FRENCH POLYNESIA

Polynesian Competition Authority

[FREE TRANSLATION]

Decision No. 2018-PAC-01 of June 6, 2018 concerning practices implemented in the mobile telephony sector aimed at residential customers.

The Polynesian Competition Authority,

Having regard to the letter dated March 23, 2016, registered on March 30, 2016 under numbers 16/0007 F and 16/0008 M, by which Pacific Mobile Telecom referred to the Polynesian Competition Authority practices implemented in the telecommunications sector by the Office des Postes et Télécommunications de la Polynésie française and its subsidiary, Vini, and requested that protective measures be ordered on the basis of Article LP 641-1 of the Polynesian Competition Code;

Having regard to the letter registered on May 17, 2017, by which Pacific Mobile Telecom withdrew its request for interim measures;

Having regard to Decision No. 2017-DESCL-02 of June 6, 2017 by which the Chairman of the Polynesian Competition Authority gave Pacific Mobile Telecom formal notice of its withdrawal of its request for precautionary measures, filing the case registered under number 16/0008 M ;

Having regard to the letter registered on August 11, 2017 by which Pacific Mobile Telecom withdraws from its referral any request relating to the billing and pricing formula for the mobile internet access service resulting from the contract of June 7, 2013 signed with the Office des Postes et Télécommunications ;

Having regard to the letter of October 17, 2017 by which Pacific Mobile Télécom provided a supplementary referral to the referral of March 23, 2016 and requested, on the basis of article LP 641-1 of the French Competition Code, the pronouncement of precautionary measures, request registered under number 17/0016 M ;

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

Having regard to the comments submitted by Vini, Office des Postes et Télécommunications and Pacific Mobile Télécom;

Having regard to the decision of April 18, 2018 by which the general rapporteur proceeded to disjoin, within file 16/0007 F, the practices raised by Pacific Mobile Telecom that were not the subject of a request for precautionary measures and to open a new registration number for the investigation of these separate parts under number 18/0006 F ;

Having regard to the preliminary assessment of practices likely to be contrary to Article LP 200-2 of the Competition Code expressed by the investigating department at the meeting of February 9, 2018;

In view of Vini's proposed commitments dated February 28, 2018 and put online on March 2 on the Polynesian Competition Authority's website for a market test, the amended version of these commitments proposed on April 23 and modified at the end of the meeting on April 27, 2018 ;

Considering the decisions related to the protection of business secrecy n° 2017-SA-01 of April 6, 2017, n° 2017-SA-02 of April 6, 2017, n° 2017-SA-03 of April 6, 2017, n° 2017-SA-04 of April 20, 2017, n° 2017-SA-05 of June 15, 2017, n° 2017-SA-01 of October 25, 2017, n° 2017-SA-01 of October 26, 2017, n° 2017-SA-02 of November 13, 2017, n° 2017-SA-03 of November 28, 2017, n° 2017-SA-04 of November 28, 2017, n° 2017-SA-05 of December 19, 2017, n° 2017-SA-06 of December 27, 2017, n° 2017-SA-07 of December 27, 2017, n° 2017-SA-08 of December 28, 2017, n° 2018-SA-01 of January 19, 2018, n° 2018-SA-02 of January 24, 2018, n° 2018-SA-03 of January 25, 2018, n° 2018-SA-04 of January 25, 2018, n° 2018-SA-16 of April 26, 2018, n° 2017-DEC-01 of December 21, 2017, n° 2017-DEC-02 of December 21, 2017, n° 2018-DEC-01 of February 6, 2018, n° 2018-DEC-02 of February 6, 2018, n° 2017-DECR-01 of December 21, 2017, n° 2018-DECR-01 of February 6, 2018, n° 2018-DECR-02 of February 6, 2018, n° 2018-DECR-03 of February 8, 2018 ;

Having regard to the other documents in the file;

The rapporteur, the general rapporteur and the representatives of the Office des Postes et Télécommunications, Vini and Pacific Mobile Telecom heard at the meetings of the Polynesian Competition Authority on February 9, 2018 and April 27, 2018;

In the absence of a representative of the President of French Polynesia duly invited to attend the meetings of February 9 and April 27, 2018 ;

Adopts the following decision:

CONTENTS

I. FINDINGS 5

A. REFERRAL AND PROCEDURE 5

B. COMPANIES CONCERNED BY THE PROCEDURE 7

1. Office des Postes et Telecommunications 7

2. Vini 8

3. Pacific Mobile Telecom 8

C. SECTORS CONCERNED 9

1. The applicable regulatory framework 9

a. Telecommunications 9

b. The postal sector 12

2. Overview of the mobile telecommunications sector 12

a. Prepaid and postpaid service packages 12

b. A mature sector despite the withdrawal of mobile data services 13

c. Limited impact of competition on prices 14

3. A mixed picture of competition in the telecoms sector 14

D. THE PRACTICES INVOLVED 15

1. Vini's mobile telephony services and their pricing conditions 15

a. Postpaid offers 15

b. Prepaid offers 17

c. Services common to prepaid and postpaid offers 18

2. Vini's Ura loyalty program 18

a. Welcome points 19

b. Accumulation, value and validity of points 19

c. Exchange of points 19

3. Customer commitment and re-engagement periods and early termination conditions implemented by Vini 21

a. Vini customer engagement and re-engagement conditions 21

b. The conditions for early termination set out in Vini's general terms and conditions of subscription. 22

4. Activities of OPT agencies 24

II. IMPLEMENTATION OF THE COMMITMENTS PROCEDURE 24

A. PRELIMINARY ASSESSMENT 24

1. The relevant markets 25

a. The retail market for mobile telephony services 25

b. Markets for mobile call termination services 26

c. The market for the distribution of mobile telephony products and services 27

d. The postal services market 28

2. Vini's dominant position on the relevant markets 28

a. On the retail market for mobile telephony services 28

b. On the mobile voice and SMS termination markets 29

3. Practices liable to breach competition law 29

a. On-net and off-net price differentiation 29

b. Vini's loyalty policy 38

B. LACK OF SUFFICIENTLY CONVINCING EVIDENCE OF PMT'S REFUSAL TO DISTRIBUTE IN OPT BRANCHES 45

C. COMMITMENTS PROPOSED BY VINI ON FEBRUARY 28, 2018 48
D. COMMENTS RECEIVED DURING THE MARKET TEST 51
1. On-net/off-net price differentiation (commitment no. 1) 51
a. Contracts in progress 51
b. On the possible retention of an on-net generosity component 52
c. On the need to release customers subscribing to the disputed offers and under commitment 52
d. Consequences of the commitments proposed by Vini 53
2. On the Ura loyalty program (commitments no. 2 to 5) 53
a. Use of welcome points 53
b. On the multi-line advantage 54
c. On the possibility of exchanging points for a terminal without the customer's recommitment 54
d. Information measures 54
e. Modification of documentation relating to the Ura program 54
3. Commitment and re-commitment periods for customers and conditions for early termination (commitments no. 6 and 7) 54
a. Information on commitment periods 54
b. Termination conditions 55
4. Other comments 55
a. On the absence of commitments relating to initial commitment periods or in the event of migration 55
b. On the absence of a commitment relating to the "corporate" market segment 55
c. On the absence of a commitment relating to access to OPT's postal network 56
d. On the implementation of a compliance program and the production of a report on the implementation of commitments 56
E. COMMITMENTS PROPOSED BY VINI ON MAY 4, 2018 56
1. On-net/off-net price differentiation (commitment no. 1) 57
2. Loyalty policy (commitments no. 2 to 7) 57
3. Implementation of the commitments 58
III. DISCUSSION 58
A. COMMITMENT PROCEDURE 58
1. PMT's arguments 58
2. Evaluation of APC 59
a. Use of the commitments procedure 59
b. On possible new competition concerns 60
B. THE ABSENCE OF COMMITMENTS RELATING TO CERTAIN PRACTICES COVERED BY THE REQUEST FOR INTERIM MEASURES 61
C. ASSESSMENT OF THE COMMITMENTS PROPOSED BY VINI 62
1. On-net/off-net price differentiation (commitment no. 1) 62
a. Future offerings 62
b. Current offerings 63
c. Information measures 65
2. Loyalty policy 66
a. Ura loyalty program (commitments no. 2 to 5) 66
b. Commitment periods and termination conditions (commitments no. 6 and 7) 68
3. Implementation of the commitments 69
a. Duration of commitments 69
c. Preparation of an annual report 70

D. CONCLUSION 71

I. FINDINGS

A. REFERRAL TO AND PROCEDURE

1. By letter dated March 23, 2016, registered on March 30, 2016 under numbers 16/0008 M and 16/0007 F, the company SAS Pacific Mobile Telecom (hereafter "PMT") referred to the Polynesian Competition Authority practices implemented in the telecommunications sector by the Office des postes et des télécommunications de la Polynésie française (hereafter "OPT") and its subsidiary, the company SAS Vini (hereafter "Vini"), which it considers contrary to the provisions of article LP 200-2 of the French Competition Code.

2. In its complaint, PMT claims that OPT is abusing its dominant position and the complainant's state of economic dependence in the supply of leased lines and mobile Internet access, by (i) imposing prohibitive tariffs constituting discriminatory or unfair practices, insofar as the same tariffs are not applied to its subsidiary Vini, and by (ii) threatening to sever established commercial relations, on the sole grounds that the partner refuses to submit to unjustified commercial conditions, in a context where access to the incumbent operator's leased lines is essential for operating in the downstream mobile telephony markets. Vini would abuse its dominant position in the distribution of subscriptions and prepaid cards by blocking competitors' access to these markets through exclusive contracts with its resellers. Vini would also abuse its dominant position on the mobile telephony retail market, on the one hand by discriminating on the basis of whether its customers send SMS to subscribers of its network or to subscribers of competing networks, and on the other hand by limiting the mobility of subscribers towards the competing operator, notably through a minimum subscription period when subscribing to contracts, and an obligation to recommit in the event of migration between its different offers during the course of a contract.

3. In addition to its case on the merits, PMT requested, on the basis of article LP 641-1 of the French Competition Code, that the Polynesian Competition Authority order protective measures against OPT and Vini in order to put an end to the serious and immediate harm that would be caused to it, to the general economy, to the sector concerned and to the interests of consumers.

4. By letter dated May 3, 2016, the investigating department invited PMT to supplement its request for precautionary measures, which the latter did on June 20, 2016 by providing a first supplement to the referral, followed by a second dated September 20, 2016. In the latter supplement, PMT criticizes Vini for abusing its dominant position by refusing to provide it, under the mobile local roaming agreement linking it with Vini on islands where PMT does not have its own network, with data transport in addition to voice transport, which prevents it from offering 3G services to its customers on these islands. Finally, in a third supplementary submission dated March 15, 2017, PMT maintains that the level of the wholesale tariff per minute for local mobile roaming charged by Vini prevents it from responding to the offers proposed by Vini on the retail market.

5. By letter registered on May 17, 2017, PMT withdrew its request for precautionary measures. The Chairman of the Polynesian Competition Authority acknowledged PMT's withdrawal of its request for precautionary measures by decision no. 2017-DESCL-02 of June 6, 2017, closing

the case registered under number 16/0008 M, with the investigation of the case registered under number 16/0007 F continuing on the merits.

6. By letter registered on August 11, 2017, PMT withdrew from its referral all requests relating to the billing and pricing formula for the mobile internet access service resulting from contract no. OPT/CSOPTR/DTE/PSRT/13/0036 of June 7, 2013, stating that it had reached an agreement with OPT on these points.

7. By letter dated October 17, 2017, PMT submitted a supplement to the referral registered on March 30, 2016. This supplementary submission denounces practices concerning, on the one hand, the retail market for mobile telephony services and the wholesale markets for mobile voice and SMS call termination, on which Vini is said to have a dominant position, and on the other hand, the market for basic postal services, on which OPT has a legal monopoly. According to PMT, Vini applies an abusive price differentiation between on-net (between two customers belonging to its network) and off-net (between a customer belonging to its network and a customer belonging to a competing network) voice calls and SMS in its postpaid package and prepaid card offers, a practice not justified by the underlying costs incurred by Vini. In addition, Vini would lock in its customers over the long term through abusive loyalty-building practices for its "package" customers in the form of excessive commitment periods, up to 24 months, when migrating to a new offer, or when using points acquired under the Vini'Ura loyalty program to purchase a mobile terminal. In addition, OPT is alleged to have discriminated against its subsidiary Vini by refusing to distribute PMT's products and services through its network of postal agencies.

8. In a letter dated October 17, 2017, PMT once again requested, on the basis of article LP 641-1 of the French Competition Code, that the Polynesian Competition Authority order protective measures against OPT and Vini in order to put an end to the serious and immediate harm being caused to it, to the general economy, to the sector concerned and to the interests of consumers. This request for precautionary measures, registered under number 17/0016 M, concerns the facts and practices denounced in the supplementary referral of October 17, 2017, which include some of those denounced in the initial referral.

9. In a decision dated April 18, 2018, the general rapporteur proceeded to separate this case, insofar as the practices raised by Pacific Mobile Telecom were not included in the request for interim measures and for which the investigation is continuing on the merits under number 18/0006 F.

10. At the meeting of the Polynesian Competition Authority on February 9, 2018, devoted to examining the facts and practices covered by this request for precautionary measures, Vini indicated its wish to enter into a commitment procedure to put an end to the practices likely to be prohibited by Polynesian competition law. The oral report of the investigating department indicated that Vini was likely to have abused its dominant position by implementing on the retail market for mobile telephony services for residential customers i) an unjustified price differentiation between calls and SMS to subscribers of its network ("on-net" calls and SMS) and calls and SMS to subscribers of its competitor ("off-net" calls and SMS), as well as ii) loyalty offers, These practices are likely to foreclose its customer base and artificially raise barriers to entry on this market.

11. After deliberating, the Autorité's College accepted the principle of the commitments procedure provided for in Article LP 641-2 of the French Competition Code and invited Vini to formulate its proposed commitments in writing with a view to conducting a market test. Vini's proposed commitments, formulated on February 28, 2018, were published online on March 2, 2018. The Direction Générale de l'Economie Numérique (hereinafter "DGEN") and PMT have commented on Vini's proposed commitments.

12. After considering the responses to the public consultation, on April 23, 2018 Vini sent a new version of its proposed commitments, which was discussed and improved at a further meeting of the Polynesian Competition Authority held on April 27, 2018. Vini transmitted a final version of its commitments to the Authority on May 4, 2018.

B. THE COMPANIES CONCERNED BY THE PROCEDURE

1. OFFICE DES POSTES ET TELECOMMUNICATIONS

13. OPT is a French Polynesian public establishment of an industrial and commercial nature, created by deliberation no. 85-1023 AT of March 8, 1985, as amended[1] . OPT's main mission is to ensure the operation of postal, financial, telecommunications and information and communication technology services, but it may also develop complementary or related activities[2] . Its operations are governed by the French Polynesian Postal and Telecommunications Code (hereinafter "CPT").

14. As the incumbent postal operator, OPT enjoys a legal monopoly on the processing of mail weighing less than two kilograms. As the public operator of the postal monopoly, OPT has a nationwide network of post offices, comprising 87 branches or contact points (Tahiti and Moorea: 16 branches and 5 annexes, Îles-Sous-le-Vent: 8 branches and 1 annex, Îles Marquises: 13 branches, Îles Australes: 5 branches, Archipel des Tuamotu Gambier Ouest: 17 branches, Archipel des Tuamotu Gambier Est: 22 branches).

15. OPT is also the incumbent telecommunications operator, and since the sector was opened up to competition in 2003[3] , it has held a legal monopoly over domestic fixed-line telecommunications (networks and fixed-line public service) and fixed-line telecommunications outside French Polynesia. OPT is also authorized to set up and operate a network open to the public, enabling it to provide Internet access[4] .

16. OPT is the 100% parent company of three subsidiaries: Vini, a mobile telephony operator, OPT's agent for the operation and commercial management of its fixed-line Internet business, and a distributor of television services; Tahiti Nui Telecom (TNT); and ISS for IT services and products.

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1 However, it wasn't until the Validation Act no. 95-173 of February 20, 1995, amending Act no. 88-1028 of November 9, 1988, laying down statutory and preparatory provisions for the self-determination of New Caledonia in 1998 and various provisions relating to overseas territories, that the creation of the territorial office was no longer contested, and decree no. 62-745 of June 30, 1962, creating the state office, was repealed. Deliberation no. 2004-39 of February 19, 2004, amending certain provisions of Books II and III of the Post and Telecommunications Code in French Polynesia, removed the OPT from public accounting regulations, and as a result, since 2005, the OPT has had private accounting.

2 Article D. 311-1 of the French Post and Telecommunications Code.

3 Deliberation no. 2003-85 APF of June 12, 2003, amended, relating to Books II and III of the French Polynesian Post and Telecommunications Code.

4 Order no. 1507 CM of October 7, 2003, as amended, granting the Office des postes et télécommunications the status of telecommunications operator and public operator, and consequently authorizing it to establish and operate various networks and provide telecommunications services, including public service, and no. 273 CM of February 18, 2014 amending order no. 2088 CM of November 16, 2009 renewing the authorization granting the Office des postes et télécommunications the status of telecommunications operator and public operator, and consequently authorizing it to establish and operate various networks and provide telecommunications services, including public service.

17. In 2016, OPT's sales totaled around F CFP 14.67 billion, broken down into 81.15% for its telecommunications activities, 12.21% for its postal activities, 4.17% for its banking activities and 2.46% for its other activities.

2. VINI

18. The simplified joint-stock company Vini was created in early 2013 through the absorption by Tikiphone, OPT's 100% subsidiary dedicated to mobile telephony, of two other subsidiaries of the public establishment, the companies Mana (internet access offers) and Tahiti Nui Satellite (satellite pay-TV). The purpose of this company is broad, covering the operation and marketing of all mobile telephony, audiovisual and Internet services.

19. In 2016, Vini's sales totaled just over 12 billion CFP francs, of which 9.513 were attributed to the cell phone sector (without distinguishing between wholesale and retail activities).

20. With regard to this sector in particular, Vini has held an authorization to establish and operate a network since October 2003, enabling it to provide a mobile telecommunications service[5] and has held authorizations to use radioelectric frequencies since 2008[6] , the latest dating from May 2017[7] . Vini's mobile network enables it to offer 2G, 3G and, more recently, 4G services on Tahiti Grand Papeete via postpaid offers (subscriptions), with commitment, and prepaid offers (cards and top-ups). It currently covers 65 islands in French Polynesia[8] , in a rather heterogeneous way (for example, in Tuamotu and Marquesas, voice services reach only 20% of the land area; in the Society archipelago, data services reach between 45% and 60% of the land area[9]).

21. With regard to its distribution network, according to its website, "*Vini relies on its subsidiary Vini Distribution to offer all its services: the network of Vini boutiques markets all Mobile/Internet/Television offers, while the Tahiti Phone network specializes in mobile telephony offers*". Vini's own distribution network comprises seven Vini boutiques and six Tahiti Phone boutiques[10] . The website adds that "*Vini is also distributed in the 5 Polynesian archipelagos through* OPT's *network of post offices (87 throughout the territory)*". Finally, Vini has a network of "Vinicard resellers", counted at 286 in December 2017 according to the operator's website.

3. PACIFIC MOBILE TELECOM

22. PMT is a société par actions simplifiée (simplified joint-stock company), whose share capital was held at the time of its creation by Pacific Islands Energy Pte Ltd (PIE) (51%), SCP Emar

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5 See orders no. 1508 CM dated October 7, 2003, granting Tikiphone the status of telecommunications operator and authorizing it to set up and operate a network enabling it to provide a mobile telecommunications service, and no. 2089 CM dated November 16, 2009, as amended, renewing the authorization granting SAS Vini the status of telecommunications operator.

6 Arrêté n° 559 CM du 6 juin 2008 attribuant une autorisation d'utilisation de fréquences radioélectriques à la société Tikiphone pour un réseau de télécommunication mobile ouvert au public.

7 Arrêté n ° 4061 MLA du 22 mai 2017 portant autorisation d'utilisation de fréquences à la société Vini pour son réseau de télécommunication ouvert au public.

8 http://www.corporate.vini.pf/la-societe-vini/vini-en-un-clin-doeil/; network coverage maps are available here: http://www.vini.pf/assistance/mobile/couverture-reseau

9 Schéma directeur d'aménagement numérique de la Polynésie française, published in February 2017.

10 http://www.vini.pf/points-de-vente

(15%), SCP Soremal 2 (10%), Patrick Moux (9%) and four other shareholders (25%). Today, following several capital increases, PIE holds 56.14% of the capital, Albert Moux 15%, Patrick Moux 1.8%, with the remaining 27% divided between all the other original shareholders.

23. PMT was granted a license to establish and operate a telecommunications network and provide a mobile telecommunications service open to the public in November 2010[11] and the first authorizations to use radio frequencies in February 2013[12] . PMT began commercial operations on June 17, 2013, under the Vodafone brand *via* a brand licensing agreement, offering 2G and 3G mobile service packages. Since November 2017, it has been offering 4.5G mobile services.

24. To date, PMT has deployed its own mobile service network (around 120 high points), mainly on Tahiti, Moorea and Bora-Bora[13] , and relies on Vini's network to serve the other islands, via a wholesale service known as "local mobile roaming"[14] . PMT offers postpaid subscriptions, with or without commitment, and prepaid offers, as well as mobile telephony equipment (phones, tablets and accessories).

25. In 2016, PMT generated sales of CFP 1.810 billion on the retail market for mobile telephony services (sale of subscriptions and prepaid packages), and sales of equipment and accessories of CFP 150.5 million.

26. With regard to its distribution activity[15] , according to its website, its mobile services are marketed through ten dedicated sales outlets, eight in Tahiti, one in Moorea (Windward Islands) and one in Bora Bora (Leeward Islands). PMT's products are also sold by 100 "prepaid" resellers, including 4 in Raiatea (Leeward Islands) and 3 in Huahine (Leeward Islands), and 120 "refill" resellers, including 3 in Raiatea and 3 in Huahine. PMT has also developed a fleet of mobile sales representatives, who canvass private and professional customers.

C. THE SECTORS CONCERNED

1. THE APPLICABLE REGULATORY FRAMEWORK

a. TELECOMMUNICATIONS

i. The French Post and Telecommunications Code

27. The telecommunications sector is governed by the CPT. This provides for a public telecommunications service, which includes the "basic service", "compulsory

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[11] Arrêté n° 2127 CM du 23 novembre 2010 confant à la société Pacific Mobile Telecom la qualité d'opérateur de télécommunication et l'autorisant en conséquence à établir et à exploiter un réseau radioélectrique de troisième génération ouvert au public et à fournir un service de télécommunication mobile ouvert au public.

[12] Arrêté n° 200 CM du 20 février 2013 portant autorisation d'utilisation de fréquences radioélectriques à la société Pacific Mobile Telecom pour son réseau de télécommunication ouvert au public.

[13] The program and timetable for deployment of the PMT network are set out in its specifications, which were last amended by order no. 818 CM dated June 13, 2017, amending order no. 581 CM dated May 4, 2011, as amended, approving the specifications associated with order no. 2127 CM dated November 23, 2010, granting Pacific Mobile Telecom the status of telecommunications operator and consequently authorizing it to establish and operate a third-generation telecommunications network open to the public and to provide a mobile telecommunications service open to the public.

[14] The contract binding the two companies is entitled "*Local roaming agreement on Vini's mobile network*" dated May 27, 2013 and features a number of riders.

[15] Website data as of December 11, 2017: http://www.vodafone.pf/fr/points-de-vente.

telecommunications services" and the "public external telecommunications service of French Polynesia", entrusted to OPT[16] . It also provides for an authorization regime, which concerns only the establishment and operation of networks open to the public for the provision of Internet access and mobile telecommunications services (the only markets to be opened up to competition, since 2003[17]).

28. In addition, the CPT provides for an "interconnection regime"[18] , which governs the way in which the various operators provide "reciprocal services", as defined by article D. 211 6°, and necessary to enable "*all users to communicate freely with each other, regardless of the networks to which they are connected or the services they use*". In particular, call termination on mobile operators' networks, as a reciprocal service, is covered by the interconnection regime. Within this framework, voice call termination rates are set by regulation on the basis of a cost model known as "CMILT Bottom-up"[19] , approved by the Council of Ministers and audited by an independent firm (art. A. 212-22-2, A. 212-22-4 and A. 212-22-5).

29. In application of these provisions, the tariff for terminating mobile voice calls on the Vini network was set by order no. 2356 CM dated December 26, 2016, supplemented by order no. 648 CM dated May 18, 2017, specifying its period of application, which runs from January 1er 2017 to December 31 2018. It amounts to 7 F CFP excl. tax per minute. The tariff for terminating mobile voice calls on the PMT network was set by order no. 401 CM of March 31, 2017 for the period from January 1er 2017 to December 31 2018, and stands at 9.9 F CFP excluding VAT per minute. For both operators, billing is per second from the first second.

30. On the other hand, SMS termination rates are not set in accordance with the principles laid down in the CPT[20] interconnection regime. It is clear from the investigation that the SMS call termination rates of each of the two mobile operators were set reciprocally, as part of a commercial negotiation leading to amendment no. 1 to the interconnection agreement between the operators Vini and PMT dated February 4, 2013, concluded on April 25, 2017. Accordingly, since April 1er 2017, the SMS mobile call termination rate on Vini and PMT networks has been 1 F CFP excluding VAT per SMS.

