Food distribution, fuel distribution, maritime services and waste management: the Autorité delivers its opinion on the competitive situation in Corsica island

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Following an investigation lasting several months, the *Autorité* today issues its opinion on the competitive situation on the island.

The *Autorité* carried out an in-depth analysis of the level of economic concentration in four sectors: maritime services to Corsica, fuel distribution, food distribution in supermarkets and hypermarkets and waste management.

The *Autorité* issues five sets of recommendations designed to stimulate competition and tackle the high cost of living.

Background

In February 2019, Bruno Le Maire, French Minister of Economy, Finance and Economic Recovery, referred to the *Autorité de la concurrence* a request for an opinion on the competitive situation in Corsica. In particular, he invited it to analyse the level of concentration in the Corsican economy and its impact on local competition, and to make recommendations to improve the functioning of competition on markets on the island.

The *Autorité* focused its work on four sectors that are particularly important from a competitive point of view and which are at the crux of the purchasing power issues in Corsica: maritime transport, fuel distribution, hypermarkets and supermarkets and waste management.

The *Autorité* carried out an in-depth investigation spanning 18 months, during which is interviewed all of the economic, political, institutional and trade union stakeholders. It visited the island twice, and held its first ever delocalised session of the *College* in Bastia, which included 2 days of hearings. The *Autorité* included in its analysis specific focuses aimed at assessing the impact of the Covid-19 crisis on the various sectors studied.

At the end of its investigation, the *Autorité* has issued a broad set of recommendations to the public authorities with a view to stimulating competition on the island for the benefit of Corsican consumers. These recommendations include structural proposals, aimed at giving the *Autorité de la concurrence* additional investigation powers, and targeted proposals, in particular with regard to maritime services and fuel supply to the island.

1 - The Autorité's cross-cutting findings on the level of concentration in the Corsican economy and its recommendations for improving the regulation of competition

After examining several sectors, including fuel distribution, food distribution and waste management, **the *Autorité* is convinced that new legal tools would make it possible to respond, more effectively than at present, to the competition concerns** resulting from a **structurally high level of market concentration** in certain parts of mainland France, including in Corsica.

Entire sectors of the economy are affected a lack of competition due to the geographical and economic characteristics of these territories. These regional specificities may, for example, be due to logistical constraints linked to their insularity or the presence of mountain ranges or constraints resulting from the prevalence of tourist activities in the local economy.

When such a region is faced with this type of difficulty, **the *Autorité* recommends that the public authorities adopt innovative mechanisms to ensure that competition policy is tailored to these specificities**.

In order to prevent excessive concentration in certain sectors as a result of uncontrolled mergers and acquisitions, it would appear useful to grant the *Autorité* the power to examine, in a targeted manner, certain merger transactions below the thresholds. Although they do not reach the controllability thresholds set in terms of turnover, some transactions that lead to the creation or consolidation of dominant positions are nonetheless "structuring" for the local economy and can have lasting effects on the competitive dynamic.

In addition, where sectors are persistently highly concentrated and this leads to proven disturbances for businesses and consumers, a structural intervention tool would be useful. It would allow the *Autorité* to order structural or behavioural remedies.

Finally, as a supplementary measure in the event that none of these mechanisms is able to restore the normal functioning of competition, sectoral regulatory tools, such as oversight of wholesale prices and conditions of access to certain "essential infrastructure", could be envisaged in order to limit the effects of this lack of competition.

Recommendations for a reform of competition policy tools

The *Autorité* considers that the competition concerns identified in Corsica could be addressed more effectively through new legal instruments. These tools would be used in mainland territories suffering from a structural lack of competition due to geographical and economic specificities (linked, for example, to insularity or the presence of mountain ranges or the prevalence of tourist activities in the local economy). In order to effectively prevent excessive market concentration in these same territories, the scope of merger control would be extended to allow for the

targeted examination of mergers and acquisitions that are likely to strengthen local monopolies, oligopolies or conglomerates.

