair conditions, for which the indispensability criterion does not apply.

84. Secondly, according to European case law, the regulatory obligation to roam also dispenses with the need to demonstrate the indispensable nature of the service *("where the relevant regulatory framework clearly requires the incumbent operator on the high-speed telecommunications services market to meet all requests for unbundling of its local loop considered reasonable and justified, in order to enable alternative operators, on that basis, to offer their own services on the mass retail (or consumer) market for fixed broadband services, the Commission's demonstration that such access is indispensable is not required.* ")[36] In this case, the regulations help to determine the conditions of competition under which a telecommunications company operates on the markets concerned, and are therefore a factor in assessing whether or not the conditions set are abusive. In the case in point, article D 212-26 of the CPT (see § 7) requires the incumbent operator to comply with all roaming requests considered reasonable.

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[32] Cass. com. July 12, 2005, no. 04-12388, NMPP.

[33] In other words, the five conditions set out in the Bronner judgment of November 26, 1998 (C-7/97, EU:C:1998:569).

[34] Cases C-152/19 (Deutsche Telekom AG v. European Commission) and C-165/19 (Slovak Telekom a.s. v. European Commission), judgments of the Court (Third Chamber) of March 25, 2021.

[35] European Commission, Communication from the commission, March 27, 2023, *Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.* See point 4 of the appendix.

[36] Judgment of the Court of the European Union of December 13, 2018, Slovak telekom, T-851/14, § 115-117, 119, 121.

85. This interpretation is shared by the French Supreme Court, which ruled in 2018 that where an operator holds significant market power on a wholesale market for the supply of services based on infrastructure necessary for its competitors to develop on downstream or related markets, it may be considered to be abusing its dominant position on the market in question, even if the non-replicability of the infrastructure under economically reasonable conditions has not been established[37] , provided that the sanctioned practice was not a refusal of access to essential infrastructure.

86. It follows that the Authority is not obliged to demonstrate the indispensable nature of access to roaming services for Viti in the AEs in order to be able to qualify a possible abuse of a dominant position.

2. MARGIN COMPRESSION (OR PRICE SQUEEZE)

a. PRINCIPLES

87. According to Community case law, an undertaking abuses its dominant position *"when, in the case of an integrated undertaking which dominates the market, there is a relationship between the prices of intermediate services to competitors on an upstream market and retail prices on a downstream market which results in a restriction of competition on the market for intermediate services or on the* [downstream] *market*"[38] . Indeed, *"[s]*uch *a situation gives rise to anticompetitive pressure on competitors' commercial margins, since these margins are either non-existent or too low to enable them to compete with the incumbent on the* [downstream] *markets*."[39] . The Commission has specified the procedures for analyzing such margin squeeze effects, which are based on the dominant company's costs (the so-called "equally efficient operator" principle)*: "The abusive nature of a dominant undertaking's pricing practices in the form of a margin squeeze is linked to the unfairness of the difference between its retail price for the by-product on the downstream market and its price for the raw material it supplies to its competitors on the upstream market, when the difference between these prices is either negative or insufficient to cover the specific costs of its own by-product. It follows that, in order to find such an abuse, the Commission is not required to demonstrate that the retail prices would have been abusive as such (...) The Commission is entitled to base its analysis of the abusive nature of the dominant undertaking's prices solely on reference to its specific situation and, consequently, by reference to its own prices and costs, and not by reference to the situation of its actual or potential competitors*".[40]

88. A margin squeeze therefore exists if the costs charged to the customer (production cost according to the "most efficient operator" principle + the tariff for the access requested) are higher than the retail price, in other words, if the margin is negative.

89. In cases where a margin squeeze is found to exist, *"The mere finding of a margin squeeze is not enough to characterize an infringement; several conditions must be met for a margin squeeze to constitute an abuse of a dominant position. Firstly, the integrated operator must have strong market power upstream. Secondly, the intermediate good must be objectively necessary for downstream competition. Thirdly, since a price squeeze is, by its very nature, a group practice, there must be a sufficient degree of coordination between the upstream and downstream branches of the dominant operator. Fourthly, where laws or regulations constrain pricing policy, the integrated operator must have sufficient room for maneuver to be able to eliminate the margin squeeze. When all these conditions are met*

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37 Court of Cassation, Commercial Chamber, May 30, 2018 TDF, no. D 16-24.792.

38 Case T-271/03 Deutsche Telekom AG v Commission of the European Communities.

39 Ibid.

40 Ibid.

are verified, the potential exclusionary effect is presumed, and the competition authority does not have to prove the existence of actual effects. The practice is then considered abusive, unless the accused company can demonstrate that it leads to efficiency gains that compensate for the harm to competition".[41]

90. In a recent communication[42] amending its guidelines on abuse of predatory pricing in the light of decision-making practice and case law, the European Commission also considered that in certain cases - notably in the network industries[43] - competition could also come from competitors who are not as efficient or not yet as efficient as the dominant operator. It has also emphasized[44] that price squeezes can be demonstrated even without proof that the good is objectively necessary for downstream competition (the second condition set out in the previous paragraph), as long as they do not amount to a refusal of access.

b. APPLICATION

91. The fixed tariff proposed by Onati to Viti for its voice and SMS roaming services for the year 2023 in the remote archipelagos amounts to 71.5 MF annually. To assess the question of a possible abuse of a dominant position, and in particular that of a price squeeze, it is necessary to determine whether such a tariff enables Viti to make its offers profitable by offering tariffs equivalent to those offered by Onati to its own customers.

92. This examination requires, on the one hand, an examination of the offers (revenues) and, on the other hand, an examination of the costs, i.e. those of the service in dispute and of the other costs, according to the principle of the most efficient operator, which can take the form of a CMILT-type estimate, similar to that implemented by Onati, but excluding common costs from the base.[45]

93. On the revenue side, the retail offers of the three Polynesian mobile operators are now very similar:

- Ora (Viti) packages range from F995 per month (for 2h calls and 20GB data) to F7,995 per month (for unlimited local calls and 100GB data per month).
- Vini (Onati) packages range from F450 per month (for 1h of calls and 100MB of data) to F9,990 per month (for unlimited local calls and 150GB of data per month).

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41 ADLC, Rapport annuel 2008, Étude thématique, Les pratiques de ciseau tarifaire, pages 147 to 177.

42 European Commission, Communication from the commission, March 27, 2023, *Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.* See points 2 (b) and 3 of the appendix.

43 Example cited by European Commission, Competition Policy Brief, No 1/2023, *A dynamic and workable effects-based approach to abuse of dominance*, page 5

44 European Commission, Communication from the commission, March 27, 2023, point 5 of the appendix.

45 In its guidelines on predatory pricing (Communication from the Commission - Guidelines on the Commission's priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02. See § 75 to 90), the European Commission refers to the practice of margin squeeze: *"Instead of refusing to supply, a dominant undertaking may set a price for the product sold upstream which, compared with the price it charges downstream, does not allow even an equally efficient competitor to operate profitably and sustainably on the downstream market ('margin squeeze'). In cases of margin squeeze, the benchmark which the Commission will generally use to determine the costs incurred by an equally efficient competitor will be the LRAIC of the integrated dominant company's downstream division".* The LRAIC is defined as follows: "*Long-run average marginal cost (LRAIC) is the average of all costs (variable and fixed) that a company incurs to produce a given product. The LRAIC and the average total cost (ATC) are good indicators of each other, and are identical for companies producing a single product. If companies manufacturing several products achieve economies of scope, the LRAIC would be lower than the AOTC for each product, because the true common costs are not taken into account in the LRAIC."* Thus, the LRAIC is partly equivalent to the LRAIC used by Onati, but excludes from its basis the share of common costs charged by Onati (corresponding to the "+" in the LRAIC + acronym). It is costs at this level that would need to be taken into account in order to estimate Onati's overall other costs, given the prospect of using the operator as efficiently as possible.

In addition, Vini offers 2h calls and 5 GB for 1,200 F/month, and unlimited calls and 100 GB for 7,900 F/month, very similar to Viti's offers.

- Vodafone (PMT) packages range from F500 per month (for 1h of calls and 6GB of data) to F7,300 per month (for unlimited local calls and 130GB of data per month).

94. For this reason, if only Viti's ARPU (average *revenue per user*) is known, it's likely that Onati's is close, even if there may be differences in customer structure (for example, the proportion of business customers). For Viti, this is 2,330 F per month per customer.[46]

95. In the presence of high fixed costs, the profitability of such an efficient operator depends on the quantity sold. In this case, to avoid being driven out of the market, the new entrant would need to be much larger in order to achieve positive profitability. Viti cannot realistically achieve this size in the short term. Indeed, at the operator's current rate of growth (+ 1,623 customers by 2022) and with 298,500 active lines in French Polynesia[47] , it would take Viti 18 years to achieve a market share of just 10%.

96. However, without needing to go into the details of attributable costs and revenue levels, it is clear from various ratios that the roaming costs invoiced by Onati do not allow an operator with Viti's sales volumes to market complete offers (including AE coverage) without incurring significant losses. Thus :

- According to the forecasts communicated by Viti in support of its referral, Viti's total mobile telephony revenues were 69.9 MF in 2022, and forecasts for 2023 are 118.4 MF. Thus, the amount of the fixed portion requested for the fixed tariff for voice and SMS roaming alone in the AEs (71.5 MF) is greater than the total revenues from mobile activity in 2022 and equivalent to 60% of the forecast revenues for 2023. This is despite the fact that the mobile telephony business involves numerous other expenses (variable costs, deployment and maintenance of its own network in Tahiti and Moorea, access to roaming in the Company's archipelago, access to feeder networks, interconnection expenses, share of common costs, share of overheads, marketing, etc.), even if the expenses incurred by Onati and included in its cost model (in accordance with the "operator as efficient" principle) are retained for these expenses.
- In 2022, Viti's average revenue per user (ARPU) was 27,960 F per year. To pay the fixed roaming tariff alone (71.5 MF) in the AEs, Viti would therefore need 2,557 additional customers by January 2023, all other things being equal, and on the unrealistic assumption that all of these users' revenues could be devoted to this expense (i.e. that they would not generate any charges). Such a development would represent a doubling of its customer base in one month, whereas according to Onati itself in its observations no. 2 of January 27, 2023, the company acquired between 79 and 183 new customers per month in 2022, for a total of 1,623 new customers over the year.
- Finally, using the Viti traffic forecasts for the years 2022-2023 mentioned in the §148, if we take only the data concerning calls made and received (assuming that the cost of SMS is very low)[48] , the fixed part alone would represent an expense for Viti of 10,515 F per minute of call in 2022, 2,626 F in 2023 and 1,168 F in 2024, again an extremely high level, of the order of magnitude of the price of a monthly package or of the monthly income per user (2,330 F), but for a single minute of call. By comparison, the variable cost per minute of call is 0.497 F/minute, and even more significantly, in the packages offered by Vini to its subscribers, the cost of a minute of call out of the package for the

[46] In 2022, Viti's declared customer base was around 2,500. With revenues of 69.9 MF, its ARPU (average revenue per user) was 27,960 F per year, or 2,330 F per month. Forecasts for the coming years are relatively similar.

[47] According to the economic report French Polynesia 2021 by the Institut d'émission d'outre-Mer (IEOM), page 123.

[48] The variable cost per SMS is set at 1 franc cent.

packages with reduced call duration, which is therefore assumed to include all induced costs, including fixed costs, is 29.20 F per minute excluding VAT[49] , i.e. 90 times less[50] than the amount that would be charged to Viti customers roaming in 2023.

97. Thus, in the case in point, whatever the comparisons used, it appears that the fixed tariff proposed to Viti for voice and data roaming services in the AEs alone, is likely to make it strictly impossible for an operator with a low sales volume to market packages at tariffs equivalent to those of its competitors, without incurring significant losses, and this even without having to examine its other costs according to the principle of the most efficient operator[51] .

