



[FREE TRANSLATION]

OPINION N°2024-AO-03 OF APRIL 29, 2024

CONCERNING A DRAFT LAW OF THE COUNTRY
AMENDING THE POST AND TELECOMMUNICATIONS CODE IN FRENCH POLYNESIA

Polynesian Competition Authority,

In view of the letter dated April 18, 2024, registered on April 18, 2024, under number 24/0012 A, by which the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter the "**Authority**") for an opinion on a draft law of the country amending the Post and Telecommunications Code (hereinafter the "**CPT**");

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

Having regard to the other documents in the file;

The rapporteur, the deputy general rapporteur, the general rapporteur and the representatives of the Direction générale de l'économie numérique (hereinafter "**DGEN**") heard on the basis of the provisions of article LP. 630-5 of the French Competition Code at the meeting of April 29, 2024;

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

1. The draft text submitted for the Authority's consideration is intended to change the regulatory framework for external telecommunications in French Polynesia. To this end, it amends the French Post and Telecommunications Code.
2. Following a presentation of the general framework for the telecommunications sector in French Polynesia and the main provisions of the draft law (**I.**), as well as a reminder of the competitive stakes in telecommunications (**II.**), the effects of the new provisions on competition will be examined, and the Authority will formulate its proposals for improvement (**III.**).

I. FINDINGS

3. The draft law of the country submitted to the Authority for examination comes against a backdrop marked by the forthcoming construction of new submarine cables and by recent technical developments enabling new telecommunications services to be offered, particularly in the most isolated territories of French Polynesia. The evolution of telecommunications infrastructures and technical developments have led to a review of the regulations governing external telecommunications in French Polynesia.
4. Before describing the draft law of the country, which is the subject of this opinion, and the context of the referral (**B.**), it is necessary to give a brief description of the operation and regulation of the telecommunications sector in French Polynesia (**A.**).

A. THE S TELECOMMUNICATIONS SECTOR IN FRENCH POLYNESIA

1. GENERAL PRESENTATION

5. The telecommunications sector in French Polynesia is governed by the CPT¹. For a long time, it was organized around the incumbent, public and integrated operator, the Office des Postes et des Télécommunications (hereinafter "**OPT**").
6. The opening up of the sector to competition was initiated in 2003 by deliberation no. 2003-85 APF of June 12, 2003, amended to include provisions relating to books II and III of the CPT. Three types of telecommunications services (mobile telephony, Internet access and call-back) were opened up to competition, subject to authorization, with OPT retaining a legal monopoly on fixed domestic telecommunications (networks and fixed telephony) and telecommunications outside French Polynesia.

2. PUBLIC SERVICE FOR EXTERNAL TELECOMMUNICATIONS

7. The public telecommunications service for French Polynesia includes the routing and transport of all telecommunications signals to and from French Polynesia. The conditions under which this public service is provided are set out in a set of specifications approved by order of the Council of Ministers (article D. 213-2 of the CPT).

¹ <http://lexpol.cloud.pf/LexpolAfficheTexte.php?texte=181953>.

8. French Polynesia's public telecommunications service is provided by a legal monopoly held by OPT.
9. Authorization to operate the outdoor telecommunications network is granted to the operator in charge for a period of twenty years (article LP. 212-10). However, the public operator is authorized to entrust all or part of this public service to third parties (article D. 213-7).
10. As a result of this monopoly, only OPT is involved in international submarine cable projects (such as the Honotua cable) linking French Polynesia to the rest of the world.
11. Similarly, only OPT has access to the satellite capacity offered by satellite operators in the Pacific region. OPT's alternative operators are therefore unable to make direct use of the satellite capacity they need to complete their coverage of the territory in terms of Internet access (mobile and fixed), without first entering into a contract with OPT.
12. Until recently, OPT had a partnership with IntelSat for satellite capacity in Polynesia.

3. NETWORK MAPPING

13. Since 2010, the main islands of the Society Archipelago have been served by the Honotua international submarine cable, which links French Polynesia to Hawaii. This cable has enabled the deployment of broadband in French Polynesia. On the domestic side, Honotua directly serves the islands of Tahiti, Moorea, Huahine, Raiatea and Bora Bora. The islands of Maiao, Tetiaroa, Tahaa and Maupiti are served by microwave links from the main islands.
14. Since July 22, 2020, a second international submarine cable, called Manatua, has been in service, linking French Polynesia, New Zealand, the Cook Islands and Samoa. The Manatua cable has secured broadband access in French Polynesia by creating a new international submarine cable connection, independent of the Honotua cable.
15. On the domestic front, the Natitua cable has linked Tahiti to ten islands in the Tuamotu and Marquesas archipelagos since December 18, 2018. Between May and October 2019, ten additional islands were connected to Natitua via microwave links from the islands connected by Natitua, enabling faster data access than via the old satellite.
16. Since 2023, two islands in the Australes archipelago, Tubuai and Rurutu, have also been linked to Tahiti by a high-speed submarine cable (Natitua Sud). Deployment of the local loop and marketing of offers took place during 2023.
17. The other islands, and in particular the southern part of the Tuamotu-Gambier archipelago, are still served by satellite, but have no broadband access to date (2G network).
18. Finally, as mentioned below, between now and 2026, 5 submarine cables will be installed by Google as part of the *South Pacific Connect* initiative. These cables will link French Polynesia to Chile, the US West Coast, Guam, Fiji and Australia.



B. TELECOMMUNICATIONS OPERATORS

1. THE OPT GROUP AND SAS ONATI

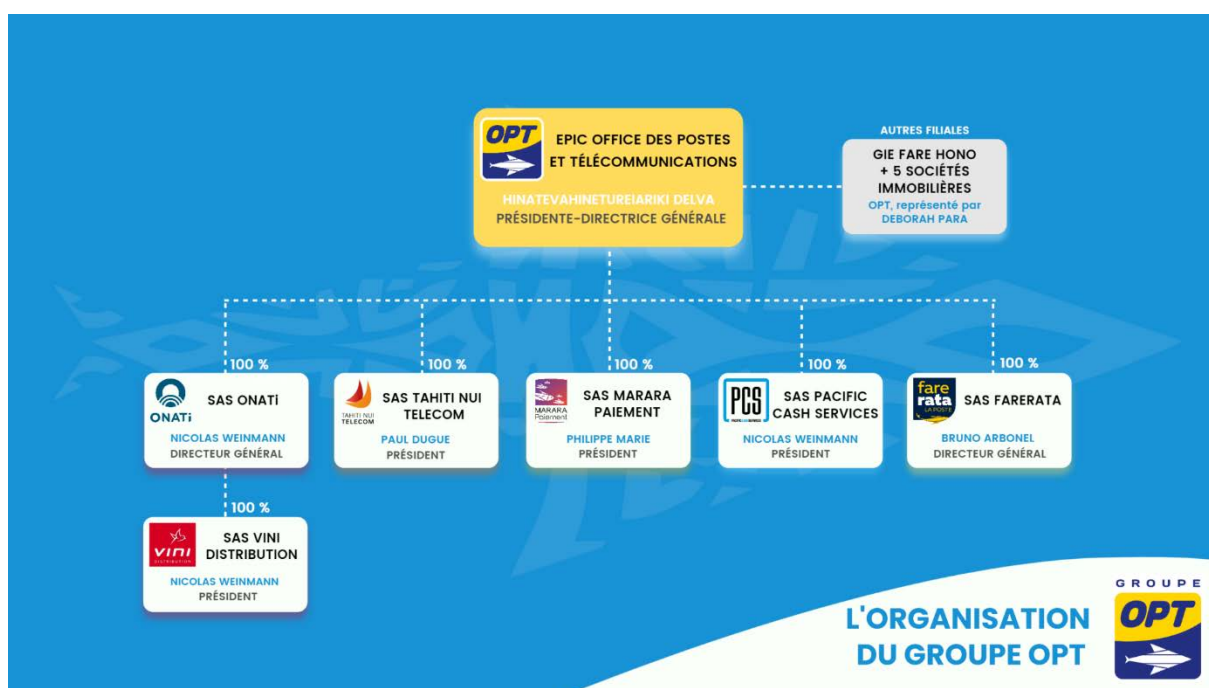
19. OPT is a French Polynesian public establishment of an industrial and commercial nature (EPIC). OPT's Board of Directors is made up of nine members with voting rights², including the Managing Director of OPT, who chairs the Board, the seven representatives of French Polynesia (the Minister for Post and Telecommunications, the Minister for Communications³, the Minister for Tourism, the Minister for the Economy, the Minister for Planning, the Chairman of the Legislative Commission for the Economy and the Chairman of the Legislative Commission for the Digital Economy) and the employee representative or his/her alternate. The Managing Director of the OPT is appointed by decree of the Council of Ministers.
20. Before 2011, the only mobile and Internet operators were OPT subsidiaries, notably Tikiphone, which received its first license in 1994, and Mana, taken over in 2013 by SAS Vini, which has since been absorbed by Onati. Since then, the market has opened up. However, OPT still has a legal monopoly on wireline infrastructure and outside telecommunications.
21. Since 2019, OPT's 100% subsidiary SAS Onati has grouped together all wireline and mobile telephone telecommunications and Internet access services, as well as network deployment and management activities for other operators and end consumers.

² Order no. 1244 CM of September 2,

2015 amending the rules of governance of the Office des postes et télécommunications.

³ Arrêté n° 215 CM du 2 mars 2017 portant modification de la composition du conseil d'administration de l'Office des postes et télécommunications.

22. Several local laws⁴ made this operation possible. The OPT and Onati have reached the following conclusions:
 - a. A partial asset contribution agreement on December 31, 2018 under which OPT contributed its entire telecommunications business to its subsidiary Onati. This treaty took effect on January 1^{er} 2019.
 - b. A public service delegation agreement on December 31, 2018 transferring the management of the telecommunications public service to Onati⁵.
23. Thus, while OPT has retained legal ownership of the essential infrastructures, it has delegated their management to its subsidiary Onati, which is in charge of an activity open to free competition, and which can therefore in practice act on the monopolistic activity at the same time as on the competitive activity.
24. Onati now handles all wholesale and retail activities in fixed and mobile telephony, as well as Internet access.
25. While the deployment of the backbone network is therefore a monopoly for Onati, the deployment of the local loop (masts and antennas) is free, subject to recognition as a telecommunications operator and the allocation of frequencies by the Council of Ministers. However, thanks to its long history, Onati is the only company to have deployed its network on all the inhabited islands of French Polynesia, i.e. 66 islands, which is essential for the mobile telephony business. It is therefore able to offer local loop access (stations, antennas and frequencies) on islands where other operators have not deployed their own networks. This access most often involves roaming services, enabling calls to be initiated or routed to the end user.



