Guide for competition impact assessment of draft legislation

The new constitutional legal framework introduced on 23 July 2008, clarified by the organic law of 15 April 2009, laid the basis for an obligation to conduct regulatory impact assessments of draft bills in France. Legislators must be able to verify that the introduction of a new rule of law is justified and proportionate. They must have access to all the necessary information in order to gain an overall perspective of the various reasons specified as being in the general interest, which includes competition.

In order to participate in the definition of a methodology to be used for these preliminary assessments, the Autorité de la concurrence proposes questionnaires to facilitate the assessment of the competitive impact of proposed new statutory or regulatory provisions in this guide.

The Autorité therefore provides public authorities with the necessary tools to be able to assess and rank all the relevant options for government intervention, and to identify, where applicable, any additional measures that may be necessary to minimise possible distortions of competition.
Guide for competition impact assessment of draft legislation
This guide is intended to serve educational purposes only. Its content is not binding on the Autorité de la concurrence within the framework of its consultative activity.

The full text of this guide is available in French. The English version is limited to the first part of the guide. The translations into English of the foreword and the editorial aim to faithfully reflect the original text, but should not be treated as quotations of the interviewees.

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Foreword

By Serge Lasvignes, Secretary General to the Government

“In addition to the quality of the rule of law, other considerations will determine the attractiveness of our legal system and our economic competitiveness (…) Consequently, a detailed examination of all proposed new statutory or regulatory provisions is essential to establish that they are both necessary and proportionate, taking into consideration their foreseeable impact and the need for a stable legal landscape”: these are the opening lines of the circular on the quality of law issued by the Prime Minister dated 7 July 2011.

Following this official recognition, the preliminary assessment of proposed new legislation and regulations is now an accepted part of the French government’s work, and it has been the subject of much study and discussion over recent years. President Bruno Lasserre has made a valuable contribution to this debate.

In July 2008, an obligation to conduct regulatory impact assessment was inserted into Article 39 of the French Constitution. The substance of such impact studies was clarified in the organic law of 15 April 2009. They are conducted by the government prior to the mandatory consultation of the Conseil d’Etat and to the transmission of the bill to Parliament. Impact assessments must include an examination of the budgetary, social, environmental and economic effects of the proposed legislation.

In early 2011, the Prime Minister extended the scope of such impact assessment to all statutory provisions relating to business undertakings and local authorities, under the supervision of the Commissioner for Simplification, Mr Rémi Bouchez.

As a result of these measures, France is now one of the countries in which regulatory impact assessment is carried out most systematically.

1. Official Journal of the French Republic (OJFR) of 8 July 2011, text no. 2
2. Circular of 17 February 2001 on the simplification of standards applied to business undertakings and local authorities, OJFR of 18 February 2011, text no. 1
The Secrétariat Général du Gouvernement is in charge of coordinating the Government’s work in the area, and is keen to constantly improve the methods and practices implemented within government departments and ministries. The experience of other countries shows that progress can only be achieved through perseverance and tenacity. Any such progress also requires the public authorities and, more generally, all those who are involved in preparing and deliberating on legislation, to adapt to these new procedures.

A sound methodology and a range of tools are needed to assess the impact of every aspect of any new statutory or regulatory provisions. Without such tools, there is a risk that any impact study will be nothing more than a detailed account of the underlying reasons for the proposed change or a promotional document.

The document you have in your hands is a valuable contribution to this process. For any person needing to carry out an assessment, it will mark out a path through the particularly sensitive and complicated territory of competition and its effects.

I particularly welcome this initiative and encourage the public authorities to make full use of this guide.
Editorial

By Bruno Lasserre, President of the Autorité de la concurrence

The introduction into French law of the principle of free competition in 1986 marked France’s definitive entry into a market economy, precisely at a time when it was facing challenges associated with the unification of the European internal market and the globalisation of trade. At the same time, the French government began to look at the need for regulatory impact assessment in order to improve the quality of French law and to measure the cost of regulation more accurately.

The combination of these two developments led to define new guiding principles for the design of draft bills or decrees: legibility, cost-effectiveness, and prior measure of their economic impact, in order to ensure a predictable and non-discriminatory implementation of law to all economic operators, irrespective of their origin or status.

However, convergence between the two aforementioned processes has not been instantaneous. Competition law has still not been fully integrated into the impact study process.