98. It follows that Onati's offer is likely to constitute a price squeeze. Indeed, the integrated operator has strong market power upstream, the intermediate good is objectively necessary for competition downstream[52] , there is a sufficient degree of coordination between the dominant operator's upstream and downstream branches, and the integrated operator had sufficient room for maneuver to be able to eliminate the margin squeeze.[53]

99. Onati points out that the tariff increase between 2022 and 2023 is only 29.4 MF. However, this does not mean that the tariff is not excessive. What's more, this additional amount for fixed roaming charges represents 42% of Viti's total mobile revenues in 2022 and 25% of those forecast for 2023, which is very significant.

100. Onati states that Viti does not take into account the positive impact of roaming tariffs on its mobile call terminations (hereinafter "MCT"). However, this revenue is in any case only anecdotal for Viti. It is true that, following the ruling of the Administrative Court of French Polynesia on March 29, 2022, part of the costs incurred by Viti for roaming will be included in its 2022-2023 TAM tariff, even though it has not been paying this expense since November 1er 2022. However, Viti's invoicing of TAM tariffs only applies when another operator's customer calls a Viti customer (incoming calls), which does not correspond to the majority of calls given its small market share. In addition, Viti pays similar costs for outgoing calls. Finally, the inclusion of total roaming costs (not just those of AEs) in mobile call terminations has only led to an increase in the per-minute tariff of 29% for 2022 and 57% for 2023 compared with the previously defined and repealed tariff, which excluded roaming costs from the TAM base.[54] In any event, any revision of these tariffs to take account of this new situation is a matter for the sector regulator, the Government of French Polynesia, which alone is responsible for setting TAM tariffs on the basis of article LP 212-22-1 of the CPT.

101. Onati constantly argues that this pricing structure would have been appropriate and even more favorable to Viti than a solely variable pricing structure if Viti had achieved the forecasts in its 2016 business plan, which accompanied Viti's application for authorization to operate as a mobile operator. However, this circumstance is not such as to call into question the impossibility for Viti to make its offer profitable in the near future and to justify the application of the tariffs currently in force. In any case, these forecasts had not been brought to Onati's attention prior to the present proceedings. On the other hand, the traffic forecasts communicated by Viti for the years 2022 to 2024, referred to in § 148, which indicate on the contrary that this unbalanced situation is set to persist for at least the next two years, are not available to Onati.

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49 Vini mobile price list, August 2022 edition.

50 2626 / 29,2

51 A low approximation of these other costs is possible, however, based on Onati's records. Onati indicates that the total annual cost of covering the Polynesian islands is between 2.5 and 3.5 billion FF per year. If we take the low range, the most favorable to Onati, and divide it by three, in line with the weighting proposed by Onati to determine roaming costs, the annual cost of coverage would be 833 MF. In this case, Viti would need 29,800 additional subscribers to cover this fixed cost alone, excluding any variable expenses linked to consumption and any expenses for interconnection to the feeder network.

52 Even if the demonstration of this condition is superfluous, as this is not a refusal of access.

53 See ADLC, Rapport annuel 2008, Étude thématique, Les pratiques de ciseau tarifaire, pages 147 to 177.

54 APC, Opinion n°2022-A-03 of October 17, 2022 on the setting of reference interconnection tariffs for mobile call termination for mobile operators PMT/Vodafone and Ora/Viti for 2022 and 2023, page 8.

were communicated to Onati on January 12, 2022, i.e. before the last proposed tariff was set.

102. Onati's practice is likely to have the effect of driving Viti out of the downstream market, as Viti is unable to address customers who want a universal offer to access mobile telephony services in remote archipelagos.

103. It follows from the foregoing that the pricing conditions proposed by Onati for voice and SMS roaming services to Viti in the remote archipelago islands, particularly since it put an end to the 75% tariff reduction granted to take account of Viti's market share, are likely to be qualified as a price squeeze and an abuse of a dominant position within the meaning of article LP. 200-2 of the French Competition Code.

3. DISCRIMINATORY PRICING

a. PRINCIPLES

104. Among the practices prohibited under anti-competitive practices, discrimination may constitute an abuse when committed by companies holding a dominant position, within the meaning of Article LP 200-2 of the Polynesian Competition Code, which stipulates that: *"These abusive practices may consist in particular in (...) 3° Applying unequal conditions to equivalent services with regard to commercial partners, thereby placing them at a competitive disadvantage*".

105. According to the general principles of EU law, the concept of discrimination consists not only in treating similar situations differently, but also in treating objectively dissimilar situations identically (ECJ July 17, 1963, Italian Republic v. Commission, case C-13/63).

106. According to a recent ruling by the Court of Justice of the European Union (April 19, 2018, Meo - Serviços de Comunicações e Multimédia): *"the concept of 'disadvantage in competition', within the meaning of Article 102(2)(c) TFEU, must be interpreted as referring, in the event that a dominant undertaking applies discriminatory prices to trading partners on the downstream market, to the situation in which that conduct is likely to have the effect of distorting competition between those trading partners." The finding of such a "competitive disadvantage" does not require proof of an actual and quantifiable deterioration in the competitive position, but must be based on an analysis of all the relevant circumstances of the case which leads to the conclusion that the said conduct has an influence on the costs, profits or other relevant interest of one or more of the said partners, so that the said conduct is likely to affect the said position.*"

b. APPLICATION

107. Onati argues that the setting of so-called "binomial" pricing arrangements, with a fixed and a variable share, stems from a request from the third operator, PMT, expressed among others at a steering committee meeting on January 15, 2019[55] , and that it has therefore - out of a concern for fairness between operators - applied a similar tariff to Viti.

108. However, this argument is questionable.

109. To assess the question of discriminatory tariffs, since the tariffs for voice and SMS roaming in the AEs are the same for both companies, the question is whether the service provided to them in return for this price is equivalent. If not, the question is whether

[55] See PMT's comments no. 1, points 318 et seq.

this difference is likely to put Viti at a competitive disadvantage.

110. Firstly, the companies are not all at the same stage of market maturity. Viti entered the market in 2020, but its first two years were disrupted by the health crisis, which was unfavorable to its initial development. It has now been on the market for three years, but has only been able to develop normally in one year, in line with its business plan (2022). However, PMT has benefited from only variable pricing from 2013 (when it entered the market) to 2018, i.e. for 6 years[56] , which is not the case for Viti, which from the first year had to pay a fixed tariff, which, even if it was reduced from 50% to 75% for three years, was always much higher than its actual usage. PMT therefore benefited from pricing conditions that were more favorable to its development, since - since variable invoicing leads to pricing based solely on usage - it was by its very nature more favorable than invoicing one-third of fixed costs, at least as long as its market share remained below this level.

111. Secondly, Onati argues in its pleadings that the total cost of roaming was comparable in absolute terms for the two operators at the same stage of their development - notwithstanding different calculation methods[57] . However, this argument ignores the fact that the overall cost of this wholesale service fell sharply between the two periods. For example, the fixed tariff for roaming in the AEs requested by Onati from Viti was 163 MF in 2020, compared with 71.5 MF in 2023, i.e. more than twice as much. This reduction in tariffs has also led to a rapid reduction in the cost of packages, and therefore in the operators' revenue per customer. As a result, to maintain that the two operators paid comparable tariffs for this service in absolute terms in 2014-2015 (for PMT) and in 2020-2021 (for Viti) means in reality that the relative cost was much higher for the second operator, and that given the reduction in the cost of packages, the latter must necessarily convince a much higher number of customers to opt for its offers to offset this cost.

112. Thirdly, the two operators are not in the same position in the market, and consequently do not receive the same service. PMT requested a change in its billing conditions, from a variable tariff to an essentially fixed tariff, even though it represented between a quarter and a third of the[58] market. It was therefore acceptable for Onati to charge a third of its cost of coverage. Today, although the figures are approximate, PMT's market share is estimated at between 40% and 45%. On the other hand, Viti's market share is consistently below 1%. These two operators are therefore in very different situations. Thus, if we take the customer data provided by Onati in its memorandum (2,500 customers for Viti and 141,000 for PMT), with a fixed cost of 71.5 MF for each operator, the fixed cost to be paid per customer is 507 F per year for PMT and 28,600 F for Viti, i.e. a ratio of 1 to 56. It may therefore seem odd to charge them equivalent fixed costs on the sole basis of a theoretical right to use the network, even though the respective outflows of Onati customers to each of the competing operators, which would justify the dominant operator charging fixed costs to these operators, are very different. As a result, the two operators pay the same fixed tariff, but do not receive the same service.

113. In terms of roaming services, Onati is free to set its own prices through commercial negotiation, and in terms of competition law, there is nothing to prevent it from charging different prices to customers in different situations[59] . Otherwise, it is likely to unbalance the chances of its different customers, depriving the market and consumers of the benefits of competition on the merits. In the case in point, if the principle of cost-orientation of the dominant operator's tariffs for coverage, where applicable increased by a "mark-up", is to be accepted, it must be based on the principle of competition on the merits.

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[56] See Onati's comments no. 1, points 328 et seq.

[57] See Onati's comments no. 1, points 330 et seq.

[58] See APC, Opinion no. 2020-A-02 of June 17, 2020, p. 55.

[59] ADLC, Decision no. 14-D-06 of July 8, 2014 concerning practices implemented by Cegedim in the medical information database sector, paragraph 158; Decision no. 20-D-15 of July 8, 2014 concerning practices implemented by Cegedim in the medical information database sector, paragraph 158; Decision no. 20-D-15 of July 8, 2014 concerning practices implemented by Cegedim in the medical information database sector, paragraph 158.
October 27, 2020 concerning practices in the business air travel distribution sector, paragraph 89.

The fixed tariff must not deviate significantly from the actual cost of the service, which corresponds to the (variable) cost of use and to fixed costs that must remain proportional to the number of users, for which the market shares of the two operators can *a priori* provide an approximation.

114. The pricing methods applied by Onati are therefore likely to discriminate against Viti, the last operator to enter the market, *especially* since the reduction in the fixed "coverage" tariff was reduced from 75% to 25% (on July 8, 2022) and then to 0 (on January 8, 2023), leading to an even greater gap with its market share. This is likely to distort competition, and could lead to the operator being driven out of the market because it is unable to cover such a high level of fixed costs, or because covering these costs reduces its investment capacity and the possibility of developing its own network. Conversely, the revenue generated by these tariffs for Onati increases the latter's net income over and above the associated costs, thereby strengthening its investment capacity and market position.

4. UNFAIR TRANSACTION CONDITIONS AND PRICE GOUGING

a. PRINCIPLES

115. In a ruling dated April 7, 2022, concerning an appeal by Google against a decision by the ADLC (19-D-26), the Paris Court of Appeal[60] defined abuse of exploitation as follows.

"Both national and European jurisprudence usually distinguish between "exploitative" abuses and "exclusionary" abuses, (...)

With regard to exploitative abuses, this concept covers, in particular, the situation in which an undertaking in a dominant position uses the opportunities arising from that position to obtain advantages from transactions which it would not have obtained in the event of practicable and sufficiently effective competition (CJEU, judgments of February 14, 1978, United Brands and United Brands Continentaal v. Commission, C-27/76, paragraph 249, and Kanal 5 and TV 4, cited above, paragraph 27), which covers in particular the practices referred to in Article 102(a) of the TFEU. The imposition of other unfair trading conditions may constitute abuses of exploitation (...) (CJEU, judgments of October 5, 1988, Alsatel, C-247/86 point 10; judgment of November 25, 2020, SABAM, C-372/19, point
25). (...)