1° Subject to the constitutionality of such territorial differentiation measures - a question that the *Autorité de la concurrence* is not competent to rule on - the *Autorité* recommends that the public authorities :

1. make provision for the *Autorité* to **impose remedies in these territories in the event of substantial competition concerns, even in the absence of a dominant position** (based on a mechanism that draws on the "new competition tools" proposed by the European Commission at European Union level), and, **failing this, to issue structural injunctions in the event of the existence of a dominant position** (based on a mechanism that resembles the mechanism provided for in Article L. 752-27 of the French Commercial Code (*Code de commerce*) for French overseas communities);
2. allow the Government to **adopt, by decree of the French Administrative Supreme Court (*Conseil d'Etat*) following an opinion of the *Autorité de la concurrence*, the necessary measures when wholesale markets for goods and services display shortcomings, in particular with regard to supply, transport, storage or distribution**. This system would be based on the system provided for in Article L. 410 3 of the French Commercial Code (*Code de commerce*) for French overseas communities. The measures thus decreed could relate, as currently provided for in Article L. 410-3 for French overseas communities, to access to these markets, the absence of price discrimination, the fairness of transactions, the margins of operators and the management of essential facilities, taking into account the protection of consumer interests;

2° The *Autorité* also recommends that, if none of the above mechanisms succeed in restoring the normal functioning of competition in these territories, the Government should consider **regulating prices "*in the sectors or areas where price competition is limited due either to monopoly situations or persistent supply difficulties* " by decree of the French Administrative Supreme Court (*Conseil d'Etat*) after consulting the *Autorité de la concurrence***. This price regulation would be decided, if necessary, in accordance with the mechanism provided for in Article L. 410 2 of the French Commercial Code (*Code de commerce*).

3° Finally, the *Autorité* recommends that the legislator grant it the **power to start examination proceedings *ex officio* of economic concentrations**

(mergers/acquisitions) which are below the current controllability thresholds set in terms of turnover, but would appear likely to give rise to substantial competition concerns. This addition to the current merger control system would give it the power to examine, in a targeted manner, transactions that have a significant impact on a territory such as Corsica, in particular when they lead to the creation of dominant positions or the takeover of essential infrastructure.

2 - Findings and recommendations of the Autorité in each of the economic sectors examined

Maritime transport: giving the transport regulatory body the power to assess public service needs and to define the terms and conditions of the provision of services to Corsica

Since the 1970s, the public maritime transport service between Corsica and the mainland has been organised in accordance with the principle of 'territorial continuity', which aims in particular to compensate for the island's insularity and to provide services to the island in accordance with terms and conditions and fares that are as close as possible to those applicable to exclusively mainland transport links.

Maritime services to Corsica are characterised by a high level of public intervention, with competing operators subject to a system of public service obligations (applicable to any operator wishing to serve Corsica from mainland France) operating alongside operators that are subject to public service delegation contracts, which currently operate several routes between Marseille and Corsica. This sector is subject to a set of binding European and national rules (internal market, state aid, public procurement, competition), which require in

particular that a "public service need" resulting from a lack of private initiative be demonstrated prior to any public intervention. The framework applicable in this field is the so-called "SNCM test" resulting from the case law of the General Court of the European Union[1] ; this test requires, in particular, that assessments of the need for a public service be carried out before the public authorities can establish a public service delegation. However, despite the improvements made since the time of the SNCM case, the definition of the scope and level of intervention of the transport organising authority is still subject to significant methodological requirements established by the European Commission. The Commission is extremely vigilant about the public financing of services of general economic interest (SGEI) in the European Union within the framework of its state aid control mission.

- *A level of public intervention that must be strictly proportionate*

At present, the Corsican local and regional authority *[Collectivité de Corse]* justifies the conclusion of public service delegation contracts (PSD) on the basis of studies carried out in 2018 and 2019, which identify a ***quantitative*** public service need for the transport of goods and various categories of passengers (sick people, students and trailer truck drivers) for all Corsican ports. For the ports of Propriano and Porto-Vecchio, these studies identify a similar need for the transport of all passengers. In addition, a ***qualitative*** public service need (in terms of frequency and fares) has been identified on all routes, justifying, in parallel, the maintenance of a system of public service obligations (PSOs) for both goods and passengers.

However, there are some methodological weaknesses in these studies: the number of participants in the consultations and the market tests carried out by the Corsican local and regional authority are systematically limited to three operators already present on the market; the evaluation of the quantitative needs in terms of passenger transport from the ports of Propriano and Porto-Vecchio or from the other ports for sick people, students and trailer truck drivers needs to be substantiated by economic data ; the question of the substitutability of Marseilles for other mainland ports (e.g., Toulon) warrants further investigation;

no distinction is made between the different types of goods and passengers; no account is taken of competition from air transport. These various aspects warrant that the preliminary studies be complemented in order to inform as well as possible the decisions of the public authorities.