In practice, knowledge of competition law is limited to a few specialists and it cannot always be accessed in a timely manner by government departments. Most public sector agents view competition law as a sophisticated and unpractical tool that sits somewhere between law, economics and European Union policies. Training in competition law is rarely offered to those who are responsible for preparing draft bills or decrees and impact assessments. The specialist units in relevant departments have often not been involved in the drafting process, or were involved too late. A prior opinion of the Autorité de la concurrence is not necessarily required by the Government or the Parliament. As for the Conseil d’Etat, it generally issues its opinion at a late stage in the process, when draft texts have already been extensively discussed within the executive branch of Government.

However, the new constitutional legal framework defined in 2008 confirms the need to efficiently incorporate competition law into impact assessment very early in the process. This is a matter of democratic accountability: the legislator must be
able to verify that the introduction of a new rule of law is justified and they must have access to all necessary information in order to gain an overall perspective of the various reasons specified as being in the general interest, which includes competition.

The Autorité de la concurrence therefore has an advocacy role towards public authorities, in accordance with the powers it was given in 1986 and that were extended by the 2008 Law on the modernisation of the economy. It can accomplish this by giving public authorities the necessary tools or, in other words, by providing them with practical guidelines that will facilitate competition impact assessment.

The purpose of this guide is to generalise the competition analysis of draft bills and decrees at a very early stage during preparatory work. In this way, public authorities will more systematically assess and rank the various available options for government intervention before drafting any text, and subsequently identify any additional measures that may be necessary to minimise possible distortions of competition. At the end of such a process, the relevant department will be in a position to propose to decision-makers draft statutory provisions that offer the requisite level of legal security and efficiency, and that are based on comprehensive and reliable impact assessment.

This guide contains questionnaires to facilitate self-assessment of competition impact, “instructions for use” on how to submit a draft text to the Autorité and a thematic presentation of the main opinions of the Autorité, which contains concrete examples in relation to a large number of different economic sectors.

I trust you will find this document to be useful.
Introduction

1. The purpose of this guide is to help public authorities assess the effect on competition of any proposed new statutory provisions.

2. The first part consists of a vade-mecum that can be used by government officials to help them identify cases that should or may usefully be submitted to the Autorité de la concurrence for an opinion, and also to assess the competitive impact of any new statutory or regulatory provisions they may propose. The second part describes the Autorité’s opinions, on which the questionnaires contained in the first part are based, thus providing a range of methods and concrete examples to facilitate the inclusion of the study of the competitive impact of any proposed statutory provisions in the preparatory process. [This second part is available only in French]

3. In some cases, prior consultation of the Autorité de la concurrence is mandatory (see paragraphs 17 to 22).

4. In other cases, consultation of the Autorité is optional. Nevertheless, where the reform of a sector that is of particular importance for the economy or where the draft statutory or regulatory provisions or a competition issue may have a decisive impact on the operation of a market, the Autorité’s opinion constitutes a useful contribution to the reflections of the relevant departments, without prejudice to the consultation of other relevant parties or bodies. Prior consultation of the Autorité can also enhance legal security. It may help prevent the risk of litigation before the European Court of Justice triggered by the European Commission under Article 106 or 260 of the Treaty on the Functioning of the European Union (hereinafter, the TFEU), or before the administrative courts.3

5. Where the Autorité is not consulted, the authors of any draft statutory provisions will still need to assess their competitive impact. This assessment will enable them to better evaluate the various possible options for government interventions and to rank the solutions in terms of their competitive impact, a factor which will ultimately determine their economic efficiency. This guide aims to encourage authors of proposals to examine the main reasons specified as being in the general interest behind the government intervention, to assess the effect of the intervention on competition, to adjust the level and the terms and conditions of the intervention in light of the identified objectives and to anticipate any additional measures that may be necessary.

6. A competition impact analysis of draft legislation may also contribute to compliance with the impact assessment obligations defined by the organic law no. 2009-403 of 15 April 2009 on the application of Articles 34-1, 39 and 44 of the Constitution, as interpreted by the Circular of 15 April 2009 on the implementation of the constitutional reform.4

7. This guide does not examine aspects of State aid5, which is governed by the specific rules relating to prior notification to the European Commission in accordance with paragraph 3 of Article 107 of the TFEU. It also does not examine aspects of freedom of movement and freedom of establishment of persons, goods, services and capital, which come under the remit of national courts and, where applicable, that of the Court of Justice of the European Union.