Source: OPT

⁴ Country Law n°2018-37 of November 28, 2018 and Country Law n°2018-42 of December 27, 2018.

⁵ A new agreement was signed on June 18, 2019, cancelling and replacing the one dated December 31, 2018.

2. OTHER PRIVATE DOMESTIC TELECOMMUNICATIONS OPERATORS

a. Pacific Mobile Telecom

26. Pacific Mobile Telecom PMT (hereafter "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, and licenses to use radio frequencies for GSM and UMTS in 2013. PMT began operations on June 17, 2013, marketing 2G, 3G and later 4G mobile service offerings under the Vodafone Polynesia brand name.
27. Authorizations to transmit were conditional on the presentation of a deployment schedule, which does not represent the operator's actual deployment status. To date, PMT has only deployed its own network on the Society Islands of Tahiti, Moorea and Bora Bora, as well as on Huahine and Raiatea. On the other islands, PMT either uses the roaming services offered by Onati (this is the case for voice and SMS on all islands not covered by its own network), or does not offer its services (this is the case for mobile data).
28. PMT also provides Internet access (4G and optical fiber).

b. Viti

29. SAS Viti, registered in 2009, initially operated as a fixed-line Internet service provider, after obtaining a license in 2010 and marketing its offers from July 2011 (in 4G and optical fiber).
30. On July 5, 2018, Viti obtained authorization to establish and operate a network open to the public enabling the provision of a mobile communications service⁶. Since early 2020, under the Ora brand, it has been offering mobile voice, SMS and data services based on 4G LTE technology (so-called "Volte" calls), operating in two ways: firstly, by providing mobile services (voice, SMS and data) from its network in a limited area of the territory (Tahiti and Moorea); secondly, by providing mobile services (voice and SMS only) using Onati's mobile network under a roaming agreement.

3. SATELLITE OPERATORS

31. Historically, the satellite telecoms sector was dominated by operators specializing in satellite TV and, to a lesser extent, voice communications, such as EutelSat and IntelSat, which operate satellites in medium⁷ orbits coupled with terrestrial infrastructure.
32. These services provided by "historic" satellite constellations are characterized by relatively long data transmission times (or "latency"). These services were well suited to the transmission of satellite television and telephony services in all regions of the world. However, they are not the most suitable for high-speed Internet uses such as streaming, online games, video calls and other activities.
33. More recently, a new satellite telecommunications offering has emerged with the deployment of the first satellites in the "Starlink" constellation, a satellite broadband Internet access service operated by **Starlink Services LLC**, a subsidiary of US aerospace company SpaceX. Starlink

⁶ Order no. 1185 CM of July 5, 2018 conferring telecommunications operator status on the company Viti.

⁷ The *Medium Earth Orbit* (MEO) is an orbit around the Earth located between 2,000 and 35,786 kilometers above low Earth orbit and below geostationary orbit (source: [Definition of Medium Earth Orbit | Dictionnaire français \(lalanguedfrancaise.com\)](https://www.lalanguedfrancaise.com/definition-of-medium-earth-orbit/)).

is the world's first and largest satellite constellation to use low-Earth orbit to provide high-speed Internet access capable of supporting, for example, streaming, online gaming and video calls⁸.

34. Starlink's ambition is to provide high-speed satellite Internet access worldwide, using a constellation of several thousand satellites placed in low Earth orbit. Several other large-scale constellations are under development in the USA, Russia and China.
35. **OneWeb**⁹ is the second operator to offer telecoms services based on a large constellation of low-earth orbit (LEO) telecoms satellites to provide broadband Internet access in regions poorly served by terrestrial networks. Unlike Starlink, OneWeb is aimed at telecoms operators and does not offer services directly available to the general public.
36. In October 2023, **Amazon** also launched the first two satellites of its Project Kuiper. This satellite-based Internet infrastructure project is based on a constellation of satellites placed in low-Earth orbit, scheduled to go into beta service at the end of 2024. The first phase of the project involves the deployment of 3,236 satellites circulating at an altitude of around 600 kilometers. Kuiper's aim is to provide low-latency broadband access to Internet users, both private and professional, who are currently underserved by terrestrial networks. The project is thus in direct competition with Starlink and OneWeb. In contrast to the previous generation of constellations, the mega constellations have demonstrated their ability to offer not only satellite TV, but also broadband Internet access across the globe with lower latency, thanks to their low-earth orbit. These telecommunications services are also well suited to sparsely populated or geographically isolated areas, with little or no connection to terrestrial networks.
37. OneWeb is already present in French Polynesia, with 18 antennas installed on the Papenoo site of OPT subsidiary Tahiti Nui Telecom. The OPT subsidiary also operates a data center there, housing so-called "sensitive" infrastructures. Alongside OPT's satellite transmission center and terrestrial equipment for the Honotua submarine cable, the European Space Agency had installed one of the ground stations for Galileo, the satellite navigation system that competes with the American GPS. Since the installation of Galileo, qualified technicians have been working on this highly secure site, enabling it to accommodate new satellite installations¹⁰.

4. INTERNATIONAL SUBMARINE CABLE OPERATORS

38. In October 2023, Google's network infrastructure division launched the "*South Pacific Connect*" initiative to provide two new transpacific submarine cables - Honomoana and Tabua - to contribute to new digital connections in the Pacific¹¹. Working with a number of partners, including French Polynesia's OPT, Google's arrival will create a loop linking the USA to Australia via Tahiti in the south and Fiji in the north via the first Honomoana cable, while a second Tabua cable will link Tahiti to Fiji.
39. In addition, the *South Pacific Connect* initiative will build cable landing stations in French Polynesia and connect them with an interconnecting cable. This will serve to connect transpacific routes, improve reliability, add capacity and reduce latency for Polynesian users.

⁸ [Starlink | How Starlink works.](#)

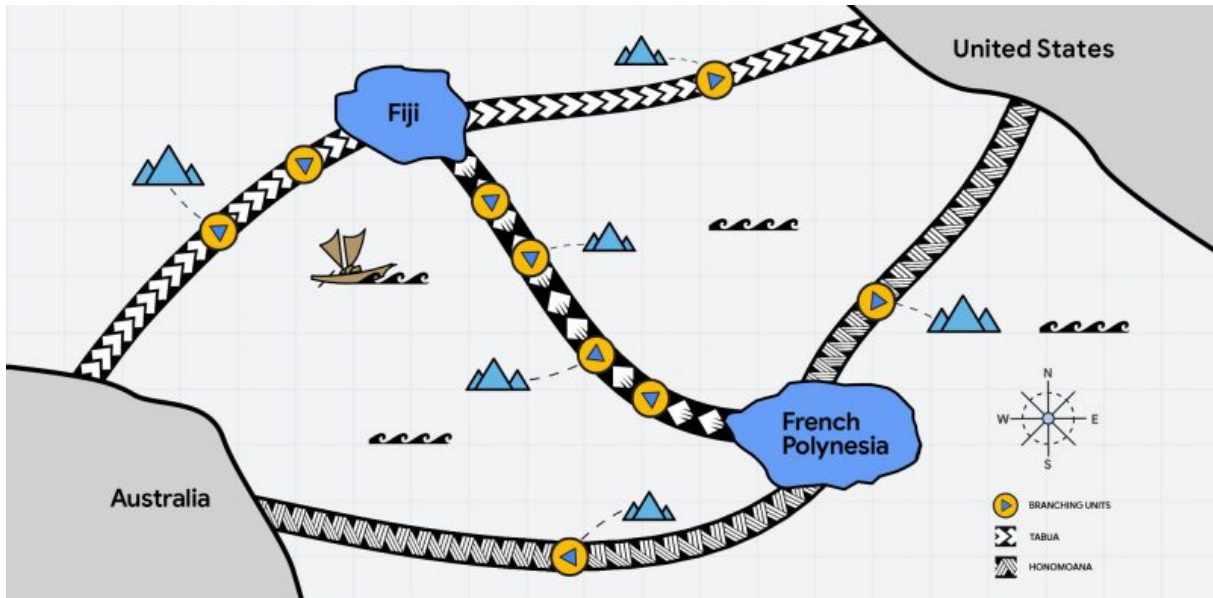
⁹ In September 2023, OneWeb was absorbed by Eutelsat. Following this operation, Eutelsat became the world's 3^{ème} satellite operator in terms of revenues, with a constellation of 648 low-Earth orbit satellites.

¹⁰ [OneWeb, StarLink... In Papenoo, OPT and the government look to the stars - Radio1 Tahiti.](#)

¹¹ Press release from Google VP for Global Network Infrastructure, Connecting the South Pacific with new subsea cables, <https://cloud.google.com/blog/products/infrastructure/honomoana-and-tabua-subsea-cables-connect-south-pacific/?hl=en>

40. Google says this is one of the first projects of its kind in the Pacific, offering the possibility of bringing redundant international connectivity to a region prone to natural disasters.

The Honomoana and Tabua international submarine cable projects

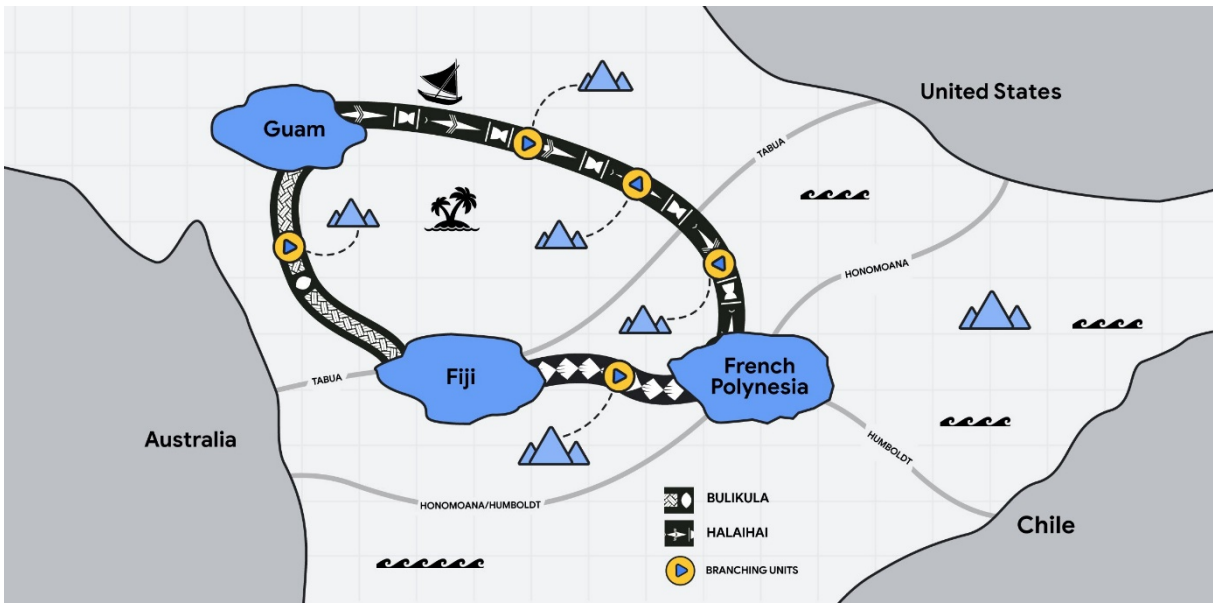


Source : Google

41. In January 2024, Google announced a new "Central Pacific Connect" initiative, which would provide two new intra-Pacific cables - Bulikula and Halaihai¹². One of these, Halaihai, will link Guam to French Polynesia. Building on the "South Pacific Connect" initiative announced in October, the Central Pacific Connect initiative will create a submarine cable network between Guam, French Polynesia and Fiji.