31. In the mobile telephony sector, the CPT provides for a wholesale roaming service local mobile, "*supplied by a mobile telecommunication service operator to another mobile telecommunication service operator to enable the latter's customers to be received on the former's network*" (art. D. 211 18°), but does not set out the technical and financial conditions of this service.

32. In application of these provisions, Vini and PMT entered into a "*Local roaming agreement on Vini's mobile network*" dated May 27, 2013, amended several times by riders.

33. Finally, since 2013, the CPT has provided for the implementation of the conservation or portability of "non-geographic mobile" numbers: "*Operators are required to offer their subscribers, at a reasonable rate, offers enabling them to keep their non-geographic mobile*

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16 For a more detailed description of the main provisions of the CPT relating to the telecommunications sector please refer to Opinion No. 2017-A-02 of September 22, 2017 of the Polynesian Competition Authority relating to the granting by the government of authorizations to provide telecommunications services to the companies Viti and Pacific Mobile Telecom.

17 Deliberation no. 2003-85 APF of June 12, 2003, amended, relating to Books II and III of the French Polynesian Post and Telecommunications Code.

18 For a summary presentation of the interconnection regime provided for by the CPT, see the aforementioned Polynesian Competition Authority opinion no. 2017-A-02 of October 9, 2017 (§ 16 to 27).

19 LTIAC: Long-Term Average Incremental Cost.

20 See Polynesian Competition Authority opinion no. 2017-A-02 of October 9, 2017, cited above (§ 243).

number, when they change operator while remaining in French Polynesia. Operators shall include the necessary provisions in access and interconnection agreements, at rates reflecting the corresponding costs.
The offers mentioned in the previous paragraph must enable subscribers who so request to change operator while retaining their number. The subscriber's request to keep his or her number, sent to the operator with whom he or she has signed a new contract, is forwarded by the latter to the subscriber's operator" (art. LP 212-20).

34. In practice, mobile number portability is implemented in such a way that customers keep only the last six digits of their eight-digit number, the first two corresponding to the prefix of the mobile operator of which they are a customer - thus, a Vini customer has a number starting with 87 and a PMT customer a number starting with 89.

ii. ***Local law no. 2016-28 of August 11, 2016 on consumer protection***

35. Chapter 1er of Title II of Country Law no. 2016-28 of August 11, 2016 on consumer protection deals specifically with contracts relating to telecommunications services, and in particular contracts subscribing to a mobile telecommunications service or the provision of internet access within the meaning of article D. 211 of the CPT (art. LP 20).

36. These specify the specific provisions that these contracts must contain, and in particular a framework for modifying contracts (art. LP 23), specifying the duration of the consumer's commitment (art. LP 26) and the contract performance period (art. LP 29)[21] :
Art. LP. 23. - Modification of contracts
Any proposed modification of the contracts referred to in article LP. 20 shall be communicated by the service provider to the consumer in writing or on another durable medium within the meaning of the present law of the country available to the latter at least one month before it comes into force, together with information to the effect that the latter may, until he has expressly accepted the new conditions, terminate the contract without penalty or right to compensation, within four months of the amendment coming into force.
In the case of fixed-term contracts which do not contain a clause specifying the cases in which the contract may be modified, or a clause relating to price changes, the consumer may demand that the original conditions be applied until the end of the contractual term.
Any contractual offer relating to the contracts referred to in article LP. 20 shall be accompanied by clear and explicit information on the provisions relating to contractual modifications.
[...]

Art. LP. 26 - Invoice disclosure of duration of engagement
When a contract mentioned in article LP. 20 including a clause requiring compliance with a minimum performance period has been signed by the consumer, invoices relating to this contract must mention the remaining duration of the commitment or the end date of the commitment or, where applicable, mention that this minimum performance period has expired.
[...]

Art. LP. 29 - Duration of contracts
The contracts referred to in article LP. 20 may not contain a clause requiring compliance with

[21] Also specified are provisions concerning: compulsory information (art. LP 21), pre-contractual information (art. LP 22), the return of advances and security deposits (art. LP 24), cancellation procedures (art. LP 25), the consumer's express agreement to continue paying for services initially provided free of charge (art. LP 27), telephone assistance services (art. LP 28), contract termination fees (art. LP 30), free calls to numbers presented as free (art. LP 31), rates for calls to directory enquiry services (art. LP 32), the cost of being put in touch by a directory enquiry service (art. LP 33), administrative penalties (art. LP 34).

a minimum contract performance period of more than twenty-four months from the date of conclusion of the contract or its modification.

Any service provider who makes the conclusion or modification of the terms of the contract conditional on the consumer's acceptance of a contractual clause requiring compliance with a minimum contract performance period of more than twelve months is required :

1° Simultaneously propose the same offer of services with a minimum contract performance period not exceeding twelve months, according to non-disqualifying commercial terms;

2° To offer the consumer the possibility of terminating the contract early from the end of the twelfth month following acceptance of such a clause, in return for payment by the consumer of no more than a quarter of the amount due for the unexpired portion of the minimum contract performance period.

The preceding paragraphs apply to the conclusion or performance of any other contract between the service provider and the consumer, where the conclusion of this contract is subject to the existence and performance of the initial contract referred to in article LP. 20, provided that the total sums due for early termination do not exceed one quarter of the amount due for the unexpired portion of the minimum contract performance period.

b. THE POSTAL SECTOR L

37. The CPT also governs the postal sector. It establishes a "postal monopoly", covering the collection, sorting, forwarding and distribution of items of correspondence (letters and similar), paper and direct mail weighing up to two kilograms, for incoming and outgoing traffic within and outside French Polynesia. The CPT entrusts this monopoly to the public operator, OPT (art. D. 112-6 and D. 311-2).

38. To this end, the OPT creates and abolishes postal establishments, in particular by ensuring that the density of contact points and collection points takes into account the needs of the public and the operating constraints resulting in particular from the geographical configuration of French Polynesia (art. D. 111-7 and D. 111-8).

2. OVERVIEW OF THE MOBILE TELECOMMUNICATIONS SECTOR

39. Since June 2013, the mobile telecommunications sector has been characterized by a duopoly, made up of Vini, a subsidiary of incumbent operator OPT, and PMT, which markets mobile service offerings under the Vodafone brand[22] . In its aforementioned opinion no. 2017-A-02 of September 22, 2017, the Polynesian Competition Authority drew up an overview of mobile telephony offers and services (§ 63 to § 73), the main characteristics of which are as follows.

a. SERVICE PACKAGE OFFERS , IN PREPAID AND POSTPAID MODES

40. Vini and PMT mobile telephony retail offers are generally marketed as *bundles* including several services (network access, including abroad, voice communications in French Polynesia and abroad, SMS, MMS, data exchanges, etc....). Generally speaking, these offers are packages expressed in telephone call duration (1h, 2h, etc...) and SMS quantity; similarly, most of these offers include an abundance component (the possibility of sending unlimited calls or SMS in a time slot specified by the offer) and/or generosity (obtaining additional call time credit or SMS

[22] Although the sector was opened up to competition in 2003, in 2013 PMT became the first mobile operator to make a commercial entry into the mobile retail services market, in the face of the incumbent operator Vini, which therefore enjoyed a de facto monopoly for some ten years, while mobile telephony was booming.

quantity) on-net (i.e. on the operator's network). Since August 2017, PMT has been marketing an offer, "Prestige", which is the first to offer a "cross-net" SMS abundance component (all networks combined), unconstrained by time.

41. The breakdown of cell phone consumers between methods of payment for offers is relatively even between postpaid mode (monthly subscriptions) and prepaid mode (cards and top-ups). According to the latest study report published in 2016 by the DGEN on digital uses in French Polynesia[23] , prepaid payments accounted for 53.7% of the total customer base in October 2013, and postpaid payments 46.3%. The aforementioned opinion no. 2017-A-02 of September 22, 2017 also noted that the proportion of prepaid cards in the total customer base had been increasing in recent years.

b. A MATURE SECTOR DESPITE THE WITHDRAWAL OF MOBILE DATA SERVICES

42. In the aforementioned opinion no. 2017-A-02 of September 22, 2017, several population penetration indicators were put forward, ranging from 84% to over 100%, the latter based on the assessment of a mobile consumer base of over 280,000 (in terms of number of SIM cards) in 2017 (for 275,918 inhabitants in French Polynesia as of November 13, 2017[24]).).

43. According to the above-mentioned DGEN report, the rate of cell phone ownership is 98% in the Windward Islands (where 75% of the population live), 95% in the Leeward Islands and 94% in the remote archipelagos. On average, each household owns 2.7 cell phones. The report also indicates that 82% of children over the age of 15 have a cell phone in the Windward Islands. Lastly, the report estimates that 31% of the population have smartphones, 16% have phones with an Internet connection and 44% have phones without an Internet connection (in the Windward Islands).

44. However, in its aforementioned opinion, the Autorité noted that mobile data services, which enable access to the Internet and the use of various services and applications, were still lagging behind international standards, despite the introduction of smartphones at affordable prices. The penetration rate of mobile data services relative to the population stood at 32% in 2016 (compared with 55% in the French overseas departments and territories under ARCEP's jurisdiction[25]).

45. What's more, while it is possible to access voice and SMS services throughout French Polynesia, this is not the case for data services, access to which is highly geographically disparate. For example, in the "*Schéma directeur d'aménagement numérique de la Polynésie française*" (hereafter "SDAN") published in February 2017, it is stated that the technologies that offer the most data services (notably 3G) are mainly deployed in the Société archipelago, with the Marquesas archipelago and several islands in the Tuamotu and Australes archipelagos not benefiting from these services[26] .

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23 "Les usages du numérique en Polynésie française : Familles", DGEN study report, 2013.

24 http://www.ispf.pf/bases/Recensements/2017

25 ARCEP, Observatoire des marchés, May 23, 2017, "Les services de communications électroniques dans les départements et collectivités d'outremer" (année 2016), p. 13.

26 Appendix 5.2 of the Schéma Directeur d'Aménagement du Numérique (p. 186) provides details of effective coverage by commune and by island, according to the different generations of mobile networks.

c. LIMITED IMPACT OF COMPETITION ON PRICES

46. According to a 2015 report by the Chambre territoriale des comptes[27] , the impact of opening up to competition on mobile telephony rates has remained limited: "*the recent entry into the market of alternative operators for mobile telephony and internet has not led to significant price cuts for users. With the exception of Vini international calls, for which the price fell by 20% in 2012, before the arrival of competitor PMT-Vodafone, the services offered to users have evolved since the introduction of competition towards the extension of offers for the same price, rather than towards lower prices. The packages offered by mobile operators now include voice, data and SMS. Users get more data credits or communication time for the same price*" (page 13).

47. The same observation, that "*operators have favored integrating data or SMS volumes into packages over lowering prices*", was reiterated in the aforementioned opinion no. 2017-A-02 of September 22, 2017 (§ 73).

3. A MIXED PICTURE OF COMPETITION IN THE TELECOMMUNICATIONS SECTOR

48. In its aforementioned opinion no. 2017-A-02 of September 22, 2017, the Polynesian Competition Authority assessed whether the conditions for effective and fair competition had been met, i.e. whether network and service operators were in a position to compete on equal terms. In this non-exhaustive exercise, the Authority concluded that the regulatory framework provided for by the CPT suffered from a number of shortcomings, and that, insofar as it did not contribute sufficiently to establishing an economic and legal context favorable to the development and maintenance of effective competitive conditions, it needed to be modified with a view to improving the competitive operation of the telecommunications sector.

49. The Authority recommended three areas for improvement: i) adapting the competitive offer to the specific characteristics of French Polynesia, in particular by revising the scope of the public service entrusted to OPT, which is responsible for outside telecommunications, and by recognizing an area where there is a lack of private initiative for mobile telecommunications services, in particular to avoid unprofitable duplication of infrastructure that can be shared; ii) the introduction of effective economic regulation of the sector, as current regulations force alternative operators to rely heavily on OPT (and its subsidiary Vini) for access and interconnection, in particular by strengthening the interconnection regime provided for by the CPT in terms of tariff and accounting obligations; iii) the creation of an independent sector regulator with extensive powers, as the "regulator" function is currently performed by the Council of Ministers, many of whom are members of OPT's Board of Directors, and the administration in charge of the sector (the DGEN) has limited powers, notably in terms of information and sanctioning.

[27] Rapport d'observations définitives de la Chambre territoriale des comptes portant sur la politiques des postes et des télécommunications, February 25, 2015, p.13.

D. THE PRACTICES INVOLVED

1. VINI'S MOBILE TELEPHONY SERVICE OFFERS AND PRICING CONDITIONS

50. The cell phone offers currently marketed by Vini to residential customers are described in Vini's "Guide des offres - Mobile", in its April 2017 edition. Four ranges of offers are available: Vinicard prepaid offers and three ranges of subscriptions or "postpaid packages": Izi (the "*packages that adapt to your wallet*"), Taure'a (blocked packages for under-26s) and Premium+ (the "all-in-one" packages).

51. According to the data provided by Vini, these four offer ranges represent between 75% and 85% of Vini's residential customer base considered active by the operator at October 31, 2017. Consequently, between 15% and 25% of Vini's current customer base benefits from offers that are no longer marketed.

		Part du parc total (%)
Nouvelles gammes	Vini-Izi	[15 - 25 %]
	Vini-Taure'a	[0 - 5 %]
	Vini- Premium+	[15 - 25 %]
	Vinicard Classic	[30 - 40 %]
	Vinicard Xtra	[0 - 5 %]
Anciennes gammes		[15 - 25 %]

a. POSTPAID OFFERS

52. **For the Premium+ range,** made up of five offers, each includes i) slots reserved for unlimited on-net calls, evenings and weekends (on-net abundance component), ii) an additional time credit reserved for on-net calls (on-net generosity component), which means that on-net calls are not systematically deducted from the main package, unlike off-net calls.

53. For each offer in the range, on-net SMS messages are unlimited 24/24h, to a maximum of 100 different correspondents per month. Off-net SMS messages are deducted from the SMS credit included in the main rate plan, ranging from 500 to 2,000 F CFP depending on the offer, at a rate of 10 F CFP (incl. tax) per local off-net SMS (in French Polynesia)[28] .

[28] The Guide to offers states that "*The following are deducted from SMS credit: local, international and roaming SMS. SMS to special numbers billed as out-of-plan at the current rate. If this credit is not used up, it is not carried over to the following month. If this credit is used up, these uses are billed as out-of-bundle at the current rate*". See also the price list for the mobile ranges marketed, included in the Offers Guide.

range	Offer	Monthly rate (incl. VAT)	Contents	
Premium+	4h	4,900 F CFP	4h cross-net[29] + 1h on-net Unlimited on-net calls evenings and weekends [30] SMS credit[31] of 500 F CFP 2 GB Mobile Internet data credit	SMS on-net unlimited 24/24h
	6h	6,500 F CFP	6h + 1h on-net Unlimited on-net calls evenings and weekends SMS credit of 500 F CFP 2 GB Mobile Internet data credit	
	8h	8,500 F CFP	8h + 2h on-net Unlimited on-net calls evenings and weekends SMS credit of 1,000 F CFP 3 GB Mobile Internet data credit	
	12h	11,500 F CFP	12h + 2h on-net Unlimited on-net calls evenings and weekends SMS credit of 1,000 F CFP 3 GB Mobile Internet data credit	
	16h	14,900 F CFP	16h + 4h on-net Unlimited on-net calls evenings and weekends SMS credit of CFP 2,000 5 GB Mobile Internet data credit	

54. **For the Izi range**, which comprises four offers, each offers an "all-purpose" main credit (i.e., the duration of the main package depends on the destination and duration of the calls to be made)[32] and an additional time credit reserved for on-net calls in a defined time slot, evenings and weekends, the duration of which is equivalent to the call time included in the main package (on-net generosity component). This means that on-net calls are not systematically deducted from the main credit, unlike off-net calls, which are deducted from the main credit at the rate of 33 F CFP incl. tax per minute[33] .

55. SMS and data credit are deducted from the main credit at the rate of 10 F CFP (incl. VAT) per local cross-net SMS and 10.3 F CFP (incl. VAT) per MB of mobile data.

range	Offer	Monthly rate (incl. VAT)	Contents		
Izi	30 min.	920 F CFP	30 min + 30 min on-net evenings and weekends	One-off SMS 10 F/unit	Pay-as-you-go mobile Internet 10.3F/MB
	1h	1,690 F CFP	1h + 1h on-net evenings and weekends		
	2h	2,970 F CFP	2h + 2h on-net evenings and weekends		
	3h	CFP 4,000	3h + 3h on-net evenings and weekends		

56. **For the Taure'a range**, which comprises three offers, each includes a call time from which on-net and off-net calls are decremented.

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[29] The duration of the main package corresponds to a call to a cell phone on a Polynesian network or to a landline within the same archipelago. All local, international and roaming voice calls are deducted. Calls to special numbers are billed at the applicable rate.

[30] Evenings = between 8pm and 6am / weekends = from Friday 8pm to Monday 6am.

[31] The following are deducted from the SMS credit: local, international and roaming (Vini-Monde) SMS messages. SMS messages to special numbers are billed at the applicable rate.

[32] The duration of the main rate corresponds to a local call to a Polynesian network mobile or to an intra-archipelago landline.

[33] In addition, calls to intra-archipelago landlines are deducted from the main credit at a rate of 33 F CFP incl. tax per minute, and to inter-archipelago landlines at a rate of 66 F per minute.

57. With regard to SMS, the first offer (45 minutes[34]) includes a credit of 30 on-net SMS, and the other two offers (1h and 2h) include an abundance component reserved for on-net SMS between 6pm and 6am, to a maximum of 100 different correspondents. The offers do not include the sending of off-net SMS, and as they are "blocked packages", they do not give access to the sending of off-net SMS unless the customer buys a top-up of 500, 1,000 or 2,000 F CFP TTC in addition to their blocked package (see table in § 62 below).

range	Offer	Monthly rate (incl. VAT)	Contents	
Taure'a (blocked packages for under-26s)	45 minutes	CFP 2,050	45 minutes 30 SMS on-net	Unlimited Facebook connection via the i-vini mobile portal
	1h	2,870 F CFP	1h Unlimited on-net SMS between 6 p.m. and 6 a.m.	
	1h30	3,800 F CFP	1h30 Unlimited on-net SMS between 6 p.m. and 6 a.m.	

58. In addition, the tariff schedule for services as at July 1er 2017 in force at the time of the[35] appraisal includes **additional services** available to postpaid customers.

59. **The Izi and Premium+ ranges** offer three on-net SMS purchase options: i) 30 on-net SMS at 255 F CFP incl. VAT per month (i.e. 8.5 F CFP incl. VAT per on-net SMS), ii) 90 on-net SMS at 665 F CFP incl. VAT per month (i.e. 7.3 F CFP per on-net SMS), iii) 150 on-net SMS at 1,020 F CFP incl. VAT per month (i.e. 6.8 F CFP incl. VAT per on-net SMS). These options enable customers in these ranges to benefit from on-net SMS messages at lower rates than off-net SMS messages, which must be consumed at the one-off rate of 10 F CFP (incl. tax) per SMS (whether included in the main package or outside the package). These two ranges also offer access to a mobile data credit purchase option, called "Option Boost", which offers 1GB at 1,500 F CFP (i.e. 1.5 F CFP per MB), 2GB at 2,500 F CFP (i.e. 1.2 F CFP per MB), 5GB at 4,200 F CFP (i.e. 0.8 F CFP per MB), with a per-use rate of 10.3 F CFP per MB (whether included in the main package or off-plan). Similarly, **the Taure'a, Izi and Premium+ ranges** include a "Vini Favoris" option offering a 30% discount on the three favorite numbers in the Vini network, billed at 450 F CFP incl. tax per month. Vini stated during the investigation that [0%-5%] of postpaid lines were concerned by this option.

b. PREPAID OFFERS

60. **The Vinicard Classic and Vinicard Xtra kits** offer a choice of call or SMS volume, from which on-net and off-net calls and SMS are deducted, valid for 30 days[36] . Both kits offer a welcome bonus of 20 on-net SMS (valid for 30 days), which means that, unlike on-net SMS, off-net SMS are systematically deducted from the main package. In addition, the Vinicard Xtra kit offers unlimited on-net SMS on evenings and weekends, provided you have a minimum

[34] The duration of the package corresponds to a local call to a cell phone on a Polynesian network or to a landline within the same archipelago.

[35] It appears that Vini modified this price list between the meeting devoted to examining the precautionary measures (February 9, 2018) and the meeting accepting its commitments (April 27, 2018); indeed, the price list currently online is dated March 2018.

[36] The duration indicated corresponds to a call to a Polynesian network mobile or to an intra-archipelago landline, and the number of SMS messages is valid for local SMS messages. In the case of a call to an inter-archipelago landline, the price per minute charged is 66 F CFP incl. VAT.

credit of 500 F CFP. This means that customers can only keep this abundant range if they reinvest in top-ups, so as to always have a credit of 500 F CFP.

61. **The 500, 1,000 and 2,000 F CFP top-ups** offer the possibility of using calls, SMS or data for this amount. On-net and off-net calls are deducted from the main credit. However, the 1,000 refill offers a bonus of 20 on-net SMS and the 2,000 refill a bonus of 50 on-net SMS (bonuses valid for 30 days), which means that, unlike on-net SMS, only off-net SMS are systematically deducted from the main credit. The 500, 1,000 and 2,000 top-ups are also available to Izi and Taure'a postpaid customers in addition to their main monthly rate plan.

62. **SMS Only recharges** offer 100 SMS at 500 F CFP (incl. VAT) and 200 SMS at 1,000 F CFP (incl. VAT) respectively, with half of the quantity offered (50 and 100 SMS respectively), with undifferentiated decrementing of on-net and off-net SMS. This means that each SMS costs 5 F CFP incl. VAT. These top-ups are also available to customers of the Izi range and the Taure'a 45-minute offer, in addition to their main monthly package.

<table>
<tr><th>range</th><th>Offer</th><th>Price (incl. VAT)</th><th colspan="2">Contents</th></tr>
<tr><td rowspan="2">Vinicard Starter Kit</td><td>Classic</td><td>850 F CFP</td><td>17 mn or 50 SMS sent in PF</td><td rowspan="2">A SIM card
Welcome bonus of 20 SMS on-net</td></tr>
<tr><td>Xtra</td><td>1,750 F CFP</td><td>20 minutes or 60 PF text messages
Unlimited SMS on-net evenings and weekends</td></tr>
<tr><td>Prepaid Packs</td><td colspan="2">From 2,900 F CFP</td><td colspan="2">phone + SIM card + 17 mn</td></tr>
<tr><td rowspan="5">Refills for :
Vinicard
Prepaid Packs
Taure'a
Izi</td><td colspan="2">500 F CFP
(valid for 15 days)</td><td colspan="2">17 mn or 50 SMS sent in PF</td></tr>
<tr><td colspan="2">1,000 F CFP
(valid for 1 month)</td><td colspan="2">34 mn or 100 SMS sent in PF
Bonus of 20 on-net SMS messages</td></tr>
<tr><td colspan="2">CFP 2,000
(valid for 1 month)</td><td colspan="2">68 mn or 200 SMS sent in PF
50 SMS on-net bonus</td></tr>
<tr><td colspan="2">SMS Only 500 F CFP
(valid for 15 days)</td><td colspan="2">100 SMS sent in PF
(50 donated)</td></tr>
<tr><td colspan="2">SMS Only 1 000 F CFP
(valid for 1 month)</td><td colspan="2">200 SMS sent in PF
(including 100 donated)</td></tr>
</table>

c. SERVICES COMMON TO PREPAID AND POSTPAID OFFERS

63. The four ranges of prepaid and postpaid offers currently on sale all include a service entitled "*3 free local SMS messages (to Vini's mobile network) per day on w*www.vini.pf". This service enables Vini customers to send 3 free on-net SMS messages via a personal space on the operator's website. This sending gives rise to a mobile SMS call termination service.

2. VINI'S URA LOYALTY PROGRAM

64. In 2013, Vini launched a loyalty program, called Vini'Ura, whose latest specific conditions of use date from February 2017. In this current version, the Ura program offers Vini customers (postpaid or prepaid) after free registration the opportunity to accumulate loyalty points on an account that can be exchanged "*for numerous gifts*". All new Vini customers are automatically enrolled.

65. Our investigations have shown that 95% of Vini's postpaid customers and 50.3% of its prepaid customers take part in this program.

a. WELCOME POINTS

66. As soon as the customer joins the program (art. 3 of the specific conditions of use), Vini offers him welcome points, "*based on the customer's seniority with regard to his last commitment end date,* [which] *will be credited and redeemable as soon as the membership is taken into account*", and according to the following terms (art. 4.3.1): i) for customers subscribing to a Vini service, they are calculated on the basis of their minimum commitment period end date and their consumption, ii) for Vini prepaid customers, they are calculated on the basis of their seniority, iii) for new customers (postpaid and prepaid), they are fixed. Contrary to what is indicated in the above-mentioned specific conditions of use, the welcome points allocation scale is not available on the Vini website.

