

LES  
ESSENTIELS

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**LES ORGANISMES  
PROFESSIONNELS**

**PROFESSIONAL  
BODIES**

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Autorité  
de la concurrence



LES  
ESSENTIELS

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**PROFESSIONAL  
BODIES**

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*This study was conducted by Aurore Boyeldieu, Thomas Gu  rin, legal advisers in the legal department, and Juliette Th  ry-Schultz, legal director, under the direction of Isabelle de Silva, president of the Autorit   de la concurrence.*

## FOREWORD

Professional bodies have existed in different forms since ancient times. At different times in history, professional bodies have been able to contribute to the structuring of professions or activities, from former merchant guilds to professional orders, including business unions in the IT or digital sector. The *Autorité's* interest in the activity of professional bodies goes back a long way. It is a fact that the functioning of professional bodies may be conducive to anticompetitive activities, in particular price agreements, anticompetitive exchanges of information or concerted actions aimed at slowing the development of competition.

In this well-known landscape, a major modification will come into play in 2021. Indeed, the transposition of Directive 2019/1 known as "ECN+" will lead to the removal of the specific sanction ceiling which was previously applicable to professional bodies, and which severely limited the financial "risk" in the event of an infringement, this being capped at 3 million euros.

With the ECN+ Directive, this ceiling is no longer applicable, professional bodies are exposed, in the event of infringements of the competition rules, to penalties of up to 10% of each of its members' cumulative worldwide turnover. This therefore constitutes a «Copernican revolution» in terms of financial risk for professional bodies that would commit competition law infringements.

The *Autorité* has therefore decided to help economic players anticipate this development, by dedicating a specific study to professional bodies. Its purpose is to analyse, in light of decision-making practice and case law, behaviours of professional bodies that may be contrary to competition law but also to recall all the essential pro-competitive actions that they often put into place. The study is thus intended to be a «turnkey» tool to promote compliance procedures on the part of the professional bodies and of their members.

I hope that this work will be useful to all and will, in the future, prevent and limit the «competitive risk» associated with the participation of companies in professional bodies and unions, and will constitute a vector of good practices.

**Isabelle de Silva,  
President of the Autorité de la concurrence**

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# INTRODUCTION

1. The notion of professional body or organisation is a polysemic notion, which does not correspond to any precise legal definition. In labour law, the term refers to trade unions of employees or professional organisations of employers. The provisions of Book IV of the French Commercial Code (*Code de commerce*) relating to competition rules refer to it in order to recognise the capacity of professional and trade union organisations to submit a request for an opinion or a complaint to the *Autorité de la concurrence* (hereinafter "*Autorité*")<sup>1</sup>.
2. This study will include under this term organisations that are intended to bring together all the companies in the same profession or sector, and the trade associations representing companies.
3. In this sense, professional bodies are distinct from civil or commercial groups, such as purchasing and reference listing offices or economic interest groups (EIG), which enable their members to pool some of their commercial activities or certain resources needed to carry them out, but are not intended to bring together all the players in the same profession or sector.
4. Their primary objective is to represent and defend the interests of all companies in a given profession or sector, even if they may carry out economic activities on an ancillary basis for the benefit of their members. Their main role is to bring together and mediate between companies, markets and public authorities.

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<sup>1</sup> Article L. 462-1, read in conjunction with Article L. 462-5, confers on "professional and trade union organisations" the power to apply to the *Autorité* to request an opinion or lodge a complaint, while Article L. 490-10 makes provision for "professional organisations" to bring actions for damages before the civil and commercial courts for acts which are directly or indirectly prejudicial to the collective interest of the profession or the sector which they represent, or to fair competition.

5. Throughout history, their place and role have not always been recognised in the same way. Considered in turn as intermediaries useful to businesses in developing their activity, or as obstacles to the economic or political structure of the country, the fate of professional bodies has fluctuated.
6. Before detailing the issues in this study, it is therefore appropriate to provide a brief historical overview of the place of “intermediary bodies” in the French economy.

## HISTORICAL APPROACH

7. The role of professional bodies as “intermediary bodies” dates back to antiquity. The Greeks referred to them as *hetaireiai*, the Romans as “colleges of craftsmen”. They appear for the first time in the constitution promulgated by Servius Tullius, which remained in force until 241 B.C.<sup>2</sup>.
8. The institution of craftsmen’ colleges was quickly established in Gaul, before disappearing with the fall of the Roman Empire in the 5<sup>th</sup> century. Professional bodies reappeared in the form of guilds of merchants or craftsmen in France in the Middle Ages, with the oldest known bodies dating from the second half of the 11<sup>th</sup> century<sup>3</sup>.
9. The corporations, which succeeded the guilds, took on a growing role from the 12<sup>th</sup> century onwards, in a highly decentralised feudal world and in the context of the major economic boom, the “12<sup>th</sup> Century Renaissance”, experienced by Western Europe at that time. These corporations contributed to the development of the craft industry by bringing together

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<sup>2</sup> The political system established by this constitution divided Roman citizens into six classes, each class being divided into several centuries. According to historians, several colleges of craftsmen were included in the new constitution: those of the *tignarii* (carpenters), the *aerarii* (bronze or copper workers) and the *tibicines* (flute players) or *cornicines* (trumpet players) each formed a century.

<sup>3</sup> E. Martin Saint-Léon, *Histoire des corporations des métiers depuis leurs origines jusqu’à leur suppression en 1791* [History of trade corporations from their origins until their suppression in 1791], 1897.

masters, journeymen and apprentices as a community. The corporative rules of trades were first codified by Etienne Boileau, Provost of Paris, in the *Livre des Métiers* [Book of Trades], a work of 1268. This code includes several measures that today would be considered restrictive of competition, but which were perceived at the time as having as their aim and rule the maintenance of economic equilibrium between members of the same trade. At the time, only the members of the corporation were entitled to carry on their activity and the corporation had general powers to organise the behaviour of its members<sup>4</sup>.

10. However, from the time of the Colbertist organisation of the French economy in the 17<sup>th</sup> century, the corporations considered as an obstacle to the creation of state-owned factories were the object of a certain mistrust. From a political point of view, these intermediary bodies were perceived as a brake on the emergence of centralism. From a philosophical and economic point of view, they could hinder individual freedom and give rise to agreements hampering the proper functioning of the markets. Adam Smith stated, on this last aspect, that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”<sup>5</sup>.
11. Revolutionary, centralist and liberal ideas reinforced this opposition to corporations. Jacobin mistrust of intermediary bodies was at the origin of the adoption of the d’Allarde Law of 2 and 17 March 1791, which abolished all the trade corporations of the Ancien Régime and preceded the Le Chapelier Law of 14 June 1791, which prohibited all professional groupings. Le Chapelier claimed, “*there are no longer any corporations in the State; there is only the particular interest of every individual*”

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<sup>4</sup> A. Perrin, *Les professions réglementées* [The regulated professions], Droit Administratif No. 8-9, August 2008, study 16, p. 16.

<sup>5</sup> A. Smith, *The Wealth of Nations*, 1776, p. 169.

and the general interest. No one is permitted to inspire in other citizens an intermediary interest, to separate them from the public good by a spirit of corporation". The provisions of Article 4 of the Le Chapelier Law, the forerunner of those currently prohibiting anticompetitive agreements, stated that "if, contrary to the principles of liberty and the Constitution, citizens with the same professions, arts, and crafts deliberate or make agreements among themselves designed to set prices for the assistance of their industry or labour, such deliberations and agreements, whether accompanied by oath or not, will be declared unconstitutional, prejudicial to liberty and the Declaration of the Rights of Man, and will be null and void; administrative and municipal bodies shall be required to declare them as such. The authors, leaders, and instigators who provoked, drafted, or presided over these agreements shall be charged by the police and at the request of the communal attorney will be fined 500 livres, suspended for a year from the enjoyment of all rights of active citizenship, and barred from admittance to the primary assemblies".

12. During the 19<sup>th</sup> century, this revolutionary radicalism was called into question. Some thinkers<sup>6</sup> advocated the return of intermediary bodies, as part of an approach based on decentralisation and protection. Tocqueville, in particular, stigmatised the central power as having "destroyed all intermediate authorities", positioning itself as "the mainspring of the social machine, the sole and necessary agent of public life", in such a way that it left "so wide a vacant space between itself and the public"<sup>7</sup>. These ideas were relayed by the social Catholicism emerging with the birth of the urban proletariat.

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<sup>6</sup> This subject was specifically addressed by the authors Alexis de Tocqueville in his works *L'Ancien Régime et la Révolution* [The Old Regime and the Revolution], 1856, and *De la Démocratie en Amérique* [Democracy in America], 1835–1840; and Emile Durkheim in *De la division du travail social* [The Division of Labour in Society], 1893.

<sup>7</sup> A. de Tocqueville, *L'Ancien Régime et la Révolution* [The Old Regime and the Revolution], 1856, p. 100.

13. Professional bodies indeed regained a more significant role in the context of the industrial revolution. Companies were uniting and setting up common rules of conduct<sup>8</sup>. Groups were organised into regional interbranch organisations, for example silk manufacturers in Lyon<sup>9</sup>. The workers' social movement would then encourage the formation of industry organisations at national level, such as the Foundry Committee (*Comité des forges*), which was created in 1864. The Ollivier Law of 25 May 1864 also abolished the offence of coalition.
14. The First World War and the interwar period saw the growth of market organisation in France and Europe, mainly in the raw material and processing industries<sup>10</sup>. Companies were organised around professional bodies dedicated to setting up cartels – such as, in the steel sector, the Foundry Committee or the Steel Syndicate of France (*Comptoir Sidérurgique de France*) – which allowed the emergence of the first multi-product cartel in the steel sector, responsible for monitoring compliance with the quotas allocated to the cartel member companies and the prices charged, and resolving any conflicts between cartel members<sup>11</sup>. Similarly, in the United Kingdom, companies in the steel sector came together in the British Iron and Steel Federation. Other organisations were created too, such as the Syndicate Financial Commission

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<sup>8</sup> OECD, *Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations*, 4 November 2008, DAF/COMP(2007)45, p. 16.

<sup>9</sup> M. Offré, *Sociologie des organisations patronales* [The Sociology of Employers' Organisations], La Découverte, 2009, p. 14.

<sup>10</sup> F. Berger, E. Bussiere, *La France, la Belgique, l'Allemagne et les cartels de l'Entre-deux-guerres. Une méthode pour l'organisation économique de l'Europe* [France, Belgium, Germany and the cartels of the interwar period. A method for the economic organisation of Europe] in S. Schirmann (ed.), *"Ces chers voisins". L'Allemagne, la Belgique et la France en Europe du XIXe au XXIe siècles* ["Dear Neighbours". Germany, Belgium and France in Europe from the 19th to the 21st Centuries], Steiner Verlag, Stuttgart, 2010, pp. 222–242.

<sup>11</sup> D. Barbezat, *The "Comptoir Sidérurgique de France", 1930-1939*, Business History Review, Vol. 70, No. 4 (1996), pp. 517–540, p. 518 and p. 524.

(*Commission financière des Comptoirs*) in the cement sector<sup>12</sup>. Created in 1934 and following on from the organisation of the market around regional bodies, the purpose of the latter was to examine the various strategies for rationalising the French cement market, for example by supervising the reorganisation of certain companies in difficulty by suggesting that they close a plant or by buying back their production.

15. The Vichy regime used intermediary bodies in the context of establishing an alternative economic policy, between socialism and capitalism. It was at this time that corporations were set up for different industries, with the aim of promoting consultation between employers and workers, and preventing class struggle<sup>13</sup>. The Peasant Corporation (*Corporation paysanne*) was also set up in this period. Committees were thus created, with particular responsibility for setting the rules for companies regarding the conditions under which they conducted business, the procedures for trading products and the regulation of competition<sup>14</sup>.
16. Today, the role of professional bodies responds to the need to unit and mobilise in an increasingly globalised economy.

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<sup>12</sup> C. Coursi ras-Jaff and A. Cartier, *Following the Pack or Fighting the Crisis? The Role of French Firms in the European Cement Cartels during the Interwar Period*, *Entreprises et histoire*, 2014/3 (No. 76), pp. 41-57.

<sup>13</sup> Adoption of the Labour Charter (*Charte du travail*) on 4 October 1941.

<sup>14</sup> J-P Le Crom, *Comit s d'organisation et comit s sociaux ou l'introuvable inter-p n tration de l' conomie et du social* [Organisation committees and social committees, or the untraceable interpenetration of economic and social issues], 2003, halshs-00256587.

**ISSUES TO BE ADDRESSED**

17. Changes in the role of intermediary bodies are therefore intrinsically linked to changes in the French economic and political system.
18. Distrust of these bodies, especially during the revolutionary period, was a consequence of the liberal political philosophy of the Enlightenment. The adoption in France of the Declaration of the Rights of Man was intended to protect and guarantee the exercise of fundamental individual freedoms from state constraints. In the same sense, companies also needed to be able to act freely, against the constraints of "corporatism", seen as a structured, rigid and closed economic system.
19. From the industrial revolution onwards, the balance of power shifted. There was a profound change in economic organisation, initiated by a continuous trend towards mergers, which led to the adoption of the antitrust rules in the Sherman Antitrust Act of 2 July 1890. The senator who wrote the text that bears his name justified the adoption of these new rules by stating "*if we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life*". Threats to the freedom of individuals, and in particular the freedom of enterprise – a principle of constitutional value in France – no longer necessarily came from the State or corporations, but also from companies themselves.
20. In this context, the role of professional bodies in the economic fabric requires renewal. Professional bodies may take legal action, and notably bring cases before the *Autorité* or bring actions for compensation, organise market conditions in a neutral manner, and share information: all these actions are designed to protect small or medium-sized players and facilitate the entry of individual players into markets occupied by major players or those in a dominant position.



21. The link between this role and the aims of competition law is nevertheless delicate. Indeed, while competition law – as defined by European and French national law, and interpreted by case law – is based on the premise that every economic operator must independently determine the policy it intends to follow on the market<sup>15</sup>, these bodies aim to create a social link between companies.
22. The very fact that, on the one hand, they bring together autonomous and sometimes competing companies and that, on the other hand, their operation presupposes contact between those companies exposes these bodies and their members to certain risks in terms of compliance with the rules of competition law, in particular those prohibiting anti-competitive agreements.
23. By providing a forum for competing firms, the activities of professional bodies can reduce the autonomy of players in their decision-making and, consequently, the uncertainty that should govern the functioning of a competitive market. Professional bodies can also, more directly, help put agreements in place, hinder access to the profession, adopt codes of ethics that restrict the commercial freedom of members, or disseminate commercially sensitive data. A significant number of cases brought before the *Autorité* therefore involve professional bodies that implement or facilitate restrictive competitive practices.
24. On the other hand, however, competition law is one of the guarantors of entrepreneurial freedom and of the possibility for all companies, whatever their size, to enter and develop in a market, to the extent to which they are entitled and according to their own merits. In this respect, professional bodies can prove to be particularly useful intermediaries for the companies concerned.

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<sup>15</sup> See, for example, Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society Ltd*, C-209/07, Rec. 2008 p. I-08637, paragraphs 33 and 34.

25. This ambivalence may make it difficult to understand the way in which competition rules apply to professional bodies. The purpose of this study is precisely to clarify these rules and make it possible to identify risky situations and behaviours where the “red line” can be more easily crossed.
26. This clarification, which is necessary due to the position and role of these bodies, is all the more essential today as the legislator is preparing to transpose into French national provisions, by ordinance<sup>16</sup>, the Directive of 11 December 2018 on the effective enforcement of competition rules, known as the “ECN+ Directive”<sup>17</sup>.
27. These new provisions will notably align the level of penalties applicable to companies and professional bodies.
28. Whereas, previously in France, the maximum amount of the fine for a professional body could not exceed 3 million euros, the ceiling of the fine incurred in the event of an infringement of competition law could reach 10% of the total turnover of the companies that are members of that body, thereby increasing the financial risk, which undergoes a radical change in scale.
29. This reform will therefore authorise stronger deterrent penalties compared to the previous situation, which increases the need for information on the conditions for characterising practices in this respect and the grounds for liability.
30. This study therefore intends to illustrate the approach taken by the *Autorité* in the competitive analyses carried out, and thus promote better compliance with competition rules in a context of increased risk.

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<sup>16</sup> The legislative transposition must be the subject of an ordinance issued upon adoption of the DDADUE Bill by Law 2020-1508 of 3 December 2020 on various provisions for adaptation to the law of the European Union in economic and financial matters, Official Journal of the French Republic (JORF) No. 0293 of 4 December 2020.

<sup>17</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ No. L 11 of 14 January 2019, pp. 3–33.

## SCOPE AND METHODOLOGY OF THE STUDY

31. As indicated, the purpose of this study is to specify the analytical framework used by the *Autorité* to assess the main behaviours that professional bodies have adopted or may be adopting. However, it is not intended to deal with issues specific to the regulation of certain sectors.
32. This is the case for exceptions to competition law covering certain practices implemented by professional bodies in the agricultural sector. The Regulation on the common organisation of the markets, known as the “CMO Regulation”<sup>18</sup>, therefore contains sector-specific exemptions from the application of the competition rules, which will not be addressed in this study. Moreover, this sector has already been the subject of an *Autorité* opinion intended to clarify the conditions of application of these exemptions, in particular with regard to the practices of professional and inter-branch bodies<sup>19</sup>. Apart from the value-sharing provisions of the “Egalim” Law, which were adopted after the opinion and which will be mentioned below, this opinion remains relevant and it may be referred to for further details regarding the rules applicable to the agricultural sector.
33. This is also the case for questions relating to the division of powers between the *Autorité* and the administrative courts to assess the legality of the practices implemented by professional associations in the sector of regulated professions.
34. As part of their traditional role, professional associations may enact certain rules for the practice of the profession, control access to the profession and exercise disciplinary power. The administrative courts and the *Autorité* have powers to rule on the legality of their decisions under the

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<sup>18</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, OJ n° L 347 of 20 December 2013, pp. 671–854.

<sup>19</sup> Opinion 18-A-04 of 3 May 2018 on the agricultural sector.

competition rules, but the *Autorité* is competent only where the decisions in question are not administrative in nature, or where the practices in question can be separated from the assessment of the legality of an administrative act.

35. The implementation of the principles applicable to the division of powers between the administrative courts and the *Autorité* has given rise to a body of case law<sup>20</sup>, whose solutions, specific to the regulated professions, will not be expanded on in the context of this study.
36. With regard to the methodology followed in the preparation of this study, the *Autorité*, in order to best meet its objective of clarification, launched a public consultation for all interested third parties in May 2019<sup>21</sup>. Twelve written contributions were received<sup>22</sup>. The *Autorité* also consulted all European competition authorities, through the European network, to find out the details of their decision-making practice in this area. Seventeen contributions were received<sup>23</sup>.

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**20** See in particular Decision 07-D-41 of 28 November 2007 regarding practices opposing the freedom to set prices for services offered to healthcare clinics in connection with calls for tender for anatomical pathology examinations; Decision 09-D-07 of 12 February 2009 regarding a referral made by the Santéclair company on practices implemented in the complementary health insurance sector; Decision 18-D-18 of 20 September 2018 regarding a request for interim measures by AGN Avocats in the legal services sector; Decision 19-D-01 of 15 January 2019 regarding practices implemented in the sector of the online promotion of medical procedures; Decision 19-D-19 of 30 September 2019 regarding practices implemented in the sector of architect services; and Judgment of the Paris Court of Appeal of 10 October 2019, AGN Avocats, No. 18/23386.

**21** <https://www.autoritedelaconurrence.fr/en/node/5708>.

**22** Contributions from APDC, AFEC, CLIAA, CNAOC, CNIPT, CNIV, MEDEF, FNSEA, GIPT, INTERBEV, INTERFEL and Val'Hor.

**23** Apart from the Commission, the authorities of the following countries replied: Austria, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Latvia, Luxembourg, Netherlands, Norway, Romania, Slovakia, Spain, Sweden and Portugal.

## **STRUCTURE OF THE STUDY**

37. The study will first identify the role of professional bodies. It will then recall the conditions for the application of competition law to professional bodies, and list the main types of conduct committed or facilitated by professional bodies that may be considered infringements under the competition rules. The conditions for obtaining an exemption for such behaviour will be specified . Finally, the rules on penalties will be set out.

# **1/ ROLE OF PROFESSIONAL BODIES**



38. Professional bodies provide a range of services, information and representation for the benefit of their members, enabling the latter to improve their competitiveness in favour of the efficient and pro-competitive functioning of the markets concerned.
39. The usual activities of professional bodies can be categorised as follows: providing services and advice to their members; disseminating market information to them; representing the collective interest of their members to the public authorities; setting technical standards and establishing best practices; and negotiating the social standards applicable to a sector. Finally, professional bodies are key points of contact with competition authorities and have a central role to play in promoting a competition law culture among their members.

### Provision of services to members of the professional body

40. One of the main functions of a professional body is to provide services to its members, by organising conferences or training, or by providing advice on legal, accounting, environmental, technical or business matters.
41. Professional bodies may legitimately, as part of these activities, organise forums, fairs or trade shows, set up training courses, disseminate information papers or publish specialised journals for their members.
42. The *Autorité* also considers that a professional body may legitimately, in the context of its role of defending and representing the profession it covers<sup>24</sup>, provide legal assistance to its members, provided that it limits its intervention to a legal discussion of general scope without interfering in the commercial policy of its members.

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<sup>24</sup> Decision 05-D-33 of 27 June 2005 regarding practices implemented by Illec, paragraph 38.



## ROLE OF CERTAIN BODIES IN THE COVID-19 EMERGENCY

In light of the exceptional situation resulting from the Covid-19 pandemic, the *Autorité* has set up a Covid-19 emergency monitoring network, which is particularly concerned with providing informal and pragmatic responses to requests made by companies seeking to ensure their initiatives are legally secure, in particular regarding the possibility of joint action to address the health crisis.

In this context, ROF, a trade union representing opticians, asked the *Autorité* about an initiative to send a letter to a number of lessors with a view to requesting an adjustment of its members' commercial rents during the lockdown period.

In a statement addressed to ROF published on 22 April 2020, the *Autorité* recalled that the behaviour by a professional body consisting in providing, in the context of the Covid-19 crisis, general advice to its members on the application of provisions made by the public authorities or on the interpretation of existing contracts, and in expressing its position in writing appeared, at first sight, to form part of its role to provide information and advice, and defend its professional interests. The *Autorité* noted that ROF had indicated that it was offering only general recommendations, and providing legal and factual arguments in support of its members' requests. ROF had also specified that it would not determine the behaviour that its members should adopt. The behaviour consisting, for a professional organisation, in providing advice, in general fashion, to its members, in the context of the Covid-19 outbreak, on the application of provisions taken by the public authorities or on the interpretation of existing contracts and in expressing its position in writing enters, at first sight, within the framework of its mission to provide information and advice and defend its professional interests.

### Box 1

43. The *Autorité* constantly reiterates that professional bodies are free to disseminate information intended to assist their members in carrying on their activities. Yet, as discussed below (see paragraphs 230 to 236), professional bodies cannot, in the context of their advisory and training role, invite their members to engage in anticompetitive behaviour.
44. In this regard, several bodies called upon the *Autorité*, in their contributions, to clarify its position on the actions through which a professional body provides legal advice to its members by engaging in the interpretation of legislation or regulation.

## Dissemination of market information

45. The preparation and dissemination of aggregated statistics and industry information is one of the main tasks of professional bodies. This activity can improve the functioning of certain markets and facilitate the entry of new players. This is particularly the case for complex markets, or those involving highly asymmetric supply and demand in terms of access to information.
46. The collection and publication of aggregated data can enable market participants to make better-informed choices in order to effectively adapt their strategy to market conditions, notably in terms of adjusting supply to demand. In an opinion on the conduct of statistical surveys by a trade union regrouping manufacturers, importers and distributors of fertilisers (*Chambre syndicale des améliorants organiques et supports de culture*), the *Autorité* considered that the exchange of aggregate and sufficiently old information on the sales volumes of different products did not present any risk of anticompetitive coordination between manufacturers, but could give them better visibility on market developments, thus enabling them to adapt more effectively to demand<sup>25</sup>.
47. Better knowledge of demand or individual consumer characteristics can also help avoiding unnecessary costs. For example, in the case of perishable products, the exchange of information on the level of demand can help companies adjust their prices to ensure efficient destocking, rather than accumulate unsold stock. Finally, exchanges of information are also likely to increase the productive efficiency of a sector as a whole. Similarly, the exchange of information on investment or research and development programmes can prevent operators from undertaking parallel strategies leading to overcapacity or the duplication of costly and irrecoverable research efforts.

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<sup>25</sup> Opinion 10-A-05 of 23 February 2010 regarding statistical surveys by the Chamber of Trade for Organic Improvers and Growing Media.

48. In order to be able to assess one's own performance on the market, it is useful to use data on companies in a similar situation as a benchmark. Benchmarking methods are commonly used by companies that wish to position themselves in relation to their competitors. Knowing its own strengths and weaknesses enables a company to improve its efficiency. New entrants or smaller players can also take advantage of this information to enter the market more effectively and compete more aggressively with established firms. However, it should be emphasised that the assessment of one's own performance in relation to the market only requires aggregated data on the sector, or possibly anonymous data on best practices, and does not justify the exchange of information identifying the individual performance of competitors.
49. In addition, the provision of aggregated information on a sector can also directly benefit consumers by reducing their search costs and improving their choice.
50. In general, the *Autorité* and the European Commission (hereinafter the "Commission") consider that the exchange of historical statistical data or sectoral market studies is a task that can legitimately be undertaken by professional bodies, provided that such data are sufficiently aggregated and do not allow the identification of individual competitors' strategies<sup>26</sup>.
51. The *Autorité* has already examined, in the context of the opinion procedure, exchanges of information by professional bodies and considered, on the basis of the information submitted thereof, that these did not restrict competition.

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**26** In relation to the Commission, see for example Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, OJ n° C 11 of 14 January 2011, pp. 1–72, paragraph 57, and Commission Decision of 16 February 1994, Thyssen Stahl, 94/215/ECSC, paragraph 266.

In relation to the *Autorité*, see for example Opinion 12-A-12 of 15 May 2012 regarding the UIP referral concerning the compliance with the competition rules of the statistics published by the CPDP on the volumes of sales of petroleum products by authorised warehouse operators, paragraph 68.

**EXAMPLE OF EXCHANGES OF INFORMATION THAT DO NOT RESTRICT COMPETITION**

**Opinion 10-A-05 of 23 February 2010 regarding statistical surveys by the Chamber of Trade for Organic Improvers and Growing Media**

The trade union regrouping manufacturers, importers and distributors of fertilisers (*Chambre syndicale des améliorants organiques et supports de culture*) had applied to the Conseil de la concurrence (hereinafter "*Conseil*") for an opinion on the compatibility of the statistical surveys it carried out annually with the provisions of Article L. 420-1 of the French Commercial Code (*Code de commerce*).

The *Autorité* considered that these studies did not raise competition concerns, in view of the structure of the market, the nature of the information exchanged and the modalities of exchange. The *Autorité* thus noted that the markets concerned did not appear to be particularly concentrated and that the combined market share of the participants to the exchange was not considerable, since, in several of the sectors concerned, the leading companies were not participating in the exchange. This meant the statistics did not reflect the exact state of the market, reducing the risk of a potential collusive scenario. In addition, the data was exchanged annually and was aggregated at national level, which did not allow for the identification of individual positions. Finally, these studies were likely to improve the performance of companies thanks to improved knowledge of the markets in which they operated.

However, the *Autorité* did issue a recommendation, inviting the professional body to ensure compliance with certain best practices in this area, in particular to guarantee the confidentiality of individual data prior to aggregation.

**Opinion 10-A-11 of 7 June 2010 on the Interprofessional Optical Council**

The *Autorité* had been asked for an opinion on whether the Interprofessional Optical Council (*Conseil interprofessionnel de l'optique*: CIO), a grouping of professional bodies in the optical sector, was likely to bring about anticompetitive exchanges of information, given that its theoretical scope of action was relatively broad and that it included almost all the representatives of the operators in the optical market, notably manufacturers and retailers.