¹² Press release from Google VP for Global Network Infrastructure, Introducing Bulikula and Halaihai, subsea cables to connect the central Pacific, <https://cloud.google.com/blog/products/infrastructure/introducing-bulikula-and-halaihai-subsea-cables-to-connect-the-central-pacific?hl=en>.

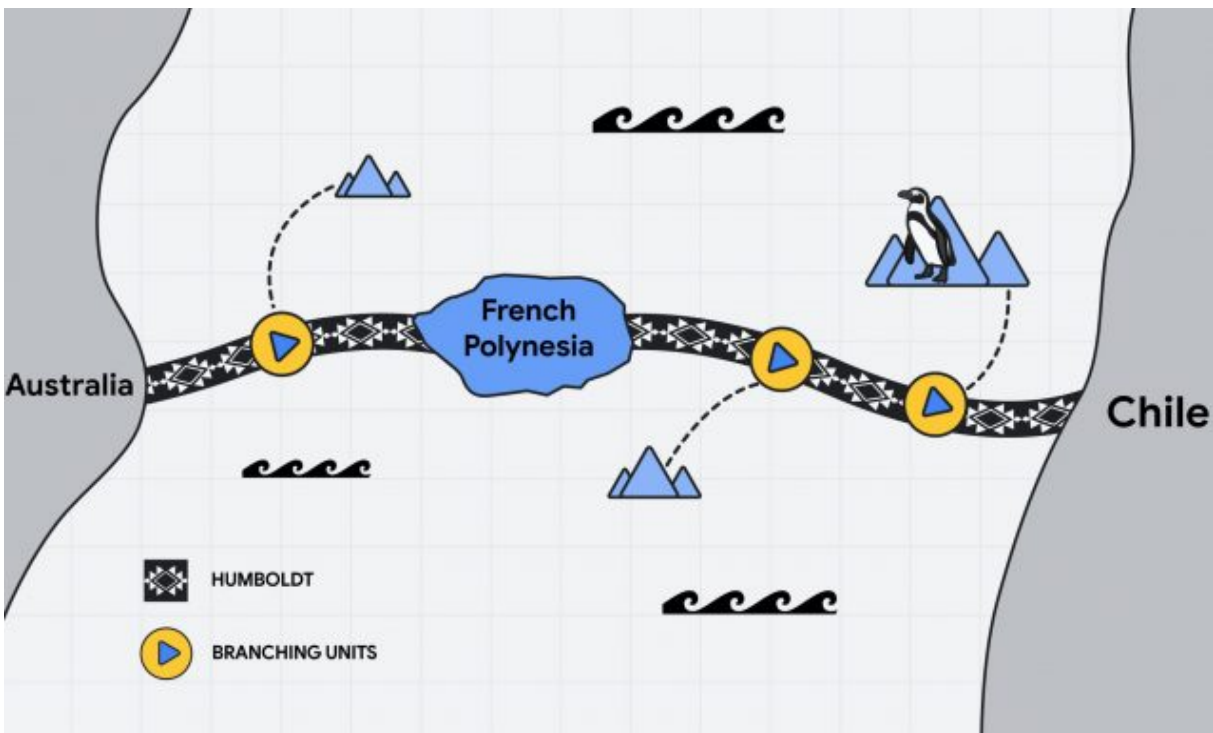
Bulikula and Halaihai international submarine cable projects



Source : Google

42. In March 2024, Google announced the creation of a new "Humboldt" international submarine cable to link Chile to Australia via French Polynesia¹³. According to general press reports, this is a new investment in cooperation between Google, the Chilean public development institution *Desarrollo Pais* and the Polynesian OPT.

The Humboldt international submarine cable project



Source : Google

¹³ <https://www.radio1.pf/google-annonce-humboldt-son-cable-chili-polynesie-australie/>.

43. In addition to these five international submarine cable projects from French Polynesia, President Moetai Brotherson plans to install several additional cables in French Polynesia over the next few years¹⁴.

C. THE DRAFT LAW OF THE COUNTRY SUBMITTED FOR EXAMINATION

44. The purpose of the draft law of the country submitted for the Authority's consideration is to amend the CPT mainly in order to:
- create a new category of private outside telecommunications operators (**1.**);
 - modify OPT's monopoly on the establishment of networks on the public domain and on external telecommunications (**2.**); and
 - modify the system of authorizations for the establishment and operation of external telecommunications networks (**3.**).

1. CREATION OF A NEW CATEGORY OF PRIVATE OUTDOOR TELECOMMUNICATIONS OPERATORS

45. Article **LP 2 A.** of the draft country law modifies article LP. 3^o. 211 by adding to the definition of a network open to the public an exclusion concerning outside telecommunications networks established or used by private operators.
46. Article **LP 2 B.** clarifies article LP. 211 concerning the definition of a public network. Private networks used by the public operator under a lease contract or a contract conferring irrevocable rights of use are now assimilated to a public network.
47. It is also proposed, in article **LP 2 D.** of the draft country law, to amend 20^o of article LP. 211 in order to create a clear distinction between a public outside telecommunications operator authorized to provide telecommunications services as part of its public telecommunications service, and a private outside telecommunications operator who is prohibited from providing this type of service and is required to guarantee access to its network to the public operator.
48. Article **LP 2 E.** adds the following definition of an external telecommunications network: "*An external telecommunications network is defined as a network enabling the routing and transport of all telecommunications signals to or from French Polynesia*", at 24^o to article LP. 211.

2. MODIFICATION OF OPT'S MONOPOLY ON THE ESTABLISHMENT OF NETWORKS IN THE PUBLIC DOMAIN AND ON EXTERNAL TELECOMMUNICATIONS

49. Article **LP 9** of the draft country law deletes all references to the public external telecommunications service from article LP. 213-2. These references are transferred by article LP. 10 to article LP. 213-7, in order to distinguish between, on the one hand, the public telecommunications service internal to French Polynesia (art. LP 213-2) and, on the other hand, the public telecommunications service external to French Polynesia (art. LP 213-7). A

¹⁴ <https://www.radio1.pf/15-cables-dici-huit-a-dix-ans-au-fenua/>.

clarification has been added to article LP. 213-7, regarding the fact that the public operator provides its public external telecommunications service via its public network.

50. Article **LP 2** of the draft country law amends article LP 211, 5°, and now assimilates private networks "*established by the public operator or used by the latter under a lease contract or a contract granting the public operator irrevocable rights of use*", to a public network.
51. Article **LP 11** supplements article LP. 214-1 by making it an offence to set up or have set up an outside telecommunications network without holding the authorization provided for in article LP. 212-1, or maintaining this network and its operation following a decision to suspend or withdraw this authorization. The penalty is 6 months' imprisonment and a fine of up to 8,900,000 FCFP.
52. Article **LP 13** proposes to insert an article LP. 231-2-1 in the French Post and Telecommunications Code to give outside telecommunications operators the prerogatives to set up and maintain the outside telecommunications network they own.
53. Article **LP. 14** adds an exception to the public operator's monopoly on the establishment of networks on the public domain. Article LP. 231-4, proposes that the private operator owning an outside telecommunications network be allowed to determine the route of its network when it must use the public highway, in agreement with the authority responsible for the highway.
54. Article **LP 15** creates a new article LP. 231-4-1, which clarifies article L. 231-4 by making it clear that private outdoor telecommunications operators are responsible for establishing their own network layout, with the prior agreement of the administrative authority responsible for the road, when they have to use the public highway.
55. Article **LP 16** supplements article LP. 231-5 by specifying that networks open to the public and independent networks are exempt from taxes or fees for occupying the public domain.
56. Conversely, article **LP 17** creates article LP. 231-5-1 CPT and makes outdoor telecommunications networks owned by private operators subject to taxes or fees for occupying the public domain.

3. MODIFICATION OF THE SYSTEM OF AUTHORIZATIONS FOR THE ESTABLISHMENT AND OPERATION OF EXTERNAL TELECOMMUNICATIONS NETWORKS

57. Article **LP 3** modifies the wording of article LP. 212-1 by making the establishment and/or operation of outside telecommunications networks subject to authorization granted by the Council of Ministers. Decrees issued by the Council of Ministers will set the conditions for issuing these authorizations. As these decrees have not yet been drafted, they have not been transmitted to the Authority.
58. Article **LP 6** supplements the provisions of article LP. 212-10 by specifying, in the same way as article LP. 212-1, that prior authorization is required for the operation of outdoor telecommunications networks. This authorization is extended to 25 years to coincide with the depreciation period and lifespan of this type of network.
59. Article **LP 6** also proposes the addition of an "IV" to subject operators of outside telecommunications networks, in the same way as operators of networks open to the public, to a certain number of minimum obligations. The purpose of this article is to remind such operators that they must respect network and service standards and specifications, comply with health and environmental protection requirements and land-use and town-planning objectives, and comply with provisions relating to frequencies on the territory of French Polynesia, to accept

the constraints imposed on the operator for the purposes of controlling its activity, to comply with the requirements of public order, national defense and public safety, and to pay the fees, taxes and charges payable by the operator to cover the administrative costs incurred in implementing the provisions of the present book (Book II - Telecommunications) under the conditions laid down in the present code and the tax code.