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4. JORF no.0089 of 16 April 2009, text no.5, NOR: PRMX0908734C
5. See the compendium of applicable rules on State Aid: (http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html), the Vade-mecum on State Aid published by the French Ministry of the Economy, Industry and Employment and the Ministry of the Budget, Public Accounts and State Reform, published by Documentation française (July 2010 edition, reference 9782110 081476) and the “Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest” (http://ec.europa.eu/services_general_interest/docs/guide_eu_rules_procurement_en.pdf)
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Competition impact assessment of draft legislation
8. A market that operates competitively optimises the allocation of available resources, maximises consumer welfare and stimulates competition in the sector, while fostering innovation, lower prices, a diversified offer and an improvement in the quality of the goods or services. Competition is a factor of productive and allocative efficiency.

9. However, competition is not an end in itself; it is a tool that serves economic efficiency. Draft statutory provisions often address broader general interest issues and provide for an intervention by the public authorities that impacts on the functioning of the economy, in particular when their purpose is to govern the provision of public services, to change the distribution of resources between various categories of the population, to protect consumers or to remedy market imperfections. Only Government and Parliament have a responsibility to weigh objectives relating to the general interest on the basis of detailed competition impact assessment and, where applicable, to reconcile these various objectives.

10. We recommend that the competition impact of such draft statutory provisions be assessed using the method described below, designed as a vade-mecum, which may be supplemented by consulting the list of main reference opinions [see appendix 1, available only in the French version of the guide] and by consulting the thematic presentation contained in the second part of this document (available only in the French version).

1.1. Is a new statutory rule needed? Are there any possible alternative solutions?

11. According to the guidelines issued by the Secrétariat général du Gouvernement on the preparation of impact assessment, the advisability of a Government intervention should be assessed on a case-by-case basis, after considering every alternative to the introduction of a new statutory rule.

12. This should also be the first phase in the assessment of the competitive impact of draft statutory provisions. The following questionnaire can be used in this context. It should be used to facilitate self-assessment and determine the approach to be taken rather than as an exhaustive list of questions to be answered in an impact study:
Questionnaire n° 1

Alternatives to the introduction of a new rule of law

Question n° 1

What are the alternatives to the introduction of a new rule of law? What are the advantages and disadvantages of each instrument?

Questions that may be relevant in various cases are listed below.

- Would it be possible to reorganise the resources currently used to apply existing legislation rather than to create a new statutory rule? If so,
  - What would be the terms and conditions of the re-organisation?
  - Could existing instruments with general scope that are not specific to the economic sector under examination be used, such as, for example, town planning documents, environmental regulations or administrative police measures?
  - Could public goals be defined to that effect? What incentives could be introduced? Which partners need to be involved to ensure the success of the project?

- Could existing legislation be simplified?

- Would an independent administrative authority be well placed to address the issue?
  - If so, can the issue be referred to it?
  - If not, has the possibility of changing its powers been considered?

- Has self-regulation been considered (e.g. code of conduct, technical standards, standard contract that would neither set uniform prices nor standardize essential features of a product or service)?

- Will an information campaign for certain categories of the public/users be necessary? Will such a campaign be sufficient to resolve or mitigate the issue that led to consideration of the government intervention?

Question n° 2

What general interest objective is pursued? Is it an economic objective?

- If so, would TFEU-compliant financial or tax incentives achieve the economic objective, and would they be sufficient? Would additional obligations to provide consumers with information (price transparency, labelling, pre-contractual or contractual information) achieve the economic objective, and would they be sufficient?

- If not, has an objective analysis of the competitive operation of the sector been already conducted?

Question n° 3

If the general interest objective is not economic, what type of general interest objective is it? Is the proposed solution proportionate?

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1.2. What type of government intervention should be favoured to minimise distortions of competition and in what cases can this guide facilitate impact assessment?

13. The very principle of a government intervention may be to open a new sector to competition. Depending on the economic characteristics of the sector, this may take one of two typical forms. The first is usually referred to as “on the market” competition, which means competition between private economic operators supplying the same goods or services in identical legal conditions. The other main form is known as opening competition “for the market”, which consists of inviting bids for the right to supply the demand on an exclusive basis for a specific time period and on a specific territory. This could be, for example, through the contracting-out of a public service of the type often arranged by local authorities for public transport, urban heating or the collection and treatment of waste. Appendix 3 (available only in the French version) describes the various factors that may influence which of these two forms of competition is judged to be appropriate. The direct intervention of public authorities in the offer of goods or services or through the maintenance of special or exclusive rights may affect the functioning conditions of the chosen form of competition. This will be discussed in sections 1.4.1 and 2.1 (available only in the French version) of this document.