The *Autorité* considered that the exchanges of information did not raise competition concerns. It noted that the exchanges of information organised by the CIO could lead the trade associations that were members of the interbranch organisation to communicate their proposals on the standardisation and computerisation of transactions relating to the marketing of optical products, particularly with regard to the data that could be communicated by opticians to supplementary health insurance bodies. The *Autorité* found that this did not constitute sensitive information from a competition law standpoint. Moreover, exchanges within the CIO were not systematic and were not carried out at frequent intervals, which reduced the opportunity of companies likely to have access to the information exchanged to use it, in particular with a view to eliminating or restricting uncertainty as to the commercial strategy of their competitors. In addition, in view of the two

areas of intervention favoured by the CIO, namely the development of common positions on the computerisation of transactions in the optical sector and the defence of the interests of the entire sector through communication and lobbying, the interbranch organisation did not seem to interfere in trade relations between operators.

**Opinion 12-A-12 of 15 May 2012 regarding the UIP referral concerning the compliance with the competition rules of the statistics published by the CPDP on the volumes of sales of petroleum products by authorised warehouse operators**

The Union of Independent Oil Importers (*Union des importateurs indépendants pétroliers: UIP*), had asked the *Autorité* for its opinion on the compliance with competition rules of the statistics on the volumes of sales of petroleum products by authorised warehouse operators published by the Professional Oil Committee (*Comité professionnel du pétrole: CPDP*).

In order to assess the lawfulness of this exchange of information, the *Autorité* took into consideration both the legal obligation of authorised warehouse operators to hold and maintain strategic stocks of petroleum products and the usefulness of these statistics for supply crisis management.

The *Autorité* then analysed the antitrust risks associated with the exchange of information, distinguishing between two categories of data: national data individualised by operator and aggregated local data (at regional or county level).

With regard to the individualised data at national level, the *Autorité* considered that exchanging these data was not likely to raise competition problems, taking the large number of players in France and the local dimension of the markets into consideration. The *Autorité* however emphasised that the publication of this data should not enable operators to monitor the commercial strategy of their competitors in real time. The *Autorité* considered that such statistics should be of a historical nature and should therefore be published after a sufficient period of time. In this respect, the *Autorité* noted that the dissemination of individualised information on a monthly basis could increase antitrust risks

As regards aggregated data at sub-national level, the *Autorité* considered that exchanging this data on a monthly basis did not raise competition concerns, as the data was aggregated at a geographical areas where a sufficient number of operators were active making it impossible to identify the operators' individual strategies. The *Autorité* considered that the dissemination of aggregated data on a regional basis, or even by defence zone (there are seven defence zones in France within which sufficient stocks of petroleum products must be built up) seemed appropriate. On the other hand, it considered that the dissemination of aggregated county level data was likely to generate antitrust risks, given the small number of players in each county and the possibility of identifying the individual strategies of those despite the aggregation of the data.

Box 2

52. Conversely, exchanges of individualised or insufficiently aggregated information, as well as those relating to future prices or quantities, may seriously disturb the competitive balance of the market by facilitating collusion between competitors and may thereby, under certain conditions, fall within the scope of anticompetitive practices. It is therefore necessary to be vigilant about the type of information exchanged and the modalities of such exchanges (see paragraphs 165 *et seq.*).

## Intervention of professional bodies with the public authorities

53. Professional bodies play an important role in promoting, representing and defending the interests of their members in any area of public policy that may affect them.
54. As recalled by the *Conseil*, "it is legitimate and lawful for professional organisations to voice these concerns and seek to influence public policy"<sup>27</sup>.
55. Thus, in a decision relating to a referral submitted by a casino, the *Conseil* found that a memorandum from an association regrouping casinos (*Syndicat des Casinos Modernes*) addressed to a Minister, which, according to the complainant, was intended to influence the Minister so that he refused the establishment of a new casino, did not have an anticompetitive object in itself, as it was part of "a public debate in which socio-professional groups make their views known in order to defend the interests of their members"<sup>28</sup>.
56. However, professional bodies may not, under the pretext of representing the profession before the public authorities, engage in anticompetitive practices. In this respect, this study provides a number of principles to be observed by pro-

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<sup>27</sup> Decision 02-MC-06 of 30 April 2002 on the request for interim measures submitted by RMC Info, p. 3.

<sup>28</sup> Decision 05-D-20 of 13 May 2005 on a referral submitted the Lac de la Magdeleine casino, paragraph 27.

professional bodies in order to avoid infringing competition law in the context of or on the sidelines of their relationship with the public authorities (see paragraphs 237 to 247).

## Dissemination of standards and best practices

57. Professional bodies can promote best practices by disseminating and explaining legislative and regulatory developments, recommending quality standards and promoting compliance programmes.
58. Standardisation work, whether internal to the professional body or in preparation for an official process<sup>29</sup>, is also a relatively common activity for professional bodies. This work is intended to supplement and improve the conditions of application of regulations on technical points, and in that sense, constitutes a self-regulation activity.
59. Standardisation is the process of developing common standards that are agreed upon by the various economic stakeholders in order to facilitate trade, both nationally and internationally<sup>30</sup>. The conditions of access to a particular quality label, the conditions of approval by an inspection body or agreements defining the environmental performance of products or production processes can also be considered standardisation agreements<sup>31</sup>.
60. Where they facilitate the development of new markets and the improvement of supply conditions, the *Autorité* favours standardisation agreements.

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<sup>29</sup> Via, for example, AFNOR, UNECE or ISO.

<sup>30</sup> Article 1 of French Decree 2009-697 of 16 June 2009 on standardisation defines standardisation as “an activity of general interest whose purpose is to provide reference documents drawn up by consensus by all interested parties, relating to rules, characteristics, recommendations or examples of best practice concerning products, services, methods, processes or organisational systems”.

<sup>31</sup> Commission Communication, Horizontal Guidelines, cited above, paragraph 257.

61. Consensus standards can limit the barriers to entry created by national particularities and open up access to new markets by establishing a level playing field for all the companies concerned. By facilitating the compatibility and interoperability of different products and services, the adoption of standards can have a pro-competitive effect where this promotes diversity of supply and makes it easier for buyers to compare different goods, thereby supporting competition on the merits.
62. More generally, the standard makes it possible to reduce a number of information asymmetries between producers and buyers, whether they are businesses or consumers, and thus helps to create or maintain a form of trust between operators, without which the market loses efficiency.
63. On this subject, the Commission stated in its Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") to horizontal co-operation agreements that: "*[s]tandardisation agreements usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers)*"<sup>32</sup>.
64. These pro-competitive effects (for example, safety, compatibility, interoperability and the integration of innovations) justify the involvement of professional bodies in the development of standards.
65. However, standardisation carried out improperly can affect economic efficiency and restrict competition, in particular if it produces unnecessary standards with an unproven econom-

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<sup>32</sup> Commission Communication, Horizontal Guidelines, cited above, paragraph 263.



ic cost-benefit balance, or if it allows a biased standard to be approved for the benefit of certain market players, who can then use it to erect a barrier to entry for competitors or innovators. These dangers are all the more pernicious since, as noted in the *Autorité's* opinion on standardisation, "improper" standards are difficult to detect and correct once the standardisation process is complete<sup>33</sup> (see paragraphs 225 *et seq.*).

## Collective bargaining

66. Collective bargaining plays a major role in defining labour relations between employers and employees even more so when it relates to the employment, professional training and working conditions, and social guarantees granted to employees.
67. Employers' organisations, which are also associations of undertakings, are social partners that play a central role in negotiating so-called "industry-wide" agreements with employees' trade unions.
68. An industry-wide agreement is negotiated in matters strictly defined by law and applies only to a sector and within a geographical scope (national, regional or at county level) that is specified during the negotiation. The agreements concluded at this level deal with all the matters mentioned in Article L. 2221-1 of the French Labour Code (*Code de travail*): *"the rules under which employees' right to collective bargaining concerning all their employment, professional training and working conditions, and their social guarantees, is exercised"*<sup>34</sup>.

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<sup>33</sup> Opinion 15-A-16 of 16 November 2015 reviewing standardisation and certification processes in the light of competition law, paragraph 7.

<sup>34</sup> An agreement at the company or group level is negotiated between the employer and the representative trade unions within a company. It can be concluded at the level of a group of companies (holding company and subsidiaries) or an establishment. It may deal with matters falling within the remit of the industry, provided that it offers at least equivalent guarantees. In all other matters not covered at the industry level, it then prevails over the industry-wide agreement.

69. Industry-wide bargaining is an essential tool for regulating labour relations, generally to the benefit of employees who have a job in that industry. Indeed, the extension of the agreement to all companies in the industry prevents any individual search for competitive advantages resulting from the application of social standards that are less favourable to employees than those negotiated collectively. For example, apart from the protections afforded by the growth-indexed minimum wage (SMIC) provided for in Article L. 3231-2 of the French Labour Code, the introduction of minimum wages determined by job type and industry makes it possible to limit the negative impact of competition between companies on wage levels, and to rebalance the power relations between employer and employee, the latter being most often the “weak party” to the employment contract. Collective bargaining at the industry level also plays an important role in many other areas, such as job security, working time regulations, the quality of the working environment, and access to training or social protection.
70. However, the participation of professional bodies in collective bargaining cannot be diverted from its legitimate objective with the aim of infringing competition law<sup>35</sup>.
71. In addition, in the positive law governing collective labour relations, Article L. 2261-25 of the Labour Code states that the Minister of Labour may refuse to extend a collective labour agreement “for reasons of public interest, in particular for excessive harm to free competition”.
72. In a recent opinion, the *Autorité* explored the issues raised by the application of competition law to industry-wide agreements<sup>36</sup>. The potential antitrust risks will be developed below (see paragraphs 248 *et seq.*).

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**35** For an example of the misuse of labour law by an association for anticompetitive purposes, see the *Autorité’s* Decision 06-MC-02 of 27 June 2006 on the request for interim measures submitted by the Bouc Bel Air town council.

**36** Opinion 19-A-13 of 11 July 2019 regarding the competitive effects of industry-wide agreements’ extension.

## Role of professional bodies in the implementation of competition rules

73. Professional bodies play a crucial role in the implementation of competition proceedings, whether advisory or litigious (1), as well as in training and raising awareness on competition issues among their members (2).

### ROLE OF PROFESSIONAL BODIES IN COMPETITION PROCEDURES

74. Professional bodies play an important role in the enforcement of competition law. They are legally entitled to seek an opinion from the *Autorité* on any competition issue or bring a complaint about anticompetitive practices affecting their members. They are also key points of contact for the *Autorité* in the context of its investigations.

#### Advisory referrals

75. Under the terms of Article L. 462-1 of the French Commercial Code (*Code de commerce*), professional and trade organisations may seek an opinion from the *Autorité* on any competition issue. These referrals remain relatively few in number (35 referrals since 2002), and have tended to decrease in recent years (only two referrals since 2015).
76. Within this framework, the *Autorité* gave its opinion on various subjects. Those have concerned issues of a general nature, such as the rules governing the exercise of the professions of land surveyor and topographer (methods of certification in georeferencing, conditions of access to public contracts and the limits on the monopoly of land surveyors)<sup>37</sup> or the internal operating rules relating to the exchange of information within a trade association in the optical sector<sup>38</sup>.

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<sup>37</sup> Opinion 18-A-02 of 28 February 2018 on the profession of surveyor.

<sup>38</sup> Opinion 10-A-11 of 7 June 2010 on the Interprofessional Optical Council.

They have also covered more specific projects, such as the introduction of statistical studies in the petroleum products sector<sup>39</sup> or the creation of a central negotiating body for the purchase of medicinal products by a professional body of veterinarians<sup>40</sup>.

77. The *Autorité* endeavours to enable professional bodies referring cases to safeguard the actions they intend to take on any new issue with regard to competition law<sup>41</sup>.
78. By way of example, in Opinion 12-A-12, the Union of Independent Oil Importers (*Union des importateurs indépendants pétroliers*: UIP) asked the *Autorité* for its opinion, inviting it to examine the compliance with competition rules of the sales statistics that the UIP was planning to disseminate. In response to this request, the *Autorité* recommended several modifications to the envisaged system for exchanging information in order to safeguard the UIP's approach, after a practical examination of the characteristics of the market and the functioning of the exchange in question<sup>42</sup>.
79. Opinion 15-A-19, which followed a referral to the *Autorité* by a fisheries cooperative<sup>43</sup>, highlighted the inefficiency and anticompetitive risks of the system for allocating French fishing quotas among producers, linked in particular to the "intergenerational" inequality that this system creates to the detriment of young producers who are new entrants.

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39 Opinion 12-A-12 of 15 May 2012, cited above.

40 Opinion 12-A-14 of 19 June 2012 on the effects on competition of the grouping of veterinarians involved in the distribution of veterinary medicinal products.

41 Opinion 04-A-02 of 16 January 2004 regarding a referral from the French Federation of Private Hospitals (*Fédération de l'hospitalisation privée*); Opinion 10-A-05 of 23 February 2010, cited above; Opinion 10-A-11 of 7 June 2010, cited above; Opinion 11-A-14 of 26 September 2011 regarding the wine sector (wines of the Bergerac région); Opinion 12-A-12 of 15 May 2012, cited above; Opinion 18-A-02 of 28 February 2018, cited above.

42 Opinion 12-A-12 of 15 May 2012, cited above.

43 Opinion 15-A-19 of 16 December 2015 on the effects on competition of the mechanism for allocating fishing quotas in France.

The *Autorité* recommended that this system be reformed to introduce individual quotas directly allocated to producers, following the example of the management of CO2 quotas.

80. As indicated above (see Box 1), in the more recent context of the Covid-19 health emergency, the *Autorité* informally clarified an issue for a professional association that wished to intervene in support of its members – opticians who had ceased their activity due to the health emergency – in their dealings with property companies on the subject of commercial rents. In the light of the information provided by the referrer, the *Autorité* took the view that the proposed approach was not such as to constitute anticompetitive intervention on the market.
81. Since the purpose of a request for an opinion is not to allow a pre-litigation examination of a practice, the *Autorité*'s opinions cannot be assimilated to individual exemptions from possible anticompetitive practices within the meaning of Article L. 420-4 of the French Commercial Code or Article 101(3) TFEU. In this regard, the *Autorité* has consistently stated *"that it is not its role, when it receives a request for an opinion, to qualify conduct in a market with regard to Articles 101 and 102 of the Treaty on the Functioning of the European Union, and Articles L. 420-1 and L. 420-2 of the French Commercial Code. Such a qualification is exclusively related to its litigation functions exercised in the context of a fully adversarial procedure, in accordance with Article L. 463-1 of the French Commercial Code"*<sup>44</sup>.

## Complaints

82. Any professional organisation that suspects the existence of anticompetitive practices concerning the interests for which it is responsible may refer such a matter to the *Autorité*, pursuant to point II of Article L. 462-5 of the French Commercial Code.
83. Such claims have been a source of reports of illegal practices for the *Autorité*.

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<sup>44</sup> Opinion 12-A-12 of 15 May 2012, cited above, paragraph 5.

84. In Decision 19-D-25, the *Autorité* imposed a penalty of 415 million euros on the four incumbent issuers of meal vouchers in France, after receiving claims from several professional bodies representing companies operating in the institutional catering and hotel sector<sup>45</sup>.
85. In urgent cases, claims from professional bodies may also be accompanied with a request for interim measures to order a company to comply with competition law.
86. In case 20-MC-01, the various professional bodies representing news publishers submitted a claim to the *Autorité* regarding Google's practices related to the implementation of the copyright and related rights of publishers and news agencies provided for under European Directive 2019/790<sup>46</sup> and French Law 2019-775<sup>47</sup>. The *Autorité* granted these requests for interim measures, ordering Google to negotiate in good faith the remuneration for the related rights with any news agency or publisher that so requested<sup>48</sup>.
87. Finally, it should be recalled that professional bodies are also empowered by law to bring actions before the courts following violations involving anticompetitive practices that would harm the interests of their members. Article L. 490-10 of the French Commercial Code specifies in this respect that they may bring such an action before the competent civil or commercial court for acts that directly or indirectly harm the collective interest of the profession or sector they represent, or

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**45** Decision 19-D-25 of 17 December 2019 regarding practices implemented in the meal vouchers sector.

**46** Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130 of 17 May 2019, pp. 92–125.

**47** French Law 2019-775 of 24 July 2019 creating a related right for the benefit of news agencies and publishers, Official Journal of the French Republic (JORF) No. 0172 of 26 July 2019.

**48** Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

fair competition. In a ruling dated 21 June 2017, following a request from the Minister of the Economy and a professional body representing the hotel sector acting on the basis of Article L. 490-10 of the Commercial Code, the Paris Court of Appeal overturned price parity clauses in the contracts of several online reservation platforms, under the terms of which the latter required hoteliers to grant them commercial conditions at least as favourable as those offered on competing platforms as well as on all other distribution channels<sup>49</sup>. While the Court of Appeal annulled these clauses on the basis of Article L. 442-6 of the Commercial Code [now article L 442-1 of the Commercial Code] prohibiting restrictive trade practices, the *Autorité* had also found in an earlier decision that these clauses were likely to raise competition concerns and had made binding the commitments undertaken by Booking.com to remove them from its contracts<sup>50</sup>.

## Participation of professional bodies in the *Autorité's* investigations

88. Competition authorities are frequently called upon to gather information and analyses from professional bodies when investigating anticompetitive practices, conducting sector inquiries, issuing opinions or examining proposed mergers.
89. The essential role of professional bodies in this context is recognised by the law.
90. Article R. 430-2 of the Commercial Code thus provides that the parties notifying a merger are required to provide a list and the contact details of the main professional organisations in the sectors concerned. The *Autorité* can thereby gather all relevant information on the functioning of a market and the effects that may occur following a merger.

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<sup>49</sup> Judgment of the Paris Court of Appeal of 21 June 2017, No. 15/18784.

<sup>50</sup> Decision 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

91. The European Commission's Notice on the definition of relevant market<sup>51</sup> also specifies that, for the calculation of the market size and market share of each supplier, the Commission may rely on studies commissioned from professional associations, as their statistical outputs are particularly reliable sources of information.
92. In practice, the *Autorité* relies heavily on written contributions from professional bodies to deliver its opinions, such as those on online advertising<sup>52</sup>, the urban distribution of medicinal products and private chemical pathology<sup>53</sup>, or the agricultural sector<sup>54</sup>. The *Autorité* also takes into account the contributions of professional bodies in the context of public consultations, when revising its procedures (for example, the adoption of the new notice on the settlement procedure) or adopting soft law (for example, the adoption of new merger control guidelines).
93. The *Autorité* may also collect the observations of professional bodies in the context of market tests, in order to assess whether the commitments undertaken by companies whose conduct is the subject of competition concerns are sufficient to remedy them. In Decision 17-D-16, the *Autorité* notably relied on the observations of the French Independent Association of Electricity and Gas (*Association française indépendante de l'électricité et du gaz*: AFIEG) and the National Association of Retail Energy Operators (*Association nationale des opérateurs détaillants en énergie*: ANODE) to ask Engie to improve its commitments to ensure that its pricing policy reflected its costs and was not predatory<sup>55</sup>.

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**51** Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ n° C 372, 9 December 1997, pp. 5–13.

**52** Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

**53** Opinion 19-A-08 of 4 April 2019 on the sectors of urban medicinal product distribution and private chemical pathology.

**54** Opinion 18-A-04 of 3 May 2018, cited above.

**55** Decision 17-D-16 of 7 September 2017 regarding practices implemented by Engie in the energy sector.



## ACTIONS BY PROFESSIONAL BODIES TO RAISE AWARENESS ABOUT COMPETITION LAW

94. Several contributions received by the *Autorité*, such as those from the French Business Confederation (*Mouvement des entreprises de France*: MEDEF), the French Association of Lawyers Practising Competition Law (*Association des avocats pratiquant le droit de la concurrence*: APDC) and the French National Federation of Agricultors' Associations (*Fédération nationale des syndicats d'exploitants agricoles*: FNSEA) highlight the important role played by professional bodies in raising their members' awareness regarding compliance with competition law, through specific training, information and competition referral mechanisms. In Opinion 10-A-11, the *Autorité* also stressed that "a trade association may take measures to ensure that its members are informed of the risks relating to the exchange of information between competitors. In this respect, the adoption by the Interprofessional Optical Council, at its annual meeting on 6 July 2009, of an ethical charter containing a reminder of competition rules to be signed by the members of the interbranch organisation is a useful measure that deserves to be highlighted"<sup>56</sup>.

## Conclusion

The central role that professional bodies play in improving the efficient functioning of markets and enforcing competition rules should be recognised and highlighted. This role, however, means that professional bodies are responsible for ensuring that they comply with these rules in the course of their various activities.

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<sup>56</sup> Opinion 10-A-11 of 7 June 2010, cited above, paragraph 109.

# THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES



95. The application of competition law to professional bodies raises a number of issues that relate to the fact that the body is not a single company, but a grouping of companies.
96. The first relates to the nature of their activities. While competition law is intended to apply to any form of economic activity, in the form of an offer of goods or services on a market, professional bodies do not, as a general rule, carry out such activities on their own. Their work consists in providing information and advice, and defending the professional interests of their members, but does not normally involve offering goods or services on a given market.
97. The second issue concerns the qualification of practices implemented by professional bodies. The vast majority of these are examined on the basis of the rules prohibiting anticompetitive agreements, provided for under Articles 101(1) TFEU and L. 420-1 of the French Commercial Code (*Code de commerce*). In the rarer cases where a professional body runs its own economic activities, it may also be subject to the rules prohibiting abuse of a dominant position in Articles 102 TFEU and L. 420-2 of the Commercial Code.
98. The third issue concerns the identification of persons liable to incur penalties as a result of practices committed by a professional body. The *Autorité* may impose sanctions on both professional bodies that have infringed the rules of competition law and, in certain circumstances, the companies that are members of such bodies.

## Applicability of competition law to practices that constitute market intervention

99. French and European competition law applies to economic activities and the subject of this law is "the undertaking", i.e. any entity engaged in an economic activity, regardless of

its form and legal status. Under French law, Article L. 410-1 of the Commercial Code subjects to competition law “production, distribution and service activities”, which are understood as being economic activities.

100. In general, a professional body does not carry out an economic activity unless it offers goods or services on a market itself. However, as soon as “it oversteps its role of providing information and advice, and defending the professional interests entrusted to it by law, and intervenes in a market”<sup>57</sup>, it has this capacity and its decisions are subject to competition rules.
101. In this way, decisions taken by professional bodies can have an impact on the functioning of a market by inviting their members to behave in a certain way in that market. The *Autorité* has, on several occasions, ruled that “*the fact that the vehicle of a [anticompetitive agreement] is a trade association or body that does not carry on an economic activity in its own right does not prevent the application of competition law to it, provided that the practices have involved its members, who do themselves carry on an activity of this nature, and that the practices are likely to have an appreciable effect on a market*”<sup>58</sup>.
102. With regard to the applicability of competition law to the practices of professional bodies, it is important to distinguish between:
  - behaviours that fall within the scope of defending the professional interests of their members, as in cases where a body intervenes with the public authorities on a policy issue<sup>59</sup>;

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<sup>57</sup> Decision 04-D-07 of 11 March 2004 regarding practices implemented in the bakery sector in the Marne *département*, paragraph 94.

<sup>58</sup> Opinion 04-A-02 of 16 January 2004 regarding a referral from the French Federation of Private Hospitals (*Fédération de l'hospitalisation privée*), paragraph 48; see also Opinion 03-A-18 of 15 October 2003 regarding a proposed publication by the French Association of Construction Economists (*Union nationale des économistes de la construction et des coordonnateurs*: UNTEC), paragraph 26.

<sup>59</sup> See for example Decision 06-D-21 of 21 July 2006 regarding practices implemented in the cognac brandy sector by the French National Cognac Bureau (*Bureau national interprofessionnel du cognac*).

- behaviours that, because they invite economic operators to adopt a particular attitude on the market, notably in the form of warnings or instructions, constitute an intervention that may, in certain scenarios, be an infringement of competition law<sup>60</sup>.
103. Without presuming that the practices in question are illegal, actions of a professional body that are similar to those of an undertaking and which therefore constitute intervention in the market justify the applicability of competition law to its practices.
104. The *Autorité* considers, for example, that a professional body intervenes in a professional activity when it encourages its members to harmonise their commercial policy regarding a parameter relevant to free competition<sup>61</sup>. Similarly, the dissemination of pricing instructions<sup>62</sup>, the implementation and imposition of a price schedule<sup>63</sup> or the adoption of non-objective, non-transparent and discriminatory membership conditions<sup>64</sup> by professional associations are all examples of market intervention.

## Legal bases applicable to the practices of professional bodies

105. The vast majority of the practices examined by the *Autorité* correspond to situations where the professional body, without

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**60** Decision 10-D-11 of 24 March 2010 regarding practices implemented by the French National Association of Ophthalmologists (*Syndicat national des ophtalmologistes de France*: SNOF), regarding the renewal of prescription glasses, paragraph 53; and Decision 12-D-19 of 26 September 2012 regarding practices in the teeth whitening and lightening sector, paragraph 76.

**61** Decision 10-D-11, cited above, paragraph 57.

**62** Decision 19-D-12 of 24 June 2019 regarding practices implemented by notaries in the real estate negotiation sector.

**63** Decision 19-D-13 of 24 June 2019 regarding practices implemented in the sector of court bailiffs.

**64** Decision 19-D-19 of 30 September 2019, cited above, confirmed by Judgment of the Paris Court of Appeal of 15 October 2020, *Ordre des architectes*, No. 19/18632.

carrying on an economic activity of its own, adopts a unilateral decision that serves as a basis for anticompetitive behaviour between its members. These practices are approached on the basis of the rules prohibiting anticompetitive agreements provided for under Article 101(1) TFEU and Article L. 420-1 of the French Commercial Code (*Code de commerce*). In certain, rarer, cases, they may also be subject to the rules prohibiting anticompetitive agreements and abuse of a dominant position by reason of the exercise of an economic activity.

### **APPLICATION OF ANTITRUST LAW TO THE DECISIONS OF PROFESSIONAL BODIES SUPPORTING AN INFRINGEMENT BY THEIR MEMBERS**

106. Article 101(1) TFEU prohibits, when they restrict competition, not only agreements and concerted practices implemented between independent undertakings, but also "decisions by associations of undertakings" taken by undertakings within the same collective body. The decisions of business associations are also referred to in other national legal systems, in particular in US law with the Sherman Act<sup>65</sup>.
107. According to the definition given by Advocate-General Mayras in his opinion on the Vereeniging van Cementhandelaren case, concerning an association of producers, in the decisions of the association of undertakings concerned, *"the anticompetitive agreement in this case takes the form of a general decision, which one might describe as of a 'legislative' nature, taken by a legal person (association or syn-*

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**65** Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court".

Section 7: "[T]he word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

*dicare) embodying producers or traders, the object of which is the defence of the economic interests of its members. Decisions by associations of undertakings differ from simple agreements in that, by belonging to the association, traders, whether natural or legal persons, accept its constitution and its discipline and are bound by majority decisions adopted by the advisory or executive organs of the association"*<sup>66</sup>.

108. The General Court of the European Union (hereinafter the "General Court") has had the occasion to point out that, where they have an impact on the European market, the inclusion in the European rules of decisions by associations of undertakings:

*"seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article 81(1) EC covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body"*<sup>67</sup>.

109. Although originating from a single legal person and appearing unilateral, the practices implemented by an association of undertakings (trade association, professional association or other association) therefore show joint intention by their members.
110. The *Autorité* also refers to this when penalising agreements by a collective body on the basis of Article L. 420-1 of the Commercial Code, the French Supreme Court (*Cour de cassation*) having, in a fundamental judgment of 16 May 2000 (*Ordre national des pharmaciens*), ruled that "a professional order represents the community of its members and [that] [...] a practice likely to have an anticompetitive object or effect

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<sup>66</sup> Opinion delivered in Judgment of 17 October 1972, *Vereeniging van Cementhandelaren*, C-8/72, EU:C:1972:84, p. 5.

