10 october 2016 : Freedom of Establishment for lawyers at the French Administrative Supreme Court and the French Supreme Court

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The Autorité de la concurrence issues an opinion on the freedom of establishment for lawyers
at the French Administrative Supreme Court and French Supreme Court.

In order to improve access to the law for litigants, while taking account of the changing number of cases brought before the high courts, it recommends the creation of four offices between now and 2018.

> Version française

In application of law no. 2015-990 of 6 August 2015 for the growth, activity and equality of economic opportunities ("Macron law"), the Autorité de la concurrence recommends the establishment of four offices of lawyers at the Administrative Supreme Court and Supreme Court between now and 2018.

The number of offices would thus go from 60 to 64, an increase of almost 7%. This recommendation is prudent and proportionate, as it takes into account the economic situation of the current offices, which is particularly favourable and consequently offers potential for an increase in number. It also takes into consideration the small pool of candidates for establishment within a two-year timeframe and uncertainties currently surrounding the growth prospects of cases before both the Administrative Supreme Court and Supreme Court. The reform projects for the French cassation model, details of which have not yet been fully defined, place stringent conditions on the prospect of the number of cases increasing.

The Autorité is making a further 14 recommendations with a view to improving access to the offices (in particular by women) and removing obstacles to the entry of future candidates to establishment.

The Autorité's opinion will be published shortly in the Journal officiel (Official journal) in application of Article 3 of Decree no. 2016-215 of 26 February 2016.

The Autorité's opinion requested in the context of the provisions of the "Macron law"

As ministerial officers, lawyers at the Administrative Supreme Court and Supreme Court are appointed by the Garde des Sceaux (Minister of Justice). They practise on the whole in the Administrative Supreme Court (high administrative court, or the Conseil d'Etat) and Supreme Court (High judicial court or Court de cassation). In the majority of cases, they enjoy a monopoly in terms of representation of litigants (filing of appeals on points of law, statements of cases and presentation of oral pleadings). While these exclusive provisions represent 90% of their activity, these Supreme Court lawyers can also act in other courts (administrative courts, administrative appeal courts, Constitutional

Court, European Court of Human Rights, Court of Justice of the European Union, etc.) and work as legal counsels in competition with court lawyers.

The number of offices (sixty) has not been changed since 1817, the date when the profession was established. The number of professionals has gone from 91 in 2004 to 112 in 2016 (+20%). Other than where legal aid is relevant, Supreme Court lawyers are free to set their fees as they see fit.

The Autorité considers that a niche market, which reserves exclusive services to a small number of professionals, may be the source of pension-seeking (in the economic meaning of the term), the negative effects of which should be corrected. Corrective measures could in theory involve ending the monopoly by either opening up the market, or through pricing regulation, or a combination of both. Unlike with other ministerial officers (notaries, bailiffs, judicial auctioneers and commercial court registrars), the Autorité has not been involved in considerations on how optimum regulation of this very specific profession could be achieved upstream of work in parliament. The legislator has however entrusted it with the task of identifying "how many offices for lawyers at the Administrative Supreme Court and Supreme Court appear necessary in order to ensure the provision of satisfactory services" and "making recommendations aimed at improving access to the offices"[1].

In this narrow context, the Autorité has limited itself to proposing, within this opinion a progressive increase in the number of offices and making recommendations to the government for improvement of access to these offices. These recommendations are based on an in-depth analysis of the changing numbers of cases brought before the high courts (Administrative Supreme Court and Supreme Court) and lower courts, considerations linked to the good administration of justice, information regarding the economic activity of existing offices, and the results of the public consultation launched last February.

Potential new establishment of an estimated four offices within a two-year time-frame

The Autorité recommends the creation of four offices between now and 2018.

The combination of a low number of professionals, exclusive services, flexible organisation (massive recourse to self-employed collaborators for file handling), and total pricing freedom, amounts to a very favourable situation for the professionals in place. Over the 2010-2014 period profit per professional averaged 543,000 euros per year, namely more than 45,000 euros per month. This level of activity can be partially explained by the large number of files handled by each of them (468 cases per year on average, with a maximum of 1,800). There is, therefore, potential for increase in the number of offices. This will benefit both the clients (better negotiability of fees and increase in the time spent on each appeal) and new entrants (access to free practice for lawyers with the professional aptitude certificate known as the CAPAC).

However, in establishing its recommendations the Autorité has taken account of two limiting factors:

- on one hand, the number of potential candidates, who must have the CAPAC for establishment as supreme court lawyers, is very limited[2];
- on the other hand, the number of cases that will be brought before the Administrative Supreme Court and the Supreme Court is uncertain in the long-term: these cases decreased by 5.4% between 2010 and 2015. Uncertainties are also enhanced by the reforms planned regarding the Supreme Court, in particular in relation to the filtering of appeals.

The situation of Supreme Court lawyers is consequently very different from that of other regulated professions reviewed by the Autorité, such as notaries. Their activity has shown huge progress over the last fifteen years, it is directly correlated to population increase and the property market and it offers dynamic development perspectives over the next few years.

Bearing this risk factor in mind, the Autorité has, in recommending the creation of four offices, adopted a prudent approach for the next two years[3]. It goes without saying that this initial opinion does not prejudge any recommendations that may be made in the future, at the time of the next biennial examination of the provision of services by high court lawyers. It will particularly take into account the changes observed in terms of litigation cases, and the reforms underway, or

indeed completed, in relation to the French cassation model.

The Autorité's other recommendations

In order to ensure the success of the reform, and in accordance with the legislator's requests, the Autorité has also submitted fourteen recommendations to the Minister of Justice, who is the guarantor of the freedom of establishment of Supreme Court lawyers. These recommendations are aimed at making the procedure for the creation of offices more transparent and limiting access restrictions to the profession.

Among these, the Autorité recommends:

- extending the time-limit for candidates applying to establish offices and making the classification procedure for candidates to the offices created more transparent;
- reducing barriers to entrance for these candidates, in particular in terms of training and advertising;
- increasing awareness of the profession among law students and court lawyers, in order to enlarge the pool of future candidates for establishment;
- improving access for women to the offices, by enhancing strategies aimed at aligning professional life and private life in this self-employed profession, and by improving statistical gender-related data on the subject.

[1] Article 57 of law no. 2015-990 of 6 August 2015 (the "Macron law") and Article L. 462-4-2 of the French Commercial Code.
[2] The Autorité estimates that there are only around ten potential candidates.
[3] An office can comprise a maximum of four associated Supreme Court lawyers.

> See full text of the opinion 16-A-18 du 10 octobre 2016 regarding freedom of establishment for lawyers at the French Administrative Supreme Court and French Supreme Court.

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