14. Once the main features of operation of the market have been determined, public authorities may also decide to intervene for a general interest objective. In this case, the assessment of the impact of draft statutory provisions on competition may be decisive in ensuring the efficiency of the action in light of the objectives identified and in minimising any resulting distortion on the market. It constitutes a public decision-making tool. Diagram no. 1 below may be of use when selecting the most appropriate instrument.
Diagram no. 1
SELECTING A GOVERNMENT INTERVENTION INSTRUMENT ON THE BASIS OF ITS POTENTIAL COMPETITIVE IMPACT

<table>
<thead>
<tr>
<th>Remedying a market imperfection</th>
<th>Regulating access to the production of goods or the supply of services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public service offer</td>
<td>Special rights</td>
</tr>
<tr>
<td>Statutory or regulatory provisions (regulating price, quality)</td>
<td>Approval, administrative authorisation, licence</td>
</tr>
<tr>
<td>Regulation of a specific sector by an independent authority</td>
<td>Prior notification</td>
</tr>
<tr>
<td>Subsidies</td>
<td>Prior notification of activity, activity reports</td>
</tr>
<tr>
<td>Taxation</td>
<td>Statutory or regulatory provisions regulating the quality of the end product or service</td>
</tr>
<tr>
<td>Tradable permit market</td>
<td>Use of general public instruments not specific to the economic sector (e.g. town planning, environmental, administrative police measures)</td>
</tr>
<tr>
<td>Self-regulation, code of conduct, information campaigns, consumer education</td>
<td>Definition of public objectives</td>
</tr>
<tr>
<td></td>
<td>Self-regulation, technical standards, ethics</td>
</tr>
<tr>
<td></td>
<td>Tradable permit market</td>
</tr>
</tbody>
</table>

15. From a legal standpoint, the government intervention subject to impact assessment may fall into one of several categories, shown in diagram no. 2.
Diagram no. 2
MAIN TYPES OF INTERVENTION ON A MARKET BY THE PUBLIC AUTHORITIES

Direct intervention on the market

Supply of goods or services
- Intervention of public entities or persons over whom the public authorities exercise a decisive influence
- Grant of exclusive or special rights is governed by competition law

Purchase of goods or services
- Laws governing public procurement contracts
- Administrative sanctions by the Autorité de la concurrence in the case of concerted practices between tenderers
- Criminal offences regarding public procurement (e.g. collusion between tenderers)
- Action for damages by public bodies

Indirect intervention on a competitive market

Regulations
- Access by operators to an economic activity, or the operation thereof, is directly or indirectly restricted by regulations
- The imposition of practices or of uniform terms and conditions of sale
- Measures likely to ease coordination and exchange of information between competitors

Subsidies
- State aid that must be notified to the European Commission
- Other State aid

Taxation
- State aid that must be notified to the European Commission
- Tax measures that do not qualify as State aid

16. This vade-mecum covers the assessment of the impact of draft statutory provisions that fall within the categories of State intervention indicated in diagram no. 2 above by pale blue shading, in other words, firstly, direct intervention by public authorities in the supply of goods or services, and, secondly, economic legislation. Only these two categories of government interventions can be analysed by the Autorité de la concurrence within the framework of its advisory role.
1.3. Is it appropriate to submit the draft law or decree to the Autorité de la concurrence, and if so, what is the procedure to follow?

17. The law provides for mandatory prior opinion of the Autorité de la concurrence in certain clearly defined cases (1.3.1). In all other cases, the submission of a draft text to the Autorité is optional, although a referral sufficiently early in the process is recommended in order to assess the competitive impact of certain draft statutory provisions and to confirm the legal security of the planned provisions. It should be borne in mind that public authorities do not enjoy a monopoly when it comes to requesting an opinion of the Autorité (1.3.2). Any proposal and any competition-related issue can be submitted to the Autorité (1.3.3). The timeframe for consulting the Autorité will depend on the type of question raised (1.3.4).

1.3.1. In what cases is a public administration required to submit a draft text to the Autorité?

18. The Autorité de la concurrence must be consulted in four cases clearly defined by law.

19. The first is defined by Article L.462-2 of the French Code of Commerce (Code de commerce) and concerns all proposed new decrees (or ordinances), the direct effect of which is to impose quantitative restrictions on the exercise of a profession or access to a market, or to grant exclusive rights in certain areas, or to impose uniform pricing practices or uniform terms and conditions of sale. Any document enacted in breach of this provision may be repealed.7

20. Pursuant to Article L.420-4-II of the Code of Commerce, a public administration is not only required to consult the Autorité but also to obtain a favourable opinion before it submits to the Prime Minister any draft decree acknowledging that certain categories of agreements or certain agreements, in particular those aiming to improve the management of small or medium-sized enterprises, constitute a vector of economic progress. Article R.420-2 of the Code of Commerce provides that such draft decrees must be published one month before referral to the Autorité so that any interested party can make their observations known.

