[FREE TRANSLATION]

OPINION N°2024-AO-01 OF JANUARY 31, 2024

ON A DRAFT LAW OF THE COUNTRY REGULATING CERTAIN ACTIVITIES RELATING TO CANNABIS WITHOUT NARCOTIC PROPERTIES AND MEDICINES CONTAINING CANNABIS OR CANNABINOIDS

Polynesian Competition Authority,

In view of the letter dated December 29, 2023, registered on January 02, 2024, under number 24/0001 A, by which the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter "the Authority") for an opinion on a draft law of the country regulating certain activities relating to cannabis devoid of narcotic properties and medicines containing cannabis or cannabinoids ;

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

Having regard to the other documents in the file;

The rapporteurs, the deputy general rapporteur and the representatives of the Direction de l'Agriculture and the Agence de Régulation de l'Action Sanitaire et Sociale were heard on the basis of the provisions of article LP. 630-5 of the French Competition Code at the meeting of January 31, 2024;

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

INTRODUCTION

1. By letter dated December 29, 2023, registered on January 2, 2024 under number 24/0001 A, the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter "the Authority") for an opinion on a draft law of the country regulating certain activities relating to cannabis without narcotic properties and medicines containing cannabis or cannabinoids.

2. The referral refers to the provisions of article LP 620-2 of the French Competition Code, which states that *"I. The Authority must be consulted by the President of French Polynesia on any draft law of the country (...) which institutes a new regime having the effect of: 1° Subjecting the exercise of a profession or access to a market to quantitative and geographical restrictions."*

3. The draft text submitted for the Authority's consideration aims to change the regulatory framework governing the use of cannabis in French Polynesia. To this end, it amends deliberation no. 78-137 of August 18, 1978 on the import, export, purchase, sale, possession and use of poisonous substances in French Polynesia.

4. A competitive market optimally allocates available resources, maximizes consumer welfare and boosts the competitiveness of the sector concerned, by promoting innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor in productive and allocative efficiency.

5. Nevertheless, competition is not an end in itself; it is a tool in the service of economic efficiency. Normative texts very often 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 the Assembly of French Polynesia are required to weigh up the various general interest objectives involved, after having been fully informed of the effects of the planned public intervention on competition, and, if necessary, to reconcile these objectives[1] .

6. The cannabis sector, whether it has no narcotic properties or not, is highly regulated. The constraints imposed on players in the production and distribution chain are essentially justified by public health requirements. However, they must not lead to the exclusion of all forms of competition. Although competition and healthcare may seem to belong to mutually exclusive spheres, healthcare, seen as a sector that encompasses the provision of healthcare services and the sale of healthcare products, cannot be excluded from the economic sphere[2] . Health care and health product distribution activities are indeed economic in nature. Even if supply and demand are specific to the sector, "*these factors cannot (...) conceal the reality of the existence of a demand, in terms of healthcare services or healthcare products, whose meeting with supply is remunerative for suppliers. A market exists when demand meets supply. Competition is intended to govern any activity carried out on a market (...), and is therefore applicable, even if the specific nature of healthcare missions prevents competition law from becoming the sole regulator*"[3] .

7. In the same way as the Authority emphasized in 2022 in its previous opinion[4] on the same subject, the present draft law of the country thus lies at the crossroads of public health and competition law. The following sections present the competition issues raised by the examination of the current draft law, and

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1 See Guide d'évaluation de l'impact concurrentiel de projets de textes normatifs published by the Autorité de la concurrence métropolitaine.

2 See in particular Opinion No. 2017-AO-04 of September 15, 2017 on the draft country law regulating the profession of masseur-kinésithérapeute and No. 2018-AO-01 of April 24, 2018 on the draft country law regulating the profession of speech therapist.

3 Conseil de la concurrence, Rapport annuel 2008, étude thématique, "Droit de la concurrence et santé".

4 Opinion no. 2022-A0-04 of November 8, 2022, cited above.

which concern the new provisions relating to cannabis without narcotic properties and medicines containing cannabis or cannabinoids.

8. Given the potential or proven dangerousness of the substances in question, of which all players in the sector are aware, the Autorité considers that restrictions on competition can be justified by public health considerations.

9. However, in terms of competition and economic freedom, not all restrictions on supply are equal. For example, in terms of economic freedom, a ban is the most restrictive regulatory instrument. In terms of health policy, political power has a choice of several regulatory instruments: quotas, standards, bans, authorizations and other reporting obligations.