<sup>67</sup> Judgment of 24 May 2012, *MasterCard*, T-111/08, EU:T:2012:260, paragraph 243.



*implemented by such a body necessarily indicates an agreement, within the meaning of Article 7 of the Ordinance of 1 December 1986, between its members".*

111. The application of antitrust law to professional bodies presupposes that several conditions are met.
112. Firstly, the members of the body must be undertakings, i.e. entities engaged in an economic activity. The case law of the Court of Justice of the European Union (hereinafter the "Court of Justice") has clarified this condition:
- A professional body does not have the status of association of undertakings when it takes decisions in the exercise of powers delegated by the State and closely controlled by it, in other words, decisions of a "state character", which presupposes an analysis of the way in which its representatives are appointed and the conditions under which its decisions are made<sup>68</sup>.
  - If the members of these bodies act as representatives of the State and not as representatives of a profession, the decisions taken by them cannot be considered to be decisions of an association of undertakings. In this respect, the fact that the State appoints all the representatives of an interbranch organisation does not mean that they should be considered representatives of the State, where the majority of these representatives are appointed by the public authority on the proposal of the organisation and must therefore be regarded as representing those organisations, and where the decision taken serves the interests of the representatives thus appointed. This is not the case if the representatives perform their functions on an honorary basis, i.e. if they are not required to take orders from the professional body and act in the general interest<sup>69</sup>.

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<sup>68</sup> Judgments of 21 September 1988, *Van Eycke v Aspa*, C-267/86, EU:C:1988:427, paragraph 16; of 17 November 1993, *Reiff*, C-185/91, EU:C:1993:886, paragraph 14; of 19 February 2002, *Arduino*, C-35/99, EU:C:2002:97, paragraph 34; of 19 February 2002, *Wouters*, C-309/99, EU:C:2002:98, paragraphs 68–69; and of 5 December 2006, *Cipolla*, C-94/04 and C-202/04, EU:C:2006:758, paragraphs 44 *et seq.*

<sup>69</sup> Judgments of 30 January 1985, *Bureau national interprofessionnel du cognac v Guy Clair*, C-123/83, EU:C:1985:33, paragraphs 18 and 19; and of 17 November 1993, *Reiff*, cited above, paragraph 19.

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

- Furthermore, if the State has the final say and control over the decisions of the professional body, these cannot be qualified as decisions of associations of undertakings<sup>70</sup>.
- The fact that a professional body is not itself an undertaking and that its members carry out a regulated activity shall not affect its status as an association of undertakings. In its *Wouters* judgment, the Court of Justice thus qualified a professional association of lawyers as an association of undertakings, on the grounds that lawyers "*carry on an economic activity and are, therefore, undertakings for the purposes of Articles [85], [86] and [90] of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion*"<sup>71</sup>. On the other hand, the European Union judge found that the Netherlands Bar could not itself be qualified as an undertaking "*since it does not carry on any economic activity*"<sup>72</sup>.
- The fact that an association of undertakings may also include persons or entities that cannot be qualified as undertakings is not sufficient to change the qualification as such of the association<sup>73</sup>.
- The concept of association of undertakings includes associations that are themselves made up of associations of undertakings<sup>74</sup>. For example, in the *FNCBV* (beef) case, the applicant associations had concluded the contested agreements in the

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**70** Judgments of 21 September 1988, *Van Eycke v Aspa*, cited above, paragraph 19; and of 19 February 2002, *Arduino*, cited above, paragraphs 40–44.

**71** Judgment of 19 February 2002, *Wouters*, cited above, paragraph 49.

**72** Judgment of 19 February 2002, *Wouters*, cited above, paragraph 112.

**73** Judgment of 13 December 2006, *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission*, T-217/03 and T-245/03, EU:T:2006:391, paragraphs 49 and 55; and Commission Decision of 8 December 2010, *Ordre National des Pharmaciens en France* (ONP), C(2010) 8952, paragraph 591.

**74** Judgment of 13 December 2006, *Fédération nationale de la coopération bétail et viande (FNCBV) and Others v Commission*, cited above, paragraph 49; and of 26 January 2005, *Piau v Commission*, T-193/02, EU:T:2005:22, paragraph 69; see also, by analogy, Judgment of 11 March 1999, *Eurofer v Commission*, T-136/94, EU:T:1999:45.

interest and on behalf of not their direct members (agricultural federations or trade associations), but the members of the latter, that is to say, farmers, “undertakings” within the meaning of competition law. The applicant associations were therefore regarded as associations of undertakings<sup>75</sup>.

113. Secondly, for an anticompetitive agreement to be characterised, the decision in question must be a faithful expression of the association's willingness to coordinate the conduct of its members in the market<sup>76</sup>. In other words, the decision must constitute *“the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity”*<sup>77</sup>. A price recommendation from the association, regardless of its exact legal status and regardless of whether it is binding or not, can be considered to constitute such a “decision”<sup>78</sup>.
114. Similarly, the *Autorité* has repeatedly held that *“the fact that the vehicle of an [anticompetitive agreement] is a trade association or body that does not carry on an economic activity in its own right does not prevent the application of competition law to it, provided that the practices have involved its members, who do themselves carry on an activity of this nature, and that the practices are likely to have an appreciable effect on a market”*<sup>79</sup>.
115. It considered that *“the decisions taken by [the entity supporting the infringement] express the will of the members of this common structure, which are indisputably legally dis-*

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<sup>75</sup> Judgment of 13 December 2006, *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others*, cited above, paragraphs 49–54.

<sup>76</sup> Judgment of 27 January 1987, *Verband der Sachversicherer*, C-45/85, EU:C:1987:34, paragraphs 29–32.

<sup>77</sup> Judgment of 19 February 2002, *Wouters*, cited above, paragraph 64.

<sup>78</sup> Judgment of 18 July 2013, *Consiglio nazionale dei geologi*, C-136/12, EU:C:2013:489, paragraph 46.

<sup>79</sup> Opinion 04-A-02 of 16 January 2004, mentioned above, paragraph 48; and Opinion 03-A-18 of 15 October 2003, mentioned above, paragraph 26.

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

*tinct undertakings pursuing distinct and competing economic objectives*"<sup>80</sup>.

116. When the document in question is disseminated to all members of the body, their adherence to the anticompetitive practice is presumed. On several occasions, the *Autorité* has taken the view that such decisions *"by definition express the common will of the member undertakings, and especially of their managers, where the latter sit on the decision-making bodies of the aforementioned association [...]. They may therefore be held liable with regard to the competition rules when the undertakings align their will with that of others to carry out, including within professional associations, illicit actions"*<sup>81</sup>.
117. The indicative nature of the document does not disqualify it<sup>82</sup>. Its form is also irrelevant; it may comprise professional regulations, internal regulations, a schedule or even a circular<sup>83</sup>. In this regard, it has been specified that *"a price recommendation, whatever its exact legal status, may be regarded as constituting such a decision"*<sup>84</sup>.
118. Finally, it should be emphasised that decisions of a professional body that are classified as decisions of associations of undertakings and which constitute restrictions of competition may escape the prohibition of Article 101(1) TFEU if they are necessary and proportionate for the proper practice of the profession in question. In the *Wouters* judgment

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<sup>80</sup> Decision 94-D-51 of 4 October 1994 on competition in the moving sector, p. 14; and Decision 10-D-15 of 11 May 2010 regarding practices implemented by the "*Groupement des Taxis amiénois et de la métropole*" economic interest group, paragraph 200.

<sup>81</sup> Decision 06-D-03 bis\* of 9 March 2006 regarding practices implemented in the sector of heating, sanitary, plumbing and air-conditioning products, paragraph 902.

<sup>82</sup> Judgment of the Paris Court of Appeal of 21 January 1993, *CAPEB*, BOCCRF No. 4 of 5 March 1993, p. 61.

<sup>83</sup> Judgment of the Paris Court of Appeal of 6 June 2013, *Géfil et al.*, No. 2012/02945, p. 8.

<sup>84</sup> Judgment of 18 July 2013, *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, cited above, paragraph 46.

mentioned above, the Court of Justice, examining in terms of antitrust law a regulation adopted by the Bar of the Netherlands, which prohibited partnerships between lawyers and accountants, ruled out the application of Article 101(1) on the following grounds: "*that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned*"<sup>85</sup>.

## APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES IN RESPECT OF AN ECONOMIC ACTIVITY

119. Although this scenario is relatively rare, professional associations as well as trade unions and associations may carry out an economic activity.
120. The concept of undertaking can therefore be applied to trade associations, as Advocate-General Jacobs has pointed out: "[s]ome trade unions may for example run in their own right supermarkets, savings banks, travel agencies or other businesses. When they are acting in that capacity the competition rules apply"<sup>86</sup>. In the same way, the Paris Court of Appeal has found that national competition law applied to "*a trade union organisation that engages in an economic activity, distinct from its primary role of defending the interests of its members*"<sup>87</sup>.

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<sup>85</sup> Judgment of 19 February 2002, *Wouters*, cited above, paragraph 110.

This case law has been applied by the European Commission in the field of sport. In two decisions delivered on 25 June 2002 (COMP/37806 ENIC/UEFA and COMP/38158 Meca Medina), the Commission used the criteria of the *Wouters* judgment to assess the validity under competition rules of the rules enacted by sports federations. It considered that the rule on multiple ownership of clubs (prohibiting control of more than one club by the same entity) and the establishment of anti-doping rules by the federations were necessary to ensure the integrity and objectivity of sporting events, in the interests of the public, athletes and supporters.

<sup>86</sup> Opinion delivered in Judgment of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430.

<sup>87</sup> Judgment of the Paris Court of Appeal of 29 February 2000, *Syndicat général du livre et de la communication écrite*, No. 1999/17522, confirmed by the Judgment of the French Supreme Court of 15 January 2002, *Les Meilleurs Editions*, No. 00-13059.

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

121. The *Autorité* has on several occasions examined the conduct of professional bodies engaged in economic activities in terms of both antitrust law and the law on abuse of a dominant position.
122. In Decision 09-D-31, the *Autorité* sanctioned the French Football Federation (*Fédération Française de Football*) for having entered into very long-term exclusive agreements with the company Sportfive – from 1985 to 2002 for some contracts – without any competitive bidding for the management of the marketing rights of the French national team and the Coupe de France, and for having colluded to organise the 2001 invitation to tender to renew the awarding of all marketing rights to the company Sportfive<sup>88</sup>. In Decision 14-MC-01, the *Autorité* considered that the agreement between the French National Rugby League (*Ligue Nationale de Rugby*) and the Canal Plus Group relating to the television rights to the Top 14 competition, as well as the conditions under which it was negotiated and signed, were likely to have implicated an anti-competitive agreement and ordered interim measures to be imposed so that the attribution of these rights be granted through a competitive bidding process<sup>89</sup>.
123. In Decision 13-D-06, the *Autorité*, which had received a referral from the French Federation for Chartered Management Associations (*Fédération nationale des associations de gestion agréées*: FNAGA), fined the French Association of Chartered Accountants (*Ordre des experts-comptables*) and the Chartered Accountant Media Association (*Expert Comptable Média Association*: ECMA) for seeking to make their online portal for filing tax and accounting data, "jedeclare.com", the indispensable portal for accountant professionals and char-

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<sup>88</sup> Decision 09-D-31 of 30 September 2009 regarding practices implemented in the sector of management and marketing of the sports rights of the French Football Federation.

<sup>89</sup> Decision 14-MC-01 of 30 July 2014 on the request for interim measures by beIN Sports France in the pay-TV sector.

tered management bodies<sup>90</sup>. The Association and ECMA had formed partnerships with accounting software publishers and the chartered management bodies responsible for certifying tax returns, and offered them an advantageous fee structure for the portal services. In return, the latter had to exclusively promote and recommend the “jedeclare.com” portal to their accountancy clients.

124. Following a referral by Eurogolf of practices implemented by the French Golf Federation (*Fédération Française de Golf*: FFG), the *Autorité* adopted a decision in which it accepted and made binding the FFG’s commitments, thereby closing the proceedings<sup>91</sup>. The Investigation Services highlighted the way that the FFG continued to conflate its public service role (the issuing of golf licences, an activity for which it holds the legal monopoly) and its economic activity (the marketing of various supplementary insurance products, an activity open to competition). As the FFG was likely to hold a dominant position in the market for insurance products offered to golfers, and taking into account its links with golf clubs, the inclusion of optional insurance in the federal licence was liable to be considered “tied selling”, which could be characterised as abuse of a dominant position. The *Autorité* decided to close the proceedings without imposing a fine by accepting and making binding the FFG’s commitments to dissociate insurance sales from the sale of the golf licence.

## **ESTABLISHING THE LIABILITY OF PROFESSIONAL BODIES AND THEIR MEMBERS**

125. The collective nature of professional bodies raises a final question with regard to the conditions of application of the competition rules, in respect of their liability.

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**90** Decision 13-D-06 of 28 February 2013 regarding practices implemented in the sector of teletransmission of tax and accounting data in EDI format to the tax administration.

**91** Decision 12-D-29 of 21 December 2012 regarding practices implemented in the sector of supplementary insurance aimed at golfers.

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

126. In principle, the *Autorité* imposes a sanction on an undertaking, either as a direct perpetrator or as a parent company. If the facts of the case show that the collective body was the sole initiator and organiser of the agreement, the *Autorité* may choose to implicate only this body. Indeed, it considers that “[the entity supporting the infringement] *must be implicated because it is [its own] governing bodies [...], albeit by delegation, that appear to be the perpetrators of the anticompetitive practices between its members*”<sup>92</sup>.
127. Apart from this situation, it is also possible to establish the liability of the members of the professional body, with or without that of the body. Further details are required regarding such situations.
128. In the first place, the members of a professional body may be held liable for practices instigated by the professional body. In the majority of cases, it is naturally to their benefit that the offences are committed.
129. It follows from case law and established practice<sup>93</sup> that, where members of a professional body have individually taken part in an anticompetitive practice implemented by a body, those members may be personally implicated.
130. In order to establish the adherence of a member of the body to a decision by an association of undertakings having an anticompetitive object or effect, it must be shown that the member has implemented the contested practice in question through concrete measures adopted in the context of the decision by the association of undertakings<sup>94</sup>.
131. Secondly, the professional body may be found liable alongside its members where it engages in separate and autono-

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<sup>92</sup> Opinion 94-D-51, mentioned above, paragraph 14; and Opinion 10-D-15 of 11 May 2010, cited above, paragraph 200.

<sup>93</sup> See, for example, Decision 15-D-19 of 15 December 2015 regarding practices implemented in the standard and express delivery sectors, paragraphs 766 *et seq.*

<sup>94</sup> Decision 19-D-19 of 30 September 2019, cited above, paragraph 400.



mous anticompetitive behaviour<sup>95</sup>, in particular by organising or playing an active role in the implementation of the anti-competitive practice instigated by its members, or where it contributes to the anticompetitive agreement by facilitating its implementation even in a subordinate, ancillary or passive manner<sup>96</sup>.

132. Pressure exerted on the professional body by one of its members, for example in the form of an instruction given to an employee of the body, does not relieve it of liability<sup>97</sup>.

### EXAMPLES OF PENALTY DECISIONS AGAINST A BODY AND ITS MEMBERS

In its decision on steel products, the *Conseil* held the main trade association in the profession (*France Négoce Acier*: FNA) and its members liable for the establishment of a cartel affecting prices, customers and contracts, and including the regular exchange of strategic information<sup>98</sup>. The FNA had played an active role in the collusion, having collected and disseminated strategic information and participated in meetings, in particular the cartel steering meetings. The association also intervened to disseminate information and clarify the functioning of the cartel<sup>99</sup>.

In the delivery service sector, the *Autorité* fined 20 companies and their trade association for exchanging information on price increases, on the one hand, and introducing a diesel surcharge, on the other. With respect to the first infringement, the association had also provided a forum for the exchange of strategic information at its meetings. In addition, it had actively participated in the meetings where infringements were committed, and obscured anticompetitive discussions in their minutes<sup>100</sup>. With respect to the second infringement, the association had organised several meetings and a conference call where infringements were committed. It had also written a report containing an order to implement the price-fixing agreement for which fines were issued<sup>101</sup>.

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**95** Judgment of the Paris Court of Appeal of 26 October 2004, *Yann Penart*, No. 04/07315, p. 8, confirming Decision 04-D-07 of 11 March 2004, cited above.

**96** Décision 19-D-25, cited above, paragraphs 667 to 671.

**97** Decision 15-D-19, cited above, paragraph 866.

**98** Decision 08-D-32 of 16 December 2008 regarding practices implemented in the steel trading sector.

**99** Decision 08-D-32, cited above, paragraphs 373–375.

**100** Decision 15-D-19, cited above, paragraphs 1004–1006.

**101** Decision 15-D-19, cited above, paragraph 864.

## CONDITIONS FOR THE APPLICATION OF COMPETITION LAW TO PROFESSIONAL BODIES

In the context of a settlement, the *Autorité* fined three major manufacturers of floor coverings in France and the relevant trade association, the SFEC (*Syndicat français des enducteurs calandriers et fabricants de revêtements de sols et murs*) for exchanging highly detailed information on their trading volumes, their turnover by product category and their commercial forecasts, and for establishing a non-competition agreement concerning communication relating to the environmental performance of their products<sup>102</sup>. This agreement involved the companies and the trade association signing a joint charter prohibiting the companies from communicating information on the environmental performance of their products. With regard to the exchange of information, the trade association had played an active role in organising the exchanges that took place at its meetings. The SFEC had also, on certain occasions, requested and then circulated information<sup>103</sup>. Regarding the cartel practice concerning environmental performance communications, the investigation showed that the charter and the non-competition agreement had been put in place within and under the aegis of the SFEC<sup>104</sup>.

Box 3

### Conclusion

While competition law applies mainly to “undertakings”, understood as entities forming economic units in the market, it may nevertheless also apply to the practices of professional bodies, independently of the collective nature of their decisions. This scope of application is explained and justified by the quest for effectiveness: if professional bodies were excluded from the competition rules, this would create a “blind spot” that would be all the more harmful as the activities of these bodies, by their very nature, present particular risks, as they require exchanges and joint action between competitors. However, it is necessary to specify the exact conditions for characterising the main practices that may be committed.

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**102** Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor covering sector.

**103** Decision 17-D-20, cited above, paragraphs 330 *et seq.*

**104** Decision 17-D-20, cited above, paragraph 407.



**3/ PRACTICES OF  
PROFESSIONAL BODIES  
INVOLVING RISKS  
WITH REGARD TO  
COMPETITION RULES**



## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

133. Professional bodies are, by definition, vectors of meetings and exchanges between competitors. As a consequence, they can easily be the source or the place for anticompetitive practices. Professional bodies are, in the vast majority of cases, highly aware of these risks and take compliance measures to prevent them. The purpose of this section is to identify and summarise the main risks encountered and thereby provide guidance to ensure compliance.
134. The practices likely to be committed by or through professional bodies are, first of all, price-related. These include cartel practices such as fixing prices, limiting output, sharing contracts, allocating customers or territories, or manipulating calls for tender. They may also involve pricing instructions, price guidelines or discounts.
135. In addition, anticompetitive practices may consist in exchange of information, which may or may not accompany pricing practices.
136. They may then relate to exclusionary strategies, such as calls for boycotts, the restriction of access to a profession or the enactment of unduly restrictive sectoral standards.
137. Finally, they may result from the misuse of its role by a professional body, through the misinterpretation of the applicable regulations for anticompetitive purposes, lobbying.
138. These different practices will be presented successively.

### Cartel risks

139. Cartels are illegal agreements, which are usually secret, between competitors with the aim of reducing or eliminating competition on the market. By entering into agreements, companies tend to behave as though they were a single entity.
140. Cartels constitute **the most flagrant violation of competition law**. They harm consumers by artificially raising prices

and restricting the production of goods and services, which become completely unavailable to some buyers and unnecessarily expensive for others.

141. The *modus operandi* of a cartel generally consists in:
- jointly fixing prices;
  - colluding in response to calls for tender (in particular by submitting a "cover bid");
  - limiting production, by setting production or sales quotas;
- or
- sharing markets or customers.
142. Although a professional body does not, in principle, carry on an economic activity and is not directly active in the market, it is likely to be held liable, alongside its members, and risks heavy penalties if it contributes to running a cartel, even in a subordinate, ancillary or passive way, for example by tacit approval or by failing to report the cartel to the authorities<sup>105</sup>.
143. In case 19-D-12 regarding practices by notaries in the real estate negotiation sector, the infringement sanctioned consisted of an agreement on the adoption of a common tariff applicable to real estate negotiation services between the members of a local economic interest group of notaries. In addition to the economic interest group, the *Autorité* also sanctioned the locals Chamber of Notaries (*Chambre interdépartementale des notaires de Franche-Comté*) on the grounds that it had taken part in the agreement by making its secretariat available to the economic interest group and by failing to report this infringement<sup>106</sup>.
144. In order to establish that a professional body has participated in an agreement, jointly with its members, the *Autorité* must show that its behaviour is separate from that of its members.
145. In this regard, it is not necessary for the organisation in question to have initiated, directed or controlled the agreement. In

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<sup>105</sup> Decision 19-D-12 of 24 June 2019, cited above, paragraph 95.

<sup>106</sup> Decision 19-D-12 of 24 June 2019, cited above, paragraph 100 *et seq.*

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

the delivery case, the *Autorité* rejected the arguments of a trade association that denied its participation in the cartel by arguing that it had merely reported the discussions of its members without giving any instructions or exercising any control over the discussions<sup>107</sup>.

146. Where a professional body acts positively in support of anti-competitive practices, it is likely to be sanctioned. This is notably the case where it organises cartel meetings, whether in the form of physical meetings on its premises or conference calls; actively participates in or passively attends anti-competitive discussions between its members; knowingly adapts or conceals the content of anticompetitive exchanges in its minutes; collects or provides information that enables an agreement to be made or monitored; or offers to act as a moderator in the event of tension between cartel participants.
147. The professional body is also likely to be held liable where it knowingly provides services or means to its members to facilitate anticompetitive practices without taking a direct part in the anticompetitive discussions. For example, a professional body that makes its secretariat available to its members, knowing that it will be used to organise a cartel meeting, is likely to be sanctioned for having facilitated the implementation of the practices<sup>108</sup>.
148. The *Autorité* considers that it is the responsibility of professional bodies, when they detect anticompetitive exchanges among their members, to remind the latter of the principles of competition law and the risks involved<sup>109</sup>. As a result, a professional body must not only refrain from taking part in anticompetitive practices, but also uphold its duty to explicitly object to anticompetitive behaviour within its bodies as soon as it becomes aware of it.

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**107** Decision 15-D-19 of 15 December 2015, cited above, paragraph 863.

**108** Decision 19-D-12 of 24 June 2019, cited above, paragraphs 102 to 104.

**109** Decision 15-D-19 of 15 December 2015, cited above, paragraph 1006.



## EXAMPLES OF CARTELS IN WHICH A PROFESSIONAL BODY WAS FOUND LIABLE

**The steel cartel:** The *Conseil* fined the main trade association in the sector, along with its members, for having run – from mid-1999 to mid-2004 – a large-scale cartel affecting prices, customers and contracts. The trade association had played a distinct role from its members, taking an active part in cartel meetings, and collecting and disseminating information relevant to the functioning of the cartel<sup>110</sup>.

**The delivery service cartel:** The *Autorité* fined 20 delivery companies for colluding on the annual price increases they were demanding of their respective customers. The exchanges, which took place between September 2004 and September 2010, mainly occurred during meetings held as part of the statutory meetings of a trade association. The trade association had taken concrete action to encourage anticompetitive practices by its members. In particular, it had organised a specific conference call and drawn up the minutes, which contained a clear order to introduce a surcharge<sup>111</sup>.

### Box 4

## EXAMPLES OF CARTEL DECISIONS IN EUROPE

### Germany

In 2013, the German Competition Authority (*Bundeskartellamt*) fined 23 milling companies and their association a total of around 65 million euros<sup>112</sup> for agreeing on price increases, customer allocation and supply volume in regular rounds of talks. In addition, the companies had coordinated capacity planning by shutting down mills or preventing mills that had already been shut down from reopening. The industry association was held liable on the grounds that one of its representatives had attended the meetings where these infringements were committed, and assisted the parties in organising the cartel meetings and coordinating the agreements.

### Spain

In 2013, the Spanish Competition Authority (*Comisión Nacional de la Competencia, now Comisión Nacional de los Mercados y la Competencia: CNMC*) fined a cartel in the sector of expandable polyurethane foam (used in the comfort industry, i.e. furniture, mattresses and chairs, as well as shoes, etc.) involving several companies in the sector and a trade association. The companies had agreed on prices and had entered into a market-sharing agreement involving production

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**110** Decision 08-D-32 of 16 December 2008, cited above.

**111** Decision 15-D-19 of 15 December 2015, cited above.

**112** *Bundeskartellamt*, 19 February 2013, B11-13/06, VK Mühlen.

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quotas. The trade association played an active role in the organisation of the cartel by convening, organising and covering up the meetings where the anti-competitive agreements were concluded or verified, and which were attended by companies not belonging to the association but participating in the practices. As a result, it was fined 250,000 euros<sup>113</sup>.

### Portugal

In 2020, the Portuguese Competition Authority (*Autoridade da Concorrência*) imposed a fine on the Portuguese Association of Advertising, Communication and Marketing Agencies (*Associação Portuguesa de Agências de Publicidade, Comunicação e Marketing*: APAP) for preventing its members from freely participating in calls for tender for advertising services when other members were also participating. The investigation revealed that APAP monitored calls for tender and urged members that were not complying with the rules thus imposed to exclude themselves from the process. As a result, APAP received a fine of 3.6 million euros, for which the members of its board of directors were held jointly and severally liable<sup>114</sup>.

### Box 5

149. Cartels are agreements referred to as “unjustifiable” that are not tolerated, even in a situation of economic crisis, which should, on the contrary, prompt special vigilance by professional bodies, as setting up a cartel is the worst response to such a situation.
150. In addition to the risk of significant fines being imposed on the companies and professional bodies involved, cartels are likely to aggravate the problems of a recession by sparing companies the need to provide a more dynamic response that would leave them better prepared for the future. Although cartels promote short-term illicit gains, they jeopardise the medium and long-term competitiveness of the companies involved, and of the sector more broadly, by slowing innovation and hampering the growth of the sector.

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**113** *Comisión Nacional de la Competencia*, 28 February 2013, *Espuma de Poliuretano*, No. S/0342/11.

**114** *Autoridade da Concorrência*, *Associação Portuguesa de Agências de Publicidade, Comunicação e Marketing*, Press release of 22 November 2020.

### EXAMPLE OF SAID “CRISIS” CARTELS

In the delivery case<sup>115</sup>, the *Autorité* rejected the claim by the trade association in question that the companies had agreed on prices due to difficulties in the sector. In fact, instead of seeking to reduce overcapacity – a structural problem in the sector – the companies agreed on price increases to pass on to their customers. These practices are economically inefficient and generate additional costs to the sole detriment of consumers.

Box 6

## Dissemination of pricing instructions

151. The drawing up or dissemination of pricing instructions by a professional body may have an anticompetitive object, notwithstanding their non-mandatory nature, in that they divert operators from a direct and personal understanding of their costs, thereby limiting free competition.
152. In a system of free pricing under ordinary law, it is not up to a professional body to set the prices of the profession or sector whose interests it defends, this possibility only being provided for, in strictly national markets, under the conditions of Article L. 410-2 of the French Commercial Code (*Code de commerce*) and reserved solely to public authorities. While sector-specific regulations, such as French Law 2018-938 of 30 October 2018 (known as the “Egalim Law”) in the agricultural sector, may entrust professional organisations with the task of disseminating price indicators on a reference market, these indicators should never take the form of pricing instructions (see Box 14).
153. Accordingly, with the exception of specific legal exemptions, prices must be determined by free competition in the market, and each company should set its prices independently, taking into account objective criteria, such as the cost of the services provided<sup>116</sup>. These prices may not take the form of or be fixed

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**115** Decision 15-D-19 of 15 December 2015, cited above, paragraph 682.

