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DISRUPTIVE INNOVATIONS IN LEGAL SERVICES

--France--

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More documents related to this discussion can be found at www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm

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--FRANCE--

1. Regulated legal professions and communication technology, the line between appropriation and disruption

1. Disruptive innovations based upon communication technologies have appeared in France in the sector of services provided by the regulated legal professions and seem to emerge as two distinctive processes.

- Firstly, legal professionals, as historic providers of legal services, started to use new tools available to them to improve the practical element of their services and expose them to a wider audience. This can be seen in a number of areas and mainly constitute a digital extension of their expertise.

2. The French national Chamber of Court Bailiffs (*Chambre nationale des huissiers de justice)* launched a platform on 1 January 2016, which offers an alternative method for dispute resolution, aimed at dealing with consumer cases online[1], and announced the imminent implementation of a platform for recovering small debts[2], shared with chartered accountants[3], with a view to creating a "digital eco-system for the profession".

3. The French National Superior Council of Notaries (*Conseil supérieur du notariat)* pioneered a digitally secure electronic signature - at the end of 2015, it had been used to authenticate over two million electronic deeds, wholly dematerialised and stored in a central digital minute. The creation of a "Novatiz" platform has been announced for 2016, where consumers will be provided with free services and a range of customised simulation tools[4].

4. The French National Bar Council (*Conseil national des barreaux* henceforth the CNB) announced the creation of a platform, due to come into operation in May 2016[5], which would provide, upon the user's request, first documentation, then a list of specialist lawyers by geographical area with whom the user can arrange appointments through the platform. CBN plans for a free first online consultation for basic questions, whereas for more complex questions, an online or phone consultation is to be provided for a fee, which could be paid online. CNB however eventually decided not to create this tool,

1 http://www.huissier-justice.fr/actualite.aspx?id=266

2 Article 1244-4 of the French civil code (*code civil)* (drafted from article 208 of law No.2015-990 of August 6, 2015 for growth, business and equal economic opportunity, known as the "Macron Law").

3 http://www.huissier-justice.fr/actualite.aspx?id=281

4 http://www.journaldunet.com/patrimoine/finances-personnelles/1173478-digitalisation-des-notaires/

5 http://cnb.avocat.fr/Lancement-par-le-CNB-d-une-plateforme-numerique-de-consultation-juridique-pour-les-avocats_a2341.html

http://cnb.avocat.fr/Le-CNB-annonce-le-lancement-de-la-plateforme-officielle-de-consultations-juridiques-a-distance-des-avocats-des-mai-2016_a2587.html

but instead to acquire an existing lawyer-client site *Myavocat.fr* designed by a company describing itself as a "legaltech" firm[6].

5. Legal professionals can also benefit, as consumers, from technological innovations which change the way of accessing information, making it faster, easier and more appropriate to the expressed needs – an example is the case of new legal research browsers, which seek to compete with traditional web content by adapting big data processing technology to legal material, and where open data is available free of charge[7].

- Although the legal professionals have thus, in part, incorporated technological innovations to modernise their services, they are also confronted with practices which represent a more radical disruption from their traditional methods of operating, and can even be outside the regulatory framework which governs each of their professions.

6. These new players in the legal arena often question the scope of the monopoly of regulated professions, with a recent case allowing us to illustrate this fine line. The website *demanderjustice.com* offers Internet users wishing to file a consumer case before the courts help in creating their case file, using pre-compiled forms, and filing them with the court - in cases where the presence of a lawyer is not mandatory. Sued before criminal courts by organisations representing lawyers for the illegal practice of the profession, the company directors involved were absolved (Paris Court of Appeal, 21 March 2016), given the website did not claim to represent nor advise users - assistance and representation being the monopoly of qualified lawyers[8].

7. In contrast, the CNB and the local Bar secured a conviction by the Court of Appeal of Aix-en-Provence[9] of the company operating the site "*divorce-discount.com*" for having provided legal advice without being qualified. In this case, this site offered to handle entire mutual-consent divorce proceedings at a discounted price, including drafting the application and the court-approved settlement, only introducing a lawyer known as a *"partner"* to sign the application and to be present at the court proceedings without ever having met the parties.

