[FREE TRANSLATION]

NOTICE N°2024-AO-05 OF JULY 29, 2024

ON A DRAFT COUNTRY LAW AMENDING BOOK I OF THE COMPETITION CODE AND RELATING TO PRICE FRAMING FOR CERTAIN PRODUCTS AND SERVICES BENEFITING FROM A SPECIAL TAX OR CUSTOMS REGIME

The Polynesian Competition Authority,

In view of the letter dated July 08, 2024, registered on July 09, 2024, under number 24/0020 A, by which the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter "**the Authority**") for an opinion on a draft law of the country amending Book I^{er} of the Competition Code;

Having regard to the Polynesian Competition Code, and in particular Article LP. 620-2 ;

Having regard to the other documents in the file;

The rapporteur, the deputy general rapporteur, the general rapporteur and the representatives of the Direction Générale des Affaires Economiques (hereinafter "**DGAE**") heard on the basis of the provisions of article LP. 630-5 of the French Competition Code at the meeting of July 29, 2024;

Is of the opinion to respond to the request presented in the sense of the following observations:

INTRODUCTION

1. By letter dated July 8, 2024, registered on July 9, 2024 under number 24/0020 A, the President of French Polynesia referred to the Polynesian Competition Authority for an opinion on a draft law du pays amending Book I of the French Competition Code.

2. The referral refers in particular to the provisions of article LP 620-2 of the French Competition Code, which stipulates that "[t]he *Authority must be consulted by the President of French Polynesia on any draft law or deliberation, and by the President of the Assembly of French Polynesia on any draft law or deliberation which institutes a new system having the effect of: (...) 3° Imposing uniform pricing practices or conditions of sale*".

3. In addition, Article II provides that the Authority "*shall have a period of one month in which to give its opinion (...) this period shall be reduced to fifteen days in the event of an emergency declared by the institution which referred the matter to it*". In the case in point, the President of French Polynesia invoked the urgency procedure, extending to July 23, 2024 the date by which the Authority must deliver its opinion. After requesting an extension of the deadline, the date by which the Authority must deliver its opinion was finally set at July 31, 2024.

4. The Autorité notes that the reasons for using the emergency procedure are not specified. It regrets the use of this procedure for this bill, which has been in preparation for several months and is likely to have a major impact on the competitive operation of markets and businesses. The use of the emergency procedure deprives the Polynesian government not only of a more detailed examination by the Authority, but also of sufficient time to study its recommendations. In future, the Authority recommends that it be involved in the preparatory work at an earlier stage.

Recommendation:

1. **Involve the Polynesian Competition Authority in the preparatory work for draft legislation likely to have a major impact on the competitive operation of markets and businesses.**

5. The draft country law submitted to the Authority for review is intended to give the Council of Ministers the power to set maximum selling prices for certain products and services benefiting from special tax or customs regimes. To this end, it amends the French Competition Code.

6. After a presentation of the main provisions of the draft law (**I.**), the effects of the new provisions on competition will be examined (**II**.).

I. THE DRAFT LAW OF THE COUNTRY SUBMITTED TO THE EXAMINATION BY THE

7. The explanatory memorandum details the reasons behind the draft law submitted to the Authority for consideration. To date, there are numerous tax and customs regimes applicable to certain products and services, the ultimate aim of which is to "*preserve consumer purchasing power or promote the country's economic and social development*". However, the explanatory memorandum points out that "*it is impossible to guarantee the effectiveness of these regimes, particularly their impact on the intended beneficiary, as products and services benefiting from special tax or customs regimes can, for the most part, be resold at free prices*".

8. With this in mind, the country's draft law amends the Competition Code and introduces a new system for regulating the prices of certain products and services benefiting from special tax or customs regimes. The aim of this new measure is to "*ensure the effectiveness of the benefits expected from a special tax or customs regime*".

9. The bill under review is structured around three articles, which will be examined in turn:

- Article LP. 1: introduces the possibility for the Council of Ministers to derogate from article LP. 110-1 of the French Competition Code, enabling it to set the conditions under which the maximum sale price, inclusive of all taxes, of a product or service benefiting from a special tax or customs regime is established;
- Article LP. 2: establishes the penalties applicable in the event of non-compliance with the provisions set out in this draft text;
- article LP. 3: provides for the entry into force of the loi du pays.

A. PROVISIONS RELATING TO PRODUCTS OR SERVICES BENEFITING FROM SPECIAL TAX OR CUSTOMS TREATMENT

10. Article LP. 1 supplements Title I^{er} of Book I of the French Competition Code, by inserting, following Chapter II, a new Chapter *II-bis* entitled "*Provisions relating to products or services benefiting from a special tax or customs regime*", comprising three articles numbered as follows:

- article LP. 112-6 derogates from the principle of price freedom set out in article LP. 110-1 of the French Competition Code, and introduces a new price control measure for products or services benefiting from special tax or customs regimes. The second paragraph of this article extends the scope of application to products resulting from one of the processes referred to in II of article LP. 100-2 of the French Competition Code, made from products benefiting from a special tax or customs regime. This includes processes that do not constitute genuine transformation, such as sorting, packaging, cleaning, labelling, changing packaging, etc. As stated in the explanatory memorandum, the aim is to prevent professionals from evading price control obligations by making minor changes to the products concerned (e.g. repackaging products).
- Article LP. 112-7 obliges the professional who receives an order for a service to indicate on his quotation, in a separate line, the use of each product or the performance of each service, the maximum price of which is governed by article LP. 112-6. These separate

lines must contain a precise description of each product or service concerned, as well as its unit price.