67. What's more, according to its website, these welcome points can be used "*immediately for a discount on the purchase of a telephone or for one-off additional credit*". However, the above-mentioned specific conditions of use specify that welcome points *"can only be used for gifts involving a recommitment by the member holding a subscription with Vini*".

b. ACCUMULATION, VALUE AND VALIDITY OF POINTS

68. According to the Vini website, the loyalty program allows customers to accumulate "*20 points for every 100 francs billed or spent at Vini, for Vini mobile subscriptions and services (top-ups, options, out-of-bundle calls)*". The program's specific conditions of use do not specify this accumulation rule. The program also offers a "multi-line bonus", "*to accumulate even more points*", by registering all the lines of the same billing account to the program, to automatically benefit from an additional 10% points credit (this is called a "booster"). Finally, Vini grants a special status, "gold status", to subscribers who have spent an average of at least 9,000 F CFP TTC on communications per month over the last 12 full months prior to their registration, enabling them to benefit from a "points booster", i.e. to accumulate 25 points for every 100 F CFP spent. Gold status is awarded for 12 months (art. 4.3.3.).

69. Depending on the specific conditions of use of the program, "bonus points" may also be awarded during special periods or promotional operations, according to specific scales and criteria (art. 4.3.).

70. The specific conditions stipulate that the points accumulated have no market value and cannot be exchanged for anything other than those provided for in the program. They are non-transferable and cannot be used in the event of an unpaid invoice (art. 5).

71. Finally, accumulated points are valid for 30 months, after which they are permanently forfeited (art. 5).

c. REDEEMING POINTS

72. Program members can redeem their points for customary gifts, such as free or promotional offers on consumer credit, or for discounts on the purchase of a cell phone or tablet in return for a recommitment (art. 7). In the latter case, if the customer does not have a sufficient number of points to make the conversion, they can top it up with a monetary contribution.

73. In October 2017, it was explicitly stated on the Vini website that only postpaid customers could convert their points to obtain a terminal, while both postpaid and prepaid customers could access one-off additional credits (usage gifts) :

74. In the course of the investigation, Vini indicated that in 2017, 23% of points were used for gifts of use, so it can be deduced that 77% of points were used as part of a re-commitment gift, i.e. as part of a discount on the purchase of a terminal in return for a re-commitment. In particular, with regard to the points used by postpaid customers, Vini has specified that [10-15%] of points were exchanged for customary gifts, and that over 85% of points were used to change terminals in return for a recommitment.

75. **With regard to customary gifts**, which do not entail any recommitment by the customer, the following grids were online, in October 2017, on the Vini website: i) conversion of points into minutes of communication: from 3 minutes to 70 minutes, with a validity period of 7 to 15 days, against a number of points from 350 to 7000, knowing that the "voice gift codes" only concern local calls to subscribers of the Vini network (on-net calls), ii) conversion of points into SMS: from 10 to 150 SMS, valid for 7 to 15 days, for 400 to 3,000 points, as "SMS gift codes" only apply to local calls to Vini network subscribers (on-net SMS), iii) conversion of points into additional mobile Internet volume: from 10 MB to 400 MB, valid from 1 hour to 30 days, for a number of points ranging from 400 to 7000, with the understanding that only Premium (Classic, Special Edition, +), Izi, Vinicard and Internet Mobile customers are eligible for "internet gifts".

76. **Conversion of points to obtain a terminal** is subject to the customer's recommitment. In this respect, in October 2017, Vini's website stated in its "legal information" that: "*Any transfer/use of points from a loyalty account for the purchase of a phone or tablet implies a 24-month re-commitment of the line(s) attached to this account*". However, the program's specific conditions do not specify any length of time for this recommitment. During the investigation, Vini mentioned that the recommitment implied by an exchange of points for a discount on the acquisition of a terminal could be for 12 or 24 months, which also seems to be deduced from the "fine print" in its advertising catalogs: "*Specific conditions of use of the loyalty program and rates applicable for a 12-month recommitment available in Vini stores*".

77. Under the "multi-line" advantage, when a member accumulates points acquired on several loyalty accounts attached to the same billing account and uses them to purchase a single terminal, all the lines from which the points were transferred are re-engaged (art. 8). The investigation revealed that 38.96% of billing accounts were multi-line and that, on average, the number of lines attached to a billing account was 2.72 lines.

78. The use of points by a customer to purchase a terminal leads to a "points freeze" period, the duration of which is indicated on the re-engagement form (art. 8). Vini explained that, in this case, the customer can continue to collect new points (only the latter are frozen), but can only use them to change terminals again after 9 months if they have signed up for 12 months, and 18 months if they have signed up for 24 months. However, they can use them to purchase gifts of usage, voice communication (on-net), SMS (on-net) and data.

79. In the "Be sure to please with Vini's new products" catalog (whose prices are valid from October 2 to November 19, 2017), which presents the handsets, tablets and accessories that can be obtained by converting accumulated loyalty points, appears their price without subscription and the price to which the customer can gain access through a certain number of acquired points and a 24-month recommitment for a given offer. Based on the off-peak rates shown in the aforementioned Guide to offers, the value of a loyalty point when used for customary gifts can be deduced, which varies between 0.25 F CFP and 0.59 F FCP (on average 0.36 F CFP). Similarly, by subtracting the price of terminals without subscription from the price displayed and charged in return for a 24-month re-engagement, it is possible to deduce the value given to the number of points needed to cover the amount of the subsidy granted, and hence the unit value of the loyalty point. This value fluctuates between 0.43 F CFP and 0.98 F CFP (on average 0.55 F CFP). This shows that the average value of the point is higher when the point is used for a change of terminal involving re-engagement than for a customary gift not involving re-engagement.

3. CUSTOMER COMMITMENT AND RE-ENGAGEMENT PERIODS AND EARLY TERMINATION CONDITIONS IMPLEMENTED BY VINI

80. According to Vini's website, in its "Documentation" section, the offers proposed to consumers are framed by the "General Terms and Conditions of Subscription to Vini Services", supplemented by the "Special Terms and Conditions for Vini Offers", the versions of which in force at the time of the appraisal date from February 2017, and by the "Specific Terms and Conditions of Subscription to Vini Mobile Options and Services" last amended on June 30, 2017.

a. VINI CUSTOMER ENGAGEMENT AND RE-ENGAGEMENT CONDITIONS

81. In the aforementioned "Guide to offers", it is stated that: i) for the Premium+ range, "*12-month or 24-month commitment for any new subscription or for any migration from a range no longer marketed to Premium+*", ii) for the Izi range, "*12-month commitment for any new subscription or for any migration from a range no longer marketed to Vini-Izi*", iii) for the Taure'a range "*12-month commitment for any new subscription or for a transfer from Vini-Loisirs, Vini-Atu or Vini-Classic to a Vini-Taure'a package*".

82. **With regard to the initial commitment period**, article 5 of the general subscription conditions concerning the duration of the contract specifies that "*The contract is established for an indefinite period with a minimum initial period, the duration of which is fixed on your subscription form. However, the minimum period may vary for specific offers. It is then fixed by the specific conditions attached to the said offers. After the initial period, the subscription is automatically extended for an indefinite period*. The specific terms and conditions in force for the three postpaid offer ranges currently on sale do not provide any clarification in this respect.

83. During the course of the investigation, Vini explained the alternatives available to first-time buyers when they subscribe to a given offer: i) a 12-month commitment without a handset, ii) a 12-month commitment with a handset subsidy, iii) a 24-month commitment with a handset subsidy higher than that granted in the case of a 12-month commitment. In all three cases, the monthly price paid by the customer for the offer is the same.

84. **With regard to the subscriber's recommitment condition in the event of migration to a new offer**, the general terms and conditions stipulate that "*if the Subscriber subscribes during the term of the contract to a specific offer involving a minimum subscription period or*

recommitment, this new minimum period takes effect from the date on which the option or offer is activated" (art. 5).

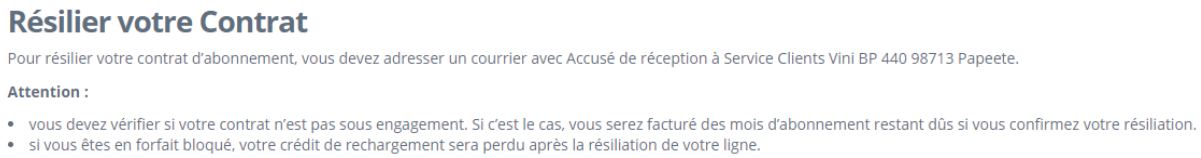
85. The special terms and conditions set out the terms and conditions for migration from one offer to another, within the same range of offers and from one range to another. In general, any change of package is possible after one month's seniority on the original package if the subscriber is moving upmarket, and after three months' seniority on the package if the subscriber is moving downmarket. In particular, any change of package to the Premium+ range requires the subscriber to recommit, with the exception of migrations within this range (article 3). Similarly, any change of package to the Taure'a range requires the subscriber to recommit, with the exception of migrations within this range or from an Izi or Premium+ range package (article 4). Finally, any change of package to the Izi range requires the subscriber to recommit, with the exception of migrations within this range or from a package in the Premium+ range (article 3). However, no indication is given as to the length of the re-engagement period. It can be deduced from the information in the Guide to offers mentioned above (§ 81).

86. Vini added during the investigation that "*customers only recommit to migration when they take out a larger package (...) this recommitment is limited to 12 months without changing terminal (...). In 80% of cases, customers who migrate to a new package do so with the acquisition of a terminal, which entails a recommitment*". Vini also indicated that when customers migrate to a lower package, they do not recommit, as this is not economically justified, particularly in view of the commissions paid by Vini to its distributors. Lastly, Vini was asked to explain its entire commercial policy with regard to migrating customers, which differs from that set out in its general terms and conditions (referred to above, § 84) and in the Guide to offers (§ 81) on one point: customers migrating from offers that are no longer marketed to the Taure'a range would not be re-engaged.

b. THE CONDITIONS FOR EARLY TERMINATION SET OUT IN VINI'S GENERAL TERMS AND CONDITIONS OF SUBSCRIPTION APPLY.

87. In article 5 of the general subscription conditions, in the section entitled "Essential information", which deals specifically with the duration of the contract, the conditions for termination before the end of the minimum commitment period are described as follows: "*In the event of termination of the contract by the Subscriber before the end of the minimum subscription period, and except in the cases provided for in article 14.1.1, the fees remaining until the expiry of this period become immediately payable, without prejudice to any damages that VINI reserves the right to claim*"[37] .

88. This is also the message that was relayed, at least until January 2018, on the Vini website[38] :



89. The exceptions mentioned in article 14.1.1 are as follows: "*The Subscriber may, by registered letter with acknowledgement of receipt addressed to VINI and subject to being able to justify it, terminate the contract for legitimate reasons, i.e. in the event of the occurrence during the course of the contract of an unforeseeable event preventing it from continuing its performance. In particular, the following cases may be considered as legitimate grounds for termination:*

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37 Emphasis added.

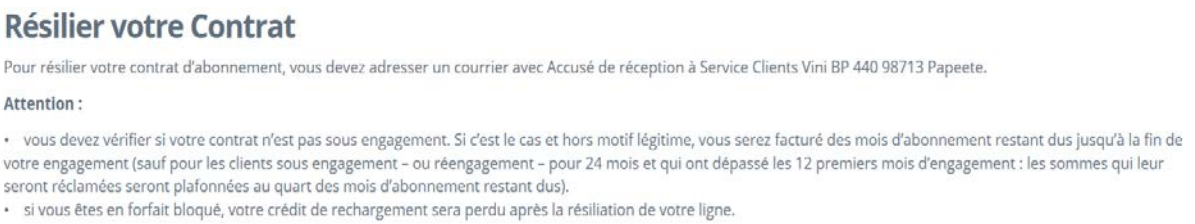
38 Screenshot as of January 19, 2017.

- Unemployment (following the termination of an open-ended contract), personal bankruptcy, receivership or compulsory liquidation;
- Death of the Subscriber;
- Hospitalization and/or sick leave of more than three (3) months affecting the Subscriber;

- Incarceration of the Subscriber;
- Moving outside the territory of French Polynesia or to an area where the Main Service is totally inaccessible from the Subscriber's home or workplace; - Force majeure as defined by the case law of the French Supreme Court, affecting the Subscriber.
It is understood between the parties that theft or loss of the cell phone cannot be considered as a legitimate reason.
To exercise this right of termination, the Subscriber must send VINI the relevant supporting documents with his termination request.
Termination of the contract will take effect ten (10) days after the date of receipt of the Subscriber's request or at a later date at the express request of the Subscriber.
However, if the initial minimum commitment period is greater than twelve (12) months, the Subscriber may terminate his Subscription contract early at the end of the twelfth month. The Subscriber must then pay a quarter of the amount due for the unexpired portion of the initial minimum contract period.
If the Subscriber terminates the contract before the end of the minimum subscription period, and apart from the cases provided for above, the royalties remaining until the expiry of this period become immediately payable, without prejudice to any damages that VINI reserves the right to claim.
In addition, if the Subscriber has benefited from a subsidy at the time of purchase of his or her terminal, VINI reserves the right to request reimbursement of the unamortized portion of said subsidy from the Subscriber"[39] .

90. Lastly, article 14.3 of the general subscription conditions stipulates: "*Upon termination of the subscription contract, Vini reserves the right to charge fees corresponding to the costs actually incurred by Vini in connection with the termination. The amount of these termination fees is indicated in the price lists*". However, these elements are not included in the price lists available on the Vini website.

91. During the course of the investigation, Vini announced on two occasions that it was modifying its website and customer subscription form to include the provisions of the aforementioned country law no. 2016-28 (§ 35) concerning the mechanism for early withdrawal from a 24-month contract, with a cap on the amounts due on this occasion. Three days before the February 9, 2018 meeting, Vini indicated that it had implemented these changes. Its website thus presents[40] :


Résilier votre Contrat

Pour résilier votre contrat d'abonnement, vous devez adresser un courrier avec Accusé de réception à Service Clients Vini BP 440 98713 Papeete.

Attention :

- vous devez vérifier si votre contrat n'est pas sous engagement. Si c'est le cas et hors motif légitime, vous serez facturé des mois d'abonnement restant dus jusqu'à la fin de votre engagement (sauf pour les clients sous engagement – ou réengagement – pour 24 mois et qui ont dépassé les 12 premiers mois d'engagement : les sommes qui leur seront réclamées seront plafonnées au quart des mois d'abonnement restant dus).
- si vous êtes en forfait bloqué, votre crédit de rechargement sera perdu après la résiliation de votre ligne.

92. Similarly, Vini has indicated that "*all the subscription forms used by VINI with commitment or recommitment have been modified to indicate as precisely as possible the cancellation*

39 Emphasis added.

40 Screenshot as of February 9, 2018.

procedures provided for by Country Law n°2016-28, even though there is no requirement to do so. They are currently being printed for use at points of sale (knowing that an information note for subscribers will be added to the documents handed out at the time of its subscription in the meantime)".

4. OPT AGENCY ACTIVITIES

93. OPT has indicated that it markets OPT products and services (postal, financial, fixed-line telecommunications) and Vini products and services (audiovisual, internet and mobile telephony). It also indicated that the branches in its network are dedicated to the following activities: i) postal activities (franking, express mail, P.O. boxes, merchandise sales), ii) trading activities (services, including the sale of Vini postpaid offers, Vini prepaid cards, terminals & accessories and packaging), iii) philatelic activities, iv) financial services, v) other services (offshore offices of exchange, management/advertising, collection & remittance, dematerialization...vi) other income (contribution to voting operations, etc.).

94. Vini's distribution activities for OPT mobile telephony products and services have long been governed by an agreement (1999 according to Vini). From September 2007 to November 2017, the agreement was entitled "*Convention de commercialisation - Distributeur Agréé "Recommandé Vini"*"" (including five amendments). Since November 2017[41] , the agreement has been entitled "*Convention de distribution des produits et services Vini par l'Office des Postes et Télécommunications*". This latest agreement, which sets out the conditions for the distribution of Vini products in OPT branches, includes all the elements of a distribution contract, its purpose, the rights and duties of each party, product pricing, brand use and advertising. It also sets out the scale of commissions paid to the OPT by Vini, based on sales.

II. IMPLEMENTING THE COMMITMENTS PROCEDURE

A. PRELIMINARY ASSESSMENT

95. Examination of the request for precautionary measures led the investigating department to identify Vini practices likely to be prohibited by competition law.

96. In accordance with article A. 640-2 of the French Competition Code, "*when the Authority considers applying article LP 641-2 I of the French Polynesian Competition Code, relating to the acceptance of commitments proposed by the parties, the rapporteur informs the companies or organizations concerned of his preliminary assessment of the practices in question. This assessment may be made (...) when the Authority is seized of a request for precautionary measures, by the presentation of an oral report at the meeting*".

97. At the meeting of February 9, 2018, the rapporteur orally presented his analysis of the practices in question. Following the discussions at this meeting, Vini proposed to implement the commitments procedure provided for in I of Article LP 641-2 of the French Competition Code.

[41] This change of agreement took place while PMT's application was being processed.

1. THE RELEVANT MARKETS

98. From the point of view of competition law, the relevant product and/or service market comprises all products and/or services that are considered interchangeable or substitutable by the purchaser, due in particular to the characteristics of the products in question, their price and the use to which they are put. A relevant geographic market is an area in which products and/or services are offered and demanded, in which conditions of competition are sufficiently homogeneous, and which can be distinguished from neighboring geographic areas, in particular where conditions of competition (prices, supply patterns, consumer preferences) differ appreciably.

a. THE RETAIL MARKET FOR MOBILE TELEPHONY SERVICES

99. The decision-making practice of competition authorities regarding the delimitation of the retail market for mobile telephony services is consistent and well-established[42] . Mobile telephony is considered to be a separate market from fixed-line telephony, in particular because of the flexibility of use of mobile services, in terms of both transmission and reception. Similarly, it cannot generally be established that mobile service prices systematically constrain fixed-line prices. These characteristics contribute to making the former non-substitutable to the latter. It is also considered that, although theoretically marketed separately, all mobile telephony services (network access, communications, SMS and MMS, data, etc.) form part of the same market, notably because consumers are not inclined to have several SIM cards and several terminals. Similarly, mobile telephony offers based on different-generation networks (2G, 3G...) belong to the same market. Prepaid and postpaid offers are also considered to be part of the same market, since they are substitutable on both the demand and supply sides. Finally, the specific characteristics of mobile services for residential and non-residential customers have led the competition authorities to segment the market between these two types of customer.

100. With regard to the geographic delimitation of the market, it has also been the consistent practice of the industry's decision-making bodies to define the mobile telephony services market as national in scope. Nevertheless, there may be specific features within this area (such as remoteness, socio-economic characteristics, penetration of mobile services, a later start-up of activity, or depending on the area provided for in the operators' administrative authorizations for use of the radio frequencies) which justify a finer geographical delimitation[43] .

101. During the investigation, Vini argued that a distinction should be made between the market for mobile services aimed at residential customers and the market for services aimed at non-residential customers. However, in the present case, whether or not the retail market for mobile telephony services is further segmented according to the type of consumer concerned, the market power held by Vini remains more or less the same (it also points to the "non-performance" of its competitor PMT in the non-residential market segment). As a general rule, when market segmentation does not provide any additional information on the market power

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[42] See in particular the decisions of the metropolitan competition authority No. 14-D-05 of June 13, 2014 on practices implemented in the mobile telephony sector for residential customers in Reunion and Mayotte and No. 15-D-20 of December 17, 2015 on practices implemented in the electronic communications sector.

[43] See the aforementioned ADLC Decision No. 14-D-05 of June 13, 2014, in which the Réunion and Mayotte areas were considered as two distinct geographic markets.

of the company concerned and the effects on competition, competition authorities prefer to leave the question open[44] .

102. In addition, Vini argued that the geographic scope of the market was limited to the islands of Tahiti, Moorea and Bora-Bora, the only islands where PMT had chosen to develop its business. However, it should be noted that i) the specifications associated with the orders authorizing operators to set up and operate mobile telephony networks open to the public explicitly stipulate that operators must provide mobile telecommunications services throughout "the whole of French Polynesia"[45] , ii) the decrees granting authorization to use radio frequencies for the purpose of establishing and operating a mobile telephony network open to the public provide for "*an allocation area covering the whole of French Polynesia*"[46] ; iii) contrary to what Vini maintains, PMT also offers mobile telephony services in remote archipelagos, albeit to a limited extent, due in particular to the absence of distribution relays in this area, The fact that PMT's services are provided to consumers via Vini's network via a mobile local roaming contract between the two operators is irrelevant, iv) as PMT points out, the prices of the two operators' offers are equalized throughout the territory, and the preferences of Polynesian consumers do not differ according to the islands in the territory, v) the content of offers between the Society archipelago (which is not limited to the proposed dense zone comprising Tahiti, Moorea and Bora-Bora) and the rest of French Polynesia reflects the generation and performance of the underlying mobile networks, but does not change the nature of the services offered by operators, vi) the fact that the Autorité noted, in its aforementioned opinion no. 2017-A-02, the existence of an area lacking private initiative on the Polynesian territory does not in fact make it a distinct relevant market. In any case, no geographic market distinction provides additional information that could call into question the analysis of Vini's market power; the relevant market retained for the purposes of the preliminary assessment is therefore the retail market for mobile telephony services equal in size to French Polynesia.

b. MARKETS FOR MOBILE CALL TERMINATION SERVICES

103. The decision-making practice of the competition authorities is also well established with regard to the wholesale markets for mobile call termination, voice and SMS. In this respect, analyses of substitutability in terms of products and services conclude that there are no substitute products for mobile call termination services on a given operator's network, either from the

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44 See ADLC decisions no. 09-D-24 of July 28, 2009, concerning practices implemented by France Télécom on various fixed electronic communications services markets in the French overseas departments (§ 146) and no. 09-D-36 of December 9, 2009, concerning practices implemented by Orange Caraïbe and France Télécom on various electronic communications services markets in the departments of Martinique, Guadeloupe and Guyane (§ 191), upheld by the Paris Court of Appeal, C.A. Paris July 4, 2013, n° 2012/05160 and C.A. Paris May 10, 2017, RG n°2010073867 and by the Cour de cassation, Cass. Com. January 6, 2015, n° 13-21.305 13-22.477.

45 For PMT: order no. 818 CM dated June 13, 2017 amending order no. 581 CM dated May 4, 2011 as amended approving the specifications associated with order no. 2127 CM dated November 23, 2010 granting Pacific Mobile Telecom the status of telecommunications operator and consequently authorizing it to establish and operate a third-generation telecommunications network open to the public and to provide a mobile telecommunications service open to the public; for Vini/Tikiphone: order no. 817 CM of June 13, 2017 amending order no. 343 CM of March 18, 2010, as amended, approving the specifications associated with order no. 2089 CM, as amended, of November 16, 2009, renewing the authorization granting Vini the status of telecommunications operator.

46 Among others, for PMT: order no. 200 CM of February 20, 2013 granting authorization for the use of radio frequencies to Pacific Mobile Telecom for its telecommunications network open to the public; for Vini/Tikiphone: order no. 1403 CM of August 27, 2009 regularizing the authorization for the use of radio frequencies to Tikiphone for a mobile telecommunications network open to the public.

demand or the supply point of view[47] . Thus, it is traditionally considered that, for each mobile telephony network operator, there is a relevant market for voice call termination to its mobile numbers, comprising all voice call termination services to mobile numbers open to interconnection on its network. Similarly, for each mobile network operator, there is a relevant market for SMS termination to its mobile numbers, comprising all SMS termination services to mobile numbers open to interconnection on its network.

104. With regard to the geographical delimitation of the market, the reasoning applied to the geographical delimitation of the retail market for mobile telephony services can be reproduced here. For the purposes of this preliminary assessment, the geographic scope of the relevant markets is therefore that of French Polynesia.

c. THE MARKET FOR THE DISTRIBUTION OF MOBILE TELEPHONY PRODUCTS AND SERVICES

105. The decision-making practice of competition authorities has defined a global market for the distribution of mobile telephony products and services, covering the sale of airtime, mobile telephony terminals and other services to end consumers[48] . On this market, distributors are either "single-brand" (distributing the offerings of a single operator) or "multi-brand" (distributing the offerings of several operators), with a greater or lesser degree of specialization. The various distribution channels can be presented according to the following typology: integrated networks of mobile telephony operators, specialized single-brand networks linked, but not integrated, to mobile telephony operators through an exclusive or quasi-exclusive partnership, specialized multi-brand networks, whether telecom specialists or specialized superstores, whether or not integrated into distribution groups, generalist multi-brand networks (food superstores), distance-selling networks (internet, telephone sales, direct sales). Although decision-making practice has not led to the segmentation of the overall market for the distribution of mobile telephony products and services according to these different channels, it has been considered that such a segmentation could be retained when the market presented certain specificities, and in particular, when the following are present on the market on one side on the other hand, general retailers (tobacconists, newsagents, service stations, post offices and food stores) whose activity is limited to the distribution of prepaid cards or even a limited range of mobile terminals, and who constitute a back-up offer[49] .

106. In terms of geographic market delimitation, decision-making practice has focused on local market delimitation for the distribution of mobile telephony products and services, particularly in view of the fact that mobile telephony operators are constantly developing their own distribution networks, with a view to gaining greater control over the distribution of their products and services. The competitive analysis is also conducted at national level.

107. Examining the practices of Vini and OPT denounced by PMT in the context of the present proceedings does not require defining the market or markets for the distribution of mobile telephony products and services with regard to the characteristics of the Polynesian market. The Authority will therefore confine itself to making the following observations.

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47 In this regard, see Autorité de la concurrence decision no. 12-D-24 of December 13, 2012, concerning practices implemented in the mobile telephony sector aimed at residential customers in mainland France.