10. It is not for the Authority to rule on the relevance of the objectives pursued, nor on the relevance of the measures chosen by the public decision-maker to achieve them. On the other hand, the Authority must examine whether the measures adopted, when they lead to restrictions or distortions of competition, are proportionate to the legitimate objective pursued, or whether the latter can be achieved by other, less restrictive means, or those likely to lead to less distortion of competition.

11. The provisions contained in the draft law are very general, and each of them refers to one or more implementing decrees, the draft versions of which have not been submitted to the Authority for review. Having met both the authors of the text and the various departments and players involved in the future industry, it appears that the main guidelines for the application of essential points of the system have yet to be defined, and that numerous arbitrations still need to take place before the draft orders can take shape. As a result, and pending decisions by the public authorities, many questions remain, and the Authority's analysis of the project's potential effects on competition, particularly in a new sector, is limited.

12. In this respect, it agrees with the CESEC's conclusion that "*in future, draft decrees should be forwarded with the draft laws of the country, in order to facilitate the understanding and study of the texts submitted by the authorities*"[5] . Generally speaking, and in order to enable the Authority to formulate an opinion that is as relevant as possible, it is recommended that all the information that could affect the Authority's analysis of the competitive aspects be sent as an appendix to requests for opinions.

I. FINDINGS

A. POISONOUS SUBSTANCES IN FRENCH POLYNESIA

1. APPLICABLE REGULATIONS AND THEIR EVOLUTION

13. The Authority has already had occasion to note[6] that Polynesian regulations governing poisonous substances are strongly inspired by international conventions signed in this field, foremost among them the 1961 United Nations Single Convention on Narcotic Drugs, amended by the 1972 Protocol[7] . Cannabis has been included in the aforementioned convention, thus generally prohibiting its cultivation and consumption in signatory countries, in the same way as poppy flower, for example.

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5 Opinion no. 04-2023 of November 6, 2023 on the draft law on the deployment of electric vehicle charging infrastructure.

6 Notice no. 2022-AO-04 of November 8, 2022 concerning poisonous substances.

7 But also the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

14. In accordance with these international conventions, French Polynesia may adopt more stringent control and monitoring measures, motivated in particular by the need to protect public health.

15. The reference text currently governing poisonous substances in French Polynesia is deliberation no. 78-137 of August 18, 1978. This decree governs the import, export, purchase, sale, possession and use of these substances in French Polynesia, and sets out the regime applicable to them. Order no. 626 CM of April 14, 2014, for its part, sets the list of poisonous substances intended for medicine and the lists of exemptions to the classification of poisonous substances in human and veterinary medicine.

16. According to this text, poisonous substances are classified in three separate tables:

    - Table A: Toxic products
    - Table B: Narcotics
    - Table C: Hazardous products

17. Two distinct regimes apply to all these poisonous substances, depending on whether or not they are intended for medical use[8] , with provisions varying according to whether these substances are classified in tables A, B or C.

18. Echoing the general prohibition of the 1961 United Nations Single Convention on Narcotic Drugs, the 1978 deliberation lays down a general ban on any form of direct use of cannabis or its derivatives (articles 17 and 18), including medical use for any product containing tetrahydrocannabinol (hereinafter "THC") (article 42).

    With regard to the general prohibition, article 18 of the text stipulates that "*The import, export, production, trade, use and possession of Indian hemp and preparations containing or made from Indian hemp are prohibited. For the purposes of this resolution, Indian hemp is taken to mean the flowering and fruiting tops of the female cannabis sativa plant (urticaceae-cannabinoids), known as the Indian variety*".

19. With regard to the specific prohibition on the medical use of cannabis, article 42 states that "*The import, export, manufacture, purchase, sale, possession, use and, in general, all commercial or non-commercial acts relating to the following substances are prohibited: [...] Tetrahydrocannabinols (tetrahydrocannabinols, all isomers, their esters, ethers, salts and salts of the aforementioned derivatives"*: *[...] Tetrahydrocannabinols (tetrahydrocannabinols, all isomers, esters, ethers, salts and salts of the aforementioned derivatives)*". As a result, no cannabis-based medicines can currently be marketed in French Polynesia.

20. The only possible derogation to this general ban on cannabis, whatever its use, may be that granted "*for the purposes of scientific research by order of the Government Council on the proposal of the Director of Public Health*"[9] . Consequently, the industrial use of hemp (cannabis free of narcotic substances) in the food, textile, paper and construction industries is again strictly prohibited by the 1978 decree.