- *Rigidities observed in the operation of the PSDs and PSOs*

The possibility of making the PSDs more flexible in terms of schedules and trip frequencies, not permitting stop-overs, as well as the type of vessels that can be used could also be raised in order to optimise the organisation of maritime services to Corsica.

Certain rigidities could unnecessarily restrict other competitors' access to the market for maritime services. For example, the PSD limits the use of "Ro-Ro" vessels (primarily used for freight transport) on Marseille/Corsica routes, even though the port of Marseille has infrastructure suited to this type of freight transport. As Ro-Ro vessels are not subject to the same requirements in terms of equipment, safety, insurance and personnel as passenger vessels, they are less costly for freight transport purposes (costs on average 50% lower), which could allow for public subsidy savings to be made and freight transport costs to be reduced.

[1] General Court of the Court of Justice of the European Union,[1] March 2017, SNCM v Commission, Case T-454/13.

Recommendations on maritime passenger and freight services between Corsica and the mainland

In order to strike a balance between the need to guarantee the public service of maritime transport between Corsica and the mainland and compliance with the competition and internal market rules of the European Union, a detailed framework for the organisation of maritime services is required. Prior technical expert assessments are of paramount importance in order to ensure that public intervention in this sector remains necessary and proportionate to the market failures identified.

With a view to securing this public service, strengthening competitive emulation in this sector and providing users of maritime transport between Corsica and mainland France with a quality public service at a managed cost for both users and taxpayers, the *Autorité* recommends, first of all, that the**transport regulatory body be granted new advisory powers under the law**. **These powers would include an assessment of the need for a public maritime transport service provided by the Corsican local and regional authority, the proportionality, where applicable, of the proposed organisational arrangements for this public service and the implementing arrangements envisaged by the Corsican local and regional authority.**

In accordance with the principle of the independence of local and regional authorities, the Corsican local and regional authority would not be bound by this opinion, but could draw on preliminary assessments of the need for a public service carried out completely independently by this sectoral regulatory authority, which has expertise in transport and pricing. The high quality of these preliminary expert assessments would be an asset in ensuring that the system is fully compatible with European Union rules, of which the European Commission is the guardian.

The *Autorité* also recommends that the authority that organises maritime transport between Corsica and mainland France, which would not be bound by the opinion of the transport regulatory body, **re-examine the validity of certain requirements imposed under the current PSD contracts and PSOs (in particular the choice of vessels and service schedule requirements) in light of this expert assessment**.

Fuel distribution: better regulation of the fuel storage and supply monopoly in Corsica

Despite a reduced VAT rate of 13%, compared with 20% on the mainland, the fuel price differential between Corsica and the mainland is significant - around +6.7% for diesel and +5.3% for SP95 (INSEE 2015 data). This differential weighs heavily on the budget of Corsican households, which are highly dependent on cars to move around.

- *Structural reasons partially account for the additional fuel costs*

Insularity, topography and seasonal demand explain, in part, these higher prices. Corsica is supplied with fuel by sea alone, which makes its transport more expensive than in other mainland areas. Once on the island, transporting fuel to petrol stations is also more expensive due to the topography of the area, with the mountainous terrain making travel times longer. In addition, the ***Autorité***'s investigation has highlighted the role that the storage capacity of Corsica's oil depots plays in the formation of fuel prices. These capacities, which would be sufficient for the needs of the resident population in the off-season, are too limited in the summer to meet tourist demand. The only two depots, located in Ajaccio and Bastia (30,000 m^3in total), are therefore managed on a "just-in-time" basis during the summer period, which leads to risks of fuel shortages or quotas, but can also give rise to significant additional costs.

- *Risks related to the conditions of access to storage infrastructure*

In addition to these structural factors relating to the island's geography and available infrastructure, the ***Autorité*** notes that the only two fuel storage depots on the island are controlled by a single player: Rubis group via the company ***Dépôts pétroliers de la Corse*** (DPLC). This monopoly was created following a gradual increase in Rubis Group's stake in DPLC between 2010 and 2017. This takeover can be seen as a takeover of an essential infrastructure [2], given the essential nature of the depots for all those involved in the distribution and sale of fuels on the island. Since another subsidiary of the group is also responsible for coordinating the supply of fuels distributed across Corsica, these depots must therefore be used for any fuel distribution to petrol stations in Corsica.