48 See in particular ADLC decisions no. 14-DCC-160 of October 30, 2014 on the acquisition of exclusive control of SFR by the Altice group, no. 13-DCC-69 of June 25, 2013 on the acquisition of exclusive control of New BBED Limited by Carphone Warehouse Group PLC and no. 11-DCC-07 of January 28, 2011 on the creation of a full-function joint venture by La Poste and SFR.

49 ADLC decision no. 14-DCC-160 of October 30, 2014, cited above (§ 105).

108. The distribution network for mobile telephony products and services in French Polynesia is made up of specialized boutiques (Vodafone, Vini, Tahiti Phone boutiques, OPT postal agencies, etc.), Moorea Informatique), where consumers can access virtually all the products and services marketed by the operator to which these stores belong or are attached (and are therefore single-brand), and general distributors - resellers - whose activity is limited to the distribution of prepaid products (cards and top-ups, possibly a terminal as part of a starter kit). The reseller network may offer the prepaid products of both operators (PMT and Vini have 27 resellers in common on the island of Tahiti). In addition, PMT has a mobile fleet made up of i) sales representatives who canvass "business" customers and ii) patented, independent "sales consultants" who canvass residential customers at home, also proposing postpaid offers. The online sales channel has not been developed, although customers of both operators have access to a number of ancillary services via a customer area.

d. THE POSTAL SERVICES MARKET

109. The examination of OPT's practices denounced by PMT within the framework of the present procedure does not require the definition of the relevant markets underlying postal activities.

2. VINI'S DOMINANT POSITION ON THE RELEVANT MARKETS

110. The notion of a dominant position is not defined in law. However, case law in metropolitan France has enshrined a definition drawn up by the Community authorities and courts: "*a dominant position concerns a position of economic strength held by an undertaking which gives it the power to prevent effective competition being maintained 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*". Since a dominant position is defined on a specific product or service market, the assessment of such a position inevitably requires a prior definition of the relevant market. The first criterion is the level of market share held by the company in question. It is traditionally considered that a company with a market share of less than 40% is not in a dominant position. 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, generally aimed at assessing the countervailing power of existing competitors and customers, as well as barriers to market entry.

111. Case law[50] 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.

a. ON THE RETAIL MARKET FOR MOBILE TELEPHONY SERVICES

112. As you will recall, Vini was created in 2013 through the merger of OPT's 100%-owned subsidiaries TNT, Mana and, finally, Tikiphone, created in 1994 and dedicated to mobile telephony. Despite the opening up of the mobile telephony sector to competition as early as 2003, Vini was not really challenged until PMT entered the market in 2013. For a long time, Vini therefore enjoyed a de facto monopoly on the mobile telephony services market, which enabled it to develop a particularly strong and important market position.

[50] Notably, C.A. Paris, December 12, 2006, Monnaie de Paris, n° 2006/01743.

113. In the aforementioned opinion no. 2017-A-02 of October 9, 2017 (§ 75), the Autorité had found that Vini currently held around 85% of the market share by volume on the retail market for mobile telephony services, which is not called into question by the information in the file. Moreover, Vini does not dispute that it holds a dominant position on this market, given its market share.

114. It should be added that Vini benefits from being part of the historic, state-owned OPT group, which retains a legal monopoly on mandatory telecommunications services (including access to leased lines for third-party operators) and on French Polynesia's public external telecommunications service (including the international Honotua submarine cable and access to satellite capacity).

b. ON THE MOBILE VOICE AND SMS TERMINATION MARKETS

115. In view of the above-mentioned decision-making practice (§ 103), Vini has a monopoly on the markets for terminating mobile voice and SMS calls to its network, which is undisputed.

3. THE PRACTICES LIKELY TO BE CONTRARY TO COMPETITION LAW

a. ON-NET AND OFF-NET PRICE DIFFERENTIATION

116. It is settled practice and case law that, for an operator in a dominant position, the practice of applying price differentials that are not justified by differences in production costs is likely to constitute an abuse if it has the object or effect of preventing, restricting or distorting competition in the market concerned. The Paris Court of Appeal recently recalled that "*price differentiation practices consist in applying different prices to identical or comparable products or services; they are not in themselves anti-competitive, but may become so, in particular if the difference in price does not correspond, at least to a reasonable extent, to the difference in costs involved*"[51] . Demonstration of an abusive practice of price differentiation therefore presupposes: i) differentiated retail prices, ii) a retail price differential that does not correspond to the difference in underlying costs incurred, iii) anti-competitive effects, iv) the absence of objective justification, and v) a causal link between the dominant position and the abuse.

117. In decision no. 09-D-36 of December 9, 2009, confirmed by the Paris Court of Appeal on this point[52] , the French competition authority considered that the practice of explicit tariff differentiation between on-net and off-net calls implemented by Orange Caraïbe on the retail market for mobile telephony services in the Antilles-Guyane zone constituted an abuse. Similarly, in its decision no. 12-D-24 of December 13, 2012, upheld by the Paris Court of Appeal on this point and by the French Supreme Court (Cour de cassation)[53] , it considered that the practices of implicit tariff differentiation between on-net and off-net calls implemented by Orange and SFR through the marketing of on-net abundance offers constituted an abuse of these operators' dominant position on the metropolitan markets for their respective mobile call terminations.

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[51] C.A. Paris, May 19, 2016, no. 2013/01006, page 10.

[52] ADLC decision no. 09-D-36 of December 9, 2009, confirmed by C.A. Paris, July 4, 2013, no. 2012/05160 and judgment of May 10, 2017, RG no. 2010073867. and by Cass. Com. January 6, 2015, no. 13-21.305 13-22.477 aforementioned.

[53] See in particular ADLC decision no. 12-D-24 of December 13, 2012 cited above, the C.A. Paris ruling of May 19, 2016, no. 2013/01006 and the Cass. Com. ruling of April 5, 2018, nos. 16-19.186 and 16-19.274.

118. With regard to differentiated retail prices, the competition authority in mainland France specified in its decision no. 09-D-15 of April 2, 2009[54] that mobile telephony offers restricting the possibility of making unlimited calls to on-net calls only result in a de facto differentiation between the price of on-net calls and that of off-net calls, with the price of the former being lower than that of the latter.

119. In this case, as the facts denounced in PMT's referral relate solely to offers currently marketed by Vini to residential customers, the following analysis is limited to these offers, to the exclusion of offers currently marketed to non-residential customers.

120. It is clear from the presentation of the ranges of offers currently marketed by Vini to residential customers that there is an objective difference in pricing between on-net voice calls and off-net voice calls, at least for offers in the Premium+ and Izi ranges, which represent around 40% of Vini's total customer base. There is also an objective difference in pricing between on-net and off-net SMS, at least for the Premium+ postpaid range as well as for the Vinicard prepaid range and the 500, 1,000 and 2,000 F CFP top-ups, which together account for more than half of Vini's total customer base. In addition, the Premium+ and Izi postpaid ranges provide access to pay-as-you-go options offering 30, 90 and 150 on-net SMS messages at more attractive rates than the default constraint of off-net SMS consumption. Similarly, the Izi and Taure'a ranges (which block off-peak consumption) offer access to prepaid top-ups of 500, 1,000 and 2,000 F CFP, which include a price differentiation between on-net and off-net SMS. Thus, all the postpaid and prepaid offers currently marketed by Vini include a price differentiation between on-net and off-net SMS.

121. With regard to the comparison between the difference in retail prices and the difference in underlying costs incurred, it has been established that a price differentiation between on-net and off-net communications can be justified by the existence of different levels of mobile termination charges[55] . On the other hand, if the price differentials between on-net and off-net communications exceed the differences in call termination charges, the tariff differentiation is unjustified[56] .

122. In the case in point, the pricing differentiation between on-net and off-net SMS in the retail offers proposed by Vini since April 2017 is not justified by a difference in SMS termination charges that the operators bill each other, as the difference in SMS termination rates is nil (see § 30). During the investigation, Vini did not contest the lack of objective justification for the SMS tariff differentiation it implements as part of its currently marketed offers, consumed by more than half of its total customer base.

123. As for the price differentiation between on-net and off-net calls, this could be objectively justified if the difference in the price per minute of each of these calls did not exceed the difference in the underlying voice call termination rates, which in relation to the regulated voice call termination rates in force is 2.9 F CFP (see § 29). However, Vini's practices of price differentiation between on-net and off-net calls are "implicit" insofar as the price differences are not nominal. In other words, Vini does not charge one unit price per minute for on-net calls and another for off-net calls (as is the case with explicit price differentiation). It is therefore not possible to establish a *prima facie* price difference between on-net and off-net calls.

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54 ADLC decision no. 09-D-15 of April 2, 2009 concerning a request for protective measures submitted by SFR regarding various practices implemented by the France Télécom group on the mobile telephony and broadband Internet markets ('Unik' offer).

55 ADLC decision no. 09-D-15 of April 2, 2009, cited above.

56 See in particular ADLC decision no. 12-D-24 of December 13, 2012 and the Paris C.A. ruling of May 19, 2016, no. 2013/01006 cited above.

124. In the aforementioned Decision no. 12-D-24 of December 13, 2012, which qualified an implicit tariff differentiation practice as abusive, the metropolitan competition authority was led to establish a method for evaluating the prices of on-net and off-net call minutes ("implicit average prices"), enabling it subsequently to relate the tariff differentiations practiced to the differences in operators' voice call termination rates. The Paris Court of Appeal, in its aforementioned ruling of May 19, 2016, upheld by the Cour de cassation[57] , underlined the relevance of the method used, outlining: "*To measure the extent of this differentiation, the Authority quantified, on the one hand, the unit price of a minute belonging to the hours bucket, representing the price of an off-net minute, and, on the other hand, the average price of an on-net minute, determined from the unit price previously calculated and the unit price of a minute belonging to the abundance slot, weighted by the call traffic of these two call slots*" (page 10).

125. In the case in point, Vini and PMT have each submitted an economic study[58] aimed at reproducing the price differentiation test used in case law, applied to the Premium+ and Izi ranges marketed by Vini.

126. PMT, which suffers from asymmetry of information regarding the characteristics of traffic (on-net/off-net) spent on Vini's network, considers that, for the Premium+ range offers, the price differentiation between on-net and off-net calls is not justified once the share of total on-net traffic spent during abundance slots reaches the threshold of 23.7%. According to PMT, this threshold is relatively low. More generally, PMT produces the table below, which can be interpreted as follows: for the Premium+ 6h package, if the share of on-net traffic deducted from the main package (X) amounts to 70%, and the on-net traffic spent in the abundance slot is greater than or equal to 18 minutes, then the tariff differentiation is unjustified. The shaded area corresponds to implausible cases, as the number of minutes spent in this slot would have to be negative for the tariff differentiation to be justified.

X	4H	6H	8H	12H	16H
0%	-60	-60	-120	-120	-240
10%	-53	-49	-105	-98	-210
20%	-45	-38	-90	-75	-180
30%	-38	-26	-75	-53	-151
40%	-30	-15	-60	-31	-121
50%	-23	-4	-45	-8	-91
60%	-15	7	-31	14	-61
70%	-8	18	-16	36	-31
80%	0	29	-1	59	-2
90%	7	41	14	81	28
100%	15	52	29	104	58

127. For the Izi range, based on Vini's assumption that 80% of Vini's total traffic corresponds to on-net traffic, PMT produces the results shown in the table below[59] , which can be interpreted as follows: if a customer of the Izi 2h + 2h on-net offer consumes 30% of the generosity component, the price differential between on-net and off-net minutes is 5.97 F CFP excl. tax

[57] Cass. Com. April 5, 2018, no. 16-19.186 and 16-19.274 aforementioned.

[58] For Vini: Study "Economic analysis in response to the price differentiation tests implemented by the firm Marpij on Vini's Premium+ and Izi range packages", carried out by the firm Tera; for PMT: Initial study by the firm Marpij, "Price differentiation test applied to the mobile telephony offers of the operator Vini", provided in PMT's supplementary submission of October 17, 2017.

[59] "Complement to the study on the tariff differentiation test applied to the mobile telephony offers of the operator Vini", carried out by the firm Marpij on December 21, 2017.

(and is therefore greater than the voice call termination rate differential of 2.9 F CFP excl. tax). The whole of the shaded area thus corresponds to a situation of unjustified price differentiation.

	30mn	1H	2H	3H
0%	0,00	0,00	0,00	0,00
10%	3,02	2,77	2,43	2,19
20%	5,43	4,99	4,38	3,93
30%	7,40	6,80	5,97	5,36
40%	9,05	8,31	7,30	6,56
50%	10,44	9,59	8,42	7,56
60%	11,63	10,68	9,39	8,43
70%	12,66	11,63	10,22	9,18
80%	13,57	12,46	10,95	9,83
90%	14,37	13,20	11,60	10,41
100%	15,08	13,85	12,17	10,93

128. According to Vini, for four out of five Premium+ offers, the price differentiation applied is justified, insofar as, as shown in the table below taken from the study produced by Vini, the difference in implicit average prices for one minute of off-net calls and one minute of on-net calls ranges from 1.59 F CFP excluding VAT to 2.74 F CFP excluding VAT, and is therefore lower than the difference in voice call termination rates. On the other hand, the Premium+ 6h offer has an implicit average price differential of 2.96 F CFP excl. tax, which is higher than the voice call termination rate differential of 2.9 F CFP excl. tax.

Heures de voix All-net	4	6	8	12	16
Heures de voix On-net	1	1	2	2	4
Tarifs nettoyés des composantes SMS "off-net" et data (FTTC)	3100	4700	5550	8550	9650
Part fixe rémunérant l'accès au service et la composante SMS "on-net" illimitée (FTTC)	1350	1350	1350	1350	1350
Tarifs nettoyés des composantes SMS "off-net", data (FTTC) et de la part fixe (FTTC)	**1750**	**3350**	**4200**	**7200**	**8300**
Prix moyen implicite des minutes all-net = Prix moyen implicite des minutes off-net = Prix moyen implicite des minutes on-net = valeur de la composante / (nombre d'heures totales x 60)(FTTC)	**5,83**	**7,98**	**7,00**	**8,57**	**6,92**
Part du trafic "on-net" de la composante illimitée au sein du trafic "on-net" total	53%	42%	36%	35%	26%
Prix moyen implicite des minutes "on-net"	**2,74**	**4,63**	**4,48**	**5,57**	**5,12**
Différence des prix moyens implicites des minutes off-net et on-net (FTTC/min)	3,09	3,35	2,52	3,00	1,80
Différence des prix moyens implicites des minutes off-net et on-net (FHT/min)	**2,74**	**2,96**	**2,23**	**2,65**	**1,59**

129. For the Izi range of offers, Vini believes that the price differentiation applied in these offers is justified, and in support of its position provides the results shown in the table below, indicating implicit price differentials ranging from 1.9 F CFP excl. tax to 2.1 F CFP excl. tax, and not exceeding the voice call termination rate differential of 2.9 F CFP excl. tax.

Heures de voix "All-net"	0,5	1	2	3
Heures de voix "On-net" S&WE	0,5	1	2	3
Prix moyen implicite des minutes all-net = Prix moyen des minutes off-net = Prix moyen implicite des minutes on-net dans la composante all-net = valeur de la composante / (nombre d'heures x 60)(FTTC)	**10,9**	**13,6**	**13,5**	**12,6**
Prix moyen implicite des minutes on-net dans la composante on-net = valeur de la composante / (nombre d'heures x 60)(FTTC)	6,4	7,9	7,9	7,4
Part des appels on-net réalisée dans le créneau on-net S&WE	**47%**	**43%**	**40%**	**41%**
Prix moyen implicite des minutes on-net (FTTC)	**8,8**	**11,1**	**11,3**	**10,5**
Différence entre les prix moyens implicites (FTTC)	**2,1**	**2,4**	**2,3**	**2,2**
Différence entre les prix moyens implicites (FHT)	**1,9**	**2,1**	**2,0**	**1,9**

130. As a preliminary point, it should be emphasized that the assumptions made by each party in its economic study are legitimately such as to tend the implicit off-net and on-net price differential towards a value less than or equal to the call termination differential in the case of Vini, and towards a higher value in the case of PMT. It should also be pointed out that the results presented by Vini are such that the implicit price differentials for off-net and on-net calls would be between 1.9 and 2.1 F CFP excl. tax in the Izi offers, and between 1.59 and 2.96 F CFP excl. tax in the Premium+ offers (the average differential being 2.3 F CFP), and are therefore just below the differential for call termination tariffs (2.9 F CFP excl. tax). Thus, any questioning of the method and assumptions used by Vini, which could lead to an upward re-evaluation of the price differentials they arrive at, would also call into question the objective justification for its practice.

131. However, without it being necessary to rely, in the context of these proceedings, on a tariff differentiation test in line with case law and adapted to the case in point[60] , it is possible to draw the following conclusions.

132. Firstly, the two parties' studies differ in their assessment of the share of the bundle's nominal price (the bundle's nominal price being the posted price including all services: network access, off-net communications, mobile data, abundance components and on-net generosity) allocated to the number of call minutes available in the bundle. Used at the start of the demonstration, the evaluation of this share of the nominal price has a decisive impact on the results, as it enables us to estimate the implicit price of the cross-net call minute[61] . For Premium+ range offers, the implicit average price of a cross-net call minute excluding generosity or abundance slots is 13.83 F CFP incl. VAT[62] according to PMT and 7.38 F CFP incl. VAT[63] according to Vini. In this respect, after having established this value in line with the method used in the

60 The test applied in the aforementioned decision no. 12-D-24 of December 13, 2012 is not a priori directly applicable due to the unprecedented nature of the coexistence, in the Vini offers in question, of generosity and abundance components.

61 On this point, it may be pointed out that in the aforementioned decision no. 12-D-24 of December 13, 2012, the metropolitan competition authority considers that the fixed portion resulting from the regression remunerates all other services, including so-called "multimedia" services (sending SMS, MMS and watching videos) (§ 89, 124 et seq.). It also points out that, as the period in question (2005-2009) is a long one, "*the various services included in the package have naturally evolved, resulting in a gradual increase in the fixed portion of the package*" (§ 171).

62 Initial study by Marpij, "Test de différenciation tarifaire applique aux offres de téléphonie mobile de l'opérateur Vini" - Supplementary submission by PMT dated October 17, 2017.

63 Study "Economic analysis in response to the price differentiation tests carried out by Marpij on Vini's Premium+ and Izi range packages", carried out by Tera.

jurisprudential price differentiation test (which imposes a regression on the entire range), Vini does not use it in the rest of the demonstration[64] . Vini chooses to use a new estimate of the implicit price, offer by offer, on the grounds that, in the case in point, this new approach, which departs from the jurisprudential method, "is preferable". However, in three out of five cases, it leads to an increase in the implicit average price differential to be compared with the voice termination rate differential.

133. Secondly, in its demonstration, Vini includes the generosity component (present in the two offer ranges in question) in the package's cross-net communication time, which PMT rightly criticizes. According to Vini, the structure of Premium+ offers is "*essentially a display*", which does not constrain customers' consumption of off-net calls; under these conditions, Vini considers that its hypothesis appears "*reasonable at first glance*". On the other hand, Vini argues that PMT's study is flawed insofar as it equates this generosity component with an abundance component. However, none of the parties has produced the results that would follow from an intermediate hypothesis, which seems appropriate. As already indicated, it is in particular the presence of this generosity component that would distinguish the case in point from the case analyzed by the tariff differentiation test validated by case law.

134. Thirdly, the results put forward by PMT for Premium+ offers are based on an estimate of the average rate of on-net communication spent on abundance and generosity (quantity of abundance and generosity minutes consumed / quantity of total on-net minutes consumed) of 23.7%. However, Vini's observed traffic data shows that, for these offers, the share of on-net traffic of the unlimited component within total on-net traffic is between 26% and 53% (on average over the five offers: 38.4%), data that is strictly higher than PMT's estimate. Furthermore, Vini's assumption that the generosity component is considered an integral part of the package's cross-net communication time suggests that the on-net traffic it generates is not included in these observed traffic data, and that the latter would therefore be underestimated. Finally, with regard to the Izi range in particular, the specific conditions for Vini offers currently in force state that customers who migrate from another offer range (except from the Premium+ range) to an offer in the Izi range benefit from a bonus credit of one hour of on-net communication every month for three months. However, these generous bonuses were not taken into account in the studies carried out by the parties.

135. Fourthly, the results of the tests carried out by Vini and PMT are based on minorities in the price of cross-net calls, insofar as it is assumed that exactly the entire quantity of calls included in the basic package is consumed by customers. However, there is necessarily a proportion of customers who do not consume their entire basic package (which leads to an increase in the unit price of the minute included in this package) and a proportion of customers who consume communication time outside their basic package (which also leads to an increase in the unit price of the minute consumed)[65] .

136. Taken together, these factors suggest that Vini's results, while just sufficient to demonstrate the justification for its practice, are likely to reveal an implicit price differential that is lower than it actually is. Thus, the differentiation in pricing for on-net and off-net calls in Vini's Premium+ and Izi range retail offers is unlikely to be justified by an objective difference in the voice call termination charges that operators charge each other.

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64 In this respect, see the values used by Vini in his demonstration, which appear in the sixth line of the table in §1. 128 of this decision.

65 In this regard, see ADLC decision no. 12-D-24 of December 13, 2012, cited above, (§ 119 et seq., 129 et seq., 138, 144, 174, 181); in this decision, taking into account the minutes actually consumed in the package (and not exactly the entire package) led to an upward adjustment in the unit price per cross-net minute in the package from 37% to 55% (§ 122, 130, 175, 182).

137. With regard to anti-competitive effects, it follows from case law and decision-making practice that, in order to demonstrate the abusive nature of a practice of price differentiation between on-net and off-net communications, voice or SMS, implemented by a dominant operator on the mobile call termination market, it is necessary to investigate whether such a practice harms competition, for example in the form of an actual or potential reinforcement of club effects or higher costs for competing operators. For example, the competition authority in metropolitan France has considered that several effects are likely to result from a practice of tariff differentiation[66] , in particular: i) on a market where operators' market shares are asymmetrical, a strengthening of "club effects" encouraging consumers to subscribe to the operator with the largest network (in particular, the amplification of the "tribe" effect, corresponding to the propensity of close relations to group together with the same operator, and of the "network" effect, linked to the size of the customer base, forcing smaller competitors to respond with offers including a cross-net abundance component[67] , which leads to a deterioration in the interconnection balance of small operators), ii) the distortion of call flows to the detriment of competing operators, leading to a negative effect on their revenues and margins, iii) without preventing equally efficient downstream market competitors from offering their services profitably, the significant increase in their costs to weaken them and thus reduce the competitive pressure they are likely to exert on the market, and iv) the deterioration in the image of competitors. In particular, these effects have the effect of foreclosing customers on the retail market and/or artificially raising competitors' costs, reducing the competitive pressure they are likely to exert by raising barriers to market entry, and strengthening the position of the dominant operator.

138. In the case in point, Vini's price differentiation practices for SMS and calls are likely to significantly reinforce club effects and artificially raise the barriers to market entry for actual and potential competitors[68] . So-called "network" club effects, which occur when the benefit the consumer derives from a service increases with the number of users of that service, are effects that naturally benefit the operator with the largest network. Price differentiation practices enable the operator who implements them to take greater advantage of these effects, by taking advantage of their cumulative and dynamic nature ("snowball effect")[69] , increasing its market share to the detriment of smaller operators, with this increase in market share reinforcing the attractiveness of the operator's network. However, as already indicated, Vini's offers in question concern around 40% of its total customer base in terms of call price differentiation, and more than half in terms of SMS price differentiation[70] ; this indicates that Vini benefits from the reinforcement of these effects on a significant part of this customer base. In addition, the current numbering plan and mechanism for retaining cell phone numbers, which enable consumers to identify the operator of their correspondents (through the number prefix -

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[66] ADLC decisions no. 04-MC-02 of December 9, 2004 concerning a request for protective measures presented by Bouygues Télécom Caraïbe against practices implemented by Orange Caraïbe and France Télécom and C.A. Paris, January 28, 2005, n° 2004/23525, n° 09-D-15 of April 2, 2009 aforementioned, n° 09-D-36 of December 9, 2016 and C.A. Paris of July 4, 2013, n° 2012/05160 aforementioned, n° 12-D-24 of December 13, 2012 and C.A. Paris of May 19, 2016, n° 2013/01006 aforementioned.

[67] In other words, to all cell phone networks.

[68] In this regard, it should be recalled that a new operator wishes to enter the mobile telephony sector (see Polynesian Competition Authority notice no. 2017-A-02 of October 9, 2017, cited above). The Council of Ministers has refused to grant a mobile operator license to this operator, but this decision is being appealed before the administrative court.

[69] ADLC decision no. 12-D-24 of December 13, 2012, cited above, (§ 505).

[70] Given that [15% - 25%] of the offers in circulation are no longer on the market, they were not analyzed as part of the present procedure.