8. The notion of legal advice, which is the criterion for the legality of the "disruptive" intervention by these new players in the legal arena, is connected to the added value delivered by a professional with a specific qualification and restricts competition to material tasks that can be automated - for example the drafting of basic contracts or a payment summons, which certain legal start-ups propose.[10]

9. The disruptive effect of practices founded on technological innovations may also result in them being perceived as incompatible with the ethical codes of the professions concerned or insufficiently protecting consumers. Subsequently, the publishers of the site connecting lawyers to clients *"avocat.net*" was sentenced by the Paris Court of Appeal, once again on request from the CNB, to delete this domain

6 https://www.myavocat.fr/pdf/Dossier-presse-MyAvocat-2015.pdf

7 https://blog.doctrine.fr/doctrine-fr-le-google-du-droit-4aa51087d620#.shrewbctl

8 Article 4 of Law No.71-1130 of 31 December 1971, reforming certain legal and legislative professions: "No person, if not a lawyer, can assist or represent any party, to file XXX and plead before any courts of law and judicial or disciplinary authority whatsoever (…)"

9 http://cnb.avocat.fr/Confirmation-en-appel-de-la-condamnation-prononcee-contre-le-site-divorce-discount-com_a2271.html

10 http://www.latribune.fr/technos-medias/legalstart-le-uber-francais-des-services-juridiques-aux-entreprises-489148.html

name, as it could create confusion in the minds of users[11], to delete the words "lawyer comparison", as well as to cease publishing any lawyer ratings by Internet users (Paris Court of Appeal, section 5, chamber 2, 18 December 2015). An appeal was filed.

10. In this context, as underlined in the Issues paper prepared by the Secretariat, the challenges posed by these innovations and the competition space thus opened up exert pressure on the existing regulations of the legal professions, toward its modernisation. The French case provides a recent illustration of the part that an antitrust authority may play, through its advisory role, in public authorities taking these challenges into account.

2. The 'Autorité de la concurrence, an advocate for competition reform in the regulation of legal professions

11. Within the framework of its advisory powers, the *Autorité* was solicited on 3 June 2014, by the French Minister of Economy, Productivity and Digitalisation, based on article L.462-1 of the French commercial code (*code de commerce)*, firstly to evaluate the tasks assigned to public and ministerial officials and court-appointed administrators and liquidators, notably in relation to the division between their general interest and market activities, and secondly, to examine the objectives and the method of fee regulation within these professions. The *Autorité de la concurrence*, of its own initiative, felt it needed to extend the scope of its opinion to two related topics, closely linked to those of the referral, namely the conditions for establishment and the operational methods of the professions concerned.

12. This government referral was part of a parliamentary debate due to start on 26 January 2015 regarding a bill adopted by the Government on 10 December 2014, which became Law No. 2015-990 of 6 August 2015 for growth, business and equal opportunities[12] (hereinafter "The Macron Law" named after the French Economy Minister).

13. This bill included a large number of reform measures in various sectors of the economy and its overall aim was to free up business activities to promote growth, notably by putting an end to excessive incomes. The *Autorité's* recommendation of 9 January 2015[13] thus helped clarify the debate and several of its recommendations were retained in the final text of the bill.

14. The *Autorité* was then also solicited by the Minister of the Economy regarding a draft regulation which became Decree no. 2016-230 of 26 February 2016[14] regarding legal professional fees and inter professional funds for access to law and justice. As the initial draft regulation underwent significant changes subsequent to its consideration by the Administrative Supreme Court (*Conseil d'Etat*), the *Autorité* was requested eventually to submit two opinions on 29 January and 22 February 2016[15].

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11 In France, article L.121-1 of the French consumer code *(code de la consommation*) prohibits deceptive commercial practices to protect consumers. Classified as such is a practice based on a presentation that is misleading as regards the nature of the goods or service, an essential characteristic of the service or the identity, qualities, skills and duties of the professional.