- Article LP. 112-8 lays down the same obligations for any invoice issued to a professional or any note issued to a consumer, once the service has been provided.

B. SANCTIONS APPLICABLE IN THE EVENT OF NON-COMPLIANCE WITH THE PROVISIONS OF THE DRAFT COUNTRY LAW

11. Article LP. 2 amends article 113-4 of chapter III of the French Competition Code relating to sanctions.

12. A new point 3° is inserted after 2°, stipulating that the penalties laid down in article LP. 410-2 of the French Commercial Code shall be imposed for failure to comply with the obligation to include, on every invoice, a separate line for each product or service for which the maximum price is limited, and which has been used or provided during the performance of the invoiced service.

13. After 3°, article 113-4 is supplemented by a large II. stipulating that an administrative fine of up to 500,000 F CFP for a natural person and 3,000,000 F CFP for a legal entity shall be imposed for :

> 1° failing to comply with the obligation to include in any quotation, given to a consumer, professional or non-professional, a separate line for each product or service whose maximum price is framed and which will be used or performed during the execution of the service ordered.
>
> 2° failing to comply with the obligation to include a separate line in any bill given to a consumer or non-professional for each product or service for which the maximum price is set and which has been used or carried out during the performance of the service invoiced.

C. THE NEW SYSTEM TAKES EFFECT

14. Article LP. 3 provides for the provisions of the present law to come into force on the first day of the second month following its promulgation.

II. COMPETITIVE ANALYSIS

15. When it is asked to give an opinion on a draft text, the Authority endeavors to assess the extent to which the text's provisions restrict or improve the competitive operation of the sector concerned. As it has already had occasion to point out, "*a competitive market optimally allocates available resources, maximizes consumer welfare and boosts the competitiveness of the sector concerned, by encouraging innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor of productive and allocative efficiency*"[1] . Nevertheless, competition is not an end in itself; it is a tool in the service of this economic efficiency.

16. Normative texts very frequently respond to concerns of general interest that go beyond competition, and involve intervention by public authorities that has an impact on the functioning of the economy. In these circumstances, the role of the Autorité is to inform the government and the Assembly of French Polynesia of the effects on competition of the public intervention envisaged, and to recommend to them, where appropriate, the measures to be taken to achieve the best possible balance between general interest objectives and economic efficiency.

17. The present draft law creates a new chapter ("*Chapter II-bis - Provisions relating to products or services benefiting from a special tax or customs regime*") within the Competition Code, with a view to offering a new possibility for controlling the prices of a certain number of products and services "*benefiting from a special tax or customs regime*" in French Polynesia.

18. The Authority will therefore first consider the relevance of a new category of regulated prices, taking into account the existing alternatives (**A**.). It will then determine whether the regulations in question are likely to affect competition on Polynesian markets, and whether there is a general interest likely to justify such effects (**B.**). The analysis will then focus on whether the restrictions in question are in line with the general interest objective pursued (**C.**), and on the risks associated with public authorities setting prices and margins (**D.**). Lastly, the Authority will analyze the system of sanctions provided for in the draft text (**E.**), as well as the evaluation of price regulation mechanisms (**F.**).

19. This analysis will be accompanied by proposals for measures that are less harmful to competition.

[1] See, in particular, opinion no. 2024-A-04 of May 30, 2024 on a draft law on sectoral energy regulation.

A. ON THE RELEVANCE OF A NEW CATEGORY OF REGULATED PRICES IN LIGHT OF EXISTING CHOICES

20. The Polynesian Competition Code provides for a number of mechanisms enabling the Council of Ministers to control prices in order to pursue a number of general interest objectives, such as combating high living costs or, more generally, promoting the economic and social development of French Polynesia. The Authority therefore questions the need to create a new price-control regime, and the risk of redundancy with existing regimes.

21. As a reminder, the Council of Ministers can regulate prices by taking temporary or permanent measures.

22. Article LP. 110-1 of the French Competition Code provides that the Council of Ministers may take this type of measure "*to counter the risk of excessive price rises or falls, for a period not exceeding six non-renewable months, motivated by a crisis situation, exceptional circumstances, a public calamity or a manifestly abnormal market situation in a given sector*". By way of example, as part of the fight against the high cost of living, the Council of Ministers adopted a measure[2] aimed at blocking the revision of rents in rental contracts, for a period of six months, between February 2024 and August 2024.

23. Article 110-1 provides for two derogations to price freedom, concerning (i) price regulation in sectors or areas where price competition is limited "*due to situations of monopoly or oligopoly, lasting supply difficulties or commercial under-equipment. "*and (ii) temporary price regulation "*to counter the risk of excessive price rises or falls, the duration of which may not exceed six non-renewable months, motivated by a crisis situation, exceptional circumstances, a public calamity or a manifestly abnormal market situation in a given sector*".

24. Article LP. 110-2 of the French Competition Code adds new derogations to enable the Council of Ministers to regulate maximum sales prices from a non-exhaustive list:

- basic necessities (**PPN**);
- consumer **goods** and services; and finally
- products or services required for the economic and social development of French Polynesia.

25. These are non-exhaustive lists of products and services required for day-to-day household use, for personal health or to combat natural disasters (PPN), products and services normally used by households in everyday life (PGC), or products and services required for economic and social development, such as inter-island freight, hydrocarbons, port handling, and so on. To date, the DGAE specifies that these two lists contain 36 PGCs and 57 PPNs respectively.