However (...) as the contested decision rightly pointed out (§351 and 352), whatever the nature of the exploitative practice committed, the standard of proof remains the same.

It involves assessing whether the dominant firm's conduct was carried out in a way that is consistent with its strategy.
This is done on the basis of a "reasonable measure" (CJEU, United Brands, paragraph 189 and Kanal 5 and TV 4, paragraph 26), and on the basis of an "objective justification" (CJEU, judgment of September 16, 2008, C-468/06, Sot. Lélos kai Sia, paragraph 34), verifying that the conduct is both necessary and proportionate to achieve the objective pursued by the dominant undertaking.

116. Thus, in order to demonstrate an abuse of exploitation relating to unfair trading conditions, it is necessary to show whether the dominant undertaking's conduct has been carried out to a "reasonable extent" and on the basis of an "objective justification", which implies verifying that the conduct is necessary and proportionate.

117. As far as pricing conditions alone are concerned, a price is unfair (or abusive) if there is an excessive disproportion between the cost actually incurred and the price actually charged and, if so, it is a question of assessing whether an unfair price has been imposed either in absolute terms or by comparison with competing products (CJEU, C-27/76, *United Brands and United Brands...).*

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[60] Paris Court of Appeal, no. RG 20/03811, April 7, 2022, Google, § 124 et seq.

Continental v Commission, February 14, 1978, § 252; CJEU, C-177/16, *l'AKKA/LAA v Konkurences padome*, September 14, 2017, § 61).

b. APPLICATION

118. While it is obligatory to respond favorably to a request for reasonable roaming services (article D 212-26 of the CPT), pricing conditions are not regulated and are set by contractual negotiation between the host operator and the hosted operator.

119. Onati is the sole provider of roaming services in the AE. The aforementioned provisions give Onati considerable autonomy in determining the structure and level of its tariffs. Pricing methods influence the costs of the host operator, and are likely to influence the nature of its offers. The structure and level of roaming charges are also decisive in encouraging or discouraging an operator to roll out, densify and secure a network. Last but not least, they can be a significant source of revenue for the host operator.

120. The ADLC has already had occasion to point out that the incumbent operator, whether the holder or former holder of a legal monopoly, has a heightened responsibility in this respect, and *"must take care to avoid any abusive exploitation of resources that cannot be reproduced by new entrants on the market open to competition at a reasonable cost and within acceptable timescales, given its particular responsibility on the market*"[61] . It is important that the competitive advantages at its disposal are used in such a way as not to hinder the competitive operation of the market.

121. In its opinion no. 08-A-16 of July 30, 2008, the French Competition Council ruled that*: "[*i]*t is clear from the case law of competition authorities that a company in a dominant position on a market may abuse this position by offering wholesale services that prevent it from competing on a retail market, under conditions that prevent effective competition. Both the technical conditions of this offer (see decisions no. 04-D-18 of May 4, 2004 and no. 05-D-59 of November 7, 2005) and the pricing conditions are taken into account (see in this respect the two previous decisions as well as the European Commission decisions of May 21, 2003, Deutsche Telekom, confirmed by the CFI in a judgment of April 10, 2008, and of July 4, 2007, COMP 38784, Telefonica SA). / These analyses can be carried out when the wholesale service is an essential facility and the dominant operator is obliged to provide it (see the decisions cited), but also in the context of an existing commercial relationship. For example, in decision no. 04-MC-07 of June 28, 2007, the French Competition Council ruled that, even if EDF had no obligation to supply, the commercial behavior adopted by the supplier in concluding the contract constituted a practice that could be qualified under competition law*"[62] .

122. Thus, the owner of the infrastructure, whether or not it qualifies as essential, as long as it is in a dominant position on the upstream market, which is the case for Onati, must guarantee access to it under transparent, objective and non-discriminatory conditions.

i. With regard to the cost model used

123. Firstly, the Authority would point out that it has already stated on several occasions that, in the absence of truly separate accounting, the data communicated by Onati is particularly opaque.[63] The Authority is therefore not in a position to assess them in the context of this procedure, even though Onati has produced a report dated February 8, 2023 from an accounting firm concluding that the input data used and the assumptions made to build the CMILT + model and allocate costs according to usage are appropriate.

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61 ADLC, Decision 17-D-06, § 128.

62 ADLC, Opinion no. 08-A-16 of July 30, 2008 on the situation of mobile virtual network operators (MVNOs) in the French mobile telephony market.

63 APC, decision 2001-PAC-01 and notices 2020-A-02 and 2017-A-02.

124. Secondly, in its opinions 2020-A-02 and 2022-A-03, the Autorité has already had occasion to state that the model used by the Polynesian regulator to determine the regulated cost of mobile call termination for the various operators - the CMILT + (or LRAIC +) model - used a very broad cost base, and was close to a full-cost model for the service in question. This cost includes not only the direct costs associated with the product in question, whether fixed or variable, in particular the fixed costs of network deployment (based on the network actually deployed by Onati and not on a theoretical optimal network), but also a pro rata share of common costs not related to the particular service in question (corresponding to the "+" in the acronym CMILT +). It argued that a more incremental model, known as "pure CILT" (LRIC), would probably have been preferable for developing usage.

125. A review of the recommendations made by various regulators shows that the model usually advocated in similar situations is often a so-called CILT-pure model, which excludes the fixed costs associated with network rollout from its base. For example :

- for fixed and mobile call termination, the European Commission recommends the use of a pure LRIC model: "[i]*n view of the particular characteristics of call termination markets, the cost of call termination services should be calculated on the basis of forward-looking long-run incremental costs (LRIC). In a LRIC model, all costs are variable and, since all assets are assumed to be replaced in the long term, setting charges based on LRICs allows for efficient cost recovery.*"[64]
- for high-speed network access, it recommends that regulators use a LRIC+ *bottom-up* model *("In setting wholesale copper and NGA access tariffs, where it is appropriate, proportionate and justified to impose cost orientation remedies in accordance with Article 16, (4) of Directive 2002/21/EC and Article 8(4) of Directive 2002/19/EC, NRAs should adopt a BU LRIC+ (bottom-up long-run incremental cost plus model) costing methodology that combines a bottom-up modeling approach using the LRIC model as a cost model with a mark-up for common cost recovery. "*)[65] and not an average cost model;
- BEREC, the association of European telecommunications regulators, also recommends the use of CILT cost models for international roaming (between countries)[66] .

126. The ADLC pointed out the competitive advantages of opting for a purely variable cost structure, particularly for a new entrant: *"Roaming can therefore enable the host operator to reduce its fixed network costs, and to replace part of these fixed costs with variable costs corresponding to the invoicing of roaming, variable costs which are only due in the event of customer acquisition. This cost structure, which includes a higher proportion of variable costs, can be advantageous in a fixed-cost economy, particularly for an operator with a small market share, which is by nature the case for a new entrant or recent entrant. It limits the natural disadvantage of a "small" network operator who has relatively fewer economies of scale than an operator whose market share is already substantial.*"[67]

127. In the case in point, Onati's billing for roaming services is based on an average cost approach (i.e., the fixed costs specific to the infrastructure or service are included in the annual cost).

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64 Commission Recommendation of May 7, 2009 on the regulatory treatment of fixed and mobile termination rates in the EU (2009/396/EC).

65 Commission Recommendation of September 11, 2013 on non-discrimination obligations and consistent costing methodologies to promote competition and encourage investment in broadband, (2013/466/EU).

66 International Mobile Roaming Regulation, BEREC, 2010.

67 ADLC, Opinion no. 13-A-08 of March 11, 2013 on the conditions for mutualization and roaming on mobile networks, § 131 and 132.

concerned) rather than marginal or incremental cost (incorporating only the production costs of an additional unit).

128. However, Onati had already deployed its network on all the islands before Viti entered the market, and would have done so in any case, given its position as incumbent operator and its public service obligations, which have often been accompanied by the allocation of public funds (which Onati specifies, however, have been deducted from the costs included in the model). In this case, roaming traffic is added to that of a network located in sparsely populated areas, with sufficient reception capacity, and therefore without generating additional fixed costs, at least for voice and SMS.

129. In theory, such costs should preferably be covered by a variable cost, determined according to the single increment represented by the marginal use of Viti, or at the very least by a fixed cost taking only this increment into account,

130. Onati points out that the model adopted follows the same method as that used by the CPT for regulated mobile termination tariffs (hereinafter "TAM"). This model includes all expenses, even indirect ones, allocated to the uses concerned. It should be noted, however, that in the case of TAMs, the maximalist nature of this cost model is corrected in several ways: on the one hand, this is a reciprocal tariff, which operators charge each other for routing their competitors' calls; on the other hand, the regulator has opted for asymmetrical tariffs between operators, with the tariff charged by new entrants, in the investment phase, being higher than that of the incumbent operator, whose network is more fully amortized and which benefits from greater economies of scale. The result is relatively balanced flows between operators. This is not the case for roaming services, which are asymmetrical in French Polynesia.

131. Onati's approach thus led to a maximalist coverage rate. However, as this is a free tariff, Onati was under no obligation to use the same model as for regulated mobile termination tariffs. Onati had sufficient autonomy to propose tariffs determined according to other modalities, which in fact it did during the first years of Viti's rollout, by proposing a reduced roaming tariff, and during the first years of PMT-Vodafone's rollout, by proposing a variable tariff only. In any case, it is not necessary to rule on the potentially unfair nature of the cost model adopted as part of the precautionary measures, since other practices already appear likely to contravene the provisions of article LP 200-2 of the French Competition Code (see in particular § 103, 114 and 157).

ii. Regarding the binomial nature of pricing

132. The fact that a roaming service provider charges a fixed fee is not in itself problematic. This is a service for which tariffs are not regulated, but are the subject of commercial negotiation between the parties, and the pricing terms and conditions are therefore not constrained by law.

133. As indicated in an OECD note on telecommunications costs[68] , from an economic analysis standpoint, by providing an access service to its infrastructure (in this case, the 2G network), an operator who is also present on the same retail market as its customer (in this case, mobile telephony services on the retail market), incurs two types of costs:

i. it increases its own marginal cost due to the increase in production;

ii. it deprives itself of a contribution to its fixed costs, due to the loss of part of the demand (to the extent of the market share shifting to its competitor), all the more important when the services provided by the two companies are similar or even identical, which is the case in French Polynesia.

[68] OECD Competition Law and Policy Review, Vol. 5, No. 3, 2003, Competition and Regulatory Issues in Telecommunications, Reference Note, Darryl Biggar.

134. While the first component (i) is intended to be financed by a variable tariff based on the volume acquired, the second (ii) can legitimately be financed by a fixed tariff.

135. In the same vein, in a 2013 opinion, the ADLC considered that: "*For the host operator, the offer of a roaming contract may constitute a favorable approach after various elements have been taken into account in its economic calculation. This assumes that the revenues from the roaming contract exceed at least the incremental costs it incurs in providing this service, and that they are also greater than the anticipated loss of revenues on the retail market ("cannibalization" effect)*"[69] .

136. It is the existence of this last component that explains why the price of access to roaming for a local operator is often higher than the cost of access to the same service for foreign operators, since the latter are not competitors of the host operator on the local market and do not deprive it of any contribution to fixed costs. What's more, in the case of international roaming, services between operators are reciprocal, and the two operators, who have both roaming-related expenses and revenues, must obtain the most favorable conditions possible for access to the foreign network, which collectively creates an incentive to reduce the rates charged as much as possible, as is the case for mobile call termination between operators. Thus, contrary to what Viti maintains in its submission[70] , it is not illegitimate in the present case for the tariffs applied by Onati for international roaming to be more favorable than those offered to it, and to be purely variable. This condition should enable Onati to obtain advantageous roaming rates for its own customers when they travel abroad. In addition, the access granted to these operators does not deprive Onati of market share in the local market.

