

[FREE TRANSLATION]

OPINION NO. 2022-AO-01 OF MARCH 30, 2022
REGARDING PRICE FRAMING CONDITIONS FOR CERTAIN PRODUCTS AND SERVICES AMENDING
THE LEGISLATIVE PART OF BOOK I OF THE COMPETITION CODE

The Polynesian Competition Authority,

Having regard to the letter received on March 15, 2022, registered under number 22/0007 A, by which the President of French Polynesia referred to the Polynesian Competition Authority for an opinion, on the basis of article LP 620-2 of the Polynesian Competition Code, on a draft law of the country relating to the conditions for regulating the prices of certain products and services and amending the legislative part of Book I of the Polynesian Competition Code.

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

Having regard to the other documents in the file;

The rapporteur, the acting general rapporteur, the government commissioner and representatives of the Directorate General of Economic Affairs (DGAE) were heard on the basis of the provisions of article LP 630-5 of the Polynesian Competition Code at the meeting of March 28, 2022;

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

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INTRODUCTION

1. By letter dated March 15, 2022, registered under number 22/0007 A, the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter "the Authority") for its opinion a draft law of the country relating to the conditions for regulating the prices of certain products and services and amending the legislative part of Book I^{er} of the Polynesian Competition Code.
2. Article LP 620-2 of the Polynesian Competition Code stipulates that: *"The Authority must be consulted by the President of French Polynesia on any draft law of the country (...) which institutes a new system having the effect of: (...) 3° Imposing uniform pricing practices or conditions of sale.*
3. In his letter of referral, the President of French Polynesia invoked the urgent procedure provided for in the same article, reducing the response time to fifteen days. Consequently, the Authority must deliver its opinion by March 30, 2022 at the latest.
4. The Authority notes that the reasons for using the emergency procedure are not specified. It regrets that systematic recourse to this procedure deprives the applicant for an opinion of more in-depth consideration by the Authority, which, if it were seized within the normal timeframe, would be able to hold more hearings with interested parties, would be in a better position to exercise its expertise and would propose a more complete analysis and recommendations.
5. In any case, in the course of the examination of this request for an opinion, the Directorate General for Economic Affairs (hereinafter "DGAE"), the bearer of the draft text submitted for examination, was heard by the rapporteur via e-mail exchanges.
6. The draft text submitted for the Authority's consideration aims to change the regulatory framework governing certain prices in French Polynesia, firstly by codifying existing texts within the Competition Code, and secondly by giving substantive legislative force to provisions hitherto governed by decrees issued by the Council of Ministers. It also amends and supplements certain existing provisions.
7. Following a presentation of current price regulation and the main provisions of the country's draft law (I), the effects of the new provisions on competition will be examined, and the Authority will make any proposals for improvement (II).

I. THE FINDINGS

A. PRICE REGULATION IN FRENCH POLYNESIA

1. A PRINCIPLE OF FREEDOM TEMPERED BY EXCEPTIONS

8. In principle, prices are free in French Polynesia, but there are a number of derogations to set regulated prices or margins.
9. Article LP 100-2 of the Competition Code, introduced by the amended Local Law no. 2015-2 of February 23, 2015 on competition, states in its first paragraph that *"Except in cases where the laws of the country provide otherwise, the prices of goods, products and market services*

are freely determined by competition". However, this is immediately tempered by the following two paragraphs of the same article, which state that "the preceding provisions do not prevent the Council of Ministers, after consulting the Polynesian Competition Authority, from regulating prices, particularly in sectors or areas where price competition is limited due to monopoly or oligopoly situations, lasting supply difficulties, or commercial under-equipment. /The Council of Ministers may also, in the event of excessive price rises or falls, take temporary measures, the duration of which may not exceed six months, motivated by a crisis situation, exceptional circumstances, a public calamity or a manifestly abnormal market situation in a given sector".

10. Furthermore, the Competition Act was not intended to abolish existing provisions. In fact, under the heading of transitional and derogatory provisions, article LP 3 stipulates that "*regulations setting prices or margins for products and services shall remain in force, subject to modification*".
11. In practical terms, there are numerous exceptions to the principle of price freedom, and the applicable regime is complex.

2. A HIGHLY DISPARATE SYSTEM

12. In accordance with the provisions of order no. 171 CM of February 7, 1992, products are classified according to four distinct categories:
 - basic necessities" (hereinafter PPN), with a maximum margin in absolute or relative terms (mark-up);
 - fast-moving consumer goods (FMCG), with a maximum margin in relative value ;
 - products whose margin is capped in relative value ;
 - products benefiting from total price freedom.
13. This text, which is over thirty years old, has since undergone a large number of changes (30 in the last ten years, according to the explanatory memorandum of the draft submitted for review), not only to the list of products concerned, but also to its procedures.
14. In addition, specific arrangements are provided for in other legislation for a number of products (hydrocarbons, pork, copra, bread, flour, medicines, etc.) and services (inter-island freight, port handling, road haulage, cabs, fees for certain professions, ministerial fees, real estate rentals, medical care, etc.).
15. The result of this brief overview is a high degree of complexity, both in terms of the applicable regime and the objectives pursued, which are not always precisely defined.

B. THE DRAFT LAW OF THE COUNTRY SUBMITTED TO THE AUTHORITY FOR EXAMINATION

16. According to the explanatory memorandum, the aim of the draft law submitted to the Polynesian Competition Authority is to "*set the legal framework for the pricing regime for PPNs and PGCs*" and "*integrate these provisions into the Competition Code, insofar as they directly derogate from the principle of price freedom proclaimed by article LP 100-2 of this code*". In particular, the aim is to "*comply with the provisions of article LP 100-2 of the*

Polynesian Competition Code, which refers to a local law the task of setting regulated price regimes".

17. However, this codification is not carried out on a constant law basis. The current system has been extensively amended, in particular - as is explicitly stated in the explanatory memorandum - to take into account some of the recommendations made by the Autorité in its opinion no. 29-A-01 of April 2, 2019, including that of "*defining the general interest objective pursued by the regulation on PPNs*".
18. The draft law of the country thus pursues various objectives which will be examined successively:
 - to codify price control measures, which until now have been the responsibility of ministerial decrees, in the "loi du pays" section of Book I of the Polynesian Competition Code;
 - reform the applicable regime.

1. CODIFICATION OF PRICE REGULATION IN THE "LEGISLATIVE" PART OF THE COMPETITION CODE

19. The country's bill completes Title I of the Competition Code, incorporating definitions and a Title I entitled "*Freedom of Prices*", which is divided into four chapters:
 - "*Introductory chapter - Principle of price freedom*
 - "*Chapter I - Provisions relating to essential and mass-market products and services*
 - "*Chapter II - Provisions relating to certain products or services necessary for the economic and social development of French Polynesia*
 - "*Chapter IV - Sanctions*
20. This codification of the various price-control regimes, which were governed by texts that were often old and repeatedly amended, has two complementary objectives:
 - improve the intelligibility of the law by clarifying the applicable regime and unifying it through codification within the Competition Code;
 - ensure the legal certainty of these measures, by "raising" provisions that until now were the responsibility of decrees to the level of local laws.
21. While the principle of price freedom is reiterated (article LP 110-1), several exceptions are now directly integrated into the Competition Code.
22. For example:
 - the possibility of concluding price moderation agreements with companies (article LP 110-4);
 - the possibility of regulating price increases (the principle of "*regulated freedom*") (article LP 110-3);
 - the PPN and PGC schemes (Chapter I, sections 1 to 3);
 - price controls for goods and services deemed "*essential to the economic development of French Polynesia*", some of which are covered by the principles set out in the PPN and PGC regimes, but may also be covered by a specific regime (article LP 112-1);
 - hydrocarbon pricing, which is covered by specific provisions now incorporated into the Competition Code (articles LP 112-2 to LP 112-5).

23. However, the law of the country merely determines the general regime for setting the prices of these various products. Determining the list of regulated products or services, and the details of the price regulation arrangements, remains a matter for the Council of Ministers, which will make its decisions by decree.

2. SOME SIGNIFICANT DEVELOPMENTS

24. However, the proposed text does more than simply codify the law as it stands. It also makes a number of changes, some of them substantial, to the applicable regime.

a) GROOMING AND CLARIFICATION MEASURES

25. Some of the price control measures, now codified, are subject to changes that the explanatory memorandum presents more as measures to clarify or specify existing systems.
26. This is the case, for example, with the following provisions:
- the introduction of a "*precise definition*" of "*locally manufactured goods or products*";
 - the codification of price moderation agreements with companies ;
 - codification of the main principles for determining the prices of certain hydrocarbons.

b) MEASURES THAT SIGNIFICANTLY CHANGE THE APPLICABLE REGIME

27. Other measures, on the other hand, substantially modify the regime applicable to certain price-regulated goods and services.
28. To begin with, the country's bill introduces a new exception to the system of price freedom, by allowing - according to the explanatory memorandum - "*the Council of Ministers to take temporary measures to control prices, in order to prevent an excessive rise or fall in prices*" and no longer only after an actual rise or fall has been observed. The aim is to enable the government to "*react more quickly in situations similar*" to those observed at the start of the health crisis concerning masks and hydroalcoholic solutions, whose prices were unable to vary insofar as the initial situation was that of a shortage of such goods.
29. Secondly, it introduces into the Code a system of "supervised freedom" for certain pricing changes.
30. In addition, a number of changes and clarifications have been made to the PPN and PGC regimes, leading to a partial overhaul of these regimes.
31. These changes are as follows:
- a restrictive definition of PPN and PGC (LP 111-3 and LP 111-6);
 - new procedures for setting ceiling prices (LP 111-1);
 - a framework for the Council of Ministers to distinguish between the treatment of imported and local products (LP 111-2);
 - the determination of cases in which the Council of Ministers may regulate the manufacturing or production price of local products (LP 111-5);
 - methods of calculating the warehouse price (LP 111-6);

- consideration of the product's impact on health and the environment (LP 111-13 and LP 111-16);
 - setting a framework for repackaging or bulk sales (LP 111-7);
 - the introduction of a rescrit procedure for professionals, *"requiring the administration, at the professional's request, to take a position on the pricing regime applicable to a specific product or service in order to avoid any conflict of interpretation"* (LP 111-11).
32. The explanatory memorandum also specifies that the PPN/PGC scheme does not apply in certain cases (*"goods and services sold as part of public purchases; / - goods and services subject to moderation agreements; / second-hand goods; / exported products (...)"*).
33. Certain obligations are imposed on professionals to ensure the effective implementation of the system:
- obligation for importers to determine, prior to any transaction, the price calculated in accordance with regulatory provisions (LP 111-6);
 - obligation for local producers and manufacturers to establish a producer or manufacturer price (LP 111-5);
 - obligation for the person responsible for first marketing to determine the limit selling price under the conditions laid down by the regulations (LP 111-9);
 - obligation for local producers and manufacturers to reserve the marketing margin for locally manufactured products to intermediaries and retailers when the producer price is free (LP 111-3);
 - obligation to indicate the maximum sale price on invoices and delivery notes for the products concerned, at all stages of marketing (LP 111-10);
 - obligation for professionals to keep price structures for products with a regulated maximum price for a period set by the Council of Ministers (LP 111-9).
34. To ensure compliance with the regulatory framework, the draft law introduces a new system of injunctions and administrative sanctions, deemed *"more effective and quicker to implement"* than current criminal sanctions.

