The Autorité de la concurrence publishes its opinion of 1 December 2023 on two draft decrees on the codes of professional conduct for commissioners of justice and notaries

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Background

At the request of the French government, the *Autorité de la concurrence* published an opinion on 1 December 2023 on two draft decrees on the codes of professional conduct for commissioners of justice and notaries. These draft texts are accompanied by professional rules, which complement the codes of professional conduct.

The *Autorité* reaffirms the need to harmonise the rules of professional conduct for ministerial officers, for the benefit of both professionals and users. It invites the French government and the professions to continue their discussions on this issue, and makes five sets of recommendations to increase the consistency of the rules that apply to both notaries and commissioners of justice. It also makes two sets of recommendations specific to notaries.

The codes of professional conduct, adopted by decrees issued on 28 December 2023, and the professional rules, adopted by orders issued on 29 January 2024 and 27 February 2024, only partially take up the *Autorité*'s recommendations.

The creation of codes of professional conduct for notaries and commissioners of justice

The decrees on the codes of professional conduct for notaries and commissioners of justice, adopted by decrees issued on 28 December 2023, are part of a more general overhaul of the discipline and professional conduct of ministerial officers, and are the latest codes to be adopted.

The code of professional conduct for lawyers at the French Administrative Supreme Court (*Conseil d'État*) and French Supreme Court (*Cour de cassation*) was adopted on 1 March 2023, and was examined by the *Autorité* in Opinion 23-A-02 of 10 February 2023. The codes of professional conduct for lawyers and commercial court registrars were adopted on 30 June and 13 July 2023 [1] respectively, without the *Autorité* being asked to issue an opinion thereon.

While the concomitant requests for an opinion on the codes of professional conduct for notaries and commissioners of justice enabled the *Autorité* to carry out a comparative analysis of the draft codes and put forward harmonised recommendations for both professions, the *Autorité* would have liked the opportunity to propose a single opinion on all ministerial officers.

The recommendations issued by the *Autorité*

The codes of professional conduct and professional rules for notaries and commissioners of justice incorporate, virtually without affecting current legislation, the national and inter-court regulations of 22 May 2018 for notaries, and the national professional conduct regulations for former court bailiffs of 5 December 2018 for commissioners of justice.

In its opinion, the *Autorité* first analyses the issues common to both professions and then looks at the provisions specific to notaries and commissioners of justice.

- **Recommendations on issues common to both professions**

Firstly, the *Autorité* notes that the rules of professional conduct for notaries and commissioners of justice, unlike those governing disciplinary procedures, have not been harmonised in either form or substance. The *Autorité* therefore invites the French government and the professions to continue their discussions with a view to harmonising the rules of professional conduct that commonly apply to ministerial officers, in order to reduce the risk of distortion of competition between these professions.

Secondly, based on its analysis of the rules of professional conduct likely to have an impact on competition between public ministerial officers, the *Autorité* makes five sets of recommendations, relating to the publication of opinions issued by professional conduct bodies, communication, signage, ancillary activities and subcontracting.

With regard to the publication of opinions issued by professional conduct bodies, the *Autorité*'s recommendations aim in particular to increase the transparency of the rules of professional conduct, for example by explicitly stipulating that opinions will be published on the websites of national professional bodies.

With regard to communication, the main recommendations are as follows:

- relax and clarify the rules relating to targeted solicitation to enable professionals to communicate effectively about their services;
- harmonise the wording of the articles relating to targeted solicitation between the two professions, by making reference to the Decree of 28 December 1973 (as amended);
- for notaries, remove the restrictions on press notices to bring them into line with the rules applicable to commissioners of justice;
- for notaries, authorise the use of priority reference listing, using wording similar to that used for commissioners of justice;
- for commissioners of justice, simplify the rules governing participation in public events.

With regard to signage, the *Autorité* recommends:

- for notaries, specifying the information that may be included on professional nameplates, and providing for the possibility of listing the office's speciality, in order to harmonise the provisions applicable to notaries with those applicable to commissioners of justice;
- for commissioners of justice, providing for the possibility, as is the case for notaries, of displaying a sign outside their office bearing the words "commissioner of justice" or "commissioners of justice" or "commissioner of justice's office".