**116** Decision 04-D-07 of 11 March 2004, cited above, paragraph 97.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

in consideration of a "trade association price"<sup>117</sup> or "indicative fee schedules"<sup>118</sup> decided or advised by a professional body.

154. The French Supreme Court (*Cour de cassation*) ruled on a document issued by a bar association containing price recommendations, shown as fee ranges or minimum amounts by type of service. The Court held that "*such a document was likely to encourage professionals to set their fees according to the suggested amounts rather than by taking into account objective criteria based on the cost of the services provided, according to the structure and management of each firm, and that its distribution to clients was also likely to dissuade them from freely discussing the minimum fees it indicated, thus hindering the setting of prices through the free play of the market*"<sup>119</sup>.
155. Regardless of the form they take, pricing instructions disseminated by a professional body **constitute a restriction of competition by object**, contrary to Articles L. 420-1 of the French Commercial Code and, possibly, Article 101(1) TFEU. They are therefore presumed to restrict competition and expose the professional body that disseminates them to heavy penalties.
156. The notion of "pricing instructions" includes any form of recommendation issued by a professional body on price elements for its members. In addition to fee schedules, the *Autorité* imposed sanctions on professional bodies for diffusing their members:
- non-objective price calculation methods<sup>120</sup>;
  - general incentives to increase prices<sup>121</sup>;

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**117** Decision 06-D-30 of 18 October 2006 regarding practices implemented in the taxi sector in Marseille, paragraph 86.

**118** Judgments of the Paris Court of Appeal of 9 December 1997, *Ordre des avocats du barreau de Quimper et al.*, BOCCRF No. 24 of 31 December 1997, p. 888; and of 11 September 2001, *Ordre des avocats de Nice*, No. 2001/02754.

**119** Judgment of the French Supreme Court of 13 February 2001, *Ordre des avocats du barreau de Marseille*, No. 98-22698.

**120** Decision 19-D-19 of 30 September 2019, cited above.

**121** Decision 95-D-74 of 21 November 1995 regarding practices in the car repair sector in the Indre *département*.

- invitations to avoid running too great a promotion on the sale of their products<sup>122</sup>;
- maximum discounts or rebates<sup>123</sup>;
- recommendations encouraging them to charge additional fees<sup>124</sup>.

157. The majority of the offences committed concern the dissemination of instructions on the *selling* prices of members of a professional body. However, in a decision of 13 February 2013, the *Autorité* also sanctioned a professional body for having issued instructions on purchase prices, fixed in collusion with these members. The case concerned the price at which trade association members purchased pork from producers in the national pig sales market<sup>125</sup>.
158. The diffusion of pricing instructions by a professional body is sanctioned regardless of the sector in which its members operate. The *Autorité* has had to impose penalties on professional bodies for having issued pricing instructions in many sectors of activity, such as those of the regulated professions (doctors, lawyers, notaries and architects), the agricultural sector, the small trade sector (bakeries), and others.

### ARCHITECTS: MISUSE OF FEE CALCULATION METHOD AIMED AT LOCAL AND REGIONAL PUBLIC AUTHORITIES

In the Architects case <sup>126</sup>, four regional councils distributed a fee calculation method to their members in order to combat alleged "fee dumping" by certain architects who were described as "anti-collegial". In order to combat these "acts of unfair competition", the French Architects' Association (*Ordre des architectes*),

<sup>122</sup> Decision 13-D-03 of 13 February 2013, regarding practices implemented in the pork pig sector.

<sup>123</sup> Decision 07-D-41 of 28 November 2007, cited above.

<sup>124</sup> Decision 08-D-06 of 2 April 2008 regarding union recommendations to Sector 1 specialist physicians to charge fees higher than those contractually authorised; and Decision 09-D-39 of 18 December 2009 regarding practices implemented by the *Conseil national des exploitants thermaux* in the balneotherapy sector.

<sup>125</sup> Decision 13-D-03 of 13 February 2013, cited above, paragraph 253.

<sup>126</sup> Decision 19-D-19 of 30 September 2019, cited above.

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diverted the guide for the Interministerial Mission for the Quality of Public Buildings (*Mission interministérielle pour la qualité des constructions publiques: MIQCP*) from its real purpose – which is to help public authorities evaluate the estimated budget for project management fees – by using the document as a reference to calculate architects' fees, and by encouraging architects to fix them according to the ranges recommended by the guide without taking their actual costs into account. In order to ensure compliance with the fee instructions thus issued to architects, the Architects Organisation organised the monitoring of compliance with the "schedule". Its National Council adopted and distributed a standard form to facilitate referrals to the regional disciplinary boards in the event that architects applied fees considered to be particularly low. The regional councils also increased the number of pre-disciplinary and disciplinary proceedings against architects who did not comply with the fee instructions.

### Box 7

#### REAL ESTATE NEGOTIATION: FEE SCHEDULES

In case 19-D-12<sup>127</sup>, GIE Notimo, an local economic interest group of notaries, set up a price-fixing agreement in breach of competition law to ensure that notaries from the region applied a "schedule" drawn up by GIE Notimo for real estate negotiation services. By making its secretariat available to GIE Notimo, the local Chamber of Notaries (*Chambre interdépartementale des notaires de Franche-Comté*) actively facilitated the infringement: emails, faxes and letters relating to the modalities of implementation of the anticompetitive agreement were sent to network members from the Chamber's addresses. It was therefore fined by the *Autorité*.

### Box 8

#### AGRICULTURAL PRODUCTS SECTOR: PRICING RECOMMENDATIONS

In the *Alsace wines* case<sup>128</sup>, the *Autorité* fined two trade organisations, an association of local winegrowers (*Association des Viticulteurs d'Alsace: AVA*) and an association of wine producers and merchants from the same region (*Groupe des Producteurs Négociants du Vignoble Alsacien: GPNVA*), as well as an interbranch organisation, the Interprofessional Council for Alsace Wines (*Conseil interprofessionnel des Vins d'Alsace: CIVA*), for fixing the price of grape. Between 2008 and 2017, AVA, which represents producers; the GPNVA, which represents wine merchants and traders; and CIVA, the interbranch organisation, worked together at the end of each harvest to establish selling price

<sup>127</sup> Decision 19-D-12 of 24 June 2019, cited above.

<sup>128</sup> Decision 20-D-12 of 17 September 2020 regarding practices implemented in the sector of Alsace wines.

recommendations for grape. From 2013, these prices were published in a trade journal. Through these practices, the professional bodies involved sought to raise the price of Alsatian wines.

#### Box 9

### AGRICULTURAL PRODUCTS SECTOR: MINIMUM PRICE LISTS

In the *Côtes du Rhône* wines case<sup>129</sup>, the *Autorité* fined a winegrowers' trade association for having drawn up minimum price lists for AOC (registered designation of origin) bulk wines. These lists were disseminated by a trade magazine, while meetings and newsletters sent to members were systematically accompanied by arguments encouraging winegrowers to refer to these lists during trade negotiations. However, while a trade association may disseminate information to assist its members in the management of their business, such assistance must not directly or indirectly influence free competition. For example, by developing and disseminating general minimum price guidelines, the trade association encouraged its members to deviate from a direct understanding of their commercial strategy – which is necessary for independent pricing – and distorted negotiations with their customers.

#### Box 10

### MODELLING AGENCIES: DISSEMINATION OF TRADE ASSOCIATION FEES

In the *Modelling* case<sup>130</sup>, the *Autorité* fined the main trade association of modelling agencies for having drawn up and diffused fee lists guiding the commercial policy of modelling agencies used by advertisers or fashion houses for their filming, advertising shoots or fashion shows. More specifically, the *Autorité* noted that, while the trade association fee lists took into account the rules imposed by the collective labour agreement and the French Labour Code (*Code de travail*) with regard to the remuneration of models, the trade association fees did not constitute a strict restatement of these minimum wages, but also included the agencies' sales margin. The *Autorité* concluded that the trade association had overstepped its primary role of providing information and advice, and defending the professional interests of its members, and that it had engaged in a practice with the object of hindering the setting of prices by market forces.

#### Box 11

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**129** Decision 18-D-06 of 23 May 2018 regarding practices implemented in the sector of marketing of *Côtes du Rhône* AOC bulk wines.

**130** Decision 16-D-20 of 29 September 2016 regarding practices implemented in the sector of modelling agency services.

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### LEISURE, CULTURE AND TOURISM ENGINEERING SECTOR: DEVELOPING A "FAIR PRICE"

In case 12-D-02<sup>131</sup>, the national trade association for leisure, culture and tourism engineering, Géfil, and several consulting firms prepared and circulated within the profession a sheet entitled "fair pricing", which listed fees described as "reasonable" or "decent". This sheet, which was used as a reference for price proposals submitted by consulting firms during calls for tender launched by clients, was intended to avoid any "dumping" or "price wars" between firms, and thus "drive the prices of the entire profession upwards". The price instructions were accompanied by actions aimed to ensure compliance with the prices set. A pricing policy had been introduced by Géfil to check that the rates applied were in line with those agreed jointly. Local and regional public authorities issuing calls for tender were alerted to this practice when certain proposals were deemed "abnormally low" by the trade association.

#### Box 12

### HEALTHCARE SECTOR: FRAMEWORK FOR FEE DISCOUNTS

In case 07-D-41<sup>132</sup>, the *Conseil* considered that by drawing up and circulating to its members a document in which it recalled that anatomical pathologists could not charge, in response to invitations to tender from hospitals, fees that were more than 5% below those in the NGAP fee schedule for medical procedures (*nomenclature des actes et des tarifs de remboursement*), and then by taking disciplinary or administrative action against uncooperative doctors, the National Association of Anatomical Pathologists (*Syndicat national des médecins anatomo-cyto-pathologistes*) was guilty of establishing an anticompetitive agreement.

#### Box 13

### PRICE INDICATORS IN THE AGRICULTURAL SECTOR

Article 5 of French Law 2018-938 of 30 October 2018 (known as the "Egalim Law") introduced, within the French Rural and Maritime Fishing Code (*Code rural et de la pêche maritime*), a system for sharing added value between the different stages of each agricultural sector. This mechanism is similar to the one provided for in Article 172a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 ("CMO Regulation") at European level.

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**131** Decision 12-D-02 of 12 January 2012 regarding practices employed in the leisure, culture and tourism engineering sector.

**132** Decision 07-D-41 of 28 November 2007, cited above.



Since 1 February 2019, Article L. 631-24 of the French Rural and Maritime Fishing Code thus provides that all written sales contracts relating to the sale to their first purchaser of agricultural products intended for resale (or processing with a view to resale) must include a clause relating to “the price or the criteria and procedures for determining and revising the price”. The same Article also provides that the criteria and procedures for determining the price set out in these clauses shall take account of one or more indicators relating to the relevant costs of production in agriculture and changes in those costs; the prices of agricultural and food products recorded on the market or markets in which the purchaser operates and changes in those prices; and the quantities, composition, quality, origin and traceability of the products or compliance with a specification.

This Article specifies that, as part of their work and in accordance with the CMO Regulation, interbranch organisations shall develop and disseminate indicators to serve as reference indicators.

In its Opinion 18-A-04 on the agricultural sector, the *Autorité* analysed the relationship between the development and dissemination of price indicators by interbranch organisations, and competition law.

**Firstly**, the *Autorité* indicated that interbranch organisations must be particularly vigilant when drawing up an indicator for their members, as such activity necessarily involves exchanges of information within the organisation. In this respect, the *Autorité* clarified that interbranch organisations may disseminate cost or price information in the form of market price lists or indices if the statistical data concerned relate to the **past**, and are **anonymous** and **sufficiently aggregated**<sup>133</sup>.

**Secondly**, the *Autorité* recalled that “the dissemination of indicators and indices by interbranch organisations must not lead to a collective agreement on the price points applied by competing operators or to price uniformity”<sup>134</sup>. In this sense, it specified that “in order to avoid generating risks with regard to competition rules, the dissemination of indicators by the recognised interbranch organisation – whether these indicators come from public bodies or are produced by the organisation – must under no circumstances be assimilated to a form of price recommendation. The development and dissemination of indicators or indices are compatible with national and European competition law only if they do not lead to the pure and simple application of recommendations issued by the interbranch organisation. Each economic operator must therefore be free to individualise prices, taking into account its charges and various costs on the basis of past information, and using, where appropriate, trend indicators issued by the interbranch organisation, provided that these are not prescriptive in nature. It is not therefore up to an interbranch organisation to encourage the players in a given sector, when they enter into contracts with one another, to simply apply the recommendations of the interbranch organisation, whether these concern starting prices or trend indicators”<sup>135</sup>.

#### Box 14

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**133** Opinion 18-A-04 of 3 May 2018, cited above, paragraphs 191–203.

**134** Opinion 18-A-04 of 3 May 2018, cited above, paragraph 206.

**135** Opinion 18-A-04 of 3 May 2018, cited above, paragraphs 204–205.

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159. Professional bodies often try to justify the diffusion of pricing instructions by evoking, for example, the need to maintain a high level of quality of products and services, or to overcome an economic crisis. Save in exceptional circumstances, however, the diffusion of pricing instructions can never be the subject of an individual exemption, and has been sanctioned by the *Autorité* in almost all the cases it has examined.
160. In the last 20 years, the *Autorité* has only once granted an individual exemption to a professional body for having issued a fee schedule. In case 07-D-05<sup>136</sup>, it found that the professional body representing prosthetists and orthotists could distribute a price list for prosthetic and orthotic devices sold to non-hospitalised patients, after noting that this practice enabled patients to benefit from rare devices under better conditions, that it concerned marginal demand, that it was not mandatory, and that it was carried out in a context where competition was difficult to achieve. The *Autorité* nevertheless fined the professional body for having issued separate pricing recommendations concerning hospital tenders, considering that the conditions for exemption were not met for this other practice.
161. A professional body is not authorised to make pricing recommendations, even if these are purely indicative and not accompanied by any measures to make them mandatory<sup>137</sup>. The publication of a price schedule by a professional body is likely to encourage its members to set their prices according to the suggested amounts, rather than by taking into account objective criteria based on their respective costs<sup>138</sup>.

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**136** Decision 07-D-05 of February 21, 2007 regarding practices implemented by the French Union of Prosthetists and Orthotists (*Union française des orthoprothésistes*: UFOP) in the market for the supply of prosthetics and orthotics, paragraphs 61–69.

**137** Decision 16-D-20 of 29 September 2016, cited above, paragraph 276.

**138** Decisions 91-D-55 of 3 December 1991 regarding the competitive situation in the surveyors sector ; 96-D-69 of 12 November 1996 regarding fee practices implemented by the Quimper Bar ; 97-D-45 of 10 June 1997 regarding practices implemented by the *Conseil national de l'Ordre des architectes* ; 98-D-05 of 14 January 1998 regarding fee practices implemented by the Colmar Bar ; 98-D-07 of 14 January 1998 regarding fee practices implemented by the Marseille Bar and 00-D-52 of 15 January 2001 regarding fee practices implemented by the Nice Association Bar.

162. The fact that the members of a professional body have not applied the pricing recommendations, if this can be taken into account in the assessment of the effects of the practices or the damage to the economy, does not call into question the qualification of the practices concerned as infringements<sup>139</sup>.
163. The fact that the diffusion of pricing recommendations by a professional body has been encouraged by the public authorities does not lead to an exemption of liability<sup>140</sup>.
164. In this way, the Paris Court of Appeal considered that the fact that a schedule that a professional body had wanted to impose on its members was partly compliant with a circular from the supervisory ministry "*did not eliminate its anticompetitive nature or relieve its authors of liability while the prices of the services in question were not set*"<sup>141</sup>. In the *Architects case*<sup>142</sup>, the *Autorité* fined the French Architects' Association (*Ordre des architectes*) for having distributed a fee calculation method drafted by the public authorities for public contractors with a view to requiring architects to comply with that method when setting fees for their services in response to calls for tender. This document had been drawn up by the public authorities for the sole attention of architects' public contractor clients. By imposing it as a reference for the calculation of architects' fees, the Architects Association thus diverted this document from its purpose for anticompetitive ends.

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**139** Decision 19-D-19 of 30 September 2019, cited above, paragraph 353.

**140** Decision 93-D-30 of 7 July 1993 on competition in the urbanism services sector, p. 5; see also Judgment of 29 June 1993, *Asia Motor France et al. v Commission*, T-7/92, EU:T:1993:52, paragraph 71.

**141** Judgment of the Paris Court of Appeal of 15 February 1994, *Société centrale pour l'équipement du territoire*, BOCCRF No. 4 of 8 March 1994, p. 84.

**142** Decision 19-D-19 of 30 September 2019, cited above.

EXAMPLES IN EUROPE OF DECISIONS  
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**Germany**

In July 2018, the German Competition Authority (*Bundeskartellamt*) imposed fines totalling 205 million euros on several companies and a professional body involved in a price-fixing cartel in the steel sector. The steel producers had in fact agreed to fix the price of elements used to produce steel, which had a big impact on its final price. They also exchanged sensitive information, in particular concerning future price increases. The investigation showed that the industry federation had played a decisive role in this cartel, organising anticompetitive meetings and providing key information to the parties<sup>143</sup>.

**Denmark**

In a judgment of 30 August 2010, the Danish Supreme Court upheld a decision of the Danish Competition Authority (*Konkurrencestyrelsen*), which had condemned the practices of an association of transport companies for exchanging price information and recommending to its members the imposition of a 4% diesel surcharge. The Danish Supreme Court stressed the seriousness of the practices and imposed a fine of 68,000 euros on the association in question, as well as individual fines on two of its board members<sup>144</sup>.

**Portugal**

In a 2010 decision, the Portuguese Competition Authority (*Autoridade da Concorrência*)<sup>145</sup>, confirmed by the Lisbon Court of Appeal<sup>146</sup>, imposed a fine of almost 2 million euros on a professional association of car park management companies. The *Associação Nacional de Empresas de Parques de Estacionamento* (ANEPE) had made pricing recommendations to its members, urging them to charge a set entry fee to car park users and suggesting price increases. The Competition Authority also found that various companies that were members of ANEPE had in fact changed their prices as a consequence.

Box 15

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**143** *Bundeskartellamt*, ArcelorMittal Commercial Long Deutschland GmbH, Cologne; Dörrenberg Edelstahl GmbH, Engelskirchen; Kind & Co. Edelstahlwerke GmbH & Co. KG, Wiehl; Saarlust AG, Völklingen; Schmidt + Clemens GmbH + Co. KG, Lindlar; Zapp Precision Metals GmbH, Schwerte; press release of 12 July 2018.

**144** *Højesterets*, 30 août 2010, *Danske Busvognmænd*, n°320/2009.

**145** *Autoridade da Concorrência*, *Associação Nacional de Empresas de Parques de Estacionamento*. Press release of 19 January 2011.

**146** *Tribunal da Relação de Lisboa*, 4 April 2013, *Associação Nacional de Empresas de Parques de Estacionamento*, No. 349/11.7TYLSB.L1.

## Dissemination of commercially sensitive strategic information

165. Exchanges of sensitive information may be restrictive of competition, in particular when they reduce the autonomy of behaviour of market operators, thereby constituting a concerted practice.
166. As the Commission points out in its Horizontal Guidelines, an exchange of information can be problematic under competition law *"if it reduces strategic uncertainty in the market thereby facilitating collusion"*<sup>147</sup>.
167. The disclosure of strategic and therefore sensitive information can indeed facilitate the coordination of companies' behaviour and enable them to *"reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement"* and to control possible deviant behaviour with respect to the collusive balance thus established<sup>148</sup>.
168. Exchanges of information may also be incidental to a larger agreement and facilitate its implementation by allowing the monitoring of its terms of application<sup>149</sup>.
169. The fact that the data is exchanged indirectly through a professional body does not affect the assessment of the legality of an exchange of information. Indeed, the Commission stresses in its Horizontal Guidelines that direct or indirect exchanges of information between competitors can be covered by competition law<sup>150</sup>.

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**147** Commission Communication, Horizontal Guidelines, cited above, paragraph 61.

**148** Commission Communication, Horizontal Guidelines, cited above, paragraphs 65 and 66.

**149** Commission Communication, Horizontal Guidelines, cited above, paragraph 59.

**150** Commission Communication, Horizontal Guidelines, cited above, paragraphs 55 and 61.

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170. In order to assess the lawfulness of an exchange of information by a professional body, the *Autorité* successively analyses the nature of the information exchanged, the characteristics of the exchange system set up, the economic functioning of the market concerned and, lastly, the role assigned to the professional body. As indicated in paragraphs 45 *et seq.*, the information exchanges set up by professional bodies can generate efficiency gains and are not anticompetitive *per se*.

**Anticompetitive object of information exchanges**

171. The assessment of the sensitive nature of the information depends of course on its nature, but also on its age and whether or not it is possible to individualise its origin.

172. Both the *Autorité* and the Commission<sup>151</sup> therefore consider that exchanges of information relating to future prices or envisaged quantities have an anticompetitive object. Such exchanges are, indeed, particularly likely to lead to collusion between competitors by facilitating an alignment of their commercial policy on a higher common price point or on a quantity level, i.e. on one of the key parameters of competition. Exchanges of information on future prices and quantities are therefore presumed to be unlawful, and there are no examples where companies that have taken part in such exchanges have been exempted on the basis of Articles 101(3) TFEU and L. 420-4 of the French Commercial Code (*Code de commerce*).

173. The communication of price-determining elements, such as the reference price serving as an indicator for the purchase price of products on the market<sup>152</sup> or the remuneration of a reseller<sup>153</sup>, also falls under this definition.

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**151** Commission Communication, Horizontal Guidelines, cited above, paragraph 73.

**152** Judgment of 19 March 2015, *Dole Food Company Inc. v Commission*, C-286/13 P, EU:C:2015:184, paragraphs 129–134.

**153** Judgment of 4 June 2009, *T-Mobile Netherlands BV*, C-8/08, EU:C:2009:343, paragraphs 40–43.

174. In that it reflects the establishment of a collusion in key elements of competition on the market, this type of practice is sanctioned by competition authorities, regardless of the characteristics of the market<sup>154</sup>, the frequency of the exchange<sup>155</sup>, the non-secret or public nature of the information<sup>156</sup>, or its accessibility<sup>157</sup>. Nor is it necessary to check whether the information exchanged has actually been used by the operators<sup>158</sup>.
175. The announcement of price intentions by means of a press release can thus be regarded as restrictive of competition in that it allows market participants to align their prices. Recently, the European Commission accepted commitments offered by shipping companies that had each, individually, been announcing their potential future price increases<sup>159</sup>.

### Anticompetitive effects of information exchanges

176. If the exchange of information is not restrictive of competition by object, it must be determined whether it may have anticompetitive effects on the market concerned.
177. French and European decision-making practice shows that an exchange of information may have an anticompetitive effect if it is likely to reduce the degree of uncertainty about the functioning of the market, resulting in a reduction of the

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<sup>154</sup> Commission Decision of 15 October 2008, Bananas case, C(2008)5955 final, paragraph 282.

<sup>155</sup> Commission Decision of 15 October 2008, Bananas case, cited above, paragraph 270.

<sup>156</sup> Commission Decision of 15 October 2008, Bananas case, cited above, paragraph 307.

<sup>157</sup> Commission Decision of 15 October 2008, Bananas case, cited above, paragraph 276.

<sup>158</sup> Commission Decision of 15 October 2008, Bananas case, cited above, paragraph 275, confirmed by Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission*, C-293/13 P, EU:C:2015:416.

<sup>159</sup> Commission Decision of 7 July 2016, Container Shipping, C(2016) 4215 final.

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decision-making autonomy of the companies involved in the exchange<sup>160</sup>.

178. Exchanges of information relating to current or past commercial data are likely to infringe competition law, in particular where these data are exchanged in a disaggregated form, i.e. showing the data of each competitor in an individualised manner.
179. Exchanges of information on prices applied within a period of time that allow operators to monitor the behaviour of their competitors in real time may, for example, have the effect of giving competitors an incentive to align their behaviour in the market. Data on sales values or volumes enable operators to monitor the impact of their commercial policy and that of their competitors with regard to sales, and thereby facilitate the establishment of collusion between them.
180. The effects of an exchange of information on competition must be demonstrated in concrete terms, in particular by reference to two sets of criteria, which concern respectively:
  - i. the prevailing economic conditions on the market<sup>161</sup> and, in particular, the intrinsic transparency of the market, its level of concentration, the similarity of the economic operators present, the complexity of the products or services concerned, and the stability of the market;
  - ii. the characteristics of the information exchanged, such as its strategic nature, and whether it is more or less aggregated, public or confidential, and current or past,

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**160** Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraphs 85 and 88–89; Decision 05-D-64 of 25 November 2005 regarding practices implemented on the Paris luxury hotel market, paragraphs 259 and 267; Decision 05-D-65 of 30 November 2005 on practices identified in the mobile phone sector, paragraphs 213 and 220 *et seq.*; and Decision 19-D-25 of 17 December 2019 regarding practices implemented in the meal vouchers sector, paragraphs 475 *et seq.*

**161** Commission Communication, Horizontal Guidelines, cited above, paragraphs 77 and 85.



as well as the terms and conditions of the exchange, and, in particular, its frequency, its public or confidential nature and the part of the market represented by the participants in the exchange<sup>162</sup>.

181. Firstly, as regards the characteristics of the market, its initial degree of transparency – i.e. the availability of information on prices, output, demand or costs on the market and outside the exchange of information – is an indication of the anticompetitive effect of the exchange. It is a matter for the competition authorities to verify how the exchange of information in question increases or creates this initial transparency<sup>163</sup>.
182. The fact that there are few players in the market is a further indication of transparency and a possible restrictive effect of the exchange of information<sup>164</sup>, in particular if access to the market is made difficult by the existence of barriers to entry.
183. The stability of supply and demand also makes it possible to assess the effect of exchanges of information on competition<sup>165</sup>. Thus, a strong demand dynamic, characterised by high growth rates, may encourage market players to favour a competitive strategy rather than a collusive balance<sup>166</sup>.
184. As the European Commission points out in its Horizontal Guidelines, “[a] *collusive outcome is more likely [...] [w]hen companies are homogeneous in terms of their costs, demand, market shares, product range, capacities etc.*”<sup>167</sup>.

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**162** Commission Communication, Horizontal Guidelines, cited above, paragraphs 76 and 86–94.

**163** Commission Communication, Horizontal Guidelines, cited above, paragraph 78.

**164** Commission Communication, Horizontal Guidelines, cited above, paragraph 79.

**165** Commission Communication, Horizontal Guidelines, cited above, paragraph 81; see also decision 05-D-65 of 30 November 2005, paragraph 168.

**166** Decision 05-D-65 of 30 November 2005, cited above, paragraph 168.

**167** Commission Communication, Horizontal Guidelines, cited above, paragraph 82.

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185. Finally, the exchange of information will be all the more likely to be anticompetitive if it takes place in a market where companies are able to constrain their respective behaviour, and have an interest in doing so, by threat of retaliation<sup>168</sup>.
186. Secondly, as regards the information exchanged, the following types of information are, in principle, considered strategic: information on prices (actual prices, discounts, increases or reductions), customer lists, production costs, quantities, turnovers, sales, marketing plans, production capacities, product quality or technical specifications, commercial strategy, risks, investments, technologies, and research and development programmes<sup>169</sup>.
187. In general, the more precise the information, the more strategic it will be considered<sup>170</sup>. It is, in short, the combination of the initial level of market transparency and the impact of the exchange of information on the market that will determine the existence of restrictive effects on competition<sup>171</sup>. Individualised data will therefore have a high probability of being considered as allowing collusion to develop. To avoid any risk of penalty, it is therefore recommended that the data exchanged through a professional body be aggregated and anonymised.
188. The timing of the information is also an essential element. Current or future information is more sensitive. Conversely, historical and public past data are less likely to be considered strategic. As regards the time frame, the Commission states in its Horizontal Guidelines that “[W]hether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry”<sup>172</sup>.