21. The third case in which it is mandatory to consult the Autorité is that of a draft decree designed to regulate prices in sectors or areas where competition through pricing is limited due to existing laws or regulations, the existence of monopolies or any long-standing supply shortages. Pursuant to Article L.410-2, paragraph 2,

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of the Code of Commerce, such decrees are deemed to be decrees of the Conseil d’État enacted after consultation of the Autorité.

22. Lastly, certain sector-specific regulatory authorities must submit certain administrative decisions, deliberations or opinions to the Autorité prior to adoption. Accordingly, pursuant to Articles L.37-1, D.301 and D.302 of the Postal and Electronic Communications Code (Code des postes et communications électroniques) the postal and electronic communications regulatory authority (ARCEP: Autorité de régulation des communications électroniques et de la poste) must consult the Autorité before it finalises the list of operators deemed to exercise substantial influence over each of the electronic communications markets. Article L.34-8-I of the same code also requires referral before any decision imposing objective, transparent and proportionate interconnection conditions is adopted. If such obligations are breached, the corresponding ARCEP decision may be void. The energy regulator (CRE: Commission de régulation de l’énergie) must also make a referral to the Autorité de la concurrence for its opinion whenever it examines rules of allocation, the scope of accounting procedures and the cost-accounting principles applied by energy operators that have a combined infrastructure management and operating activity, pursuant to Article 25 of Law 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service and Article 8-I of Law 2003-8 of 3 January 2003 on the gas and electricity markets and the public energy service, as consolidated. The rail regulator (ARAF: Autorité de régulation des activités ferroviaires) has a similar obligation in its own specific area pursuant to Article 15-IV of Law 2009-503 of 8 December 2009 on the organisation and regulation of rail transport, introducing various provisions relating to transport.

1.3.2. When may prior opinion of the Autorité be useful? Are referrals reserved for public authorities?

23. In addition to the aforementioned cases, any competition-related issue or any proposed provisions falling into either of the categories referred to in paragraph 16 can also be referred to the Autorité de la concurrence for an opinion.

24. The second series of questions set out below may help identify those cases in which a referral to the Autorité might be useful.
Questionnaire no. 2
Optional referrals to the Autorité de la concurrence

Question no. 1
The need for a competitive analysis of a market prior to the preparation of draft statutory provisions can be assessed by asking the following questions:

- Does the planned intervention pursue economic objectives?
- Will it open a new sector to competition?
- Would it be useful to assess the impact of currently applicable legislation, if an amendment is contemplated?
- Is the economic sector at stake an emerging sector? Are new business practices developing on the market?
- Is the purpose of the draft statutory provisions to remedy the existence of strong entry barriers? Or high prices compared to those observed in other comparable geographic areas? Or the possible foreclosure of competition?

If the answer to any of these questions is yes, you are advised to move on to question 2.2.

Question no. 2
Is the economic sector in which a government intervention is planned of special significance for the national economy, or for any significant or specific part of the national territory?

If the answer to questions 1 and 2 is yes, referral to the Autorité for an opinion is recommended.

Question no. 3
Is the aim of the planned government intervention to address an individual practice, in other words, the behaviour on the market of a specific operator or an agreement entered into between two operators who are governed by a private law status?

If the answer to question 3 is yes, a referral to the Autorité for an opinion is not generally recommended. However, a referral may be useful in some cases, for example, if the behaviour is likely to be copied by other operators, or if this is a new business practice that could be analysed in light of competition law in order to provide a greater level of legal security which will benefit the entire sector. If the behaviour could constitute an anti-competitive practice, you are advised to contact the Autorité to establish whether the filing of a complaint on the basis of Article L.462-5 of the Code of Commerce would be a more appropriate course of action than a referral for an opinion.
25. Optional consultation of the Autorité is not reserved to public authorities. Parliamentary commissions responsible for economic issues, professional organisations and consumer protection organisations are also entitled to request an opinion from the Autorité on any competition-related matter, including proposed new statutory or regulatory provisions⁹ and their consequences¹⁰.