21. To date, only the Institut Louis Malardé (hereinafter "ILM") has been authorized by decree[10] from the President of French Polynesia, on an exceptional basis, to possess cannabis for the purposes of scientific research within the framework of two research programs.

22. Since the signing of the 1961 Single Convention, the medical context has evolved, and more and more countries are once again looking favorably on cannabis for therapeutic use. Since California authorized the medical use of cannabis in 1996, over forty countries have legalized this therapeutic use.

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8 Plans detailed respectively in chapters III and II of deliberation no. 78-137 of August 18, 1978.

9 Article 18 paragraph 3 of deliberation no. 78-137 of August 18, 1978.

10 Arrêté n° 196 PR du 9 mars 2023 portant autorisation, à titre dérogatoire, de détention et de culture du Cannabis sative L. aux fins de recherches scientifiques au sein de l'Institut Louis Malardé ; arrêté n° 248 PR du 30 mars 2022 portant autorisation, à titre dérogatoire, de détention du Cannabis sativa L. aux fins de recherches scientifiques au sein de l'Institut Louis Malardé.

23. In December 2020, the United Nations Commission on Narcotic Drugs also reviewed the classification given to cannabis and the virtues that can be attributed to it[11] . In its tables, cannabis is still considered a narcotic product, but its therapeutic potential is now recognized.

24. Metropolitan France, for its part, began an experimental phase in March 2021, with the aim of assessing the suitability of medical cannabis supply and distribution channels. Despite a declared political will to see French Polynesia involved, the legal obstacles noted by CESEC in its opinion no. 85/2021 of October 28, 2021[12] have prevented the implementation of an experiment in the territory.

2. THE STATE OF PLAY IN THE FIELD

25. With a view to studying the possibility of developing a local cannabis industry, French Polynesia approached the ILM in 2019[13] to look into this subject as part of an experimental program. To this end, ILM has developed two research projects mentioned *above*. The first experimental program, "Porinetia Pakalolo Screening - Phytochemical screening of French Polynesian cannabis plants", aims to assess and classify the cannabis varieties present in French Polynesia. To this end, the territorial directorate of the national police sends ILM cannabis samples from seizures made in criminal proceedings on the illegal market for analysis. The second program, "Porinetia Pakalolo-Rapa'au", involves studying the possibility of developing a cannabis industry using imported seeds.

26. For this second experiment, ILM imported three seed varieties (one rich in THC, another in cannabidiol (hereinafter "CBD"), and a third with a balance of THC and CBD). The plants were grown in a sterile, controlled environment, in containers, to protect them from theft, pollutants and the risk of pollination of surrounding crops.

27. Initial results from these experiments have shown that growing cannabis plants under aseptic, controlled conditions (air-conditioning, lighting) has produced plants with stable THC and/or CBD levels. The aim now is to experiment with cuttings to monitor this stability over time using this technique. According to the industry players interviewed, it is generally accepted that cuttings enable stable, homogeneous production to be maintained.

B. THE DRAFT LAW OF THE COUNTRY SUBMITTED FOR THE AUTHORITY'S OPINION

1. THE INTRODUCTION OF A LEGAL FRAMEWORK ALLOWING THE CULTIVATION OF CANNABIS WITHOUT NARCOTIC PROPERTIES

28. According to the explanatory memorandum, the aim of the new legal framework is to *"enable the use of cannabidiol (CBD)-based products, regulate the cultivation of certain varieties of cannabis and authorize therapeutic cannabis[14] "*. The country's draft law now authorizes certain activities relating to cannabis without narcotic properties, and medicines containing cannabis or cannabinoids, subject to certain conditions.

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11 https://news.un.org/fr/story/2020/12/1083712

12 Cesec opinion no. 85/2021 of October 28, 2021 : Opinion nB085-2021.pdf (cesec.pf)

13 Minutes of interview with ILM, January 16, 2024, c. 81 (81-83).

14 Explanatory memorandum, c. 12 (1-17).

29. Against this backdrop of advances in medical research, and developments in international conventions and the legislation of certain countries, the country's draft law, organized into five chapters[15] , focuses on three main areas:

- the regulation of certain activities involving non-narcotic cannabis (Chapters I and II);
- the introduction of the possibility of growing cannabis without narcotic properties (chapter III);
- the modification of regulations on medicines to allow the prescription of treatments containing cannabis or cannabinoids (chapter IV).

30. These three main lines of action pursue the same general objectives as those set out in the 2023-5 law of January 5, 2023, on which the Authority issued an opinion[16] . This opinion therefore updates the recommendations made in 2022, in the light of the new provisions of the current draft law.