26. Article LP. 110-3 allows the Council of Ministers to introduce a system of controlled price freedom, by *"subjecting the evolution of the prices of these goods or services to compliance with a defined calculation formula or to administrative approval*", when this measure is necessary to protect the purchasing power of users, the economic development of French Polynesia or the correction of disparities linked to the remoteness of the archipelagos. This mechanism is used in certain sectors to remedy sharp price rises for certain products or services (for example, residential rent reviews are now subject to the index for private rents)[3] .

27. Article LP. 110-4 also provides for the possibility of French Polynesia signing a price moderation agreement with a professional organization or group of companies representing a

[2] Order no. 235 CM of February 29, 2024 concerning the temporary freeze on rent increases for certain leases.

[3] Compte rendu du Conseil des ministres du 26 juin 2024.

branch or sector of activity. This mechanism would be applied in "*the automotive after-sales sector, where agreements with dealers have formalized several price moderation agreements for automotive parts, making it possible to limit the overall marketing margin for certain spare parts*"[4] .

28. In addition to these general provisions, there are also various sector-specific price regulations, such as regulated prices in the healthcare sector, for regulated professions, and so on.

29. The Authority questions the advisability of creating a new category of regulated prices to add to the many other legal price-control regimes described *above*, when it seems possible, *a priori,* to control prices, under constant law, by adding new products and services to the list of PPN, PGC, or by acting through the other instruments listed *above*. In its opinion *Conditions d'encadrement des prix* de 2022, the Autorité stressed the particularly broad scope of the proposed definition of PGCs, "*which leaves the Council of Ministers free to include goods and services, even where there is no need to do so*"[5] .

30. When asked how this new measure would fit in with other existing price regulation schemes, the DGAE indicated that the logic behind the creation of this new regulated price category is different from that of other regulated price schemes, such as PPN and PGC: "*There will be no cumulation of the two schemes, it is because the products are part of the PPN list that they are exempted (the country wants low prices, so exemptions are granted downstream). Conversely, for this measure, it is because the products benefit from a tax/customs exemption that their price must be regulated*". However, this explanation does not, in itself, appear to provide any justification for the creation of a new scheme, nor does it justify the absence of recourse to schemes currently in force and available to the government.

31. In addition, the Authority notes that the bill does not provide for any time limit on regulated prices, whereas a number of exemptions are granted on a temporary basis (for example, the exemption for building materials is extended for one year). As a result, it will be important to ensure that price regulation expires at the same time as the end of the tax or customs exemption.

32. In view of the above, the Authority considers that there is no need to create a new tool in the already extensive arsenal available to the Council of Ministers, enabling it to derogate from the principle of price freedom.

Recommendations:

2. **Consider using existing legal categories enabling the Council of Ministers to derogate from price freedom, rather than creating a new legal category for price regulation.**

3. **Provide that the administration's power to set the regulated price may not exceed the lifetime of the tax or customs exemption to which it relates.**

4. **Provide for a limited lifespan for measures aimed at regulating prices or margins, even for permanent tax or customs exemptions.**

[4] Report no. 59-2022 of June 17, 2022 of the Assembly of French Polynesia on the draft law of the country relating to the conditions for regulating the prices of certain products or services and amending the legislative part of Book I of the Competition Code.

[5] Opinion no. 2022-AO-01 cited above, § 118.

B. ON THE EXISTENCE OF A GENERAL INTEREST CAPABLE OF JUSTIFYING THE RESTRICTIONS IN QUESTION

33. In French Polynesia, the first paragraph of Article LP 110-1 of the Competition Code establishes the principle of price freedom: "*the prices of goods, products and market services are freely determined by competition*". This principle of price freedom is one of the elements of freedom of enterprise and freedom of contract, principles with constitutional value deriving from article 4 of the 1789 Declaration of the Rights of Man and of the Citizen. However, the French Competition Code immediately tempers this principle by providing for a number of derogations to price freedom.

34. The new article LP. 112-6 provides for a new derogation to the principle of price freedom, by introducing a new price control measure for products or services "*benefiting from a special tax or customs regime*". The second paragraph of this article extends the scope of application to products resulting from one of the processes not constituting a "*transformation*" within the meaning of II of article LP. 100-2 of the French Competition Code, such as sorting, packaging, cleaning, labelling, changing packaging, etc.

35. By creating a new exception to price freedom, the bill directly undermines entrepreneurial freedom. It is therefore important to ensure that this new restriction on the freedom of companies to set their prices and margins is the subject of a particularly precise and detailed justification of the general interest pursued.

36. The explanatory memorandum to the bill states that "*the present initiative* is *aimed at contributing to the economic and social development of French Polynesia*"[6] . According to the text's sponsor, the DGAE, the genesis of the text stems from reflections aimed at identifying "*new ways of combating the high cost of living in Polynesia*". At the meeting, the Government Commissioner also stated that the aim of the bill was to combat the high cost of living.

37. Nevertheless, the new article LP 112-6 states that the aim of this new category of regulated prices is to ensure the "*effectiveness of the benefits expected from a particular tax or customs regime*", and the draft text is likely to undermine the principle of free competition on several markets in French Polynesia, by removing a fundamental parameter of market competition, namely the free setting of prices and/or margins by companies.

38. Indeed, the DGAE has indicated that the ambition of the bill is to ensure that "*the effort made by the government in the case of a particular tax or customs exemption is passed on to end customers*". The Authority therefore understands that the effectiveness of a tax or customs exemption measure, within the meaning of the bill, must be understood in terms of the moderation of prices charged by the importer or distributor in question, which must result in a stable or falling price for the end customer.

39. This bill is said to have been prompted by the administration's repeated observation that tax and customs exemptions granted to operators in the Polynesian value chain, such as importers and distributors, were not "*passed on by the latter in their sales prices*", even though these exemptions had been granted to encourage lower prices.