II. COMPETITIVE ANALYSIS

A. THE ANALYSIS GRID APPLICABLE TO REGULATORY PROJECTS

1. GENERAL PRINCIPLES

35. The Guide d'évaluation de l'impact concurrentiel de projets de textes normatifs published by the Autorité de la concurrence métropolitaine, from which the Polynesian Competition Authority can draw inspiration, states: *"A market that functions competitively allocates available resources in an optimal manner, maximizes consumer welfare and stimulates the competitiveness of the sector concerned, by promoting innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor of productive and allocative efficiency"*.
36. The guide goes on to stress: *"Nevertheless, competition is not an end in itself; it is a tool in the service of economic efficiency. Normative texts very frequently respond to broader concerns of general interest, and represent the intervention of public authorities which have an impact on the functioning of the economy, particularly when their purpose [...] is to modify the distribution of resources between different categories [...] or to remedy market imperfections. In such cases, the government and parliament are each required to weigh up the various general interest objectives involved, after having been precisely informed of the effects on competition of the planned public intervention, and, where appropriate, to reconcile these objectives."*

2. PRINCIPLES SPECIFIC TO PRICE REGULATION

a) AN EXCEPTION TO FREE PRICING

37. Price regulation derogates from the principle of free determination of prices through competition, which is a constitutional principle, as part of entrepreneurial freedom and freedom of contract, principles of constitutional value deriving from article 4 of the Declaration of the Rights of Man and of the Citizen.
38. Generally speaking, a minimum price system is not justified, as it reduces some of the benefits of competitive markets for consumers (absence of price competition, lack of incentives to produce quality at lower cost).
39. On the other hand, a maximum price system can be justified under certain conditions, particularly when the diversity of supply (actual or potential) is limited. This is the case, for example, in professions subject to quotas (such as cabs, or certain regulated professions such as the health professions, notaries or bailiffs). The introduction of price regulation limits the ability of existing players to generate monopoly rents to the detriment of consumers. It can also compensate for the lack of information available to consumers in cases of strong asymmetry and, by increasing price transparency on the market, limit the scope for excessive pricing and increase economic efficiency.
40. In French Polynesia, price regulation mostly consists of setting price ceilings for a certain number of goods and services.
41. However, while such measures may sometimes be justified, they are not always to be recommended, even when supply is limited. Indeed, as the Metropolitan Authority points out in the above-mentioned guide to maximum prices: *"As for maximum prices, they are not neutral*

from the point of view of competition, even if they allow a certain degree of pricing freedom. On the one hand, they restrict the commercial freedom of suppliers under conditions from which it is not certain that consumers will benefit. A price higher than the maximum imposed could, for example, make it possible to offer a better service, or give the company the resources to offer another product at a lower price or of better quality. On the other hand, in the medium-to-long term, maximum prices tend to become imposed prices, as has been observed in particular in the cab and overseas fuel sectors, and thus eliminate all price competition."

b) PRICE REGULATION ANALYSIS GRID

42. On p.37 and 38, the same guide sets out a number of questions to ask when drawing up price regulations.

i. Regarding the appropriateness of a regulatory regime

43. Does the proposed regulation address one of the following situations?

- price competition is limited due to monopoly situations or long-term supply difficulties;
- it is necessary to respond, on a short-term basis, for a maximum period of six months, to excessive price increases or decreases due to exceptional or manifestly abnormal circumstances;
- it is necessary, in order to ensure the equality of citizens before the law, to set uniform tariffs for services of general interest, i.e. services provided without economic consideration;
- the regulation of tariffs for services of general economic interest is necessary for social reasons, to protect targeted categories of individual consumers because of their particular vulnerability.

44. Rate regulation outside of these situations must be justified in particularly precise and detailed terms. In addition, the use of less restrictive means of competition to meet the general interest objective motivating public intervention must always be considered.

ii. Parameters for determining a ceiling price

45. The questions proposed by the Metropolitan Authority are as follows:

- Are the price determination parameters objective and clearly, completely and precisely set out in the proposed regulations?
- Do they meet general interest objectives?
- Are pricing parameters set in relation to market conditions determined in absolute terms, so as to maintain an incentive for price competition, or in relative terms, depending on the sector's average or median economic performance?
- Does the proposed regulation involve setting a maximum price? If so :
 - Does the service or product whose price could be regulated play a decisive role in competition in the economic sector concerned?
 - Is the maximum price higher than the cost of producing the goods or providing the service?
 - At what level do you plan to set the maximum price? Is it high or low in relation to the average market price, or the median price? Is there significant price dispersion above the ceiling price?

- Does regulation have the effect of prohibiting economic operators from offering products or services that are partially substitutable for price-regulated products or services, particularly if they are of significantly higher quality?
- Is pricing likely to have a greater or lesser impact on different categories of operator (upstream, downstream), thereby introducing indirect discrimination?
- Is there an exit mechanism from the regulated price system? Is it automatic or quasi-automatic? Are the exit criteria clear and precise?
- Has temporary public income support for those affected been considered as an alternative?

c) BALANCE SHEET

46. It is against this backdrop that the government must assess the appropriateness and modalities of a price framework.
47. Through its opinions, the Authority must check that the text submitted for its examination complies with the principles of adequacy and proportionality with regard to the objectives sought, and in particular :
 - ensure that the price cap system does not function as a system of imposed prices, and encourage price competition, in particular by promoting market transparency (displays, price comparisons, quotations, etc.);
 - ensure that price regulation is adapted to the functioning of the markets concerned;
 - ensure that the general principles underlying the determination of regulated prices are respected, the first of which is that the level of regulated prices is based on a prior assessment of the costs incurred by players.
48. If necessary, the Authority can propose alternative solutions to better meet the objectives.

B. ANALYSIS OF THE PROVISIONS OF THE DRAFT LAW OF THE COUNTRY SUBMITTED FOR EXAMINATION

1. A COMMENDABLE BUT AS YET INCOMPLETE EFFORT TO CLARIFY AND SECURE TEXTS

49. Since its adoption by country law no. 2015-2 of February 23, 2015, article LP 100-2 of the Competition Code provides for freedom of pricing.
50. There were only three exceptions:
 - the laws of the country may provide otherwise, after obtaining the opinion of the Authority on the basis of Article LP 620-2 of the Polynesian Competition Code;
 - the Council of Ministers may also intervene:
 - on the advice of the Autorité, but in limited cases (monopolies or oligopolies, supply difficulties, under-equipped stores);
 - in exceptional circumstances and for a limited time.
51. Yet the price regulation regimes in force prior to the adoption of the 2015 law "*remain in force and are subject to modification*" by virtue of its article LP 3. They are in fact numerous and

were mostly adopted by decree, through numerous texts that are rarely codified. While they are therefore regularly applicable and amendable, these texts no longer necessarily meet the spirit of this text, particularly in the case of substantial modifications.

- 52. As a result, the government's decision to propose to the Assembly of French Polynesia that some of these regulatory provisions be "moved up" to a local law seems appropriate and in line with the text.
- 53. Indeed, in its 2019 opinion on PPN¹, the Autorité stated that *"a law of the country should clearly define the general interest objective pursued in order to ensure that the restrictions of competition it induces are justified, appropriate and proportionate"*. On the other hand, it recognized that *"within the framework of the regulations defined, the list of PPNs and the rules of application concerning prices should remain fixed by a decree issued by the Council of Ministers, to enable rapid adaptation to the circumstances and needs of the population"*. Such a system has been chosen.
- 54. The partial nature of this codification is questionable, however, since a large number of regulations setting regulated prices are still in force, but are governed by other texts which have not been incorporated into the Competition Code (for example, and in a very partial manner, the price of medicines, but also numerous services: services provided by public officials, fees paid to certain liberal professions, medical procedures, cab fares, freight rates, port handling, maritime passenger transport, etc.). To ensure that regulatory texts are as intelligible as possible, this work should be continued, with the aim of producing a single text providing an exhaustive overview of exceptions to price freedom. Consideration could also be given to the creation of a consumer code, which would be better suited than a competition code to accommodate this single text containing exceptions to price freedom.
- 55. Questioned on this point, the DGAE states that *"Decision 761 AE and Order no. 171 CM will be repealed and replaced by orders in line with the new regulatory framework"*, and that *"as far as all the other orders are concerned, an assessment will be made on a case-by-case basis, but a priori all of them will require a minimum of modification, due to the change in the nature of the sanctions (criminal sanctions are currently provided for in the orders and must therefore be repealed)"*. It specifies that these texts will then be integrated into the Competition Code *"insofar as possible (...) the aim being to ensure the accessibility of the law by putting an end to the current jumble of texts and bringing all the texts together in the same legal corpus. In the meantime, it may be possible to consolidate the Competition Code by appending the decrees to it (see the Tax Code, where this method has been used)"*.

Proposals :

On the codification of price control mechanisms:

- 1. Pursue codification work to ensure that a single text (currently the Competition Code) provides an exhaustive overview of exceptions to price freedom.
- 2. Consider bringing together all the texts governing prices in a single code, which could be a consumer code.
- 3. Incorporate all implementing decrees into the regulatory part of the code in question (currently the Competition Code).

¹ Opinion no. 2019-A-01 of April 2, 2019 on the effects of regulation on the competitive operation of staple goods markets.