60. Articles **LP 4 and LP 5** propose to amend articles D. 212-3 and D. 212-4, which now become articles LP. 212-3 and LP. 212-4, in that they no longer apply solely to telecommunications operators, but also to outside telecommunications operators. The competent authorities of French Polynesia will now be able to obtain from these operators any information or documents required to ensure compliance with the principles and obligations defined in articles D. 212-1 and D. 212-2 of the CPT. The possibility for the authorities to sanction breaches by external telecommunications operators has been added.
61. Article **LP 7** clarifies article LP. 212-22 by limiting the right of interconnection to networks open to the public, no longer to all holders of an authorization issued under article LP. 212-1, but only for holders of an authorization to establish or operate networks open to the public, de facto excluding private outside telecommunications operators.
62. Article **LP 8** amends article L. 212-25-2 only insofar as it adds "*telecommunications*" after "*operators*" for the sake of consistency and precision.

II. COMPETITION AND TELECOMMUNICATIONS

63. Worldwide, the liberalization of telecommunications infrastructures has been justified by the transformation of societies and economies towards "information" societies and economies, brought about by the development and progressive ubiquity of information and communication technologies. Indeed, in this movement, an economy can only remain efficient and competitive if it integrates and disseminates information and communication technologies in its production processes, to improve productivity, which is essential to the production of wealth and competitiveness. By stimulating economic growth, competitiveness creates jobs.
64. The benefits of opening up the telecommunications sector to competition are now well known: increased downward pressure on tariffs, a wider choice of services and improved quality. The penetration of information and communications technology products and services into the economic and industrial fabric contributes to technological progress and innovation. These positive effects combine to trigger virtuous circles in all areas of the economy, to the benefit of businesses and consumers alike.

A. CHARACTERISTICS OF THE TELECOMMUNICATIONS SECTOR

65. The telecommunications sector is characterized first and foremost by heavy investment and high fixed costs, making it a "*network industry*" (just like the rail or energy sectors, for example). Introducing competition into such an industry is generally not possible at all levels, and requires a distinction to be drawn between what falls within the scope of essential infrastructures and what should be left to competition. This distinction is classically based on the notion of increasing returns, which leads to the restriction of the scope of the monopoly to essential infrastructures, which therefore present natural monopoly characteristics, or, in other

words, to network infrastructures which it is undesirable to duplicate. Network operation, on the other hand, is a competitive business. Traditionally, this stage is based on the abolition or regulatory reorganization of the special or exclusive rights granted to incumbent (mostly public) telecoms operators for the establishment and operation of telecoms networks and the provision of telecoms services.

66. Similarly, network industries are unique in that they are part of a public service or universal service¹⁵, or even contribute to a mission of general interest¹⁶, a characteristic which justified their legal status as a public monopoly. Opening up to competition and maintaining a public or universal service are not incompatible, but they do raise the question of the conditions under which public-sector and private-sector activities can coexist in a competitive environment. If the public authorities decide to entrust these public services to the public operator¹⁷, the limits of this monopoly must be clearly defined within the framework of the division between monopoly and competitive activities, and care must be taken to ensure that the financing granted to the public company does not enable it to obtain advantages of any kind that a private investor in a market economy would not be able to obtain¹⁸.
67. Secondly, network industries prior to opening up to competition often present a vertically integrated structure, which means that activities open to competition generally depend on activities reserved for the monopoly. This interconnection raises a number of questions, stemming from two main concerns: i) the conditions of access to monopoly infrastructures by new entrants who aspire to develop in segments open to competition, access which must be free and non-discriminatory to prevent the monopoly from re-establishing itself where it has been challenged; ii) opportunities for cross-subsidies between reserved (monopoly) activities and the incumbent operator's competitive activities, which make it possible for artificially competitive offers to distort competition.

B. CONDITIONS FOR SUCCESSFUL COMPETITION

68. The characteristics of a network industry, and of the telecommunications sector in particular, call for compliance with a certain number of principles to ensure the introduction and development of effective competition in the market(s) concerned: 1) the separation of monopoly and competitive activities, 2) the pricing of access to infrastructures and services, and 3) the need for an independent sector regulator.

¹⁵ Service that could be defined as a minimum service of a given quality, accessible to all users regardless of their geographical location and at an affordable price.

¹⁶ Regional planning, social cohesion, public safety, public health, etc.

¹⁷ In this respect, public-sector activities do not, by their very nature, require the operator in charge of them to be the incumbent or to be in a public monopoly situation. See "*Étude thématique : Les monopoles publics dans le jeu concurrentiel*", Rapport annuel de l'Autorité nationale de la concurrence, 2003, p.109.

¹⁸ In particular, the provision of public services imposes constraints on the company, such as the need to be present throughout the country, to serve unprofitable areas, to equalize tariffs between categories of consumers or geographical areas, etc., which, in the historical monopoly situation, were financed by cross-subsidies between profitable and loss-making services, thus operating a form of redistribution between different categories of users. However, opening up to competition calls this "internal" financing system into question, insofar as new entrants are inclined to concentrate on the most profitable activities, leaving the operator in charge of less profitable or even loss-making public service obligations ("cream-skimming"). Nevertheless, public service financing is possible within a competitive framework: "*to avoid destabilizing the financing of the least profitable segments of activity, various instruments are conceivable: compensation funds fed by taxes on operators or State allocations, negative auction procedures for unprofitable areas, a pay-or-play system where each operator chooses to provide the obligation or contribute financially to it*" ("*Étude thématique : concurrence et transport de voyageurs*", Annual Report of the French Competition Authority, 2011, p.69).

69. Once the public authorities have made a distinction, prior to opening up to competition and within the incumbent operator, between network infrastructures, which remain under monopoly, and operating activities, which are open to competition, it is important to ensure that new entrants to competitive activities have free access to monopoly infrastructures, under fair conditions, so that they can invest in the provision of telecommunications services, more or less progressively, and in the deployment of their own networks. The aim is to prevent the incumbent operator, who enjoys a pre-eminent position acquired through exclusive or special rights to its infrastructures, from excluding or restricting access to them for its competitors.
70. However, conditions of access to network infrastructures must be defined in such a way as to strike a fair balance between, on the one hand, encouraging access to these infrastructures by new entrants to enable the development of competition for the benefit of consumers and, on the other hand, maintaining the quality of the incumbent operator's network, by ensuring the necessary revenues for its maintenance and development.
71. However, as the French National Competition Authority points out: "*The balance we're seeking requires fairly detailed knowledge of essential infrastructure costs, both in terms of structure and level. However, the acquisition of this information by the regulator is all the more complex in that the incumbent operator is vertically integrated, and its accounts do not allow the desired distinctions to be made between its different activities. What's more, the company that owns or manages the essential infrastructure is in principle much better informed than the regulator or potential entrants, not only about the specific elements of the network to which it must provide access, but also about the characteristics of the sector, such as the structure of demand. These asymmetries of information can lead to incorrect estimates of infrastructure costs, and consequently distort the effectiveness of regulation in the non-competitive sector and the effectiveness of competition in activities open to new entrants*"¹⁹. For this reason, a prerequisite for opening up a vertically integrated sector to competition is the separation of the incumbent's monopoly activities from its competitive activities.
72. Despite this separation, regulation of the sector is necessary, to a greater or lesser extent depending on the degree of separation from the incumbent operator. Indeed, the process of opening up to competition impacts the nature and modalities of public intervention in the "deregulated" sector.

1. SEPARATION OF MONOPOLY AND COMPETITIVE ACTIVITIES

73. In order to understand the costs incurred by a vertically integrated operator with a monopoly over its network infrastructure, it is essential to establish a *minimum* level of accounting and financial separation between activities covered by the monopoly and those open to competition.
74. By creating several separate accounting entities for each type of activity, accounting and financial separation makes it possible to counter the distortions to the development of competition associated with the vertical structure of the operator. In accounting terms, it therefore simulates the existence of several operators within the same operator: those operating in monopoly markets and those operating in competitive markets. As a result, it enables us to verify that the incumbent's costs are fairly distributed and recovered between monopoly and competitive activities, and thus facilitates the determination of access tariffs and uncovers cross-subsidies.
75. However, in network industries, and particularly where essential infrastructures are involved, the accounting and financial separation of the vertically integrated operator's activities is not

¹⁹ ["Étude thématique concurrence et transport de voyageurs", Annual Report of the French Competition Authority, 2011, p.58.](#)

enough to counteract its incentives to implement predatory or abusive strategies on downstream or related markets open to competition.

76. This is why, in this particular context, the competition authorities recommend further separation, ranging from functional separation to ownership unbundling, depending on the case²⁰. The national competition authority considers that *"the implementation of such separation aims to facilitate access to the network by new entrants and to specify and verify the principles of non-discriminatory pricing for access to infrastructure, while ensuring that public service obligations are respected in a competitive environment"*²¹.
77. Generally speaking, transferring ownership of essential infrastructure to a company separate from the operator operating on markets open to competition is the option favored by European competition authorities, as it is considered the most economically efficient way of ensuring non-discriminatory access to infrastructure for new entrants, as well as eliminating any risk of conflict between the incumbent's different activities (in particular by avoiding cross-subsidies, or the gathering of information on competitors' commercial strategies) and reducing control costs²². When ownership unbundling is not possible in the short or medium term, for example because of difficulties in transferring personnel, a second-tier solution is to spin off the incumbent's entities carrying out the different types of activity. The option of functional separation, on the other hand, can only be considered for a transitional period, and on condition that it is accompanied by a genuine accounting separation: *"a strict division of functional, financial, operational and human competencies"*²³.

2. PRICING ACCESS TO ESSENTIAL INFRASTRUCTURES

78. In a thematic study entitled *"The cost orientation of prices"*²⁴, the French competition authority (Autorité nationale de la concurrence) takes a closer look at the issue of pricing access to essential infrastructure.
79. ***The qualification of infrastructure as essential*** is the result of well-established decision-making practice and case law; the French Competition Authority has set out five cumulative conditions for this qualification: *"Secondly, access to the infrastructure is strictly necessary (or indispensable) to carry out a competitive activity on a market upstream, downstream or complementary to that on which the infrastructure holder holds a monopoly (or a dominant position); Thirdly, the infrastructure cannot be reproduced under reasonable economic conditions by competitors of the undertaking which manages it; Fourthly, access to this infrastructure is refused or authorized under unjustifiably restrictive conditions; Fifthly, access to the infrastructure is possible"*²⁵.

²⁰ Functional separation involves creating a separate department and implementing operating rules to erect "Chinese walls" between it and the incumbent operator's other departments. Ownership separation requires the operator to divest the department concerned in a subsidiary created for this purpose (resale to a different shareholder). Between these two types of separation is legal or structural separation, which consists of spinning off the department concerned.