137. Conversely, in the case of unilateral deployment of a network by an operator, often the incumbent, and in the context of one-way flows, it is legitimate for the tariff to include a share of coverage costs, insofar as the incumbent operator who makes its network available must not be the only one to finance it, otherwise there is a disincentive to investment.

138. Coverage of remote archipelagos clearly falls within the scope of such an asymmetrical service, since Onati has a de jure monopoly on regional services and a de facto monopoly on the deployment of local 2G sites. Network coverage is therefore very unbalanced, and Onati is the sole provider of roaming services, without reciprocity. It is therefore not unjustified for part of the coverage costs to be passed on to the host operator. Indeed, it is able to attract new customers without rolling out its own network, which limits its incentive to invest. In addition, the incumbent operator should not lose out by financing its network for the benefit of another operator's subscribers rather than its own.

139. However, it should be pointed out that the "risk" mentioned by Onati in its written submissions and at the meeting is minimal, given that the company is an integral part of EPIC OPT, which is regularly subsidized by French Polynesia.

140. Mixed or binomial invoicing is therefore not incompatible with competition law. It should be noted that fixed and variable invoicing methods are not necessarily dedicated exclusively to variable expenses and expenses independent of quantities. Losses to cover fixed costs can also be included in variable costs.[71]

iii. Regarding the inclusion in the tariff of infrastructures that Viti does not use

141. According to data provided by Onati, while in 2017, 93 of the 94 cell phone sites in the AE were 2G sites (the last being a 3G site), in 2022, only 45 are 2G sites, while 52 sites have been converted to accommodate 4G. The cost of network coverage determined by Onati includes both 2G sites, which are old and still present, particularly on the most remote islands.

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[69] Opinion no. 13-A-08 of March 11, 2013 on the conditions for mutualization and roaming on mobile networks.

[70] Referred to Viti on October 3, 2022, pages 26 et seq.

[71] This contribution is often estimated according to the "*retail plus*" pricing principle. The cost corresponds to the retail price charged by the host operator, plus a contribution linked to the loss of customers. This price is therefore directly linked to the actual use of the network, and not a purely flat-rate price.

remote areas that have no access to 4G, and sites that have been renewed and upgraded to 4G on islands recently connected to the new Natitua submarine cable, which now have broadband.

142. However, Viti is contesting the inclusion of these renewed sites in the cost price. In fact, it wishes to use roaming for voice and SMS only, and has no intention of offering its subscribers roaming services for mobile data. Consequently, it considers that it should not be obliged to bear the cost of renewing sites for a switch to 4G, even though it will not be using them, since 2G sites are sufficient to cover its needs. It also points out that these sites are old and depreciated, and that not taking them into account should lead to a very significant reduction in fixed costs[72] . It is clear that converting 2G sites to 4G does not - at this stage - present any added value for Viti, since it is not disputed that the old 2G network is sufficient for its use.

143. Onati retorts that the so-called *bottom-up scorched node* cost model starts from the existing network, and that there is no reason to exempt Viti from the coverage costs necessitated by the replacement of old 2G sites by 4G sites, adding that on the other hand it only charges Viti the pro rata coverage costs linked to voice and SMS usage and not to data[73] . However, if the supposed improvements in infrastructure have made it possible to support new data-related uses on the existing network, and Onati claims to be using an incremental cost model, this cost should have been minimal or even nil for voice and SMS, including for investments covered by a fixed share.

144. In any case, it is not necessary to rule on the potentially unfair nature of the inclusion in the tariff of infrastructures that Viti does not use in the context of the precautionary measures, since other practices already appear likely to contravene the provisions of article LP 200-2 of the French Competition Code (see in particular § 103, 114 and 157).

iv. Regarding the breakdown of fixed costs into three equal parts

145. Once the total cost of coverage for remote archipelagos has been determined, Onati divides it into three equal shares, allocated to each of the three operators (directly to PMT and Viti, indirectly to Onati).

146. This lump sum of 71.5 MF must be paid in order to benefit from the right to roam, whether or not operators make use of this service, and irrespective of the number of customers using it. However, the market shares of the three operators vary enormously. In particular, the complainant, Viti, has a derisory market share (less than 1%). In concrete terms, the cost of the network for each operator's customers, who do not all have access to or need this service, comes to 28,600 F per year per Viti user, 507 F per PMT user (56 times less) and 447 F per Onati user at the low end (64 times less) and 340 F at the high end (84 times less).[74]

147. As mentioned above (§ 132 et seq.), while in principle a fixed cost may be charged by an operator offering roaming services, on the grounds that it may lose customers as a result, making it more difficult to cover its network costs, this charge must be in line with the number of customers concerned. In the present case, Viti is charged one third of network costs for a derisory number of customers. The access price may include a component reflecting the contribution to fixed costs, but only to the extent of the customer leakage to the new operators, and not to the full cost of deploying this network.

148. Viti has also provided growth forecasts, which show that call volumes are likely to remain low over the next two years. It estimates them as follows.

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72 Seizure of Viti u October 3, 2022, pages 23 et seq.

73 Onati comments no. 1 of November 30, 2022, appendix 10, Terra Consultants report, page 12.

74 Customer data taken from Onati's memorandum of March 14, 2023.

Roaming traffic forecasts in remote archipelagos (Viti data)[75]

	Outgoing calls (in monthly minutes)	Calls received (in monthly minutes)	SMS sent (monthly)	SMS received (monthly)
2022	4 000	2 800	3 200	2 240
2023	16 000	11 200	12 800	8 960
2024	36 000	25 200	28 800	20 160

149. Onati argues that it gives Viti a right of access to its entire network in the AEs, and that whether or not it is actually used is irrelevant. However, Onati, which deployed its network long before Viti entered the market, would have paid these expenses in any case. What's more, Viti's arrival increases Onati's costs only up to the amount of the costs linked to the additional use of the network as a result of the services offered to Viti (a variable cost linked to actual consumption), on the one hand, and the possible loss of its customers to a competing operator, on the other. However, Onati charges Viti fixed costs as high as its own for a network it uses only very marginally.

150. External operators also have access to Onati's network, particularly foreign operators. They pay Onati for this service, either directly, or through privileged access to their own network (symmetrical services), which increases Onati's use of its network beyond its own customer base. This reduces the share of costs attributable to Onati.

151. While Onati argues that it is entitled to recover the costs incurred in accordance with the principle of cost-orientation of its wholesale services, i.e. above marginal cost and including its investments (the average cost), this does not mean that the fixed price should be assessed independently of demand, given that these are services sold by the unit, by the minute or by SMS. In fact, by charging a third of the total cost of coverage (33%) for a market share of less than 1%, Viti is in reality charged a much higher rate (a priori at least 33 times higher) than the average total costs incurred per user. All other things being equal, therefore, it is only if it were to lose a third of the market to Viti that Onati would be likely to incur losses linked to this service. In a competitive wholesale market with several suppliers having deployed a local loop on the same islands, Viti could therefore have benefited from a more advantageous offer, at least as long as it represented less than a third of the market (suppliers being able to generate a positive margin up to this level). Onati thus departs from the principle of causality between costs (supply) and prices (demand).

152. Ultimately, due to the choice of model and the amount of the fixed portion, which is determined on a flat-rate basis and independently of customer transfers, the cost proposed by Onati appears to be much higher than the marginal cost, the average cost and the retail cost paid by its own subscribers for telephony services, given that their numerical importance is considerably greater than that of Viti.

153. In a case that was similar in some respects, in which access to a service was only partial, but the dominant operator demanded payment for the entire service, the European Court of Justice ruled that "*the conduct of an undertaking which operates a nationwide system for the collection and recovery of sales packaging in Germany, consisting in requiring the undertakings which use its system to pay a fee for all sales packaging marketed in Germany with the exception of sales packaging, constitutes an abuse of a dominant position*".

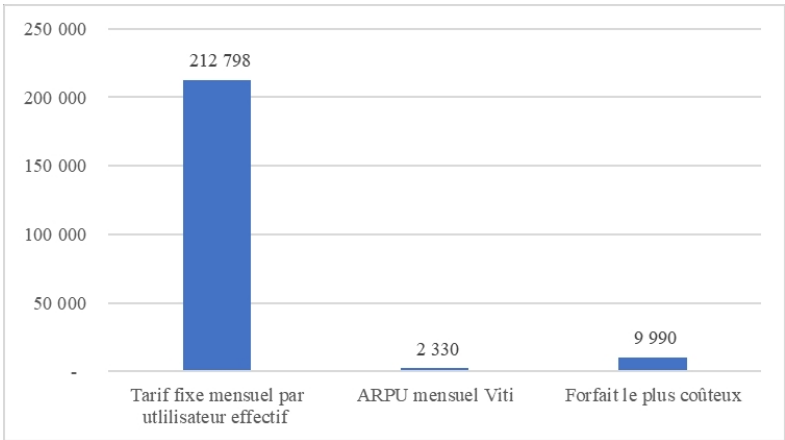
[75] Referred to Viti on October 3, 2022, pages 32 et seq.

its logo, when these companies demonstrate that they do not use this system for some or all of their packaging.[76]

154. Onati argues that such a billing system, based on the actual cost of the network, encourages Viti to develop its own network, but it should be remembered that this is a regulatory consideration, linked to public policy priorities (what choice should be made between service-based or infrastructure-based competition in sparsely populated areas?), which it is not up to an operator to decide by determining its billing system. While it is undeniable that Viti has regulatory deployment obligations, including in certain islands of the AE, the ADLC has already ruled that*: "Generally speaking, the existence of a specific regulatory framework for regulating a sector open to competition does not place the sector outside the scope of competition law, nor does it constrain the solutions that the Competition Authority might adopt when the company in question has autonomy of conduct within this regulatory framework. The European Commission, for example, emphasized this point in its Telefónica decision*[77] *, backed up by the Court of Justice, which stated that "the fact that an undertaking's conduct complies with a regulatory framework does not imply that that conduct complies with Article 102 TFEU"."*[78] In the case in point, Onati had a large degree of autonomy in its conduct, since it was a non-regulated tariff.

155. In any case, Onati was not unaware that the Direction générale des affaires numériques (DGEN) had launched a review of the very relevance of this infrastructure-based competition in the AEs. In the initial conclusions communicated to operators following the study carried out by a consultancy firm in December 2022, none of the AE islands were intended to be included in the dense zone perimeter. As a result, roaming or infrastructure sharing could become the norm.

156. According to Onati, today only 28 Viti customers on average use roaming services in the AEs on a monthly basis. At 71.5 MF per year, or 5.96 MF per month, this means - for roaming calls to remote archipelagos alone and excluding variable costs - a fixed cost for Viti of over 212,8000 F CFP per month per user, well above the entire range of packages marketed by Viti and its competitors. This amount is more than 21 times higher than Vini's most expensive package (9,990 F), 27 times higher than Viti's most expensive package (7,995 F) and 91 times higher than Viti's average monthly income per user in 2022 (2,330 F).



157. It follows from the foregoing that by charging Viti for the cost of its network well in excess of the actual use made of it, and by clearly deviating from the underlying costs without economic justification, Onati is likely to have abused its dominant position by charging unfair prices.

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[76] Case T-151/01, Der Grüne Punkt - Duales System Deutschland GmbH v *Commission of the European Communities.*

[77] Court, judgment of July 10, 2014, Telefónica SA v Com, aff. C-295/12 P, ECLI:EU:C:2014:2062, paragraph 133; Opinion no. 21-A- 07 of May 10, 2021 concerning draft rules for the separation of the accounts of SA SNCF Voyageurs and SAS Fret SNCF, paragraph 22 et seq.

[78] Decision no. 16-MC-01 of May 2, 2016 concerning a request for interim measures submitted by Direct Energie in the energy sector.