2. EXCEPTIONS TO THE PRINCIPLE OF PRICE FREEDOM

56. As has been the case since the adoption of the Competition Code in 2015, the country's draft law reiterates the principle of price freedom, and its article LP 110-1 largely reproduces the provisions of the former article LP 100-2.
57. The text nevertheless provides for a number of exceptions:
- i. LP 110-1, 1^{er} paragraph: as in the original text, a local law may derogate from the principle of price freedom. Although this point seems to be necessary in view of the parallelism of forms, it is preferable to specify it in the text, as it contravenes the constitutional principle of entrepreneurial freedom and contractual freedom, which implies that limitations must be proportionate to the general interest objective pursued, and are indeed the responsibility of the substantive legislator.²
 - ii. LP 110-1, 2^e paragraph: as in the original text, the Council of Ministers may take price regulation measures limited to certain sectors or areas where competition is restricted due to market structure (monopoly or oligopoly), commercial under-equipment or supply difficulties. Such measures must be preceded by a referral to the Autorité, which issues an opinion.
 - iii. LP 110-1, 3^e paragraph: the Council of Ministers may take provisional price regulation measures in emergency situations.
 - iv. LP 110-2: by way of derogation, the prices of three categories of products may be regulated by orders issued by the Council of Ministers:
 - o PPN ;
 - o FMCG ;
 - o products or services essential to the economic and social development of French Polynesia.
 - v. LP 110-3: a system of "supervised freedom" allows the Council of Ministers to make tariff changes subject to compliance with a tariff formula or to administrative approval.
 - vi. LP 110-4: price "moderation agreements" can finally be concluded with professional organizations or groups of companies.
58. Given the urgent nature of this referral, the Autorité has been unable to carry out a precise assessment of the various existing systems, or their competitive impact.
59. In particular, it has not examined measures that already exist in current regulations and have not been modified by the present text (codification in constant law or retention of provisions already existing in the Competition Code). This is the case, for example, of the cases in which the Council of Ministers can regulate certain prices after consultation with the Autorité (ii. above). In any case, the latter will be in a position to give its opinion on any planned measures, even if, in the absence of any clarification on this point, it will only issue a simple, non-consenting opinion.
60. On the other hand, new systems or those that have undergone substantial changes will be examined in the remainder of this opinion.

² Constitutional Council, Decision no. 2018-749 QPC of November 30, 2018: "It is open to the legislator to limit the freedom of enterprise and the freedom of contract, which derive from Article 4 of the Declaration of 1789, in line with constitutional requirements or justified by the general interest, provided that this does not result in disproportionate infringements with regard to the objective pursued."

3. INTRODUCING A DEFINITION OF LOCALLY-PRODUCED GOODS

61. Book I of the Polynesian Competition Code now begins with an article LP 100-2, which defines *"locally produced or manufactured"* goods. The aim, according to the explanatory memorandum, is to make it possible to *"distinguish local production with real added value from local activities involving only a repackaging operation or assembly."*
62. By nature, a competition authority is not in favor of schemes that favor production based on origin, whether local or imported. They are in fact the source of distortions, since competition on price and quality is not fully effective. For example, the advantages granted to local production can result in consumers paying a higher price for an equivalent local product than for an imported product (or the same price for a lower-quality product). Overall, therefore, there is a loss of well-being for the consumer. However, the gains in purchasing power on imported products could in whole or in part be transferred to a demand for other local goods and services, made more advantageous by the lower cost of imported intermediate consumption.
63. However, as mentioned in §3 36 other general interest objectives may, in certain cases, lead to limited derogations from competitive principles. The development of local production, and hence employment, is obviously one such objective. However, it remains to be seen whether the infringements selected are appropriate and proportionate.
64. To do this, two elements must be taken into account:
 - the definition adopted for local goods, since if the aim of these measures is to strengthen local production, they must not be diverted (a) ;
 - the scope of these measures, since a definition has legal consequences only in terms of the provisions that refer to it (b).

a) A WELCOME CLARIFICATION

65. At first glance, the introduction of such a definition is commendable. Indeed, since certain price regulation systems distinguish between imported and locally-produced goods, it is essential, to ensure their effectiveness, to avoid companies artificially benefiting from more advantageous provisions for some of their products, by artificially giving them a local origin.
66. This point was also raised by the Authority in its 2019 opinion on import and distribution mechanisms³ with regard to a tax provision, the local development tax (hereinafter "TDL"), which applies only to imported products and not to locally sourced products. It was pointed out that *"the TDL poses another problem when it protects industries that are not really local, since they have very little added value, or industries that are local in name only, insofar as their intermediate consumption is of foreign origin. In this case, it is diverted from its purpose, since it no longer has an industrial objective. There are many examples of this dual problem: local charcuterie or corned beef made partly from imported pork or beef, local fruit juice or soda made from imported concentrate, toilet paper made from imported paper, locally assembled kitchen furniture in kit form, simple packaging of imported agricultural produce. These "industrial" products, which use foreign inputs, ultimately create few jobs, yet are protected from foreign competition. As a result, the Autorité suggested in this opinion that the TDL should be "targeted on products whose production offers real added value, which are undoubtedly also the most job-creating. In particular, products for which local companies only carry out the final processing of imported products should not benefit from it".* It also proposed *"determining a*

³ Opinion no. 2019-A-02 of September 19, 2019 on import and distribution mechanisms in French Polynesia

minimum 'transformation rate' or 'local added value' for protected products, since local production cannot consist solely of the assembly or repackaging of imported products, without any real added value.

67. Precisely defining local production is one way of avoiding this kind of detour of objectives, and ensuring that the measures taken actually benefit local production and employment.
68. The text proposed by the draft loi du pays incorporates a similar provision applicable in New Caledonia (article 7 of deliberation no. 252 of December 28, 2006 on market protection in New Caledonia and article LP. 413-2 created by loi du pays n° 2019-5 of February 6, 2019). In particular, it excludes from the qualification of locally-produced goods those whose transformation processes are deemed "insufficient". This includes operations aimed solely at preserving products, restoring them to their original condition, changing packaging or containers, affixing trademarks or simply assembling them. Such clarifications are precisely designed to guard against the risks outlined above.
69. New Caledonia's Competition Authority has had occasion to comment on these provisions, as the quality of locally produced goods is a condition for benefiting from various market protections existing in this territory. In its recommendation no. 2018-R-02 of November 9, 2018, it found in particular that the "ouvrison" (equivalent to "transformation") criterion⁴ *"poses difficulties of interpretation"* and that *"several cases of granting market protection are or have been challenged before the administrative judge, who confirmed that the rate of ouvrison of certain locally processed products was insufficient, preventing any form of protection. / Among the most emblematic cases is that of frozen salmon fillets (TD 0304.29.00) (...) Other equally symbolic cases include multi-ingredient frozen vegetable pans, tubes and pipes and aluminum joinery"*. For this reason, it considered that *"an improvement to the system could be to provide for the formal transmission of an opinion from the local production committee (which deserves to be re-established following its disappearance as a result of the repeal of certain texts linked to the general consumption tax) as well as an opinion from the Customs Department to assess this working criterion"*.
70. In French Polynesia, the criteria set out in II of the new article LP 100-2 essentially define the sufficiency of local transformation in the negative, by listing a certain number of processes deemed insufficient. While this list appears relatively clear and precise, and includes all the contentious cases already mentioned by the Authority in its previous opinions, there is a risk that it may be too restrictive. Other operations that might fall into this category, without being explicitly included, should be able to be integrated into this definition without requiring a modification of the text. For this reason, and in order to give the administration greater room for interpretation, it could be proposed to remove the restrictive nature of the list by indicating that these operations are merely illustrations. This could be done by adding the word "notably" at the beginning of II.

b) AN UNCERTAIN SCOPE

71. The competitive stakes of discrimination between imported and locally-produced goods emerge when it leads to distortions between the respective prices of goods depending on their origin. For this reason, it is essential to know precisely which tools are impacted by this definition in the remainder of the text, and therefore to list the provisions referring to the notion of "locally produced" goods.

⁴ In a subsequent opinion, no. 2018-A-10 dated December 10, 2018, the Caledonian Authority noted that: *"the notion of sufficient transformation is likely to raise the same difficulties of interpretation as that of insufficient opening"*.

72. In some cases, the provisions that refer to this notion do not actually concern pricing. This is the case for provisions that determine the basis on which authorized margins apply. This notion is used, for example, in the new article LP 111-1, which lays down the rules for setting the maximum selling price, or in article LP 111-3, which defines the rules for allocating the authorized margin. Indeed, whereas for imported goods, the margin applies to a price delivered to the warehouse, for local production it applies to the cost price incurred by the manufacturer, and the intermediaries are different in both cases. As far as these measures are concerned, the definition of locally-produced goods is not in itself the cause of price distortions. In fact, if correctly determined, the delivered warehouse price and the manufacturing price are two relatively equivalent notions, corresponding to the cost price of the importer or producer who first places the product on the market. In these cases, the use of this concept does not lead to imported goods being outbid by applying a higher tariff, and therefore does not create distortions.
73. On the other hand, other provisions that refer to this definition are likely to cause distortions.
74. To begin with, on the basis of article LP 111-2, the Council of Ministers can provide for *"distinct pricing regimes between locally produced or manufactured goods or services and similar imported goods"*. A similar differentiation system is also provided for goods and services destined for remote archipelagos. As for article LP 111-8, which already existed in a similar form in the previous regulations, it stipulates that when only local production is classified as PPN or PGC, the equivalent imported product must still be subject to the margin capping regime provided for local goods. According to the DGAE, the idea is that *"distributors should not be encouraged to import only, and no longer sell local products, in order to benefit from total price freedom"*, while potentially allowing consumers to benefit from lower prices if the warehouse delivered price of the imported good is lower than the "manufacturer" price of the local product. This provision has the effect of limiting price distortions, but in the case of PPNs, it still has the effect of depriving imported goods alone of some of the advantages granted to PPNs⁵, in contradiction with the objective of making these products accessible to as many people as possible⁶. In fact, this provision is highly emblematic of the contradictions in a system that aims to achieve both low prices and the protection of local production, with the two sometimes contradicting each other.
75. The applications of such discrimination are already numerous. For example, several products on the PPN list apply only to local products, but not to equivalent imported products. This is the case, for example, with fruit and vegetables (bearing in mind that imports are also subject to quotas), but also with certain manufactured goods (household products in particular, some of which are banned from import).
76. These provisions are designed to promote the economic development of French Polynesia and employment in productive activities. This is indeed an objective of general interest, which can justify infringements of free competition, provided they are limited and proportionate. From this point of view, the precise definition of these goods takes on its full meaning. For example, if locally-produced goods are priced more advantageously than imported goods, in order to compensate for the difference in production costs due to the lack of economies of scale in French Polynesia, it is essential that these advantages do not benefit activities that are falsely local, as this would create a rent and an unjustified advantage for certain companies. In this case, administrative control of the use of "local transformation" criteria will be essential.