12 https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000030978561

13 Opinion no.15-A-02 of 9 January 2015 regarding competition issues concerning certain regulated legal professions http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=606&id_article=2480

14 https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000032115195

15 Opinion of 29 January 2016, relating to a draft decree regarding certain legal professional fees and inter professional funds for access to law and justice pursuant to article 50 of the Law of 6 August 2015 and the opinion of 22 February 2016 relating to the draft amending decree for certain legal professional fees and

2.1 The principle of regulating certain professions

15. The *Autorité's* opinion had already been solicited on the articulation between specific rules governing regulated professions and competition law. Therefore, in relation to a regulated profession in the health sector[16], the former *Conseil de la Concurrence* (succeeded by the *Autorité* in 2009) specified that *"the restrictions on competition imposed by the regulation of a professional activity which seeks to provide a framework for the operational conditions of this profession, may nevertheless be justified, by analogy to the judgement delivered by the Court of Justice of the European Union under the Wouters judgement of 19 February 2002 seeking to ensure guarantees necessary to protect the consumer. The latter do not necessarily impinge on the objectives of competition policies if the restrictive effects on competition by this regulation are inherent to the aim of protecting consumers, i.e. necessary and proportional to this purpose."*

16. The European Commission in its 2004 report on professional services[17] outlined the grounds for justifying regulations, namely the asymmetry of information held by consumers and service providers, externalities and the notion of "public goods", offering value for society as a whole.

17. In its opinion of January 2015, the *Autorité* therefore examined the proportionality of competition restrictions imposed by the regulation of the legal profession, the subject of the referral, in relation to the considerations of general public interest it fulfils. Without calling into question the legitimacy of a certain degree of regulation to ensure legal certainty and expertise for consumers, it issued 80 proposals aimed at modernising and increasing openness within these legal professions.

18. The professions involved are notaries, court bailiffs, judicial auctioneers, registrars of the Commercial courts (*tribunaux de commerce)*, and lawyers at the Supreme Courts (*Conseil d'Etat* and *Cour de cassation*), who in common hold offices assigned by the State as well as a monopoly in the exercise of part of their activities; also concerned were administrators appointed by the court when there is a safeguard procedure or insolvency proceedings, and the liquidators named by the Commercial court to represent creditors. However, this contribution will focus on the case of public and ministerial officials and more specifically, notaries, bailiffs and judicial auctioneers who in terms of numbers represent the core of these professions[18].

2.2 Scope of the Monopoly

19. The *Autorité* firstly examined the scope and consistency of the monopoly attributed to each of these professions.

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inter professional funds for access to law and justice pursuant to article 50 of the Law of 6 August 2015 http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=629&id_article=2737

16 Recommendation of 29 July 2008 regarding a draft degree on the code of ethics for masseur-physiotherapists.

17 Report on professional services of 17 February 2004 (COM (2004) 83 final/2)

18 On 31 December 2015, according to the French Superior Council of Notaries, *(le Conseil supérieur du Notariat)*, there were 9,802 notaries working in 4,570 offices, in addition to 1,336 annex offices; according to qualitative data from the French Ministry of Justice, on 31 December 2013, in mainland France, there were 3,177 bailiffs spread across 1,708 offices, and 405 judicial auctioneers grouped together in 313 offices.

- Notaries have a dual monopoly: a functional power of authentication, by which they can confer a high level of legal certainty to a deed - a confirmed date, a probative power and enforceability; an exclusive material competence, that restricts certain deeds to them, linked to the exercise of this authentication monopoly, among which "formal deeds" (such as marriage contracts), property transfer or property declaration documents (such as property sales) and a series of relatively less frequent documents that require notarized authentication by law.

20. Besides the task of authenticating restricted documents, the bedrock of their monopoly, notaries also carry out tasks that are wholly open to competition (such as property negotiations or the drafting of private agreements) and furthermore perform deeds that are part of a monopoly shared with other regulated professions - these are documents which can legally be created by other legal professionals, but where the parties choose voluntarily to have them authenticated by a notary (such as commercial leases).

21. In its opinion, the *Autorité*'s main recommendation was to evaluate the pertinence of the authentication requirement, moving towards a tightening of the range of deeds with a mandatory requirement to be notarized.

22. It also recommended questioning the exclusive power that notaries enjoy in the public auctioning of intangible assets (such as trademarks, patents or commercial leases), as well as the removal of competition restrictions regarding the drafting by a third party qualified to draw up private agreements of deeds requiring notarized authentication - if parties to a draft document requiring authentication are not prohibited from having it drafted by another professional, the cost of the authentication service by the notary is not in the least diminished, discouraging this competitive practice.