31. ***Definitions*** (art. LP 1) :

- **Cannabis**, as defined by the law of the land and its implementing decrees, is "the plant of Cannabis sativa L., of whatever variety, in its entirety, with the exception of the seeds, whether separated from the plant or not. The cannabis genus comprises a single species, Cannabis sativa L.".
- The **seed** is the organ which, after germination, enables the plant to reproduce.
- The **seed** is the seed that can germinate, intended for planting and not for consumption or processing.
- **Grain** is the seed that cannot germinate, is sterile and is intended for consumption or processing, not for planting.

32. ***The general principle of prohibition*** is maintained for all operations relating to cannabis, its plant and resin, products containing them or those obtained from cannabis, its plant and resin (art. LP 4).

33. ***The country's draft law introduces a derogation*** to the general principle of prohibiting any operation containing cannabis. It sets out general provisions regulating certain activities relating to cannabis without narcotic properties, both in its therapeutic use and in its agricultural and industrial uses, without however ruling out the narcotic quality of the plant and its derivatives. In addition to authorization for use in scientific research, *the* following are now authorized (art. LP 3): "*transport, import, export, possession, supply, transfer, acquisition, processing and use :*

1°) cannabis seeds;

2°) cannabis seeds, under the conditions laid down in Chapter III;

3°) products containing or made from cannabis seeds, subject to the provisions of article LP 5".

34. The provisions of article LP 5 stipulate, on the one hand, that products derived from cannabis seeds are authorized and, on the other, that activities involving cannabis seeds capable of germinating and being cultivated to produce cannabis without narcotic properties are authorized, subject to conditions[17] (art. LP 4).

35. ***There are limits to this exemption***. Activities involving the entire plant are not authorized, nor is the practice of cuttings, which remains prohibited on the grounds of preventing the cultivation of cannabis plants containing higher THC levels than authorized.

36. According to the draft law, cannabis **has no narcotic properties** if its THC content is below a certain level, to be determined by ministerial decree (art. LP 4, III). For information, in Europe and in mainland France, the maximum permitted level is 0.3%.

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[15] Chapters IV and V deal respectively with the regulation of medicinal products containing cannabis or cannabinoids, and with provisions relating to the certification, conformity and safety of products and services, but will not be addressed in this opinion as there are no competition concerns.

[16] Notice no. 2022-AO-04 of November 8, 2022 concerning poisonous substances.

[17] These conditions are set out in Chapter III of the text under review.

37. According to the explanatory memorandum, products containing cannabis seeds or CBD are not considered narcotics. They are therefore considered to be conventional products and are subject to the ordinary law governing products intended for consumption. With regard to products derived from cannabis seeds, only those products defined and regulated by decree in application of French law no. 2008-12 of September 26, 2008 on the certification, conformity and safety of products and services are authorized (art. LP 5). As a result, authorized products will be subject to a specific framework by decree issued by the Council of Ministers.

38. With specific reference to the CBD products authorized by this article, Dr. Romain Bourdoncle points out, as he stated back in 2022, that while CBD is devoid of narcotic properties, it can nonetheless lead to potentially dangerous health effects and risks. According to him, CBD interacts with drugs, and it's important that patients are aware of this. As an example, he cites a significant reduction in the contraceptive effects of the pill in women, or an increase in the concentrations of anticoagulant treatments and therefore a potential risk of bleeding in patients taking this type of medication. In his view, it is therefore imperative to introduce product labeling warning of the effects it may have on health or on the efficacy of other molecules.

39. The text also specifies that **leaves, flowers and any part of the cannabis plant that has no narcotic properties and is intended to be smoked, sniffed, chewed or sucked** are considered to be **tobacco** products and are subject to the relevant regulations, notably prohibiting sale to minors (art. LP 6).

40. The specific provisions governing the cultivation of cannabis without narcotic properties include a catalog of authorized varieties (art. LP 10), a licensing system for the import and transfer of cannabis seeds for cultivation (art. LP 12), and a declaratory system for the cultivation of cannabis without narcotic properties (art. LP 11).

41. There is a bilateral obligation between the licensee and the person authorized to cultivate cannabis. The holder of a licence to import and sell cannabis seeds may only sell his seeds to persons authorized to cultivate them after declaration (article LP 23). Similarly, persons authorized to cultivate cannabis may only obtain seeds for cultivation from a person holding an authorization. In addition, growers are not authorized to destroy their harvest without the control of agents of the department in charge of agriculture (article LP 28).