⁵ Particularly in terms of exemptions from customs duties and import taxes (which can be very significant for competing imports of locally produced goods) and the inclusion of freight to islands other than Tahiti.

⁶ Especially since local production is often insufficient to meet demand.

77. It should be noted that other market protection mechanisms are also affected by this issue. This is particularly true of specific import taxes, such as the TDL. For this reason, the provisions relating to TDL, as well as applications for protection on this basis, could usefully refer to these provisions to determine whether or not the products subject to taxation are locally produced (because if this is not the case, the application of a TDL on imports is no longer legitimate and penalizes the consumer, whether individual or business, without any counterpart in terms of employment). The difficulty is that today's TDL rates apply to relatively broad customs nomenclatures, including different product categories, some but not all of which are produced locally.

Proposals :

On the definition of locally produced goods:

4. Insert the word "notamment" after the words "Ne constituent" in II of article LP 100-2.
5. Consider eliminating the distinction between local and imported production for PPNs, in order to give priority to making the goods concerned accessible to as many people as possible.
6. Refer to the provisions of the new article LP 100-2 of the Polynesian Competition Code concerning the definition of local production in the tax provisions relating to TDL, as well as in the TDL application file.

4. AN EMERGENCY MECHANISM TO DEAL WITH THE RISK OF EXCESSIVE PRICE VARIATIONS

78. Paragraph 3^e of article LP 110-1 introduces a new provision for emergency measures.
79. The Council of Ministers could already take provisional price regulation measures, for a maximum period of six months, in certain duly listed circumstances (crisis, exceptional circumstances, public calamity, manifestly abnormal market situation). However, such intervention was limited to cases of excessive price rises or falls, which meant that such trends had to be identified in advance.
80. From now on, it can also intervene on the sole grounds of "*risks of excessive price rises or falls*", and for twelve months instead of six. The derogation is therefore longer-lasting, and above all, it no longer requires actual inflation of certain goods, but only a high probability of it. The explanatory memorandum explains that the aim is to draw lessons from the covid-19 health crisis. In fact, the finding of excessive price rises requires that the products concerned have already been marketed before, in relatively large volumes. However, covid-19 created a new demand for products that had previously been in short supply. This was the case, for example, with masks and hydroalcoholic solutions at the start of the pandemic (today, we can also think of self-tests for covid-19 contamination). The aim is therefore to offer public authorities a faster response capability in similar cases.
81. Article LP 111-5 on the general regime for PPNs and PGCs provides further details on this regime. It stipulates that the Council of Ministers may substitute itself for the company in setting the methods for calculating the "manufacturer" or "producer" price in the following cases:
- unjustified increase in "manufacturer" or "producer" prices;
 - risk of price rises due to epidemics, public calamities or health crises.

82. In these situations, the measure cannot exceed twelve months, cannot exceed the end of the crisis or calamity in question (for the second case), and can only be renewed after the Authority has given its opinion before each renewal. This is therefore a new case of referral to the Authority, specific to emergency situations, but only valid in the event of renewal of the measure.
83. While the government's concern is legitimate, this new system raises two questions: the duration of the proposed measures, and the assessment of the notion of "risk".
84. To begin with, exceptional or abnormal circumstances can lead to excessively high or low prices, with no benchmarks to qualify a "rise" or a "fall".
85. Moreover, exceptional or abnormal circumstances leading to excessively high or low prices are relatively common criteria for justifying price regulation. However, the wording adopted, i.e. "to prevent an excessive rise or fall in prices", remains too uncertain and deserves to provide greater legal certainty.
86. In addition, exceptional or abnormal circumstances leading to excessively high or low prices are usually limited to six months. Indeed, beyond this period, the market must in principle be able to supply the good under normal conditions, as was the case for masks or gel, for example. Otherwise, if the situation is likely to continue, the public authorities must be able to implement the measures available under ordinary law (e.g., inclusion of the goods on the PPN or PGC list, or, in the event of supply difficulties or a particular market situation, regulation after consulting the Polynesian Competition Authority). The twelve-month renewable period, even if it is a maximum, therefore appears excessively long. In addition, in the absence of precision, it appears that these measures can in fact be renewed without limit, which is against the spirit of an emergency measure. For these two reasons, it would be conceivable for this measure to be set for a maximum period of six months, renewable once on the advice of the Authority, making the twelve-month period both a derogatory and absolute ceiling.
87. This limitation on duration is all the more necessary as the measure may be based solely on a "risk" of excessive price trends, even in the absence of any actual observation of such trends. The advantage of such precision is to be able to anticipate expected and probable trends, and to react even before the actual increase occurs, to the benefit of the consumer. However, since the risk is not a certainty, setting a shorter duration makes it easier to reverse the measure should the risk not materialize, enabling a quicker return to normal market operation, better able to guarantee the consumer the best price level.
88. As a result, such an arrangement is admissible only if it is limited in time and scope.
89. It should also be remembered that if the aim is to prevent companies from engaging in such practices, the application of ordinary competition law can also be an effective lever. Competition authorities can sanction the practice of "excessive pricing" by one or more companies in a dominant position. While such cases have long been relatively rare, given the difficulty of proving them,⁷ decisions to this effect, whether or not linked to the covid-19 crisis, have recently been handed down by several authorities around the world⁸.

⁷ ECJ, Case 27/76 United Brands Company and United Brands Continental BV vs. European Communities: it is necessary to assess "*whether there is an excessive disproportion between the cost actually incurred and the price actually charged and, if so, to examine whether an unfair price has been imposed, either in absolute terms or by comparison with competing products*".

⁸ See, for example, a decision by the Turkish competition authority concerning a real estate services and vehicle sales internet platform (Sahibinden.com decision, 1st October 2018, No. 18-36/584-285) commented on in Concurrences No. 89255, February 2019. See also several cases related to drug pricing, notably from the UK Competition and Market Authority (CMA), which in 2020 and 2021 issued three decisions sanctioning pharmaceutical companies.

Proposals :On the emergency device:

7. In the 3rd paragraph of article LP 110-1, replace "risks of excessive price increases or decreases" with "risks of excessively high or low prices".
8. In the 3^e paragraph of article LP 110-1, replace the words "twelve months" with the words "six months, renewable once, after consulting the Polynesian Competition Authority".
9. In III of article LP 111-5, replace the word "twelve" with the word "six"; insert the words "once" after the word "renewed" and delete the words "issued before each renewal and".

5. PRICE MODERATION AGREEMENTS AND REGULATED PRICE FREEDOM

90. Articles LP 110-3 and LP 110-4 provide for two derogation regimes, which do not consist directly in the fixing of ceiling prices, like most of the other measures examined, but in a different framework:
- Finally, price "moderation agreements" can be concluded with professional organizations or groups of companies;
 - a system of "supervised freedom" enabling the Council of Ministers to make tariff changes subject to compliance with a tariff formula or to administrative approval.

a) PRICE MODERATION AGREEMENTS

91. This derogation already existed before this text, in a similar form.
92. To date, it only applies to the automotive aftermarket, where dealer agreements no. 2075/MEF to 2086/MEF dated April 5, 2013 have formalized several price moderation agreements for automotive parts, limiting the overall marketing margin for certain spare parts to 135% of the delivered warehouse price.
93. This provision differs from the others in that it is a contractual measure, freely negotiated and accepted by the co-signatory companies. As such, it is not a derogation from price freedom, especially as non-signatory companies in the same business sector are not obliged to respect these commitments, even if they have the opportunity to do so.
94. In addition, the agreements consulted by the Authority mainly concern maximum margins applied to the cost price of certain imported goods. Consequently, they are presumed to allow the companies concerned to compete on price, in particular by purchasing or producing at lower cost.
95. The Authority notes, however, that in the automotive sector, the 135% authorized margin enables the signatories (mainly dealers) to sell at a higher price the six types of automotive parts (brake pads and discs, ball joints and steering rods, shock absorbers, universal joints, exhaust silencers, water-cooling radiators) which are subject to PGC regulations, and for which the margin is in principle capped at 100%. In this way, at least for these parts, the price moderation agreement actually enables these companies to increase their margins.
96. Furthermore, the Autorité has shown that in the automotive aftermarket, customers (garages and private individuals) are often captive to the parts supplied by their dealer, and that inter-

brand and intra-brand competition is weak or even non-existent for the most complex parts.⁹ In this case of limited competition between suppliers, and for parts that are not very substitutable, the mark-up set by the price moderation agreement, which is already very high (135%), runs the risk of acting as an imposed price rather than a ceiling.

97. However, one of the consequences of such a system organized by the authorities is to prevent the Autorité from taking legal action, for example on the grounds of excessive pricing (due to the exclusions provided for in article LP 200-5 of the Polynesian Competition Code).
98. For all these reasons, the APC is not in favor of this system and, particularly in view of the risk of collusion, suggests that the government evaluate it, or even consider abolishing it.

b) RESTRICTED FREEDOM

99. The so-called "controlled freedom" regime may be applied *"when this measure is necessary to protect the purchasing power of users or the economic development of French Polynesia, or to correct disparities linked to the remoteness of the archipelagos"*.
100. This is a new measure, not a reworking of an existing text. However, such a framework for annual price changes already applies in certain areas, such as rent reviews¹⁰, which are based on the general price index for residential rents published by the Institut de la Statistique de Polynésie Française (ISPF). Another decree governs fare changes for sea crossings in French Polynesia, and provides for the validation and approval of fare increases in certain cases.¹¹
101. Such measures were more widespread in the past, but are tending to disappear in favor of price freedom.¹²
102. While the other schemes are relatively tightly regulated, this one remains very vague. It is simply a decree of the Council of Ministers, does not require the prior opinion of the Autorité, and the conditions for its application are not specified, nor are the goods or services to which it is likely to apply.
103. Admittedly, such measures have less of an impact on price freedom than setting ceilings. What's more, they are designed to protect vulnerable consumers from the actions of service providers or suppliers, particularly when they are captive (as in the case of rents, for example). However, they raise the same issues as price-setting, particularly insofar as the initial price, to which the regulated change applies, may itself be too low or too high, and may deviate from a market price.
104. As a result, the text does not answer a number of questions:
 - What precisely are the public interest reasons for these measures?