- Bailiffs have a monopoly in the notification of procedure documents and in the enforcement of judgements and enforceable deeds.

23. Although the *Autorité* expressly underlined that their intervention brings a high degree of legal certainty in the notification of these documents, it nevertheless recommended *"restricting its use to acts of procedure wherein maximum legal certainty is required*", as well as extending notifications by electronic signature, particularly by extending this to all deeds where the recipient is a legal person, whilst reducing costs.

24. It finally recommended that their territorial competency be broader - from the remit of Courts of first instance *(tribunal de grande instance)* to Courts of appeal - to increase competition between these professionals and offer clients the option of using a single intermediary for several deeds across an extended territory (the region).

- Judicial auctioneers exercise their powers in competition with other public and ministerial officers, as well as with other regulated professions, but retain a monopoly in relation to the judicial auctions of moveable assets in their municipality of residence.

25. The *Autorité* proposed removing this monopoly, the geographical scope of which is no longer suited to current realities, as the bodies representing the profession admit, and recommended harmonising the conditions, currently dissimilar, whereby various professions - notaries, bailiffs, judicial auctioneers - intervene to carry out judicial auctions of moveable assets.

2.3 Conditions for establishment

26. In its opinion, the *Autorité* highlighted the Malthusian conditions prevailing in the establishment of public and ministerial officers, which constitute barriers to entry leading to insufficient replenishment of these professions.

- - It determined that this concern was the most pressing for notaries. The number of young graduates, over a ten-year period (2005-2014) was five times greater than the number of notaries leaving the profession, so much so that the in-take capacity was mainly adjusted by increasing the number of salaried notaries and so-called "assistant" notaries.[19]

27. The *Autorité* consequently highlighted a recurrent problem in the in-take capacity of graduate notaries, restricted opportunities for salaried notaries to access liberal practice (characteristic of the profession) and an offer being constituted by transfer rather than by creation of notary positions, with the presentation of a successor in exchange for payment. During the same period, it was determined that there was one creation for every 15 transfers.

- The framework for establishment is similar for bailiffs, even though their professional demographics are different. Although the number of bailiffs was stable over the period 2005-2014, a fall in the number of bailiffs positions was observed (one single position created and 320 discontinued), corresponding to the regrouping of existing practices; the density of bailiffs is imbalanced, the territorial network being a lot less dense than for notaries. The *Autorité* found there was a need for fluidity to ensure generational renewal, offering perspectives for salaried bailiffs and ensuring the sufficient geographic density of their practices.

28. Furthermore, for both notaries and bailiffs, the weight of representative bodies is dominant in accessing the profession, both in terms of the aforementioned entry mechanism as well as through the role of the commissions which assist the Minister of Justice in determining the needs for new positions, leading to a form of self-regulation.

- Subsequent to this observation, the *Autorité* called on a change in the methods for establishment, compliant with the specific natures of the professions involved. It underlined that the objectives of public interest allocated to public and ministerial officers could impose retaining a certain degree of protection for the sector to guarantee minimum profitability to cover deeds prepared at a loss and to ensure the presence of professionals throughout the country.

29. Despite this, the *Autorité* recommended broader perspectives for establishing an independent practice be provided to young entrants to these professions, which would encourage modernization of their practices. It recommended that the principle of regulated freedom to practice be established - which would be notably restricted in areas where an excessive concentration could jeopardise the viability of existing offices.

30. In addition, it suggested placing an occupational age limit on these professions.

19 See also "*Professions réglementées - Pour une nouvelle jeunesse*" (Regulated Professions - For a new generation) - Report by Richard Ferrand, MP working with the French Minister of the Economy, Industry and Digitalisation *(ministre de l'Economie, de l'industrie et du numérique)* - October 2014.

2.4 The methods of operation:

31. Public and ministerial officers can practice as sole traders - which is the case for a little more than half the judicial auctioneers (55%) - or they can set up partnerships or limited liability partnerships - as chosen by two thirds of notaries and bailiffs.