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**168** Commission Communication, Horizontal Guidelines, cited above, paragraph 85.

**169** Commission Communication, Horizontal Guidelines, cited above, paragraph 86.

**170** Commission Communication, Horizontal Guidelines, cited above, paragraph 89.

**171** Commission Communication, Horizontal Guidelines, cited above, paragraphs 77 and 78.

**172** Commission Communication, Horizontal Guidelines, cited above, paragraph 90.

189. The public nature of the information depends on its accessibility and cost of acquisition<sup>173</sup>.
190. Thirdly, it should be emphasised that potential restrictive effects on competition are sufficient to characterise an illegal exchange of information<sup>174</sup>.

### Implementation of information exchanges

191. The modalities of implementation of information exchanges involving professional bodies that are sanctioned by the *Autorité* can be divided into three categories.
192. Firstly, exchanges of strategic information may take place orally, during meetings of the professional body. These illicit exchanges often take the form of “round table discussions”. They are not usually included in the meeting agenda and their content is not always reflected in the minutes prepared by the body.
193. Round table discussions giving rise to illicit exchanges are typically those where participants disclose commercially sensitive information relating to their future commercial policy, as well as confidential information on their recent commercial activity (such as changes in their turnover or sales volume, the price points they apply, the loss or gain of an important client, etc.).
194. Participation in these anticompetitive round table discussions is heavily sanctioned by competition authorities. Professional bodies can be found liable if the exchange takes place during their instances, alongside with the companies that played an active or passive role in those discussions. On the latter point, it is clear from case law that companies that attend – even passively, i.e. without personally communicating sensitive information to their competitors – one

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**173** Commission Communication, Horizontal Guidelines, cited above, paragraph 92; Decision 15-D-19 of 15 December 2015, cited above, paragraphs 631 et seq.

**174** Commission Communication, Horizontal Guidelines, cited above, paragraph 75.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

or more meetings where a practice of unlawful exchanges take place, are presumed to have adhered to the anticompetitive object of these meetings<sup>175</sup>.

195. If such anticompetitive exchanges take place, companies that wish to avoid any possibility of being implicated must leave the meeting, ensuring that their departure is recorded in the minutes, and publicly distance themselves from the content of these exchanges. For example, Fedex was able to avoid liability in the delivery service cartel by ensuring that there was a record of its departure from an anticompetitive meeting organised by the professional body of the transport sector<sup>176</sup>. For its part, the professional body must immediately put an end to discussions that could give rise to anticompetitive exchanges of information during its proceedings.
196. The body and companies that do participate in this type of meeting also have the option of reporting what took place by filing a leniency application with the *Autorité*.

### EXCHANGE OF PRICE INFORMATION

In Decision 15-D-19, the *Autorité* fined twenty companies and one trade association (*Fédération des entreprises de Transport et de Logistique de France*: TLF) in the delivery service sector for information exchanges involving companies representing, depending on the year of the infringement, 52 to 87% of the market<sup>177</sup>. Each year, in advance of their respective trade negotiations, the companies would discuss the overall rate of price increases they were considering. They would then report on this rate during negotiations with their respective customers.

The *Autorité* considered this information to be confidential as it would have been too costly and time-consuming to obtain by competitive monitoring for each customer, and the information thus obtained would not have been exhaustive<sup>178</sup>. Although this information was aggregated, since the rate details were not provided for the different transport services, it nevertheless gave an overall picture of the pricing policy of the various transport services<sup>179</sup>.

**175** Decision 15-D-19 of 15 December 2015, cited above, paragraph 768.

**176** Decision 15-D-19 of 15 December 2015, cited above, paragraph 475.

**177** Decision 15-D-19 of 15 December 2015, cited above, paragraph 1246.

**178** Decision 15-D-19 of 15 December 2015, cited above, paragraphs 733–734.

**179** Decision 15-D-19 of 15 December 2015, cited above, paragraph 738 *et seq.*

Exchanging this information at the time of the annual negotiations made it all the more strategic, and had a definite impact on the parties' commercial policies<sup>180</sup>. The *Autorité* thus emphasised that *"even though each company had to individually manage discussions with their own customers, they enjoyed a much more favourable negotiating position than that which would have resulted from a situation of undistorted competition"*<sup>181</sup>.

The *Autorité* took the view that this exchange concerning future prices was likely to reduce market transparency and allow the coordination of behaviour. It was therefore restrictive of competition by object<sup>182</sup>. TLF was fined, as well as its members, as it had not only provided a setting for the exchange, but also played an active part in it, notably by concealing the anticompetitive discussions in the meeting minutes<sup>183</sup>.

### *Encadré 16*

197. Secondly, the *Autorité* has sanctioned the exchange of sensitive information in the form of individualised sales statistics, by value or volume. Both the Commission and the *Autorité* consider these data to be confidential information that is crucial to the commercial strategy of operators, and which is likely to greatly facilitate the establishment of tacit collusion on the market. Such data should not therefore be exchanged if it is disaggregated and sufficiently detailed<sup>184</sup>.
198. These individualised statistics may be presented in the form of raw data (turnover or quantities sold) or market shares. In this respect, it should be noted that the dissemination of sales statistics including both value and volume data makes it possible, in certain cases, to reconstruct the average value of the prices charged by the parties.
199. Sales statistics are thus considered to be individual, even if they are not directly linked to the name of a company, as long as the company can be easily identified in the light of other

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**180** Decision 15-D-19 of 15 December 2015, cited above, paragraphs 746–754.

**181** Decision 15-D-19 of 15 December 2015, cited above, paragraph 755.

**182** Decision 15-D-19 of 15 December 2015, cited above, paragraph 764.

**183** Decision 15-D-19 of 15 December 2015, cited above, paragraph 1004.

**184** Opinion 12-A-12 of 15 May 2012, cited above, paragraph 65.

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market data. This situation is all the more likely where there are few suppliers on the market.

200. The dissemination of individualised sales statistics is likely to be heavily sanctioned by the *Autorité*. In such a case, the bodies that disseminate such data are likely to be found liable, alongside with their members. Indeed, where a company sends information to a professional body and can reasonably foresee that this information will be communicated to other members – for example, where it receives information itself on its competitors through that body – it will be considered to have taken part in the exchange of information with its competitors<sup>185</sup>.
201. The analysis of cases may include consideration of the potential efficiency gains associated with the exchange of information.
202. The exchange of individualised data is not generally vital for the generation of efficiency gains, as aggregated information could produce the same efficiency gains while limiting the risk of collusion. The dissemination of sales statistics in an aggregated form should therefore be systematically favoured by professional bodies over the dissemination of individual sales statistics.
203. With regard to individualised sales statistics, parties involved in exchanges often argue that this increased transparency allows traders to better assess their performance, and that it provides an incentive for them to improve their efficiency. However, it is generally accepted that the dissemination of aggregated data or averages and, where appropriate, extreme values for assessing the spread of individual performance is sufficient for the implementation of such comparison or benchmarking techniques, without it being necessary to reveal the individual performance of competing firms. Thus,

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**185** Decision 19-D-25 of 17 December 2019, cited above, paragraph 474.

in practice, companies often fail to justify the establishment of individualised information exchanges and, in particular, to demonstrate that the desired pro-competitive goal could not be achieved by means less harmful to competition<sup>186</sup>.

### EXCHANGE OF INFORMATION ON MARKET SHARES

In a decision relating to an anticompetitive agreement between floor covering manufacturers<sup>187</sup>, the *Autorité* imposed penalties for an annual exchange of information within the sector trade association (*Syndicat Français des Enducteurs Calandreurs et Fabricants de Revêtement de Sols et Murs*: SFEC) regarding the sales volume of its members. Operators also communicated three to four times a year on recent changes in their sales and on their economic forecasts<sup>188</sup>. Although the market was highly concentrated, with the three manufacturers involved accounting for a share of 65 to 85%<sup>189</sup>, the information exchanged was in the form of individualised statistics including data from the previous year<sup>190</sup>.

The exchange was confidential, regular, and focused on each manufacturer's trading volume by product category and distribution channel. The participants in this exchange had also recognised its influence on their commercial autonomy, in that it gave them precise knowledge of the state of the market, and enabled them to adapt their commercial policy and better anticipate the behaviour of other market players<sup>191</sup>.

The SFEC was fined for its active role in organising the exchanges, as it had been requesting the communication of information from the companies<sup>192</sup>. It had also contributed to developing the modalities of the exchange. The compliance audit undertaken by the SFEC had in fact led to a change in its *modus operandi*, with exchanges increasingly concealed so that the illicit practices could continue<sup>193</sup>.

#### Box 17

204. Lastly, exchanges can take the form of the diffusion of market price lists. These may, in certain circumstances, infringe competition law.

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**186** Opinion 06-A-18 of 5 October 2006 on a draft occupancy indicator for hotels in the Mulhouse region, paragraph 26.

**187** Decision 17-D-20 of 18 October 2017, cited above.

**188** Decision 17-D-20 of 18 October 2017, cited above, paragraphs 348–349.

**189** Decision 17-D-20 of 18 October 2017, cited above, paragraph 459.

**190** Decision 17-D-20 of 18 October 2017, cited above, paragraph 346.

**191** Decision 17-D-20 of 18 October 2017, cited above, paragraphs 433–434.

**192** Decision 17-D-20 of 18 October 2017, cited above, paragraph 331.

**193** Decision 17-D-20 of 18 October 2017, cited above, paragraph 334 *et seq.*

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205. The dissemination of market price lists consisting of centralised lists of aggregated, past data on prices charged or discounts granted by companies in a market is permitted, but may be illegal if certain conditions are not met.
206. This is the case where the market price list is insufficiently aggregated and allows the identification of the players whose price data are communicated. Data exchanged through the dissemination of market price lists must, therefore, comply with conditions relating to anonymity, age, the impossibility of individualising information, and the historical nature of the data used.
207. This is also the case where the professional body directly or indirectly encourages its members to set their prices by taking into account the market price lists it disseminates. In such a scenario, the market price list is assimilated to a pricing instruction that is restrictive of competition by object.
208. Finally, the legality of the dissemination of a market price list is assessed in light of the competitive situation on the market concerned. In this respect, market price lists issued by sectoral professional bodies can have a “prescriptive” effect. Indeed, if operators have capacity constraints and insufficient knowledge of their costs, they may be encouraged to set their commercial policy, including their pricing policy, not according to their own operating conditions but on the basis of the information received, which may have the object and effect of “disciplining” competition in the sector<sup>194</sup>.
209. The legality of the dissemination of market price lists in the agricultural sector is discussed in more detail in the *Autorité’s* Opinion 18-A-04<sup>195</sup>.

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**194** Decision 95-D-74 of 21 November 1995, cited above.

**195** Opinion 18-A-04 of 3 May 2018, cited above.



## EXAMPLES OF ANTICOMPETITIVE INFORMATION EXCHANGES IN EUROPE AND THE UNITED STATES

### Spain

In 2019, the Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*: CNMC) imposed fines amounting to 80.6 million euros for the exchange of information on prices and quantities between eight milk processing companies and two industry associations<sup>196</sup>. The companies in question had exchanged sensitive information concerning the purchase price offered to dairy farms, future purchase prices and quantities, the identity of farmers who wished to change trading partner and possible ways of dissuading them, as well as the quantities of surplus milk. These practices had taken the form of bilateral and multilateral exchanges directly between companies and through meetings within the trade associations involved. The CNMC qualified the practices as restrictive by object. It further noted that the practice had had a significant impact on the market by preventing dairy farms from setting their prices. The CNMC also took into account the fact that the market was highly concentrated and characterised by the purchasing power of the processing companies. The trade associations in question were fined 60 000 and 90 000 euros respectively.

### Portugal

By a decision of 12 December 2008<sup>197</sup>, upheld on appeal<sup>198</sup>, the Portuguese Competition Authority (*Autoridade da Concorrência*) imposed a fine of 1.17 million euros on the association of bakers of the city of Lisbon for information exchange practices. The association had asked the bakers to provide it with information on the selling price of bread to the consumer, with the clear aim of fixing prices in the sector. Indeed, the articles of the association clearly indicated its objective of price harmonisation. The Portuguese Authority noted the alignment of prices among bakers participating in the exchange.

### Etats-Unis

US courts have long sanctioned the exchange of information within professional bodies<sup>199</sup>. More recently, the US Federal Trade Commission penalised a multifaceted exchange of information between the three major steel pipe

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<sup>196</sup> *Comisión Nacional de los Mercados y la Competencia*, 11 July 2019, *Industrias Lácteas 2*, No. S/0425/12.

<sup>197</sup> *Autoridade da Concorrência*, 16 December 2008, *Associação dos Industriais de Panificação de Lisboa*.

<sup>198</sup> Confirmed by a decision of the *Tribunal de Comércio de Lisboa* (25 June 2010, No. 178/09.8TYLSB) and then by the *Tribunal da Relação de Lisboa* (28 December 2011, 178/09.8TYLSB.L1) reducing the sanction to 850 000 euros.

<sup>199</sup> Supreme Court of the United States, 22 June 1914, *Eastern States Retail Lumber Dealers Ass'n v. United States*, No. 234 U.S. 600 (1914).

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manufacturers<sup>200</sup>. The producers exchanged information on their future prices notably via their joint distributor. The three companies also exchanged information on their monthly sales volumes through a trade association, the Ductile Iron Fittings Research Association (DIFRA). Each of the three companies submitted these data to DIFRA, which circulated them to the other two.

Box 18

### RECOMMENDATIONS

As part of a compliance approach, it is recommended that professional bodies endeavour to comply with the following principles when exchanging information as part of their proceedings:

- Avoid the exchange of individualised data statistics, whether contemporary or historical, relating to prices, market shares or any other strategically important information.
- Avoid exchanging information on business results for the current month or the previous month.
- Avoid any exchange consisting of a round table discussion on this type of element during meetings within a professional body, especially if this is not on the meeting agenda.
- Record the exchanges that take place during these meetings in the minutes.

In the event of the disclosure of sensitive information by one of the participants during a meeting of the body, ask the participants to leave the meeting and report this behaviour to the competition authorities.

Box 19

## Exclusionary strategies

210. Professional bodies can play a role in developing practices to exclude the competitors of their members from the market. Such practices may consist in organising boycotts, adopting discriminatory conditions of membership or unfairly applying such conditions, or enacting unduly restrictive sectoral standards.

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<sup>200</sup> Federal Trade Commission, January 4, 2012, *McWane Inc. and Star Pipe Products Ltd*, No. 9351.

## CALLS FOR BOYCOTT

211. An anticompetitive boycott is an action to refuse to market or purchase goods or services from one or more companies with the aim of driving them out of the market or preventing them from entering it. It can also be exercised by companies against their clients with a view to obtaining more favourable commercial conditions<sup>201</sup>.
212. In its implementation, the boycott may be the result of an instruction issued by a professional body. It is then qualified as an agreement between its members.
213. In such cases, the boycott “is a deliberate action with the aim of driving an operator out of the market”<sup>202</sup>. Unlike other anti-competitive practices, it is therefore necessary in the case of boycott to establish the perpetrator’s intent to exclude an operator. In the case relating to the practices implemented by the French Federation of Insurance Companies (*Fédération française des sociétés d’assurances*: FFSA), the *Conseil*<sup>203</sup> thus considered that the FFSA’s suggestion to its members to suspend their participation in a trade show did not reflect a desire to exclude them. Indeed, the FFSA had decided that, due to low levels of participation by the general public in this event, it would only have a limited media and commercial impact, which was not very appealing given the high cost of participation. The FFSA therefore suggested that its mem-

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**201** Decision 04-D-56 of 15 November 2004 regarding practices implemented by the La Dépêche du Midi group and auctioneers in Toulouse, paragraphs 65–67, and Decision 07-D-49 of 19 December 2007 regarding practices implemented by Biotronik, Ela Medical, Guidant, Medtronic and Saint Jude Medical in hospital supply of implantable defibrillators, paragraphs 243 *et seq.*

**202** Judgment of the French Supreme Court of 22 October 2002, *Vidal*, No. 00-18.048, emphasis added.

**203** Decision 99-D-68 of 9 November 1999 regarding practices implemented by the French Federation of Insurance Companies (FFSA), p. 9, confirmed by Judgment of the Paris Court of Appeal of 27 June 2000, *Vidal*, No. 2000/02659 and by Judgment of the French Supreme Court of 22 October 2002, cited above.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

bers postpone their participation and attempted to negotiate with the show organiser.

### Anticompetitive object of a boycott

214. Boycott actions have, by their very nature, an anticompetitive object<sup>204</sup> and constitute particularly serious infringements<sup>205</sup>.
215. The fact that a boycott has no effect on the activity of the operator targeted<sup>206</sup>, or was not or could not be implemented, does not affect the definition of the practice. A laboratory that had participated in meetings organising a boycott and then sent a letter to one of its trading partners announcing the end of their relationship therefore received a fine, irrespective of the fact that it had continued to place orders with the concerned party<sup>207</sup>.
216. Likewise, the fact that the perpetrators of a boycott lack any interest in participating in the boycott is irrelevant. Thus, in the *Dansk Rørindustri* case, the Court of Justice held that the fact that an undertaking did not implement or did not have an interest in the boycott that was agreed at a meeting in which it had participated was irrelevant<sup>208</sup>. The fact that the perpetrators of the practice are not in competition with the person targeted is equally irrelevant<sup>209</sup>.

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**204** Judgment of the Paris Court of Appeal of 23 February 1996, Conseil régional de l'Ordre des pharmaciens de la région Rhône-Alpes, No. 95/15611 and Decision 99-D-01 of 9 November 1999 regarding practices implemented by the company *Distri Club Médical*, p. 10.

**205** Decision 06-D-03 bis\* of 9 March 2006, cited above, paragraph 1361, confirmed by Judgment of the Paris Court of Appeal of 29 January 2008, No. 2006/07820.

**206** Decision 03-D-68 of 23 December 2003 regarding practices implemented by the Centre national des professions de l'automobile (Conseil National des Professions de l'Automobile: CNPA) in the vehicle distribution sector, paragraphs 37 and 38.

**207** Decision 98-D-25 of 17 March 1998, regarding practices implemented in the medical biological analyses sector, confirmed by Judgment of the Paris Court of Appeal of 3 December 1998, No. 1998/15305, pp. 7 and 8.

**208** Judgment of 28 June 2005, *Dansk Rørindustri et al. v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 146–147.

**209** Decision 98-D-25 of 17 March 1998, cited above, paragraph 18, confirmed by Judgment of the Paris Court of Appeal of 3 December 1998, *Frerot*, No. 1998/15305.

217. The term boycott also applies to threats. In the Judgment of 29 June 2004<sup>210</sup>, the Paris Court of Appeal confirmed *Conseil* Decision 03-D-68<sup>211</sup>, which had fined an automobile trade association for threatening to withdraw its advertisements from a newspaper if the latter continued to publish advertisements for car agents working outside its network of manufacturers.
218. A call for a boycott by a professional body can take several forms. It may, among other things, take the form of organising meetings regarding a boycott strategy, sending a circular or individual letters to members of the professional body, organising telephone or face-to-face meetings, or threatening of disciplinary or other proceedings against clients of the company to be excluded<sup>212</sup>.

### BOYCOTTS AIMING TO EXCLUDE AN OPERATOR FROM THE MARKET

By Decision 98-D-56, the *Conseil* fined a local pharmacists' association (*Syndicat des pharmaciens de l'Essonne*) for having implemented a boycott against a newly installed pharmacist in order to discourage them from opening their pharmacy at times that differed from the usual opening hours, which involved being closed on Sunday mornings. This boycott was established by sending a circular imposing very demanding Sunday duty shifts to the newly installed pharmacist<sup>213</sup>.

In its Decision 06-D-03 bis<sup>214</sup>, the *Conseil* also fined 69 manufacturers and traders in heating and sanitary appliances, as well as seven trade federations, for having implemented a boycott against DIY superstores and installers' cooperatives that had started to sell sanitary and heating products at low

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**210** Judgment of the Paris Court of Appeal of 24 June 2004, *Conseil national des professions de l'automobile* (CNPA), No. 04/01851.

**211** Decision 03-D-68 of 23 December 2003, cited above, paragraph 44.

**212** Decision 02-D-14 of 28 February 2002 regarding competition in the business sector of expert geometers and surveyors-topographers, p. 45 *et seq.*; and Decision 20-D-17 of 12 November 2020 regarding practices implemented in the sector of dental care surgery, paragraphs 661 *et seq.*

**213** Decision 98-D-56 of 15 September 1998 regarding practices observed in the pharmacy sector in Val d'Yerres in Essonne, p. 8.

**214** Decision 06-D-03 bis of 9 March 2006, cited above.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

prices. Following meetings during which the need to organise a boycott had been discussed<sup>215</sup>, one of the federations in question had put pressure on manufacturers to cease their trade relations with the DIY superstores and installers, stop disclosing their public prices and modify their prices in such a way as to disadvantage these sales networks. The same federation had concluded agreements with other installers' trade organisations to encourage them not to maintain relations with these two competing distribution channels<sup>216</sup>.

A call for a boycott may be perpetrated against an operator in a market related to the one in which the professional body in question and its members operate. This was the case for practices implemented by a professional association against the *Santéclair* care network due to its commercial policy, which was deemed too aggressive. Accordingly, in Decision 09-D-07<sup>217</sup>, the *Autorité* fined the National Council of the French Dental Surgeons' Association (*Conseil national de l'Ordre des chirurgiens-dentistes*), which had organised a boycott of this care network by arranging meetings<sup>218</sup>, and distributing circulars inviting its members to end their relations with said network<sup>219</sup> and threatening them with disciplinary proceedings<sup>220</sup>. The *Autorité* fined the National Council of the Dental Surgeons' Association as well as several departmental councils that had relayed the call for a boycott.

By Decision 20-D-17, the *Autorité* once again sanctioned this type of practice, imposing fines on the National Council and certain departmental councils of the Dental Surgeons' Association, as well as on certain dental surgeons' unions<sup>221</sup>. In particular, the *Autorité* penalised the agreement between the Association and the dental surgeons' unions to organise a campaign encouraging dental surgeons to file complaints to the Association against their colleagues who were members of the *Santéclair* care network, in an attempt to convince the latter to terminate their partnership.

### Box 20

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**215** See paragraphs 144, 222, 246 and 299 for more details on the subjects covered in the meetings.

**216** Decision 06-D-03 bis of 9 March 2006, cited above, paragraphs 892 *et seq.*

**217** Decision 09-D-07 of 12 February 2009, cited above, confirmed by Judgment of the Paris Court of Appeal of 19 January 2010, *Conseil national de l'Ordre des chirurgiens-dentistes et al.*, No. 2009/06049 and by Judgment of the French Supreme Court of 7 June 2011, No. 10-12.038.

**218** Decision 09-D-07 of 12 February 2009, cited above, paragraphs 52–55.

**219** Decision 09-D-07 of 12 February 2009, cited above, paragraph 58.

**220** Decision 09-D-07 of 12 February 2009, cited above, paragraphs 61 and 68–69.

**221** Decision 20-D-17 of 12 November 2020, cited above.

## EXAMPLES OF BOYCOTT POLICIES SANCTIONED IN EUROPE AND THE UNITED STATES

### Etats-Unis

In a 2011 decision<sup>222</sup> confirmed by the Court of Appeal<sup>223</sup> and the US Supreme Court<sup>224</sup>, the Federal Trade Commission held that the North Carolina State Board of Dental Examiners, an agency regulating dentistry, had breached competition law through the use of exclusionary practices aimed at non-dentist providers of teeth whitening services. In this case, the Dental Board had sent formal letters to the providers alleging that they were offering services illegally. It had also sent letters to mall owners, urging them not to lease space to these teeth whitening providers.

### Denmark

In 2016, following a decision by the Danish Competition Authority, the Danish Public Prosecutor's Office charged six real estate agencies grouped together as part of a single property search website (Boligsiden.dk)<sup>225</sup>. These agencies had agreed to boycott a competing and newly launched website (Boliga.dk), denying it access to photos of properties for sale on the internet. These practices made the Boliga.dk website less attractive to potential customers. Five real estate agency chains were therefore sanctioned for breaching competition law. Following a settlement, the various estate agency chains were imposed fines ranging from 65,000 to 500,000 euros, with the Association of Independent Estate Agents receiving a fine of approximately 10,000 euros. A chain of estate agents and the Danish Association of Chartered Estate Agents, which refused to settle, were respectively fined around 134,000 and 34,000 euros by the Copenhagen City Court<sup>226</sup>.

### Box 21

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**222** Federal Trade Commission, 2 December 2011, *The North Carolina State Board of Dental Examiners*, Docket No. 9343.

**223** Judgment of the United States Court of Appeals for the Fourth Circuit, 31 May 2013, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 12-1172.

**224** Supreme Court of the United States, 25 February 2015, 135 S. Ct. 1101 (2015). For more information, see the link to the press release.

**225** *Statsadvokaten for Særlig Økonomisk og International Kriminalitet, EDC-Gruppen A/S*, press release of 2 March 2016.

**226** Copenhagen City Court, 30 January 2018.

**CONDITIONS OF MEMBERSHIP  
OF A PROFESSIONAL BODY**

219. Depending on its corporate purpose, a professional body provides a certain number of services to the benefit of its members (legal and business advice, training or economic studies) that are likely to give them an advantage, sometimes very significant, over other non-member companies. By way of example, in Decision 05-D-12, the *Autorité* found that membership of an association of newspaper publishers gave the latter a competitive advantage in that it enabled its members to have their circulation figures published, an essential condition to access the market for the sale of advertising space<sup>227</sup>.
220. In addition, some clients may require suppliers with whom they are considering contracting to be members of a professional body. In the context of distribution networks, the head of the network may also ask its retailers to be members of the professional body representing the profession.
221. The unjustified refusal faced by a company to join a professional body, which is in principle open to all members of a profession, may therefore give rise to antitrust risks where that refusal is liable to limit an operator's ability to access or remain in a market. The unjustified exclusion of a member company by a professional body may raise similar risks, if not based on objective grounds.
222. By respecting the principles of transparency, objectivity and non-discrimination in the enactment and application of their internal rules, professional bodies can avoid exposing themselves to the infringements described in the previous paragraph.

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<sup>227</sup> Decision 05-D-12 of 17 March 2005 on practices implemented on the circulation figures market in the national daily press sector, and on the related market of advertising in this sector, paragraphs 41–43.



223. On several occasions, the *Autorité* imposed sanction on operators, including professional bodies, for failing to comply with these principles, in particular by enacting conditions of membership that were not based on objectively verifiable criteria, refusing to give reasons for decisions to refuse membership, or laying down conditions that were either unjustified from an economic point of view given the nature of the profession practised (for example, setting a prohibitive entry fee) or discriminatory, for example on grounds of nationality<sup>228</sup>.

### EXAMPLES OF PENALTIES FOR DISCRIMINATORY ENTRY REQUIREMENTS

In Decision 19-D-13<sup>229</sup>, the *Autorité*, in the context of a settlement, fined a local Joint Bureau of Services (*Bureau commun de signification*: BCS), which brings together all bailiffs in the Hauts-de-Seine county, a total of 120 000 euros for having enacted discriminatory membership conditions solely for bailiffs who had recently benefited from an new framework of establishment (within the framework provided for under the 2015 "Macron Law")<sup>230</sup>, subjecting them to a prohibitive fixed entry fee of 300 000 euros. The aim of this discriminatory practice was to hinder the exercise of the profession for "new" bailiffs, as access to the services of the BCS was essential to their activity.

In Decision 18-D-04<sup>231</sup>, the *Autorité* ruled that access to the Martinique Interprofessional Association for Meat, Cattle and Milk (*Association martiniquaise interprofessionnelle de la viande, du bétail et du lait*: AMIV) guaranteed that member farmers would benefit from European aid, which for some of them determined their capacity to remain in the market. In this case, the *Autorité* accepted and made binding commitments from AMIV to guarantee farmers a non-discriminatory access. AMIV thus undertook to modify the procedure and criteria for becoming an active member of the association (by specifying the formalities for submitting a membership application, setting deadlines for examining membership applications, establishing the

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**228** Decision 00-D-84 of 8 February 2001 regarding professional identification issued by the National Federation of Public Works (*Fédération nationale des travaux publics*: FNTP), p. 8.