Fuels are sold downstream within the network of service stations through three oil operators: Rubis (Vito Corse), Total Corse (Total) and Ferrandi (Esso): each of the 133 service stations on the island operates under one of these brands.

The oligopolistic configuration of the fuel distribution sector does not seem to be open to challenge by the entry of low-cost retailers or supermarkets. These models of distribution of cheaper fuels are not favoured by the local public authorities, which prefer to maintain the territorial network of service stations on the island, some of which are sometimes the only local shops in some mountainous areas. This context does not foster the entry of new actors in Corsica.

[2] An essential infrastructure is a resource owned by an operator, which cannot be reproduced by competitors, and without which the latter would not be able to perform their activity.

Recommendations regarding the fuel distribution market in Corsica

There are specific structural constraints impacting the organisation of fuel distribution markets in Corsica, in particular the fact that access to oil depots is essential for any operator or potential operator wishing to supply a retail fuel distribution network (service stations) on the island.

Apart from the obligation to contribute to the constitution of strategic stocks, the current legal framework does not allow the public authorities to intervene effectively in the strategic decisions of companies managing storage infrastructure, even when this infrastructure is of an "essential" nature.

The *Autorité* accordingly recommends that the Government:

1 **adopt a new legal framework applicable to operators of storage infrastructure that is of an "essential" nature in order to guarantee security of supply more effectively** and also to prevent an under-dimensioning of capacities from giving rise to excessively frequent impositions of quotas or occurrence of shortages, which have negative repercussions for fuel distribution players and, *ultimately,* for Corsican consumers;

2 **examine the case for implementing on the fuel distribution markets in Corsica**, if the legislative and regulatory framework so permits, **structural measures to remedy the shortcomings observed**. In this respect, the recommendations issued by the *Autorité* with a view to adding to the body of competition policy tools could be particularly applicable to the storage and distribution of fuels.

Hypermarkets and supermarkets: revising the threshold for below-cost selling to take better account of the specific features of Corsica

Corsica is one of the regions in France with the lowest average incomes per capita: it was 1,669 euros per month in 2017, which is almost 5.1% below the national average (1,759 euros per month).

Measures have been taken by the public authorities to remedy this situation, such as the establishment since 1986 of 2.1% VAT on food for human consumption, compared with 5.5% or 20% on the mainland depending on the product category. In 2019, an initiative involving a basket of 230 low-priced products was set up by the Corsican local and regional authority and supermarket chains.

However, it should be noted that although the application of a reduced rate of VAT in Corsica was intended to tackle the high cost of living on the island, it has had very little effect on the final price paid by consumers, suggesting that the reduction in VAT has been captured by the sales margins of certain companies. Indeed, several economic studies point to the fact that consumer prices for food

products in supermarkets and hypermarkets are, overall, still higher in Corsica than on the mainland.

The higher prices observed, on average, in hypermarkets and supermarkets in Corsica are partly the result, as in the case of fuels, of constraints linked to insularity and seasonal demand. Having to use maritime transport lengthens the logistics chain from the purchasing offices in the south of France. The limited storage capacity of Corsican warehouses also means that more frequent deliveries of goods are required than on the mainland. This limited storage capacity means that they cannot benefit from the same discounts as on the mainland. Finally, the seasonal fluctuations in economic activity, with a high concentration of tourist activity during the summer period, mean that Corsican supermarkets and hypermarkets have to tailor their retail space and employment levels to the peak of summer demand, which generates specific additional costs (buildings, personnel). The commercial density of hypermarkets and supermarkets is also higher in Corsica than on the mainland (in 2018, 3,959 m ^{2}per 10,000 inhabitants in Corsica compared to 2,885 m^2 on the mainland, i.e. 37.2% more).