⁹ See APC, Opinion no. 2021-A-04 of December 23, 2021 on the competitive operation of the motor vehicle spare parts repair and trade sector.

¹⁰ Order no. 1462 CM of December 31, 1992, as amended, on rent reviews for leases of premises for residential, professional, commercial, industrial or craft use; Order no. 499 CM of April 18, 2013, limiting the rate of rent review for certain premises for residential use.

¹¹ Order no. 767 CM of June 20, 2012, amended, setting maximum freight and sea passage rates in French Polynesia.

¹² Until 2014, for example, on the basis of Decision no. 764 AE of October 13, 1978 setting the general price regime for services in the territory, service tariffs had to be filed annually with the department in charge of economic affairs, which carried out an analysis of the accounting elements with a view to approving a possible increase in the event of a price change greater than the change in the consumer price index. These provisions were repealed by order no. 680 CM of April 24, 2014.

- What are the parameters for determining price changes (general principles for setting the parameters, as is the case for PPNs, would be welcome)? Will these parameters be set in relation to market conditions, and will they be determined in such a way as to maintain an incentive for price competition?
 - How can we check that the price to which the change applies is not higher or lower than the costs incurred to produce the goods or provide the service concerned?
105. In the final analysis, this system needs to be more closely supervised, by laying down a certain number of rules, and by being preceded by a request for an opinion from the Autorité.

Proposals :

Price moderation agreements:

10. Evaluate the system, or even consider abolishing it in view of the risk of anti-competitive agreements.

On the "supervised freedom" of pricing :

11. Clarify the system of supervised price controls, setting out in greater detail the cases in which it is intended to apply and the general rules for determining authorized changes.

12. Orders issued on this basis must be preceded by a request for an opinion from the Polynesian Competition Authority, pursuant to article LP 620-2.

6. THE NEW PPN AND PGC REGIME

a) A REMINDER OF THE MAIN PRINCIPLES APPLICABLE TO PPNs AND PGCs

106. Most of the draft law is devoted to codifying the PPN and PGC schemes, in three sections, one devoted to provisions common to both schemes, and the next two to each of the specific schemes (PPN and PGC).
107. The explanatory memorandum states that the bill defines the general framework, but *"leaves it to the Council of Ministers to draw up the list of essential and mass-market products and services, and to define the maximum price framework"*.
108. The text introduces a *"restrictive definition of essential products and services and mass-market products and services"*, but also provides for *"systematic consideration of the product's impact on health and the environment"* (LP 111-13 and LP 111-16).
109. It also provides for certain exclusions from the PPN/PGC scheme, which does not apply, for example, to goods and services sold as part of public procurement.
110. It lists the different ways in which prices are set (LP 111-1), sets out the distinction between imported and local products (LP 111-2 and LP 111-5) and defines the basis on which the margin is applied (delivered warehouse price or "manufacturer" price).
111. The text then lays down *"the conditions for marketing products with a regulated maximum price and the obligations incumbent on professionals"*, such as the obligations to determine (LP 111-5, LP 111-6), keep (LP 111-9) and carry forward (LP 111-10) cost prices and ceiling prices. It also lays down the principles governing margin sharing (LP 111-3).
112. Lastly, the text creates a rescrit procedure, requiring the administration to take a position on the pricing regime applicable to a particular product or service, at the request of the professional.

b) OBJECTIVES AND DEFINITION OF THE GOODS AND SERVICES CONCERNED

i. Clear objectives and definitions

113. One of the main reservations expressed in the Authority's 2019 opinion on PPNs was the lack of a precise definition of the general interest pursued by this regulation. Thus, the objectives of price regulation did not appear sufficiently defined (is it to support access to goods for the most disadvantaged, combat the high cost of living, support local production, etc.?) and sometimes proved contradictory (favoring local production, for example, can be to the detriment of the consumer, including the most modest households).
114. The Autorité thus wrote: *"The regulations defining the PPN regime in French Polynesia could be justified by the general interest objective of moderating prices and protecting consumer purchasing power. A loi de pays should clearly define the general interest objective pursued, so as to ensure that the restrictions on competition it induces are justified, appropriate and proportionate. In this respect, it would appear difficult to justify permanent regulation of PPN prices by the objective of making basic products accessible to the most disadvantaged, given that all consumers benefit, not just the most disadvantaged."*
115. Taking note of these remarks, the proposed text now sets three objectives for price controls on certain goods and services in article LP 110-2:
- their impact on household budgets;
 - their impact on the economic development of French Polynesia ;
 - the correction of disparities linked to the remoteness of the archipelagos.
116. These objectives are clarified by a more precise definition of the goods and services concerned:
- Essential products and services are products and services necessary for everyday household life and/or personal health and/or to combat natural disasters (LP 111-13);
 - FMCG products or services are products normally used by households in everyday life (LP 111-16).
117. It therefore appears that the proposed text has taken account, at least in part, of the Authority's recommendations. It sets out the objectives more clearly, and defines more precisely the goods and services likely to fall into each of the categories.
118. It should be noted, however, that the proposed definition of FMCGs is extremely broad, leaving the Council of Ministers free to include goods and services even when there is no need to do so. It may therefore appear disproportionate and, given the infringement of freedom of commerce, questionable. This definition could be narrower and better targeted, by reserving it, for example, to products representing a constrained expenditure (as opposed to chosen expenditure) or a significant share of the household budget.
119. The text also provides for systematic consideration of the product's impact on health and the environment. The Council of Ministers may also take into account consumption habits and constraints linked to the remoteness of the archipelagos.
120. The Authority had also suggested that the specific characteristics of remote archipelagos be taken into account, and that environmental criteria be used to discriminate between eligible goods (e.g. LED bulbs rather than filament bulbs, or products with less fat and sugar). On this question of environmental criteria, it should be noted that since that date, the European Commission has published draft guidelines on sustainable development agreements¹³, recalling

¹³ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371

in particular that sustainable development is a priority objective of EU policy (542), including competition policy, and that it can therefore justify certain adjustments to competition rules, provided that consumers receive a fair share of the expected improvements. Competition authorities are increasingly taking account of environmental concerns in this way, and can usefully include them among the grounds for justifying price regulation. The Autorité is therefore delighted to see it included in the text.

ii. Uncertainties remain, however, as to whether the list of PPN/PGCs meets these objectives.

121. The list of products concerned is still defined by ministerial decrees, which are not subject to the Authority's mandatory opinion. It will therefore be impossible for the Authority to verify, for each of these products, whether or not they meet the conditions laid down, and whether a system of price regulation is the best way of achieving these objectives.
122. To date, in the latest version of order no. 171 CM dated February 7, 1992, the PPN and PGC are broken down as follows
 - PPN :
 - 46 food products or categories (meat, fish, fruit, vegetables, milk and dairy products, cereals, baby food, water, coffee, oil, etc.).
 - 16 non-food products or product categories (household products, mosquito repellents, condoms, LED bulbs, masks, hydro-alcoholic gel, etc.).
 - PGC :
 - 6 food products or categories (eggs, corned beef, flour, bread, water, etc.)
 - 44 non-food products or product categories (diapers, pharmaceuticals, school supplies, building materials, car parts, copra or hydrocarbons, etc.).
123. There is little debate about the content of this list, especially as it was reduced and simplified in February 2019, in order to refocus it on products deemed indispensable, with the possible exception of certain products with a debated health impact (corned beef or punu pua toro and pork and beans, which were removed from the NPP list in 2019, but to join the PGC list).
124. In addition, in 2019, the Autorité pointed out that *"an overly restrictive definition of PPNs also has anti-competitive effects when it leads to a substantial reduction in the intensity of competition or to the creation of unjustified distortions of competition between competing operators. This is particularly the case when the characteristics of PPNs are defined too restrictively, or when the origin of products is too selective"*. In this respect, an examination of the list shows that the products or product categories are relatively broad, enabling inter-brand competition to be maintained for similar products, without favouring one supplier over another.
125. However, while the efforts made to define the objectives of these schemes and to define the eligible products represent definite progress, the Authority's main reservations concern the appropriateness of such a system for the objectives pursued. Indeed, while the main objective is to provide access to basic products for a modest population, price regulation for both NPPs and CPGs creates a windfall effect for wealthy households, since they benefit from tax exemptions, public subsidies and capped margins or prices for products they would have purchased anyway.
126. Accordingly, in its 2019 PPN opinion, the Authority proposed *"that the notion of PPN be defined restrictively"* and that the list of products concerned be reduced *"to a few basic food and non-food products based on a health approach to the real needs of the population, while respecting environmental protection."* In its subsequent 2019 opinion on import and distribution

channels, it also argued *"for a refocusing of the PPN scheme, on the one hand on a list of a few really necessary products and, on the other hand, on the territories furthest from Tahiti, where customers are captive to a very small number of distributors. Such measures would have the advantage of limiting expenditure and windfall effects for wealthy households, by refocusing the scheme on priority target groups."*

127. Indeed, it is often preferable in public economics to opt for more targeted schemes, especially since, contrary to what one might think, the regulated price regime has an impact not only on private players (households and businesses), but also on the country's budget. According to the 2019 APC notice on import and distribution channels, *"the PPN scheme alone cost F CFP 1.431 billion in tax exemptions in 2018, to which must be added the cost of inter-island transport (F CFP 477 million in 2017). In addition, other price regulation measures have a budgetary cost, such as flour imports (at a cost of 500 million F CFP). All these measures also require substantial administrative resources. Direct or fiscal expenditure probably amounts to nearly 2.5 billion F CFP per year. However, "the amounts devoted to this action do not translate into equivalent price reductions, but are partly captured by intermediaries, and (...) schemes better targeted at consumers could - for a lower cost - have at least an equivalent effect for the most modest households."*
128. A number of alternative avenues could be explored that would be less detrimental to competition overall:
- a refocusing of the system on a list of a few really necessary products and on the most remote areas of Tahiti, where customers are captive to a very small number of distributors;
 - limiting windfall effects for wealthy households by refocusing the scheme on priority target groups, for example by replacing the scheme with direct aid to the most modest households¹⁴, to enable them to purchase certain essential goods (cards or vouchers providing free or discounted access to a list of basic necessities);
 - maintaining a certain degree of pricing freedom and price competition, either by allowing distributors to apply the PPN scheme only to some, but not all, products in the category concerned (with, however, an obligation to always have at least one PPN-priced product available)¹⁵, or by examining the possibility of implementing a scheme such as the quality-price shield¹⁶, in force in the French overseas departments and Wallis and Futuna¹⁷ since 2012, and in New Caledonia since 2019.