The effect of such invoicing methods is to distort competition to the detriment of the last entrant on the mobile telephony market, artificially creating a barrier to its development (these elements are developed in § 91 et seq. relating to margin squeeze).

5. CONCLUSION ON THE PRACTICES DENOUNCED

158. In the case of precautionary measures, without going so far as to qualify the practices, the investigation must make it possible to assess whether it can be suspected with reasonable assurance that they may constitute infringements of competition law.

159. The tariffs for the services of a dominant operator must be reasonable and non-discriminatory. This involves examining whether or not there is a manifest disproportion between the costs incurred and the rates in question. In a case concerning the transport sector, the ADLC ruled that "*SNCF has therefore abused its dominant position by requiring online travel agencies to use the Ravel license to access the essential Résarail facility, and to do so at a particularly high cost, thereby erecting barriers to entry on the French market for the distribution of train tickets*"[79] .

160. With regard to an incumbent operator in particular, in its decision no. 2021-PAC-01, the APC referred to the notion of "reasonable cost" (with reference to the price charged to the competitor):
"The incumbent operator, a holder or former holder of a legal monopoly, has a heightened responsibility in this respect, and "must take care to avoid any abuse of resources that cannot be reproduced by new entrants on the market open to competition at a reasonable cost and within acceptable timescales, given its particular responsibility on the market".

161. In this case, the discussion concerns the transparency, objectivity and non-discriminatory nature of the tariff proposed by Onati to Viti for access to voice and SMS roaming in remote archipelagos.

162. Firstly, it appears that Onati had considerable autonomy in setting its rates.

163. Onati is the sole provider on the wholesale roaming market. It is a free-price service, which gives it commercial autonomy in setting rates, and the company appears to be able to opt for a variety of pricing methods to offset the costs of this use of its network. Paragraphs 179 and 180 of ADLC notice no. 13-A-08 state that when roaming takes place in a sparsely populated area, where the network is not saturated, it is beneficial for the host operator, who generates additional revenue. In this case, the operator tends to charge a variable rate that does not dissuade. Only in densely populated areas, when saturation is likely to generate additional investment costs, does the operator favor a high fixed portion, to ensure that the resulting investment costs are recovered. Furthermore, it is clear from the above that Onati could perfectly well have used other pricing methods, in particular a variable cost model (CILT) rather than an average cost model (CMILT +), as is customary for this type of service. Onati was also able to opt for a fixed-cost breakdown based on other modalities, notably linked to the number of users.

164. Secondly, it appears that the pricing conditions proposed in the first pricing amendment and finally by Onati in its letter of October 21, 2022 are likely to fall within the scope of several anti-competitive practices and in particular :

- constitute a price squeeze, since it is impossible for Viti, with such prices, to propose retail offers as competitive as its competitors without incurring significant losses;
- be considered discriminatory, given that PMT had more favorable rates for equivalent services at the same stage of its development, and paid a higher rate than PMT.

[79] ADLC, Decision 09-D-06 of February 05, 2009 concerning practices implemented by SNCF and Expedia Inc. in the online travel sales sector, § 248. Underlining added.

today at the same rate for a much higher level of roaming usage;

- be qualified as unfair, since the pricing of network costs - determined according to a maximalist cost method and in three equal parts between operators, without taking into account the number of users and the operators' market shares - leads Onati to charge Viti a tariff that is much higher than the cost of the service actually provided.

165. However, the existence of a single practice likely to be anti-competitive is sufficient to justify the pronouncement of precautionary measures (see §72). The Autorité therefore goes beyond what is required by the French Competition Code and case law.

166. Thirdly, these practices are likely to have had anti-competitive effects.

167. As far as effects are concerned, it follows from established European case law, issued on the basis of Article 102 TFEU, that it is not necessary to demonstrate that the abuse in question has had a concrete effect on the markets concerned. In this respect, it is sufficient to demonstrate that the abusive conduct is of such a nature or is likely to have had an anti-competitive effect (EU Court judgments of December 17, 2003, British Airways, C-322/81, paragraph 293, of September 3, 2003, Michelin II, T-203/01, paragraph 239 and of September 9, 2003, Michelin II, T-203/01, paragraph 239).
2010, Torma T-155/06, paragraph 289).

168. In this case, Onati's seemingly illogical behavior, which *ultimately* leads it to deprive itself of roaming revenues and appears neither necessary nor proportionate, can be explained by its reluctance to welcome a new operator, or even by a desire to evict the new entrant, which is not in a position both to develop its own network or an attractive offering and to pay these tariffs. These practices are likely to have the effect of hindering the development of a competitor, or even driving it out of the mobile telephony retail market, especially as this is a business with strong economies of scale, in which overcoming such additional costs is particularly difficult for a recently-established operator.

169. On the basis of the above, and subject to further investigation, it is clear that the pricing conditions proposed by Onati, in particular since it ended the 75% price reduction granted to take account of Viti's market share, for voice and SMS roaming services for Viti in the remote archipelago islands are likely to constitute a practice prohibited by article LP. 200-2 of the French Competition Code.

D. ON THE REQUEST FOR PRECAUTIONARY MEASURES

170. Article LP. 641-1 of the French Competition Code states that: *"At the request of the persons, companies and organizations mentioned in article LP.620-5, and after hearing the parties involved, the Authority may take any precautionary measures it deems necessary. and after having heard the parties involved, take the precautionary measures requested of it, or those which appear necessary. / These precautionary measures may only be taken if the practice complained of causes serious and immediate harm to the general economy, to that of the sector concerned, to the interests of consumers or to the complaining company. / They may include the suspension of the practice concerned, as well as an injunction to the parties to return to the previous state. They must remain strictly limited to what is necessary to deal with the emergency".*

171. In order to determine whether the practices described above justify the granting of precautionary measures, it is necessary to assess the serious and immediate nature of the harm caused to the general economy, to the sector concerned, to the interests of consumers or to the company making the referral. However, these different types of harm are not cumulative conditions, but rather alternatives: a serious and immediate harm identified in only one of these cases is sufficient to allow the granting of precautionary measures.

172. On the other hand, seriousness, immediacy and the existence of a causal link between the facts reported and the injury are three cumulative criteria[80] .

173. The first step is therefore to assess the serious and immediate nature of the damage, and then, if the situation is urgent, to consider the protective measures that can be taken to remedy it.

1. ON THE SERIOUS AND IMMEDIATE NATURE OF THE DAMAGE

174. In a ruling dated November 8, 2005 (Neuf Telecom), the French Supreme Court (Cour de cassation) stated that "*precautionary measures may be decided (...) within the limits of what is justified by urgency, in the event of serious and immediate harm to the general economy, to the sector concerned, to the interests of consumers or to the complainant company.) within the limits of what is justified by urgency, in the event of serious and immediate harm to the general economy, to that of the sector concerned, to the interests of consumers or to the complainant company, provided that the facts denounced, and covered by the investigation, in the proceedings on the merits, appear likely, on the basis of the evidence produced in the debates, to constitute a practice contrary to articles L. 420-1 or L. 420-2 of the French Commercial Code, a practice which is the direct and certain cause of the harm identified*"[81] .

175. As far as seriousness is concerned, the harm identified can be either to the general economy, or to that of the sector concerned, or to the interests of consumers, or to the complainant company. A serious and immediate infringement identified in just one of these cases is sufficient to allow the granting of precautionary measures. Seriousness may result in particular, but not exclusively, from the irreversibility of the harm identified.[82]

176. As far as immediacy is concerned, only immediate harm can justify emergency intervention by the Authority, aimed at preventing the occurrence of damage that a decision on the merits would be powerless to prevent or remedy. The Authority's intervention may be requested to put an end to recent behavior as a matter of urgency, so that the damage cannot materialize or increase, or to prevent an event that is likely to occur in the near future. In this way, the Authority can intervene not only to prevent the worsening of an established damage, but also to prevent the occurrence of an irremediable future damage, particularly in sectors opening up to competition or with little competition[83] .

177. With regard to the causal link between the practices and the harm, it is clear from decision-making practice that
"the decision to grant precautionary measures can only be taken if there is a causal link

[80] ADLC decision 20-MC-01 of Apr. 9, 2020, § 271.

[81] Com. November 8, 2005, no. 04-16857.

[82] See in particular ADLC decisions n°14-MC-02 and n°11-MC-01.

[83] See in particular ADLC decisions n°14-MC-02 and n°16-MC-01.

direct and certain link between the practice in question and the serious and immediate harm to one of the interests protected by article L. 464-1 of the French Commercial Code".[84]

a. ON THE SERIOUS NATURE

i. Damage to the industry and the consumer

➢ ***Principles***

178. It should be noted at the outset that the practices complained of are being implemented against a backdrop of gradual opening up of the mobile telephony market, which began in 2013 with the arrival of PMT, but will be accelerated in 2020 with the arrival of a third operator, Viti.

179. In its study on price squeezes, the ADLC noted that "*when formerly monopolistic sectors are liberalized, new operators generally enter the various markets gradually, so as to limit their risk-taking. The entrants then move up along the*
They climb the "investment ladder", "rung by rung". (...) This sequential process reflects the classic distinction between service-based and infrastructure-based competition. The first rungs of the ladder belong to service competition: entrants, at this stage, depend on the incumbent operator for access to infrastructure. Only once they have acquired a sufficiently large customer base and brand awareness can they invest in infrastructure at a higher level of capillarity, and finally free themselves from their dependence on the incumbent operator. In the initial phase of the process, it must be ensured that efficient entrants have the capacity to be active downstream, given the wholesale and retail prices charged by the incumbent operator (...) For entrants to be able to move up the investment ladder, it is essential to guarantee the absence of a margin squeeze between the different rungs: the prices charged by the incumbent operator for access on the one hand, and for retail services on the other, must leave alternative operators a sufficient margin to cover their incremental costs; it is on this condition that they will be able to develop and reach the critical size that will enable them to commit to new investments. "[85]

180. With regard to protective measures, the same authority noted in decision no. 09-MC-01 that *"anti-competitive practices by an incumbent operator likely to distort the free play on an emerging market, related to the one on which it holds a dominant position inherited from its legal monopoly, occurring at a key stage in the development of this market, can cause serious and immediate harm to the interests of competitors, the sector and, ultimately, end consumers"*[86] . In its decision no. 07-D-33, concerning the telecommunications sector, it considered that
"abuses of dominance in a nascent market are particularly serious because of their potentially structuring effect on the market, or even the sector in question".

181. In decision 04-MC-02 of December 9, 2004, the Conseil de la concurrence observed that
"the serious weakening or disappearance of any competitive pressure exerted on the dominant operator would be detrimental to the sector and to consumers, in a context where the Caribbean economy as a whole is already suffering the effects of a certain delay in the development of the new potential expected from mobile telephony and of a relatively high price for communications exchanged over mobile telephony networks".[87]

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[84] See in particular ADLC decisions no. 14-D-07, no. 09-D-26 and no. 12-D-01.

[85] ADLC, Rapport annuel 2008, Étude thématique, Les pratiques de ciseau tarifaire, pages 147 to 177 (emphasis added).

[86] Decision 09-MC-01 of April 8, 2009, concerning the request for protective measures submitted by Solaire Direct.

[87] Decision no. 09-MC-02 of September 16, 2009 concerning the referrals on the merits and requests for interim measures submitted by Orange Réunion, Orange Mayotte and Outremer Télécom concerning practices implemented by SRR in the mobile telephony sector in Réunion and Mayotte.

➢ ***The importance of Viti in competitive animation***

182. While the health crisis slowed Viti's development considerably in the early stages, particularly in 2020 and 2021, it subsequently played an important role in stimulating competition in the market.