40. Unlike the general interest objectives pursued by the other price regulation provisions, the general interest objective pursued does not concern the "*impact on household budgets*"[7] or the "*economic development of French Polynesia*"[8] or the "*correction of disparities linked to the*

6 Explanatory memorandum, p. 2.

7 Article LP 110-2 of the French Competition Code.

8 *Idem.*

remoteness of the archipelagos"[9] but the "*effectiveness of the benefits expected from a tax or customs regime*".

41. In this respect, it may be recalled that the Conseil d'État recognized, in its decision *Fédération générale du commerce de la Polynésie* française of December 9, 2022[10] , that the objectives pursued by the country's law introducing PPNs and PGCs constituted reasons of general interest: "[u]*nder these circumstances, consumer protection and economic and social development constitute reasons of general interest*. Similarly, in its 2022 opinion, the Autorité also considered that the objectives pursued by the regulations on PPNs in French Polynesia constituted general interest objectives[11] .

42. Conversely, the Authority questions whether the "*effectiveness of the benefits expected from a tax or customs regime*" constitutes an objective of general interest sufficient to justify infringement of the principle of freedom of pricing, which derives from principles of constitutional value.

43. It is clear from the foregoing that the objectives pursued by the provisions of this bill are not clearly defined.

44. The Authority deplores the fact that, having found that existing measures have failed to meet their intended objectives, the country is now seeking to correct the ineffectiveness of these measures by introducing new restrictive measures, without first reassessing the initial measures and their operation in order to ensure that they meet their original objectives.

45. While the DGAE stated at the meeting that it regularly conducts audits of certain systems (notably PPN and PGC), the Authority regrets that these are not made public, and recommends that these initiatives be expanded to serve as a reliable basis for analysis and political decision-making.

46. The introduction of existing tax support measures has had perverse effects, including the establishment of rent situations through margin capture. Rather than balancing these measures against their perverse effects, the bill runs the risk of extending these rent-seeking situations, with no guarantee of achieving the advanced objectives of general interest, at the risk that these additional restrictions on competition will be offset by circumvention measures (such as compensation through higher prices for other products) that players with a certain capacity will be able to implement, and at the risk of suffocating smaller players who will not be able to counterbalance them with such circumvention measures[12] .

Recommendations:

5. **Reassess existing systems before introducing new measures that restrict entrepreneurial freedom and free competition.**

6. **Publish the audits and other assessments carried out by the DGAE on existing schemes, and develop them further so that they can serve as a reliable basis for analysis and political decision-making.**

[9] *Idem*.

[10] Conseil d'État, December 9, 2022, *Fédération générale du commerce de la Polynésie française*, No. 466687, §. 5.

[11] Opinion n°2022-AO-01 of March 29, 2022 on a draft law of the country relating to the conditions for regulating the prices of certain products and services and amending the legislative part of Book I of the Competition Code, § 115 to 117.

[12] The DGAE said at the meeting that it could not rule out such a risk, and confirmed that it had observed offsetting effects in the case of PPN and PGC.

C. ON THE ADEQUACY OF THE RESTRICTIONS AT ISSUE IN RELATION TO THE GENERAL INTEREST OBJECTIVE PURSUED

47. The potential scope of this new bill covers all "*products or services benefiting from a special tax or customs regime*" contained in the French Tax Code and in the customs nomenclature of French Polynesia, provided that these exemptions are attached to specific products or services and that the products or services in question fall within the scope of economic activities. It will then be up to the Council of Ministers to determine the list of products and services that may be subject to price controls. In this respect, the Authority understands that the term "*special tax or customs regime*" is to be understood here as a tax or customs exemption granted by the country to an economic operator.

48. The products and services concerned do not appear to be precisely defined by the bill. The DGAE itself has stated that it has no visibility on which products or services (current and future) will be affected by these price control measures. The Authority understands that it will be up to each administrative department to identify the products and services benefiting from tax or customs exemptions, and for which the country's financial effort is deemed to have been insufficiently passed on to local businesses or the end consumer, although the bill does not provide any details on the definition of "insufficient". The implementing decrees were not available at the time of the Authority's referral. In the absence of detailed objective criteria for determining which products will be included, the Autorité notes a risk that inclusion decisions may be discretionary.

49. Similar to the PPN and PGC lists, this new list of price-regulated products and services will be an open list, subject to revision at the discretion of the Council of Ministers over time. This list is bound to evolve as the system develops, without being subject to an opinion from the Autorité.

50. However, the DGAE, the body responsible for the text, has specified that the choice of products and services to be targeted will be based on the identification of excessive selling prices. The Authority therefore understands that the price regulation of a given product or service must be read from a double angle, which is not apparent in the current wording of the draft text, i.e. both (*i*) the existence of a tax or customs exemption relating to a given product or service, and (*ii*) a selling price for the latter which will be deemed excessive by the administration.

51. The Authority questions the decision not to include these two interpretation keys in the bill. As the text is currently drafted, there is still a degree of discretion in identifying the products and services concerned, particularly as regards the excessive nature of a given selling price or the "performance" of tax or customs exemptions.

52. As currently drafted, the scope of application is therefore potentially very broad, while leaving the administration considerable discretion as to which products and services are covered.

53. As a result, there is a significant risk that the scope of application of these measures may not be valid. It should be remembered that the Constitutional Council ruled that the New Caledonian legislature had defined an insufficiently precise scope for provisions affecting entrepreneurial freedom: "*the country's legislature has allowed an indeterminate number of products or*

services, other than basic necessities or mass consumption items, to be subject to regulation, on the sole grounds of their impact on household budgets"[13] .