§ 34), do not hinder the practice and facilitate it. Moreover, as the Paris Court of Appeal[71] pointed out, in the case of price differentiation, the extent to which club effects are reinforced "*depends in particular on the asymmetry of market shares between operators and the extent of price differentiation between on-net and off-net calls*" (page 26). The absence of a differentiation test in line with case law and specifically adapted to the practices complained of makes it impossible to quantify the difference between on-net and off-net call and SMS prices in the offers in question. However, it can be considered that the asymmetry of market shares (around 85% market share for Vini) and more specifically the difference between the network sizes of the two operators, in that it constitutes a lever multiplying the effects of club[72] , are such that the reinforcement of these effects is potentially significant, even if the difference between on-net and off-net prices were to be small *prima facie*. What's more, in the specific case of SMS, the trend in the overall volume of SMS exchanged, which has not yet reached the threshold of decline due in particular to the development of data exchanges over the mobile Internet, is upward and therefore value-bearing. In this context, insofar as the on-net and off-net price differentiation for SMS concerns all the prepaid offers currently marketed by Vini, and is therefore aimed at a clientele of first-time buyers considered by the Paris Court of Appeal as "*important in the operators' competitive game*"[73] , the reinforcement of club effects is likely, by encouraging new consumers to subscribe to an offer with Vini, to marginalize its competitor's offers.

139. Vini's price differentiation practices for SMS and calls are also likely to weaken competitors' ability to drive competition on the market. Decision-making practice and case law[74] have established that, in a context where the operator with the largest network implements such practices, the launch of their own abundance or on-net generosity offers by smaller operators is not likely to protect them from the resulting crowding-out effect. As a result, these operators are obliged to respond by marketing cross-net abundance or generosity offers, which, by raising their costs, weaken their ability to drive competition on the market. Indeed, and this is the case for PMT, given their small size, small operators cannot rely on club effects to encourage new customers to subscribe to abundance or on-net generosity offers on their networks, all the more so when the market is mature, a characteristic verified in the present case (§ 42 et seq.) That's why PMT needed to make its network attractive by launching the "Prestige" range of offers in August 2017, which includes an abundance component, 24-hour cross-net SMS: "*We developed the Prestige offer because we need to acquire customers and be innovative in terms of offers (...) a certain amount of feedback from our prospects mentioned not wanting to join Vodafone because their relatives were Vini customers: we needed to establish a gateway (...). Our challenge, given the maturity of the market, was to remove the barriers to customer migration from Vini to Vodafone. Unlimited cross-net SMS opens the way*". However, this response, which PMT says was only made possible by the drop in SMS termination rates (to 1 F CFP HT per unit) in April 2017, does not concern voice calls and is geographically restricted. On the exclusion of voice calls, PMT suffers, all other things being equal, a negative interconnection balance in volume and value for voice minutes, which shows, as it rightly argues, that the

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71 C.A. Paris, July 4, 2013, no. 2012/05160, cited above.

72 ADLC decision no. 04-MC-02 of December 9, 2004: "*the club effect resulting from the price differentiation between off-net and on-net calls (...) is directly proportional to the extent of this differentiation. It is also considerably reinforced by the fact that there are only two networks, and that the larger of the two has a market share of over 82%. The difference in size between the networks, and not the absolute size of the smaller network, is the crucial factor in this case, as it acts as a lever multiplying the effect of the amount of the difference in tariffs*" (§ 61).

73 C.A. Paris, July 4, 2013, no. 2012/05160, cited above.

74 ADLC decision no. 12-D-24 of December 13, 2012 and C.A. Paris judgment of May 19, 2016, no. 2013/01006 cited above.

asymmetry in regulated voice call termination rates implemented at the start of 2017 (§ 29) is not sufficient to offset the distortion of voice flows in favor of the operator with the largest network. Under these conditions, the risk of extending the cross-net abundance component of its offers to calls could appear too great for PMT in view of the potential acceleration in traffic leaving its network and hence its growing interconnection deficit already incurred since June 2017. With regard to the geographic limitation of its cross-net SMS abundance offer to Tahiti, Moorea and Bora-Bora (an area in which PMT has deployed its own infrastructure), given that in the rest of the territory PMT reaches its customers via costly local mobile roaming on Vini's network and in fact does not receive any call termination revenue there, the risk of distorting SMS traffic volumes in favor of Vini and the subsequent increase in roaming charges could also appear too great for PMT. Thus, in view of the competitive context as a whole, while PMT's response to Vini's generous and abundant on-net offers is only partial, it appears to be the only one possible. As a result of the foregoing, Vini's price differentiation practices have the effect, actual or potential, of (i) in the case of calls, artificially increasing the distortion of call flows in Vini's favor and depriving PMT of call termination revenues, without PMT being able to respond with offers featuring on-net components on calls, (ii) in the case of SMS, after forcing PMT to respond with a cross-net abundance offer, even if limited, artificially increase the distortion of SMS flows in its favor, even if there is a "rebound effect"[75] , and widen its interconnection deficit[76] , iii) in both cases, independently of PMT's efficiency and the distortion of flows attributable to its commercial strategy[77] , artificially increase its costs, limit its ability to win customers and, in fact, drive competition in the retail market for mobile telephony services, to the detriment of consumers.

140. Finally, Vini's price differentiation practices for SMS and calls are likely to artificially present PMT to consumers as a less attractive operator. In this respect, the file contains language circulated by Vini's customer service highlighting the benefits of the club effect in the sales pitch promoting Vini's offers.

141. To conclude, in addition to the potential effects described above, it should be added that a dominant position on the retail market, as in this case, is likely to aggravate the effects of an abusive differentiation practice, by strengthening the dominant position of the downstream operator: "*the fact that [the] operator also holds a dominant position on the downstream market - that of supplying services to end consumers - is likely to reinforce the effects of this abuse: tariff differentiation can also be one of the levers of a strategy aimed at ousting or disciplining competitors on the downstream market, all the more effectively as this position is strong*"[78] .

142. As regards the causal link between the dominant position and the abuse, it is settled case law that conduct may be qualified as abusive on a market other than that on which the company in question holds a dominant position, provided two conditions are met: the first relating to the existence of "close links" between these markets, and the second relating to the existence of "special circumstances" justifying this qualification[79] . Connectedness between the upstream mobile call termination market and the downstream retail market for mobile telephony services has been recognized on several occasions by case law[80] . With regard to the existence of special

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75 According to Vini, the "bounce effect" refers to the fact that an SMS received almost systematically generates an SMS in response.

76 ADLC decision no. 12-D-24 of December 13, 2012, cited above (§ 527).

77 ADLC decision no. 12-D-24 of December 13, 2012, cited above (§ 538 and 539).

78 ADLC decision no. 09-D-36 of December 9, 2009 (§ 336).

79 See in particular Cass. Com. March 17 2009, Glaxosmithkline, no. 08-14.503.

80 C.A. Paris, May 19, 2016, no. 2013/01006, page 19, confirmed by Cass. Com. April 5, 2018, no. 16-19.186 and 16-19.274, page 6.

circumstances, the decisional practice[81] and the case law[82] have considered that the operator in question, dominant on the market for its mobile call termination, must be able to generate a margin on the sale of its call termination and to forego all or part of this margin by charging lower on-net call tariffs on the retail market than its off-net call tariffs.

143. In the case in point, insofar as mobile SMS termination rates are the result of free negotiation between operators (§ 30), Vini has such leeway in the SMS termination market, which it does not dispute. As for mobile voice termination rates, as mentioned above (§ 29), they are regulated. In this respect, the file shows that Vini's unit cost per minute for voice mobile call termination, calculated according to the CMILT method imposed by the CPT, amounted to 6.42 F CFP in 2016. In addition, Vini stated during the investigation that "*the trend in the CMILT cost of voice call termination is downwards, due to the volume of traffic, particularly data*", for which it is also seeing strong growth. As a result, Vini's unit cost of voice call termination per minute is likely to be lower today than the value calculated in 2016, and therefore lower than Vini's regulated voice call termination tariff set at 7 F CFP for the years 2017 and 2018. Furthermore, contrary to what it maintains, Vini is in a position, without contravening the provisions of the CPT, to reduce its call termination rate in view of its cost below the regulated rate. Indeed, the provisions of the CPT stipulate that "*any overrun of the tariffs set by order of the Council of Ministers (...) will be penalized*" (art. A. 212-22-7). Lastly, under the local mobile roaming contract on Vini's mobile network, the technical and pricing terms of which are not regulated (§ 31), Vini receives revenue from call termination and other services, the level of which cannot be verified[83] .

144. It follows from all the above that the price differentiation practices implemented by Vini between on-net voice and SMS communications on the one hand, and off-net voice and SMS communications on the other, are likely to constitute an abuse of a dominant position, a practice prohibited by article LP. 200-2 of the French Competition Code.

b. VINI'S CUSTOMER LOYALTY POLICY

145. In its aforementioned decision no. 09-D-36 of December 9, 2009, the French competition authority drew a distinction between "loyalty offers" and "retention offers". A loyalty offer corresponds to a gratuity from the operator to the customer, to reward him for his past loyalty. It is similar to a volume discount. A loyalty offer, on the other hand, offers a discount or benefit to the customer, in exchange for a commitment for the future. The effect of this type of offer is to deprive the consumer of his or her ability to arbitrate for a given period.

146. Loyalty offers are generally considered to be pro-competitive, whereas loyalty offers can have restrictive effects on competition. Indeed, although loyalty offers have a direct favorable effect for the consumer by lowering the purchase price compared to the price paid by the non-loyalized consumer, they also have an unfavorable indirect effect by increasing the cost of switching operator. In this way, they skew the trade-off faced by consumers when comparing the option of keeping their current operator with that of changing operator, by making the latter more expensive. As a result, loyalty offers freeze operators' market shares and limit their incentive to compete on price.

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81 ADLC Decision No. 14-D-05 of June 13, 2014, cited above, § 162.

82 C.A. Paris, May 19, 2016, no. 2013/01006, page 19, confirmed by Cass. com. April 5, 2018, no. 16-19.186 and 16-19.274page 6.

83 In this respect, the fact that the local roaming tariff is indexed to the regulated call termination tariff does not mean that the principle of non-discriminatory, cost-oriented pricing is respected.

147. Insofar as loyalty and loyalty-building offers relate to a rebate system, it is decision-making practice and case law on anti-competitive rebates that should be referred to. In this respect, it can be seen from[84] that only rebate systems which do not have a loyalty-building effect for the benefit of a company in a dominant position, such as quantity rebates linked solely to the volume of purchases made from it, are devoid of anti-competitive effect. It follows that a rebate system will be considered abusive if the criteria and procedures for granting it show that the system is not based on an economically justified consideration, but tends, like a loyalty rebate, to limit customers' purchases from competing producers (loyalty effect).

148. Consequently, as the Paris Court of Appeal pointed out in its aforementioned ruling of July 4, 2013, the analysis of the bids in question must "*be assessed in the context of a balance sheet comparing the anti-competitive effects of the bid with its economic justifications, in particular with regard to the advantages granted, the way in which they were implemented, the duration of the commitments and the structure of the market*" (page 22).

149. In the case in point, it is therefore necessary to assess whether the Ura loyalty program and Vini's customer commitment and re-commitment practices are likely to be anti-competitive, after weighing up their anti-competitive effects against the benefits for consumers or the market.

i. ***About the Ura loyalty program***

150. The aforementioned analysis grid has already been applied to demonstrate the abusive nature of a loyalty program offered by a mobile telephony operator in a dominant position on the retail market for mobile telephony services. In the aforementioned decision no. 09-D-36 of December 9, 2009 (§ 319 to 326), confirmed on this point by the Paris Court of Appeal and the Court of Cassation[85] , the "Changez de mobile" loyalty program offered by the dominant operator (between 2002 and 2005) was qualified as anti-competitive.

151. In this case, the French competition authority emphasized, at the stage of the above-mentioned precautionary measures decision no. 04-MC-02 of December 9, 2004: "*However, the loyalty points acquired (...) are proportional to the sums billed (...). As such, they could be considered as a credit materializing a volume discount granted on the rate of minutes consumed. However, since these points can only be used for the purchase of a new terminal, with a 24-month recommitment, this volume discount changes its nature to become a loyalty discount, since it is not possible to use the points acquired to reduce the price of the minutes consumed, but only to reduce the price of the new terminal acquired, with a new commitment. In this way, Orange Caraïbe customers who have acquired points because of their high consumption, but who wish to complete their commitment in order to compete with the two operators, can only do so by losing the value of their points (...). This loyalty effect would disappear if the points could be used to purchase, not only a terminal, but any other good or service offered by Orange Caraïbe to its customers, in particular the acquisition of communication minutes*" (§ 75, emphasis added).

152. On this point, in its May 10, 2017 ruling on the compensation action brought by Outremer Telecom against Orange Caraïbe's practices condemned by the French Competition Authority, the Paris Court of Appeal points out that, in the case in point, "*this program prevented Orange Caraïbe customers wishing to change mobile operator from doing so, as they would lose their loyalty points*" and that "*the anti-competitive effect was therefore linked to this obligation to*

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[84] See in particular ADLC decision no. 09-D-36 of December 9, 2009, confirmed by C.A. Paris of July 4, 2013, no. 2012/05160, endorsing the judgment of the European Court of Justice of February 13, 1979, Hoffmann-LaRoche v. Commission, no. 85/76.

[85] C.A. Paris, July 4, 2013, no. 2012/05160 and Cass. Com. january 6, 2015, no. 13-21.305 13-22.477.

use points in exchange for the purchase of a terminal and a 24-month re-commitment"[86] . However, it does not rule out the possibility that a different loyalty program, which did not have this loyalty-building effect, could be anti-competitive.

153. Moreover, in this ruling, the Paris Court of Appeal analyzed the loyalty program implemented (during 2005) by Orange Caraïbe in response to the injunction issued by the French competition authority in the above-mentioned precautionary measures decision[87] , in the light of the criteria laid down by case law. In the case in point, Orange Caraïbe's "new loyalty program" provided for customers to use their loyalty points without having to recommit. From 350 points upwards, customers had the following options: i) use their points to access Orange services (calls, SMS messages, GPRS connections, etc.) without recommitting themselves, ii) use their points to acquire a new handset on preferential terms, in which case they had two choices: acquire a new handset without subsidy or recommitment, but in return for a monetary payment, or acquire a new handset with subsidy in return for a 24-month recommitment. Lastly, the points accumulated under the program were retained by the customer after the termination and cessation of his subscription contract, and could be exchanged for packages of services that could be used in prepaid mode[88] . Thus, in the above-mentioned ruling, independently of the option provided by Orange Caraïbe's new program whereby customers could benefit from non-re-engaging gifts of use ("service lots"), the Paris Court of Appeal analyzed the choices available to customers who wish to change their handset by exchanging the loyalty points they have acquired, This means benefiting from a subsidy on their terminal in return for a 24-month commitment, or not benefiting from this subsidy, not recommitting and paying the amount required to obtain the terminal. The Court concludes that, insofar as the customer is faced with this choice, and the documents in the file are not such as to demonstrate that the attractiveness of the terminals offered by Orange Caraïbe is such that this choice is no longer a choice, the "new loyalty program" implemented by Orange Caraïbe does not have a loyalty-building character (pages 20 and 21).

154. In the case in point, the investigation revealed the following specific features of the Ura program:

- only postpaid members have access to the possibility of acquiring a terminal in return for a 24-month recommitment (§ 73) ;
- welcome points, awarded when the customer signs up and according to consumption, length of service and remaining commitment period, can only be used for gifts that require the customer to sign up again (§§ 67) ;
- under the "multi-line" advantage, when loyalty points accumulated on all lines attached to the same billing account are used to obtain a single terminal, the customers of all the lines concerned are re-engaged (§ 77) ;
- as Vini points out, "*the voice and SMS bonuses have a monetary value (...) because they involve the use of points which are monetized, since they also give the right to a discount*

[86] C.A. Paris, May 10, 2017, RG n°2010073867 relating to the indemnity action brought by Outremer Telecom against the practices of Orange Caraïbe condemned by the French Competition Authority in the aforementioned decision n° 09-D-36 of December 9, 2009 (pages 19 and 20).

[87] ADLC decision no. 04-MC-02 of December 9, 2004, cited above: "*Orange Caraïbe is enjoined, as a precautionary measure and pending a decision on the merits, to allow its customers to use the loyalty points they have acquired or may acquire, as a deduction from the price of any purchase of goods or services it offers its customers, the value of the point being that set by Orange Caraïbe. Orange Caraïbe will inform its customers of this on their next bill and by visible display in France Télécom agencies and Orange sales outlets*" (article 4).

[88] ADLC decision no. 09-D-36 of December 9, 2009 (§ 106 to 110).

on a telephone"[89] . It is clear from the investigation that the value of a loyalty point, while constant when acquired by the customer[90] , fluctuates according to the gift chosen by the customer at the time of point redemption (§ 79). As a result, the loyalty point is less valued overall when redeeming a "non-recommitting" gift (on average 0.36 F CFP) than when acquiring a terminal, which re-commits the customer (on average 0.55 F CFP);

– While it's true, as Vini points out, that customers make use of custom gifts "*according to their wishes and needs*", the fact remains that their decision-making will depend on the alternatives available to them. Contrary to Vini's argument, the "attractiveness" of usage gifts in relation to the offer from which customers benefit does not depend on the slots of abundance or on-net generosity that these offers present, but on the out-of-bundle rates for SMS, communications or data services. Indeed, a customer will only rationally resort to a usage gift when the service credits included in his offer are not sufficient to satisfy his short-term needs. In this respect, the "perishable" nature of gifts of use supports the "complementary" nature of these gifts (Vini's website describes them as "one-off") (§ 73). When the customer is in an "off-peak" consumption situation, the usage gifts therefore compete with the additional subscription options provided by Vini's commercial offer. However, for postpaid customers (95% of whom are members of the program) benefiting from Premium+, Izi and Taure'a offers (i.e. around 40% of Vini's total customer base), the use of these additional options may appear more advantageous than the use of the usage gifts offered by the Ura[91] program. From the customer's point of view, this is likely to enhance the value of the Ura program more for its "terminal acquisition" component than for its "gifts of use" component. In this respect, Vini has indicated that, in 2016, between 85% and 90% of points used by postpaid customers were used in connection with a terminal change.

155. In any case, in its aforementioned ruling of May 10, 2017, the Paris Court of Appeal held that the consumption of points in the context of a gift of use and the consumption of points in the context of the acquisition of a terminal were not substitutable (§ 153). Thus, the analysis of the loyalty-building nature of the program in question is conducted with regard to the choice presented to the member when he or she wishes to change terminals.

156. However, when a postpaid customer wishes to change terminal using his points (i) during the commitment period, he re-commits for a further 24 months, thereby extending the duration of his contractual relationship with Vini, (ii) at the end of his initial commitment period, he can only change operator by losing the value of the points he has accumulated (article 11 of the specific conditions of use of the Ura program). As a result, the Ura program is likely to resemble "*not only a loyalty offer rewarding the past, but a loyalty offer offering the customer an*

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89 In this respect, it is interesting to note that in its comments of January 22, 2018, Vini rectifies: "*it is perfectly inoperative to seek to analyze the monetary counterpart of the points - which on the contrary are not monetizable - in order to deduce the allegedly unattractive nature of the bonuses*".

90 100 F CFP generate 20 points, or 25 points for customers with Gold status.

91 In fact, the gift of on-net SMS usage i) does not concern Premium+ customers, who have an unlimited 24-hour on-net SMS offer, ii) appears less advantageous than "SMS Only" refills for Izi customers, as they include cross-net SMS at 5 F CFP each and have a doubled validity period (15 days to 30 days), iii) appears less advantageous than these same refills, for the same reasons, for Taure'a customers. For Izi and Taure'a customers, the gift of on-net voice usage is less advantageous than the 500, 1000 and 2000 refills (which target this clientele in addition to prepaid customers), insofar as they include off-net calls as well as cross-net SMS and have a double validity period (15 days to 30 days). Lastly, the data usage gift, which is only available to Premium+ and Izi members (and therefore excludes Taure'a customers), appears to be less advantageous than the Boost option (§ 59), which is specifically aimed at these same customers, insofar as this option offers rates 6 to 8 times lower than the default off-peak rate, and a data volume at least 2.5 times greater for a validity period of one month. In addition, the use of these options enables program members to accumulate new loyalty points.

advantage in return for a commitment for the future, and depriving the customer of his or her ability to arbitrate for a future period"[92] , and thus likely to produce anti-competitive effects. Indeed, by discouraging postpaid customers from competing at the only time they can, i.e. at the end of their commitment period, the Ura program is likely to lock in Vini's market share of the most profitable customers on the market. It should also be remembered that Premium+, Izi and Taure'a postpaid customers represent around 40% of Vini's total customer base, and that 95% of these customers are members of the Ura program. This means that a significant proportion of Vini's PMT-addressable customer base is likely to be substantially affected by the terms of the Ura program.

157. The loyalty-building effects of this program are further enhanced by the multi-line advantage, which systematically re-engages all customers linked by this advantage, even if only one customer *ultimately* benefits from a terminal subsidy.

*ii. **On engagement and re-engagement periods***

158. The grid for analyzing loyalty offers has also already been applied in the context of **so-called duration discounts**, which the OECD's June 13, 2016 report on loyalty discounts[93] defines as follows: "*certain loyalty discounts reward the length of time the supplier and customer have worked together, rather than the amount of purchases made from the supplier*". In the aforementioned decision no. 15-D-20 of December 17, 2015, the French competition authority sanctioned a system of loyalty discounts, including a duration discount called "Privilège", which enabled corporate customers of the dominant operator to benefit from a discount on their monthly package in return for an extension of the subscription commitment period from 24 to 36 months. This discount contributed to committing customers for long periods and creating artificial barriers to exit. By artificially increasing the costs of changing operator, particularly exit costs, and locking customers in for the long term, this practice was likely to have the effect of foreclosing the addressable market and artificially protecting the dominant operator's position on the retail market for mobile telephony services to non-residential customers, by creating the basis for competition not based on merit.

159. The above-mentioned OECD report points out that "*if the commitment period required to obtain the discount is long, particularly in relation to the frequency with which suppliers are normally put out to competition, the loss of the discount in the event of a breach of the commitment or failure to meet the target may dissuade a customer from moving to a competitor. Customers are then tied to their reference supplier for a given period, without competitors being able to offer them an attractive contract for the duration of the commitment. Such discounts can then have the effect of artificially raising barriers to entry for competitors by artificially lengthening the period during which customers are tied to their supplier*".

160. The documents in the file show that the initial commitment periods associated with the postpaid offers marketed by Vini are as follows: i) minimum commitment of twelve months without a terminal (which represents 10% of initial subscriptions), ii) commitment of twelve months with a subsidized terminal, iii) commitment of 24 months with a subsidized terminal. In all three cases, the price paid by the customer for an identical offer is the same. During this initial commitment period, the customer may wish to migrate to another postpaid offer marketed by Vini; thus, any migration is necessarily to the three postpaid ranges Premium+, Izi or Taure'a. There are three possible scenarios: i) if the customer chooses to migrate to a more "high-end" range of offers (which he or she can do after a one-month period), he or she must recommit under the same conditions as before, with the duration of the recommitment not being added to

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92 C.A. Paris, July 4, 2013, no. 2012/05160, page 22.

93 DAF/COMP/M(2016)1/ANN4/FINAL ; Contribution from France: DAF/COMP/WD(2016)32

the commitment period linked to the offer prior to migration; ii) if he/she chooses to migrate to a "downward" offer (which he/she can do after a period of three months), he/she does not have to recommit (his/her initial commitment period continues); iii) if he/she chooses to migrate within the same range of offers, he/she does not have to recommit (his/her initial commitment period continues).

161. During the investigation, Vini explained that the initial commitment periods are justified on the one hand by the customer acquisition costs incurred, i.e. sales, marketing and distribution costs, including subsidies granted on handsets, and on the other hand by the economics of the offers in question. In this respect, Vini states that "*the price of its package offers is precisely calculated by Vini taking into account the existence of this minimum commitment period. Simply put, an offer without a commitment period would necessarily be more expensive*". In other words, Vini gives its customers an advantage by granting them a discount on the price of its offers in return for their long-term commitment. Thus, when a customer subscribes to an offer without a terminal, he receives a discount on the price of his offer in return for a 12-month commitment. Similarly, when Vini grants a terminal subsidy, the customer benefits from this discount as well as a discount on the terminal in return for a 12-month commitment, or a higher discount on the terminal in return for a 24-month commitment.

162. However, in all three situations, the price of the offers is the same, which leads to the conclusion that there is an inconsistency between the situation involving a 12-month commitment for a customer who does not acquire a terminal, and that involving a customer who acquires a terminal in return for an initial 12-month commitment, insofar as the customer who acquires a terminal benefits from an additional discount (the terminal subsidy). As a result, either the commitment period of a customer without a terminal subsidy is not economically justified, or the commitment period of a customer with a terminal subsidy does not reflect the additional discount corresponding to this subsidy. In the case of a customer migrating to a higher-end offer, the same inconsistency is reproduced insofar as the customer who acquires a terminal benefits from an additional discount (the terminal subsidy). As a result, either the 12-month re-engagement period for a customer who does not change terminal is not economically justified, or the 12-month re-engagement period for a customer who changes terminal does not reflect the additional discount corresponding to this subsidy.

163. It is also worth pointing out the lack of transparency in Vini's general and special subscription terms and conditions, to which, according to Vini, "*customers will and must naturally refer*" with regard to commitment and recommitment periods: as mentioned above (§ 80 et seq.), there is no mention of any concrete duration, but only of "initial minimum period", "minimum period" or "recommitment" in the event of "migration".

