The Autorité publishes its opinion on the draft decree on the code of professional conduct for lawyers to the French Administrative Supreme Court and French Supreme Court

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The *Autorité de la concurrence* publishes its opinion of 10 February 2023 on the draft decree on the code of professional conduct for lawyers to the French Administrative Supreme Court (*Conseil d'État*) and French Supreme Court (*Cour de cassation*) (hereinafter "lawyers to the Courts")

Background

After the Government sought its opinion, on 10 February 2023, the *Autorité* issued an opinion on the draft decree on the code of professional conduct for lawyers to the Courts, in which it proposed seven recommendations to the Government concerning certain rules of the code.

While the decree finally adopted on 1 March 2023 did not take into consideration all the recommendations aimed at clarifying the wording of certain articles of the code of professional conduct, the *Autorité* will be careful to ensure that they are taken into account in the drafting of the professional rules that will soon be adopted pursuant to Article 2 of Ordinance 2022-544 of 13 April 2022.

Creation of a code of professional conduct for lawyers

The decree on the code of professional conduct for lawyers to the Courts, published on 1 March, is part of a more general overhaul of the discipline and professional conduct of ministerial officers. The enactment of a code of professional conduct applies to the following: lawyers to the Courts, commissioners of justice, commercial court registrars and notaries.

As it did not have access to the other codes of professional conduct, the *Autorité* was unable to carry out a comparative analysis in order to propose harmonised recommendations for all these professions and therefore reserves the right to conduct a more detailed analysis at a later date.

Previous recommendations of the *Autorité* on professional conduct

Without affecting current legislation, the draft decree incorporates the general rules of professional conduct for lawyers to the Courts of 5 November 2020, on which the *Autorité* had already issued recommendations in its opinions on the freedom of establishment of lawyers to the Courts (Opinion 16-A-18 of 10 October 2016, 18-A-11 of 25 October 2018 and 21-A-02 of 23 March 2021).

For the record, on the basis of the recommendations made by the *Autorité*, several changes were made to the rules of professional conduct with respect to fellowship (see points 60 to 65 of the opinion) and communication (see points 66 to 81 of the opinion).

Recommendations issued by the *Autorité*

The *Autorité* considers that, due to a lack of precision and transparency, certain rules may still constitute obstacles to the growth and development of the offices of lawyers to the Courts. In this regard, it has proposed seven recommendations to the Government.

The *Autorité*'s general recommendation (points 89 to 94 of the opinion)

The *Autorité* made a general proposal aimed at specifying the rules of professional conduct, taking into account the intention of the French Bar Association of lawyers to the Courts (see point 93 of the opinion) to convene its Board of professional conduct as soon as the code of professional conduct is published in 2023, with a view to issuing professional conduct opinions in the form of guidelines. It therefore proposed:

- actively implementing the consultation process of the Board of professional conduct of the Bar Association of Lawyers to the Courts, as soon as the code of professional conduct is published;
- providing for this college to issue, via opinions, its recommendations on all professional conduct issues referred to it;
- publishing the opinions of the Board of Professional Conduct on the Bar Association website, and distributing them to the lawyers to the Courts electronically if these opinions do not contain information of an individual nature;
- indicating, in the professional rules that will be adopted pursuant to the new code of professional conduct, that the opinions issued by the Board of professional conduct will be published on the Bar Association website.

Other recommendations

The *Autorité* has suggested several drafting clarifications, either to the rules of professional conduct set out in Articles 7, 8, 41, 57 and 60 of the draft decree or within the professional rules that will specify their application.

- **On the interpretation of the principle of independence (points 100 to 109 of the opinion)**

This provision sets forth a principle of independence for lawyers to the Courts on the basis of which several prohibitions are specified but does not give a precise framework for its interpretation.

The *Autorité* has therefore recommended that future professional rules include examples of cases that would violate the general principle of independence, such as those proposed by the Bar Association of lawyers to the Courts.

- **On the possibilities of partnering with a professional (points 110 to 121 of the opinion)**

By virtue of the principle of the independence of lawyers to the Courts (Article 7 of the draft decree), Article 8 of the draft decree provides that lawyers to the Courts "*may not associate with a professional of any profession or join a professional network except in the cases expressly provided for by law*", without providing clear definitions of these notions. In this regard, the *Autorité* considered that the wording of this article was still too vague.