¹⁴ For example, RSPF beneficiaries or other means-tested households.

¹⁵ Rather than setting a ceiling price for all white rice, for example, white rice will be included, and at least one PPN white rice will have to be on the shelves, with specific marking.

¹⁶ The BQP aims to correct the shortcomings of product-by-product price or margin regulation. In effect, it sets a ceiling price for a list of essential products (usually between 50 and 100), which makes it possible to :

- to allow the distributor to distribute his margins between the different products on the list, limits the phenomenon of catching up on products not on the list and allows a certain amount of competition to be maintained between chains (which will have different prices for the different products without all being based on the ceiling price for each product);
- leave it up to the distributor to choose which brand to include in the list;
- avoid the inflationary effects of margin ceilings (by setting a price ceiling rather than a margin ceiling, importers and distributors are encouraged to buy the best)

However, the difficulty of such a system is considerable. On the one hand, it requires annual negotiations between the administration and importers/distributors to set the list and the ceiling price, as well as the administration's ability to impose its prices if negotiations fail. On the other hand, it requires complex controls in stores to ensure product availability, marking and compliance with the basket price ceiling.

¹⁷ Introduced by the "Lurel" law on economic regulation in overseas France of November 20, 2012.

c) GOODS AND SERVICES EXCLUDED FROM THE PPN SCHEME

129. The text provides for certain exclusions from the PPN/PGC scheme, which do not apply:
- goods and services sold as part of public purchases (new provision);
 - used goods (new provision) ;
 - to exported products (existing provision) ;
 - goods and services subject to other price-control regimes in application of a local law (e.g. price moderation agreements, goods necessary for economic development, etc.).
130. On the other hand, some of the previously existing exceptions have been abolished, in particular those relating to beverages and transactions carried out in areas reserved for shops during temporary festivities (tiurai, heiva, etc.). Firstly, the number of products concerned was very small (among beverages, for example, only water in certain containers is a PPN), and secondly, these exceptions led merchants to buy goods at regulated prices, while being able to resell them at free prices.
131. For the most part, these exceptions are justified: since the aim is to protect Polynesian consumers and economic development, for example, there is no reason for the regulations to apply to exported products. In the case of second-hand goods, the application of the text would have come up against the problem of defining the basis for the mark-up (in the absence of a production cost or warehouse delivery price).
132. On the other hand, it is questionable why public procurement contracts are excluded from this scheme. Of course, the aim of PPN/PGC is to protect the purchasing power of households, not that of companies or public authorities. This is why articles LP 111-13 and LP 111-16, for example, only include products whose packaging is compatible with household use (e.g. less than 2 kg for flour, or in small units for school supplies).
133. The DGAE confirms this interpretation. According to the DGAE, *"PPNs and PGCs are intended to govern only products intended for households, as the definitions set out in articles LP 111-13 and LP 111-16 make clear"*. It also states that it has been alerted by certain professionals *"to the existing incompatibilities between purchase order contracts and the PPN regime, as the market price may exceed the regulated maximum price. Unless the contract expressly provides for it, it is not possible to modify the agreed rates, which forces companies either to derogate from the contract (which is not possible) or to sell above the regulated price (which is punishable by law)."*
134. But if we exclude public purchasers, shouldn't we also exclude the intermediate consumption of companies, which are no more than households. In either case, the potential savings on purchases are only indirectly passed on to consumers, who will not be obliged to reflect them in their selling price if the end product is not a PPN/PGC. However, a certain number of intermediate goods are covered by this regulation, notably building materials (cement, wood or sheet metal, for example), with no mention of volume limits. There is therefore no logic in specifically excluding goods purchased by public administrations, and preventing them from benefiting from goods and services at prices considered to be advantageous, all the more so as in the case of the latter, there will be a direct impact on the general interest, through a reduction in the production cost of the public service, which will be passed on either to the user or the taxpayer. Intermediate consumption should also be excluded from the scheme.
135. Furthermore, while it may be argued that regulated prices could in fact turn out to be higher than those resulting from the public authority's competitive tendering of different suppliers or service providers, it should be remembered that these are only ceiling prices, and that nothing

prevents the public purchaser from benefiting from prices below these ceilings through competitive tendering.

d) PRICING RULES

136. The country's bill includes the following provisions:

- procedures for setting sales price limits (article LP 111-1);
- determination of the bases to which surcharges apply: manufacturing or production price of local goods and services (LP 111-5); warehouse-delivered price of imports (LP 111-6);

137. From a competitive point of view, pricing is a central element, as it is the one most likely to lead to distortions and undesirable effects. Attempting to define a maximum price or margin level is indeed a complex operation:

- if the regulated price is set too high, there is a risk that retail prices will be aligned with this publicly available reference and remain higher than market prices;
- if, on the other hand, the regulated price is set at too low a level, there is a risk of reducing consumer choice (dissuasive, bypass and degradation effects) and of offsetting effects;
- in addition, if the maximum margin level is set as a rate rather than an absolute value, operators have no incentive to buy or produce at the best price.

i. Determining the ceiling price

➤ *The terms and conditions*

138. Article LP 111-1 sets out the various methods for determining sales price limits:

- imposition of a maximum margin, either in absolute or relative terms, applied to the cost price of goods (delivered warehouse price for imports; invoice price for local products);
- setting a ceiling price (this is the only option available for services);
- introduction of a specific regime setting a maximum selling price at different stages or taking into account the specific features of the good or service (specific regimes already exist for various agricultural or food products: copra, pork, bread and flour, etc.).

139. Article LP 111-3 specifies that these margins and prices constitute a maximum, whatever the number of intermediaries. It is up to the parties to negotiate the sharing of this margin (for example, in the case of long circuits with intermediaries such as importer-wholesalers). As in the previous text, products are sold according to their date of arrival in stock, at the price in force on that date, without revaluation (article LP 111-4).

140. The text also sets out a framework for repackaging products or selling them in bulk, as these sales methods have recently developed (LP 111-7).

➤ *The limits*

141. Broadly speaking, these different rules are the same as in the previous text, although the draft clarifies certain points.

142. The main reservations raised by the Authority in its previous opinions therefore remain unchanged:

- Price regulation is inflationary, at least when the price is set by applying a margin to the cost price. In fact, there is no incentive for importers to lower the purchase price of goods - quite the contrary:
 - when the margin is in absolute terms, there's no particular point in doing so (the sales margin will be identical);
 - when the margin is a percentage, it's better to set the purchase price as high as possible (to increase the margin).
 - Price regulation also limits the quality and diversity of goods. It discourages the import of quality goods, *all the more so* when the margin is fixed by value or the price itself is fixed by law. It also limits the scope for diversifying consumption through product substitution, since some products enjoy a competitive advantage (distortionary effect).
143. The investigation of these notices also revealed that the system was being abused by importers and/or distributors in a number of ways:
- an artificial increase in the c.i.f. purchase cost on which the margin is calculated, particularly when the margin is calculated as a percentage (e.g. through the creation of intermediary structures, the use of over-invoicing on these products by the supplier, or the introduction of back margins);
 - equalization between products, with a widening of the range of non-PPN products and a catching-up of margins on these products. In its response to the 2019 notice on import and distribution channels, the DGAE stated that free-price products "*enable distributors to rebuild their 'constrained' margins*".
144. In theory, these different effects are likely to be counterbalanced by a high degree of competition between players, either on the same products (same or competing brands), or on substitutable products. Indeed, if there are several importers, for example, it will be in their interest, even with a given percentage margin, to buy at the lowest cost, in order to offer a competitive product for sale and be better distributed.
145. But this is rarely the case:
- Firstly, the Polynesian market is structurally restricted and characterized by numerous import exclusivities, which limit the scope for intra-brand and inter-brand competition between players;
 - Secondly, the lack of competition is precisely one of the justifications for regulating the prices of certain goods, which are therefore by nature less likely than others to be subject to price or quality competition.
146. As a result, the system seems to be at least partially abused by its various stakeholders, who artificially increase the price at which the mark-up is applied (notably through back margins), do not give priority to importing quality products, and equalize with the range of free-price products.
147. The Autorité also points out that the principle of setting margins by reference to exposed costs plus a reasonable return on capital, known as the "*cost-plus*" method, is often contested on theoretical grounds, as it does not encourage players to improve their management and reduce production costs. It is therefore preferable to set a *price cap*, adjustable over time, which provides a greater incentive to reduce costs. And when a margin is nevertheless set, it is essential to give priority to absolute rather than percentage margins, as the latter reduce the incentive to buy at the best price.
148. In conclusion, setting price ceilings instead of margins seems more appropriate and proportionate to cost control, and a better incentive to seek productivity gains. For local

products, setting a ceiling price in line with production costs and local production subsidies could be fairly easily defined and updated. It would also benefit efficient producers. This is also the approach adopted for services. The new text excludes services from prices that can be determined by applying a margin to the cost price. The Authority therefore recommends that this system also be applied to local products from the outset.

149. On the other hand, to take account of objections relating to the possible complexity of implementing such a system for imported products, it would be advisable for the latter to give priority, at least initially, to the setting of margins, but only in absolute terms.

ii. With regard to the basis for surcharges

150. The margin, whether expressed as a percentage or an absolute value, must be applied to a cost price. And even when a price ceiling is set in terms of value, it must also take this cost into account, in order to avoid forcing producers, suppliers or service providers to sell at a loss or, conversely, to set a price that is too high. The definition of the cost price is therefore essential, as it will determine whether the price is set at the right level, neither too high (to avoid creating rents or limiting consumption of the good or service), nor too low (to avoid degrading quality or creating shortages).
151. To this end, the proposed text sets out the main calculation methods:
- of the delivered warehouse price of imports (LP 111-6);
 - the manufacturing or production price of local products (LP 111-5).