- Examining the rules applicable to shareholding and voting rights in limited liability partnerships (*sociétés d'exercice libéral or SEL*) led the *Autorité* to observe that, mainly by excluding a professional not working in the organization from holding more than half the voting rights, these limited the opportunity of creating professional networks made up of secondary entities controlled by the same person or same controlling company.

32. In addition, inter-professional partnerships were restricted in that the majority of capital of a SEL could not be held by a person belonging to another legal profession, and in that no professional other than belonging to a legal profession could be a shareholder in a SEL of these professions, meaning that it was practically impossible to constitute a group structure associating legal and accounting professions.

- The *Autorité* also recommended opening up SEL shareholding and voting rights, including extending them beyond 50%, for the benefit of professionals practising the same profession but in another entity, as well as developing inter-professional entities, firstly by removing the shareholding threshold of 49% in a SEL for a member of another legal profession and secondly by allowing professionals other than legal professionals, for example chartered accountants, to own shares in these SELs.

33. Furthermore, the *Autorité* looked at the salaried work of these professions and recommended expanding use of this status, whilst offering these professionals real opportunities in terms of setting up a practice. It thus outlined in detail this direction for each profession involved, based on their specific natures - among which the removal of the various restrictions on the number of salaried professionals per office.

2.5 Fee structure

34. A large portion of the *Autorité's* 2015 recommendations related to the issue of determining fees, and both its 2016 opinions are exclusively dedicated to this question.

- It is consistent with the characteristics of the professions concerned that fees for their services are regulated, mainly as a consequence of the monopoly they hold in terms of drafting certain deeds. The fee structure has the dual objective of equality of access to users of the public service, by the fixed fee structure, as well as equality of treatment, thanks to maintaining a network present throughout the country, ensured through a level of fees that guarantee the viability of the offices, including the least profitable ones.

35. Nevertheless, this method of setting fees, through successive, multiple layers of regulatory norms[20], led to their disconnection from the economic reality of the professions involved.

36. The *Autorité* therefore exhorted revising fee regulations which, without prejudice to the duties of the general interest missions undertaken by these professionals, would be based on the costs of the services provided and the calculation of a so-called "reasonable" remuneration.

20 For example, with regard to notaries: decree no.78-262 of 8 March 1978 concerning the setting of notary fees, was amended three times by decrees of 16 March 2006, 21 March 2007 and 17 February 2011.

37. As a consequence, it was recommended that a new mechanism for fee regulation be adopted, based on an analysis of the economic fundamentals of the professions involved and aimed at setting fees at a correct level to ensure fair remuneration of the work provided and the capital invested, a condition for accessibility for all to a service of comparable quality providing a higher level of legal certainty.

38. This principle of fee structure methodology must be understood in a practical sense within the context of the reality of the professions and the methods of managing the organisations involved. Thus, the *Autorité* recommended that this focus on costs operates within a holistic approach, taking into account the average costs in the profession - and not in relation to the inherent cost of each individual service provided. This holistic approach appears most likely to encourage professionals to improve their own efficacy because, by taking into account the average costs of the profession, they would take in the additional profits. Furthermore, it was shown that the lack of available data, notably the absence of analytical accounts, hindered in the short term the production of a method for setting fees for different services based on their respective costs. Finally, in business activities which sustain significant fixed costs or in advisory or intellectual services, such as those performed in these professions, there always exists an equalisation between the services, which a "deed by deed" method would not have been able to take into account.

39. The *Autorité* moreover highlighted that there should be a regular and periodic revision of the fees, to take into account the changes in services provided by the professionals involved.

40. In addition, the *Autorité* insisted on the need to develop fee transparency, notably by the publication of fees on various professionals' websites.

41. All of these proposals were in line with the bill regarding growth and business adopted by the Government on 10 December 2014, specifying that fees for regulated legal professions, which *"take into account the costs related to the service provided and a reasonable remuneration, defined on the basis of objective criteria"*, and which can be associated with equalisation mechanisms, are agreed jointly by the Ministers of Justice and Economy and are the subject of a decree "*decided following the opinion of the Autorité de la concurrence"*.

- The *Autorité* then detailed proposals relating to each of the professions concerned, complementing this general mechanism for the revision of fee structures.