With regard to ancillary activities, the *Autorité* recommends in particular:

- clarifying and harmonising the definition of the term "ancillary";
- harmonising the rules between the two professions, and authorising commissioners of justice to disclose their status when carrying out ancillary activities, provided that they are no longer authorised to advertise these activities;
- for notaries, specifying that property management and arbitration activities must be carried out on an ancillary basis.

With regard to subcontracting, the *Autorité* makes the following two recommendations:

- the legal framework applicable to subcontracting should not unduly restrict the freedom of professionals to organise their activities or, in particular, impose disproportionate constraints on the development of newly-created offices;
- the two professions should conduct a joint review of the ancillary activities that can be subcontracted.

While the majority of its recommendations have not been taken up, the *Autorité* welcomes the fact that the professional rules for commissioners of justice, adopted in February 2024, incorporate several recommendations that move towards greater harmonisation with the rules applicable to notaries. Furthermore, a number of changes will have a significant impact on professionals' activities. For example, commissioners of justice will now be able to disclose their status when carrying out ancillary activities, and take part in

public events, subject to notifying their participation in advance.

- **Recommendations on issues specific to notaries**

The *Autorité* looked at changes to the rules governing the *plume* (the right to draw up all the contracts in a transaction) and the non-competition clause.

With regard to the rules for awarding the *plume*, the *Autorité* recommends:

- abolishing the rule of awarding the *minute* (the right to sign the contracts) based on seniority, and introducing a more objective criterion, for example the awarding of the *minute* by alphabetical order, with the French Superior Council of Notaries (*Conseil supérieur du notariat* – CSN) drawing a letter each year;
- including in the professional rules the possibility for notaries to derogate from these rules when awarding the *plume*;
- reintroducing into the professional rules the option, hitherto granted to notaries in the jurisdiction of different local bodies, to apply their regulations containing similar provisions for the awarding of the *minute*.

In addition, as the *Autorité* was unable to obtain any significant data from the profession's local bodies concerning the awarding of the *plume* in property matters, it invites the CSN to carry out an impact study on the introduction of the single vendor *plume* (*plume unique vendeur*), particularly for recently established notaries.

With regard to the non-competition clause, the *Autorité*'s recommendations aim to restrict its application to cases where there is a risk of the public confusing the different professionals.

The *Autorité* notes that to date, none of these recommendations have been taken up in the texts adopted at the end of 2023 and the beginning of 2024. In addition, the provisions relating to the awarding of the *plume* were extracted from the professional rules and adopted on the basis of Article 26 of Decree 71-942 of 26 November 1971 [2].

- **Recommendations on issues specific to commissioners of justice**

The *Autorité* makes no specific recommendations for commissioners of justice, but welcomes two improvements introduced by the French National Chamber of Commissioners of Justice (*Chambre nationale des commissaires de justice* – CNCJ):

- clarification of the rules governing remuneration for *pilotage* activities (case management);
- the new obligation for professionals to transmit any statistical or accounting information to the national body without delay, thus improving the quality of the data transmitted by professionals.

[1] Decree 2023-552 of 30 June 2023 on the code of professional conduct for lawyers and Decree 2023-609 of 13 July 2023 on the code of professional conduct for commercial court registrars.

[2] Article 26 of Decree 71-942 of 26 November 1971 states that: "*The French Superior Council of Notaries may draw up regulations concerning the national practices of the profession and the relations of notaries established in the jurisdictions of different Courts of Appeal, which are submitted to the Minister of Justice, Keeper of the Seals for approval*".

OPINION 23-A-19 OF 1 DECEMBER 2023

on two draft decrees on the codes of professional conduct for commissioners of justice and notaries

See the full text of the opinion (in French)

- **See** Decree 2023-1297 of 28 December 2023 on the code of professional conduct for notaries **and** Decree 2023-1296 of 28 December 2023 on the code of professional conduct for commissioners of justice

- **See** the order of 29 January 2024 approving the professional rules for notaries and the professional regulations for the notarial profession **and** the order of 27 February 2024 approving the professional rules for commissioners of justice

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