54. Furthermore, at this stage, no inventory of the measure's scope of application has been carried out, and even less so a study of the measure's impact on the sectors concerned.

55. However, the categories of products and services potentially concerned by the new bill are characterized by their great heterogeneity, evolving in line with current customs and tax exemptions, such as, for example, various building materials, hybrid and electric vehicles, photovoltaic panels, etc. benefiting from tax or customs exemptions.

56. In addition, it appears that the motives put forward by the decrees providing for tax or customs exemptions are manifold: to reduce the impact of certain consumption habits on the environment, to promote the energy transition, or to encourage companies to adopt a particular behavior (e.g. choosing to import one type of product rather than another, etc.).

57. These decrees rarely state that their aim is to maintain or even reduce sales prices. For example, the exemption from certain taxes applicable to hybrid and electric vehicles was introduced "*to encourage Polynesians to acquire hybrid and electric vehicles in order to promote a fleet of clean, low-carbon vehicles*", with no mention of a desire to maintain or lower prices thanks to this exemption[14] . Similarly, the measure to exempt certain building materials from import duties and taxes was adopted in 2022 "*in order to limit the impact of the global increase in the price of raw materials and building materials*"[15] , due to "*persistent inflation*". It therefore appears that the decrees providing for the exemptions make no mention of craftsmen, or end consumers, as the primary beneficiaries of these tax or customs measures. In fact, the primary beneficiaries of these measures are the importers, wholesalers or distributors who receive the exemptions.

58. The Authority stresses that the impact of such a price-regulation measure should first be studied for each of the products or services concerned. The justification for such a measure cannot be assessed generally on the sole basis of the fact that a tax or customs exemption has been granted to certain operators in the value chain. In the case in point, price-setting by the authorities appears particularly perilous in view of the wide variety of products and services potentially concerned, and the high risk of error in setting the administered price.

59. The use of a price freeze mechanism must be exceptional and limited in time (e.g. to combat inflation). However, the current text leaves too much latitude to the Council of Ministers as to which products and services may be subject to price regulation. The Authority therefore proposes to revise the draft text by limiting its scope, with a clearer delimitation of the products and services that will fall within its scope.

Recommendations:

7. Include in the wording of article LP 112-6 of the draft text that one of the triggering events for price regulation will be the existence of an excessive selling price, duly verified by the administration, for products or services benefiting from a tax or

[13] Decision no. 2019-774 QPC of April 12, 2019, *Société Magenta Discount et autre [Control of prices and margins in New Caledonia*, § 20.

[14] Report n° 115-2023 of December 1er 2023 of the Assembly of French Polynesia on the draft law of the country concerning various fiscal measures in the context of the approval of the budget of French Polynesia for the fiscal year 2024 p. 3.

[15] Report no. 198-2021 of December 11, 2021 of the Assembly of French Polynesia on the draft law of the country on simplification and performance of the tax system, in favor of solidarity and employment, p. 16. This measure has been extended for the years 2023 and 2024.

customs exemption.

8. **Introduce a definition of "excessive" pricing, based on objective, verifiable criteria.**

9. **Introduce a definition of the "performance" of tax and customs exemptions, based on objective, verifiable criteria.**

D. ON RISKS RELATING TO PRICE AND MARGIN FRAMEWORKS AND MARGINS

60. As a reminder, price regulation consists of "a *mechanism for setting prices by an administrative authority, which replaces competition in cases where the legislator considers, most often as a result of market inefficiencies, that competition is not the appropriate means of regulating prices*"[16] .

61. When public authorities take the place of market mechanisms, they run up against difficulties in determining selling prices or regulated margins, given the complexity of the process leading to price formation, i.e. the determination of costs borne by the various operators in the value chain (importers, distributors, etc.), the multiplicity of products involved, changes in the prices of the various inputs, inflation trends, etc. These pricing difficulties are made all the more acute by the asymmetry of information that characterizes relations between the authorities and the public.

62. As a result, competition authorities have traditionally viewed price regulation as an exceptional measure, designed for clearly identified sectors and targeting specific pricing or supply problems.

63. In this case, the new article LP 112-6 of the draft LP stipulates that this new category of maximum prices will be governed by the same methodology as that applicable to PPNs and PGCs, set out in articles LP. 111-1 to LP. 111-11 of the French Competition Code. The applicable methodology will therefore be recalled (**1.**), as well as the positions already taken by the Authority in 2019 and 2022 concerning the risks of setting too high a margin (**2.**) and too high a margin (**3.**). Finally, these various elements will be applied to the present draft LP (**4.**).

1. METHODOLOGY FOR SETTING PRICES AND MARGINS

64. It may be useful to remember that article LP 111-1 of the French Competition Code sets out the different ways in which sales limit prices can be set, in three different ways:

(i) the imposition of a maximum margin, either in absolute or relative terms, applied to the cost price of goods (delivered warehouse price for imports; invoice price for local products);

(ii) price caps (the only option for services); and

[16] See the definition of Mr. Etienne Pfister, "*Prix régulés" in the Dictionnaire de droit de la concurrence, Concurrences*, Art. N° 86497.

(iii) the introduction of a specific regime setting a maximum selling price at different stages or taking into account the specific features of the good or service (specific regimes already exist for various agricultural or food products: copra, pork, bread and flour, etc.).

65. Article LP 111-3 specifies that these margins and prices constitute a maximum, "*whatever the number of intermediaries in the* distribution *circuit*". It will be up to the parties to negotiate how this margin is to be shared (for example, in the case of long distribution channels, with intermediaries such as importers-wholesalers).