2. DETERMINING THE CATALOG OF AUTHORIZED CANNABIS VARIETIES

42. According to the country's draft law, only cannabis varieties registered in a catalog are authorized (art. LP 10). However, by way of derogation, the use of non-catalogued cannabis varieties may be authorized in the context of scientific research activities under the conditions set out in the aforementioned 1978 deliberation (art. LP 10).

43. This project provides for the creation of a catalog of cannabis varieties authorized in French Polynesia for the import of seeds and the cultivation of cannabis (art. LP 29). This catalog will be defined at a later date by a decree issued by the Council of Ministers, after obtaining the advisory opinion of a joint commission comprising representatives of French Polynesia and of the professional sectors concerned (art. LP 30). The conditions for examining applications for registration, the suspension and withdrawal of a variety when it no longer meets the conditions for registration, and the composition and operation of the commission will also be defined by decree of the Council of Ministers (art. LP 33).

44. While the presence of representatives of the professional sectors concerned may prove useful in terms of their technical knowledge, their presence on the commission may give rise to conflicts of interest. The Authority recommends particular vigilance in the composition of this advisory commission.

3. APPROVAL REQUIREMENTS FOR THE IMPORT AND SALE OF CANNABIS SEEDS

45. The draft law of the country under review introduces barriers to entry at several levels of the cannabis value chain, which by their very nature restrict the scope for exercising and developing competition in the sector. In effect, only those players holding a license or authorization are able to operate on the market, as importers or cultivators.

46. This approval is required for (art. LP 13):

1°) importation of cannabis seeds;

2°) possession, storage and transport of cannabis seeds;

3°) the transfer of cannabis seeds for cultivation to persons authorized to cultivate after declaration".

47. This is a nominative authorization, which may under no circumstances be lent, sold, transferred or otherwise dealt with by its holder (art. LP 14).

48. It will be issued by a decree of the President of French Polynesia after the application for approval has been examined by the Department of Agriculture (art. LP 18), and defines the quantities of seed that may be acquired, stored and sold. This approval may also lay down specific requirements to ensure compliance with approval conditions and the effectiveness of controls (art. LP 19).

49. Approval ***applications*** must comply with the import quotas set out *below*, as well as with the conditions governing the particular activity for which approval is sought. These conditions must be laid down in an implementing decree (art. LP 20).

50. The information contained in the approval application and the documents to be attached must comply with the import quotas set out and developed *below*, as well as with the conditions governing the particular activity for which approval is sought. These will be determined by a decree of the Council of Ministers (art. LP 20). As this decree has not been transmitted, it is not possible to determine whether these criteria are likely to cause unjustified distortions of competition.

51. Nevertheless, the draft law of the country contains the *minimum* information that must be included in the application for approval, such as the identity and status of the applicant, an extract from criminal record no. 3 and a description of the project. The Authority notes that the wording of the last paragraph of article LP 20 lacks precision, as it introduces a non-exhaustive list of criteria that could lead to differentiated treatment of approval applicants. In fact, it states that "*The department in charge of agriculture may require the applicant to submit, within a specified time, any additional document or information useful for examining the application*". Consequently, when drafting the future decree specifying these criteria, care should be taken to avoid any wording that could discriminate between approval applicants. In addition, the legislator must ensure that the approval conditions and criteria applied are non-discriminatory, objective and transparent, so as not to distort competition between importers.

52. ***The*** *minimum* criteria ***for obtaining approval*** are as follows (art. LP 17):

"1°) that the beneficiary has a professional status and specific skills, and that he or she meets the criteria of good character and probity;

2°) maximum quantities that may be imported by a single authorized person during a calendar year;

3°) the terms and conditions for importing, holding, storing, transporting and transferring in order to guarantee the traceability and control of operations and to ensure that imported seeds meet the standards set by the present law of the country and its implementing decrees".

53. The granting of approval is therefore based on a certain number of common criteria relating to conditions of eligibility (art. LP 20): proof of professional status and specific skills, and criteria of good character and integrity defined by a decree issued by the Council of Ministers. As this decree has not been transmitted, it is not possible to determine whether these criteria are likely to cause unjustified distortions of competition.