As a result, the *Autorité* recommended that the ban on "associating with another professional" be better defined to avoid the *de facto* exclusion of situations that are consistent with the principle of independence or, at the very least, to refer to the professional regulations to specify the terms of application.

In addition, it also proposed defining the "professional network" in the same terms as the multidisciplinary network for lawyers to the Courts contained in Article 16-1 of the internal rules of procedure for lawyers to the Courts and, if necessary, framing the rules of communication with which lawyers to the Courts must comply if they join a professional network.

- **On the concept of professional domicile (points 124 to 139 of the opinion)**

Article 41 of the draft decree provides that "*Lawyers to the French Administrative Supreme Court (Conseil d'État) and French Supreme Court (Cour de cassation) shall have an office that conforms to customary practice and allows them to practice in accordance with the essential principles of the profession*", without specifying the "customary practice" referred to, or referring to a reference text that defines it. However, this clarification seems essential to guarantee a perfect understanding of this provision, given that the professional domicile is likely to have different configurations (i.e. the sharing of premises with a colleague or another professional, the sub-letting of premises, the use of the personal domicile, or the use of shared workspaces).

The *Autorité* therefore recommended clarifying the concept of professional domicile, in particular by specifying the "customary practices" referred to, and by

consulting the Board of professional conduct of lawyers to the Courts on questions relating to professional domicile.

- **On the possibility of communicating on specialisations (points 147 to 155 of the opinion)**

The *Autorité* noted that the third paragraph of Article 57 of the draft decree maintains the ban on mentioning the specialisation of the lawyer to the Courts in their personal advertising. However, it believes that highlighting one or more specific skills could be an effective means of communication and so help to develop the business.

To take into account the position of the Order, it therefore proposed clarifying the ban on mentioning a specialisation, by specifying that it does not extend to mentions of one or more predominant areas of expertise, which should be authorised subject to certain reservations that the draft decree could specify.

On this point, Article 57 of the decree which was finally adopted has partially taken into account this recommendation, by including the possibility of stating professional experience within the framework of personal advertising.

- **On the integration of the provisions on personal advertising into the professional rules (points 156 to 159 of the opinion)**

The *Autorité* noted that the application of the rules on personal advertising referred only to Article 15 of the Ordinance of 10 September 1817, without also referring to the professional regulations, which nevertheless specify the terms of application.

It therefore recommended that the wording of the third paragraph of Article 58 of the draft decree be amended accordingly.

- **On the possibility of expressing a doctrinal view (points 160 to 165 of the opinion)**

Article 60 of the draft decree authorises lawyers to the Courts to "*make known their doctrinal views on Case law and doctrine to date or jurisdictional methods*".

However, it expressly excludes comments on a decision issued in proceedings in which the lawyer to the Courts was involved.

While noting the position of the Order, the *Autorité* considers that Article 60 is not sufficiently precise and that there is a risk that situations will be dealt with on a case-by-case basis, or even that it will create a fear of sanctions in the minds of professionals. On the other hand, a framework could be established for doctrinal comments on a particular case, even one in which the lawyer to the Court was involved.

It therefore recommended that the draft decree or professional regulations explicitly state that the dissemination of judgements and doctrinal comments, even those relating to cases in which the lawyer to the Court was involved, is authorised.

Decree of 1 March 2023

While the decree which was finally adopted did not take into consideration all the recommendations aimed at clarifying the wording of certain articles of the code of professional conduct, the *Autorité* will be careful to ensure that they are taken into account in the drafting of the professional rules that will soon be adopted pursuant to Article 2 of the Ordinance of 13 April 2022.

OPINION 23-A-02 OF 10 FEBRUARY 2023

on a draft decree on the code of professional conduct for lawyers to the French Administrative Supreme Court (Conseil d'État) and French Supreme Court (Cour de cassation)

Full text of the opinion (in French)

DECREE 2023-146 OF 1 MARCH 2023

on the code of professional conduct for lawyers to the French Administrative Supreme Court (Conseil d'État) and French Supreme Court (Cour de cassation)

See the decree (in French)

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