66. These three methodologies will also apply to the new price regulation provided for in the bill.

67. In this respect, the DGAE has indicated that the preferred method will be to limit margins rather than set price ceilings: "*[c]oncerning price ceilings, these would essentially apply to services, as it is easier to limit the price of the services concerned by a price ceiling, as it is impossible to determine the cost of a service. In the case of products, the Council of Ministers may decide to set a margin limit in absolute or relative terms, depending on the case*".

2. THE RISKS OF EXCESSIVE MARGINS

68. In its opinions issued in 2019[17] and 2022[18] , the Authority identified a number of risks relating to the regulation of margins by the administration, the operating method favored by the public authorities in Polynesia. The main reservations noted by the Authority in its previous opinions therefore remain unchanged, and will be recalled in the developments below.

69. When the maximum price or value margin is set too high, there is a risk of a "*cleat*" effect, leading indirectly to an alignment of retail prices with the maximum price or (value) margin reference made public by the authorities. This risk is particularly important in markets where competition is weak, where market players' incentives could lead them to maximize their margin by sticking to the maximum authorized margin, having no incentive to place their margin below the authorized value.

70. Given the time constraints, the Authority regrets not having been able to gather data on this aspect. However, reference can usefully be made to the data collected by the Authority in its 2019 opinion. On that occasion, the Authority used DGAE data on PPN product prices to establish that "*in 80% of cases, the price charged is a price that includes almost the maximum margin. In less than 5% of cases, prices are more than 15% below the maximum price*"[19] . The Autorité had also noted a homogenization of PPN prices, in contrast to free-price products.

3. THE RISKS OF TOO LOW A MARGIN

71. In its previous opinions, the Autorité has identified four types of risk induced by setting an overall marketing margin (in value or rate) for products at too low a level:

- **Deterrent effect**: if the margin is too low, wholesaler-importers may be deterred from sourcing all, some or all of their products at regulated prices. This disincentive effect is all the greater for products where the maximum margin is fixed in CFP francs and does not vary, regardless of the value of the product.

[17] Opinion no. 2019-A-01 of April 2, 2019 on the effects of regulation on the competitive operation of staple goods markets.

[18] Opinion no. 2022-AO-01 of March 30, 2022, cited above.

[19] Opinion n° 2019-A-01, § 121.

- **The bypass effect**: too low a margin can encourage wholesaler-importers to adapt by switching to similar or analogous products, or products with similar characteristics but not included in the list of regulated products. This behavior is encouraged by overly precise definitions and restrictive names for the products concerned.
- **The degradation effect**: too low a margin on the product concerned, when fixed in terms of value, encourages wholesaler-importers and retailers to prefer sourcing lower-cost products. Importers prefer to source low-priced products, which are often synonymous with lower quality but offer higher relative margins.
- **The offsetting effect**: excessively low margins on regulated products encourage wholesaler-importers and retailers to transfer the "shortfall" in revenue to margins, and hence to the prices of unregulated products, in order to cover their operating costs as effectively as possible. This behavior can result in the bidding up of products whose prices are not regulated. The incentive to compensate is greater when the margin is set in absolute terms and is insufficient to cover costs, than when it is set in relative terms and applies to a product with a higher purchase price.

72. The various effects of administrative price regulation have been the subject of theoretical demonstrations and empirical verification for many years. Please refer in particular to empirical studies[20] or to the recent note by the Caledonian Competition Authority (hereafter "**ACNC**") on price and margin regulation[21] , in which the ACNC takes a position similar to that of the Authority on the subject. In particular, the ACNC pointed to the limited effectiveness of public intervention on prices as a tool for combating the high cost of living, and noted similar risks associated with price and margin regulation.

4. APPLICATION TO THIS BILL

73. With regard to the pricing methodology set out in the bill, the Authority understands that margin setting will be the administration's preferred tool, similar to other regulated prices, such as PPN and PGC.

74. In line with the findings already made by the Authority in its previous opinions[22] , it may be recalled that the principle of margins being set by the public authorities using a "*cost plus*" method, which consists of setting a price by reference to the costs incurred plus a reasonable remuneration, is often contested on a theoretical level, as it does not encourage players to improve their management and reduce their production costs.

75. The Autorité therefore recommends once again the use of price ceilings, which can be adjusted over time, instead of margins, as this instrument appears to be better suited and more proportionate to cost control, and a greater incentive to seek productivity gains. If margins are nevertheless chosen, it is essential to give preference to absolute rather than percentage margins, as the latter reduce the incentive to buy at the best price.

76. As mentioned *above*, this new regulatory framework is likely to generate a number of risks. By way of illustration, we could take the example of products subject to regulated prices but sold as part of a mix of regulated and free-price products, such as photovoltaic panels, which are generally sold in kit form with all associated accessories and services. Under these conditions,

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[20] See in particular the article "*The Problem of Price Controls*" by Fiona Scott-Morton, Regulation n°50, 2001, pp. 50-54.

[21] Note économique de l'ACNC, *La règlementation des prix et des marges en Nouvelle-Calédonie: quand et comment réglementer?* n°2, June 2024.

[22] Opinions n° 2019-A-01 and n° 2022-AO-01 cited above.

any shortfall in the profits of industry professionals on regulated products can easily be avoided by offsetting their margins on unregulated products.

77. With regard to the efficiency of tax and customs exemptions, the Authority points out that, in the past, there has frequently been a phenomenon of "capture" by the beneficiaries of these measures. Generally speaking, tax and customs exemptions are only partially passed on to the consumer, and it is therefore not surprising that the DGAE has observed a similar phenomenon in French Polynesia.