➤ ***The cost of imports***

152. For imports, the definition is relatively straightforward and not subject to much debate, as it can easily be supported by supporting invoices¹⁸: the warehouse delivered price takes into account the CIF value of the product (purchase cost + insurance + freight cost), to which are added landing and handling charges, as well as transit and customs clearance operations (LP 111-6). This price is calculated by product batch, with no possibility of averaging.
153. Then, in detail, certain questions may arise which are covered by the decrees or even the administration's doctrine (for example, the choice of values applied for operations carried out locally, such as transit, which may be flat-rate, proportional or actual costs).

➤ ***The cost of local production***

154. For local production, the definition is far more complex. It involves determining an internal cost for a specific good or service, which requires the use of cost accounting.
155. The text stipulates that the local producer is obliged to establish a "manufacturer" (for the secondary sector) or "producer" (for the primary sector) price per retail unit, but that this is "*freely determined (...) from the cost price plus a margin*". This means that manufacturers are free to apply discounts or rebates, but only *after the fact*, since "manufacturer" or "producer" prices must be the same for all customers, regardless of sales volumes. A wholesale price is therefore determined upstream, transparent and common to all, even if subsequent invoice discounts are possible in compliance with the specific regulations governing these commercial practices.¹⁹

¹⁸ This does not, however, prevent certain types of optimization, particularly when the supplier and importer are linked (risk of over-invoicing), or when there is an imbalance between the wholesaler and distributor (imposition of back margins which *de facto* reserve the margin for the supplier).

¹⁹ For the record, article LP 410-1 of the French Commercial Code only authorizes discounts on PPNs and FMCGs if they fully benefit consumers.

156. While the requirement to determine and keep this cost is a positive step in terms of transparency, the principle of freedom to set the cost is questionable. It is a calculation that can be complex and, above all, easily manipulated, depending on the induced costs used (full costs or not, average cost or marginal cost, etc.). However, it is likely that local producers will seek to maximize this cost for all their production appearing on the list of NPPs and FMCGs, which risks increasing the price, to the detriment of the objectives set by the text and, in particular, the consumption of these goods by the most modest households.
157. The 2009 opinion on import and distribution channels also stated that *"cost price controls, to which the margin is applied, appear insufficient for local production. Indeed, while data concerning imports are systematically declared, the cost of local production has not been monitored by the DGAE since the repeal by order no. 680 CM of April 24, 2014 of decision no. 762 AE of October 13, 1978, which provided for the approval of producer prices for locally manufactured products thanks to elements derived from the cost accounting of the applicant companies. As a result, production costs are now only monitored on an ad hoc basis."*
158. In principle, competition should make it possible to remedy this risk. Indeed, if a producer sets a price that is too high, he runs the risk of losing markets to competing producers who will charge a lower price, either because they are more efficient or because they have not tried to determine costing methods that are excessively favorable to their interests. However, we know that structurally, the potential number of local producers is low in French Polynesia. And while competition from imports should serve as a reminder, the Authority has already had occasion in its 2019 opinion on import and distribution channels to highlight the many protections enjoyed by local production (import bans, quotas, customs duties, TDL etc.), which often enable local producers to set their prices not in relation to their cost price, but in relation to the cost-plus of these imports (when they are not banned outright).
159. The government has clearly recognized this difficulty, since it has provided for a number of exceptions to the principle of free determination of the "manufacturer" or "producer" price calculation methods, by allowing the Council of Ministers to substitute itself for the company in certain cases already mentioned (weakness of competitive intensity in production; unjustified increase or risk of price rise).
160. Taking competitive intensity into account should therefore make it possible to mitigate the risk described above, since only two scenarios would remain:
- i. either competition is fierce, and producers have no interest in raising their prices, otherwise they risk losing market share;
 - ii. or there is little competition and production is concentrated, in which case the Council of Ministers can intervene to set the cost price.
161. But this possibility doesn't solve everything:
- i. in the first case, where there are a large number of producers, price regulation actually loses its *raison d'être*, since free competition between producers is able to guarantee consumers the best prices, with invoicing at marginal cost;
 - ii. in the second case, where producers are rare, the text only allows the Council of Ministers to define the cost price itself (or to determine different rules for doing so), without being obliged to do so.
162. As a result, almost all of the remaining PPNs and PGCs should be subject to production cost controls by the Council of Ministers, which it will probably not be physically able to carry out. For the time being, only a few products are concerned, such as hydroalcoholic solutions.²⁰

²⁰ Order no. 297 CM of March 23, 2020, article 3.

163. Ultimately, the producer's freedom to determine his cost price appears risky, but on the other hand, it is relatively illusory to define precise calculation methods valid for all particular cases, and probably impracticable to carry out an *a priori* control of all prices, given the time and resources that this would involve.
164. However, the government still has two options:
- provide a framework for the free setting of producer or manufacturer prices, with the general calculation methods it wishes to see applied, particularly with regard to margins;
 - reserve the right to penalize producers who have applied an excessive tariff with regard to the market and these general rules (control permitted by the obligation for producers to keep the calculation method used for three years under article LP 111-9, and sanctionable on the basis of 3° of article LP 113-2).
165. So, in reality, it's only through the credibility of its controls that the government will be able to avoid any possible abuses.

➤ ***A free margin authorized for local production***

166. At first glance, the inclusion of a margin in the "manufacturer" or "producer" cost may seem surprising, given that regulated prices operate by adding a ceiling margin to a cost, which must therefore be limited to the cost of production. Indeed, with such a wording (margin integrated into the calculation of the manufacturer's cost + ceiling margin applied to the manufacturer's cost), the consumer pays a double margin. What's more, the margin integrated into the manufacturer's cost is not, *in principle*, subject to any framework, at least at the level of the law of the land.
167. Article LP 111-3 confirms this interpretation, but also justifies the system. It stipulates that, by way of exception, the margin applied to locally-produced goods and services is shared solely between the wholesaler, retailer and any intermediaries, but that the producer or manufacturer cannot reserve part of this margin for himself unless he sells his products directly to the end consumer. There is therefore no double margin for the sole benefit of the producer. The idea behind this producer margin is to create a parallel with external producers. Indeed, the FOB selling price already includes the margin of foreign producers. The regulated margin in French Polynesia therefore only concerns distribution activities. In the same way, the cost price of local producers must be increased by an equivalent "production margin", which is added to the "distribution margin", which is the only one concerned by the mark-ups applicable to PPN and PGC.
168. From a competitive standpoint, however, the risk is that while there is strong competition between exporters, which allows them to reduce their margin *a priori*, local producers are often relatively isolated and have more leeway to maximize it. It would therefore seem appropriate to regulate this margin.

e) HOW THE PPN AND PGC SCHEMES ARE IMPLEMENTED

169. The text sets out the procedures for implementing the PPN and PGC schemes.

i. The tax system for PPN and PGC

170. PPNs are exempt from duties and taxes, including VAT, in accordance with applicable tax and customs provisions (article LP 111-4). This is not the case for PGCs, which are taxed at the rates in force for the corresponding products.

171. Although the new text no longer refers to the assumption of responsibility for freight to islands other than Tahiti, this is already covered by another text, deliberation 95-118 AT of August 24, 1995, as amended, relating to the assumption of responsibility by the Territory for the freight of copra and basic necessities. PPN freight will therefore continue to be covered on this basis.

ii. Marketing conditions and professional obligations

172. A number of obligations are placed on economic players: producers, importers, wholesalers and distributors.

173. Importers must determine, before any transaction, the import price (delivered to warehouse) calculated in accordance with regulatory provisions (LP 111-6).

174. Local producers and manufacturers are free to set the "producer" or "manufacturer" price, with some exceptions. Nevertheless, its definition and conservation will provide the country with information on this data, which is currently unknown (LP 111-5).

175. The person responsible for first placing the product on the market (importer or producer) is required to keep the statement used to establish the regulated maximum selling price for at least three years, and to indicate this on invoices (LP 111-9). The obligation to deposit these documents with the DGAE has thus been replaced by an obligation for the company to keep them, which is less cumbersome administratively, both for companies and for the country's departments, but does extend to producer prices (it previously only concerned importers). On the other hand, these documents, together with the elements used in the calculations, must be produced on first request in the event of an inspection.

176. Limit prices, once determined and retained, must appear on all invoices and delivery notes, at all stages of marketing, and the prices charged must necessarily be less than or equal to this amount (LP 111-10). As long as this obligation is respected, responsibility for any error in invoicing therefore lies with the person responsible for first placing the product on the market, who first establishes and indicates this price on his invoices.

177. Taken as a whole, these provisions seem likely to enhance transparency on the level of regulated prices for the various players (with the exception of end consumers), without requiring excessive administrative work on the part of companies or the authorities. They therefore appear proportionate to the objectives pursued.

iii. The rescript procedure

178. A rescript procedure, similar to that used in tax matters, has also been introduced to reinforce legal certainty for professionals. They will now be able to ask the authorities, in case of doubt, to take a position on the pricing regime applicable to a specific product or service.

179. *A priori*, this measure has no impact on competition, and is likely to make it easier for companies to determine which regulations apply.

Proposals :

On PPN and PGC:

13. Restrict the definition of FMCGs, for example by reserving it to products representing a constrained expenditure or a significant proportion of household budgets.

14. Refocus the scheme (by decree) on a list of a few products that are really needed, at least in Tahiti and Moorea (where competition is fiercer), and reserve the detailed list for the territories furthest from Tahiti.

15. Consider alternatives to the current system, including the following two options:

- limit windfall effects for affluent households by refocusing the scheme on priority target groups, for example by strengthening alternative direct assistance schemes for low-income households (cards or vouchers providing free or discounted access to essential products);
- maintain a certain degree of pricing freedom and price competition, either by allowing distributors to apply the PPN scheme only to some of the products in the category concerned, or by examining the possibility of implementing an alternative scheme such as the quality-price shield.

16. In article LP 111-12, add a new 5° to read as follows: "5° to goods acquired by companies with a view to their transformation during the production process".

17. In the implementing decrees determining the pricing terms for each product or product category:

- for local products, systematically set price ceilings rather than margins, as is already the case for services;
- for imports, give preference to absolute margins rather than percentage margins.

18. Set, at least by decree, the general rules for determining the "manufacturer" or "producer" price (both those relating to cost price and the margin applied).