**229** Decision 19-D-13 of 24 June 2019, cited above.

**230** Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities, Official Journal of the French Republic (JORF) No. 0181 of 7 August 2015.

**231** Decision 18-D-04 of 24 October 2018 regarding practices implemented in the meat production and sale sector in Martinique.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

obligation to give reasons for its decisions to accept or refuse membership, and specifying the criteria for representativeness, activity and specialisation). It also undertook to create the new status of associate member, with less rigorous conditions of membership, to enable applicants who so wish to be able to benefit from European aid without taking part in the work of the Association.

In Decision 98-D-81 on the expert examination of works of art<sup>232</sup>, confirmed by the Court of Appeal<sup>233</sup> and the French Supreme Court (*Cour de cassation*)<sup>234</sup>, the *Autorité* considered that the rules making the admission of experts to professional bodies subject to their presentation by members (co-optation and sponsorship), combined with the exemption from having to give reasons for decisions to refuse membership, led to discriminatory situations restricting competition<sup>235</sup>. The *Autorité* found that an expert's membership in a trade union was considered to "demonstrate competence" and thus constituted a competitive advantage in that it played a certifying role with consumers<sup>236</sup>.

### Box 22

#### EUROPEAN EXAMPLE ON CONDITIONS OF MEMBERSHIP OF A PROFESSIONAL BODY

##### Spain

In 2017, the Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*: CNMC) fined the Association of Spanish Basketball Clubs (*Asociación de Clubes de Baloncesto*: ACB) 400 000 euros for membership rules deemed to be anticompetitive<sup>237</sup>. These rules imposed unjustifiable and discriminatory financial membership conditions on clubs that were not members of the Association. In addition, the imposed entry fee had been increased in a significant and unjustifiable way. It was also applied in a discriminatory manner, as some of the ACB members never had to pay any entry fee. The ACB had also created a fund for team transfers to other leagues, to which only newcomers had to contribute. These practices thus also benefited certain members of the ACB that, on the basis of their sporting results, should have

**232** Decision 98-D-81 of 21 December 1998 regarding practices implemented in the valuable and fine art expertise sector.

**233** Judgment of the Paris Court of Appeal of 12 October 1999, *Compagnie nationale des experts spécialisés en livres, antiquités, tableaux et curiosités (CNE) et al.*, No. 1999/05054.

**234** Judgment of the French Supreme Court of 26 February 2002, No. 99-20.829.

**235** Decision 98-D-81, cited above, p. 15.

**236** Decision 98-D-81, cited above, pp. 4 and 15.

**237** *Comisión Nacional de los Mercados y la Competencia*, 11 April 2017, *Asociación de Clubes de Baloncesto*, No. S/DC/0558/15 ACB.

been relegated to lower leagues. According to the CNMC, these practices had impeded access to the ACB league and affected the competitive position of recently promoted basketball clubs, which, as a consequence, lacked the funds to recruit players or make other investments.

### Box 23

## RECOMMENDATIONS

As part of a compliance approach, it is recommended that professional bodies endeavour to comply with the following principles when enacting and applying their internal rules:

- Enact objectively verifiable criteria, avoiding overly generic formulations that allow a discretionary assessment.
- Verify that membership conditions are economically justified in relation to the nature of the profession.
- Specify the formalities for submitting a membership application, set deadlines for the professional body to examine the application and allow the applicant to be heard on request.
- Communicate the membership conditions to any company that requests them.
- Apply these criteria in a non-discriminatory manner, verifying in particular that companies in similar situations are treated in the same way.
- Provide reasons for any decisions to refuse membership.

### Box 24

224. In any event, the professional body must rigorously refrain from enacting membership conditions membership that would include anticompetitive clauses with the object or effect of limiting internal competition between members (i.e., by organising market or customer sharing between them). The *Autorité* has already had occasion to sanction the adoption of such clauses by associations of companies that are not professional bodies (a group of transport companies and a joint sales company)<sup>238</sup>. These clauses are anticompetitive by object and may never be included in the internal rules of a professional body.

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<sup>238</sup> Decision 19-D-21 of 28 October 2019 regarding practices implemented in the road freight transport sector and Decision 12-D-09 of 13 March 2012 regarding practices implemented in the packaged flour sector.

### **SPECIAL CASE: SPORTS FEDERATIONS**

In a decision of 8 December 2017, the Commission found that by adopting and applying its eligibility rules, the International Skating Union (ISU), which organises and runs international skating events, had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area. Indeed, the eligibility rules of the ISU restricted the possibilities for athletes to engage in international speed skating events organised by third parties and thereby deprived potential competing speed skating event organisers of the services of the athletes<sup>239</sup>. This consequently hindered access to the market for the organisation and commercial exploitation of international speed skating events.

*Box 25*

### **ENACTMENT OF UNDULY RESTRICTIVE STANDARDS OR TECHNICAL AGREEMENTS**

225. As explained above, competition authorities generally take an initially favourable approach to standardisation agreements which, by their very nature, facilitate in principle the development of new markets and the improvement of supply conditions. However, the conclusion of such agreements also provides a “forum” for companies to discuss the potential exclusion of certain new products or technologies, and thus carries the risk of anticompetitive effects.
226. A standardisation agreement does not constitute restriction of competition unless it forms part of a broader agreement for anticompetitive purposes. In the case of the hard-wearing floor covering cartel<sup>240</sup>, detailed below, the main companies in the sector had entered into a non-competition agreement, under the aegis of a trade body, regarding the communication of the environmental performance of their products, whereby they reciprocally prohibited each other from communicating their individual environmental performance by limiting their communication to the average performance at sector level, in order to avoid “dangerous green marketing”

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**239** Commission Decision of 8 December 2017, International Skating Union's Eligibility Rules, C(2017) 8240.

**240** Decision 17-D-20 of 18 October 2017, cited above.

in a context where consumers were increasingly sensitive to these issues. The *Autorité* considered that establishing this agreement constituted a restriction of competition by object.

227. In this respect, the Commission Guidelines on horizontal co-operation agreements state that “an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard would fall into this category [of competition infringements]”<sup>241</sup>.

### DEVELOPMENT OF ENVIRONMENTAL CHARTER RESTRICTING COMPETITION

In case 17-D-20<sup>242</sup>, the *Autorité* considered that the three leading floor covering manufacturers in the market, Forbo, Gerflor and Tarkett, with the active support of the sector’s trade association (*Syndicat français des enducteurs calandriers et fabricants de revêtements de sols et murs*: SFEC), had taken part in an agreement in the form of a communication charter on environmental data for hard-wearing linoleum-type floor covering products, entitled “SFEC members’ charter on the use of the eco-design tool”. The participants in this agreement signed under the aegis of the SFEC had given up the right to compete freely on the basis of the merits of their respective products with regard to environmental criteria.

Indeed, the charter required that communication to the public on the environmental performance of their products be based exclusively on the average values adopted within the trade association. By refraining from reporting on the basis of individual environmental data, based on the specific performance of each manufacturer – especially when this data was better than average, for example with lower emissions of volatile organic compounds when the product is laid – companies had given up competing on the merits of their respective products with regard to environmental criteria, even though the environmental performance of floor coverings, in particular with regard to the emission of volatile organic compounds, has become one of the main criteria in clients’ choice, whether they are professionals or private consumers.

#### Box 26

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<sup>241</sup> Commission Communication, Horizontal Guidelines, cited above, paragraph 273.

<sup>242</sup> Decision 17-D-20 of 18 October 2017, cited above.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

228. A standardisation agreement may also be artificially used to raise barriers to entry into a market and prevent innovation. This is the case in particular if it produces unnecessary standards with an unproven economic cost-benefit balance, or if it allows a biased standard to be approved for the benefit of certain market players, who can then use it to erect a barrier to entry for competitors or innovators. As mentioned above, these dangers are all the more pernicious since “improper” standards are difficult to detect and correct once the standardisation process is complete<sup>243</sup>.
229. It should be noted in this respect that, with some exceptions<sup>244</sup>, a technical standard is not approved by the public authorities and is not intended to be part of the hierarchy of legal standards. Standards therefore differ from regulations in that they are non-binding. However, this non-binding nature is fairly formal, as the approval of a standard entails widespread adherence by the stakeholder companies. It is therefore not necessary for a certified standard to be made mandatory by a regulatory decision for its application to become a *de facto* condition for entering or remaining in a market. For example, the construction sector is characterised by the production of large numbers of “quasi-standards”, which are neither validated by the French standardisation authority (AFNOR) nor approved, but are nevertheless in practice compulsory for so-called “traditional” construction techniques. Similarly, technical opinions in the broadest sense – technical opinions (AT) and technical application documents (DTA) – relating to innovative products are not legally binding but are required in practice by project owners or insurers<sup>245</sup>.

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**243** Opinion 15-A-16 of 16 November 2015, cited above, paragraph 7.

**244** Under the terms of Article 17 of French Decree 2009-697 of 16 June 2009 on standardisation: “The application of standards is voluntary. However, the application of standards may be made mandatory by an order signed by the minister responsible for industry and the other minister(s) concerned”. In practice, the application of standards remains an almost exclusively voluntary process, as standards made mandatory by a regulatory text represent only a tiny proportion of the total (around 1%), for both national and international standards (see Opinion 15-A-16 of 16 November 2015, cited above, paragraphs 14 and 15).

**245** Opinion 15-A-16 of 16 November 2015, cited above.

## DEVELOPMENT OF STANDARDS POTENTIALLY RESTRICTIVE OF COMPETITION

In Decision 10-D-20<sup>246</sup>, the *Autorité* accepted commitments from discount coupon processors HighCo and Sogec, and the retailers' association Perifem, which had been accused of engaging in exclusionary practices resulting from a standardisation agreement for the adoption of the Webcoupon format. These practices were likely to appreciably restrict competition on the markets for the issuing and distribution of e-coupons, which are used to obtain price reductions on e-commerce websites.

In order to determine whether or not such agreements restricted competition, it was necessary to take into account the extent to which the parties remained free to develop other standards or products that did not comply with the standard that was the subject of the agreement.

In this case, the *Autorité* found that the Webcoupon format had been designed to be the security standard applicable to all e-coupons issued on French territory. Distributors and advertisers had been invited to select the Webcoupon format, to the exclusion of other formats, by a communication that could have led them to believe that they would not be reimbursed for the sums advanced when they accepted e-coupons other than those in the Webcoupon format at the checkout.

The *Autorité* also noted that the professional body Perifem had made a significant contribution to retailers' approval of this format by diffusing all the relevant information to its members, getting some of them to sign a commitment letter acknowledging that the Webcoupon format "effectively standardised" e-coupons, and refusing to provide comparable assistance to other operators in the sector for the approval of an alternative format.

The *Autorité* concluded that the conduct in question could lead to the gradual introduction – with regard to both upstream advertisers, at the stage of issuing e-coupons, and downstream retailers, at the stage of accepting e-coupons – of the Webcoupon format as the only format able to guarantee the security of and thus compensation for e-coupons presented at the checkout, even though other formats were likely to be able to provide the same level of guarantee.

The *Autorité* considered that such behaviour could lead, in an emerging market, to the foreclosure of operators offering other e-coupons formats, and that its effects would be difficult to reverse. It accepted the commitments offered by the parties concerned in response to these competition concerns. Following their application, the Webcoupon ceased to be presented as the single standard applicable to e-coupons and became merely the private application of a standard open to all, which was itself optional. Furthermore, free access was given to the "proprietary" elements of the Webcoupon solution to any operator that so requested, provided that the security specifications were respected and reimbursement of the Webcoupons guaranteed under certain circumstances by the licence applicant. HighCo and Sogec also undertook to process the reimbursement of all e-coupons under non-discriminatory conditions.

### Box 27

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**246** Decision 10-D-20 of 25 June 2010 regarding practices implemented in the discount coupon sector.

## DEVELOPMENT OF CERTIFICATION GUIDELINES RESTRICTIVE OF COMPETITION

According to established practice, a collective certification approach – such as, for example, the creation of a quality label or a trade identification system leading to the selection of companies according to their ability to carry out certain work or meet certain quality criteria – constitutes an agreement between the companies adhering to this approach. Such an agreement is anticompetitive if the criteria for the award of a label or qualification, the possession of which is indispensable for carrying on an activity, are not sufficiently objective and clear, and leave room for discriminatory application, allowing competitors to be squeezed out of the market covered by the label or other qualification, by means other than those based on merit<sup>247</sup>.

For a professional identification system to be acceptable under the competition rules, the criteria laid down must be clear and objective, and of a nature such as to guarantee the competence of professionals without going beyond what is strictly necessary for this guarantee<sup>248</sup>.

### Installation of fire extinguishers

In Decision 12-D-26 concerning practices in the sector of the production, marketing, installation and maintenance of fire extinguishers, the *Autorité* sanctioned a trade association for implementing an anticompetitive agreement aimed at excluding or limiting the access of certain installers/maintainers to the French market for the installation and maintenance of portable fire extinguishers<sup>249</sup>. It found that the certification of services for the installation and maintenance of the portable fire extinguishers developed by the association concerned appeared to be indispensable in order to be able to operate in the French market for the installation and maintenance of portable fire extinguishers. It then found that the service certification guidelines implemented by the association contained an unjustified requirement (the NF mark), going beyond what was necessary under the national regulatory framework, and which had the object or effect of hindering access to the French market for products not bearing the NF mark but holding, in accordance with the national regulatory framework, a certificate of conformity with European standards.

In Decision 01-D-30 of 22 May 2001<sup>250</sup>, having established that the “AP-MIS qualification” for fire detector installers and maintainers was indispensable for access to certain markets, the *Conseil* examined the clauses of the AP-MIS qualification rules and concluded that some of them – in particular those linking

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**247** See, for example Decision 12-D-26 of 20 December 2012 regarding practices implemented in the sector of the production, marketing, installation and maintenance of fire extinguishers, paragraph 241.

**248** Decision 00-D-84 of 8 February 2001, cited above.

**249** Decision 12-D-26 of 20 December 2012, cited above.

**250** Decision 01-D-30 of 22 May 2001 on the AP-MIS qualification issued to companies installing and maintaining fire detection systems.



installation and maintenance services, or requiring candidates for certification to provide evidence of having carried out and maintained at least 20 installations totalling 1000 or 2000 fire detectors for at least two years and no more than five years – were not essential with regard to the intended safety and quality objective of this qualification. The *Conseil* therefore qualified the practice as an anti-competitive agreement contrary to Article L. 420-1 of the French Commercial Code (*Code de commerce*).

In Decision 95-D-50 of 4 July 1995<sup>251</sup>, the *Conseil* ruled that the fact that a company installing or maintaining fire extinguishers benefited from “APSAD qualification” determined access to customers. Consequently, the clauses for access to “APSAD certification”, which were not based on objective criteria for verifying the technical competence and the commercial and financial stability of applicant companies, had an anticompetitive object or could have an anticompetitive effect. The *Conseil* therefore qualified the practice as an agreement contrary to Article L. 420-1 of the Commercial Code.

#### Box 28

## Anticompetitive practices that may be committed by professional bodies through a misinterpretation of regulations

230. As explained above, professional bodies are required to provide a number of services to their members and, as such, may diffuse legal advice by providing interpretations of the legislation applicable to the activity of their members.
231. While the provision of legal advice falls within the scope of the role of a professional body and does not in itself raise competition concerns, it should not be used as a basis for anticompetitive intervention in a market.
232. Professional bodies should therefore be particularly vigilant when giving legal advice that relates to pricing issues, or which may deter their members from using a particular category of products, services or professionals.

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<sup>251</sup> Decision 95-D-50 of 4 July 1995 regarding practices implemented in fire extinguishers installation and maintenance markets.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

233. The *Autorité* considers that legal analyses by a professional body, which may lead its members to align their policy on a competition parameter (prices, customers, production, etc.), constitute market intervention. Such an intervention is anticompetitive where the legal analysis carried out by the professional body is based on a misinterpretation of the regulations, and where such intervention is likely to have an anticompetitive object or effect.
234. This is notably the case where a professional body diffuses, under the pretext of a legal analysis, price instructions to its members inviting them to apply a price calculation method<sup>252</sup>, avoid offering discounts<sup>253</sup> or limit rates in sectors of activity where prices are not set.
235. This is also the case where a professional body, on the basis of a misinterpretation of the legislation, sends unjustified warnings to its members prohibiting or deterring them from offering certain products or services, or from using certain service providers<sup>254</sup>.
236. A professional body may also have an anticompetitive conduct when it diffuses incorrect legal arguments aimed at exerting pressure on clients of the profession it represents, for example to deter them from accepting services at prices it considers “too low”, or from using certain providers.

### EXAMPLES OF ANTICOMPETITIVE INTERVENTIONS BY A PROFESSIONAL BODY TOWARDS ITS MEMBERS' CLIENTS

In Decision 19-D-19<sup>255</sup>, confirmed by the Paris Court of Appeal<sup>256</sup>, the *Autorité* fined the regional councils of the French Architects' Association (*Ordre des architectes*) for having threatened public contractors with legal proceedings if they accepted fees lower than those resulting from a price calculation method distributed to

<sup>252</sup> Decision 19-D-19 of 30 September 2019, cited above.

<sup>253</sup> Decision 07-D-41 of 28 November 2007, cited above.

<sup>254</sup> Decision 09-D-07 of 12 February 2009, cited above.

<sup>255</sup> Decision 19-D-19 of 30 September 2019, cited above.

<sup>256</sup> Judgment of the Paris Court of Appeal of 15 October 2020, cited above.

their members, it having been claimed by the councils that those fees could be considered “abnormally low bids” penalised by the French Code of Public Procurement (*Code des marchés publics*).

In Decision 09-D-17<sup>257</sup>, the *Autorité* fined a regional professional association that had put pressure on a retirement home to use its nearest pharmacies, on the basis of unfounded legal arguments based on the misinterpretation of the French Public Health Code (*Code de la santé publique*). The *Autorité* stressed that, although the Public Health Code aims to ensure adequate “geographical coverage” of pharmacies to meet the needs of the population, it does not establish a territorial monopoly or imply that a retirement home cannot make use of competition and engage the pharmacist of its choice to meet the needs of its residents.

In Decision 05-D-43, the *Conseil* fined a local Council of the Dental Surgeons' Association (*Conseil départemental de l'Ordre des chirurgiens-dentistes du Puy-de-Dôme*) and the National Council of the National Dental Surgeons' Association (*Conseil national de l'Ordre national des chirurgiens-dentistes*) for having sent a letter to local retirement homes stating, on the basis of an erroneous legal analysis, that the cleaning of dental prostheses should be prescribed by a dental surgeon<sup>258</sup>.

In Decision 02-D-14<sup>259</sup>, the *Conseil* sanctioned a professional association for having drawn up and disseminated misleading legal arguments to local and regional public authorities with a view to extending the scope of the monopoly of surveyors and eliminating competition from the profession of topographer.

## Box 29

# Anticompetitive practices that may be committed in the course of lobbying activities

237. An examination of French and European decision-making practice makes it possible to identify practices carried out on the sidelines of or in connection with the lobbying activities of professional bodies that are likely to infringe competition law, regardless of the undisputed right to carry out such activities.

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**257** Decision 09-D-17 of 22 April 2009 regarding practices implemented by the Lower Normandy Regional Council of the Pharmacists' Association (*Conseil régional de l'Ordre des pharmaciens de Basse-Normandie*).

**258** Decision 05-D-43 of 20 July 2005 regarding practices implemented by the Departmental Council of the National Order of dental surgeons of the Puy-de-Dôme and the National Council of the National Order of dental surgeons.

**259** Decision 02-D-14 of 28 February 2002, cited above.

## PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS WITH REGARD TO COMPETITION RULES

238. Firstly, the existence of an “official” position of a professional body with regard to the public authorities should not prevent any operators concerned or any groups of operators from making other proposals to the public authorities<sup>260</sup>. The professional body must therefore refrain from exerting any form of pressure on these operators, which remain free to express a critical stance to the public authorities.
239. Secondly, a professional body that asks its members to adopt commercial behaviour likely to distort competition, in order to bring them in line with the positions it defends to the public authorities, may be sanctioned under competition law. Indeed, while a professional body has the right to freely speak with public authorities, it is not entitled to interfere in the commercial policy of its members in order to induce them to adopt anticompetitive behaviour.

### EXAMPLE OF EARLY IMPLEMENTATION OF A LOBBYING ACTION CONSTITUTING AN ANTICOMPETITIVE PRACTICE

In Decision 15-D-19, the *Autorité* fined a trade association and its members for colluding on the early introduction of a “diesel” surcharge, the application of which was introduced a few months later by the legislator. On this point, the *Autorité* recalled that *“the application of a diesel surcharge and the development of a common methodology agreed upon by the respondents cannot be justified by the fact that TLF [the trade body representing the transport and logistics sector] was negotiating with the public authorities to seek a solution to counterbalance the cost of the increase in diesel prices”*<sup>261</sup>.

#### Box 30

240. Thirdly, professional bodies may not engage in disparaging practices in their discourse with the public authorities or in press campaigns they organise to promote or defend the activities of their members.
241. Disparagement is the public discrediting of a person, product or service. It differs from criticism insofar as it comes

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<sup>260</sup> Decision 06-D-21 of 21 July 2006, cited above, paragraph 62.

<sup>261</sup> Decision 15-D-19 of 15 December 2015, cited above, paragraph 691.

from an economic stakeholder seeking to gain a competitive advantage by penalising its competitor. In assessing disparaging behaviour, the *Autorité* verifies whether the commercial discourse of the perpetrator is based on objective and verifiable findings, or on unverified assertions. It also verifies whether the commercial discourse is likely to affect the structure of the market by examining its expected or actual effects on the potential customers of the competitor targeted and its possible deterrent effect on consumers.

### EXAMPLE OF DECISION RECALLING PRINCIPLES OF PUBLIC COMMUNICATION UNDER THE COMPETITION RULES

In Decision 12-D-19<sup>262</sup> the *Autorité* declared itself competent to examine whether communication campaigns conducted by professional bodies representing dental surgeons constituted an anticompetitive disparagement practice against companies active in the teeth whitening and lightening market. Although the *Autorité* ordered dismissal in this case, it recalled the principles that professional bodies must observe in the preparation of public notices with regard to the competition rules prohibiting disparagement.

#### Box 31

242. Lastly, presenting misleading information to the public authorities in order to mislead them may, in certain cases, constitute an infringement of competition law.
243. In order to assess the existence of unacceptable intervention with a public authority, the *Autorité* does not focus on the legality of the decision taken by the authority – which falls within the exclusive jurisdiction of the administrative courts – but on whether the offender unduly interfered in the decision-making process of the authority, or whether it implemented practices likely to induce the authority to adopt a decision that it should not have taken<sup>263</sup>.

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<sup>262</sup> Decision 12-D-19 of 26 September 2012, cited above, paragraphs 80–82.

<sup>263</sup> Decision 17-D-25 of 20 December 2017 regarding practices implemented in the sector of transdermal patches of fentanyl, paragraph 422.

244. The assessment of the misleading nature of statements provided to public authorities for anticompetitive purposes must be made *in concreto* and is likely to vary depending on the circumstances of each case. More specifically, the limited margin of discretion of public authorities or the absence of an obligation on them to verify the accuracy or veracity of the information provided may be relevant elements to be taken into account in determining whether the practice in question is liable to distort the competitive functioning of the market.
245. While the provision of misleading information to public authorities has, until now, been approached in terms of abuse of a dominant position by companies<sup>264</sup>, in the light of the principles mentioned above, such behaviour could lead to the sanctioning of a professional body.
246. If the professional body communicates misleading information in an attempt to win over a public authority to its opinion by leading it to take a decision on the basis of erroneous or partial facts, it is likely to infringe antitrust law. This could also be the case if a professional body knowingly fails to disclose information in its possession that could influence the decision of the public authority.
247. The provision of misleading information by a professional body to the *Autorité* is also likely to constitute obstruction, and this is penalised by a specific text in the French Commercial Code (point V of Article L. 464-2).

## Collective bargaining

248. Opinion 19-A-13 of 11 July 2019 on the effects on competition of the extension of industry-wide agreement describes the analytical framework for collective bargaining between professional bodies and employee unions with regard to competition rules.

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<sup>264</sup> Decision 17-D-25 of 20 December 2017, cited above, confirmed by the Judgment of the Paris Court of Appeal of 11 July 2019, No. 18/01945; Judgment of 1 July 2010, *AstraZeneca/Commission*, T-321/05, EU:T:2010:266, confirmed by Judgment of 6 December 2012, *AstraZeneca et al. v Commission*, C-457/10 P, EU:C:2012:770.

249. Since the Judgment of 21 September 1999, *Albany*, the Court of Justice has considered that agreements concluded in the context of collective bargaining between management and labour that are intended to improve employment and working conditions must, by their nature, be regarded as outside the scope of Article 101(1) TFEU. Although the Court acknowledged that certain effects restrictive of competition could be inherent in such agreements, it also stressed that "*the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty [now Article 101(1) TFEU]*"<sup>265</sup>.
250. This exclusion from the scope of the competition rules is nevertheless strictly assessed. If one of the conditions is lacking, namely (i) agreements concluded in the context of collective bargaining between management and labour (ii) whose purpose is to improve working conditions, the agreement falls within the scope of the prohibition of anticompetitive practices.
251. With regard to the first condition, the Court of Justice ruled in its *Pavel Pavlov* judgment<sup>266</sup>, that this exclusion cannot be extended to agreements concluded outside the framework of collective bargaining between trade union organisations representative of employees and employers; thus, an organisation of signatory doctors constitutes an association of undertakings and not a representative trade union organisation. Similarly, a collective agreement between employers and self-employed workers who do not have the status of employees does not escape the application of competition law<sup>267</sup>.

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**265** Judgment of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraphs 59 and 60.

**266** Judgment of 12 September 2000, *Pavel Pavlov*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 68.

**267** Judgment of 4 December 2014, *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 30.

**PRACTICES OF PROFESSIONAL BODIES INVOLVING RISKS  
WITH REGARD TO COMPETITION RULES**

252. With regard to the second condition, the scope of the exclusion is not extended to the provisions of collective agreements that do not relate to the improvement of employment and working conditions, i.e. provisions dealing with matters that do not fall within the essential character of collective bargaining. This is also the case for provisions directly affecting relations between employers and third parties, such as clients, suppliers, competing employers or consumers.
253. Some collective labour agreements may grant exclusive rights to a company. For example, they may provide for compulsory membership of a supplementary health reimbursement scheme, qualified as an enterprise, by conferring on it the exclusive right to collect and manage contributions paid by employers and employees in the sector concerned. The decision to extend this type of agreement will only be lawful if the granting of exclusive rights is itself lawful, i.e., if it does not lead the enterprise thus designated to abuse its dominant position within the meaning of Article 102 TFEU or Article L. 420-2 of the French Commercial Code (*Code de commerce*).
254. Although the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 106(1) TFEU is not, as such, incompatible with Article 102 TFEU, the abuse of this position is. This type of abusive practice contrary to Article 106(1) TFEU exists, in particular, where a Member State grants an enterprise the exclusive right to carry out certain activities and creates a situation in which that company is manifestly unable to satisfy market demand for such activities. In the Pavlov case<sup>268</sup>, the Court of Justice ruled that the fund that had been granted the exclusive right to manage part of the compulsory supplementary pension scheme held a dominant position in a substantial part of the common market. However, in this instance, it consid-

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**268** Judgment of 12 September 2000, *Pavel Pavlov*, cited above.



ered that it was not proven that the fund could be induced, by the mere exercise of an exclusive right conferred by the public authorities, to exploit its position in an abusive way.

255. Thus, abuse of a dominant position can be envisaged in industries where one or more companies hold, alone or jointly, such a position, and could be tempted to exploit collective bargaining at industry level.