Despite the high level of presence of hypermarkets and supermarkets and even though certain areas, particularly in the suburbs of Ajaccio, have seen an increase in competition in recent years due to the establishment of large retail spaces, the *Autorité* notes that certain catchment areas are characterised by a high degree of concentration. This is for example the case in Grossetto-Prugna and Corte, which can contribute to the high price of products in these areas. It is not uncommon, in these catchment areas, for an operator to own more than 60% of the market share in terms of retail space. This lack of competitive stimulation and alternatives for consumers is a factor that contributes to the increase in prices in the areas affected.

Finally, some national and local regulations are difficult to reconcile with the objective of tackling high living costs. On the one hand, in a region where all foodstuffs are transported by sea, the ban on below-cost selling, which includes transport costs in the definition of the below-cost selling threshold, and, particularly, the trial of a 10 % increase in this threshold and the supervision of special offers provided for by the Agriculture and Food law penalise Corsican

consumers and the trade margin generated by this measure is not necessarily passed on to suppliers, in particular farmers. On the other hand, the establishment of new hypermarkets and supermarkets is nowadays hampered by strict local policies aimed at protecting local commerce. However, a weakening of competition, which is detrimental to the interests of consumers, resulting from the current levels of concentration, means that policy makers need to reconcile local urban planning objectives with the equally asserted desire to enable Corsican consumers to benefit from lower prices.

Recommendations for the hypermarket and supermarket sector

Owing to its island status, the share of transport costs in the actual purchase price of traders is higher in Corsica than elsewhere in mainland France. Furthermore, the experimental application of a compensator coefficient of 1.10 to these costs to take account of the 10 % increase in the below-cost selling threshold tends to increase, to the detriment of Corsican consumers, the inflationary effects of the ban on below-cost selling provided for in Article L. 442-5 of the French Commercial Code (*Code de commerce*).

Under these circumstances, the *Autorité* recommends that the legislator provide for **an exemption** for Corsica from the **ban on below-cost selling** (Article L. 442-5 of the French Commercial Code (*Code de commerce*)) and, at the very least, provide for a specific exemption from the **10 % increase in the below-cost selling threshold and the rules on special offers** provided for in the 2018 Agriculture and Food Law. Such a legislative exemption could be based on the derogation already provided for in Article 6 of Ordinance No. 2018-1128 of 12 December 2018 for French overseas territories and communities, on similar grounds pertaining to the high cost of living in the affected territories and the constraints linked to their remoteness.

Household waste management: quickly find a sustainable landfill or waste recovery solution for the island

Corsica produces more household waste per capital than the national average: 740 kg/inhabitant compared with 580 kg for the whole of France in 2018. In addition, the production of this waste is not uniform in respect of space and time:

- Firstly, population density varies greatly on the island: though low on average (38 inhabitants per km2 compared to 106 in France as a whole), it can reach more than 2,300 inhabitants per km2 in Bastia. In addition to the concentration of inhabitants, there is also the concentration of tourists on the coast, which has a clear impact on the geographical distribution of the waste produced.
- Secondly, the influx of tourists leads to a significant increase in the amount of waste produced during the summer period.

The result is a doubly complex situation. In rural and remote areas, the low volume of waste is not conducive to the installation of waste management infrastructure, which is considered to be uneconomic. At the same time, insularity generates land constraints, which make it difficult to set up new waste collection and treatment centres in highly waste-producing and densely populated areas.

This situation generates a significant additional cost. Thus, the cost of the public waste service to be financed by the public authorities, also known as the assisted cost[3], is well above the national average: 243 € excl. tax compared with an average of 93 € excl. tax per capita in France. This additional cost of + 161 % is partly borne by Corsican taxpayers - through the household waste collection tax - whose average municipal rates are 5 percentage points higher than elsewhere in mainland France.

Despite the undeniable efforts made by stakeholders in Corsica to reduce and sort waste, the waste generation is increasing, particularly as a result of the

increase in the number of residents and tourists. Moreover, the waste recovery rate is below the national average: due to the lack of an incinerator on the island, waste continues to be placed in landfill at only two facilities, which currently operate on a just-in-time basis and will soon reach their maximum capacity. New sites in Moltifao or Giuncaggio, for example, could improve the total landfill capacity in Corsica, but they will only open, at best, in a relatively distant future.

This chronic waste treatment under-capacity on the island creates a context of scarcity that is not conducive to public tendering, which is needed in order to provide public household waste management services. Difficulties in finding bidders that submit reasonable financial bids have thus been observed, in particular by the Regional Court of Auditors in Corsica, in respect of public tenders awarded for the storage and road transportation of waste in Corsica and for the maritime transport of the same waste for treatment on the mainland.