183. In particular :

- On April 27, 2022, Viti was the first Polynesian operator to offer unlimited mobile packages to the general public[88] , which the APC had noted were absent from the Polynesian market[89] , even though they had already been available for several years in mainland France and the French overseas departments.[90] The other operators (Vodafone-PMT in June 2022, Vini-Onati in August 2022) subsequently adapted their respective offers, enabling the launch of a new cycle of price cuts for[91] packages.
- Viti was also the first operator to offer no-commitment packages by default, on August 1er 2021[92] , which is now also the case for its two competitors (even though all operators offer discounts on the purchase of mobile handsets in return for a commitment, and PMT-Vodafone for its part has been offering a range of no-commitment packages since 2018, but on which a 12- or 24-month commitment enables a significant price reduction).
- Finally, Viti is the only operator to use Volte technology (on the 4G network) for calls on its own network. Using this technology means faster calls, simultaneous use of calls, SMS and data, and better call quality.

184. The Institut de la statistique de la Polynésie française (ISPF) has also pointed out on several occasions, notably in its documents on price trends, that competition has led to a reduction in telecommunications tariffs. In November 2022, just a few months after all operators had introduced new packages, the ISPF reported that inflation had "*been offset by lower prices for imported goods and telecommunications, thanks to competition in this sector*.[93]

➢ ***The potential effect of Onati's practice***

185. In order to develop in an emerging market, an operator must be able to offer services equivalent to those of its competitors, either by developing its own network or, as in this case, by using the network of a third party.

186. It's clear that asymmetrical roaming agreements can be pro-competitive. For example, "*roaming can be useful in grey areas, i.e. areas where it is not profitable for all operators to cover. It helps to stimulate competition in these areas. It has also been widely used in white areas, where it has created a range of mobile telephony services*. In the same vein, "*roaming lowers the barriers to entry into the mobile telephony market. Given the several years required to roll out a network, without roaming, an incoming operator would initially be unable to offer a competitive service, due to a lack of sufficient coverage. This competitive disadvantage is all the greater when other network operators, who have been present on the market for longer, offer coverage that is not as good as that of their competitors.*

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88 Vini-Onati had in fact launched an unlimited package on December 1er 2021, but at a price of F14,990 and therefore reserved for a restricted clientele, while Viti offered an unlimited package in April 2022 at a price of F4,995, setting in motion the trend towards lower package prices, since today there is, for example, an offer with unlimited calls at Vini-Onati for F2,700 per month.

89 APC, opinion no. 2020-A-02 of June 17, 2020, § 174 et seq.

90 https://www.tntv.pf/tntvnews/polynesie/economie/telephonie-mobile-la-concurrence-tire-les-prix-vers-le-bas/

91 https://www.radio1.pf/vodafone-aussi-degaine-de-nouvelles-offres/ and https://www.tahiti-infos.com/Vini-lance-ses-nouvelles- offres-de-telephonie-mobile_a211034.html

92 See Ora Mobile Subscription Terms and Conditions at 1er August 2021

93 ISPF, Points Études et Bilans de la Polynésie française No. 1351, L'évolution des prix de 2011 à septembre 2022.

roaming, by making up for the entrant's lack of coverage, is a solution that limits market entry difficulties and enables the entrant to quickly and effectively stimulate competition on the retail market. In fact, the French Competition Authority had stressed the importance of roaming to enable the fourth operator to compete effectively with the three mobile network operators already established (...) in less densely populated areas, where the viability of deployment is more problematic, and where roaming may be the necessary condition for the presence of one and/or other of the operators party to the agreement."[94]

187. However, the pro-competitive impact of an asymmetrical roaming agreement depends on its terms. In concrete terms, "[t]*he pricing terms negotiated between the host operator and the hosted operator influence the costs of the hosted operator, depending on the offers it markets. They are therefore likely to influence the nature of these offers. The structure and level of roaming charges are therefore decisive in encouraging or discouraging network deployment, density and security.*"[95]

188. In the case in point, Onati's practice, notably through its fifth and sixth endorsements and the end of tariff reductions on the[96] tariff, presents Viti with a dilemma. Either it pays roaming charges for AE alone that are more or less equivalent to the total sales of its mobile business, making its progression up the "investment ladder" illusory, or it does not, and is excluded from the retail market segment made up of customers making calls from remote archipelagos.

189. In its 2013 opinion on roaming, the ADLC noted that "*roaming is clearly a factor of attractiveness and competitiveness for the operator who benefits from it, all the more so as coverage rates differ between the host and host operators: the extension of the geographical base will be all the stronger as a result. In particular, the availability of national roaming is a key competitive factor for an operator at an early stage of network rollout, all the more so in a context where other operators have very high coverage rates*.[97]

190. The AEs represent 12.3% of the Polynesian population[98] and the share of voice and SMS traffic in these islands represents a similar proportion[99] . However, to this number must be added all the non-residents of the AEs who visit these islands for family, tourist or professional reasons, or who may simply be led to visit and make calls there. What's more, these islands actually represent 56 of the 66 islands covered by a cell phone network, and some of them are particularly well known for tourism (Marquesas, Rangiroa, Fakarava, etc.).The notes for deliberation produced by Viti and Onati show that travel to and from the islands of the remote archipelagos represents a significant volume of traffic, with 335,865 annual air travellers, i.e. if we take the proportion of residents in total domestic traffic (60%), at least 200,000 annual journeys[100] (by comparison, at the end of 2021 there were around 298,500 active mobile lines in Polynesia[101]). This market segment is therefore not insignificant, whether for consumers or businesses. Not to cover AEs would be to deprive oneself of a substantial part of the demand, to the benefit of an operator offering a service to the whole territory. For example, if Viti did not accept Onati's offer, it would be cutting itself off from a significant part of its customer base.

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94 Opinion no. 13-A-08 of March 11, 2013 on the conditions for mutualization and roaming on mobile networks.

95 Opinion no. 13-A-08 of March 11, 2013 on the conditions for mutualization and roaming on mobile networks, § 80 and 81.

96 This forces Viti to pay a third of the total cost of network coverage, despite its low market share.

97 ADLC, opinion N°13-A-08 of March 11, 2013, §148.

98 Census 2017.

99 Between 10 and 15%, according to Onati's memo of March 14, 2023.

100 This is only an approximation, which may be revised upwards (as the share of residents in traffic to and from the AE is undoubtedly higher than that to and from the Society Archipelago). It is not indicative of the absolute number of people having travelled, as these are not necessarily single passengers, and part of these journeys may take place between islands in the AE.

101 According to the economic report French Polynesia 2021 by the Institut d'émission d'outre-Mer (IEOM), page 123.

191. On August 30, 2022, Viti opted to forego roaming services in the AEs under the terms of the fifth rider, with effect from November 1er 2022, and then to reject the tariff terms of a sixth rider proposed by Onati in a letter dated October 21, 2022. This choice therefore excluded it from a substantial part of the demand. In a relatively mature market, given the high rate of household equipment (98% according to the DGEN's 2017 report *"Digital uses in households in French Polynesia"*) and whose growth prospects are based above all on capturing the customers of other operators through its offers, Viti finds itself unable to offer services equivalent to those of its competitors at equivalent rates and thus to develop its customer base.

192. If Viti had accepted the terms of the sixth amendment, as proposed in the letter of October 21, 2022, the risks of its exclusion from the market, or at least the impediments to its development and the competitive vitality of the sector, were also real. Indeed, the company had not acquired a sufficient customer base to ensure its long-term survival if it had to assume such costs (see § 91 et seq.).

193. As Onati points out, every month an average of 28 Viti customers use roaming services in the AEs. At 71.5 MF per year, i.e. 5.96 MF per month, the result - for roaming calls in remote archipelagos alone and excluding variable costs - is a fixed cost for Viti of over 212,800 F CFP per month per user, well above the entire range of packages marketed by Viti and its competitors. This amount is more than 21 times higher than Vini's most expensive package (9,990 F), 27 times higher than Viti's most expensive package (7,995 F) and 91 times higher than Viti's average monthly income per user in 2022 (2,330 F). These practices therefore have a particularly acute and penalizing effect on Viti.

194. According to data provided by Viti, the fixed roaming service alone - if it were not to give it up - would absorb a significant proportion of its revenues, and in particular 60% by 2023.

	2 022	2 023	2 024	2 025
Total telephony sales	69 900 000	118 400 000	178 200 000	282 500 000
Fixed cost AE roaming	42 100 000	71 500 000	71 500 000	71 500 000
%	60%	60%	40%	25%

195. It considers that this would lead to a significant reduction in the ratio of shareholders' equity to share capital[102] , which would fall to 52% by 2023 and 7% by 2024, prompting the implementation of an alert procedure based on article L. 225-248 of the French Commercial Code.

196. While these expenses do not account for the company's entire deficit, they do represent a significant proportion (39%) in 2022, and would have accounted for more than half (52%) in 2023.

	2 022	2 023	2 024
Operating income	- 109 300 000	- 137 800 000	- 58 900 000
Fixed cost AE roaming	42 100 000	71 500 000	71 500 000
%	39%	52%	121%

197. Finally, while Onati argues that the tariff increase between 2022 and 2023 is only 29.4 MF, this additional amount for fixed roaming charges in the AEs still represents 42% of total mobile revenues in 2022 and 25% of those forecast for 2023.

198. Thus, the effects of Onati's practice appear serious for the sector and for consumers.

199. Decision-making practice and case law have already considered that, in a mature market, the foreclosure effects of the practices in question are more sensitive, insofar as, as in the case of a mature market, the foreclosure effects of the practices in question are more sensitive, insofar as, as in the case of a mature market, the foreclosure effects of the practices in question are more sensitive.

[102] As share capital is a component of shareholders' equity, such a ratio necessarily means that shareholders' equity other than share capital is strongly negative, and therefore that retained earnings are strongly negative.

As already mentioned, most new customer acquisition is achieved by winning over the customers of other operators[103] .

200. The alleged practices therefore have an impact on competition in the sector, by having the effect of depriving a competing player of all access to a significant segment of the market, or at least delaying access to it, and reducing its development prospects and consequently investment in networks.

201. As a result of Onati's practices, a significant proportion of customers are deprived of the benefits of the recent opening up to competition sought by the legislator, and in particular of the possibility of using the services of one of the three operators. This has the immediate effect of depriving the sector in part of the competitive stimulus brought about by the arrival of this new player, and could lead to its eviction or marginalization.

202. If Viti had continued to accept the terms of the fifth and sixth amendments after November 2022 and maintained roaming, its ability to exert competitive pressure would also have been seriously undermined by the losses these terms would have generated and its possible eviction from the market. Such a situation would deprive it of the incentive to innovate and exert effective competitive pressure on the market.

203. Finally, it should be pointed out that, given the reduced scope for market entry due to investment costs and the fact that no other license has been granted by the regulator, the competitive situation with three players is fixed, and reinforces the effects of the pricing conditions of the sixth rider proposed in the letter of October 21, 2022 on the market.

204. The seriousness of the damage to the sector and to consumers has therefore been established.

ii. Damage to the company's interests

205. As explained in § 175, damage to the sector or to consumers is sufficient to characterize the seriousness of the practices and to allow the granting of precautionary measures. Harm to the company's interests is therefore an alternative condition, developed in addition to the harm previously established.

