Freedom of establishment for lawyers at the French Administrative Supreme Court (Conseil d'État) and French Supreme Court (Cour de cassation): the Autorité issues its opinion for the years 2021-2023

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The *Autorité de la concurrence* issues its opinion to the government on the freedom of establishment for lawyers at the French Administrative Supreme Court (Conseil d'Etat) and French Supreme Court (Cour de cassation) for the years 2021-2023 (third period of application of the Law for Growth, Activity and Equal Economic Opportunities).

Taking into account the impact of the health crisis on the profession, the foreseeable evolution of the litigation brought before the high courts, and the economic situation of current professionals as well as those who have benefited from freedom of establishment, the *Autorité* proposes that the government creates two offices by 2023.

Background

In accordance with Law No 2015-990 of 6 August 2015 on Growth, Activity and Equal Economic Opportunities ("Macron Law"), which provides for a review of the situation at least every two years, the *Autorité* has determined the number of offices that should be created for the period 2021-2023. The analysis, following the one carried out for the periods 2016-2018 (four offices created) and 2018-2020 (four offices created), was based on the foreseeable evolution of litigation before the high courts (French Administrative Supreme Court and French Supreme Court), on the activity and economic situation of professionals in place before the reform

and those newly established since 2016 within the framework of free establishment (activity of the professionals, income, profitability).

In its analysis, the *Autorité* has taken into account, in particular, the effects of the COVID-19 crisis on the activity of the two supreme courts, on the one hand, and on the activity of lawyers at the Courts, on the other hand.

At the end of this analysis, the *Autorité de la concurrence* suggests that the government **creates two counsel offices at the French Administrative Supreme Court (Conseil d'Etat) and French Supreme Court (Cour de cassation) [1] by 2023**, which will be added to the eight offices already created since 2017, bringing the total number of offices to 70.

Thanks to the flexibility of their business model, the newly established lawyers to the Courts have quickly found their place in the profession, and their turnover has grown steadily since 2017, without the professionals in place before the reform suffering a significant drop in activity. This corresponds to the objectives stated by the Growth and Activity Law of 2015: to encourage the opening up of the profession, by allowing more lawyers to the Courts to access the private practice of their profession by setting up in new offices, without disrupting the activity conditions of the existing offices.

At the end of its examination, the *Autorité* considers that, in view of the various parameters taken into account and the objectives pursued by the reform, there is potential for the establishment of two additional offices for the period 2021-2023.

[1] The lawyers to the Courts are holders of an office assigned by the State. They have a monopoly on representing litigants before the French Administrative Supreme Court and the French Supreme Court in appeals on points of law in most matters, a monopoly which accounts for approximately 90% of their activity. The remainder consists of interventions before other jurisdictions (administrative courts, administrative courts of appeal, Constitutional Council, European Court of Human Rights, Court of Justice of the European Union, etc.) and legal advice.

Schedule

The *Autorité*'s opinion will shortly be published in the *Official Journal* (OJ).

The *Autorité* draws the attention of interested candidates to the fact that this publication in the OJ will launch the two-month period within which interested persons may submit their application for appointment to an office created for French Administrative Supreme Court (Conseil d'État) and French Supreme Court (Cour de cassation)[1].

[1] Article 25 of Decree No 91-1125 of 28 October 1991 on the conditions for admission to the profession of lawyers at the French Administrative Supreme Court (Conseil d'Etat) and French Supreme Court (Cour de cassation).

Assessment of the reform implementation

After two initial opinions that led, in 2016, to the creation of four offices[1], and then in 2018, to the creation of four further offices[2] (taking the total number of offices from 60 before the reform to 68 today), the *Autorité* is now issuing a third opinion on the freedom of establishment of lawyers to the Courts.

This opinion begins by assessing the implementation of the reform and provides an updated overview of supply and demand trends affecting the profession. In its analysis, the *Autorité* has taken particular account of the consequences of the health crisis that occurred in March 2020, drawing on all the available data, in particular that provided by professionals, in order to make recommendations adapted to this exceptional context.

To draw up this assessment, the *Autorité* conducted a public consultation, in accordance with Article L. 462-4-2 of the French Commercial Code (*Code de commerce*). Following the adoption of Law No 2020-290 of 23 March 2020 on the health crisis and Ordinance No 2020-306 of 25 March 2020, the deadline for responding to this consultation, which opened on 9 March was adjourned from

12 March to 30 May inclusive, and then extended until 30 June 2020.

Of the 125 lawyers to the Courts in the profession today, ten have set up in an office created since the implementation of the reform (six professionals in 2017, one of whom retired in 2018, then five in 2019).