42. The main recommendations relating to notaries consisted firstly in authorising partial discounts, to stimulate price competition and to allow professionals to recover potential productivity gains and secondly, to substitute the regulatory fee structure with a liberal fee structure for activities already conducted competitively (for example property negotiations), as well as for deeds voluntarily submitted by parties for authentication.

43. Other recommendations to be highlighted include fixed duties to substitute for fees based on the value of the assets processed, in the case of certain formalities (such as the discharge of a mortgage); authorisation of fee differentiation if the notary only intervenes to authenticate documents presented by the client, where the draft was prepared by another professional.

44. In relation to bailiffs, the *Autorité* encouraged simplification of the nomenclature, for better clarity of fees, by the creation of a flat-fee structure, as well as eliminating multiplication coefficients, more often connected to the amount of underlying obligation and unrelated to the difficulty of the tasks performed.

45. Through its two 2016 opinions, the *Autorité* was once again able to draw attention to its clear preference for a, holistic fee structure as opposed to the "per service" method, notably given the difficulty

in the relevant professions to determine the respective cost of each service. It furthermore recommended the adoption of a transitory mechanism, particularly given the absence of information available allowing for a fee structure to be immediately operational on the basis of a per-service cost.

3. Reform of the legislative and regulatory framework of the legal professions

46. The Macron Law of 6 August 2015 introduced a number of reforms in the legal profession, taking on board a number of the recommendations made by the *Autorité.* It was supplemented by the publication of the aforementioned decree on fee structuring, a series of ministerial orders relating to fees per profession, adopted on 26 February 2016, and by two decrees 2016-215[21] and 2016-216[22] of 26 February 2016, in relation to the freedom of establishment in ministerial offices.

47. This law and its applicable texts created a moderate, yet tangible opening to competition amongst the aforementioned professions. They also relate to other legal professions, such as qualified lawyers which given their importance, notably in terms of numbers (according to the CNB, on 1 January 2014, there were 60,223 lawyers present in France), will be discussed below.

3.1 The scope of the monopoly: extending territorial competence

- Pursuant to the Macron Law, as from 1 September 2016, lawyers can represent their clients before all courts of first instance in the jurisdiction of the Court of Appeal where they are established - and no longer solely before the court of first instance to which they are attached - which extends the scope of competition between these professionals.

- The same applies to bailiffs in that the area where they are authorised to practice as a monopoly shall, from 1 January 2017, be extended to the jurisdiction of the Court of Appeal where they are established and no longer that of the *département.*

48. This change takes up the recommendation by the *Autorité*, which had underlined that this extension would stimulate competition, improve the quality of service and better respond to litigants' needs (companies or private individuals) and furthermore encourage the grouping of bailiff offices.

3.2 Conditions of establishment: regulated freedom

49. The law of 6 August 2015 establishes the principle of freedom of establishment for notaries and bailiffs, to be regulated and gradually implemented, considering the economic realities of these professions.

50. In the areas opened up to free establishment "*where the establishment of offices is deemed useful to strengthen the proximity of the services offered"*, applicants may request authorisation from the Minister of Justice to set up an office. Beyond these defined areas, the installation of new offices will also be possible unless opposed by the Minister of Justice, in a justified refusal decided subsequent to an opinion issued by the *Autorité*, insofar as its establishment would "*affect the operational continuity of existing offices and compromise the quality of service delivered* ".

51. The criteria for this zoning stipulated by Decree 2016-216 of 26 February 2016 firstly involve supply (the number of existing offices, age of practising professionals, etc.) and secondly, demand (changes in the property market or marriage demographics for notaries, judicial activity for bailiffs, etc.).

21 https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000032113239

22 https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000032113254

52. This new regulatory scheme would involve not only the relevant branch of the executive, as the decision-making authority, but also the *Autorité de la concurrence*, making proposals regarding the implementation of this zoning. In order "*not to disrupt the conditions of operation of existing offices"* (article 52 of the law of 6 August 2015), the map drawn up by the *Autorité*, to be submitted to the Ministers of Justice and Economy for them to issue a joint order, will be complemented with recommendations on the pace of establishment compatible with the gradual increase in numbers of professionals in the relevant zone. In addition, the map will be revised every two years.