54. Nevertheless, some of the industry players interviewed pointed out that one of the conditions for approval is the importer's ability to carry out THC level controls on cannabis plant crops grown from imported seeds, in order to ensure that the THC levels of these plants are stable and in line with the levels indicated on the imported seeds. According to those involved in the industry, these control measures would require specific technical skills, as well as relatively substantial investment to acquire the equipment needed to carry out these controls, in particular a chromatographic machine. Should this indeed be the case, it would be advisable to ensure that the conditions for approval, given the technical nature of THC control, do not result in approval being granted only to the only establishment currently equipped with chromatographic machines and the skills required to carry out these controls, namely ILM.

55. With this in mind, the Authority questions the need to make the availability of control resources a condition of approval upstream in the chain, and recommends that a distinction be made between the activity of importing seeds, on the one hand, and the activity of controlling cannabis cultivation, on the other. As cannabis seeds are imported from a catalog of varieties authorized in French Polynesia, the control of cannabis fields could be carried out *a posteriori* by a body separate from the importers. This distinction would make it possible to open up seed importation to competition, subject to approval under objective, transparent and non-discriminatory conditions, and to entrust the control activity to a single body, possibly a legal monopoly justified on general public health grounds.

56. ***The*** draft text does not specify the ***conditions and procedures for examining, issuing, renewing, suspending and withdrawing approval***, and also refers to a decree to be issued by the Council of Ministers (art. LP 21). The Autorité considers that these decisions to grant, renew, suspend and withdraw approval should also be determined on the basis of perfectly transparent, objective and non-discriminatory criteria, otherwise distortions of competition between importers will be introduced.

57. Similarly, this article makes no provision for refusing approval. In the Authority's view, the reasons for refusal should be clearly explained, in a written, reasoned response to the application for approval, in order to guarantee the transparency of the measure and to leave no room for discretionary decisions.

58. The Authority also considers that the nominative and non-transferable nature of approval is justified in view of the need for product traceability and quality control, and appears proportionate to the legitimate public health objective pursued (art. LP 14).

59. The draft law does not specify ***the duration of the approval issued or renewed*** by the President of French Polynesia, following appraisal by the department in charge of agriculture. This must also be set by decree by the Council of Ministers. The country will have to ensure that this is not abnormally long, in order to avoid locking up the market. In the event that the acquisition of specific equipment is a condition for obtaining approval, it will be necessary to ensure that the duration of authorizations is justified and limited to the amortization period of the initial investment.

Recommendations:

The Authority reiterates that the rules for granting authorizations must not prevent the entry of new players, and recommends :

1. Include incompatibilities in the conditions of appointment to the advisory board, to ensure impartiality and the absence of conflicts of interest.
2. In the rules governing the conduct of advisory board meetings, include rules on deferral to ensure that none of the members present is in a conflict of interest situation with regard to the item submitted for consultation.
3. Include in the draft law of the country that the procedures for granting, renewing and withdrawing approvals must be based on objective, transparent and non-discriminatory criteria.
4. Include in the draft law of the country that the duration of approval must be based on objective, transparent and non-discriminatory criteria, and where appropriate capped at the amortization period of the initial material investment.
5. Distinguish between the activity of importing seeds and the activity of controlling the cultivation fields of cannabis without narcotic properties.
6. In the event of an import license and a cultivation authorization being issued simultaneously to one and the same person, we must take care not to encourage the emergence of a dominant or monopoly position.

4. PROVISIONS CONCERNING MEDICINES CONTAINING CANNABIS OR CANNABINOIDS

60. ***Authorizations***. The country's bill introduces provisions concerning medicines containing cannabis or cannabinoids (art. LP 39 to LP 40). It modifies article 18 of the 1978 deliberation by authorizing medicines containing cannabis or cannabinoids (art. LP 39). Pharmaceutical wholesalers and in-house pharmacies are authorized to import Cannabis sativa L. plants for the preparation of medicines, and healthcare professionals are authorized to issue cannabis-based medical prescriptions. In addition, the use of foreign pharmaceutical specialties containing cannabis or cannabinoids that have not been authorized for marketing in mainland France is permitted (art. LP 40). These provisions do not raise any competition issues.

5. DECLARING THE CULTIVATION OF CANNABIS WITHOUT NARCOTIC PROPERTIES

61. The country's draft law introduces a system whereby the cultivation of cannabis without narcotic properties must be declared to the department in charge of agriculture (art. LP 24). This declaration covers :

- the acquisition and possession of cannabis seeds for cultivation ;
- sowing, plantation maintenance, harvesting, storage and packaging of cannabis ;
- possession and transfer of the harvest.

