

**Opinion no. 2025-A-04 of 20 June 2025  
on the draft country law amending the legislative part of the Commercial Code  
applicable in New Caledonia (Book IV)**

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

## Summary<sup>1</sup>

On 11 April 2025, the Government of New Caledonia requested the *Autorité de la concurrence de la Nouvelle-Calédonie* (hereinafter "the *Autorité*") opinion's on the draft country law amending the legislative part of the Commercial Code, on the basis of Article Lp. 462-2 of the Code.

This text aims in particular to clarify and adapt the rules applicable to anticompetitive practices, merger and retail expansion control, market regulation, and restrictive trade practices, while also reforming certain aspects of the *Autorité*'s internal functioning.

The *Autorité* issues a favourable opinion on the reform, while making **19 recommendations** intended to strengthen its coherence, legal certainty, and effectiveness.

**Regarding anticompetitive practices**, the *Autorité* supports the inclusion of excessive margins or prices among abuses of a dominant position, but recommends that they be directly integrated into the existing list of abuses in the first paragraph of Article Lp. 421-2, without creating a separate paragraph (Recommendation No. 1). It welcomes the extension of the structural injunction mechanism provided for in Article Lp. 422-1, which would allow to act more effectively on the structural causes of a market malfunction, but proposes an alternative wording based on the prior existence of a dominant position, in order to preserve legal certainty and the constitutionality of the system (Recommendation No. 2). Finally, it recommends that the possibility of exempting certain anticompetitive practices be reserved to a deliberation of the Congress of New Caledonia, rather than by a simple government decree (Recommendation No. 3).

**As regards merger and retail expansion control**, the *Autorité* warns against the multiplication of referrals to government decrees, including for statutory time limits and procedures falling within the legislative domain or governing the exercise of the rights of defense, and recommends direct codification in the Commercial Code (Recommendation No. 4), with, if necessary, the possibility of suspending deadlines to strengthen procedural flexibility (Recommendation No. 5). It also proposes amendments to certain provisions to clarify the procedural safeguards offered to companies prosecuted for breaches of merger and retail expansion rules (Recommendation No. 6), and to avoid any confusion regarding the conduct of in-depth review (Recommendation No. 7).

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

From a technical perspective, the *Autorité* recommends:

- simplifying the drafting of the exclusions from its jurisdiction provided for in Article Lp. 431-2 (Recommendation No. 8) ;
- clarifying the conditions for the notification of changes in commercial activity (Recommendation No. 9) ;
- incorporating into the regulatory part of the Commercial Code the contents of notification files currently set out by decree, in order to improve readability and remove non-essential information (Recommendation No. 10).

**Regarding market regulation measures**, the *Autorité* regrets the absence of a comprehensive reform, despite the introduction of two new mechanisms: the mandatory opinion of the *Autorité* in the event of renewal of such measures, and an exemption regime for businesses whose production facilities have been destroyed. As regards the procedure for requesting the *Autorité*'s opinion on applications for the introduction, modification or renewal of market regulation measures, the *Autorité* recommends that consultation should not be systematic but left to the discretion of the government or to its own initiative when a significant competition risk is identified. To enable it to make effective use of this power to deliver opinions on its own initiative, the *Autorité* proposes that the government inform it of any request submitted.

It also recommends unifying response times by replacing the specific 20-day period provided for renewals with the 40-working-day period set by the Commercial Code for other opinions (Recommendations Nos. 11 and 12). As regards the exceptional regime, the *Autorité* notes its adoption, without real prior consultation or impact assessment. It regrets that this mechanism replaces the targeted aid schemes it had recommended following the May 2024 riots.

**Regarding restrictive trade practices**, the *Autorité* approves the clarifications brought to payment periods, in particular concerning the starting point of the deadline, now set at the date of issue of the invoice. However, it recommends raising the sanction caps in case of non-compliance with these deadlines, to ensure their effective deterrence (Recommendation No. 13). More broadly, it proposes harmonising the sanctions applicable to all breaches under Title IV of Book IV of the Commercial Code, whether relating to transparency obligations or restrictive practices of competition, in order to reinforce the coherence and effectiveness of the sanctioning system (Recommendation No. 14). It also reiterates its recommendation to abolish the prohibition on resale at a loss codified in Article Lp. 442-2, which restricts distributors' pricing freedom and limits their ability to pass on cost reductions to consumers (Recommendation No. 15).

Finally, **as regards the *Autorité*'s functioning**, the draft country law proposes several advances, which the *Autorité* welcomes while suggesting important adjustments to strengthen its effectiveness. It recommends explicitly setting out in the Code the rules on interim appointments of the President and the General Rapporteur in the event of a vacancy (Recommendation No. 16), aligning the incompatibility rules of the General Rapporteur with those applicable to members of the Board (Recommendation No. 17), broadening the list of decisions that may be taken directly by the President without convening the Board, in order to streamline case handling (Recommendation No. 18), and establishing systematic follow-up of its recommendations, within a framework of public policy evaluation (Recommendation No. 19).

All of these recommendations are intended to usefully assist the government in its reform, by ensuring a better balance between procedural flexibility, legal certainty, and the effectiveness of the instruments.