²¹ *"Étude thématique : concurrence et transport de voyageurs"*, Annual Report of the French Competition Authority, 2011, p.58.

²² *Ibid*, page 61.

²³ *Ibid*. pp. 61 and 64.

²⁴ ["Étude thématique : l'orientation des prix vers les coûts"](#), Annual Report of the French Competition Authority, 2002.

²⁵ Avis du Conseil de la concurrence n° 02-A-08 du 21 mai 2002 relatif à la saisine de l'Association pour la promotion de la distribution de la presse; Décision ADLC n° 09-D-06 du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne; Décision ADLC n° 12-D-01 du 10 janvier 2012 relative à une demande de mesures conservatoires concernant des pratiques mises en œuvre par les sociétés Oracle Corporation et Oracle France.

80. The Cour de cassation specified that the demonstration of "essential character" implied, for the competitor claiming access, the absence of "*economically reasonable alternative solutions, even if less advantageous*"²⁶. The Court of Appeal in the same case concluded that "*it must at the very least be established that the creation of these products or services is not economically profitable for production on a scale comparable to that of the company controlling the existing product or service*".²⁷
81. Under these circumstances, ***pricing for access to essential infrastructure*** must be transparent, fair and non-discriminatory. Such pricing makes it possible to remove barriers to access to this infrastructure, and enables new entrants to develop the activities that depend on it.
82. However, in network industries and in the presence of a vertically integrated operator, the principle of non-discriminatory pricing is rendered inoperable by the high degree of vertical integration. Indeed, for an integrated company, in the sense that the only objective pursued by the whole structure is the maximization of the total profit of the activities, the transfer price of the essential infrastructure has no economic significance and can be the object of accounting manipulation²⁸. As a result, tariffs are generally only artificially non-discriminatory.
83. The problem becomes more acute when the vertically integrated operator who owns the essential infrastructure and offers access to it on a wholesale market is also active on markets open to competition downstream of this infrastructure.
84. In this case, since the aim is to enable competitors to exercise effective competition on the downstream market dependent on access to the infrastructure, it may suffice to ensure that they are not victims of a price squeeze on this market, taking into account, on the one hand, the price they are charged for access to this infrastructure on the upstream market, and, on the other hand, the prices charged by the infrastructure owner on the downstream market. The aim is therefore to ensure that the difference between upstream prices (the access fee paid by new entrants to the infrastructure owner) and downstream prices (the price paid by end consumers) is sufficient to enable reasonably efficient competitors to operate²⁹.
85. Basing the pricing of access to essential infrastructure on the key variable of the difference between the upstream and downstream prices charged by the owner to its competitors is therefore a way of remedying any margin squeeze, and ensures short-term economic efficiency. However, in the specific context of opening up a sector to competition, and in particular that of telecommunications, the objective is longer-term and requires more direct action on access prices to essential infrastructures.
86. For example, the French competition authority (Autorité nationale de la concurrence) considers that "*several characteristics of the telecommunications sector justify the preferred use of cost orientation for interconnection tariffs, in particular the vertical integration of national operators and their presence on all downstream markets, which facilitates cross-subsidies between activities and makes non-discrimination tests of little significance, despite the accounting separation of activities. But above all, in a context of opening up a sector to competition, cost orientation makes it possible to achieve regulatory objectives that go beyond simply establishing effective competitive conditions on the markets concerned. The main objective pursued by the regulator is, in fact, the entry of new operators into the markets, despite the barriers to entry that protect the incumbent operator, such as the age of its network, which is partly amortized, the capillarity of this network, the economies of scale it enjoys due to its*

²⁶ Cass. com. July 12, 2005, no. 04-12388, NMPP.

²⁷ CA Paris, January 31, 2006, ct0175.

²⁸ "Étude thématique : l'orientation des prix vers les coûts", Rapport annuel de l'Autorité nationale de la concurrence, 2002, p.70.

²⁹ *Ibid*, p.71.

age, and customers' reluctance to change operators. Cost orientation means that new entrants can benefit from the incumbent's economies of scale, even though they have not yet reached critical mass. What's more, some of the downstream markets concerned (Internet, mobile telephony) are emerging markets whose development prospects depend on the possibility of a rapid fall in retail prices. More generally, the cost of telecommunications services is a key factor in an economy's competitiveness. However, the cost-orientation of upstream tariffs encourages lower prices, by preventing the end customer from paying a double margin, on the final service and on the intermediary service"³⁰.

87. However, ***even in the absence of essential infrastructure***, but in the presence of an operator with significant market power on a wholesale market for the supply of services based on infrastructure necessary for competitors to develop on downstream or related markets, a regulator may be led to impose cost-based pricing obligations on this operator³¹.

3. THE NEED FOR EFFECTIVE REGULATION AND AN INDEPENDENT SECTOR REGULATOR

88. Opening up a sector to competition not only involves structural changes in the sector concerned. It must be accompanied by changes in regulations and regulatory practices. Indeed, to enable competition to be introduced and then exercised, public intervention remains necessary, but must take on different forms in response to new missions³².
89. The legislative and regulatory texts applicable to the sector concerned must therefore be rethought and reworked to ensure compliance with the principles necessary for the introduction and development of effective competition in markets open to competition.
90. The provisions of the regulatory framework must therefore specify the rules that will prevent a vertically integrated company with a monopoly on infrastructure from hindering the smooth operation of markets open to competition, where it operates alongside new entrants. These rules must make it possible to control monopoly activities, by ensuring that the conditions and procedures for access to infrastructures, including pricing, are appropriate. In addition, rules must be put in place which, while organizing competition between operators, will ensure that their public service obligations are respected. The provisions of the regulatory framework must therefore make it possible to award and withdraw licenses, define and modify operators' specifications, encourage operators to respect their commitments in terms of price and quality of service, and settle disputes between them.
91. With this in mind, it is essential to create independent sector-specific regulatory agencies with all the necessary powers. In the rail sector in particular, the French competition authority (Autorité nationale de la concurrence) has pointed out, with regard to the lack of resources of the newly-created independent sectoral agency (Autorité de régulation des activités ferroviaires), that it was "*particularly problematic that, at this stage in the opening up to competition of a network industry characterized by the large number of essential facilities potentially involved, the incumbent operator is left with sole control over determining access*

³⁰ *Ibid*, p.74.

³¹ The regulatory model for the electronic communications sector in the European Union is based on a "market analysis" procedure, aimed at establishing an operator's significant position on a relevant market for the purposes of *ex ante* regulation, and imposing obligations proportionate to the competitive problems identified.

³² "*Étude thématique : concurrence et transport de voyageurs*", Annual Report of the French Competition Authority, 2011, p.70.

costs and the services provided by these facilities. [...] The current situation is therefore extremely worrying in terms of both legal and economic security"³³ .

92. Indeed, a regulator who is not independent of the ministry responsible for the sector concerned is not independent of the public monopoly operator. The combination of the functions of regulator and owner of the operator by the public authorities is highly likely to create situations of conflict of interest, or even "regulatory capture"³⁴ , particularly in areas as sensitive as decisions on the granting of authorizations to operate telecoms networks and services, and the determination of the conditions and procedures for access to essential infrastructures. In other words, public authorities' decisions as regulators impact on the value of the company from which they receive dividends. In addition to these two types of interest, there are also political influences. Thus, for example, political fluctuations foster both legal and economic insecurity, significantly reducing private operators' incentives to invest.
93. The lack of independence of the regulator and the supervisory authority thus has a direct and negative influence on the activities of new entrants, and contributes to an environment that is unfavorable to the establishment and development of effective competition in the sector concerned, to the detriment of consumers and users.
94. In addition, the regulatory framework applicable to the sector concerned must give the sector regulator the broadest possible powers to ensure the credibility of its intervention in the sector. In this respect, the French competition authority (Autorité nationale de la concurrence) considers that, "*in addition to the requirement for independence, sector regulators need to be granted real powers of coercion, as well as human and technical resources commensurate with the complexity of their task. Given the problems of access to information for regulated companies (e.g. on the structure and level of costs, on the relevance of investment choices or on the distribution of fixed costs in a multi-product business), the creation of a sector regulator must be accompanied by a transfer of resources and power*"³⁵ .

C. THE NEED FOR A COMPETITION AUTHORITY TO CONTROL THE SECTOR

95. Opening up a sector to competition and setting up an independent sector regulator does not call into question the role of a competition authority, in several respects.
96. Firstly, the existence of sector-specific regulation serves complementary objectives to those of competition law, which aims to guarantee the efficient operation of markets. In other words, "*the division of tasks between these two types of intervention is traditionally as follows: sector-specific regulation missions, entrusted to specific bodies (...), apply to sectors that were initially monopolies or at least closed-entry oligopolies, in the process of being opened up to competition. [...]. As the initial structure of the market is not conducive to the emergence of information on the sector, the regulator's primary missions are to set up audits on the costs and internal organization of incumbent operators, and to establish procedures for the disclosure of information, before undertaking pro-competitive actions to encourage the entry of new competitors. Competition policy, for its part, monitors compliance with the rules of the game*

³³ ADLC Opinion No. 11-A-15 of September 29, 2011 on a draft decree on passenger stations and other service infrastructures on the rail network.

³⁴ Regulatory capture" describes a situation in which a public regulatory institution, although intended to act in favor of the community, ends up serving commercial and/or private interests. Regulatory capture thus constitutes a failure of public authority, since it produces incentives for the production of negative externalities for households, for example.

³⁵ "Étude thématique : concurrence et transport de voyageurs", Annual Report of the French Competition Authority, 2011 p.72.

in markets where competition is the modus operandi"³⁶ . To this end, the sector regulator and the competition authority "do not have the same tools at their disposal to influence or control the behaviour of economic players"³⁷ .