62. ***The content of the declaration file and the supporting documents to be submitted*** will be defined in an order issued by the Council of Ministers. The declaration file must contain *at least* the following information: the identity of the applicant, a copy of his or her valid agricultural and lagoon fisheries card, the location and description of the project site, the maximum surface area of the plots to be cultivated, the varieties and maximum quantities of seed to be purchased, the identity of the approved

seed supplier, the maximum number of plants that can be grown, the cultivation methods and potential outlets (art. LP 25).

63. The draft law specifies that the department in charge of agriculture has two months to check that the application is complete (art. LP 26). An acknowledgement of receipt, equivalent to authorization to start cultivation, is issued for complete applications. In the event of an incomplete application, a letter is sent to the applicant, who has one month from the date of notification to submit the requested information. Failure to do so will result in the application being closed and no acknowledgement of receipt issued.

64. ***Limitations***. The country's bill introduces a provision enabling the department in charge of agriculture to reject any new declaration, if the levels of occupation of land for agricultural purposes dedicated to cultivation (art. LP 15) have reached their maximum authorized level (art. 27). It also introduces other limitations on the granting of authorization, with the aim of preserving crop diversity, promoting food self-sufficiency or ensuring environmental protection. Thus, under the terms of this article, the country may set by decree :

1°) maximum cultivation areas and maximum number of plants per person;

2°) a maximum rate of agricultural land use for cannabis cultivation;

3°) a maximum number of persons authorized to declare a cannabis cultivation activity;

4°) limiting distances from certain establishments.

65. Generally speaking, the Autorité considers that market restrictions introduced by regulation are justified for reasons of general interest, provided that other solutions less damaging to economic freedom cannot be envisaged.

66. However, the justifications are stated in very general terms, such as the need to preserve crop diversity, promote food self-sufficiency or ensure environmental and economic protection.

67. With regard to the geographical restrictions imposed by this article, and as the Autorité noted in its previous opinion[18] , there are a number of issues at stake: for reasons of public order and health, these crops must not be grown in densely populated areas, thus attracting covetousness, or near schools, given the CBD or even THC content of the plants grown. What's more, the specifications for cannabis plant cultivation have not yet been drawn up, so if the plants are to be grown in open fields rather than greenhouses, there is a risk that THC-free plants will be pollinated by neighboring illegal plants with a high THC content. Potential geographical restrictions therefore appear proportionate in these respects.

68. Examination of the draft text shows that no geographical area has yet been determined, and that the country had not planned to allocate public land or agricultural allotments to cannabis cultivation. With regard to restrictions on the maximum surface area for cultivation, the maximum number of plants per registered person, and the maximum number of persons authorized to register a cannabis cultivation activity, the country's draft law does not provide any justification for these restrictions.

69. Consequently, the Authority is not in a position to give an opinion on these restrictions of competition that could lead to the rejection of cultivation authorization applications. In any case, the Authority reiterates that rejection criteria must be objective, transparent and non-discriminatory, so as not to distort competition.

70. In addition to the *above-mentioned* restrictions, the only criterion for issuing an authorization set out in the draft law of the country under review is the completeness of the file. However, insofar as other criteria are attached to the issuance of authorization, the Authority recommends that the implementing decree include an exhaustive list of documents and information, to ensure that the content of the declaration file is transparent, objective and non-discriminatory, otherwise unjustified inequalities of treatment could be introduced.

71. Lastly, in the absence of a clear definition of the ***duration of authorizations*** in the law of the land, the first players to position themselves could *de facto* foreclose the market, due to the restrictions imposed

[18] Opinion no. 2022-A0-04 of November 8, 2022, cited above.

in terms of land occupation. To avoid this foreclosure phenomenon, authorization durations should be justified and capped at the length of the production cycle. To avoid distorting competition, these restrictions must apply to all market players, without discrimination.

72. ***Control and sanctions.*** Section VI of the draft loi du pays sets out the framework for control and administrative sanctions applicable to the activities set out in Chapter III of the present loi du pays. The department in charge of agriculture is responsible for monitoring compliance with the provisions of Chapter III. Accordingly, any holder of an approval or any declarant in an irregular situation will be given formal notice to regularize their situation within a given timeframe. Should they fail to do so, the President of French Polynesia may suspend or withdraw their approval or cultivation authorization (article LP 34).

Recommendations:

The Authority reiterates that the rules for granting authorizations for the cultivation of cannabis without narcotic properties must not prevent the entry of new players, and recommends :

7. Include in the country's draft law that the procedures for granting, renewing, withdrawing and rejecting licenses must be based on objective, transparent and non-discriminatory criteria.