53. A Decree of 20 May 2016[23] defines the practical methods for creating offices by the Minister of Justice - the guarantor under the terms of the law (article L 462-4-1 of the Commercial code) of the freedom of establishment. These considerations are not without importance to ensure the effective opening up of the professions concerned, under objective conditions - for example as regards the impartial management of the "waiting list" for new applicant (time stamping of applications received on the Ministry of Justice website, appointment in the resulting ranking order, etc.)

54. Moreover, the Macron Law, taking into account the conclusions from the *Autorité's* recommendations, introduced an age limit of 70 years for the practice of the relevant professions, to promote the entry of young professionals.

- In addition to these new attributions, the *Autorité* is to issue an opinion to the Minister of Justice on the freedom of establishment for lawyers at the Supreme Courts (solely qualified to represent clients in final appeal cases before these supreme courts), including recommendations "*with the aim of progressively improving the number of these counsel positions",* and specifying the number of new practices required to ensure a satisfactory delivery of the services. This therefore involves the gradual and measured opening up of another regulated legal profession, but one with characteristics distinctly different from those examined by the *Autorité*, and where development depends principally on that of litigation liable to final appeal .

The opinions to be issued by the *Autorité* on these new establishment schemes are under discussion. They were first the subject of broad public consultation aimed at collecting contributions from interested parties, which totalled almost 500[24].

3.3 Fees: focus on costs

55. The method adopted for determining fees under the aforementioned Macron Law and decree 2016-230 seeks to set fees based on the cost of services, whilst ensuring that professionals receive reasonable remuneration, as recommended by the *Autorité de la concurrence* in its opinion of January 2015.

- The interpretation of the provisions of the Macron Law by the Administrative Supreme Court *(Conseil d'Etat)* within the framework of assessing the draft decree setting out the method for structuring fees finally led to the choice of a fee-structure which, instead of a holistic method of

23 https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000032576285

24 February 29 and March 1:
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=629&id_article=2736

http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=629&id_article=2739

evaluating costs and reasonable remuneration, took into account "*for each service*", on the one hand, the costs relating to the service delivered, including the direct costs for this service and a portion of indirect costs, and on the other hand a reasonable remuneration, based on the average work time spent to deliver this service, to which is added a portion of the remuneration from the capital invested.

56. Given the difficulty to determine, in the short term, the respective costs of services in the absence of available accounting data, and due to the tight deadline for the adoption of the implementing provisions (before 1 March 2016), a transitory system was adopted[25]. This determines that for a maximum period of two years, *"whilst waiting for the necessary data and information to be collected"*, as listed in the Decree, fees shall be fixed on the existing basis "*within the limit of a 5% fluctuation*". The approach that will thereafter preside over the forthcoming rounds of fee structuring revisions, will in practical terms lead to allocating a cost and specific remuneration to each document or service (article R 444-5 and seq. of the Commercial code) - a challenging exercise which will require the implementation of analytic accounting methods by professionals.

- It is within this framework that the various ministerial orders on fees were published, which led to a reduction of notary, bailiff and judicial auctioneers' fees for services carried out from 1 May 2016.

57. This reduction is relatively moderate, both for flat-fee deeds (for example from €117 to €115.39 ex-vat for fees relating to a donation between spouses during marriage, i.e. -1.39%) as well as for payments proportionate to the costs of property purchases (reduction of -1.01% to -1.39% depending on fee bands)[26], but it constitutes a positive message immediately delivered to consumers, who furthermore benefit from greater transparency and clarity of fees. It also has to be assessed in conjunction with the new cap on fees due within the context of small property transactions (see below).

- Furthermore, this reduction is combined with margins of flexibility for determining fees introduced by this reform, which in part adopts the recommendations issued by the *Autorité*.

58. The services provided by notaries that compete with other professionals are now subject to a free fee structure, for example property negotiations (R444-16 of the Commercial code). However, this fee de-structuring was not extended to deeds optionally authenticated where drafted by notaries, although this was recommended by the *Autorité*.

59. The Macron Law instituted and provided a framework for the option for notaries to offer discounts: notaries can apply a maximum discount of 10% on fees for transactions over €150,000 (article A. 444-174 of the Commercial code), and a maximum discount of 40% for commercial properties, can be applied to fees calculated on bands over €10m.