## Conclusion

A professional body must not go beyond its role of defending, informing and advising its members. It commits an infringement when it engages in conduct liable to disturb the normal competitive functioning of the market in which its members operate.

Any form of anticompetitive strategy is liable to be apprehended by *the Autorité*, whether on the basis of the law relating to anticompetitive practices or abuse of a dominant position.

These definitions do not preclude the examination of efficiency gains with regard to exemptions.

## **4/ EXEMPTIONS**



256. **In national law**, exemptions are governed by point I of Article L. 420-4 of the French Commercial Code (*Code de Commerce*), which states that "*the provisions of Articles L. 420-1 and L. 420-2 do not apply to practices:*

*1° that result from the application of a legislative text or of a regulatory text adopted for its application;*

*2° that can be justified by those carrying out the practices on the grounds that they have the effect of ensuring economic progress, including by creating or maintaining jobs, and that they reserve for users a fair share of the resulting benefit, without affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. Such practices, which may consist in organising, for agricultural products or products of agricultural origin, under the same brand or trade name, the volumes and quality of production as well as the commercial policy, including agreeing on a common trade price, should only impose restrictions on competition in so far as they are indispensable to achieve this objective of progress".*

257. A body implementing a practice covered exclusively by Articles L. 420-1 and L. 420-2 of the French Commercial Code may invoke the benefit of these provisions<sup>269</sup>.

258. **The TFEU** limits individual exemptions to anticompetitive practices alone where the conditions laid down in Article 101(3) TFEU are cumulatively fulfilled: the practices (1) contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, (2) while allowing consumers a fair share of the resulting benefit, (3) without imposing on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives (4) or affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

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<sup>269</sup> See notably Decision 09-D-17 of 22 April 2009, cited above, paragraph 50 and 51.

259. Although the Court of Justice has accepted that, under certain conditions, undertakings may invoke efficiency gains to escape the classification of abuse of a dominant position, the TFEU does not however provide for individual exemptions in cases of abuses of dominant position. Likewise, no article expressly states that anticompetitive behaviour imposed by the law can be exempted<sup>270</sup>.
260. Under both European and national law, it is up to the professional body wishing to benefit from an exemption to invoke it and demonstrate that it fully meets the conditions<sup>271</sup> by means of convincing arguments and evidence<sup>272</sup>.

## National exemptions for practices taken in application of legislation

261. Firstly, with regard to the acts covered by the exemption, point I. 1° of Article L. 420-4 of the French Commercial Code (*Code de commerce*) provides for exemptions for practices resulting from legislative texts or regulatory texts implementing said legislative texts. Circulars or letters from a minister issued in application of a law fall within this definition<sup>273</sup>. Conversely, an encouragement, ministerial approval<sup>274</sup>, the customs of a

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**270** Where national legislation requires an association of undertakings to engage in anti-competitive behaviour, national competition authorities must leave this legislation unenforced in so far as it is contrary to competition law. The association of undertakings is only exempt from penalties for past behaviour if the law leaves it no room for manoeuvre. On the other hand, it is liable for penalties for its past conduct if the law merely encouraged the establishment of anticompetitive practices, or for its conduct subsequent to the decision not to enforce such national legislation (Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 58).

**271** Judgment of the French Supreme Court of 13 February 2001, *Synergie*, No. 98-21078.

**272** Judgment of the Paris Court of Appeal of 14 December 2011, *Emirates*, No. 09/20639.

**273** Opinion of 16 April 1975 on competition in the glass tableware (glassware) trade, pp. 3–4.

**274** Opinions of 21 March and 25 April 1975, *Procirep*, p. 5.

sector<sup>275</sup> or a letter clearing a merger<sup>276</sup> do not permit to claim for an exemption.

261. Secondly, an exemption can only be invoked for anticompetitive practices that are the direct and necessary consequence of the application of the legislative text invoked<sup>277</sup>.
263. A large number of the decisions handed down based on point I. 1° of Article L. 420-4 of the Commercial Code concern the application of the texts authorising professional associations to regulate their profession<sup>278</sup>.
264. However, when the professional body acts outside of the scope of these legislative texts, it exposes itself to proceedings for anticompetitive practices.
265. The French National Union of Modelling Agencies (*Syndicat national des agences de mannequins*) was imposed a fine by the *Autorité* for having circulated a fee schedule, which, although based on the minimum wages provided for in the texts, exceeded their scope as it also provided the agencies' margin for each modelling service<sup>279</sup>. No exemption was therefore granted.
266. The *Autorité* also noted that the provisions of the French Public Health Code (*Code de la santé publique*) invoked by a pharmacists' trade association did not oblige a pharmacist to be closed on the same days and at the same hours as other pharmacists in the same area<sup>280</sup>.

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**275** Decision 11-D-02 of 26 January 2011 regarding practices employed in the historic monument restoration sector, paragraphs 563 *et seq.*

**276** Decision 10-D-04 of 26 January 2010 regarding practices implemented in the operating table sector, paragraphs 119 *et seq.*, confirmed by Judgment of the Paris Court of Appeal of 28 October 2010, *Maquet S.A.A.*, No. 2010/03405.

**277** Decision 10-D-04 of 26 January 2010, cited above, paragraphs 119 *et seq.*, confirmed by Judgment of the Paris Court of Appeal of 28 October 2010, cited above, and Decision 11-D-01 of 18 January 2011 regarding practices implemented in the cargo handling sector in La Réunion, paragraph 106.

**278** See for example Decision 03-D-03 of 16 January 2003, cited above, paragraph 46, and Decision 03-D-04 of 16 January 2003, cited above, paragraph 56.

**279** Decision 16-D-20 of 29 September 2016, cited above, paragraphs 258–261.

**280** Decision 90-D-08 of 23 January 1990 regarding practices observed with regard to setting the opening hours of independent pharmacies, p. 10.

## Exemptions based on the existence of economic progress

267. To invoke the benefit of such an exemption, the parties must justify that the practices in question (i) have the effect of ensuring economic progress, including by creating or maintaining jobs; (ii) reserve a fair share of the resulting benefit to consumers; (iii) do not allow the undertakings concerned to eliminate competition in respect of a substantial part of the products in question; and (iv) do not impose restrictions on competition that are not indispensable<sup>281</sup>.
268. As these four criteria are cumulative, if one is missing there is no need to examine the others<sup>282</sup>.
269. This economic progress must not solely benefit the companies party to the agreement<sup>283</sup>, and must be a direct consequence of the agreement granted an exemption, which implies that it must not be achievable by other means that are less restrictive of competition<sup>284</sup>.

### DECISIONS GRANTING AN EXEMPTION

For example, the Autorité granted an exemption to the French Union of Prosthetists and Orthotists (*Union française des orthoprothésistes*) in its Decision 07-D-05<sup>285</sup>. The latter had circulated to its members a price list relating to the selling price of prosthetics and orthotics not reimbursed by health insurance, for which prices are not set, for non-hospitalised patients.

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**281** Judgment of the Paris Court of Appeal of 17 June 1992, *Compagnie générale de vidéocommunication et al.*, BOCCRF No. 13 of 4 July 1992, p. 217.

**282** Judgment of the Paris Court of Appeal of 31 January 2013, *Pierre Fabre Dermo-Cosmétique*, No. 2008/23812, p. 22.

**283** Decision 15-D-19 of 15 December 2015, cited above, paragraph 721.

**284** Decision 16-D-26 of 24 November 2016 regarding practices implemented by the Group of French Installers in the supply, installation and maintenance of professional kitchen equipment sector, paragraphs 109–112.

**285** Decision 07-D-05 of 21 February 2007, cited above, confirmed by Judgment of the Paris Court of Appeal of 29 January 2008, *Union française des orthoprothésistes (OFOP)*, No. 2007/04524.

The *Autorité* noted in this case that “the practice concerns equipment that is rarely used, which patients sometimes have to receive at short notice and whose value is often difficult for social security bodies to assess when they examine the quotations accompanying requests for treatment. In a number of cases, these bodies are reluctant to refuse quotations in order to avoid harming patients. In this context, the recommendation of a pricing method, which is also used by the public authorities for the majority of large prosthetic and orthotic devices, can contribute to both moderating the remuneration demanded by prosthetists and orthotists, and avoiding possible refusal of treatment, which benefits both patients and the social welfare system”<sup>286</sup>. In addition, the *Autorité* found that the practice concerned marginal demand, that companies were free to use an alternative method, and that it took place in a context where it was difficult to achieve free competition<sup>287</sup>.

### Box 32

#### DECISIONS REFUSING AN EXEMPTION

More frequently, the benefit of an exemption has been refused by the *Autorité*.

The practice of the French Union of Prosthetists and Orthotists (*Union française des orthoprothésistes*) consisting in disseminating recommendations to its members that encouraged them not to grant discounts for the supply of prosthetics and orthotics to hospitals in the context of calls for tender was not exempted. Indeed, the *Autorité* noted that such a practice “does not aim to limit a price increase that would be to the detriment of the community and, where appropriate, individual patients, but rather to prevent the desired price reductions for the benefit of the community and patients through the tender mechanism”<sup>288</sup>.

Similarly, the *Autorité* took the view that the agreement between independent kitchen installers to divide the territory into exclusive zones could not be justified by the desire of the members of the group to provide a quality local service<sup>289</sup>. Indeed, the *Autorité* noted that this objective could be achieved by other means, such as gaining new members in areas where the group had a limited presence<sup>290</sup>.

The *Autorité* also decided that the price-fixing practices of a local inter-professional association regrouping strawberry producers (*Association interprofessionnelle des fraises du Lot-et-Garonne*) aimed at strawberry producers in that *département* were not justified by the promotional operations organised

**286** Decision 07-D-05, cited above, paragraph 65.

**287** Decision 07-D-05, cited above, paragraph 66.

**288** Decision 07-D-05, cited above, paragraph 73.

**289** Decision 16-D-26 of 24 November 2016, cited above, paragraphs 108–109.

**290** Decision 16-D-26, cited above, paragraph 110.



by mass-market retailers to offer strawberries at prices below the market price. The *Autorité* considered that the restrictions of competition resulting from these practices were not indispensable to the attainment of such an objective<sup>291</sup>.

### Box 33

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**291** Decision 03-D-36 of 29 July 2003 regarding practices implemented on the market for strawberries produced in the south-west of France, paragraph 91.

**5/ PENALTIES INCURRED  
BY PROFESSIONAL  
BODIES AND THEIR  
MEMBERS**



270. There are two kinds of penalty that the *Autorité* may impose on professional bodies that infringe competition law: financial penalties, which will undergo profound changes in terms of their assessment and ceilings with the transposition of the ECN+ Directive, or non-financial injunctions, mainly in the form of information and publication measures.

## Reform of rules on financial penalties for professional organisations

271. The objective of the ECN+ Directive<sup>292</sup> is to strengthen the effective application of competition rules in order to create a uniform regulatory area within the European single market.

272. This strengthening requires the competition authorities, Commission and national authorities – all members of the European Competition Network set up by Regulation (EC) No 1/2003<sup>293</sup> – to be given the same powers, in terms of both procedures and penalties.

273. In this respect, the Directive's transposition into the French Commercial Code (*Code de commerce*) will lead to a change of the legal framework on penalties, in particular those imposed on professional bodies. The new framework to be introduced into French law corresponds to the provisions of Article 23(2) and (4) of Regulation (EC) No 1/2003 on fines imposed on associations of undertakings.

274. This reform concerns two points of the current legal framework in particular: the level of the ceiling of the fines imposed on professional bodies, and the arrangements for their recovery.

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<sup>292</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

<sup>293</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, pp. 1–25.

275. The first point, relating to the ceiling on fines, will change a national specificity.
276. It should firstly be recalled that, for infringements committed by undertakings, the legal ceiling on the amount of the fines incurred is 10% of their consolidated worldwide turnover. This ceiling, which the French Constitutional Council (*Conseil constitutionnel*) considers to be in line with the principle of proportionality<sup>294</sup>, corresponds to that laid down in Article 23 of Regulation No 1/2003 mentioned above. The turnover of the undertaking concerned is a relevant reference point for the imposition of a fine. Indeed, it makes it possible to award, on a case-by-case basis, fines that are proportionate to the economic setting of the infringements in question and, more specifically, to its scale and the relative weight of each of the undertakings involved within the relevant sector. Up to the limit of that ceiling, the *Autorité* also determines the amount of the fines according to the value of the undertakings' sales in relation to the infringement.
277. There is currently an exception to this method for professional bodies. Indeed, unlike companies, the corporate purpose of professional bodies is not, primarily, that of making profits from an economic activity. Their financial resources are most often limited to solely the membership fees paid by their members. As they usually have a limited turnover, the French legislator has provided for a flat-rate ceiling of 3 million euros for offenders "that are not undertakings" (point I, paragraph 3 of Article L. 464-2 of the Commercial Code). However, in certain cases, this ceiling does not allow the imposition of fines that are sufficiently deterrent and proportionate to the scale of the infringement, in particular where the infringement committed by a professional body relates to the activities of its members.

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<sup>294</sup> Decision of the French Constitutional Council No. 2015-489 QPC of 14 October 2015.

## PENALTIES INCURRED BY PROFESSIONAL BODIES AND THEIR MEMBERS

278. The second point of the current legal framework, which will change with the transposition of the ECN+ Directive, relates to the recovery of fines imposed on professional bodies. Even if a professional body is not in a position to pay, due to limited financial resources, the *Autorité* may consider the possibility of calling for contributions from its members to pay for the fines imposed. However, this mechanism does not allow the *Autorité* to make the members jointly and severally liable for the fine imposed on the organisation, or legally oblige them to pay in the event of default of the body.
279. The transposition of the ECN+ Directive<sup>295</sup> will lead to changes in both aspects of our legislation. The Directive thus provides for:
- on the one hand, a ceiling on the fines imposed on undertakings and associations of undertakings of 10% of their worldwide turnover (Article 15.1). Where the infringement committed by the professional body relates to the activities of its members, the ceiling will correspond to 10% of the sum of the total turnover of the members active on the market concerned (Article 15.2). Thus, the exception of a national flat-rate ceiling reserved for offenders “that are not undertakings” will have to be removed;
  - on the other hand, the introduction of new specific actions against members of the professional body if the professional body does not have sufficient financial resources to pay the fine it has received.
280. The specific features of the current legal framework for determining the fines applicable to professional bodies (1) and the main reforms brought about by the transposition of the ECN+ Directive that specifically concern them (2) are set out in more detail below.

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<sup>295</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

## LEGAL FRAMEWORK APPLICABLE BEFORE TRANSPOSITION OF THE ECN+ DIRECTIVE

281. The rules currently applicable to the determination of fines for professional bodies differ in several major respects from those applicable to companies.
282. Firstly, as explained above, the legislator has made provision for a flat-rate ceiling of 3 million euros for any offender that is not an undertaking. This ceiling therefore applies to all professional bodies.
283. Secondly, the *Autorité* issued a notice on determining financial penalties on 16 May 2011 (the “notice on fines”), which is binding on the *Autorité*, in which it describes the different steps it must follow to determine the amount of the fines to be imposed on infringing undertakings. However, decision-making practice shows that, in the majority of cases, the *Autorité* departs from the method laid down in the notice on fines when determining the amount of the fines imposed on professional bodies, favouring a flat-rate method.
284. Thirdly, at the stage of determining individual fines, the *Autorité* may take into account, as aggravating circumstances, the authority and capacity to influence of professional bodies, which make the anticompetitive practices they have committed all the more reprehensible.
285. Lastly, where professional bodies have limited financial resources, the *Autorité* may take into account their capacity to call for contributions from their members in order to pay the fine.

### Legal ceiling of 3 million euros on the fine incurred by professional bodies

286. In its current version, point I of Article L. 464-2 of the Commercial Code provides for a flat-rate ceiling on the fine fixed at 3 million euros “if the offender is not an undertaking”. For the purposes of this provision, an undertaking is defined as

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any entity that has one of the statuses or legal forms suited to the pursuit of a for-profit purpose<sup>296</sup>.

287. As professional bodies take legal forms that are not suited to the pursuit of a for-profit purpose – in this case in the form of professional associations governed by the French Law of 1 July 1901 or trade unions – they are subject to the flat-rate ceiling of 3 million euros, even if they achieve a turnover from an ancillary economic activity for the benefit of their members<sup>297</sup>.

### APPLICATION OF THE FLAT-RATE CEILING OF 3 MILLION EUROS TO PROFESSIONAL BODIES ENGAGED IN AN ECONOMIC ACTIVITY

In Decision 13-D-06 relating to the market for the electronic submission of tax and accounting data in EDI format to the tax authorities<sup>298</sup>, the *Autorité* fined the French Association of Chartered Accountants (*Ordre des experts-comptables*) 77,220 euros and the Chartered Accountant Media Association (*Expert Comptable Média Association: ECMA*) 1,170,000 euros for seeking to make their online filing portal, “*jedeclare.com*”, indispensable for accountant professionals and chartered management bodies.

The ECMA is an association governed by the Law of 1 July 1901 and was created directly by the Association of Chartered Accountants, which is responsible for its governance. At the time of the events, the ECMA was marketing the “*jedeclare.com*” portal and other services to chartered accountant professionals and chartered management bodies.

Although this case was dealt with under the old “no contest of objections” procedure, the ECMA challenged the amount of the fine imposed by the *Autorité* on the grounds that it exceeded the threshold of 10% of its total turnover. Its request for a reduction of the fine was rejected by the Paris Court of Appeal<sup>299</sup> and the French Supreme Court (*Cour de cassation*)<sup>300</sup>, which considered, after the Constitutional Council (*Conseil constitutionnel*) had ruled on this point in

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**296** Judgment of the French Supreme Court of 8 February 2017, No. 15-15.005.

**297** Decision 13-D-06 of 28 February 2013 regarding practices implemented in the sector of teletransmission of tax and accounting data in EDI format to the tax administration.

**298** Decision 13-D-06 of 28 February 2013, cited above.

**299** Judgment of the Paris Court of Appeal of 26 February 2015, ECMA, 2013/0666.

**300** Judgment of the French Supreme Court of 8 February 2017, No. 15-15005.



the context of a priority ruling on constitutionality<sup>301</sup>, that the flat-rate ceiling of 3 million euros was applicable to associations governed by the Law of 1901, even if they had a turnover from an economic activity.

#### Box 34

288. The flat-rate ceiling of 3 million euros that applies to professional bodies does not, however, make it possible to take into account the economic power of their members, which together may generate a very large turnover. In the bank cheque case, a fine of 3 million euros was imposed on the *Confédération nationale du Crédit Mutuel*, an association governed by the Law of 1 July 1901, although this fine could have been increased to 45.37 million euros if the sales made by the member banks of the Crédit Mutuel mutualist network had been taken into account<sup>302</sup>. This example illustrates the limits of the flat-rate ceiling of 3 million euros, which may be inadequate to sanction professional bodies in a proportionate and individualised manner given the scale of the infringements they are likely to commit.

### On the method for determining penalties

289. The *Autorité* evaluates the legal criteria for determining penalties according to the methods described in the notice on fines, "*unless it explains, in the statement of reasons for its decision, the particular circumstances or the reasons of general interest which lead it to depart from them in a given case*"<sup>303</sup>.
290. In determining the amount of the fines imposed on professional bodies, the *Autorité's* decision-making practice varies

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**301** Decision of the French Constitutional Council No. 2015-510 QPC of 7 January 2016, ECMA.

**302** Decision 10-D-28 of 20 September 2010 on prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes, paragraphs 778–780.

**303** Notice of 16 May 2011 on the method for determining financial penalties, paragraph 7.

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depending on whether or not the professional body carries on an economic activity in connection with the infringement<sup>304</sup>.

291. Where the professional body pursues its own economic activity in the market or markets concerned by the infringement, the *Autorité* determines the basic amount of the fine by applying the methodology provided for in the notice on fines. In this case, the *Autorité* first determines the basic amount of the fine, which corresponds to a proportion of the value of the products and services related to the infringement sold in France during a reference year. It then applies a multiplying factor to take the duration of the infringement into account<sup>305</sup>. The basic amount of the fine is then adjusted according to the individual situation of the party concerned.
292. Where the professional body limits itself to representing the interests of its members active on the market(s) concerned by the infringement, and does not have a turnover or sales value in relation to the product or service concerned by the practices, the *Autorité* departs from the methodology provided for in the notice on fines and determines the basic amount on a flat-rate basis, taking into account the specific circumstances of the case. In this instance, the *Autorité* endeavours to provide reasons for its decision, taking into account the legal criteria for determining penalties provided for in point I, paragraph 3 of Article L. 464-2 of the Commercial Code. In the majority of cases where professional bodies have been sanctioned, the *Autorité* imposed a flat-rate fine, which can be explained by

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**304** Decision 20-D-12 of 17 September 2020, cited above, paragraph 384.

**305** The proportion of the value of sales is set on a case-by-case basis within the range of 0% to 30%, or within the range of 15% to 30% for hardcore horizontal cartels with the object of fixing prices, sharing customers or limiting output. With regard to the multiplying factor for duration, where the infringement lasts for more than one year, a coefficient of 1 is applied for the first year of the infringement, and 0.5 for the following years (example: if the infringement lasted 3 years, a coefficient of 2 would be applied). Once the basic amount has been established, the *Autorité* may adjust the basic amount of the fine upwards or downwards according to the undertaking's individual situation.

the fact that most professional bodies do not carry on an economic activity generating a turnover.

293. The *Autorité* has also, although this is rarely done in practice, used the methodology in the notice on fines to determine the amount of the fine imposed on a professional body. In Decision 13-D-06 mentioned above, the *Autorité* set the amount of the fine imposed on the ECMA association, set up and governed by the Association of Chartered Accountants, using the method provided for in the notice on fines, after finding that this association was engaged in an economic activity generating sales in connection with the infringement<sup>306</sup>. The *Autorité* also imposed a separate fine on the Association of Chartered Accountants by applying the flat-rate method to set the fine for this entity, as the Association did not directly engage in economic activities or generate any turnover.

### On the aggravating circumstances that may be held against professional bodies

294. Depending on the circumstances of each individual case, the *Autorité* may take into account various mitigating or aggravating circumstances characterising the conduct of the party concerned in the context of its participation in the infringement, as well as other relevant objective factors relating to its individual situation. This consideration may lead to either upward or downward adjustment of fines.
295. Paragraph 46 of the notice on fines provides a non-exhaustive list of aggravating circumstances. In particular, the *Autorité* may take into account the fact that "*the undertak-*

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**306** The *Autorité* noted that, as the practices aimed to maintain the dominant position of this association on the French market for the electronic submission of tax and accounting data in EDI format by crowding out actual or potential competitors on that market, the basis for the penalty should be the value of the sales made by the association on that market through the "*jedecclare.com*" portal. After taking into account the seriousness of the facts and the damage to the economy, the *Autorité* settled on a proportion of 7% of the sales value and a duration coefficient of 4.2 (the infringement having lasted 7 years and 5 months).

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*ing or body enjoys a particular degree of influence or moral authority, in particular because it is entrusted with a public service mission" or that "the undertaking or body has played the role of leader or instigator, or has played a particular role in the conception or implementation of the infringement".*

296. In a number of cases, the *Autorité* has taken into account one or both of these reasons for increasing the amount of fines:

- In Decision 20-D-17, the *Autorité* found an aggravating circumstance against the National Council of the Dental Surgeons' Association (*Conseil national de l'Ordre des chirurgiens-dentistes*), a local Council of the Dental Surgeons' Association (*Conseil départemental de l'Ordre des chirurgiens-dentistes de l'Isère*), and the Federation of Private Dental Surgeons' Unions (*Fédération des syndicats dentaires libéraux*) on account of the leading role they had played in implementing the infringement<sup>307</sup>.

- In Decision 19-D-19<sup>308</sup>, confirmed by the Paris Court of Appeal<sup>309</sup>, the *Autorité* found an aggravating circumstance linked to the institutional role played by the Organisation of Architects and its misreading of its public service mission, which should lead it to be particularly vigilant in ensuring compliance with laws and regulations.

- In case 13-D-04, the *Autorité* found two aggravating circumstances against the a Regional Council of the Veterinary Surgeons' Association (*Conseil régional de l'Ordre des vétérinaires: CROV*): (i) in its capacity as an ordinary body, CROV undoubtedly has special moral authority that makes the anti-competitive practices it committed all the more reprehensi-

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**307** Decision 20-D-17 of 12 November 2020, cited above, paragraphs 860, 864 and 869.

**308** Decision 19-D-19 of 30 September 2019, cited above, paragraph 502.

**309** Judgment of the Paris Court of Appeal of 15 October 2020, cited above, paragraph 341.

ble; (ii) the regional branch of CROV played a special role in the conception and implementation of the infringement<sup>310</sup>.

297. Other elements of individualisation may be taken into account in fines imposed on professional bodies that infringe competition law. In particular, the *Autorité* may take into account repeated infringements, which is an independent criterion provided for by law, to increase the amount of the fines. In Decision 20-D-17<sup>311</sup>, the *Autorité* took into account the fact that the National Council of the Dental Surgeons' Organisation had twice repeated similar infringements. This led to the imposition of a financial penalty of 3 million euros, corresponding to the maximum fine ceiling provided for in the Commercial Code.

### Assessment of professional bodies' ability to pay

298. Professional bodies usually have limited financial resources, which generally solely consist of the membership fees paid by their members.

299. In order to ensure that fines imposed on professional bodies have a sufficiently deterrent effect, the *Autorité* may take account of the fact that the bodies in question have the possibility, over and above their immediately available resources, of calling on their members to raise the funds needed to pay their penalty.

300. In accordance with the *Autorité's* established practice, "the loss to an association of undertakings must be assessed by taking into account the situation of its members, where the objective interests of the association are not independent in relation to those of the undertakings that belong to it"<sup>312</sup>. In

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**310** Decision 13-D-14 of 11 June 2013 regarding practices implemented in the context of relations between veterinarians and Animal Protection Societies (*Sociétés Protectrices des Animaux*: SPA) in the Alsace region, paragraphs 179–181.

**311** Decision 20-D-17 of 12 November 2020, cited above, paragraph 880.

**312** Decision 19-D-05 of 28 March 2019 regarding practices implemented in the taxi sector in Antibes Juan-Les-Pins, paragraph 179 and Decision 06-D-30 of 18 October 2006, cited above, paragraph 118.

## PENALTIES INCURRED BY PROFESSIONAL BODIES AND THEIR MEMBERS

this respect, if the ability to pay of associations of undertakings was assessed without taking the financial resources of their members into account, the *Autorité* could not confer a sufficiently deterrent character on penalties imposed on undertakings, which, anticipating the risk of a financial penalty based on their own financial means, would set up for this sole purpose an association of undertakings to which only part of their resources would be allocated.

301. The *Autorité* does not have the legal capacity to jointly order the members of a professional body to pay the fine imposed on the professional body of which they are members. Yet, in order to avoid participating indirectly in the payment of the fine, these members may undertake certain manoeuvres, which are difficult for the *Autorité* to counteract with solely the tools currently at its disposal. For example, if a professional body were to call for exceptional fees from its members to pay a fine imposed by the *Autorité*, the members of that body could refuse to pay those fees by leaving the professional body, while deciding to create a new one.
302. An examination of European case law shows, however, that undertakings may be held jointly and severally liable for the payment of a proportion of the fine imposed on the professional association of which they are members, outside any solidarity mechanism provided for by law.
303. In the *Cartonboard cartel* case<sup>313</sup>, the Commission fined 19 manufacturers supplying cartonboard to the Community market for participating in an illegal cartel to fix their prices and thereby limit competition in their markets. One of the companies fined was Finnboard, a trade association under Finnish law grouping together several board manufacturers. The Commission imposed a fine on Finnboard on the

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**313** Commission Decision of 13 July 1994, *Cartonboard*, 94/601/EC confirmed by Judgment of 14 May 1998, *Metsä-Serla Oy, United Paper Mills Ltd, Tampella Corporation and Oy Kyro Ab v Commission*, T-339/94, EU:T:1998:100, and by Judgment of 16 November 2000, C-294/98 P, EU:C:2000:632.

grounds that it, and not its member companies, had actively and directly participated in the cartel. However, it held the member companies jointly and severally liable with Finnboard for payment of part of the fine corresponding approximately to the sales of cartonboard made by Finnboard on behalf of each of them. As a basis for this decision, the Commission considered that the trade association and the member companies formed **an economic unit**, noting that while the members had, at the time of the facts, authorised Finnboard to negotiate prices and other conditions of sale for their cartonboard products with the final customers, these negotiations had to follow guidelines set by the companies and no sale could take place without the prior approval of the price and other conditions of sale by the member company concerned.

