



Autorité de la Concurrence
de la Nouvelle-Calédonie

**Opinion n°2024-A-01 of 11 March 2024
on the Authority's referral of the preliminary local draft legislation for better
connectivity in New Caledonia**

**Only the French version is authentic and it prevails in the event of its
differing from the translated version**

Summary¹

The *Autorité de la concurrence de la Nouvelle-Calédonie* (hereinafter "the *Autorité*") was requested by the government of New-Caledonia on January 17, 2024, to provide an opinion on the preliminary local draft legislation for better connectivity in New Caledonia, under Article Lp. 462-1 of the Commercial Code applicable in New-Caledonia (Code de commerce).

The proposed text primarily aims at **opening the Internet access markets to new players**, particularly satellite operators (hereinafter "SO"), while maintaining the public monopoly of the OPT-NC over other networks and services.

Key points of the preliminary local draft legislation include **the definition of a "telecommunications operator" status**, the introduction of **an administrative authorisation** for the establishment of public-access networks and the provision of public Internet access, the creation of **an authorisation for the use of frequency** (hereinafter "AUF") for operators requiring radio frequency assignments, and the definition of legal obligations and sanctions for operators.

Firstly, the *Autorité* finds that difficulties arise from **the duality of the telecommunications sector in New-Caledonia**, where the OPT-NC holds the monopoly over public telecommunications services, **while the Internet access market is open to competition**. The proposed text thus grants a "telecommunications operator" status to Internet access providers (hereinafter "IAP") and SOs, who **remain excluded from other telecommunications markets, including mobile and fixed-line telephony**.

The *Autorité* emphasizes the need for precautions regarding **the articulation of the OPT-NC's monopolistic missions and those exercised in the competitive market**, especially concerning the **risk of cross-subsidies**.

Regarding the introduction of an administrative authorisation for IAPs and SOs to establish a network and provide telecommunications services, the *Autorité* rather recommends the implementation of **a declarative regime, which is less restrictive of competition**. The *Autorité* indeed notes that **the conditions attached to the administrative authorisation appear overly broad, sometimes unjustified, or even irrelevant** in terms of the risk of restriction and distortion

¹ This summary is strictly for information purposes. Only the numbered reasons of the opinion are authentic.

on competing actors. Additionally, the authorisation procedure is lacking in terms of timeframe and procedural guarantees.

Furthermore, the *Autorité* believes that **independent regulation** by an **impartial body with adequate expertise** is essential to promptly ensure transparent, objective, and non-discriminatory treatment for operators active in these competitive markets and which are welcoming new entrants.

The *Autorité* also observes a need for **objectivity and transparency regarding the conditions of the AUF**. Moreover, while the calculation of fees is crucial in the context of opening the provision of Internet access to competition by SOs, the *Autorité* finds that the calculation method is not specified and is deferred to a subsequent decree.

Regarding the legal obligations of the telecommunications operators, the *Autorité* notes that the standard clauses provided by the preliminary local draft legislation are substantial as they apply to actors operating in a competitive market. Therefore, **they must be formulated transparently and in a non-discriminatory way**. Additionally, the *Autorité*, not having had access to the various draft specifications, has formulated general observations, particularly regarding **the distinct treatment of IAPs and the OPT-NC for the specifications**, as well as regarding **the OPT-NC's tariff grid**, which is **identical for Internet service providers** (hereinafter "ISP") **and IAPs, approved by the government**, or because it **ties the purchase of international bandwidth**.

Finally, the *Autorité* has sought to clarify the regulation of independent networks to limit real or potential obstacles to competition in these markets. The *Autorité* especially believes that **the procedure for issuing authorisations should evolve** to ensure **more effective competitive conditions** in the market for independent networks opened to competition.

In light of the above, the *Autorité* provides 9 recommendations aimed at presenting the various actors with the framework and means necessary to foster effective competition in the telecommunications sector, ultimately benefiting consumers. The *Autorité* is of the opinion:

Recommendation n° 1:

- that a strict separation be implemented in the telecommunications sector between the activities of the OPT-NC under monopoly and the OPT-NC's activities carried out in competitive markets, from an accounting, and even functional standpoint.