26. A large number of sector-specific regulatory authorities can also refer any matters within their remit to the Autorité de la concurrence for an opinion, in application of the legal provisions creating such authorities.¹¹

27. Furthermore, pursuant to Article L.462-3 of the Code of Commerce, the Conseil d’État may also refer a matter to the Autorité for an opinion in connection with an appeal for abuse of authority filed against any decree or ministerial order.¹²

28. Lastly, the Autorité may issue opinions¹³ on any competition-related matter on its own initiative on the basis of Article L.462-4 of the Code of Commerce. The purpose of such self-referrals is usually to carry out a detailed analysis of a market in order to spur compliance efforts. In such cases, its findings may take the form of a general opinion combined with recommendations, providing the relevant sectors with information on whether certain practices comply with competition law¹⁴.

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⁹. Three French associations representing professional accountants and statutory auditors (le Conseil supérieur de l’ordre des experts-comptables, l’Institut français des experts-comptables et des commissaires aux comptes, and les Experts-comptables et commissaires aux comptes de France) referred new legislation allowing lawyers to countersign private deeds to the Autorité de la concurrence in two letters dated 8 January and 5 February 2010, pursuant to Article L. 462-1, paragraph 2, of the French Commercial Code. The Autorité based its opinion no.10-A-10 of 27 May 2010 on the bill for the modernisation of regulated judicial and legal professions, put before the National Assembly in March 2010.

¹⁰. In opinion no.05-A-22 of 2 December 2005, the Conseil de la concurrence addressed issues relating to the legal and economic consequences of the privatisation of mixed-economy motorway concession holders. Although the referral was made after the enactment of ordinance no.2005-649 of 6 June 2005, some of recommendations made by the Conseil relating to the drafting of concession specification documents and concession agreements were implemented.

¹¹. See, for example, Articles L. 5-8 and L. 36-10 of the Code of Postal and Electronic Communications (Code des postes et communications électroniques) for the postal and electronic communications regulatory authority (ARCEP: Autorité de régulation des communications électroniques et de la poste), Articles 3 and 39 of Law no. 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service, as amended, and Article 8 of Law no.2003-8 of 3 January 2003 on the gas and electricity markets and the public energy service, as amended, for the energy regulator (CRE: Commission de régulation de l’énergie), Articles 17, 24 and 41-4 of Law no.86-1067 of 30 September 1986, as amended, for the audiovisual regulator (CSA: Conseil supérieur de l’audiovisuel), and Article 27 of Law no. 2009-1503 on the organisation and regulation of rail transport introducing various provisions relating to transport, for the rail regulator (ARAF: Autorité de régulation des activités ferroviaires).

¹². The Conseil d’État referred two cases of this kind to the Conseil de la concurrence. The first concerned three decrees dated 21 March 1995, 19 April 1996 and 11 August 1998 on amounts charged by the INSEE (National Institute of Statistics and Economic Studies) for entries in the national register of companies and establishments. The second concerned two decrees dated 29 December 2005 and 28 April 2006 setting the sale price for natural gas distributed to the public by Gaz de France.

¹³. See decisions no. 09-SOA-01 of 18 May 2009 following a self-referral for an opinion on the land-based public transport sector, no. 09-SOA-02 of 14 December 2009 following a self-referral for an opinion on the cross usage of customer databases, no. 10-SOA-01 of 25 February 2010 following a self-referral for an opinion on affiliation agreements with independent stores and the conditions of purchase of commercial land in the food retail sector, no. 10-SOA-02 of 19 March 2010 following a self-referral for an opinion on “category management” contracts between food retail chains and certain suppliers, and no. 10-SOA-03 of 15 September 2010 following a self-referral for an opinion on the on-line gambling and gaming sector.

and/or a decision starting proceedings *ex officio* when this is justified by the practices identified. The Autorité can also use this type of opinion to draw the attention of public authorities on various problems that may justify the introduction of new statutory provisions.

29. Opinions issued at the request of a parliamentary commission or the Government are published in accordance with the provisions of Articles L.410-2, L.462-1, L.462-2 and R.462-1 of the Code of Commerce. Pursuant to Article R.462-1, the Autorité de la concurrence can also publish opinions requested by any other body or person. This includes opinions requested by professional organisations or consumer protection organisations concerning draft statutory provisions.