97. With the aim of fostering the emergence of an efficient market structure and defining the economic and legal framework in which operators will operate, the sector regulator acts "ex ante": "upstream, the authorities can control the very structure of markets by determining the number of participants (...), their identity (...) or their mode of selection (...). Further downstream, sector regulators can influence the structure of companies operating on the market: they can split a company into several entities, either vertically or horizontally. (...). Sector regulators also intervene in the choice of goods and services offered by companies, in determining quality levels, and in their investment choices. Finally, as the last stage in the sequential decisions of companies, quantities produced or prices are also the responsibility of sectoral regulation"³⁸ .
98. Supervision by the competition authority, on the other hand, takes place *ex post*³⁹ , once anti-competitive behavior (or infringements of competition rules) have actually been observed. Thus, "the use of instruments is conditioned by the qualification of practices. With the exception of merger control, the competition authorities must first determine whether the practices in question constitute an abuse of a dominant position (or "economic dependence") or an agreement (or concerted practice). The simple observation that a market operates in an imperfectly competitive manner, for example, does not in itself open the door to any intervention. (...) Secondly, once the practices have been qualified, the instruments that a competition authority can use are essentially repressive in nature: injunctions to cease practices, financial penalties, requests for behavioral and possibly structural commitments"⁴⁰ .
99. However, the competition authority's intervention can take a more proactive form, in particular by ordering the perpetrator of anti-competitive practices to modify his behavior in order to comply with competition law. When such injunctions are issued, particularly in the context of precautionary measures or commitment procedures, which may have a short timeframe, they can fill a legal vacuum in sectoral law and help establish the economic and legal framework necessary for the introduction and development of competition in a recently opened sector. For example, the French competition authority (Autorité nationale de la concurrence) forced France Télécom to create a wholesale offer for its competitors, enjoining it "to propose to third-party operators, within a maximum period of eight weeks from notification of this decision, a technical and commercial offer for access to the permanent virtual circuit for the provision of high-speed Internet access using ADSL technology, or any other equivalent technical and economic solution enabling third-party operators to exercise effective competition, both in terms of price and the nature of the services offered"⁴¹ . Similarly, it obliged France Télécom to align its tariffs with the costs of a service that was not covered by the interconnection regime applicable in this case (which provided for cost-oriented interconnection tariffs published in an interconnection catalog), by enjoining it "to align its tariffs with the costs it bears for the provision of this service". to the costs it incurs in providing this service, the rates it charges for

³⁶ [Perrot Anne "Les frontières entre régulation sectorielle et politique de la concurrence"](#), *Revue française d'économie*, volume 16, n°4, 2002, pp. 81-112.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ With the exception of merger control, where, by its very nature, it is called upon to give its opinion upstream of the transaction.

⁴⁰ *Ibid.*

⁴¹ Conseil de la concurrence decision no. 00-MC-01 of February 18, 2000 relating to a request for interim measures submitted by 9 Télécom Réseau.

*the collection of telephone traffic emanating from its fixed public switched telephone network in mainland France and destined for the special numbers of its telecoms service provider customers under article L. 34-2 of the French Post and Telecommunications Code, such as Kosmos, for their public code card services"*⁴² . The Conseil⁴³ considered that *"pricing conditions for the collection of traffic which are oriented towards the costs actually borne by France Télécom for the provision of this service, constitutes an indispensable condition for real competition to take place on the market concerned, and is necessary to deal with the urgency of the situation, given the risk of France Télécom capturing this market by means which do not fall within the scope of competition on the merits"*.

100. Secondly, the existence of a specific regulatory framework ensuring the regulation of a sector open to competition does not place this sector outside the scope of the rules of competition law, nor does it constrain the solutions that the Authority might adopt when the company in question has, within this regulatory framework, sufficient autonomy to decide to commit or participate in the implementation of an anti-competitive practice⁴⁴ .
101. In France, as in Europe, it is common for a "regulated" operator to be sanctioned for abuse of a dominant position by a competition authority, even though its behavior is regulated by the sector regulator. Indeed, the fact that an operator's behavior complies with a sector-specific regulatory framework does not imply that this behavior complies with competition rules.
102. Finally, it should be remembered that the fact that a company belongs to the public sector does not place it outside the scope of competition law, as stipulated in article LP. 100-1 of the French Competition Code: *"the rules defined in this Code apply to all production, distribution and service activities, whether carried out by public or private entities"*.

III. COMPETITIVE ANALYSIS OF THE BILL

103. When a draft law is submitted to the Polynesian Competition Authority for an opinion, the Authority assesses the extent to which its provisions restrict or improve competition in the sector concerned. As it has already had occasion to point out, *"a competitive market optimally allocates available resources, maximizes consumer welfare and boosts the competitiveness of the sector concerned, by encouraging innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor of productive and allocative efficiency"*. Nevertheless, competition is not an end in itself; it is a tool in the service of this economic efficiency.
104. When it comes to telecommunications, the Polynesian authorities are explicitly required to ensure a certain degree of competition when they intervene. Indeed, among the general objectives set for the government in article D. 212-2 of the CPT include the following principles: "(...) 2°- *the exercise of effective and fair competition between operators of mobile telecommunication services, Internet access providers or call-back procedure providers, for the benefit of users, 3°- the definition of conditions of access to networks open to the public and of interconnection of networks, in particular for mobile telecommunication services, which*

⁴² Decision no. 01-MC-07 of December 21, 2001 concerning a referral and a request for precautionary measures presented by Kosmos.

⁴³ Now the French Competition Authority.

⁴⁴ See, for example, Autorité nationale de la concurrence decision no. 16-MC-01 of May 2, 2016 on a request for interim measures submitted by Direct Energie in the energy sector.

guarantee the possibility for all users to communicate freely with each other, as well as equal conditions of competition in the field of mobile telecommunication services, [...6°- the shared use between operators of installations deployed on public property and private property".

105. Thus, the issue at stake in the Authority's examination of this text is to assess whether or not it is able to most effectively ensure the conditions for the development and exercise of effective and fair competition between telecommunications operators. As the Autorité indicated in its opinion n°2017-A-02 of September 22, 2017⁴⁵, the introduction and development of effective competition in a network industry, particularly in the telecommunications sector, presupposes compliance with the following principles: 1) the separation of monopoly and competitive activities, 2) the pricing of access to infrastructure and services and, 3) the need for an independent sector regulator. These principles remain applicable in 2024.
106. This draft law raises questions on all three points, since it introduces changes to the CPT affecting both the external telecommunications offer in French Polynesia and the conditions of access by local operators to telecommunications signals from public and private external telecommunications operators.
107. As a reminder, in parallel with the opening up of the telecommunications sector to competition in 2003, Polynesian regulations established a "*public telecommunications service*", comprising the "*basic service*", "*mandatory services*" and the "*public external telecommunications service*" (art. LP 213-2 and LP 213-7). All these services are reserved, by legal monopoly, to the incumbent operator: OPT. As such, all collection and transport infrastructures in French Polynesia belong to OPT.
108. The main contribution of this draft law is to create a new category of operator, that of "*private outside telecommunications operator*" (art. LP 2. 20°). This amendment to the CPT is largely in line with existing law, and does not alter the fundamental structure of the outside telecommunications service in French Polynesia, by consolidating OPT's monopoly position in outside telecommunications.
109. Without being exhaustive, this opinion sets out to answer the main questions raised by the referral in the light of the time constraints imposed (urgent opinion procedure).
110. The Authority has therefore examined the benefits that can be expected from the arrival of new outside telecommunications operators in French Polynesia (**A.**), as well as the risks generated by the draft text (**B.**) with regard to the competitive operation of the telecommunications sector.

A. BENEFITS EXPECTED FROM THE ENTRY OF NEW OUTSIDE TELECOM OPERATORS

111. As a reminder, article D. 213-2 (transferred to the new article LP. 213-7 by the bill) of the CPT defines French Polynesia's public external telecommunications service as including "*the routing and transport of all telecommunications signals to or from French Polynesia to enable the provision of telecommunications services to the public in French Polynesia*". The external telecommunications sector therefore includes all telecommunications signals, both from satellite constellations and from international submarine cables connected to French Polynesia. These external telecommunications signals will provide the downstream capacity needed to

⁴⁵ Opinion n°2017-A-02 of September 22, 2017 relating to the granting by the government of authorizations to provide telecommunications services to the companies Viti and Pacific Mobile Telecom.

structure fixed and mobile telecommunications offerings by the various local operators in French Polynesia.

112. The arrival of new international operators could help bridge the digital divide in French Polynesia (1.) and stimulate the development of lower-cost telecommunications offerings (fixed and mobile Internet, 4G and 5G network rollouts, etc.) for Polynesians (2.).

1. BETTER COVERAGE OF THE POLYNESIAN TERRITORY

113. The issue of high-speed network coverage (mobile and fixed Internet) for the various archipelagos that make up French Polynesia, some of which are both remote and sparsely populated, is crucial and had already been identified as a priority by the 2017 digital development master plan (hereafter "SDAN").
114. In recent years, major investments have been made in sparsely populated areas, notably following the rollout of 4G on the islands of the remote archipelagos (Marquesas, Tuamotu and Australs), which will be covered by the Natitua cable from 2019 (Marquesas and Tuamotu) and 2023 (Australs).
115. Nevertheless, despite these investments, a large number of remote islands still do not have access to broadband telecommunications services (e.g. the southern Tuamotu-Gambier archipelago).
116. In this respect, it is illusory to imagine that mobile operators would be able to achieve economic equilibrium by rolling out their own network across the whole country, except at the cost of very high tariffs for consumers.
117. Accordingly, the Authority welcomes the proposed changes aimed at enabling the arrival of private external telecommunications operators via submarine cables and/or satellite channels.
118. The arrival of new private telecommunications operators outside the region could enable remote archipelagos in particular to benefit from infrastructures offering access to high-speed telecommunications services.
119. On this point, however, the Authority regrets that no specific impact study has been carried out to (i) anticipate the consequences of the entry of external private telecoms operators and (ii) measure the benefits.

2. BETTER TELECOMMUNICATIONS SERVICES AT LOWER COST

120. An impact study carried out by Idate in October 2016 on behalf of the Government of French Polynesia lists the benefits expected from the development of mobile Internet services, but these are largely transposable to the fixed broadband and very high-speed broadband sector. Similarly, the SDAN highlights the challenges of digitizing the Polynesian economy and society, which rely on the development of both mobile and fixed Internet.
121. Here again, the Authority regrets that no specific impact study has been carried out to anticipate the consequences (positive or negative) of the entry of new private external telecommunications operators.
122. Indeed, it would have been useful and appropriate to assess the more recent impact of the availability of new satellite capacity on the wholesale telecommunications services market, and of the launch of new submarine cables, both in terms of the quality of telecommunications

offers and services (particularly in remote archipelagos) and in terms of prices for end consumers.