These ten professionals account for 77% of the increase in staff numbers since 2016 (+13 people), and even 100% of the increase in the number of self-employed staff, as at the same time three new lawyers to the Courts were appointed as employees in existing offices.

Potential for additional office development

The economic analysis of supply and demand in this market confirms the highly profitable nature of this niche activity, which is concentrated on a small number of highly specialised professionals who benefit from the combination of a monopoly situation and a great deal of freedom in terms of pricing and management. The average margin rate was 44% in 2019 within the profession and the average profit per partner just over half a million euros per year. This is the highest average earnings level among the legal and judicial professions, although it fell by 2.7% in 2019 compared to 2017.

In addition, the *Autorité* has observed that the offices established in 2017 have been successful in developing their business and enjoyed rapid growth between 2017 and 2019. Indeed, contrary to the fears expressed prior to the reform, the revenues and profitability of the offices have remained very solid and at a very high level. Thus, in the offices created, the average annual turnover per private practitioner rose from 53,589 euros in 2017 to 194,791 euros in 2019, an increase of +263%. The average income rate of these offices has also increased over the period: from 51.1% in 2017 to 58.9% in 2019. These results reflect a business model characterised by great flexibility in terms of organisation, which has enabled the new offices to develop and sustain their business rapidly.

Although the uncertainties linked to the health crisis have led it to be somewhat moderate in its recommendations, the *Autorité* considers that there is potential for the development of additional offices, without the creation of new offices being likely to undermine the quality of the services provided before the courts of cassation, or jeopardising the viability of existing offices.

In the light of all the jurisdictional and economic parameters, the Autorité recommends the creation of two offices

Three factors justify a cautious approach:

- firstly, while the demand for services by litigants before the French Administrative Supreme Court grew somewhat between 2017 and 2019 (+5%), the number of cases recorded before the French Supreme Court, on the other hand, fell over the same period (-12%), partly as a result of the various reforms undertaken.
- in addition, the pool of professionals holding the CAPAC likely to apply to set up in practice remains small, which limits the prospects for growth in the number of lawyers to the Courts over the next two years.
- lastly, the *Autorité* notes that the health crisis has had a definite impact on the activity of lawyers to the Courts, with a 15% drop in turnover in 2020 compared to 2019, linked to a sharp slowdown in activity before the Judicial Supreme Court from March 2020 and a timid recovery in the second half of 2020. Activity before the French Administrative Supreme Court has remained at a high level, despite the health situation (and even increased significantly in the case of summary proceedings). Although the overall drop in activity linked to the health crisis appears, at this stage, to be more limited than for other professions, there are still major uncertainties about the evolution of the epidemic and its consequences on the activity of lawyers to the Courts.

In this context, the *Autorité* has adopted a cautious approach, recommending the creation of a reduced number of offices: two by 2023, in addition to the eight created since 2017.

Additional recommendations

The *Autorité* welcomes the significant efforts made by the *Ordre des avocats aux Conseils et la Chancellerie* (Order of Lawyers to the Courts and the Chancellery) to take into account the recommendations it made in its previous opinions. Several texts have recently modified the legal regime applicable to lawyers to the Courts, in particular with regard to the composition of the examination board for the Bar examination, the governance and conduct of training, the rules governing communication and the ethics of the profession. The adopted measures have enabled significant progress to be made in modernising the profession, as well as real support for the development of the created offices.

However, certain additional measures could still make it possible to improve the arrangements governing the freedom of establishment of lawyers to the Courts. In the opinion published today, the *Autorité* makes new recommendations on the following points:

- introducing greater transparency on the criteria used to rank candidates for the offices created;
- informing the public more widely about the methods of accessing counsel offices to the Courts, by extending measures of communicating about the profession and its training to the whole of France, and by providing for a module on the conditions for setting up in an office created as part of this training.

[1] Consult the first opinion No 16-A-18 of 10 October 2016 and the press release.

[2] Consult the second opinion No 18-A-11 of 25 October 2018 and the press release.

OPINION 21-A-02 OF 23 MARCH 2021

on the freedom of establishment and recommendations for the creation of counsel offices at the French Administrative Supreme Court (Conseil d'Etat) and the French Supreme Court (Cour de cassation)

See full text

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