19. Reinforce administrative controls on the determination of "manufacturer" or "producer" prices.

7. GOODS AND SERVICES ESSENTIAL TO ECONOMIC DEVELOPMENT

a) PRODUCTS OR SERVICES REQUIRED FOR THE ECONOMIC DEVELOPMENT OF FRENCH POLYNESIA

180. According to the explanatory memorandum, in addition to hydrocarbons, the goods and services covered by these provisions include inter-island freight, port handling and copra. Their specificity compared to PPN and PGC is that they are not directly intended for households, but rather for businesses.
181. However, article LP 112-1 refers to the common law price frameworks for PPNs and PGCs, and more specifically to articles LP 111-1 and LP 111-3, unless otherwise specified.
182. The AMF therefore refers to the discussion above on the rules for determining prices, and reiterates its wish that all existing and future provisions be codified in the Competition Code, in order to make the applicable law more intelligible.

b) WITH REGARD MORE SPECIFICALLY TO HYDROCARBONS

183. For the most part, the text codifies and brings up to the legislative level already existing provisions relating to the main principles for setting hydrocarbon prices. These include, in particular, the rules for determining the "CAF scale", which serves as the basis for setting authorized ceiling prices.
184. The Authority has already had the opportunity to comment on hydrocarbon pricing in its opinion no. 2016-A-02 issued on November 7, 2016 on the state of competition in the hydrocarbon sector. Consequently, these provisions will not be discussed further in this opinion.

8. THE SANCTIONS REGIME

185. The bill concludes with the introduction of administrative sanctions. According to the explanatory memorandum, these will replace the current criminal sanctions, as they are *"more effective and quicker to implement, and thus respond to the APC's recommendation to reinforce the effectiveness of controls"*.
186. An injunction procedure has also been introduced, in line with the provisions of the country's law no. 2021-42 of September 7, 2021, *"aimed at encouraging exemplary business practices, which enables economic operators to be rapidly brought into line with regulations."*
187. The effectiveness of price regulation depends to a large extent on the ability to put in place adequate dissuasive and corrective measures. In its 2019 opinion on PPNs, the Autorité considered that *"while the penalty system attached to the regulation appears proportionate, it is not sufficiently dissuasive, due to its lack of implementation. The effectiveness of the regulations could be strengthened by facilitating price controls, by involving other administrations in remote islands and by enabling direct price control by consumers, via a reporting procedure and an obligation to display regulated prices in stores"*.
188. *A priori*, the measures taken by the new text will make it easier to implement sanctions, which is in line with these proposals and therefore with the effectiveness of the measures put in place.
189. However, such measures are insufficient if they are not accompanied by effective price controls, particularly on remote islands. The DGAE's recent review of inspections carried out in 2021 shows that one of its priorities is to monitor the price margins of regulated products. Thus, in 2021, *"307 inspections, including 8 fines, were carried out to ensure compliance with maximum marketing margins for basic necessities and mass-market products in all the archipelagos. In addition, 58 investigations, including one fine, were carried out on distributors, importers and wholesalers in various food and non-food sectors. In all, 188 professionals were reminded of their obligations, including 104 wholesalers and retailers, 72 stores and 12 importers"*.²¹ This allocation of DGAE resources is designed to make these measures more effective.
190. As in 2019, however, the Autorité considers that price cap control could be made even more effective by making the consumer active, particularly on the islands. This could be achieved by introducing an obligation to display the maximum price. While the new provisions require the maximum price to appear on all invoices and delivery notes, they do not make it compulsory to display the price limit in stores. The only requirement is for specific labelling. Yet such a display would enable consumers to know whether the price they are paying is equal to or lower than the ceiling, and could be a selling point for retailers. It would also facilitate checks - including by consumers and competitors - particularly in the event of discrepancies with the prices of similar products in other stores. A practical difficulty remains, however, linked to the possible diversity of regulated prices for the same product, given that purchase dates may differ, at least for products whose price is determined by applying a margin to the purchase price. In this case, a display on a dedicated website could also be envisaged, or an obligation limited to certain goods (those of significant value, such as car parts or building materials, for example).

²¹ See the minutes of the Council of Ministers meeting of March 16, 2022: https://www.presidence.pf/conseil_ministres/conseil-des-ministres-du-16-mars-2022/#_Toc98333136

Proposals :

On controls :

20. Introduce - where possible - an obligation to display ceiling prices for the goods and services concerned, in order to increase consumer involvement in controls, particularly on remote islands.

9. LACK OF REGULAR EVALUATION OF THE VARIOUS SYSTEMS

191. As a matter of public policy, economic regulation schemes, *especially* if they infringe certain principles such as free enterprise, must be regularly evaluated and made public to check whether they are achieving their objectives, and whether, for example, all operators are applying prices close to or equal to the ceiling .
192. However, price control measures do not always seem to be able to fulfill the functions assigned to them, due to the lack of sufficient definition of objectives *ex ante* and adequate evaluation *ex post*.
193. *Ex ante*, when defining tools, an economic policy rule, known as Tinbergen's rule²², states that when a policy aims to modify *n* economic variables, it must have at least *n* instruments at its disposal (taxation, subsidies, interest rates, etc.). This is justified by the fact that targets must be achieved independently of one another, and that the *n* degrees of freedom to be attained (the objectives) must correspond to *n* constraints (the instruments). To put it another way, even if the effects of economic instruments are multiple and act on various variables, a single tool will be unable to effectively pursue several objectives at the same time, unless they are directly linked.
194. Economic policy measures also have secondary effects on other variables (budgetary or redistributive, for example). In particular, they can have the effect of modifying the competitive structure of a market.
195. However, it seems that price control measures are designed to achieve a variety of, even contradictory, objectives (e.g., accessibility of products to the most modest or remote consumers, health or environmental imperatives, protection of local production, etc.). However, controlling the prices of local products differently, for example, does not simultaneously and effectively guarantee more local employment, lower prices and a change in consumer behavior. Trade-offs are therefore necessary. Any regulation with an impact on prices should therefore be accompanied by clearly defined and assessable objectives.
196. The price regulation analysis grid presented above in §§ 42 et seq. can serve as a tool for the government.
197. *Ex post*, a widely accepted principle of public policy is the need for an objective assessment of its effectiveness (ability to achieve objectives) and efficiency (ratio between costs incurred and results obtained). Measuring the quality of a regulation cannot, in fact, be assessed solely by budgetary measurement of the resources made available (in the form of spending or tax expenditure). However, current price-control regulations have a tendency to pile up, without being systematically and regularly evaluated and, where necessary, amended.

²² Nikolaas Tinbergen, *On the Theory of Economic Policy* (1952).

198. However, any measure that undermines the principle of freedom of pricing and trade should be subject to regular and comprehensive assessments, including economic studies, to determine whether it should be retained, amended or even abolished.

Proposals :

On evaluation:

21. Define the precise objectives of all price regulation measures.
22. Implement a systematic, regular evaluation of regulatory measures designed to control the prices of goods and services.

Deliberated on the oral report by Antoine Callot, rapporteur, and the intervention of Matthieu Pujuguet, acting general rapporteur, by Johanne Peyre, chairwoman, Aline Baldassari, Youssef Guenzoui, Marie-Christine Lubrano and Christian Montet, members.

The President

Johanne Peyre

SUMMARY OF RECOMMENDATIONS :

On the codification of price control mechanisms:

- 1) Pursue the codification process, so as to obtain in a single text (currently the Competition Code) an exhaustive panorama of exceptions to price freedom.
- 2) Consider bringing together all the texts governing prices in a single code, which could be a consumer code.
3. integrate all implementing decrees into the regulatory part of the code in question (currently the Competition Code).

On the definition of locally produced goods:

4. Insert the word "notamment" after the words "Ne constituent" in II of article LP 100-2.
5. Consider eliminating the distinction between local and imported production for PPN, in order to give priority to making the goods concerned accessible to as many people as possible.
6. Refer to the provisions of the new article LP 100-2 of the Polynesian Competition Code concerning the definition of local production in the tax provisions relating to TDL, as well as in the application for protection under this heading.

On the emergency device:

7. In the 3rd paragraph of article LP 110-1, replace "risks of excessive price increases or decreases" with "risks of excessively high or low prices".
8. In the 3rd paragraph of article LP 110-1, replace the words "twelve months" with the words "six months, renewable once, after consulting the Polynesian Competition Authority".
9. In III of article LP 111-5, replace the word "twelve" with the word "six"; insert the words "once" after the word "renewed" and delete the words "issued before each renewal and".

Price moderation agreements:

10. Carry out an evaluation of the system, or even consider abolishing it in view of the risk of anti-competitive agreements.

On the "supervised freedom" of pricing :

11. Clarify the system of supervised price controls, setting out more precisely the cases in which it is intended to apply and the general rules for determining authorized changes.
12. Precede orders issued on this basis by a request for prior opinion from the Polynesian Competition Authority pursuant to article LP 620-2.

On PPN and PGC:

13. Restrict the definition of FMCGs, for example by reserving it to products representing a constrained expenditure or a significant share of household budgets.
14. Refocus (by decree) the scheme on a list of a few products that are really necessary, at least in Tahiti and Moorea (where competition is fiercer), and reserve the detailed list for the territories furthest from Tahiti.
- 15) Consider alternatives to the current system, in particular the following two options:
 - limit windfall effects for wealthy households by reinforcing the system for priority target groups, for example by reinforcing alternative direct aid schemes for the most modest households (cards or vouchers providing free or discounted access to essential products);
 - maintain a certain degree of pricing freedom and price competition, either by allowing distributors to apply the PPN scheme only to some of the products in the category concerned, or by examining the possibility of implementing an alternative scheme such as the quality-price shield.

16. In article LP 111-12, add a new 5° to read as follows: "5° to goods acquired by companies with a view to their transformation during the production process".

17. In the implementing decrees determining the terms and conditions for setting the price of each product or product category :

- for local products, systematically set price ceilings rather than margins, as is already the case for services;
- for imports, give preference to absolute margins rather than percentage margins.

18. Set, at least by decree, the general rules for determining the "manufacturer" or "producer" price (both those relating to cost price and the margin applied).

19. Reinforce administrative controls on the determination of "manufacturer" or "producer" prices.

On controls :

20. where possible, make it compulsory to display ceiling prices for the goods and services concerned, in order to increase consumer involvement in controls, particularly on remote islands.

On evaluation:

21. Define the precise objectives of all price regulation measures.

22. Implement a systematic and regular evaluation of regulatory measures aimed at controlling the prices of goods and services.