78. The experience of past VAT cuts in France illustrates this phenomenon. When VAT in the restaurant sector was cut from 19.6% to 5.5%, an Insee study estimated that only 20% of the reduction in the VAT rate was passed on to consumers[23] . The Conseil des Prélèvements Obligatoires, a body attached to the Cour des Comptes, noted that the measure had contributed to increasing margins in the catering sector[24] and that it was "*not effective in supporting the purchasing power of the most modest and middle-class households, since it benefits the wealthiest households most and a large part of this reduction is captured by companies*"[25] .

79. If, as the Authority understands it, the ultimate aim of the bill is to freeze, or even bring down, the price of products and services benefiting from tax or customs exemptions, then it would seem more effective to rethink the method of achieving this. Indeed, the present bill is based on the observation that a certain number of tax and customs exemptions are not achieving their objectives in terms of "*expected impact*" on price moderation, even though these exemptions are particularly costly for the country's finances.

80. However, this bill will lead to the addition of a new layer of regulation, aimed at setting the prices of several products and services benefiting from exemptions, generating additional costs, particularly in terms of field controls. This new mobilization of financial and human resources, however, offers no certainty as to its ability to achieve its objectives.

81. However, if the ultimate objective is to combat the high cost of living, it would be advisable to study the possibility of focusing the legislator's intervention on the most disadvantaged category of consumers, which is not possible with the various price regulation regimes. As the Authority has already pointed out in its previous opinions in 2019 and 2022, a regulated price affects "*all Polynesian consumers without fulfilling its function of providing access to these products for the most disadvantaged*"[26] .

82. The choice of regulating prices to ensure the effectiveness of a tax and customs exemption measure does not appear to be the simplest or most obvious way, either for the country or for the companies targeted by these measures. Rather than offering exemptions to companies, which then justify the intervention of the administration to set and control the selling prices of the products and services benefiting from these exemptions, it would appear more effective to consider the allocation of direct aid to populations in need. This would be a more direct way of making products that are too expensive accessible, for the benefit of the part of the population that suffers most from the effects of the high cost of living.

83. This solution would also have the merit of putting an end to costly exemptions for the country's public finances. This possibility offers an interesting avenue for creating a simpler system that is less detrimental to market mechanisms.

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[23] Insee study, Évaluation de l'impact de la baisse du taux de TVA de juillet 2009 sur le prix de production des unités légales de la restauration, p. 5.

[24] Note n°6, Conseil des prélèvements obligatoires, *La TVA est-elle un impôt juste*, September 2023.

[25] *Idem*.

[26] Opinion no. 2019-A-01 cited above, § 181.

84. In addition, this new price regulation regime will increase complexity and legal uncertainty for companies benefiting from tax or customs exemptions, which will potentially fall within the scope of this draft text.

Recommendations:

10. Prefer a method of pricing based on ceiling prices, adjustable over time, instead of margins.

11. When a margin is nevertheless set, it should be expressed in absolute terms rather than as a percentage.

12. Rather than a general regulation of prices to the public, it would be better to explore the possibility of regulatory intervention directed specifically at the most disadvantaged category of consumers, and possibly professionals, in order to combat the high cost of living.

E. ON THE SENSITION SYSTEM OF THE DRAFT LAW

85. Article LP. 2 of the draft law of the country provides for the introduction of administrative penalties when a product or service is offered for sale "*at a price higher than the maximum selling price resulting from the application of the provisions of this title and its implementing decrees*". The explanatory memorandum points out that non-compliance with the provisions of article LP. 112-6 is already penalized by article LP. 113-2 of the French Competition Code.

86. In the event of failure to comply with articles LP. 112-7 and LP. 112-8, the bill provides for the introduction of an administrative fine.

87. In its 2022 opinion, the Authority stated that the effectiveness of price regulation lies "*to a large extent in the ability to put in place adequate dissuasive and corrective mechanisms*"[27] . The Authority had already taken up an analysis made in its 2019 opinion on PPNs, which noted that "*while the penalty system attached to the regulation appears proportionate, it is not sufficiently dissuasive, due to its lack of implementation. The effectiveness of the regulations could be strengthened by facilitating price controls, by involving other administrations in remote islands and by enabling direct price control by consumers, via a reporting procedure and an obligation to display regulated prices in stores*".

88. The obligation to indicate on an invoice each product used or service rendered subject to a price framework, as well as its unit price, will help "*facilitate the DGAE's control to ensure that the prices charged are lower than or equal to the maximum prices regulated on the invoice, which is compulsory between professionals*". The same formal requirements also apply to the quotation given to the buyer in application of article LP. 112-7. However, the Authority notes that there is a limit to how far compliance with the obligations laid down in article LP. 112-7 because, as the DGAE points out, "*to date, no estimate is compulsory for private individuals*". Consequently, to ensure compliance with the provisions of article LP. 112-7, the DGAE could

[27] Opinion no. 2022-AO-01 cited above, § 187.

consider making it compulsory to issue a quotation to private individuals in certain sectors of activity, to be determined by the administration.

89. To be effective, these measures must be accompanied by price controls, particularly on remote islands. According to a report on the DGAE's inspections in 2023, it carried out "*411 inspections on the prices of products with regulated marketing margins (PPN and PGC)* in all the archipelagos of French Polynesia. *As part of these checks, 148 professionals, including 16 importers or manufacturers, were reminded of their obligations to comply with regulations capping margins for PPNs and PGCs. 110 stores were reminded of their obligations to provide consumers with information on the prices and conditions of sale of basic necessities. Finally, the DGAE issued fines against 8 stores and 1 shipowner (adventure sales), for practices that led to significant price increases to the detriment of consumers*"[28] .