### 1.3.3. What types of questions or draft provisions may be submitted to the Autorité de la concurrence?

30. The Autorité's opinion is generally requested on a draft law or decree. Referrals to the Autorité are mandatory in certain circumstances (see paragraphs 17 to 22). The Autorité will issue an opinion on the instrument referred to it and its foreseeable impact. At the request of the Government, the Autorité has recently issued opinions on draft legislation concerning the regulation of rail transport\(^{15}\) and the postal sector\(^{16}\). These opinions may serve to assist the work of interministerial parties and also the work of the two chambers of Parliament: the National Assembly and the Senate. Parliamentary commissions may also refer bills directly to the Autorité. The National Assembly commission responsible for the economy has asked the Autorité for its opinion on the bill concerning the reorganisation of the electricity market\(^{17}\).

31. However, referrals for an opinion do not necessarily need to concern proposed new statutory provisions; they may also concern any competition-related matter. Accordingly, the Autorité can be asked to examine other types of documents prepared with the collaboration of the public authorities, the conditions in which an economic activity is performed, or any matter of principle that may improve how competition rules are applied.

32. The Autorité can also examine the competitive operation of a market in order to identify any concerns relating to the operation of competition in certain economic sectors, or to make any recommendations. Four recent opinions illustrate this type of referral: opinions on the retail sector, the overseas fuel market\(^{18}\), on-line

\(^{15}\) Opinion no. 08-A-17 of 3 September 2008 on the bill concerning the organisation and regulation of rail and public transport and transport safety

\(^{16}\) Opinion 09-A-52 of 29 October 2009 on the bill concerning the public undertaking La Poste and postal activities

\(^{17}\) Opinion no. 10-A-08 of 17 May 2010 on the bill concerning the new organisation of the electricity market

\(^{18}\) Opinion no. 09-A-21 of 24 June 2009 on competition in fuel markets in the overseas departments (DOMs), and no. 09-A-45 of 8 September 2009 on the import and distribution of retail goods in the overseas departments (DOMs)
advertising\textsuperscript{19}, and the operation of the milk sector\textsuperscript{20}. This last opinion was issued following a request from the Senate’s permanent commission responsible for economic matters. The Autorité also regularly looks at recent developments on the telecommunications market on the basis of referrals from ARCEP pursuant to legislation applying to that sector (see paragraph 22).

33. In its advisory capacity, the Autorité can also help assess whether a government intervention would be appropriate to remedy any competition concerns. Examples of this include its opinions on approved healthcare networks and supplementary insurance companies\textsuperscript{21}, digital books\textsuperscript{22}, exclusive access to audiovisual content\textsuperscript{23}, the insurance sector for property loans\textsuperscript{24} and on-line advertising\textsuperscript{25}.

34. Pursuant to Article L.462-1, paragraph 2, of the Code of Commerce, the Autorité can also be consulted \textit{ex post facto} in order to conduct a competition review of any existing legislation or regulations. In such cases, the Autorité does not express an opinion on the appropriateness of existing legislation. Instead, the Autorité’s role consists of retrospectively assessing legislation or regulations in terms of competition. Consequently, it may recommend changes to existing regulations while taking any other public interests into consideration. To date, the Autorité has reviewed the impact on the economy of three existing laws. In 2004 it issued an opinion\textsuperscript{26} on the “Galland Law”\textsuperscript{27}, following a referral by the consumer association l’Union Fédérale des Consommateurs (UFC-Que Choisir), and in 2007 it made recommendations\textsuperscript{28} on the “Raffarin Law”\textsuperscript{29} at the request of the Government. The Autorité made use of its new self-referral powers in 2009 to issue an opinion on land-based public transport\textsuperscript{30}, in which it more specifically analysed European and national laws and regulations in the sector.

35. However, in an opinion the Autorité cannot address any individual questions that may fall within the merger control procedure\textsuperscript{31}. Any opinion expressed by

\textsuperscript{19} Opinion no.10-A-29 of 14 December 2010 on the competitive operation of the on-line advertising market
\textsuperscript{20} Opinion no. 09-A-48 on the operation of the milk sector
\textsuperscript{21} Opinion no. 09-A-46 of 9 September 2009 on the effects on competition of the development of approved healthcare networks
\textsuperscript{22} Opinion no. 09-A-56 of 18 December 2009 following a request by the Minister of Culture and Communication for an opinion on digital books
\textsuperscript{23} Opinion no. 09-A-42 of 7 July 2009 on exclusive relations between the activities of electronic communications operators and the distribution of content and services
\textsuperscript{24} Opinion no. 09-A-49 of 7 October 2009 on competition in the insurance sector for property loans
\textsuperscript{25} Opinion no.10-A-29 of 14 December 2010 on the competitive operation of on-line advertising
\textsuperscript{26} Opinion no. 04-A-18 of 18 October 2004 following a request by the consumer association l’Union Fédérale des Consommateurs (UFC-Que Choisir) for an opinion on competition in the general retail sector
\textsuperscript{27} Law 96-588 of 1 July 1996 on fairness and balance in commercial relationships
\textsuperscript{28} Opinion no. 07-A-12 of 11 October 2007 on the legislation concerning commercial facilities
\textsuperscript{29} Law 96-603 of 5 July 1996 on the development and promotion of commerce and trades
\textsuperscript{30} Opinion no. 09-A-55 of 4 November 2009 on the land-based public transport sector
\textsuperscript{31} Opinion no. 10-A-10 as above
the Autorité on markets concerned by competition-related matters referred to it pursuant to Article L.462-1 of the Code of Commerce cannot have any influence on the definition of relevant markets or on a competition analysis made in connection with a merger control