Recommendation n° 2:

- primarily, that a declarative regime be substituted for the administrative authorisation regime required of operators to establish a network and provide a telecommunications service;
- within this framework, that declarative formalities do not exceed the minimum requirements set out in Article 12 of the European Electronic Communications Code. In this respect, and in practice, the previous form provided by the ARCEP could be used as part of this declarative approach;
- Failing that, and subsidiarily, if the authorisation regime were to remain transitional as suggested by the *Conseil d'État*'s opinion:
 - o that the conditions listed under items 1, 3, and 5 of the new Article Lp. 213-1 be removed;
 - o that the condition relating to frequency availability be restricted to SOs only;
 - o that the aforementioned article expressly states that the authorisation is granted "*under conditions that are objective, transparent, and non-discriminatory, ensuring compliance with the principle of effective competition*";

- that a deadline, if necessary renewable, be set for the authorisation procedure; that the absence of an authorisation within the set deadline be deemed acceptance;
- that a refusal procedure be structured with procedural safeguards; that the rationale for a refusal of authorisation issuance be mentioned in the text and that the decision of refusal be legally and factually motivated.

Recommendation n° 3:

- to establish an independent regulation as soon as possible;
- that regardless of the form chosen for this purpose (independent *ad hoc* authority, an addition to the missions of the *Autorité*), the regulatory body should possess the essential attributes of its effectiveness, including independence, decision-making and sanctioning competence, expertise, as well as adequate human and technical resources (agreements with national regulatory authorities to provide technical expertise support if necessary and following the chosen approach).

Recommendation n° 4:

- that the AUF be issued by a body independent of the government, as well as public and private operators in the sector, in accordance with the regulatory model that would be chosen.

Recommendation n° 5:

- that the procedure and conditions attached to the issuance of the AUF follow those recommended by the *Autorité* regarding the administrative authorisation regime for IAPs and SOs to establish a network and provide a telecommunications service (*cf.* Recommendation 2);
- that the calculation method of the fee be aligned with the provisions of decree n°2007-1532 of October 24, 2007; failing this, and in any case, that the calculation method be developed objectively and transparently so as not to constitute a barrier to entry or to competition from operators.

Recommendation n° 6:

- that the draft legislation provides for the specifications to fall under an independent regulator, be established under transparent and non-discriminatory conditions, and that the implementing decree be based, where relevant, on articles L.33-1 and D.98-3 to D.98-14 of the French Postal and Electronic Communications Code (Code des postes et des communications électroniques).

Recommendation n° 7:

- that the tariff grid of the OPT-NC, for the access to its network by IAPs, provides the necessary guarantees for the proper functioning of competitive markets and, as such:
 - be established objectively, transparently, and in a non-discriminatory way; in particular that, on one hand, the tariffs correspond to specifically identified services, distinct from each other, and on the other hand, that this tariff grid is sufficiently detailed and broken down in the description of its services so that the beneficiary (ISP or IAP) does not have to pay for elements or network resources that are not necessary for the provision of the service;
 - does not include services to IAPs already billed elsewhere, particularly with regard to costs billed by the OPT-NC directly to the consumer under *Optimo* and/or fixed telephone subscription;
 - presents cost-oriented tariffs, complying with the principles and objectives of efficiency, non-discrimination, and that they are not subject to any price squeeze effect;

- IAPs' access to the international bandwidth market should be authorised as since international connectivity capacity services are open to SO's competition;
- be subject to the validation of an independent regulator.

Recommendation n° 8:

- that the subscription to a fixed line from the OPT-NC by the end customer, to access an Internet access service by an IAP, no longer be linked to Internet access provision.

Recommendation n° 9:

- to align, or even merge, the terms for granting operating authorisations for independent networks with those provided for the AUF of networks open to the public by reforming Articles 231-1 and 231-2 of the New-Caledonian Post and Telecommunications Code (Code des postes et des télécommunications de la Nouvelle-Calédonie, hereinafter CPT-NC);
- to delete from section II of Article 213-1 the criterion f) relating "*to the existence of services provided by the office of posts and telecommunications capable of meeting the technical needs of the applicant*" from the conditions for granting the authorisation, which confers without justification to the OPT-NC a more favorable treatment than other players operating in this historically open to competition market.

The *Autorité* also observes that it would be necessary:

- to clarify Article 212-1 of the CPT-NC to exempt the authorisation for independent networks from the opinion of the telecommunications advisory committee;
- to include wired independent networks in the free networks as soon as they have obtained the necessary urban planning authorisations referred to in item c) of Article 231-1;
- that a deadline, possibly renewable once upon justification, structures the authorisation procedure; that at the end of this period, the authorisation shall be deemed granted unless expressly rejected;
- to ensure that the procedure for independent networks is also "transparent, objective, and non-discriminatory".