90. The DGAE specifies that it will be stepping up the number of inspections carried out in connection with the introduction of this new system. This allocation of DGAE resources is designed to make the measures more effective.

91. When price ceilings are adopted, a requirement to display them would reinforce the effectiveness of price controls, in particular by making consumers active in remote islands. In the case in point, while the provisions of articles LP. 112-7 and 112-8 require professionals to indicate on all quotations and invoices, the products and services used for which the maximum price is limited, as well as their respective unit price, they do not, however, make it compulsory to display the maximum price of products in stores. In its 2022 opinion[29] , the Autorité considered that "*such a display would enable consumers to know whether the price they are paying is equal to or lower than the ceiling, and could represent a commercial argument for distributors. This measure would also facilitate checks - including by consumers and competitors - particularly in the event of discrepancies with the prices of similar products in other stores*". In the case of services, where prices are often not displayed, one possible solution would be to publish these ceiling prices on quotations, which are compulsory for both professionals and private individuals, for optimum price control.

Recommendations:

13. Make it compulsory for individuals to receive a quotation in certain sectors of activity, to be determined.

14. Introduce, where possible, an obligation to display the ceiling prices of the goods and services concerned, in order to increase consumer involvement in controls.

F. ON THE LACK OF REGULAR ASSESSMENT OF THE VARIOUS SYSTEMS

92. When economic regulation measures infringe the principle of price freedom, they must be regularly reviewed and subjected to public scrutiny to examine whether they meet the objectives set . In its opinion of 2022, the Autorité noted that "*the regulations in force concerning price*

[28] See the minutes of the Council of Ministers meeting of February 21, 2024.

[29] Opinion no. 2022-AO-01 cited above, § 190.

controls have (...) a tendency to pile up, without being systematically and regularly evaluated and, where necessary, amended"[30] .

93. In fact, price control systems do not always fulfill the functions assigned to them, insofar as their objectives are not sufficiently defined upstream, and are generally not sufficiently evaluated *after the fact*.

94. As the Autorité emphasized in 2022, "*a widely accepted principle of public policy is the need for an objective assessment of its effectiveness (ability to achieve objectives) and efficiency (ratio between costs incurred and results obtained). Measuring the quality of a regulation can in no way be assessed solely by budgetary measurement of the resources made available (in the form of spending or tax expenditure)*"[31] .

95. When asked about the duration of application of the measures envisaged, the DGAE confirmed that the a posteriori evaluation of such a measure is more important than the question of whether it is temporary or not. It also confirmed that the DGAE was competent to carry out such an analysis, on the initiative of the Minister of the Economy, and subject to its inclusion in the DGAE's workload plan.

96. For this reason, the Autorité recommends amending the bill to ensure that the price control measures provided for are systematically and regularly evaluated, notably in the form of economic studies, in order to assess their relevance and determine whether they should be retained, amended or even abolished. It will also be necessary to ensure that any such evaluation is included in the workload of the DGAE or other government department responsible for carrying it out.

Recommendation:

15. **Implement a systematic, regular evaluation of the measure to limit the maximum price of goods and services covered by this bill.**
16. **Ensure that such an assessment is included in the workload of the DGAE or other government department responsible for carrying it out.**

[30] Opinion no. 2022-AO-01, above, § 197

[31] *Idem.*

Deliberated on the report by Mariko Ishibashi, *rapporteur*, Frédéric Paillusson, *deputy general rapporteur*, and Sophie Bresny, *general rapporteur*, by Johanne Peyre, *chairman*, Enzo Silvestro, *member*, Henri Piffaut and Vivien Terrien, *alternate members*.

The President

Johanne Peyre

SUMMARY OF RECOMMENDATIONS

1. Involve the Polynesian Competition Authority in the preparatory work for draft legislation likely to have a major impact on the competitive operation of markets and businesses.

2. Consider using existing legal categories enabling the Council of Ministers to derogate from price freedom, rather than creating a new legal category for price regulation.

3. Provide that the administration's power to set the regulated price may not exceed the lifetime of the tax or customs exemption to which it is linked.

4. Provide for a limited lifespan for measures aimed at regulating prices or margins, even for permanent tax or customs exemptions.

5. Reassess existing systems before introducing new measures that restrict entrepreneurial freedom and free competition.

6. Publish the audits and other assessments carried out by the DGAE on existing schemes, and develop them further so that they can serve as a reliable basis for analysis and political decision-making.

7. Include in the wording of article LP 112-6 of the draft text that one of the triggering events for price regulation will be the existence of an excessive selling price, duly verified by the administration, for products or services benefiting from a tax or customs exemption.

8. Introduce a definition of "excessive" pricing, based on objective, verifiable criteria.

9. Introduce a definition of the "performance" of tax and customs exemptions, based on objective, verifiable criteria.

10. Prefer a method of pricing based on ceiling prices, adjustable over time, instead of margins.

11. When a margin is nevertheless set, it should be expressed in absolute terms rather than as a percentage.

12. Rather than a general regulation of prices to the public, we need to explore the possibility of regulatory intervention aimed specifically at the most disadvantaged category of consumers, and possibly professionals, in order to combat the high cost of living.

13. Make it compulsory for individuals to receive a quotation in certain sectors of activity, to be determined.

14. Introduce, where possible, an obligation to display price ceilings for the goods and services concerned, to reinforce consumer involvement.

15. Implement a systematic, regular evaluation of the measure to limit the maximum price of goods and services covered by this bill.

16. Ensure that such an assessment is included in the workload of the DGAE or other government department responsible for carrying it out.