206. Decision-making practice in mainland France, as clarified in particular by the case law of the Cour d'appel and the Cour de cassation, considers that :

- the mere finding of a loss of earnings for the plaintiff company is insufficient to characterize seriousness;[104]
- it is nevertheless possible to consider a practice as serious despite an increase in the seizing party's market share or the absence of any risk of imminent exit from the market.[105]

207. For example, the ADLC recalled that "*the fact that beIN Sports continues to develop on its own merits does not mean that an anti-competitive practice is not likely to cause it serious damage. According to established decision-making practice, an eviction practice can have the object and effect of delaying a competitor's entry into the market, and can be condemned on this basis, even if that competitor sees its market share increase. It is therefore not necessary to observe a fall in the seizing party's market share or to identify a risk of imminent exit from the market in order to demonstrate the existence of serious damage*"[106] For its part, the Paris Court of Appeal has already held that
"that the fact that a company is experiencing positive results does not prevent it from undergoing a downturn.

[103] ADLC decisions no. 04-MC-02 of December 9, 2004 (§107) and no. 09-MC-02 of September 16, 2009 (§86).

[104] See in particular ADLC decision no. 10-D-38.

[105] See ADLC decision no. 14-MC-01, in particular § 258.

[106] ADLC decision no. 14-MC-01 of July 30, 2014 on the request for interim measures submitted by beIN Sports France in the pay-TV sector.

a serious and immediate disturbance as a result of practices likely to constitute anti-competitive behaviour"[107] .

208. As mentioned above, Viti is faced with a dilemma:

    i. pay for roaming services under the conditions proposed by Onati, at the risk of jeopardizing the profitability of its business and its ability to invest;

    ii. give up roaming in the AEs, at the risk of halting development at a time when the business is still in its infancy.

209. As explained above, in both cases, there is a real risk that the Viti mobile market will disappear. In its decision-making practice, the ADLC has noted that precautionary measures may be ordered in "*cases where one or more companies could be excluded from the market, disappear before the end of the proceedings on the merits, or see their chances of development seriously compromised*" (ADLC decision no. 13-D-16 of June 27, 2013, point 178; no. 12-D-01 of January 10, 2012, points 183 to 185; Conseil de la concurrence, no. 09-D-12 of March 18, 2009, points 62 and 69). The recent decision ordering Google to implement precautionary measures specifies that *"Precautionary measures may also be justified in cases where the company in question suffers a massive decline in its sales, a circumstance that significantly jeopardizes its business."*[108]

210. In any case, the ADLC has already indicated that harm to the business can be assessed by market and not necessarily globally. Thus, in a 2014 decision, it stated that "*Firstly, it should be emphasized that, while Direct Energie is indeed experiencing growth in its customer base, this is the result of its recent entry into the gas market. / Secondly, the fact that Direct Energie continues to develop on its own merits does not mean that an anti-competitive practice is not likely to cause it serious harm. According to established decision-making practice, an eviction practice can have the object and effect of delaying a competitor's entry into the market, and can therefore be condemned*.[109] In another decision, the Court indicated that the harm caused to a new activity, likely to constitute a *"growth relay",* may be sufficient to characterize the harm caused to the company.[110]

211. The seriousness of the damage to the company therefore appears sufficiently established to justify the imposition of precautionary measures on this basis.

b. ON THE IMMEDIACY OF THE DAMAGE

212. In its thematic study on precautionary measures, the ADLC stated that "*assessing the immediacy of the damage is particularly useful in sectors opening up to competition or with little competition, where competitive pressure, already weak or unstable, may be threatened by the practices of the dominant operator (...)*"[111] . It also considered that "[the *Authority's*] *intervention may also be requested to put an end, as a matter of urgency, to recent behavior that should be stopped to prevent the damage from materializing or becoming more extensive*".[112]

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[107] CA Paris, October 31, 2014, RG n°2014/19335 aforementioned.

[108] ADLC, Decision No. 19-MC-01 of January 31, 2019 on a request for interim measures by Amadeus, § 168

[109] ADLC, Decision No. 14-MC-02 of September 9, 2014 on a request for interim measures submitted by Direct Energie in the gas and electricity sectors.

[110] ADLC, Decision no. 14-MC-01 of July 30, 2014 on the request for interim measures submitted by beIN Sports France in the pay-TV sector, § 257.

[111] ADLC, Rapport annuel 2007, Étude thématique, Les mesures conservatoires, pages 45 to 88.

[112] ADLC, Decision No. 14-MC-02 of September 9, 2014 on a request for interim measures submitted by Direct Energie in the gas and electricity sectors.

➢ ***With regard to the period between the referral on the merits and the request for precautionary measures***

213. Onati argues that Viti filed its application on the merits on November 29, 2021, and waited more than ten months before filing its request for precautionary measures on October 3, 2022. However, there is no time limit for filing such a request, since the practices concern "*recent behavior that should be stopped so that the damage does not materialize or expand*".[113]

214. In this case, however, Viti could legitimately have understood from the regular exchanges with Onati from the end of 2021 onwards that a more favorable roaming offer would be made.

215. Thus, Viti states that it has requested a revision of tariffs on various occasions, on November 25, 2021 during a Telecommunications Consultative Committee meeting, on November 29, 2021 by letter and on January 4, 2022 by e-mail, on the basis of article 13 of roaming agreement no. 2019-20-Onati-DTEM, which provides for a periodic revision of tariffs to take account in particular of changes in costs and traffic[114] . In fact, it considers that the reduction in tariffs for capacity services and the new tariffs for the Natitua cable should have led to a reduction in roaming tariffs, as should the lower traffic forecasts for 2022-2023 sent to Onati in a letter dated January 12, 2022.

216. In response, Onati sent Viti a fourth rider on January 18, 2022, followed by a fifth rider on March 28, 2022, revising tariffs downwards with effect from January 1er 2022, with an annual fixed portion of 3.8 MF for the Company's islands and 85.9 MF for remote archipelagos, as well as a variable tariff of 0.39 F / minute for voice and 1 centime of F per SMS (unchanged), as specified in § 29 and following.

217. However, Viti considered that these tariffs remained excessive, and that while the fixed tariff had been reduced by 86% in the Society archipelago, it had only been reduced by 47% in the remote archipelagos, with a gap of 1,450% between these two tariffs, whereas this gap was only 36% for Vodafone between 2013 and 2018. In a letter dated May 20, 2022, Viti requested details of the costs used and the model used to determine roaming costs, which were provided by letter dated June 2, 2022. In a letter dated June 15, 2022, Viti requested an urgent review of the tariff, which it considered excessive for the following two reasons: no reduction had been observed between June 2020 and June 2021, despite the fall in the share of voice in total traffic; costs were allocated on the basis of one-third per operator, without regard to the weight represented by each[115] .

218. On July 13, 2022, Onati informed Viti by letter of its refusal to modify the tariff, confirming that it was divided equally between the three operators and determined on the basis of the cost of mobile network coverage in the remote archipelagos. Consequently, in a letter dated August 30, 2022, Viti informed Onati that it was terminating the roaming service in the remote archipelagos with effect from November 1er 2022, which Onati acknowledged in a letter dated September 22, 2022. As of November 1er 2022, Viti no longer offers its customers roaming in the 46 islands of the remote archipelagos.[116]

219. On October 3, 2022, shortly after Onati's letter of September 22, 2022, Viti applied for precautionary measures. Consequently, contrary to Onati's assertion, the latter had constantly sought to obtain a tariff reduction and could legitimately believe that it was in a position to do so, as had been the case over the previous three years (with the tariff reductions granted by the second and third endorsements and repeated in the subsequent endorsements).

➢ ***With regard to the new nature of the situation***

220. For the first three years of its cell phone business, Viti benefited from reduced roaming charges (75% for the first two years and the first half of the third year, and 25% for the second half of the third year). Following numerous

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[113] ADLC, Decision No. 14-MC-02 of September 9, 2014 on a request for interim measures submitted by Direct Energie in the gas and electricity sectors.

[114] See appendices 2-1, 3 and 4 attached to the Viti referral of October 3, 2022.

[115] See appendix 12 attached to Viti's referral of October 3, 2022.

[116] See appendices 13, 15 and 16 attached to the Viti referral of October 3, 2022.

amendments to the tariff conditions, which took Viti's situation into account, Viti could expect Onati to modify its tariff conditions until the sixth amendment of October 21, 2022. As mentioned above (§30), it is therefore only from January 8, 2023, when roaming charges come into force for the first time without any reduction in tariffs, that the practices are likely to have their full effect, without any downward trend being foreseen in the short term.

221. Although Onati argues that the increase in roaming charges between 2022 and 2023 is *ultimately* only 29.4 MF, this additional amount for fixed roaming charges in the AEs still represents 42% of Viti's total mobile business revenues in 2022 and 25% of those forecast for 2023, and above all, it comes against a backdrop of falling roaming charges overall and a concomitant reduction in bundle tariffs and therefore in operators' expected revenues (average revenue per user). Its effect on Viti's financial leeway is therefore significant.

222. Consequently, even if the decision to give up these roaming services is the result of a decision by Viti, it establishes that it was forced to give up these roaming services from November 1er 2022. This is a new factor, and it is from this date that Viti runs the risk of being excluded from the market, since it necessarily deprives itself of the possibility of addressing a significant part of the population, i.e. those living in the AEs and those likely to visit them. In any case, the sixth amendment proposed by Onati in its letter of October 21, 2022 presents Viti with an alternative, the two branches of which are likely to harm the interests of the sector, consumers and Viti.

- ***Regarding the immediacy of effects***

223. In a decision also relating to the telephony sector, the ADLC considered that "*the obligation imposed on France Télécom, as 'an operator exercising a significant influence on the fixed telephony retail market', to grant justified requests for access and special access from telecommunications service providers under objective, non-discriminatory and transparent conditions, and at rates reflecting the costs of the service rendered, introduced by order no, introduced by Order no. 2001-670 of July 25, 2001, has clearly not been complied with, thereby running the risk of excluding this type of competitor and, consequently, facilitating France Télécom's acquisition or maintenance of a dominant position on the relevant market, through practices that do not reflect competition on the merits ; that such practices, and their consequences, send signals to potential investors that are likely to discourage investment in this sector for several years; that, consequently, they seriously undermine the process of opening up the telecommunications markets to competition, and must be stopped*".[117]

224. The practices implemented by Onati are likely to crystallize the market shares of each of the operators, and even increase those of Onati and PMT, by preventing Viti from offering the same services as its competitors. In this context, they are likely to prevent Viti from obtaining, whatever its own merits, its share of the revenue and growth potential, as it is unable to win over the captive customers of the two incumbent operators. These effects primarily concern customers on remote islands (12% of the population, but 56 of the 66 islands with access to telephony services), but also the most mobile customers (individuals and businesses) and all customers likely to travel there and therefore wishing to opt for a package covering the whole territory, who often have the particularity of opting for more abundant offers and often present a higher average revenue per customer (ARPU).

225. However, Viti is at a critical point in its development. Its activity has been greatly reduced in 2020 and 2021 due to the health crisis, and it is now in its second year of useful deployment. It is therefore essential that it be able to challenge the position of existing operators as quickly, effectively and fairly as possible, in order to guarantee the maintenance of a higher degree of transparency.

[117] Decision no. 01-MC-07 of December 21, 2001 concerning a referral and a request for precautionary measures presented by Kosmos.

competition in the Polynesian mobile telephony market. Otherwise, it risks being squeezed out of the mobile telephony market.

226. Viti also pointed out at the meeting, and confirmed in its note for deliberation[118] , that it won only 39 new customers in January 2023 and 72 in February 2023, whereas the number of new customers averaged 135 per month in 2022, and in particular 136 in January 2022 and 133 in February 2022, i.e. more than double[119] , when it was still offering roaming in the AEs (until November). After sustained growth in November and December 2022, which Viti attributed in the meeting to the effect of the end-of-year festivities, the effects of the practices on the development of its customer base would therefore already be effective.

227. There is therefore an urgent need for Viti to regain access to roaming services for the entire Polynesian market at a reasonable rate.