123. It would also have been useful, particularly for private operators on the downstream telecoms markets (PMT and Viti in particular), to be able to measure the impact of the arrival of new satellite capacity on the prices they have to pay on the wholesale telecoms market.
124. Nevertheless, as already pointed out by the French telecommunications regulator⁴⁶, from a macroeconomic point of view, the development of broadband contributes to access to numerous services, notably in the fields of education, health, tourism and administration, as well as to regional planning, economic development, social cohesion and regional attractiveness.
125. From a microeconomic point of view, the development of high-speed and ultra-high-speed broadband helps to liberate and stimulate usage. Businesses that benefit from it gain in efficiency, productivity and performance, both at home and abroad, leading them to grow, invest, hire and innovate. Connected consumers are better informed, with access to services that improve their daily lives (education, health) and to professional opportunities.
126. However, for such uses to develop, access to broadband and ultra-broadband must be easy for businesses and consumers alike: prices must be low, and the services offered must be of high quality and diversified. While OPT's major investments in submarine cables are affecting the incumbent's internal equalisation model between profitable and unprofitable areas and/or activities, the arrival of new private outside telecoms operators will enable OPT to offer new, lower-cost capacity on the wholesale telecoms market.
127. The arrival of new high-speed satellite capacity and new submarine cables, along with the entry of private outside telecoms operators, would limit the increase in wholesale costs and rates offered by the incumbent group to its competitors, as a result of these heavy investments.
128. For Polynesian end-users, businesses and consumers, the expected benefits resulting directly from the entry of these new outside telecoms operators should therefore be reflected in an improvement in the content and prices of the offers made by operators on the retail markets.
129. In this respect, the draft law stipulates that the private operator is required "*to provide access to its network to the public operator, under the conditions defined in its authorization, at cost-oriented tariff conditions to enable the public operator to ensure the provision of the public telecommunications service and to reinforce the security of access to telecommunications services in French Polynesia*" (art. LP 211 20° modified by the draft country law).
130. This cost-orientation of pricing conditions should lead to a significant drop in prices on the telecommunications wholesale market, and *ultimately* on retail markets.
131. With regard to Google's deployment of its new submarine cables, while most of the telecommunications signal will only transit through French Polynesia, part of it will be made available to OPT. As the responsible minister, Vannina Crolas, told the press: "*Google is not at all interested in the local market. In its cables, part is reserved for its own needs and part is made available to the OPT.*"⁴⁷.
132. Consequently, the new infrastructures deployed or likely to be deployed in the near future by new private operators have technical qualities that are bound to have a positive impact on the quality of offers on the retail telecoms markets (power, reduced latency, etc.). The imminent

⁴⁶ Opinion n°2017-A-02 of September 22, 2017 relating to the granting by the government of authorizations to provide telecommunications services to the companies Viti and Pacific Mobile Telecom, paragraph 159.

⁴⁷ Tahiti Infos article from February 22, 2024, *Is "Google" a danger for OPT*, https://www.tahiti-infos.com/Google-est-il-un-danger-pour-l-OPT_a222443.html.

arrival of these new capacities on the wholesale telecoms market should enable operators to offer improved and more attractive services and prices on the retail market.

133. Despite OPT's monopoly on the wholesale telecoms market, and in the absence of an impact study, the Authority expects the arrival of new external private telecoms operators to lead to a significant drop in prices on the wholesale market, with consequent price cuts by the three operators Vini, PMT and Viti on the retail telecoms markets (fixed and mobile telephony and Internet).

B. RISKS ENGENDERED BY THE DRAFT LAW OF THE COUNTRY

134. As previously indicated, the present draft law does not modify the fundamental structure of the external telecommunications service in French Polynesia and confirms OPT's monopoly position in this field, although the draft law creates a new category of "*private external telecommunications operator*" (art. LP 2. 20°).
135. As a reminder, article D. 213-2 (transferred to the new article LP. 213-7 by the bill) of the CPT defines French Polynesia's public external telecommunications service as including "*the routing and transport of all telecommunications signals to or from French Polynesia to enable the provision of telecommunications services to the public in French Polynesia*".
136. Under this new legal regime, private overseas telecommunications operators will be "*authorized to establish and/or operate a telecommunications network between Polynesia and the rest of the world*", but will be prohibited from providing telecommunications services to the public in French Polynesia (art. LP 211 20° modified by the draft country law). The private operator must make its signal available to OPT.
137. In the draft law, only OPT, through its subsidiary Onati, remains the exclusive delegate for the public service mission of routing telecommunications signals to and from Polynesia (art. LP 211 20° modified). Based on signals transmitted by satellite constellations and international submarine cables, Onati then offers capacity services to local operators on downstream markets.
138. While the Authority considers it appropriate to open up the outside telecommunications sector in French Polynesia to private operators, the draft law of the country proposes a few marginal modifications to the CPT, as the reform of the sector is largely carried out on the basis of constant law. In particular, OPT's monopoly on the wholesale market remains unchanged. In its analysis, the Authority distinguishes between the impact of this new draft law on outside telecommunications signals from international submarine cables (**a.**) and outside telecommunications signals from satellite constellations (**b.**).

1. ON EXTERNAL TELECOMMUNICATIONS VIA INTERNATIONAL SUBMARINE CABLES

139. The Authority understands that the changes introduced by the draft country law are designed to adapt the Polynesian regulatory framework to the arrival of several international submarine cables carried by Google to create an undersea loop in the South Pacific. In this context, the draft law will enable the company, which is set to become the first "*private operator of external telecommunications*" in Polynesia, to route its cables through Polynesian territory, while retaining ownership of the cables and associated infrastructure.
140. As previously mentioned, French Polynesia is currently linked to the rest of the world by two international submarine cables, Honotua and Manatua, which carry most of the

telecommunications signals used for Internet access and mobile networks in Polynesia. This analysis will distinguish between the impact of the country's draft law on the situation of the existing Honotua and Manatua international cables (a.) and the international cable projects led by Google (b.).

a. With regard to the international submarine cables Honotua and Manatua international submarine cables

141. The changes introduced by the draft law will have no impact on the situation of the Honotua and Manatua cables, as OPT already owns the Honotua cable and is a member of the Manatua consortium, to the exclusion of any other telecommunications operator in French Polynesia.
142. The Authority considers it appropriate to recall its opinion 2017-A-02⁴⁸, in which it deplored: "*the impossibility, for alternative operators to use, without contracting with the OPT, the international submarine cable capacities that are necessary to build their Internet access offer (mobile and fixed)*"⁴⁹.
143. OPT's legal monopoly on upstream infrastructure markets prevents alternative operators from integrating more vertically to control their costs and build diversified retail offerings. These obstacles represent a significant brake on the development of alternative offers to OPT, forcing the latter to negotiate with the incumbent operator for the supply of these services.
144. However, the conditions under which alternative operators to OPT gain access to telecommunications signals from international submarine cables have an impact on the conditions of competition in French Polynesia, and *ultimately* on the development of diversified services in terms of both price and quality of service for the benefit of Polynesian consumers.
145. However, even if OPT's legal monopoly on outside telecommunications were lifted, this would not fundamentally alter the structure of access to the telecommunications signal from the Honotua and Manatua cables, due to OPT's ownership of all or part of these infrastructures. In this context, several recommendations can be made by the Authority.
146. Firstly, and similar to its position taken by in 2017⁵⁰, the Authority considers that, at the very least, it would be appropriate to ensure that access to outside telecommunications signals from the Honotua and Manatua cables is managed according to the principles of objectivity, transparency, non-discrimination and that tariffs do not lead to excessive charges being imposed on the operators using them.
147. One way of achieving this would be to modify the regulatory framework so as to consider the outside telecommunications signal from the Honotua and Manatua cables not as an "*outside telecommunications service*", but as a "*mandatory access and interconnection service*". Such a modification would allow all wholesale services based on the Honotua and Manatua cables to be included within the framework of "*mandatory services*" of the public service as currently provided by the CPT.
148. Secondly, the Authority recommends that the organization of the OPT group be reformed as quickly as possible, to enable the separation of monopoly activities from competitive ones (the provision of fixed and mobile services to the public).
149. As a reminder, since 2019, the telecoms activities of the public establishment OPT, responsible for managing the public service delegation, and the telecoms activities of Vini, the OPT

⁴⁸ Opinion n°2017-A-02 of September 22, 2017 relating to the granting by the government of authorizations to provide telecommunications services to the companies Viti and Pacific Mobile Telecom.

⁴⁹ Opinion n°2017-A-02, paragraph 194.

⁵⁰ Opinion n°2017-A-02, paragraph 235.

subsidiary responsible for telecoms activities on the competitive market, have been merged into a single legal entity: SAS Onati. The Autorité has already indicated that this confusion between public service activities under monopoly and competitive activities within the same legal entity was problematic, as it was likely to prevent competition on retail offers from taking place transparently and on equal terms.

150. *At the very least*, it would be advisable to separate OPT's activities under free competition and monopolistic activities under OPT's public service delegation, in separate legal entities.
151. Indeed, regulators prefer to isolate monopoly activities from competitive ones, as this is the most economically efficient way of :
 - i) ensure non-discriminatory access to infrastructures for competitors ;
 - ii) avoid any risk of conflict between the various activities (prevention of cross-subsidies in particular);
 - iii) reduce the risk of using competitors' sensitive information; and
 - iv) reduce the costs of this control for the sector regulator.
152. As we saw earlier, this development is all the more necessary as the sector lacks the "*external*" guarantees obtained from an independent sector regulator.
153. Finally, the Authority also reiterates the need for independent regulation of access to the wholesale market provided by OPT via its submarine cables, and more generally of the telecommunications sector, by entrusting these tasks to an independent body.

b. With regard to the planned international submarine cables

154. As mentioned above, the legal status of the "*private operator of external telecommunications*" created by the present draft law of the country, has been planned to enable the realization of an international submarine cable project supported by Google, including in particular the "Honomoana" cable which will link Tahiti to the United States and Australia, the "Tabua" cable, which will link Tahiti to Fiji and the "Humboldt" cable linking Australia to Chile via Tahiti.
155. Based on publicly available information, it appears that the planned infrastructure will be built in cooperation between Google and OPT, as far as French Polynesia is concerned. The draft law also stipulates that the private operator will retain full ownership of its associated infrastructures in French Polynesia.
156. With regard to the question of maintaining OPT's monopoly, the DGEN, the text's sponsor, argued that only OPT had the financial resources and technical expertise required for international submarine telecommunications cable connections, thanks to its experience with the Honotua and Manatua cables in particular. The decision to consolidate OPT's monopoly would also, according to the sponsor of the text, meet the need to provide a certain number of guarantees of stability and predictability to Google, in order to support its decision to route its submarine cables through French Polynesia. Having a single partner to develop this submarine cable would have been a decisive factor in securing the project in French Polynesia.
157. On the basis of the information available, it seems conceivable that an OPT monopoly might be justified in order to secure the project in French Polynesia, and then to successfully deploy this infrastructure, given its experience in submarine cable and its financial strength.
158. On the other hand, while the choice of a single operator, in this case OPT, may be justified by the actual implementation of the submarine cable projects, the same cannot be said of the use, once the infrastructures have been installed, of the telecommunications signals made available exclusively to OPT.