8. Ensure that the authorization period is justified and limited to the length of the production cycle.

6. ON THE BAN ON CUTTINGS

73. Article LP 18 IV of the 1978 deliberation, as amended by article LP 4 of the present draft law, prohibits the practice of cuttings. However, the industry players interviewed feel that taking cuttings has certain advantages, as it ensures the homogeneity and stability of the cuttings.

74. For them, this technique also avoids certain risks associated with planting, such as hermaphroditic plants with the risk of producing seeds and the risk of contaminating other nearby fields.

75. Following discussions with players in the sector, it would appear that the cutting technique could also offer the advantage of being less expensive than importing seeds, and would eventually enable self-sufficiency through local production, so that the country would no longer be dependent on seed imports, the costs of which could prove prohibitive.

76. From a competitive point of view, banning cuttings could lead to a double restriction of competition. On the one hand, it would force growers to source seeds only through imports, even though local production could be supplied through a local cuttings subsidiary, which would be potentially more economically advantageous. On the other hand, if the conditions for approval turn out to be highly restrictive, and only one player is in a position to meet these criteria, banning cuttings would favour this single player to the detriment of growers, and could end up generating a rent for this player without any incentive to be more economically efficient or to innovate.

Recommendations:

The Authority reiterates that the rules for granting authorizations must not prevent the entry of new players, and recommends :

9. Allowing cuttings from cannabis plants that have demonstrated their stability.

7. THE INTRODUCTION OF QUOTAS

77. The country's draft law provides for the possibility of setting, by order of the Council of Ministers, the maximum quantities that may be imported by a single authorized person in the course of a calendar year (art. LP 17). It also provides for the possibility of setting, by order of the Council of Ministers, maximum cultivation areas and a maximum number of plants per registered person (art. LP 15).

78. In any case, and as stated by the Autorité in its previous opinion on poisonous substances[19] , the competition authorities in their decision-making practice consider that such a production quota system is purely and simply an administered, non-market management system, which by its very nature leaves no room for market mechanisms where competition rules could normally apply. This point has been extensively developed in several of the Authority's previous opinions[20] .

79. A risk of undermining competition may be identified if quotas are not allocated individually to producers, but rather to one or more producer organizations (hereinafter "POs"). This does not appear to be the approach adopted in the present case, since the draft text takes care to specify, as seen *above*, that approvals and authorizations are granted by name to a natural person, in a personal capacity or as the legal representative of the legal entity, responsible for the cultivation of cannabis free of narcotic properties. In the absence of precise practical details, however, it is worth pointing out the pitfalls associated with allocating collective quotas to POs.

80. Schematically, this system would involve allocating a global production quota to one (or more) POs, which would then allocate individual sub-quotas to their members. Two types of distortion of competition could then arise. Firstly, the key to allocating collective production quotas among the various POs must be perfectly transparent, objective and non-discriminatory, otherwise it will introduce inequalities of supply that are unjustified from the point of view of economic rationality. Secondly, there is a risk of discrimination against new entrants who would need to join a PO to gain access to the resource. This risk is heightened by the fact that POs may not be obliged to accept a membership application from a professional, or to justify their refusal. There is therefore a risk that this system could create a disincentive for new entrants to enter the market for the production of cannabis and its derivatives, without this situation being justified by the merits of the operators in question.

81. A tried and tested solution, therefore, is to opt - as the draft text appears to do - for individually allocated quotas for importers and growers. This system would enable them to be allocated, on an individual basis, the right to import and produce a set quantity of cannabis seeds and plants over a given period.

82. Furthermore, in order to maximize collective well-being, the question of the transferability of these individual quotas between competing importers could be raised. Nevertheless, as the draft law of the country takes care to specify the non-transferability of the authorizations, in view of the imperatives of public health and quality control of narcotics products, it seems justified to set this aside.

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[19] Opinion no. 2022-A0-04 of November 8, 2022, cited above.

[20] See in particular Opinion No. 2016-A-03 of December 9, 2016 on the draft law of the country regulating professional activities related to the production and marketing of pearl and mother-of-pearl products in French Polynesia.

Recommendations:

With regard to quotas, it is proposed to :

10. Ensure that these are individual production quotas.

Deliberated on the report by Mariko Ishibashi, *rapporteur*, and the contributions of Frédéric Paillusson, *deputy general rapporteur*, and Alexandre Raguideau, *rapporteur*, by Johanne Peyre, *chairman*, Ingrid Izquierdo and Pierre Frébault, *full members*.

The Chairman

Johanne Peyre