164. This lack of transparency extends to subscription termination conditions. In fact, article 5 of the general terms and conditions, in the section entitled "Essential information", which deals with the duration of the contract, states that in the event of termination by the customer before the end of the minimum subscription period, the fees remaining until the end of this period become immediately payable. Exceptions to this rule, which appears to be the norm, are referred to in article 14.1.1 above (§ 89). This article begins by listing the "extreme" cases of termination (death, unemployment, incarceration, etc.) before concluding with the case of the "minimum initial commitment period" when it exceeds 12 months. In this case, the customer has the option of cancelling his subscription early, at the end of the twelfth month, by paying a quarter of the amount due for the remaining period of the "minimum initial commitment period". It is also specified that if the customer terminates the contract before the end of the "minimum subscription period", and apart from the above exceptions, the remaining fees due until the end of this "minimum period" become immediately payable. Finally, it is specified that, "in

addition", where the subscriber has benefited from a terminal subsidy, Vini reserves the right to demand reimbursement of the unamortized portion of said subsidy.

165. For example, the provisions of French law no. 2016-28 of August 11, 2016 on consumer protection are, on the one hand, not explicitly presented as falling within the scope of a legal text, and on the other hand, are linked to cases of exception when they fall within the scope of the norm. What's more, Vini's website, which, as Vini points out, has no contractual value, states in the "Cancel your contract" section: "*You should check whether your contract is under commitment. If it is, you will be billed for the remaining months of your subscription if you confirm your cancellation*" (§ 88), these legal provisions are not mentioned. Furthermore, if Vini were to request reimbursement of the unamortized portion of the terminal subsidy, as it does in its general terms and conditions, it would be in breach of these provisions, which stipulate that customers who terminate early must pay "at most" a quarter of the outstanding amount. Lastly, the semantic shift, in two successive paragraphs, between "minimum initial period" and "minimum period" may lead to confusion, with the initial term implicitly opposing the recommitment period that a migration would generate.

166. Vini's failure to clearly explain the cancellation conditions to its customers led them to believe that they could not change operator before the end of their commitment period without paying the full amount of the monthly subscriptions they would have had to pay up to the end of this period, or even an additional sum linked to the "reimbursement" of the unamortized part of the terminal when they had benefited from a terminal subsidy.

167. It follows from all the above that Vini's policy of commitment for initial subscriptions and re-commitment for migrations during the contract period, applied to postpaid customers with the highest ARPU[94] , is likely to influence their ability to arbitrate, the basis of competition, for a given period, by artificially increasing the costs of switching to competitors. In so doing, it is likely to foreclose postpaid customers and crystallize Vini's market share in the most lucrative segment of the mobile telephony retail market.

iii. ***The effects of loyalty practices***

168. The two offers in question, i.e. the policy of initial commitment and re-commitment in the event of migration during the course of a contract, and the Ura loyalty program, implemented simultaneously, have combined effects. The commitment and re-commitment periods, under one or other of the offers in question, may in fact overlap and be repeated (though not, as Vini points out, cumulatively), so that the customer may no longer be in a position to compare or access other offers on the market, and in fact, being captive, no longer be addressable by the dominant operator's competitors.

169. The two offers in question must also be seen in the context of the structure and maturity of the market. In terms of market structure, with Vini's share of the mobile telephony retail market approaching 85%, the market is highly asymmetrical to the disadvantage of PMT, Vini's sole competitor, which has not yet reached critical mass. Decision-making practice and case law applicable to loyalty offers have considered that "*the implementation of the customer loyalty practice in question by an operator benefiting from such dominance* [83%] *was likely not only to dissuade these customers from migrating to other operators, but also to reduce the number of potential new customers, by effectively reducing the number of potential customers of its*

[94] ARPU (Average Revenue Per Unit or Average Revenue Per User) is the average monthly revenue generated by a telecom operator with one customer. The average ARPU weighted by Vini's customer base for the three postpaid offers Premium+, Izi and Taure'a is between 4,000 and 5,000 F CFP, while it is between 500 and 1,500 F CFP for the customer base of the two prepaid offers Vinicard and Vinicard Xtra. APC calculation based on Vini data.

competitors, to erect a barrier to market entry for any new operator"[95] , but also that, in such a market structure, "*loyalty practices will be more likely to prevent the development of these operators, or even cause their exit from the market*"[96] . Similarly, decision-making practice and jurisprudence have considered that the effects on competition of a loyalty practice were reinforced when the mobile telephony services market reached a stage of maturity[97] : "*such a loyalty mechanism was likely to crystallize the dominant operator's market shares, in a context of slower growth in which the share of demand based on renewals increased compared with that based on unequipped first-time subscribers*"[98] . However, in its aforementioned opinion no. 2017-A-02 of October 9, 2017, the Polynesian Competition Authority noted that the market in this case was mature, which is not disputed by the market players[99] .

170. It is clear from all the above that Vini's policy of initial commitment and re-commitment in the event of migration during the course of a contract, and the Ura loyalty program implemented on the retail market for mobile telephony services, are likely to constitute practices prohibited by article LP 200-2 of the French Competition Code.

B. LACK OF SUFFICIENTLY CONVINCING EVIDENCE OF PMT'S REFUSAL TO DISTRIBUTE IN OPT BRANCHES

171. In its referral, PMT criticizes OPT, which has a network of 81 postal agencies and 6 annexes throughout French Polynesia as part of its legal monopoly on postal activities, for reserving exclusive access to this network, financed by its legal monopoly, for its subsidiary Vini. According to PMT, these agencies act as veritable boutiques, offering Vini an exceptional showcase throughout the Polynesian territory. In this way, OPT would be using the resources derived from a monopolistic and public service activity in the postal services market, to give Vini a competitive and non-replicable advantage in related markets, the market for the distribution of mobile telephony products and services, and the retail market for mobile telephony services.

➢ *Diversification of the activities of an operator with a legal monopoly*

172. It is settled practice in decisions and case law[100] that it is lawful for a public company holding a dominant position on a market by virtue of a legal monopoly to enter one or more markets in competitive sectors, provided that it does not abuse its dominant position to restrict or attempt to restrict its competitors' access to the market by means other than competition on the merits. Thus, competition rules do not, as a matter of principle, stand in the way of an incumbent

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95 Notably, C.A. Paris, July 4, 2013, no. 2012/05160 aforementioned, page 23.

96 In particular, ADLC decision no. 09-D-36 of December 9, 2009 (§ 316).

97 In particular, ADLC decision no. 09-D-36 of December 9, 2009 (§ 322).

98 In particular, Cass. Com. January 6, 2015, 13-21.305 13-22.477, page 9.

99 In its December 14, 2017 hearing, Vini stated, "*In terms of the market, we are reaching saturation in the Polynesian market*".

100 See in particular ADLC Opinion No. 94-A-15 of May 10, 1994 on a request for an opinion on the problems raised by the diversification of the activities of EDF and GDF with regard to competition, and ADLC Decision No. 13-D-20 of December 17, 2013 on practices implemented by EDF in the sector of services intended for the production of photovoltaic electricity, confirmed on this point by the Court of Appeal, C.A. Paris, May 21, 2015, Electricité de France e.a., 2014/02694, and by the Cour de cassation, Cass. Com. 27 September 2017, Electricité de France, R 15-20.291.

operator's diversification strategies, as long as they can stimulate competition through the arrival of a new player on one or more markets.

173. However, the diversification of incumbent monopolies retaining a public service activity entails a number of risks that call for special precautions in order to preserve effective and fair competition on the various markets concerned. In this context, decision-making practice and case law distinguish three main lines of analysis.

174. Firstly, the provision of resources derived from an activity carried out under a legal monopoly for the development of activities falling within the scope of competition is likely to be qualified as an abuse of a dominant position when the technical, commercial or financial support for the activity or subsidiary provided by the monopoly is, on the one hand, provided without any financial consideration reflecting actual costs and, on the other hand, when it leads either to predatory pricing or to lasting disruption of the market[101] . In this case, reference should be made to the decision-making practice and case law relating to abusive cross-subsidy practices. In order for a "subsidy" to exist, the provision of resources must give rise, on the part of the activity benefiting from them, to financial compensation which does not reflect the actual costs.

175. In the case in point, however, the above-mentioned agreement (§ 94) between OPT and Vini explicitly provides for a fee-for-service remuneration system for OPT, which has not been shown to be insufficient to cover the costs incurred by OPT. In addition, Vini indicated during the investigation that its subsidiary Vini Distribution, which distributes the operator's mobile telephony products and services via two banners, Tahiti Phone and Vini, benefits from the same distribution agreement as that signed with OPT. Similarly, Vini has indicated that the distribution of Vini's mobile telephony products and services by OPT "*takes place under normal market conditions, since the conditions applied are the same as those applied to other stores, independent or otherwise*". It cannot therefore be validly argued that Vini would impose on all its distributors, even if they were its own subsidiaries, a level of remuneration insufficient to cover their costs.

176. Secondly, the use, by the incumbent operator's competitive activity, of resources available to it as a result of its reserved activities under its legal monopoly, and in particular its universal service or public service activities, and not as a result of its capacity for innovation or investment, may produce anti-competitive effects insofar as these resources constitute advantages that cannot be reproduced by its competitors[102] . The metropolitan competition authority considered that such advantages included the swearing-in of La Poste letter carriers and the use of incoming contacts from La Poste group postal service customers to promote and sell the group's waste collection services[103] .

177. However, in the case in point, there is no evidence in the file to suggest that OPT staff present in the branches were promoting Vini's mobile telephony services to customers who had come to use postal services covered by the monopoly; similarly, there is no evidence in the file to suggest that Vini's mobile telephony services were being marketed as part of the personalized assistance offered by OPT for postal services (telephone, mail or e-mail).

178. Thirdly, the provision of tangible and intangible resources by a legal monopoly for the benefit of one of its subsidiaries may result in confusion between a public service activity (carried out by the monopoly) and a competitive activity (carried out by the subsidiary), when this provision

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[101] ADLC decision no. 13-D-20 of December 17, 2013, cited above (§ 345).

[102] ADLC decision no. 17-D- 26 of December 21, 2017 concerning practices implemented in the sector of the collection and recovery of common business waste (§ 44 and 47).

[103] ADLC decision no. 17-D- 26 of December 21, 2017 concerning practices implemented in the sector of the collection and recovery of common business waste (§ 52 and 56).

enables the subsidiary to use the brand image and reputation of the monopoly to operate on the competitive market, and more particularly in the context of a recently created market or one recently opened to competition, or when the induced competitive advantage occurs in market circumstances which amplify this advantage in a way that cannot be replicated by its competitors[104] .

179. However, in the case in point, there is no evidence in the file to suggest that Vini, a subsidiary of OPT, would use OPT's brand image or reputation as a public postal service operator to operate in the market for the distribution of mobile telephony products and services and/or in the retail market for mobile telephony services. While it cannot be ruled out that Vini benefits from a particular visibility by marketing its products and services in OPT branches compared with its competitors, the file does not contain any evidence to show that Vini's resulting reputation would constitute a competitive advantage of such a nature as to disrupt these markets. In this respect, from January to October 2017, OPT branches contributed [0-20%] of prepaid sales and [0-20%] of top-up sales nationwide, and [0-15%] of initial subscriptions to Izi and Premium+ postpaid rate plans and [0-5%] of rate plan migrations. In OPT branches, Vini products and services are explicitly marketed as such. In particular, OPT states that "*there is POS advertising (posters, displays)*" in its branches. In addition, the above-mentioned agreement between OPT and Vini explicitly sets out the conditions for use of the Vini brand and advertising, and provides in its appendix 3 the Vini graphic charter to be respected by OPT.

- ***Denial of access***

180. There are two aspects to the decision-making practice and case law applicable to refusals of access.

181. The first concerns the abuse of a dominant position by a company holding an infrastructure or service that is essential for competitors to gain access to customers on a downstream market, an infrastructure that gives it a dominant position, if it fails to grant access on reasonable terms: "*When the monopolistic operator of an "essential infrastructure" is at the same time the potential competitor of a company offering a service requiring the use of this facility, this operator may restrict or distort competition on the downstream market for the service by abusing its dominant position or the situation of dependence in which its competitors find themselves in relation to it, by setting an unjustified price for access to this facility*"[105] . In a ruling dated July 12, 2005[106] , the French Supreme Court (Cour de cassation) stated that to qualify a facility as essential, it must be established, firstly, that the companies requesting access to it cannot implement any economically reasonable alternative solution and, secondly, that access to the facility is essential to the exercise of their activity. In 2010, the Paris Court of Appeal specified *that* "*an infrastructure becomes essential if it cannot be reproduced under reasonable conditions by the competitors of the company that manages it; if access to this infrastructure is refused or authorized under restrictive conditions ; if access to the infrastructure is nevertheless possible (particularly from a technical point of view); and if access to the infrastructure is strictly necessary (or indispensable) to carry out a competitive activity on a market upstream, downstream or complementary to the one in which the infrastructure owner holds a dominant position*"[107] (page 7).

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[104] ADLC Decision No. 17-D-08 of 1er June 2017 concerning practices implemented in the passenger transport sector (§ 207).

[105] Conseil de la concurrence decision no. 96-D-51 of September 3, 1996 concerning practices by SARL Héli-Inter Assistance.

[106] Cass. com. July 12, 2005, NMPP, 04-12388.

[107] C.A. Paris, February 23, 2010, Edition Jean-Paul Gisserot and others, 2008/09840.

182. The second relates to the abuse of a dominant operator imposing different conditions or prices on buyers in equivalent situations, thereby placing them at a competitive disadvantage. On the other hand, an operator in a dominant position is free to treat buyers in different situations differently. The French competition authority has pointed out[108] that discriminatory behavior contrary to competition law can broadly fall into two categories. Firstly, discrimination may consist in artificially strengthening the company that implements it in the competition it faces on the dominated market or on another market. This situation may arise, for example, when a vertically integrated company enjoys privileged access to certain goods or services which it controls upstream and which are useful, or even essential, to the downstream activity in which it is also present. Secondly, discrimination can distort competition without the company implementing it being a direct stakeholder in the affected market. Through unjustified differences in treatment, the dominant company may, for example, by virtue of the special position it occupies in relation to players at another stage of production, whether they be its partners, customers or suppliers, artificially advantage or disadvantage some of these players over others. By thus unbalancing the chances of the various competing suppliers, the dominant player deprives the market, and ultimately the consumer, of the benefits of competition on the merits.

183. In the case in point, contrary to what it maintains, PMT wrote to OPT once on June 26, 2013, requesting access to the latter's branches with a view to marketing its own mobile telephony products and services. PMT states that it has not received any reply to its letter, nor has it sent any reminders, and that it has therefore received an implicit refusal. It should be remembered, as OPT did, that the rules of competition law have only been applicable in French Polynesia since February 24, 2015, the day after the publication of loi du pays n° 2015-2 du 23 février 2015 relative à la concurrence, in the *Journal Officiel* de la Polynésie française, which took place on February 23, 2015. Prior to this date, a refusal of access by a company in a dominant position could not be unlawful under these rules. As things stand, PMT has not reiterated its request to the OPT, either since the rules prohibiting abuse of a dominant position came into force, or in the context of the current proceedings. In the absence of a refusal, an anti-competitive practice of refusing access cannot therefore be established.

184. It follows from the foregoing that the facts complained of by PMT are not supported by sufficient evidence to assume that OPT would have relied on its legal postal monopoly to grant its subsidiary a substantial and exclusive competitive advantage through access to facilities deriving from its monopoly and not replicable by its competitors. PMT's referral is therefore rejected on this point, pursuant to the second paragraph of article LP 620-9 of the French Competition Code.

C. COMMITMENTS PROPOSED BY VINI ON FEBRUARY 28, 2018

185. After reviewing the rapporteur's preliminary assessment of the practices in question at the February 9, 2018 hearing on the request for precautionary measures, Vini requested the use of the commitments procedure. On February 28, 2018, Vini submitted a proposal for commitments to the Polynesian Competition Authority.

[108] ADLC Decision No. 14-D-06 of July 8, 2014 concerning practices implemented by Cegedim in the medical information database sector, upheld by the Court of Appeal, C.A. Paris, September 24, 2015, Cegedim e.a., 2014/17586, and by the Court of Cassation, Cass. Com. June 21, 2017, Cegedim e.a., H 15-25.941.

186. A summary of the preliminary assessment and the commitments proposed by Vini were put online on March 2, 2018 on the Authority's website in order to gather any comments from interested third parties as part of a one-month market test.

187. Vini's commitment proposal of February 28, 2018 includes a set of 7 commitments, the scope of which is limited to the retail market for mobile telephony services for residential customers. Vini undertakes to implement them within three months of the Polynesian Competition Authority's decision and for a period of 5 years.

188. The full content of these commitments is reproduced below[109] :

Commitment no. 1: development of VINI's offerings

VINI undertakes to stop marketing the "Premium+", "Izi", "Taure'a" and "Vinicard Xtra" offer ranges as they currently exist.

VINI undertakes not to include in the new offers it markets either a[110] voice or SMS on net abundance component, or a[111] voice or SMS on net generosity component, but to offer only, where applicable, voice and/or SMS cross net abundance and/or generosity components[112] (the "Cross Net Offers"). This commitment is without prejudice to the possibility for VINI to propose, where applicable, in its offers, when they include cross net voice abundance, a voice on net generosity component on condition that the latter is no more generous than that currently contained in the "Premium+" offers[113] .

Customers of the current Premium ranges[114] will be able to migrate to the new range of Cross Net Offers proposed by VINI, whose positioning is comparable to that of the Premium+ range and which will include cross net voice and SMS abundance components, without recommitting themselves (but with, where applicable, the maintenance of their current commitment period), unless they decide at the time of this migration to acquire a subsidized telephone against recommitment. They will be informed of this possibility in the first billing letter following the launch of the new range.

Customers of the current Izi range will be able to migrate to the new range of Cross Net Offers proposed by VINI, with a positioning comparable to that of the Izi range and which will include a generous or abundant cross net voice component, without recommitting themselves (but with, where applicable, the maintenance of their current commitment period), unless they decide at the time of this migration to acquire a subsidized telephone against recommitment. They will be informed of this possibility in the first billing letter following the launch of the new range.

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109 The footnotes appearing in the content of Vini's undertakings reproduced below are an integral part thereof.

110 For the purposes of the proposed commitments, abundance components are defined as the possibility of sending unlimited communications (voice or SMS) under conditions defined by VINI (e.g. specific time slots).

111 For the purposes of the proposed commitments, generosity components are understood to mean the possibility of sending communications (voice or SMS) on a limited basis within the framework of a credit specifically dedicated to the communications in question, and for which the conditions are defined by VINI (specific time slots, for example).

112 For the purposes of the proposed commitments, cross net calls are defined as calls and/or SMS sent by VINI customers to VINI and PMT customers.

113 This exception is valid only for offers with a limited cross net allocation of 4 hours or more, and within the following limits: 1 hour of on net generosity in offers with a limited cross net allocation of between 4 and 6 hours, 2 hours of on net generosity in offers with a limited cross net allocation of more than 6 hours and up to 12 hours, and 4 hours of on net generosity when the limited cross net allocation is more than 12 hours.

114 In other words, the "Premium", "Premium Special Edition" and "Premium+" offer ranges.

New top-ups taken out by Vinicard Xtra customers after this commitment comes into force will enable them to benefit from an SMS cross net abundance component instead of the SMS on net abundance component, of which they will be informed in advance by SMS.

The generous SMS on net bonuses offered to Vinicard and Vinicard Xtra customers will be replaced by SMS cross net bonuses, of which they will be informed in advance by SMS.

The price of the new Cross Net Offers that will be marketed in application of § 8, 9 and 10 will be non-disqualifying, in the knowledge that VINI will carry out a communication campaign to accompany their launch.

The first new Cross Net Offers marketed by VINI as part of the implementation of commitment no. 1 will, prior to being marketed, be submitted in confidence to the APC's appraisal departments to ensure that they comply with the said commitment and to approve them.

Lastly, it is specified that VINI retains full commercial latitude to define and develop its range of mobile telephony service offers (for example, with regard to (i) the content of other services, (ii) the possibility of marketing offers without a generosity and/or abundance component for voice and SMS calls, or (iii) the possibility of adding generosity or abundance components for voice or SMS cross net calls to its offers) in compliance with the present commitments.

Commitment no. 2: use of welcome points without re-commitment

VINI undertakes that (i) any welcome points it allocates to customers joining its loyalty program and (ii) those it has already allocated to its customers may be used to benefit from both non-reengaging and re-engaging gratuities.

VINI undertakes to inform customers registered in the URA program and benefiting from welcome points already allocated of this possibility by mail sent at least one month before the entry into force of this commitment.

Commitment no. 3: re-engagement as part of the multi-line advantage

In the context of the multi-line advantage, VINI undertakes to ensure that only the line benefiting from the transfer of points to subscribe to a subsidized telephone against recommitment is recommitted, to the exclusion of lines that have transferred points to its benefit. This commitment is without prejudice to the possibility, for VINI, of terminating this possibility of transferring points.

VINI undertakes to inform customers enrolled in the URA program and whose line depends on a billing account grouping several lines of this possibility by mail sent at least one month before the entry into force of this commitment.

Commitment no. 4: use loyalty points in exchange for a subsidy on a phone without recommitment

VINI undertakes to make it possible to use loyalty points in exchange for a subsidy on a phone without recommitting, both for new points allocated from the date of entry into force of this commitment and for those already held by customers.

The subsidy granted to non-recommitting customers will depend on a points scale determined by VINI, it being specified that the implicit value of the points in this scale will be consistent with the value of the points used for non-recommitting gratuities.

This commitment is without prejudice to the possibility for VINI to continue to offer its customers the possibility of using their loyalty points in exchange for a larger subsidy.

VINI undertakes to inform customers enrolled in the URA program of this possibility by letter sent at least one month before this commitment takes effect.

Commitment no. 5: Modification of contractual and commercial documentation relating to the URA program

VINI undertakes to modify its contractual documentation (such as its specific conditions of use of the URA program and the URA points redemption form), its commercial documentation (such as the loyalty program presentation brochure and the VINI mobile catalog) and its Internet site to reflect the changes resulting from the implementation of commitments no. 2 to 4.

With the exception of the points to which they relate, commitments 2 to 4 are without prejudice to the possibility for VINI to develop its loyalty program (for example, in terms of eligible customers or the type of rewards offered).

Commitment no. 6: information on the commitment periods proposed by VINI

VINI undertakes to clearly state in its offer guide that its offers, which can be subscribed to for a 24-month commitment period, are also available for a 12-month commitment period.

Commitment no. 7: clarification of contractual and commercial documentation on termination terms and conditions

VINI undertakes to (i) amend articles 5 and 14.1.1. of its general subscription terms and conditions available on its website and given to its new customers in order to remove any possible drafting ambiguity on the fact that its customers under commitment - or re-engagement - for 24 months and who have exceeded the first 12 months of commitment benefit from the capping mechanism for termination penalties laid down by Country Law n°2016-28 and (ii) to confirm to all its customers subject to a 24-month commitment (or recommitment) in progress at the date of entry into force of the commitments that they benefit from this mechanism via the first billing letter that will be sent to them.

D. OBSERVATIONS GATHERED DURING THE MARKET TEST

189. On March 1er 2018, the Authority sent Vini's proposed commitments to the referring party and the Government Commissioner, which it also posted on its website. Only the Direction Générale de l'Economie Numérique and the referring party, PMT, expressed their position on this proposal.

190. In general, the DGEN and PMT consider that the commitments proposed by Vini are insufficient to meet the preliminary assessment expressed by the rapporteur during the session on February 9, 2018, even if the DGEN stresses that "*VINI's commitment proposals tend to bring an improved quality of service to Polynesian consumers*".

1. ON-NET/OFF-NET PRICE DIFFERENTIATION (COMMITMENT NO. 1)

191. The DGEN considers that, from a general point of view, "*cross-net offers with the addition of abundance and/or generosity components should make it possible to erase the anti-competitive effects of current offers*".

a. ON CONTRACTS IN PROGRESS

192. PMT considers that, by ceasing to market the Premium+, Izi, Taure'a and Vinicard Xtra ranges and by not undertaking to modify contracts in progress, Vini's proposed commitments "*amount*

to no more and no less than endorsing the continuation of anti-competitive practices", which is "*unacceptable*", particularly in the light of decision-making practice. In this respect, PMT points out that article 8.1 of Vini's general terms and conditions of service provides for the possibility of modifying existing contracts[115] . Consequently, PMT believes that Vini should undertake to immediately cease the current price differentiation for all contracts currently in force and for all offers marketed. PMT adds that Vini should also undertake not to re-engage customers who migrate to the new cross-net offers proposed, and not to take advantage of these migrations to incite the same customers to change terminal in order to re-engage them.