304. In European law, the adoption of Regulation (EC) No 1/2003<sup>314</sup>, in particular Article 23(4), has considerably broadened the possibility of appealing to members to recover payment of a fine imposed on a professional association. This will also be the case in France with the transposition of the ECN+ Directive, which introduces similar provisions into French law, presented below (see paragraph 311).

## LEGAL FRAMEWORK APPLICABLE AFTER TRANSPOSITION OF THE DIRECTIVE

305. The transposition of the ECN+ Directive<sup>315</sup> will lead to a profound change in the rules for determining the fines incurred by professional bodies, which could result in a very substantial increase in the fines they receive for infringements relating to the activities of their members. It will lead to a reform of the way in which fines for professional bodies are determined and will introduce specific actions against members in the event of the professional body's insolvency.

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**314** Council Regulation (EC) No 1/2003 of 16 December 2002, cited above.

**315** Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

### Specific amendments concerning the methods for determining fines for professional bodies

306. The transposition of the ECN+ Directive<sup>316</sup> will lead to the repeal of the provisions of point I of Article L. 464-2 of the French Commercial Code, which sets the maximum penalty at 3 million euros for parties that are not companies.
307. The transposition of the first paragraph of Article 15 of that Directive will make it possible, where the infringement by an association of undertakings – and therefore a professional body – does not relate to the activities of its members, to provide for a single ceiling on penalties for undertakings and associations of undertakings, set at 10% of the consolidated total worldwide turnover.
308. The transposition of the second paragraph of Article 15 of that Directive will make it possible, where the infringement by an association of undertakings relates to the activities of its members, to take into account 10% of the sum of the total worldwide turnover achieved by each member active on the market affected by the infringement for the purpose of calculating the legal ceiling of the penalty.

#### ARTICLE 15 OF THE ECN+ DIRECTIVE

*Member States shall ensure that the maximum amount of the fine that national competition authorities may impose on each undertaking or association of undertakings participating in an infringement of Article 101 or 102 TFEU is not less than 10% of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision referred to in Article 13(1).*

*Where an infringement by an association of undertakings relates to the activities of its members, the maximum amount of the fine shall be not less than 10% of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association. However, the financial liability of each undertaking in respect of the payment of the fine shall not exceed the maximum amount set in accordance with paragraph 1.*

#### Box 35

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**316** Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.



309. Insofar as professional bodies do not, as a general rule, engage in their own economic activity and have a duty to act in defence of a profession, the offences they commit generally relate to the activities of their members. Consequently, following the transposition of the ECN+ Directive<sup>317</sup>, the ceiling on penalties incurred by professional bodies for competition law infringements will, in the vast majority of cases, correspond to 10% of the sum of the worldwide turnover of their members active on the market affected by the infringement.
310. Within this new legal ceiling, the *Autorité* may take into account the sum of the sales of goods and services directly or indirectly related to the infringement made by the undertakings that are members of the association in order to determine the amount of the fine in proceedings against an association of undertakings where the infringement relates to the activities of its members. However, recital 48 of the ECN+ Directive<sup>318</sup> states that when a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed should not be taken into account when calculating the fine of the association.

### **PRACTICAL EXAMPLE OF NEW PROCEDURES FOR DETERMINING THE CEILING AND AMOUNT OF THE FINE**

In the case of the Pharmacists' Association, the Commission fined the National Pharmacists' Association (*Ordre national des pharmaciens*) and its governing bodies for adopting decisions to impose minimum prices on the French market for chemical pathology tests and hinder the development of groups of laboratories in that market.

In order to calculate the legal ceiling of the penalty incurred by the Association and its governing bodies, the Commission took into account the turnover generated by all the private chemical pathology laboratories in the French market<sup>319</sup>.

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**317** Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

**318** Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

**319** Commission Decision of 8 December 2010, *Ordre National des Pharmaciens en France*, cited above.

## PENALTIES INCURRED BY PROFESSIONAL BODIES AND THEIR MEMBERS

With regard to calculating the amount of the fine, the Commission imposed a fine of 5 million euros on the National Pharmacists' Association on a flat-rate basis, without applying point 14 of the Guidelines on the method of setting fines<sup>320</sup>, which states that "[w]here the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members".

In this case, the Commission departed from the general method for setting fines provided for in the Guidelines on Fines<sup>321</sup>, on the grounds that the present case concerned the first case since the entry into force of Regulation 1/2003<sup>322</sup>, under which the financial liability of the members of an association of undertakings could be invoked to secure payment of part of the fine imposed on the association, and that the members may not have been fully aware of the scope of the legal provisions in question and that the breaches in question were not secret.

However, the Commission has clarified that these grounds will not necessarily be retained in future cases involving fines imposed on associations of undertakings.

### Box 36

#### On the new specific actions introduced by the ECN+ Directive against members of a professional body

311. In order to ensure the recovery of fines imposed by the *Autorité*, the transposition of Article 14(3) and (4) of the ECN+ Directive<sup>323</sup> will introduce new specific actions against members of a professional body where the infringement committed by the professional body relates to their activities:

- Where a fine is imposed on a professional body taking account of the turnover of its members and the professional body is not solvent, the *Autorité* may order the professional body to call for contributions to cover the amount of the fine.

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**320** Commission Communication, Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003, OJ C 210, 1 September 2006, pp. 2–5.

**321** Commission Communication, Guidelines on the method of setting fines, cited above.

**322** Council Regulation (EC) No 1/2003 of 16 December 2002, cited above.

**323** Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, cited above.

- If full payment has not been made after the call for contributions, the *Autorité* may require payment of the fine directly by any undertaking whose representatives were members of the decision-making bodies of the professional body.
- Secondly, where necessary to ensure full payment of the fine, after requiring payment by undertakings that are members of the decision-making bodies, the *Autorité* may require payment of the remaining amount of the fine by any member of the professional body that was active in the market on which the infringement was committed, with an exemption for undertakings which show that they did not implement the infringing decision and were not aware of its existence, or which actively distanced themselves from it before the investigation started.

#### ARTICLE 14 OF THE ECN+ DIRECTIVE

**Paragraph 3.** Member States shall ensure that, where a fine for an infringement of Article 101 or 102 TFEU is imposed on an **association of undertakings** taking account of the turnover of its members and the association is not solvent, **the association is obliged to call for contributions from its members to cover the amount of the fine.**

**Paragraphe 4.** Member States shall ensure that, where contributions referred to in paragraph 3 have not been made in full to the **association of undertakings** within the time limit fixed by national competition authorities, the latter may require the payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of that association. Where necessary to ensure full payment of the fine, after the national competition authorities have required payment from such undertakings, **they may also require the payment of the outstanding amount of the fine by any of the members** of the association which were active on the market on which the infringement occurred.

However, **payment under this paragraph shall not be required from undertakings** which show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started.

Box 37

## Publication and information measures

312. Pursuant to the terms of point I, paragraph 5 of Article L. 464-2 of the French Commercial Code (*Code de commerce*), the *Autorité* "may order the publication, distribution or display of its decision or an extract thereof according to methods it sets". The publication injunction is the predominant injunction used against professional bodies.
313. An information and publication measure aims to inform professionals in the sector and the victims of the anticompetitive practices, very often the final consumers. It also serves as a deterrent.
314. To justify this extension of the *institution's* powers (then "Conseil de la concurrence"), MP Eric Besson in Report 2327, made on behalf of the Finance Committee of the French Parliament (*Assemblée nationale*), on Law 2001-420 of 15 May 2001 on New Economic Regulations indicated that "*in its reports, the Conseil stresses that, beyond the character of a penalty, publication has an educational virtue and allows 'the spirit of competition to spread among producers, distributors and consumers'*".
315. In addition, publication in the professional body's internal newsletter informs its members of the wrongdoing made by their leaders, who are often elected.
316. The purpose of such a measure is also to hold professional bodies accountable. Indeed, the publication of a summary of the decision in both local and national specialised daily newspapers makes compliance with competition law a communication issue.
317. The *Autorité* makes almost systematic use of publication measures in addition to the financial penalties it imposes on a professional body.

## Conclusion

318. Professional bodies now enjoy an established position within the economy, a position that is both central and exposed.
319. Their position is central, as professional bodies provide a meeting place for players in the same market, enabling them to carry out joint projects and liaise with public authorities.
320. Professional bodies thus play an essential role in providing advice and information to their members. By aggregating and disseminating market information, they can foster the emergence of best practices resulting from joint reflection. They also provide training programmes, particularly legal ones, to their members. Through these various actions, they promote the improvement of the quality of supply, the opening of markets and the emergence of new market players.
321. As intermediary bodies, professional bodies enable their members to express their views and represent their interests before public authorities or other economic players. They may also perform "self-regulation" functions by specifying the technical conditions of application of sector-specific regulations. Lastly, they bring the interests of their members before the courts and competition authorities, and can thus bring about a real improvement in the competitive conditions of a market.
322. Through these different functions, professional bodies are able to adapt their role to macro-economic developments. They can provide valuable support to their members by informing them and providing concrete solutions to the difficulties they may encounter, such as those caused since 2020 by the Covid-19 health emergency.
323. However, their responsibility for the functioning of markets and compliance with competition rules is commensurate with their role.

## PENALTIES INCURRED BY PROFESSIONAL BODIES AND THEIR MEMBERS

324. The activity of professional bodies may indeed, by its very nature, expose them to risks with regard to anticompetitive practices. Professional bodies can indeed quite easily be the catalyst or facilitator of anticompetitive practices, whether they act as supporter or instigator. This risk is structural: professional bodies bring together the market players, which are often competitors.
325. As associations of undertakings active on a market, professional bodies are subject to the application of competition rules. Their possible involvement in anticompetitive practices is likely to expose them to personal liability and subject them to penalties that could, with the transposition of the ECN+ Directive, be extremely dissuasive.
326. The practices subject to antitrust risks are varied.
327. The dissemination of instructions and information by a professional body can thus encourage the creation of cartels – which are among the most serious infringements of competition law – and facilitate their operation. The exchange of strategic information via a body can lead to collusive behaviour or the alignment of the practices of its members.
328. Communication with public authorities may also be an opportunity for a professional body to provide misleading information or disparage a competitor with a view to foreclosing the market.
329. Lastly, professional bodies may attempt to reserve market access for their members through anticompetitive membership conditions, discriminatory membership refusals or unjustified exclusions, or by enacting sector-specific standards that restrict competition.
330. In this respect, they can play a role in ensuring compliance by informing their members about antitrust risks in the context of their training and information activities. In order to prevent any risks in this area, professional bodies must therefore take additional care regarding their internal discussions

and rules, notably those relating to membership, and in their external communication, to ensure that their practices do not fall under the prohibitions of competition rules.

# APPENDICES





DOs  
DON'Ts

## PROFESSIONAL BODIES

### HOW CAN PROFESSIONAL BODIES AVOID ANTITRUST RISKS?



#### CONDITIONS OF PROFESSIONAL ACTIVITY

- ✓ Establish a compliance programme and implement actions to raise awareness of competition rules among members and staff.
- ✓ Establish an agenda prior to each meeting and circulate it to members sufficiently in advance of the meeting.

- ✗ Adopt rules that limit members' trade practices, notably advertising and promotional practices.
- ✗ Prohibit members from using contractual terms and conditions that differ from the standards developed by the body.
- ✗ Encourage members to avoid contracting with a particular operator.



#### PRICES

- ✓ Do not discuss individual pricing policies during meetings of the professional body.
- ✓ Do not discuss prices between members of the professional body.

- ✗ Make recommendations on prices, production targets or the commercial policy of members.
- ✗ Issue messages implying that lower prices go hand in hand with lower quality.



#### EXCHANGE OF INFORMATION

- ✓ Record exchanges that take place during meetings (1).
- ✓ In the event of the disclosure of commercially sensitive information by a member during a meeting: intervene to stop the communication, ask participants to leave the meeting and report the behaviour to competition authorities.

- ✗ Facilitate or allow the exchange of individualised data statistics, whether contemporary or historical, relating to prices, market shares or any other strategically important information.
- ✗ Facilitate or allow exchanges of business results for the current month or the previous month.
- ✗ Facilitate or allow exchanges in the form of round table discussions on commercially sensitive information (especially if this is not on the meeting agenda).



#### CONDITIONS OF MEMBERSHIP

- ✓ Provide membership criteria that are easily accessible, based on objective and verifiable conditions, and justified in relation to the nature of the profession practised.
- ✓ Specify the formalities for submitting an application for membership, set deadlines for responding and allow the applicant to be heard in the event of difficulties with membership.
- ✓ Communicate the membership conditions to any company that requests them.

- ✗ Establish rules of admission that are unclear, irrelevant, arbitrary or based on mere sponsorship.
- ✗ Refuse to admit a member without giving reasons for this decision.



#### STANDARDISATION/ CERTIFICATION

- ✓ Ensure that the requirements of any certification system are fair, reasonable and accessible to all companies that meet them.

- ✗ Use the standardisation process to block the road to innovative competitors or raise technical barriers.



#### LEGAL ADVICE/ RELATIONS WITH PUBLIC AUTHORITIES

- ✓ Be particularly vigilant when providing legal advice that is price-related or which may deter members from using a category of products, services or professionals.

- ✗ When communicating with public authorities: prevent members from expressing a different position, make disparaging remarks or present misleading information.

(1) See, for example, the commitments made by the French Federation of Metal Distributors (Fédération Française des Distributeurs des Métaux) in the context of Decision 08-D-32, under which the latter set up a system to produce sound recordings of meetings so that the minutes could be as accurate as possible.

Decision	Infringement	Type of entity	Penalty
<b>Cartels</b>			
Decision 08-D-32 of 16 December 2008 regarding practices implemented in the steel products trading sector	Cartel involving pricefixing, customer and market sharing for steel products	Trade association	<i>France Négoce Acier</i> (FNA): 124 500 euros
Decision 15-D-19 of 15 December 2015 regarding practices implemented in the standard and express delivery sectors	Establishment of common method for passing on increase in diesel price and agreement on annual price increases	Trade association	<i>Fédération des entreprises de transport et de Logistique de France</i> (TLF): 30 000 euros
Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor covering sector	Agreement on many aspects of commercial policy, including prices, and conclusion of a non-competition agreement on communication regarding environmental performance of floor coverings	Trade association	<i>Syndicat français des enducteurs calandriers et fabricants de revêtements de sols et murs</i> (SFEC): 300 000 euros

Decision	Infringement	Type of entity	Penalty
<b>Dissemination of pricing instructions</b>			
Decision 07-D-05 of 21 February 2007 regarding practices implemented by the French Union of Prosthetists and Orthotists (Union française des orthoprothésistes: UFOP) in the market for the supply of prosthetics and orthotics	Dissemination of a pricing methodology with the aim to fix the prices charged by members for the supply of prosthetics and orthotics	Trade association	<i>Union française des orthoprothésistes</i> (UFOP): 125 000 euros
Decision 07-D-41 of 28 November 2007 regarding practices opposing the freedom to set prices for services offered to healthcare clinics in connection with calls for tender for anatomical pathology examinations	Dissemination of pricing instructions for anatomical pathologists responding to invitations to tender organised by hospitals	Trade union and professional association	<i>Syndicat national des médecins anatomo-cyto-pathologistes français</i> : 20 000 euros  <i>Conseil départemental du Nord de l'Ordre national des médecins</i> : 12 000 euros
Decision 09-D-39 of 18 December 2009 regarding practices implemented by the Conseil national des exploitants thermaux in the balneotherapy sector	Dissemination of pricing instructions encouraging the invoicing of an additional fee in the form of administrative charges for people undergoing spa treatments	Trade association	<i>Conseil national des exploitants thermaux</i> (CNETH): 140 000 euros
Decision 16-D-20 of 29 September 2016 regarding practices implemented in the sector of modelling agency services	Production and dissemination of annual fee lists to influence the commercial policy of modelling agencies	Trade association	<i>Syndicat National des Agences de Mannequins</i> (SYNAM): 50 000 euros

Decision 18-D-06 of 23 May 2018 regarding practices implemented in the sector of marketing of Côtes du Rhône AOC bulk wines	Production and distribution of annual price lists to winegrowers and discourse encouraging them to refer to those	Trade association	<i>Syndicat général des vignerons réunis des Côtes du Rhône:</i> 20 000 euros
Decision 19-D-19 of 30 September 2019 regarding practices implemented in the sector of architect services <sup>1</sup>	Dissemination of mandatory fee schedule to be applied by architects in their responses to public management contracts	Professional association	<i>Ordre des architectes:</i> 1 500 000 d'euros
Decision 20-D-12 of 17 September 2020 regarding practices implemented in the sector of Alsace wines <sup>2</sup>	Coordination aimed at fixing the price of grapes for each harvest, involving consultation between the trade associations and the publication of price recommendations	Trade associations and interbranch organisation	<i>Conseil Interprofessionnel des Vins d'Alsace (CIVA):</i> 348 000 euros  <i>Association des Viticulteurs d'Alsace (AVA):</i> 26 000 euros  <i>Groupement des Producteurs-Négociants du Vignoble Alsacien (GPNVA):</i> 2 000 euros

<sup>1</sup> This decision is under appeal

<sup>2</sup> This decision is under appeal

Decision	Infringement	Type of entity	Penalty
<b>Dissemination of commercially sensitive information</b>			
Decision 15-D-19 of 15 December 2015 regarding practices implemented in the standard and express delivery sectors	Exchange of commercially sensitive information relating to annual price increases of participating companies	Trade association	<i>Fédération des entreprises de transport et de Logistique de France</i> (TLF): 28 000 euros
Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor covering sector	Exchange of highly detailed information on business volumes, turnover by product category and commercial forecasts of the competitors participating in the cartel	Trade association	<i>Syndicat Français des Enducteurs Calandriers et Fabricants de Revêtements de Sols et Murs</i> (SFEC): 300 000 euros
Decision 19-D-25 of 17 December 2019 regarding practices implemented in the meal voucher sector <sup>3</sup>	Exchange of confidential business information on respective market shares of the member companies	Trade association	<i>Centrale de Règlement des Titres</i> (CRT): 1 000 000 euros

<sup>3</sup> This decision is under appeal

Decision	Infringement	Type of entity	Penalty
<b>Calls for boycott</b>			
Decision 09-D-07 of 12 February 2009 regarding a referral made by the Santéclair company sectors practices implemented in the complementary health insurance sector	Encouraging dental surgeons to report or refrain from joining the Santéclair care network	Professional association	National Council of <i>Ordre des chirurgiens-dentistes</i> : 76 000 euros  Departmental councils of <i>Ordre des chirurgiens-dentistes</i> : 200–600 euros
Decision 10-D-11 of 24 March 2010 regarding practices implemented by the French National Association of Ophthalmologists (SNOF) regarding the renewal of prescription glasses	Call for boycott of opticians who had signed a partnership contract with Santéclair	Trade association	<i>Syndicat national des ophtalmologistes de France</i> (SNOF): 50 000 euros
Decision 20-D-17 of 12 November 2020 regarding practices implemented in the sector of dental care surgery <sup>4</sup>	Call for boycott by dental surgeons in the Santéclair and Itélis care networks	Trade unions and professional association	National Council of <i>Ordre des chirurgiens-dentistes</i> : (CNOCD): 3 000 000 euros  Departmental councils of <i>Ordre des chirurgiens-dentistes</i> (CDOCD): 4 000–57 000 euros  Dental surgeons' unions: 216 000 and 680 000 euros

<sup>4</sup> This decision is under appeal

Decision	Infringement	Type of entity	Penalty
<b>Conditions of membership of professional body</b>			
Decision 19-D-13 of 24 June 2019 regarding practices implemented in the sector of court bailiffs	Discriminatory membership conditions for newly installed bailiffs, consisting of imposition of prohibitive entry fee	Trade association	<i>Bureau commun de signification</i> (BCS) des Hauts-de-Seine: 120 000 euros
Decision 19-D-25 of 17 December 2019 regarding practices implemented in the meal voucher sector <sup>5</sup>	Adoption of non-objective and non-transparent membership conditions	Trade association	<i>Centrale de Règlement des Titres Traitement</i> (CRT): 2 000 000 d'euros
<b>Enactment of unduly restrictive standards</b>			
Decision 12-D-26 of 20 December 2012 regarding practices in the sector of the production, marketing, installation and maintenance of fire extinguishers	Introduction of unjustified certification requirement aimed at excluding or limiting the access of certain installers/maintainers to the French market for the installation and maintenance of fire extinguishers	Trade association	<i>Centre National de Prévention et de Protection</i> (CNPP): 50 000 euros
Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor covering sector	Implementation of communication charter on environmental data of hard-wearing floor covering products preventing communication on the basis of individual product performance	Trade association	<i>Le Syndicat Français des Enducteurs Calandriers et Fabricants de Revêtements de Sols et Murs</i> (le SFEC): 300 000 euros

<sup>5</sup> This decision is under appeal



Decision	Infringement	Type of entity	Penalty
<b>Misinterpretation of a regulation</b>			
Decision 02-D-14 of 28 February 2002 regarding competition in the business sector of expert geometers and surveyors-topographers	Production and dissemination of misleading legal arguments to public authorities to extend the scope of the monopoly of surveyors and thereby eliminate topographers from the market	Professional association	High Council of <i>Ordre des géomètres-experts</i> : 150 000 euros  Regional councils of <i>Ordre des géomètres-experts</i> : 50 000–100 000 euros
Decision 07-D-41 of 28 November 2007 regarding practices opposing the freedom to set prices for services offered to healthcare clinics in connection with calls for tender for anatomical pathology examinations	Dissemination of association instructions prohibiting the granting of discounts by anatomical pathologists responding to hospital tenders as these are allegedly contrary to the code of ethics	Trade union and professional association	<i>Syndicat national des médecins anatomo-cytopathologistes français</i> : 20 000 euros  <i>Conseil départemental du Nord de l'Ordre national des médecins</i> : 12 000 euros
Decision 09-D-07 of 12 February 2009 on a referral made by the Santéclair company on practices implemented in the complementary health insurance sector	Communication of inaccurate information on scope of ethical opinions of the Association's National Council with regard to dental surgeons	Professional association	National Council of <i>Ordre des chirurgiens-dentistes</i> : 76 000 euros  Departmental councils of <i>Ordre des chirurgiens-dentistes</i> : 200–600 euros

Decision	Infringement	Type of entity	Penalty
<b>Misinterpretation of a regulation</b>			
Decision 19-D-19 of 30 September 2019 regarding practices implemented in the sector of architect services <sup>6</sup>	Intervention by the French Order of Architects with project owners, threatening them with administrative proceedings if they accepted allegedly "abnormally low" rates compared to a price calculation method disseminated by the Order to its members	Professional association	<i>Ordre des architectes</i> : 1 500 000 euros

<sup>6</sup> This decision is under appeal

Decision	Infringement	Type of entity	Penalty
<b>Lobbying activities</b>			
Decision 15-D-19 of 15 December 2015 regarding practices implemented in the standard and express delivery sectors	Early introduction of a price surcharge linked to increases in diesel prices, which was at the time under negotiation with the public authorities by the trade association in question	Trade association	<i>Fédération des entreprises de transport et de Logistique de France (TLF)</i> : 2 000 euros

Decision	Infringement	Type of entity	Penalty
<b>Collective bargaining</b>			
Decision 91-D-04 of 29 January 1991 on certain practices of groups of opticians and organisations providing supplementary health insurance services	Introduction of contractual clauses through which certain unions of mutuals prohibited their affiliated companies from negotiating agreements on an individual basis	Trade associations and unions	Fines of 10 000–70 000 francs <sup>7</sup>

<sup>7</sup> Penalties in part resulting from Judgment of the Paris Court of Appeal of 5 December 1991, *Syndicat des opticiens français indépendants*, n°. 91/4201

Les organismes professionnels existent, sous différentes formes, depuis l'Antiquité. A différentes époques de l'histoire, les organismes professionnels ont pu contribuer à la structuration de professions ou d'activités, des anciennes guildes de marchands aux ordres professionnels, en passant par les syndicats d'entreprise du secteur informatique ou numérique. L'intérêt de l'Autorité pour l'activité des organismes professionnels est ancien. Il est de fait que le fonctionnement des organismes professionnels peut être propice à des activités anticoncurrentielles, notamment des ententes sur les prix, des échanges d'informations anticoncurrentiels ou encore des actions concertées visant à freiner le développement de la concurrence.

Dans ce paysage bien connu, une modification majeure va devenir réalité à compter de 2021. En effet, la transposition de la directive n°2019/1 dite « ECN+ » va conduire à supprimer le plafond spécifique de sanction qui était jusque-là applicable aux organismes professionnels, et qui limitait fortement le « risque » financier en cas d'infraction, celui-ci étant plafonné à 3 millions d'euros. Avec la directive ECN+, ce plafond n'est plus de mise, les organismes professionnels s'exposent, en cas d'infractions aux règles de concurrence, à des sanctions pouvant aller jusqu'à 10 % du chiffre d'affaires mondial cumulé de chacun de ses membres. C'est donc une « révolution copernicienne » en termes de risque financier pour les organismes professionnels qui commettraient des infractions au droit de la concurrence.

L'Autorité a ainsi décidé d'aider les acteurs économiques à anticiper cette évolution, en dédiant une étude spécifique aux organismes professionnels. Son but est d'analyser, au vu de la pratique décisionnelle et de la jurisprudence, tous les comportements qui risquent d'être contraignants au droit de la concurrence, en rappelant aussi toutes les actions pro-concurrentielles que peuvent mener les organismes professionnels. L'étude se veut ainsi un outil « clefs en main » pour favoriser les démarches de conformité de la part des organismes professionnels et des entreprises qui en sont membres. J'espère que ce travail sera utile à chacun et permettra de prévenir et de limiter, à l'avenir, le « risque concurrentiel » associé à la participation des entreprises aux organismes et syndicats professionnels, et constituera un vecteur de bonnes pratiques.

Isabelle de Silva, Présidente de l'Autorité de la concurrence

Professional bodies have existed in different forms since ancient times. At different times in history, professional bodies have been able to contribute to the structuring of professions or activities, from former merchant guilds to professional orders, including business unions in the IT or digital sector. The Autorité's interest in the activity of professional bodies goes back a long way. It is a fact that the functioning of professional bodies may be conducive to anticompetitive activities, in particular price agreements, anticompetitive exchanges of information or concerted actions aimed at slowing the development of competition.

In this well-known landscape, a major modification will come into play in 2021. Indeed, the transposition of Directive 2019/1 known as "ECN+" will lead to the removal of the specific sanction ceiling which was previously applicable to professional bodies, and which severely limited the financial "risk" in the event of an infringement, this being capped at 3 million euros. With the ECN+ Directive, this ceiling is no longer applicable, professional bodies are exposed, in the event of infringements of the competition rules, to penalties of up to 10% of each of its members' cumulative worldwide turnover. This therefore constitutes a "Copernican revolution" in terms of financial risk for professional bodies that would commit competition law infringements.

The Autorité has therefore decided to help economic players anticipate this development, by dedicating a specific study to professional bodies. Its purpose is to analyse, in light of decision-making practice and case law, behaviours of professional bodies that may be contrary to competition law but also to recall all the essential pro-competitive actions that they often put into place. The study is thus intended to be a "turnkey" tool to promote compliance procedures on the part of the professional bodies and of their members. I hope that this work will be useful to all and will, in the future, prevent and limit the "competitive risk" associated with the participation of companies in professional bodies and unions, and will constitute a vector of good practices.

Isabelle de Silva, President of the Autorité de la concurrence

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