[3] According to the definition given by the ADEME, this "assisted cost" of waste management comprises "*all costs (structure, collection, transport, etc.) minus industrial revenue (sales of materials and energy, services to third parties), support from eco-organisations (extended producer responsibility/ERP streams) and public aid*. *This cost reflects the residual cost to be financed by the public authorities. It is often expressed in euros per capita excluding tax as the financing of this cost is expressed using this unit of measurement and to show users the structure of the costs to be financed. When expressed in euros per tonne excluding tax, it accounts for the residual economic weight of each waste stream in order to put it into perspective* ". See the National benchmark of costs of the public waste prevention and management service - 2017 version, accessible online.

Recommendations for the household waste management sector

The high cost of managing household waste in Corsica places a high tax burden on the local tax payer compared with the national average. The lack of studies on

pricing along the value chain of household waste management in Corsica hampers the transparency of information relating to these public service activities. In addition, the lack of infrastructure leads to under-capacity for the treatment of residual household waste in Corsica, which gives rise to a scarcity rent that benefits suppliers of these services. This situation is likely to give rise to competition concerns in relation to the award of certain public tenders.

The conditions for the award of the public tenders concerned would also be better known to the public if the reports on the cost and quality of the management of this public service were made available on the Internet, as required by the regulations. Supervisory bodies would also benefit from better dissemination of essential public procurement data, which any public purchaser must make available in an open and freely reusable format. Improvements to the information available could include the financial bids of all successful and unsuccessful tenderers.

Until these enhanced management tools are fully operational, it would be useful to ensure that government officials responsible for enforcing competition rules systematically sit on tender committees.

Therefore, the *Autorité* recommends :

1 that the local and regional authorities responsible for the public management of waste in Corsica, and in particular SYVADEC :

- **have systematic economic studies carried out by an independent third party in order to detect abnormal additional costs generated by public procurement tenders at each stage in the waste management chain** (collection, recovery, disposal, transport);
- **disseminate widely and systematically to users**, in particular via their Internet site, **the annual reports on the price and quality of public waste management** provided for in Articles D. 2224-1 et seq. of the French Code of local and regional public authorities (*Code des collectivités territoriales*);
- **set up door-to-door waste collection and explore the possibility of tax incentives** to encourage waste producers to act responsibly and effectively reduce the tonnages of waste produced;

2 that the public authorities :

- **expand the list of "essential" data relating to public tenders and concession contracts** within the framework of the release of public procurement data provided for in Articles L. 2196 2 and L. 3131 1 of the French Public Procurement Code (*Code de la commande publique*) in order, in particular, for supervisory bodies to be able to obtain information concerning the bids of unsuccessful bidders while still complying with business secrecy rules;
- **ensure that a representative of the Corsican Regional Directorate for Business, Competition Policy, Consumer Affairs, Labour and Employment (Direccte) is systematically present at the meetings of the tender committees** convened in this sector;
- **have a study conducted by Direccte on price levels in the public waste management chain in Corsica**, along the same lines as the one conducted in the fuel sector, in order to identify possible anomalies;
- examine, on the basis of the conclusions of the above-mentioned study by the Corsican Direccte, the case for implementing in the **household waste management sector** in Corsica, as soon as the legislative and regulatory framework permits, the **sectoral regulatory measures proposed in the context of the proposals for the new** competition policy **tools**, at least for as long as Corsica finds itself in a situation of chronic under-capacity in the household waste treatment sector;

3 that the central, devolved and territorial administrations responsible for waste prevention and management **quickly find a sustainable solution for the treatment of household waste on the island, where necessary through the creation of new infrastructures in accordance with the most environmentally friendly standards**. **If necessary, it might be useful to consider** the possibility of the State invoking the provisions of the French town planning code (*code de l'urbanisme*) (in particular Articles L. 153-49 to L. 153-53), which allow it to provide for the implementation of such a project of general interest or public interest when it requires a prior amendment to or revision of a local town planning plan.

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on the level of market concentration in Corsica and its impact on local competition

See full text of the opinion

Contact(s)

Bertille Gauthier
Communications Officer
+33155040039
Contact us by e-mail