193. For its part, the DGEN considers that "*the new VINI offers should enable retroactive correction of all old offers, whether existing or discontinued but still involving a subscriber*", and that "*it would be desirable for subscribers to existing offers to migrate automatically to the new offers*".

b. ON THE POSSIBLE RETENTION OF AN ON-NET GENEROSITY COMPONENT

194. PMT considers that maintaining on-net overtime in the new cross-net offers is unjustified and is designed to maintain the anti-competitive effects of price differentiation. According to PMT, maintaining on-net overtime does not address any cost issues for Vini. Its sole purpose would be to maintain the signal to customers that they must remain Vini customers in order to obtain longer communication times to almost the entire market, a signal that has been anchored with consumers as a result of the tariff differentiation. PMT therefore considers that Vini should undertake to remove any abundance and/or on-net generosity component from all its offers, so that consumers are free to consume their entire package without having to worry about which network their correspondent belongs to.

c. ON THE NEED TO RELEASE CUSTOMERS WHO HAVE SUBSCRIBED TO THE DISPUTED OFFERS AND ARE UNDER COMMITMENT

195. PMT argues that the price differentiation practiced by Vini, by artificially reinforcing the attractiveness of its offer for many years, has led its customers to commit and recommit to it. In order to immediately remedy the effects of the practices in question, PMT believes it is essential for Vini to undertake to release all customers abusively attracted by the illicit offers from their commitment periods. In this regard, PMT recalls that the metropolitan competition authority has had occasion to accompany a decision to sanction unjustified price differentiation practices with an injunction aimed at informing subscribers of the on-net offers in question of their right to terminate their subscription without compensation and at any time (aforementioned decision no. 12-D-24 of December 13, 2012). Insofar as the general terms and conditions of subscription to Vini's services, in their article 8.1. do not provide for this double measure of informing and releasing customers when the modification of current contracts

[115] "The *rates for the Services and their terms and conditions of application, in particular those concerning the billing of communications (hereinafter referred to as the rates), are set out in the Rate Schedules drawn up and updated by VINI for its Subscribers.*
Changes in rates will apply to all contracts, in particular those currently in force.
In the event of an increase in the rates charged by VINI, it is expressly agreed that the Subscriber will be notified in writing one (01) month prior to the effective implementation of the rate change. The Subscriber may then terminate his Subscription Contract under the conditions set out in article 14.1.3.
This termination option is not available if the rate change is the result of a decision by a regulatory or judicial authority.
It is also agreed and accepted by the Subscriber that the above provisions are not applicable to reductions in service rates, the Subscriber waiving in this case in advance the need for any prior notice, in any form whatsoever, incumbent on VINI ".

results from the decision of a regulatory or judicial authority, PMT believes that Vini should also undertake to inform its customers of their right to cancel without penalty by mail and SMS as well as by display in all points of sale of Vini products and services. According to PMT, the text of this information measure should first be submitted to the Autorité for approval.

d. ON THE CONSEQUENCES OF THE COMMITMENTS PROPOSED BY VINI

196. In PMT's view, it is inconceivable that the proposed commitments would be designed in such a way as to generate new competition concerns.

197. Firstly, PMT maintains that "*PMT's financial situation would be seriously impacted by the launch of cross-net offers by Vini*", given the structure and tariff level of the local mobile roaming service on which it depends in the area where it has not deployed its own infrastructure network. In this area, PMT must pay a roaming tariff of 11 F CFP HT per minute for the Leeward Islands and 15 F CFP HT per minute for the outlying archipelagos, for each call originated and each call received. So if Vini's subscribers, thanks to the launch of offers with cross-net abundance components, call PMT's subscribers more, then the volumes of incoming off-net calls on its network will increase, as will its roaming charges. This is why, in PMT's view, it is essential for Vini to "*undertake to modify the conditions of the roaming contract in order to enable PMT to obtain access to the essential infrastructure constituted by Vini's network in the remote islands*", either by abolishing the pricing of incoming calls, or by proposing that PMT pay a "*reasonable*" lump sum corresponding to an irrevocable right to use its network. Failing this, PMT believes that Vini should refrain from offering cross-net services on the islands.

198. Secondly, PMT argues that the launch of cross-net abundance offers will lead to an increase in usage which, given the excessively high termination rates, exposes operators to "*significant risks of slippage*" in their termination charges. As a result, PMT believes that Vini should commit to offering a mobile voice termination rate on its network based on the LTIC (Long Term Incremental Cost) method, rather than the LTICM method. PMT adds that this commitment can be made on condition that it does the same and accepts a symmetry of agreed tariffs, as PMT and Vini have agreed for SMS mobile call termination.

2. ON THE URA LOYALTY PROGRAM (COMMITMENTS NO. 2 TO 5)

199. The DGEN believes that "*the changes made to the conditions of use of the Vini Ura program should also give Vini subscribers greater freedom, particularly in their choice of program membership, but also in the use of loyalty points*".

a. ON THE USE OF WELCOME POINTS

200. According to PMT, to ensure that customers are fully informed, Vini should undertake to inform members of the Ura program who already benefit from welcome points of the possibility of using them to benefit from both non-rebundling and rebundling gratuities by mail, SMS and by display in Vini product and service outlets. In addition, PMT believes that the text of this information measure should be submitted to the Autorité for prior approval.

b. ON THE MULTI-LINE ADVANTAGE

201. PMT considers that, in order for the foreclosure effect resulting from the multi-line advantage to cease immediately, Vini should undertake i) to release, immediately and under the same conditions as suggested for the disputed offers with price differentiation (§ 195), all customers who have been re-engaged for this reason in the last two years, ii) to inform its customers of the lifting of their commitment by sending a letter, an SMS and by displaying it in all points of sale of Vini products and services. In addition, PMT believes that the text of this information measure should be submitted to the Autorité for prior approval.

c. ON THE POSSIBILITY OF EXCHANGING POINTS FOR A TERMINAL WITHOUT RECOMMITTING THE CUSTOMER

202. According to PMT, members of the Ura program should not be encouraged to use their loyalty points for the acquisition of a handset against a recommitment rather than without a recommitment; Vini should therefore i) clarify the calculation methods for loyalty points used to acquire a phone without a recommitment, to ensure that the implicit value of these points is non-disqualifying compared with the implicit value of points used to purchase a new terminal in return for a recommitment, ii) ensure that the conditions of use of points for the acquisition of a non-recommitted terminal are not disqualifying in relation to the conditions of use of points for the acquisition of a recommitted terminal.

d. INFORMATION MEASURES

203. PMT believes that Vini should inform customers who have joined the Ura loyalty program of all the measures taken under commitments 2 to 4 by mail and SMS (the latter being considered essential), as well as by display in all points of sale of Vini products and services, at least one month before these commitments come into force. In addition, PMT considers that the text of this information measure should be submitted to the Autorité for prior approval.

e. ON THE MODIFICATION OF URA PROGRAM DOCUMENTATION

204. PMT believes that Vini should submit to the Authority for approval the content of the changes made to its contractual and commercial documentation relating to the Ura program.

205. According to the DGEN, "*the changes to the contractual and commercial documentation should make it easier for customers to make the right decision. However, we will wait until this is the case before giving a more detailed opinion*".

3. ON CUSTOMER COMMITMENT AND RE-ENGAGEMENT PERIODS AND EARLY TERMINATION CONDITIONS (COMMITMENTS NO. 6 AND 7)

a. INFORMATION ON COMMITMENT PERIODS

206. According to PMT, Vini must undertake to inform its customers of the possibility of signing up for 12 months or 24 months, with an indication of tariffs and terminal subsidies in both cases, not only by mention in its Offer Guide but also by visible display in Vini stores and OPT postal agencies on the mobile terminal display.

b. TERMINATION CONDITIONS

207. According to PMT, Vini should submit to the Authority for approval the content of the changes to its contractual and commercial documentation relating to termination procedures. In addition, Vini would have to inform its customers subject to a 24-month commitment or recommitment in progress on the date the commitments come into force of the early termination mechanism by sending a letter, an SMS and by displaying it in all Vini product and service outlets, at least one month before the commitment comes into force - the text of this information measure to be submitted to the Authority for approval beforehand.

4. OTHER COMMENTS

a. ON THE ABSENCE OF COMMITMENTS RELATING TO INITIAL COMMITMENT PERIODS OR IN THE EVENT OF MIGRATION

208. PMT considers that the minimum subscription period imposed by Vini on the initial subscription to a 12 or 24 month package, and the obligation to recommit for 12 or 24 months during the course of the contract when migrating to a higher range of offers or new offers, lead to a cascade of recommitments binding the customer for a very long time and make the market more rigid, even though they are not justified. PMT therefore considers that, in order to unlock Vini's customers and enable PMT to stimulate competition, it is essential that Vini undertakes to i) abolish the minimum 12-month commitment period in the absence of terminal subsidy, ii) abolish recommitment periods in the event of migration to another offer, iii) not propose any specific subsidy offer to subscribers migrating to another offer, iv) not take advantage of the migration to push the subscriber to change terminal.

209. In addition, PMT considers that Vini must undertake to i) inform subscribers to its offers, by mail and SMS as well as by display in points of sale of Vini products and services, of the fact that they have the option of changing their offer during the course of the contract without recommitting themselves - the text of this information measure must first be submitted to the Autorité for approval; ii) release customers who have recommitted to a change of offer within a period of two years prior to the forthcoming decision, by lifting their commitment for the duration of the contract, and inform the customers concerned of this by mail, SMS and display in all Vini product and service outlets - the text of this information measure to be submitted to the Autorité for prior approval.

b. ON THE ABSENCE OF A COMMITMENT RELATING TO THE "CORPORATE" MARKET SEGMENT

210. PMT believes that limiting the scope of the commitments to the retail market for mobile telephony services for residential customers, to the exclusion of business customers, is unjustified. Although PMT was unable to carry out an in-depth analysis of Vini's business offers, as these are not public, it maintains that the on-net/off-net price differentiation and loyalty practices also concern the business segment of the market. Consequently, it considers that the commitments should also cover this segment.

c. On the absence of a commitment relating to access to OPT's postal network

211. For the same reasons as those set out in its referral, PMT believes it is necessary for OPT to undertake, within one month of the decision, to offer PMT access to its network of postal agencies throughout France under commercial and pricing conditions that are non-discriminatory compared with those offered to Vini, for the marketing of its products and services.

d. On the implementation of a compliance program and the production of a report on the implementation of commitments

212. PMT points out that Vini considers the recent application of competition law to be an element of the specific context of the present case which would justify recourse to the commitment procedure. Under these conditions, it seems justified that Vini and OPT undertake to set up a compliance program within three months of notification of the decision, including the following measures i) the distribution of a communication to all their officials, managers and employees reminding them of the existence of the competition law compliance program, the need to support it, and the general and permanent commitment to respect competition rules; ii) the appointment of a "competition delegate" responsible for implementing the compliance program ; iii) the implementation of effective and regular information, training and awareness-raising measures, including in particular the organization of mandatory training sessions; iv) the establishment of regular internal prevention, control, audit and warning mechanisms against possible anti-competitive practices; v) the introduction of an effective monitoring system, including a procedure for handling requests for advice, examining alerts and analyzing the action to be taken, and the drafting, for a period of five years, of an annual report on the implementation of these commitments, to be sent to the Autorité.

213. In addition, PMT believes it would be useful for Vini to send the Authority, by registered mail with acknowledgement of receipt, a report on the implementation of the commitments made binding under the present procedure.

214. The DGEN considers that the Polynesian Competition Authority could ask the two operators, Vini and PMT, to draw up an annual report on the effects of corrective measures, as such a report would seem "*appropriate in the current context, where market development is dependent on the Administrative Court's decision on whether or not to admit a potential mobile operator*".

E. COMMITMENTS PROPOSED BY VINI ON MAY 4, 2018

215. After reviewing the results of the market test, Vini submitted a new version of its commitments to the investigating department on April 23, 2018, which was discussed at the meeting on April 27, 2018.

216. After modifying and improving its proposed commitments on several major points, presented below, Vini sent the Authority the final version of its commitments, appended to this decision, on May 4, 2018. This final version will be assessed in the "Discussion" section that follows.

1. ON-NET/OFF-NET PRICE DIFFERENTIATION (COMMITMENT NO. 1)

217. Vini has made a number of modifications and additions to commitment no. 1, relating to the practice of on-net/off-net price differentiation, as initially proposed, and in particular provides for :

- the introduction of the general principle of not marketing offers including a price differentiation between on-net calls and SMS and off-net calls and SMS that goes beyond the difference in mobile termination charges for these two types of communications, this principle applying to communications to PMT and any other mobile telephony operator authorized to operate under article D. 212-1 of the CPT;
- automatic migration, without re-commitment, of customers from the postpaid offer ranges covered by the preliminary assessment to the new "cross-net" offer ranges with comparable tariff positioning i) immediately if they are released from any commitment or re-commitment period, ii) at the end of their commitment or re-commitment period if they are not;
- the transitional implementation, for the latter customers, of an option entitled "Option Off-net", automatic and free of charge, enabling them to extend the generosity and/or on-net voice or SMS abundance components of their offers to voice or SMS calls to PMT;
- more targeted and extensive customer information measures, including SMS text messages and posts on the Vini Facebook page.

2. LOYALTY POLICY (COMMITMENTS 2 TO 7)

218. With regard to the terms and conditions of the Ura loyalty program, Vini has made a number of changes and additions to the measures initially proposed, including :

- the lifting of the residual commitment period for customers whose line has been re-committed following the transfer of loyalty points to another line as part of the multi-line advantage;
- details of the value of loyalty points used to obtain a voucher that can be used to obtain Ura program rewards or combined with a terminal subsidy, and associated transparency measures;
- more targeted and extensive customer information measures, including SMS text messaging and postings on the Vini Facebook page;
- control measures through approval by the Autorité of changes to the content of Vini's communication relating to commitments under the Ura program.

219. With regard to its policy of initial engagement and re-engagement in the context of a migration, Vini has proposed in particular:

- extend to all its contractual and commercial documents the information that its offers can also be subscribed to for a 12-month period;
- give customers who sign up or renew for a 12-month period without terminal subsidy one hour of free cross-net communication during the first three months of subscription or renewal;
- extend this benefit to customers who, over the previous 12 months, have signed up or signed up again without benefiting from the terminal subsidy;

- to extend the clarification of its termination conditions with regard to the provisions of the aforementioned law n° 2016-28 to all of its contractual and extra-contractual documentation;
- more targeted and extensive customer information measures, including SMS text messages and posts on the Vini Facebook page;
- control measures through approval by the Autorité of changes to the content of its contractual and commercial documentation associated with this new policy.

3. IMPLEMENTATION OF COMMITMENTS

220. In the final version of its commitments, Vini proposes to extend their implementation period to 10 years, and to draw up an annual monitoring report for the Polynesian Competition Authority.

III. DISCUSSION

221. Under the terms of article LP 641-2 I of the French Competition Code, the Polynesian Competition Authority "*may accept commitments proposed by companies or organizations and likely to put an end to [the practices identified]*".

222. The Authority's assessment of the company's offer of commitments consists, firstly, in examining its relevance, credibility and verifiability, and secondly, in ensuring that it is proportionate. The proportionality criterion assumes that the commitments are necessary and sufficient to put an end to all the practices identified by the preliminary assessment.

A. ON THE COMMITMENTS PROCEDURE

1. PMT'S ARGUMENTS

223. In a letter dated February 16, 2018, as well as in its comments on the commitments proposed by Vini on February 28, 2018, PMT argues, referring to the metropolitan competition authority's procedural communiqué on commitments in competition matters[116] , that the commitments procedure is not suitable for all situations, particularly in cases where the damage caused to the economy calls for the imposition of a penalty. In the case in point, given the practices implemented and the context, PMT believes that the commitments procedure is particularly favorable to Vini, insofar as all the companies that have implemented similar practices have been heavily penalized.

224. Under these conditions, "it *seems imperative that, if commitments are accepted, they fully address all the competition concerns identified by the investigating authorities and the Collège, and include effective and efficient measures to free up the market immediately. Not only must*

[116] Communiqué de procédure de l'Autorité de la concurrence métropolitaine du 2 mars 2009 relatif aux engagements en matière de concurrence

the practices cease immediately and completely for the future, but the persistent effects of the behavior in question must also be remedied".

225. In addition, at the meeting on April 27, 2018, PMT argued that Vini's commitment proposal of April 23, modified in light of the results of the public consultation, ran counter to the principles underlying the commitment procedure insofar as Vini called into question certain aspects of the preliminary assessment by the investigating department by not responding to them, through this proposal, in full. In particular, PMT argued that, at this stage, Vini's commitments were insufficient insofar as they did not put an end to the price differentiation and loyalty practices identified by the preliminary assessment, and allowed their effects to persist. In addition, PMT reiterated its position that Vini's commitments could not give rise to new competition concerns (§ 196 et seq.)

2. EVALUATION OF APC

a. RECOURSE TO THE COMMITMENTS PROCEDURE

226. In its ruling of December 19, 2013, Cogent Communications France, the Paris Court of Appeal noted that "*the commitments procedure is one of the tools enabling a competition authority to carry out its mission of guaranteeing the functioning of competition on the markets, this mission of defending economic public order empowering the said authority to issue commitment decisions, not to satisfy the request of a complaining party, but to put an end to situations likely to be prejudicial to competition*".

227. Article LP 641-2 I of the French Competition Code allows the Polynesian Competition Authority to accept commitments proposed by companies or organizations to put an end to identified practices. The aim of this procedure, which falls into the category of "negotiated" procedures, is to obtain that the companies in question voluntarily cease or modify, for the future, the behaviors identified in the preliminary assessment, unlike a penalty decision, which imposes cessation or modification and, where appropriate, imposes a financial penalty.

228. The decision to accept the commitments proposed by the respondent companies, provided that they make it possible to put an end to situations likely to be prejudicial to competition, falls within the broad discretionary powers of the AMF Board to determine, from among those provided for in article LP 641-2 I of the French Competition Code, the most appropriate procedural course of action, particularly in the light of the competition policy entrusted to it.

229. In this respect, PMT points out in its comments that, according to the March 2, 2009 procedural communiqué on competition commitments issued by the competition authority in mainland France, the latter does not apply the commitments procedure in cases where the infringement of public economic order requires the imposition of financial penalties, "*which excludes in particular a priori particularly serious agreements such as cartels and certain abuses of a dominant position which have already caused significant damage to the economy*"[117] . However, it should be remembered that, although it may constitute a useful analytical guide for the Polynesian Competition Authority, this communiqué is not binding insofar as, contrary to

[117] Communiqué de procédure of the Autorité de la concurrence métropolitaine of March 2, 2009 on competition commitments (§ 11).

the case law of the Court of Appeal and the Court of Cassation, it is a non-binding text (known as "*soft law*" or "droit souple"), as the Authority can define its own prosecution policy[118] .

230. The commitments procedure seems particularly appropriate in the context of this case, insofar as this is the Polynesian Competition Authority's first contentious decision, and it contributes to the objective of raising awareness (or "*advocacy*") of competition rules among all players, private and public, in the Polynesian economy. This first decision is in fact a vehicle for demonstrating the methods and legal standards that the Authority must apply in carrying out its contentious mission.

231. In general terms, the use of the commitments procedure enables the Autorité to speed up the resolution of cases, to give priority to maintaining or voluntarily restoring competition on the markets in appropriate cases, and consequently to free up more resources for the examination of other infringements.

232. The commitments procedure also seems appropriate in this case, particularly insofar as the final commitments proposed by Vini have an immediate effect on the market. The choice of this procedure means that Vini's commitments will have a useful effect as soon as they are implemented, since they will make the retail market for mobile telephony services more fluid. On the one hand, this choice contributes directly to improving the degree of competition on this market, by offering an immediate lever to Vini's actual and potential competitors to win over new customers, including those of the dominant operator. Secondly, it directly benefits the well-being of Polynesian consumers, who will in the short term have access to enriched mobile telephony service offers and commercial conditions more favorable to their freedom of choice. Lastly, it has the advantage of securing Vini's full involvement in implementing the measures needed to restore competition in the retail market for mobile telephony services[119] .

b. ON POSSIBLE NEW COMPETITION CONCERNS

233. As explained at the February 9, 2018 meeting, the preliminary assessment carried out by the investigation department covered the facts and practices denounced and which were the subject of a request for precautionary measures by PMT. Consequently, the present proceedings fall within this scope, as do the preliminary assessment carried out by the investigating department at that meeting and the commitments proposed by Vini, insofar as they are intended to put an end to the practices that have been identified.

234. PMT considers that the changes in Vini's behavior on the retail market, generated by the implementation of its commitments, are likely to aggravate the effects of other facts and practices denounced by PMT in its referral on the merits, without having been the subject of a request for precautionary measures (in particular the pricing conditions for local mobile roaming services on Vini's network or the method of assessing costs and pricing mobile voice call termination).

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[118] The national competition authorities of European Union member countries do the same with regard to the "soft law" texts of the European Commission, 2013 Activity Report of the Metropolitan Competition Authority (page 127).

[119] In this respect, under the terms of article LP 641-2 II of the French Competition Code, the Polynesian Competition Authority can, on the one hand, impose penalty payments on interested companies to force them to comply with a decision that has made commitments binding, and on the other hand, under the terms of the second paragraph of article LP 641-2 of the French Competition Code, impose a financial penalty in the event of non-compliance with the commitments it has accepted.

235. However, as indicated above, the effects of the final commitments proposed by Vini on the retail market for mobile telephony services are similar to those which would have resulted from the interim measures requested.

236. In any event, insofar as PMT does not maintain that the commitments proposed by Vini constitute anti-competitive practices in themselves, but that they aggravate the effects of the practices denounced in its referral on the merits, there is no need, in the context of the present proceedings and in view of its scope, to rule on whether or not these other facts and practices comply with competition rules, nor to take them into account in the assessment of the commitments proposed by Vini to respond specifically to the practices identified in the case in point.

237. On the other hand, these other facts and practices denounced by PMT in its referral are, following the aforementioned disjunction decision of April 18, 2018 by the general rapporteur, the subject of an investigation on the merits under number 18/0006 F.

B. ON THE ABSENCE OF COMMITMENTS RELATING TO CERTAIN PRACTICES COVERED BY THE REQUEST FOR INTERIM MEASURES

238. PMT criticizes Vini for failing to offer commitments relating to the non-residential segment of the retail market for mobile telephony services (§ 210) and OPT for failing to offer commitments relating to access to its postal agency network (§ 211).

239. With regard to the first point, the facts denounced by PMT in its referral, both concerning the practice of on-net and off-net tariff differentiation and concerning loyalty practices, are limited to the residential segment of the retail market for mobile telephony services. Indeed, in its request for interim measures, PMT refers to the non-residential segment of the market only to note that, as at August 25, 2017, it had less than 5% of the 25,794 business customers counted in French Polynesia in 2016, "*the remainder being largely pre-empted by Vini*". In addition, PMT argued during the adversarial exchanges that "*it is extremely likely that VINI practices the same type of differentiation in its offers to business customers, the content of which is not publicly accessible*". Finally, during the meeting of February 9, 2018, Vini pointed out that, as far as this market segment was concerned, there was only one document in the file relating to PMT's offers for business customers, which, in its view, only supported the question of the existence of two distinct relevant markets.

240. It follows from the above that there is nothing in the file to suggest that the practices identified in the residential segment also concern the non-residential segment of the retail market for mobile telephony services.

241. With regard to the second point, at the meeting of February 9, 2018, the investigation department proposed to the Collège de l'Autorité to reject the practice relating to access to its network of postal agencies to distribute its mobile telephony products and services complained of by PMT to OPT on the grounds that the facts complained of were not supported by sufficiently conclusive evidence. Consequently, the investigating department did not express any competition concerns regarding this practice.

242. In light of the developments in §§ 171 et seq. concerning the decision-making practice and case law applicable to the practices of a company holding a legal monopoly and diversifying its activities on markets open to competition, on the one hand, and to practices of refusal of access liable to be qualified as anti-competitive, on the other, as well as to the evidence in the file, the Autorité considers that the facts relating to access to its postal agency network of which OPT

is accused and of which PMT has complained are not supported by sufficiently convincing evidence. Consequently, PMT's complaint is rejected on this ground.

243. It follows from the foregoing that there is no reason to criticize Vini for not having proposed commitments relating to the non-residential segment of the retail market for mobile telephony services, nor OPT for not having proposed commitments relating to access to its postal agency network.

C. ASSESSMENT OF THE COMMITMENTS PROPOSED BY VINI

244. As already indicated, Vini's final commitments, which form an integral part of this decision, were sent to the Polynesian Competition Authority on May 4, 2018.

1. ON-NET/OFF-NET PRICE DIFFERENTIATION (COMMITMENT NO. 1)

245. Concerning the practice of on-net/off-net price differentiation for calls and SMS likely to be anti-competitive identified by the preliminary assessment, Vini has proposed commitments both for the future offers it will market (a) and for the offers currently marketed (b), as well as measures to inform its customers (c).

a. FUTURE OFFERS

246. In general, Vini undertakes "*not to market offers that include a price differentiation between on-net calls and SMS and off-net calls that goes beyond the difference in mobile termination charges for these two types of communications*"[120] . Consequently, Vini undertakes to stop marketing the offer ranges explicitly targeted by the preliminary assessment, namely the Premium+, Izi, Taure'a and Vinicard Xtra ranges as they currently exist.

247. This general principle, which will apply to all the prepaid and postpaid offers that Vini will market in the future and throughout the period of application of its commitments, is necessary to prevent them from presenting an unjustified on-net/off-net tariff differentiation and the effects that this practice entails, in particular the reinforcement of club effects and the artificial increase in competitors' costs, leading to an artificial increase in barriers to entry to the market concerned (detailed in §§ 137 à 141), do not become established and develop in the future.

248. To implement this general principle, Vini has proposed specific commitments for prepaid and postpaid offers.

249. **As regards prepaid offers**, Vini undertakes to replace the on-net SMS abundance component with a cross-net SMS abundance component in Vinicard Xtra starter kits and new top-ups purchased by customers. In addition, Vini undertakes to replace, in Vinicard Classic and Xtra offers, the on-net SMS generosity components ("bonuses") with cross-net SMS generosity components.

250. The proposed changes to the composition of Vinicard offers are necessary and sufficient, as they remove any on-net/off-net SMS price differentiation practiced by Vini in its prepaid offers,

[120] Vini specifies that, in this commitment, off-net communications are understood to be those sent by Vini customers to any other authorized mobile telephony operator within the meaning of article D. 212-1 of the CPT and therefore PMT and any potential market entrant.

which was not objectively justified by the difference in SMS termination rates between PMT and Vini, which are identical.