159. As previously mentioned, the creation of several additional submarine cables to French Polynesia represents a remarkable opportunity for the telecoms sector in French Polynesia. The capacities offered by these new submarine cables will be capable of profoundly shaking up the structure of telecommunications supply in French Polynesia's retail markets. These additional telecommunications signals could be expected to stimulate downstream competition, by enabling telecom operators to differentiate themselves on retail markets, in terms of services offered, prices and quality of service to Polynesian consumers. It is also an important economic development project for the country.
160. However, maintaining OPT's monopoly on signals from the planned cables will create an exclusive relationship between the private outside telecommunications operator and OPT, which does not appear to be justified by any technical constraints, as the installation of the cables and associated infrastructure has already been completed.
161. The Authority deplors the inadequacy of the information available, the absence of an impact study or data on the figures for this submarine cable project, and the very tight deadlines for the investigation (emergency procedure), which make it all the more difficult to give an opinion on the decision to consolidate OPT's monopoly on the signals produced by the new submarine cable project.
162. Furthermore, the Authority is concerned about the creation of a new intermediary, in this case OPT, between the outside private telecom operator and the downstream local operators, and consequently about the way in which OPT will operate in order to re-invoice Google's tariffs for its new available capacities. It is essential that this re-invoicing be geared to OPT's costs for this activity.
163. At the very least, it seems unreasonable to entrust OPT with a monopoly on new external telecommunications signal capacities, without *at the very least* a prior reform of the company's organization.
164. As mentioned above, OPT's current organization is likely to generate conflicts of interest within the group, due to the confusion of competitive activities with activities under a public service delegation agreement. The present draft law could therefore provide an opportunity to reform OPT's internal organization in order to ensure the separation of the management of the external telecommunications monopoly from competitive activities.
165. In particular, the Authority stresses the importance of alternative operators' access to outside telecommunications signals being based on the principles of objectivity, transparency and non-discrimination. It is also important to ensure that, in future, issues relating to access to outside telecommunications signals are not dealt with through litigation before the administrative court or the Authority, as has been the case in recent years.
166. In this respect, the Authority also reiterates the vital need for independent regulation of access to the wholesale market provided by OPT via its submarine cables, and of the telecommunications sector in general, by entrusting these tasks to an independent body.
167. In particular, the government will have to pay particular attention to the conditions of access and pricing for wholesale services relating to telecommunications signals from Google submarine cables, but for which third-party access will be managed by OPT.
168. It will therefore be necessary to ensure that pricing is guided by the principles of objectivity, transparency and non-discrimination, and that it does not impose excessive costs on the operators who use them.

Last but not least, it seems essential to consider the relevance of OPT's monopoly on outside telecommunications from Google's submarine cables, once the cables and associated facilities have been installed.

Recommendations:

With regard to external telecommunications via international submarine cables, the Authority makes the following recommendations:

1. Reform, as quickly as possible, the internal organization of the OPT group to guarantee the separation of monopoly activities from those in competition, by bringing together the activities of providing fixed and mobile services to the public within a single entity, distinct from that carrying out activities linked to the establishment and operation of networks (where monopolies and essential infrastructures are brought together);
2. Guarantee Onati's competitors that wholesale access and interconnection services to the Honotua and Manatua cables, and in the future, to cables belonging to the private external telecommunications operator, are managed according to the principles of objectivity, transparency and non-discrimination;

One way of achieving this would be to modify the regulatory framework so as to consider the outside telecommunications signal from the Honotua and Manatua cables, and in future, from cables owned by the private outside telecommunications operator, not as an "*outside telecommunications service*", but as a "*mandatory access and interconnection service*".

3. Establish a pricing structure for wholesale access and interconnection services to the Honotua and Manatua cables, and in future, to the cables belonging to the private outside telecommunications operator, that does not impose excessive charges on the operators using them. In particular, the Authority recommends :
 - ensure that the pricing methodology is based on the principles of objectivity, transparency and non-discrimination, and that it does not lead to the imposition of excessive charges on the operators who use them;
 - ensure that OPT's charges for re-invoicing the private outside telecommunications operator's tariffs are geared to OPT's costs for this activity.
4. Establish an independent regulator for the telecommunications sector in French Polynesia, with powers of sanction; and
5. Consider whether OPT should retain a monopoly on outside telecommunications from Google's submarine cables, once the cables and associated facilities have been installed.

2. FOR EXTERNAL TELECOMMUNICATIONS VIA SATELLITE LINKS

169. Although the present draft law aims to adapt the CPT by creating a new category of operator, that of "*private operator of external telecommunications*" (art. LP 2. 20°) in anticipation of the launch of a submarine cable project by Google Network, it has to be said that these modifications necessarily have an impact on external telecommunications by satellite links, since the OPT remains the exclusive interlocutor of private satellite operators and retains the monopoly on the wholesale marketing of telecommunications services with satellite capacity offered by private operators.
170. Similar to the Authority's findings for submarine cables, the distinction between OPT, the public external telecommunications operator, and private external telecommunications operators "*authorized to establish and/or operate a telecommunications network between Polynesia and the rest of the world*" also applies to satellite links. Here too, the private operator authorized to set up or operate an outside telecommunications network will not be authorized to provide telecommunications services directly to the public: "*this authorization does not allow it to provide a telecommunications service to the public in French Polynesia*" (article LP 211, 20° modified by the country's bill). Only OPT is authorized to provide telecommunications services on the wholesale market as part of its public telecommunications service (art. LP 211, 20° modified by the draft country law).
171. As mentioned above with regard to submarine cables, as part of its authorization, the private operator is also required "*to provide access to its network to the public operator, under the conditions defined in its authorization, at cost-oriented tariff conditions to enable the public operator to ensure the provision of the public telecommunications service and to reinforce the security of access to telecommunications services in French Polynesia*" (art. LP 211 20° modified by the draft law of the country). In addition, article LP 2 C. clarifies article LP 211 5° on the definition of a public network. This amendment assimilates private networks, "*used by the public operator by means of a lease contract or a contract conferring irrevocable rights of use, for the needs of the public*", to a public network. The same applies to satellite links.
172. The Autorité wishes to point out that the classification of outside telecommunications services as "public service" activities entrusted to a single operator, does not allow regulators to effectively apprehend them under an economic and competitive spectrum. This is exacerbated by the fact that alternative operators on the retail market are unable to contract directly for satellite capacity with private outside telecoms operators.
173. Once again, the Authority notes that these obstacles represent a significant brake on the development of alternative offers to OPT, by forcing the latter to negotiate with the incumbent operator. The conditions under which alternative operators to OPT gain access to telecommunications signals from satellites have an impact on the conditions of competition in French Polynesia, and *ultimately* on the development of services for the benefit of Polynesian consumers.
174. In particular, the Authority questions the appropriateness of the choice made by the present draft law of the country to consolidate OPT's monopoly on outside telecommunications signals from satellite constellations at a time when the market is seeing a significant change in supply in the satellite telecommunications sector. As mentioned above, several companies, such as SpaceX and Amazon, are preparing satellite constellations (e.g. Starlink, Kuiper, etc.) that will enable high-speed Internet access even in sparsely populated areas within the next few years.
175. However, the maintenance of OPT's monopoly on external telecommunications signals by the present draft law specifically prohibits private external telecommunications operators from providing their services directly to Polynesian consumers.

176. Similar to what has been indicated for telecommunications signals from submarine cables, the Authority stresses the importance of alternative operators' access conditions to telecommunications signals from satellites being based on the principles of objectivity, transparency and non-discrimination. The recommendation concerning the reform of OPT's structure is also fully applicable to this type of external telecommunications.
177. The Authority also stresses the need for a new amendment to the CPT to put an end to OPT's external telecommunications monopoly, at least for satellite telecommunications signals. Consideration should also be given to the conditions under which satellite constellation operators could be allowed to provide their commercial services directly to Polynesian consumers, once these new services have reached a sufficient level of maturity (in terms of price, geographical coverage of the satellite signal, etc.) to be made available to Polynesians.
178. On this point, it is worth noting that other French countries and local authorities have carried out reforms aimed at opening up external telecommunications to competition⁵¹. In November 2023, for example, the Caledonian government adopted a bill designed to enable private operators such as Starlink and Oneweb to offer satellite connections to Caledonians. The main aim of the bill is to open up the Internet access markets to competition from new players, in particular satellite operators. The New Caledonian Competition Authority (hereinafter the "ACNC") has issued a favorable opinion on the draft bill⁵². In particular, the ACNC noted the difficulties arising from the duality of the telecommunications sector in New Caledonia, where the OPT de Nouvelle Calédonie (hereinafter "OPT-NC") holds a monopoly on public external telecommunications services, while the market for Internet access provision is open to competition. The draft text thus confers "*telecommunications operator*" status on Internet access providers and satellite operators, who nevertheless remain excluded from other telecommunications markets, including mobile and fixed telephony. In 2024, the latter could therefore offer commercial services in New Caledonia. This bill puts an end to OPT-NC's monopoly on Internet access markets. This reform is taking place in New Caledonia in a context where, as in French Polynesia, several Internet service providers are competing with each other, but are dependent on the monopoly of OPT-NC and its submarine cables for data flows in and out of the archipelago.
179. Lastly, the Authority questions the need for an urgent referral by the government on a draft law of the country, the urgency of which does not seem particularly obvious.

Recommendations:

With regard to outside telecommunications via satellite links, the Authority makes the following recommendations:

6. Guarantee Onati's competitors that access to satellite telecommunications signals is managed according to the principles of objectivity, transparency and non-discrimination;
7. Establish a pricing system for access to satellite telecommunications signals that does not impose excessive charges on the operators who use them;
8. Provide for a new amendment to the CPT to end OPT's monopoly on outside telecommunications, at least for satellite telecommunications signals;

⁵¹ [New Caledonia and Fiji open their skies to Starlink - Radiol Tahiti](#).

⁵² Opinion no. 2024-A-01 of March 11, 2024 on the Authority's referral of the preliminary draft law for improved connectivity in New Caledonia.

9. Consider the conditions under which satellite constellation operators could be allowed to provide their commercial services directly to Polynesian consumers.

Deliberated on the report by Maxime Hebling, *Rapporteur*, and Frédéric Paillusson, *Deputy General Rapporteur*, and the intervention of Sophie Bresny, *General Rapporteur*, by Johanne Peyre, *Chairman*, Enzo Silvestro and Ingrid Izquierdo, *full members*.

The Chairman

Johanne Peyre