60. In its opinion issued in January 2015, the *Autorité* encouraged the removal of the principle of prohibiting partial discounts (unless exceptionally authorised by disciplinary courts), applicable up to the reform of 2015, in order to stimulate price competition. It nevertheless underlined in its January 2016 opinion that the basic threshold of 10% for discounts seemed "*insufficiently attractive to generate competition on prices amongst professionals"*, although in the context of the freedom of establishment, it would be better that new entrants implementing a high-performance organisation could set themselves

25 See article 12 of Decree no. 2016-230 of 26 February 2016 relating to the fees for certain legal professionals and the inter-professional fund for access to law and justice, which operates modulation on the basis of the existing fees, limited to 5%.

26 http://www.notaires.fr/fr/le-tarif-du-notaire

apart through attractive pricing terms. The *Autorité* consequently proposed an increase of 10% to 20% to the discount threshold, as well as the freedom to negotiate fees for non-residential property above a threshold, rather than a maximum discount of 40% - which was not retained.

61. On the other hand, the *Autorité's* recommendation was followed as regards ceasing discounts granted by notaries to members of notary offices and replacing this by the generic option of declining payments, for social purposes.

- The Decree also provides for a cap on fees for property transactions, up to 10% of the total value of the assets or underlying title.

62. In its recommendation of January 2016, the Autorité considered that this limit could be considered to be "a legitimate counterbalance to the proportionality of the fee structure agreed in terms of equalization, which tends to over-pay certain deeds to compensate for the costs of less profitable deeds", and that furthermore it would constitute an incentive to the mobility of land assets of lower value for the collective benefit (for example forestry re-parcelling) - compliant with the public service mission of notaries.

- Finally, the new provision reforms and limits the scope of the services and professionals eligible to apply an emergency fee, in compliance with the *Autorité's* recommendations (articles R.444-11 and 444-12 of Commercial code). This emergency fee in practice only applies to bailiff fees for specific services: it is determined by the deadline for the intervention, and the amount is fixed at an absolute value by law - instead of unrestricted fees added on to the standard fee when *"the bailiff carrying out his office is confronted with an emergency situation"*, based on regulations prior to the reform.

- Changes in fee regulations will henceforth be a continuous, rather than a sporadic, process. The *Autorité* can participate in this revision process by issuing an opinion at the request of the Government or of its own initiative, with the Government being required to inform it of any draft proposals on the matter at least two months in advance (article L 462-2-1 of the Commercial code).

3.4 Conditions of practice: more flexibility in inter-professional services

- An order dated 31 March 2016, pursuant to the Macron Law, introduced new provisions relating to the shared practice of regulated professions, both legal professions (lawyers, lawyers at the Supreme Courts, bailiffs, notaries, etc.) and other specialist professions (chartered accountants, industrial property consultants).

63. The purpose of this new multi-professional company, which can be take on any legal form (except those with a trading capacity) is to share the practice of several of the aforementioned professions, and its share capital can only be held by natural or legal persons that are members of the professions comprised in said company. This multi-professional company will be created to offer clients, whether businesses or individuals a "one-stop-shop" by offering a range of services with more attractive prices through cost-sharing.

- Pursuant to the Macron Law (articles 63 and 67), legal professionals can henceforth create several various company structures, such as a partnership or a public limited company, under the same restrictions as above. If the structure is a company, both the share capital and voting rights may be held by any person practising in any legal profession.

64. These developments are fully compliant with the recommendations by the *Autorité* expressed in its opinion of January 2015.

4. Conclusion

65. This reform also marks the attribution of a new task for the *Autorité de la concurrence* in participating in the regulation of a series of professions, at the far edge of its primary mission of competition regulation responsible for conserving the economic public order. A new team has been created in the *Autorité* to take on this responsibility, comprising seven agents with a range of diversified backgrounds, both financial and legal.

66. The reform remains to be completed regarding bailiffs and legal auctioneers because the Macron Law (article 61-III) provides for their progressive merging into a new profession as Commissioners of Justice (*commissaires de justice)* by an order - the draft proposal was submitted to the *Autorité*, which has been called upon to issue an opinion to the government.