228. It follows from all of the above that an emergency situation exists, and that Onati's practices, which are likely to distort "*effective and fair* competition *between operators*" as required by article D. 212.2 of the French Post and Telecommunications Code, should be brought to an end for the benefit of Polynesian users.

c. ON CAUSALITY

229. The application of a high flat-rate roaming charge, as expressed by the fifth and sixth recitals, captures a significant proportion of Viti's revenues, leaving the company with the choice between paying it at the expense of its investments and network deployment, or foregoing these services at the expense of customer development. This amounts to depriving French Polynesia of the benefits of a third operator, and customers of a real choice, while also jeopardizing Viti's own business.

230. Onati explains that it is Viti's unrealistic business plan, and not its own conduct, that is at the root of its slow development.[120] However, as explained above, Viti's weak development is rooted in the health crisis. What's more, a business plan dating back to 2016 is of little relevance in assessing Viti's competitive position seven years later.

231. Onati maintains that Viti has no intention of expanding, as it has never requested access to the most dynamic segment of the market, mobile data access. However, it appears that the reduction of voice and SMS roaming tariffs and the billing of mobile data access on an equivalent basis - depending on the number of users - would probably have the effect of enabling Viti to make use of such services.

232. As can be seen from the foregoing, the potentially anti-competitive practices complained of are therefore the direct and certain cause of the serious and immediate harm to the interests of the sector, consumers and the company, justifying the issue of precautionary measures.

d. CONCLUSION

233. The practices denounced, which consist in refusing to grant Viti a roaming agreement under fair and non-discriminatory tariff conditions, are designed to protect the customer base of the dominant operator and its main competitor (PMT) from the competitive pressure of the latest entrant. They limit competition in the retail market for mobile phone services.

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[118] Note for deliberation dated March 13, 2023.

[119] Onati comments no. 2, January 27, 2023, page 5.

[120] Onati, observations n°1 of November 30, 2022, pages 14 to 21.

mobile telephony, irrespective of the efficiency of operators[121] , at a critical time for Viti's development.

234. In addition, the fifth and sixth amendments, insofar as they deny Viti recourse to other methods of determining the cost of cover (e.g. based on variable costs) and no longer provide for a tariff reduction as from January 8, 2023 (and a significant reduction as from July 8, 2022), are likely to amplify the effects of these practices and lead to Viti being driven out of the market in the short term.

235. The conditions required by jurisprudence for the issue of precautionary measures are therefore met, given the seriousness of the effects of the practices on the sector, consumers and Viti.

2. THE NATURE OF PRECAUTIONARY MEASURES

236. Under the terms of the third paragraph of article LP 641-1 of the French Competition Code, precautionary measures, which "*may include the suspension of the practice concerned and an injunction to the parties to return to the previous state*", without these possibilities being limitative, must also These measures must "*remain strictly limited to what is necessary to deal with the emergency*". To this end, the Autorité can "*take the interim measures requested*" or measures other than those requested ("*those it deems necessary*"). It is therefore not bound by the measures requested by the referring party, and has the power to order any measure it deems necessary and proportionate.

237. These measures can only be taken in respect of the companies concerned, and are provisional in nature, pending a decision on the merits of the case.

i. With regard to roaming tariff conditions

238. The present decision has established that the tariff conditions imposed by Onati in its fifth rider and then in its proposal for a sixth rider (letter of October 21, 2022), in particular from July 8, 2022 (tariff reduction reduced from 75% to 25%) and from January 8, 2023 (end of tariff reduction), are likely to fall within the scope of several anti-competitive practices and in particular:

- constitute a price squeeze, since it is impossible for Viti, with such prices, to propose retail offers as competitive as its competitors without incurring significant losses;
- be qualified as discriminatory, given that at the same stage of its development PMT had more favourable tariffs for equivalent services and today pays an identical tariff for much greater actual use of the roaming network;
- be qualified as unfair, since the pricing of network costs - determined according to a maximalist cost method and in three equal parts between operators, without taking into account the number of users and the operators' market shares - leads Onati to charge Viti a tariff that is much higher than the cost of the service actually provided.

239. In order to remedy the serious and immediate prejudice and restore effective competition, it appears that Onati should propose new roaming conditions in the AEs to Viti. It is not the role of the Autorité to set tariffs freely negotiated between operators. However, any new tariff proposal must be based on transparent, objective and non-discriminatory conditions.

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[121] In the aforementioned precautionary measures decision no. 09-MC-02 of September 16, 2009, the ADLC considered that "*the artificial reduction in Outremer Télécom's ability to win new customers, particularly from SRR, artificially reduces the future prospects of this operator, independently of its efficiency. SRR's practices are thus hindering the development prospects of this new entrant, which could consequently jeopardize certain planned investments (notably in 3G networks), the profitability of which can only be envisaged with a market share significantly higher than that currently held by Outremer Télécom*" (§85).

and oriented towards the costs actually incurred by Onati in providing this service to the roaming customer. This is a prerequisite for real competition in the relevant market, and is necessary to deal with the urgency of the situation.

240. In this case, the new pricing proposal will have to take into account the number of actual users of the service, which is currently very low for Viti. Onati is responsible for determining the actual price, but particular attention will need to be paid to this parameter and its consequences on the choice of pricing. While it is not out of the question that part of the tariff should correspond to Onati's fixed costs, this contribution should not extend beyond the share of Onati's customers who would switch to the other operator's offers (the marginal cost of use, a function of call time, being already covered by the variable cost).

241. With regard to the measures that may be proposed, the French Competition Council has already forced France Télécom to create a wholesale offer for its competitors, ordering it "*to propose to third-party operators, within a maximum period of eight weeks from notification of this decision, a technical and commercial offer for access to the permanent virtual circuit for the provision of high-speed Internet access using ADSL technology, or any other equivalent technical and economic solution enabling third-party operators to compete effectively, both in terms of price and the nature of the services offered*"[122] . In another case, it forced France Télécom to make the tariffs for a service not covered by the interconnection regime cost-oriented, by ordering it to
"direct the rates it charges for the collection of telephone traffic emanating from its fixed public switched telephone network in mainland France and destined for the special numbers of its telecommunications service provider customers under article L. 34-2 of the French Post and Telecommunications Code, such as Kosmos, for their public code card services, towards the costs it incurs in providing this service"[123] .

242. It seems proportionate to give Onati sufficient time to construct a pricing proposal that respects the principles set out above. In its decision-making practice in similar cases, the ADLC has ordered the dominant operator to propose a new offer within eight weeks of the adoption of the decision. In the present case, the Authority considers a period of ten weeks to be appropriate. However, in order to restore effective conditions of competition as quickly as possible, it seems necessary to grant Viti the possibility of roaming in the AEs as soon as possible. To this end, without waiting for Onati to be in a position to propose a new roaming offer, it seems appropriate to revert to the conditions offered to Viti between January 8, 2020 and July 7, 2022, which provided for *"taking into account Viti's low start-up market share in the mobile telephony sector"*[124] a 75% discount on the amount of the calculated coverage tariff.

243. The Authority therefore considers it appropriate to order Onati to :

a. offer Viti the conditions for reducing the calculated amount of roaming charges that were offered to Viti between January 8, 2020 and July 7, 2022, within two weeks of the date of adoption of this decision;

b. propose and negotiate in good faith within ten weeks of the date of adoption of this decision new conditions for roaming in the AEs to Viti. This new tariff proposal must be based on transparent, objective and non-discriminatory conditions, and oriented towards the costs actually incurred by Onati in providing this service to Viti. In particular, it must take account of the operators' respective market shares and/or the number of users.

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[122] Conseil de la concurrence decision no. 00-MC-01 of February 18, 2000 relating to a request for interim measures submitted by 9 Télécom Réseau.

[123] Decision no. 01-MC-07 of December 21, 2001 concerning a referral and a request for precautionary measures presented by Kosmos.

[124] This reduction, explicitly justified by Viti's low market share, was provided for in tariff amendments no. 3 of August 18, 2021, no. 4 of January 18, 2022 and no. 5 of March 28, 2022.

of the service, including that part which may cover the host operator's fixed costs.

244. Such a measure appears proportionate to the seriousness and immediacy of the infringement, allowing Viti rapid access to the segment of the retail market from which it is excluded, and is the most user-friendly way of putting an end to structural discrimination likely to affect the market.[125]

ii. With regard to monitoring injunctions

245. Where precautionary measures are concerned, follow-up mechanisms can be put in place. They are all the more necessary in this case, as the injunction is not intended to set a price for the roaming service, but rather to commit the parties, and Onati in particular, to negotiations in good faith. In a similar case, a mechanism was imposed on Google as part of its negotiations with press publishers.[126]

246. In this case, in order to monitor the implementation of the injunctions, which depend in particular on Onati's good faith in conducting the negotiations, it would appear useful to provide for a mechanism to monitor compliance with the injunctions. Accordingly, Onati will be required to provide the Authority with a methodological progress report no later than four weeks after notification of this decision, followed by a second report within ten weeks of implementation of the injunctions, and a third report within fifteen weeks on the state of negotiations with Viti.

247. These three reports must include, in particular, a detailed description of both the variable and fixed portions, if any:

- the implementation of the roaming offer under the tariff reduction conditions in force until July 7, 2022;
- the methodology used to determine the new tariff, and in particular to ensure consistency between the costs charged and the size of the host operator;
- the calculation elements on which the tariff proposal is based and, in particular, with regard to network costs, the infrastructure base used to determine coverage costs, the prorata allocated to voice and SMS usage only, the cost base used to determine the amount of the fixed portion (CAPEX, OPEX and cost of capital), justification of the amount of investments, the duration and methods of amortization used, justification of the annual amount of this amortization and the annual operating cost of the infrastructure;
- any other element enabling the objective, transparent and non-discriminatory nature of this proposal to be assessed;
- details of any negotiating difficulties encountered with Viti.

248. Onati will notify the Authority of the roaming agreement finally concluded with Viti, together with the descriptions required in the previous paragraph.

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[125] See, for example, decision no. 14-MC-02 of September 9, 2014 concerning a request for protective measures submitted by Direct Energie in the gas and electricity sectors*: "in a decision of April 9, 2002 (....) considered that the protective measures* granted *by the Competition Council "appear proportionate to the seriousness and immediacy of the infringement, in that they are the only means of putting an end to structural discrimination likely to affect operators and the market, and in that they are limited, in the case of the measure provided for in Article 1, to the strict restoration of equality between ISPs".*

[126] Decision no. 20-MC-01 of April 9, 2020 concerning requests for protective measures submitted by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale e.a. and Agence France-Presse.

DECISION

Article 1er : As a precautionary measure and pending a decision on the merits of the case, Onati is hereby enjoined to propose to Viti, within a maximum period of ten weeks from notification of this decision, a tariff offer for access to voice and SMS roaming in the islands of the "distant archipelagos" in which it has deployed a mobile telephony network enabling Viti to exercise effective competition. In particular, the tariff offer must be formulated in good faith, i.e. be based on the costs actually incurred by the operator to provide the service for which use is requested, be justified by transparent and verifiable accounting elements, and take into account the size of the host operator and in particular the number of users of the service, including for the coverage of fixed network costs, in the assessment of its fair and non-discriminatory character. Pending acceptance of the tariff offer by both parties, Onati will apply to Viti, to take account of its small market share, the discount on the coverage tariff implemented between January 8, 2020 and July 7, 2022.

Article 2: Onati will send the Authority reports on the implementation of the measures ordered in the previous article, no later than four, ten and fifteen weeks from notification of this decision. It will notify the Authority of the roaming agreement finally concluded with the company Viti.

Deliberated on the oral report by Antoine Callot, Deputy General Rapporteur, by Henri Piffaut, Chairman of the meeting, Aline Baldassari and Marie-Christine Lubrano, members of the College.

The Chairman

Henri Piffaut