251. **As regards postpaid offers**, Vini undertakes not to include in the new offers it markets any on-net voice or SMS abundance component, or any on-net voice or SMS generosity component, but to propose only, where applicable, cross-net voice and SMS abundance and/or generosity components (the "*new cross-net offers*"). However, Vini reserves the right to include a generous on-net voice component in these offers, on condition that it is no more generous than that included in the Premium+ offers currently in force (1h of on-net generosity for a basic package of between 4 and 6h, 2h for a basic package of between 6 and 12h, 4h for a basic package of more than 12h). In its definition of "cross-net" communications, Vini specifies that they are understood to be those sent by Vini customers to PMT and any other authorized mobile telephony operator within the meaning of article D. 212-1 of the CPT, on condition that the difference between the voice and SMS call termination charges of Vini and any new operator is no greater than that currently existing between Vini and PMT (2.9 F CFP).

252. The composition of its future postpaid offers eliminates any on-net/off-net price differentiation for calls and SMS. Furthermore, the reservation allowing Vini to introduce an on-net generosity component, in certain offers and in the proportions announced, is justified insofar as the difference between Vini's and PMT's existing voice call termination charges authorizes price differentiation for on-net and off-net calls within the limit of this difference. Similarly, the reservation relating to the voice and SMS termination rate levels of a potential new entrant (in particular if it were to present a voice termination rate higher than that of Vini by more than 2.9 F CFP and/or an SMS termination rate higher than 1 F CFP), and consisting of calling into question the announced composition of Vini's new offers, is justified. Indeed, in such a case, a price differentiation for on-net and off-net voice and/or SMS calls within the limits of the differences in call termination rates observed would be justified, and Vini could legitimately be led to revise the composition of its new offers within the limits of the general principle set out in undertaking no. 1 (§ 245).

253. To ensure the compliance of its first future prepaid and postpaid offers, Vini has undertaken to have them approved by the Polynesian Competition Authority. This commitment appears necessary in the case in point, as it is necessary to ensure that these first offers comply with the letter and spirit of the commitments accepted by the Authority. On the other hand, this process does not appear to be required for any changes to these initial offers, or to all subsequent offers, whether postpaid or prepaid, that Vini will market during the term of its commitments. In fact, these offers will be subject to real-time market monitoring and a posteriori control by the Autorité, and will appear in the annual reports on the implementation of the commitments (commitment no. 8 below).

b. CURRENT OFFERS

254. **As regards prepaid offers**, given the validity period of Vinicard refills, 15 days or one month (see § 60 et seq.), the existing Vinicard Classic and Xtra customer base will benefit from changes in the composition of future offers within the same timeframe, i.e. relatively quickly, especially as Vini plans to inform the customers concerned by SMS as soon as the commitment is implemented. No specific commitment is therefore required for current offers.

255. **As regards ongoing contracts underlying postpaid offers**, *at least* those covered by the preliminary assessment, the final version of Vini's commitments provides for two scenarios, depending on whether or not customers are still bound by a commitment period.

256. Firstly, as regards customers of current offers in the Premium (Premium, Premium+ and Premium Special Edition), Izi, Taure'a and Metu'a ranges **who are no longer committed on**

the date of implementation of its commitments, Vini undertakes to migrate them, on that date and without recommitting them, to an offer from among the new ranges of cross-net offers with a price positioning comparable to their current offer. Vini will inform the customers concerned by mail and SMS at least one month before this commitment takes effect. The message sent will specify that they will have the option of terminating their subscription to the new offer without penalty, in accordance with article LP 23 of the aforementioned country law no. 2016-28.

257. This measure, aimed at customers whose contracts are currently running but who have been released from a commitment period, automatically migrates them to one of Vini's new cross-net offers, thereby removing from the market some of the current contracts underlying the offers covered by the preliminary assessment. The conditions of this migration do not appear to be unfavorable to the customer insofar as i) the customer will be informed at least one month before the migration, ii) he will benefit from an enriched offer (with abundance and generosity components valid for all mobile networks) for a comparable advertised price, and iii) he will not be bound by this new offer to a minimum commitment period. Should this not be the customer's perception, he or she will have the opportunity to take advantage of the competition and, if necessary, to change operator without any obstacles other than the current cancellation terms and conditions.

258. Secondly, with regard to customers of current offers in the Premium (Premium, Premium+ and Premium Special Edition), Izi, Taure'a and Metu'a ranges **who are still committed at the date of implementation of its commitments,** Vini undertakes to offer them a free option (the "Off-net" option) enabling them to extend their generous or abundant on-net voice and SMS components to off-net calls and SMS to PMT or any other authorized mobile operator. Vini points out that, in practical terms, this option will enable these customers to benefit from cross-net communications in place of the on-net generosity or abundance communications allowed by their current offers. This option will be automatically subscribed to by customers, without generating a new commitment period, as soon as they send a call of the same nature to PMT or any other authorized operator during the on-net abundance or generosity slot. **At the end of the residual commitment period applicable at the date of implementation of the commitments**, Vini undertakes to migrate the customers concerned, without imposing a minimum commitment period, to one of the new ranges of cross-net offers with a price positioning comparable to their current offer. Vini will inform the customers concerned by mail and SMS at least one month before this commitment takes effect. The message sent will specify that they will have the option of terminating their subscription to the new offer without penalty, in accordance with article LP 23 of the aforementioned country law no. 2016-28.

259. The implementation of the Off-net option, which concerns customers whose contracts are in progress and still bound by a commitment period at the date of entry into force of Vini's commitments, will make it possible to gradually withdraw from the market, over a period of two years, the other part of the current contracts underlying the offers covered by the preliminary assessment. The use of this option is therefore not intended to last. In essence, this option will enhance the services provided under current contracts, by opening up the abundance and generosity components of on-net communications to off-net communications, all other things being equal. As a result, each offer covered by the preliminary assessment will no longer include any on-net/off-net price differentiation in practice (although, facially, it will).

260. This commitment appears to be a substitute for the modification of current contracts or the immediate migration of all Vini customers to the new offers, insofar as it entails, in practice, the same consequences, i.e. the cessation of price differentiation and its effects. Although DGEN and PMT, and then the investigating department at the April 27 meeting, argued that it was necessary to immediately migrate all customers with current contracts, whether or not they

were bound by a commitment period, to the new cross-net range offers, the Autorité considered Vini's argument that such a migration would expose it to a significant financial risk. In particular, insofar as a customer whose contract is modified may, in application of article LP 23 of country law no. 2016-28 (§ 36), terminate it without cost or penalty, Vini could, in the event of such a migration, face a reconsideration of the unamortized portion of its terminal subsidy investments. In order to enable Vini to recover these investments, the transitional implementation of the Off-net option is justified and proportional for customers whose contracts are ongoing and still committed.

261. All in all, these measures mean that, as soon as Vini's commitments come into force, the question of the contracts in progress underlying the offers covered by the preliminary assessment will be resolved, insofar as they allow the concomitant cessation of the price differentiation practice identified and of its effects. They also prevent the migration of customers (in part immediate and in part gradual) to the new cross-net range offers generated by the implementation of Vini's commitments, from being accompanied by a new minimum commitment period and locking in customers. Finally, at the end of the residual customer commitment periods still in force at the date of implementation of the commitments, the disappearance from the market of the postpaid offers covered by the preliminary assessment is guaranteed.

262. It should be noted, however, that Vini's proposed commitments do not exclude the possibility that, should they so wish, the customers concerned could, on the occasion of this migration, recommit to Vini for 12 or 24 months (depending on their preference) in return for a subsidy on their terminal. Although this possibility is entirely justified, the Authority considers that, in general, and to ensure that the spirit of the commitments made in this case is respected, the rates of commitment and recommitment of Vini customers observed between notification of this decision and implementation of the commitments, and then during the transitional period when the Off-net option will be introduced, should not appear disproportionate.

c. INFORMATION MEASURES

263. The information measures relating to commitment no. 1 are broken down on a case-by-case basis: i) current prepaid customers will be informed by SMS of changes to Vinicard, Xtra and Classic top-ups; ii) current postpaid customers still under contract will be informed of the existence of the Off-net option by letter at least one month before its implementation, by SMS and by posting on the Vini Facebook page, and then, at the end of their contract period, of their automatic migration without recommitment to one of the new cross-net offer ranges by letter and SMS at least one month before the end of their contract period; iii) current postpaid customers who are not committed will be informed of their automatic migration without recommitment to one of the new cross-net offer ranges by mail and SMS at least one month before this migration.

264. In general, Vini will inform its current and potential customers of the content and consequences of commitment no. 1 by posting on its Facebook page at least one month before it comes into force. In addition, Vini undertakes to submit to the Authority for approval the content of the communication it will carry out to implement this commitment.

265. These information measures are necessary because they help to fluidify the market and counteract the effects of price differentiation. By targeting customers who are both directly concerned by the consequences of undertaking no. 1 and, via its Facebook page, a major

communication vector in French Polynesia[121] , both a proportion of existing customers and a proportion of potential customers interested in the operator (around 47,000 subscribers to the page in May 2018), these measures concern a relatively and sufficiently broad spectrum of consumers, especially as the process of approval by the Authority of the content of the messages that will be delivered will guarantee their effectiveness.

266. In view of all the above, the final version of Vini's commitments relating to the practice of price differentiation for on-net and off-net communications therefore appears justified and proportionate in response to the preliminary assessment made by the Polynesian Competition Authority.

2. LOYALTY POLICY

a. ON THE URA LOYALTY PROGRAM (COMMITMENTS NO. 2 TO 5)

267. In the final version of its commitments, Vini proposes to modify certain terms and conditions of use of its Ura loyalty program. It thus proposes :

- that members can exchange the welcome points they have acquired for all the Ura program's re-engagement and non-re-engagement rewards (commitment no. 2);
- that, in the context of the multi-line advantage, only the line benefiting from the transfer of points to obtain a terminal subsidy be re-engaged, to the exclusion of lines having participated in the transfer of points to its benefit (commitment no. 3);
- make it possible to use the points acquired as a down payment on the purchase of a terminal, from among all the terminals offered under the Ura program, without the customer having to re-engage (commitment no. 4).

268. In order to implement commitment no. 4, Vini undertakes to ensure that the value corresponding to the amount of points used is consistent regardless of how they are used (credit on the purchase of a terminal, purchase of communications - minutes, SMS, data, cumulation with a terminal subsidy, etc.). In this way, and as PMT has rightly requested, the value of points obtained as a reward for past loyalty - the points allocated depending on the sums spent by the customer and the generic value of the point being determined by Vini - will not depend on the customer's

[121] Indeed, a reading of the master plan for digital development (SDAN) shows that Facebook is the most widely used social network in French Polynesia, both from the point of view of households and businesses, due in particular, for the latter, to the low barriers to entry compared with e-commerce platforms or website development. More specifically, in the DGEN's 2017 study report entitled "Les usages du numérique dans les ménages en Polynésie française", it appears that, in 2017, i) 70% of the total population and 86% of Internet users were registered on the Facebook social network in 2017 (respectively 21% and 27% for Google+, 23% and 29% for Instagram, 31% and 39% for YouTube and 7% and 9% for Twitter), ii) 24% of the total population is exclusively registered on Facebook and iii) 70% of Facebook registrants report logging on daily. In the study report dedicated to businesses, "Les usages du numérique dans les entreprises en Polynésie française", it is stated that 34% of companies with at least 10 employees have a website, and 37% are present on Facebook. Finally, in a 2016 survey carried out by the MEDEF of French Polynesia, in partnership with the Organisation des Professionnels de l'Economie Numérique (OPEN) and entitled "Baromètre de la transformation digitale des entreprises de Polynésie" (Barometer of the digital transformation of companies in Polynesia), involving 148 MEDEF member companies, 55% of them claim to have an internet presence, 40% claim to have an institutional website and 63% a "Company" page on Facebook. The specialized website "outremers 360°" comments on these figures, underlining that "*the enthusiasm for Facebook can be explained by the informal and direct mode of communication promoted by the social network and appreciated on the islands*".

choice to recommit, benefiting from a terminal subsidy of greater or lesser value depending on the length of this commitment, nor on the offer he chooses at the time of this recommitment.

269. These changes to the terms and conditions of use of the Ura program are designed to widen the range of choices available to members wishing to redeem the points they have earned for past loyalty, and to enable them to play the competition more effectively when making these choices, particularly when renewing their handsets. In this way, they are helping to unlock the retail market for mobile telephony services, particularly in the highly profitable postpaid customer segment (95% of whom are members of the Ura program).

270. In addition, commitment no. 4, which gives members the option of converting their points into a discount that can be deducted from the purchase price of a telephone, does not prevent Vini from offering its customers a terminal subsidy as part of the Ura program, in return for a new commitment. In this case, the value-added obtained with loyalty points can be added to the subsidy. The amount of the discount will appear separately, in its commercial documents and on the customer re-engagement form, in (i) the amount of the discount granted to the customer in the event of re-engagement (the discount being made up of the sum of the discount and the subsidy granted) or in (ii) the price of the discounted terminal[122] .

271. By making transparent to Ura program members both the reward they receive for their past loyalty (the "à-valoir") and the advantage granted in return for their future commitment (the "subvention"), this measure improves the degree of information available to Vini's customers, and hence their ability to make choices. In this way, it also helps to counter the potential effects of the practices identified, and to make the market more fluid.

272. Furthermore, as Vini pointed out at the meeting on April 27, 2018, Commitment No. 4 has no impact on Vini's terminal subsidy policy, and in particular on the subsidy levels it would be led to offer its customers. In this respect, the Authority would point out that Vini's terminal subsidy policy was not, as such, the subject of the preliminary assessment and was only mentioned in the context of the present case because of the necessary dichotomy that Vini had to establish, in the context of the Ura program, between the valuation of points acquired by customers in return for their past loyalty and, where applicable, the terminal subsidy granted to them for the future in return for their re-engagement.

273. In addition, Vini is proposing to waive the residual commitment period for all members who have re-enrolled in the last two years via the multi-line advantage, having transferred points to another line and thus re-enrolled without having benefited from a terminal subsidy - unless these members have themselves, in the meantime, benefited from a terminal subsidy in return for re-enrollment (commitment no. 3).

274. By releasing the customers concerned from their residual commitment period as soon as Vini's commitments come into force, this measure immediately puts an end to the effects of the multi-line advantage identified on the market, helping to make it more fluid by giving these customers the opportunity to play the competition. Generally speaking, commitment no. 3 on the multi-line advantage, which concerns 38.96% of invoicing accounts, prevents Vini from deriving undue benefit from the "tribe" effect (§ 137), which it naturally enjoys due to the size of its network and the highly asymmetrical structure of the market.

[122] At the April 27, 2018 meeting, Vini submitted the following example. A bare phone costs 5500. A member has a number of points valued at 500. If he wishes to acquire the bare phone, he pays 5000 for it. If he wishes to benefit from a subsidy on this phone: - by recommitting for 12 months, he pays 4000 (benefiting from a subsidy of 500 in addition to the 500 obtained by his points); - by recommitting for 24 months, he pays 2000 (benefiting from a subsidy of 1500 in addition to the 500 obtained by his points).

275. As regards the customer information measures relating to commitments 2 to 4, Vini undertakes to inform the members concerned by each of them, i.e., i) members benefiting from welcome points, ii) members whose line depends on a billing account grouping together several lines, iii) customers concerned by the lifting of their residual commitment period by mail, SMS and by posting on Vini's Facebook page at least one month before the commitments come into force. In addition, Vini expects the Autorité to approve the content of this communication to customers before it is sent.

276. Thanks to the diversity of their media, these information measures target, on the one hand, Vini customers directly affected by changes to the terms and conditions of the Ura program (mail and SMS) and, on the other hand, a certain number of consumers interested in Vini via its Facebook page. In addition, the fact that the content of the messages sent is subject to approval by the Polynesian Competition Authority ensures their effectiveness.

277. These specific information measures are supplemented by undertaking no. 5, which consists of modifying the contractual documentation (including the specific conditions of use of the program and the points redemption form) and commercial documentation relating to the Ura program (program presentation brochure and Vini mobile catalog), as well as its website, to reflect the changes resulting from undertakings no. 2 to 4. All these information measures, insofar as they contribute to improving transparency on the market, and thus to remedying the potential effects of the practices identified as rigidifying it (§ 168 et seq.), promote competition.

278. In view of all the above, the final version of Vini's commitments relating to the Ura program therefore appear justified and proportionate in response to the preliminary assessment made by the Polynesian Competition Authority.

b. COMMITMENT PERIODS AND TERMINATION CONDITIONS (COMMITMENTS 6 AND 7)

279. The final version of Vini's commitments on this subject includes three sections which help to respond to the preliminary assessment of loyalty practices.

280. Firstly, **with regard to information on commitment periods** (commitment no. 6.1), Vini undertakes to modify the Guide to offers and its other contractual and commercial documents to clarify the fact that its postpaid offers can be subscribed to for a commitment period of 12 months or 24 months. These amended documents will be sent to the Autorité for approval.

281. This commitment enables the consumer to be informed, before deciding to become or remain a Vini customer, of the different contract durations available, as well as the conditions that accompany and justify these durations. He or she will then be in a position to decide between these possibilities and to take advantage of the competition before committing to Vini.

282. Secondly, **with regard to the commitment relating to the 12-month initial and migration commitment periods without terminal subsidy** (commitment no. 6.2), Vini proposes to grant its customers who do not wish to benefit from a subsidy on their terminal, in conquest or migration, and who choose an offer with a 12-month commitment period, an advantage corresponding to one hour of cross-net communications for 3 months. Vini will modify the Guide to offers and its other contractual and commercial documents to include this benefit, and will communicate them to the Authority for approval.

283. At the hearing on April 27, 2018, PMT argued that this commitment to grant an advantage as part of a minimum 12-month commitment period did not address the issue of systematic commitment by Vini customers, maintaining that as long as a customer did not benefit from a terminal subsidy he should not be subject to a commitment period.

284. However, the Autorité recalls that the loyalty practices identified by the preliminary assessment did not concern the fact that all mobile telephony services offered by Vini were systematically accompanied by a minimum 12-month commitment period, but rather the inconsistency, for a given offer and an identical price, between the situation of a 12-month commitment for a customer who does not acquire a handset and that of a customer who acquires a handset in return for an initial 12-month commitment, insofar as the latter benefits from an additional discount (the handset subsidy).

285. By committing to granting an advantage to new customers or those migrating to a higher-end offer who do not wish to benefit from a terminal subsidy, Vini is remedying the inconsistency identified for the future. In addition, by undertaking to extend this benefit to customers who, over the past 12 months, have signed up or re-signed up without benefiting from a terminal subsidy, and who are still subject to this commitment period, Vini remedies this inconsistency for customers who have suffered from it. The practice in question and all its effects are therefore covered by commitment no. 6.2, which is therefore sufficient.

286. Thirdly, **with regard to the cancellation conditions for contracts with a 24-month commitment period**, Vini undertakes to amend articles 5 and 14.1.1 of its general subscription conditions so as to remove any ambiguity regarding the application of the capping mechanism for cancellation penalties provided for in article LP 29 of the aforementioned country law no. 2016-28, and to bring all its contractual and extra-contractual documentation into line with this regulatory provision. All such amended documents will be forwarded to the Authority for approval. Vini also undertakes to inform all its customers whose current commitment or recommitment period is 24 months that they benefit from this mechanism via the first billing mail sent to them, by posting on Vini's Facebook page and by SMS.

287. These measures will help to clarify, in Vini's contractual and commercial practice, the conditions for exiting the market in the specific context of 24-month contracts, which the Assembly of French Polynesia wished to facilitate, and to inform consumers of this specificity provided for by law. This increase in transparency, the effectiveness of which the Authority will be able to assess through the approval process, will give current and future Vini customers the opportunity to take advantage of competition ahead of the end of their 24-month contract. These measures will reduce the exit costs and switching costs currently faced by consumers, which is necessary to make the market more fluid and create a competitive dynamic.

288. In view of all the above, the final version of Vini's commitments relating to the duration of commitments, re-engagement and termination conditions therefore appears justified and proportionate in response to the preliminary assessment made by the Polynesian Competition Authority.

3. IMPLEMENTATION OF COMMITMENTS

a. ON THE DURATION OF COMMITMENTS

289. In the final version of its commitments, Vini undertakes to implement all the measures detailed above within three months of the Polynesian Competition Authority's decision to accept them, and for a period of ten years. Vini adds a clause reserving the right to request a revision or termination of all or part of its commitments in the event of a significant change in the legal or factual circumstances relating to i) the preliminary assessment, ii) the appropriateness of said commitments. Vini specifies that this could be the case if the difference between Vini's mobile voice termination rates and those of PMT or any other authorized mobile operator were to increase.

290. With regard to the duration of the commitments, the Autorité notes that five years have passed since PMT entered the retail market for mobile telephony services in 2013, ending a de facto monopoly that had lasted more than twenty years. However, as the Autorité had occasion to note in its aforementioned opinion no. 2017 of September 22, 2017, the competitive situation in the telecommunications sector, at the end of these five years, is not satisfactory. As mentioned above (§ 48), the regulatory framework provided for by the current CPT does not contribute sufficiently to creating an economic and legal context conducive to the development and maintenance of effective competitive conditions, insofar as it has a number of shortcomings. In particular, this framework does not provide for an independent sector regulator with extensive powers, nor for effective economic regulation, particularly of the infrastructure-based wholesale markets on which certain operators depend to operate in retail markets. What's more, the entry of a third mobile telephony operator, which would be likely to stimulate competition in the retail market for mobile telephony services, remains uncertain at present.

291. Thus, given a constant regulatory framework, and notwithstanding the fact that it may have to remedy anti-competitive situations on the telecommunications markets during the period of application of the commitments, the Autorité considers that a ten-year duration for the commitments is proportionate. Should it be contradicted, the revision clause contained in the final version of Vini's commitments ensures that it will be able to request a revision or termination of all or part of the commitments it has entered into.

b. ON THE TIMETABLE FOR IMPLEMENTING THE VARIOUS COMMITMENTS

292. Vini's final commitments can be divided into two sets of measures: those relating to the practice of price differentiation in retail offers for residential customers in the retail market for mobile telephony services (commitment no. 1), and those relating to the policy of building loyalty among residential customers in the same market (commitments nos. 2 to 7).

293. In view of the effects of Vini's loyalty policy, and in particular the foreclosure effects on the market (§ 168 et seq.), Vini must ensure that it implements all the measures taken as part of the preliminary assessment of this policy prior to the implementation of undertaking no. 1 relating to the practice of price differentiation in its retail offers.

294. To guarantee the effectiveness of this decision, the implementation of Vini's final commitments must be structured in two stages. Firstly, the market must be unlocked, i.e. a sufficient degree of fluidity must be re-established, in particular by giving consumers back the possibility of arbitrating and competing. The implementation of commitments 2 to 7 will help to achieve this objective. Secondly, in a market that will then be more conducive to competition, consumers will be able to accept new offers from Vini, as provided for in undertaking no. 1), and will be able to arbitrate between these offers and those of Vini's competitors. The improved market fluidity achieved in the first phase will also facilitate the migration of Vini customers who so wish to its competitors. This timetable for implementing the commitments is all the more necessary given the maturity of the market and the fact that, in such a market, new customers are won more from competitors' customers than from hitherto unsatisfied demand.

295. Consequently, as part of the approval process for the vast majority of the measures underlying Vini's final commitments, the Autorité will verify that this timeline is respected.

c. ON ANNUAL REPORTING

296. In the final version of its commitments, Vini undertakes to draw up, for the entire duration of its commitments, an annual monitoring report on their implementation. In this report, Vini will

describe the measures taken over the past year to implement each of its commitments. This report will also present any changes in its prepaid or postpaid commercial offers, and any modifications to its commercial and contractual documentation in connection with the proposed commitments.

297. The Autorité considers that, in view of the competitive situation described above, it is appropriate to monitor Vini's behavior on the retail market in relation to the commitments it has entered into throughout the period of their execution. In particular, this report will be intended to take over from the process of monitoring the implementation of the various measures through approval, by reporting on all changes or modifications to commercial offers and commercial and contractual documents relating to its commitments subsequent to their initial implementation.

298. Furthermore, such a report will not prevent the Polynesian Competition Authority's investigation department from requesting additional information on the basis of the annual report submitted by the company or any other source of information, and from carrying out an investigation.

D. CONCLUSION

299. Vini's commitments, in their latest version sent to the Polynesian Competition Authority on May 4, 2018, constitute, in the Authority's view, a proportionate solution to the competition concerns identified by the preliminary assessment and are substantial, credible and verifiable. They should therefore be accepted, made binding and referrals 16/0007F and 17/0016M closed.

DECISION

Article 1er : The Polynesian Competition Authority accepts the commitments made by Vini which form an integral part of the present decision to which they are annexed. These commitments are binding from the date of notification of this decision.

Article 2: The referrals registered under numbers 16/0007F and 17/0016M are closed.

Deliberated on the oral report by Hélène Bonnet, rapporteur, and the intervention of Gwenaëlle Nouët, general rapporteur, by Jacques Mérot, *chairman*, Maiana Bambridge and Merehau Mervin, *members*.

The session secretary, The Chairman,

Sabrina Emen Jacques Mérot