36. Likewise, in its opinions the Autorité cannot establish an antitrust infringement pursuant to Articles L.420-1 or L.420-2 of the Code of Commerce or, if applicable when trade within the European Union is likely to be substantially affected, Articles 101 or 102 of the TFEU. Indeed, the Autorité may adjudicate an antitrust case only within the inter partes procedural framework defined by Articles L.463-1 et seq. of the Code of Commerce. Furthermore, any opinion issued by the Autorité is without prejudice to any national or European competition proceedings.

37. The Autorité cannot issue an opinion on any case law, nor may it intervene in any proceedings before the administrative or judicial courts other than within the framework defined by law.

38. Lastly, in certain cases, the law provides for mandatory prior opinion of the Autorité de la concurrence, on a temporary or permanent basis, on individual decisions or private law agreements. A more efficient allocation of tasks between the public administration and the Autorité could replace this system. Accordingly, it is recommended that draft statutory provisions, or any more general questions on the legal and economic consequences of such proposals, be referred to the Autorité sufficiently early in the drafting process. The Autorité will thus be able to provide the public administration and the economic operators with appropriate upstream guidance in a timely manner. In the on-line gaming and gambling sector, the Autorité issued an ex officio opinion that contained a general review of the

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32. Opinion no. 10-A-10 as above

33. See in particular opinion no. 88-A-12 of 12 July 1988 on questions raised by the Tarn division of an automobile industry association (la Chambre syndicale nationale de commerce et de la réparation de l’automobile), decision no. 01-DA-02 of 13 June 2001 on a question raised by the Minister of the Economy, Finance and Industry on a new method of marketing cinema tickets; decision no. 01-DA-03 of 13 June 2001 following a question raised by two associations in the cinema industry (l’Association française des cinémas d’art et d’essai et la Société civile des auteurs réalisateurs producteurs), opinions no. 95-A-05 of 28 March 1995 following a request by two associations in the horse breeding sector (la Fédération des acteurs du développement des techniques de reproduction équine et l’Association syndicale des étalonniers particuliers), no. 95-A-15 of 19 September 1995 on a draft agreement prepared by the Haute-Garonne chamber of trades (la Chambre des métiers) and an association representing professional accountants in Toulouse-Midi-Pyrénées (le Conseil régional de l’Ordre des experts-comptables de Toulouse-Midi-Pyrénées), no. 04-A-13 of 12 July 2004 on the introduction of assistance with employment formalities for businesses (Service Emploi-Entreprise), no. 05-A-12 of 21 June 2005 on the marketing of funeral insurance plans in light of competition law, no. 07-A-04 of 15 June 2007 on the possibility of reserving certain intermediate products for agro-food producers of quality products, and no. 08-A-16 of 30 July 2008 on the position of virtual mobile network operators on the French mobile phone market

34. See in particular opinions no. 89-A-09 of 23 May 1989; no. 89-A-10 of 5 July 1989; no. 90-A-19 of 13 November 1990 on questions raised by the national union of anaesthetists (le Syndicat national des anesthésiologistes-réanimateurs français) on doctors’ fees; no. 91-A-01 of 22 January 1991 on a question raised by the French banking association (l’Association française des banques) on the market for interbank payment processing; no. 02-A-08 of 22 May 2002 on a referral by a press association (l’Association pour la promotion de la distribution de la presse); no. 04-A-17 of 14 October 2004 on a request by the telecommunications regulator (l’Autorité de Régulation des Télécommunications) for an opinion pursuant to Article L. 37-1 of the Code of Postal and Electronic Communications

35. Decision no.10-SOA-03 of 15 September 2010 following a self-referral for an opinion on the on-line gambling and gaming sector
competitive operation of the sector. It was of the opinion that general guidelines identified in a single document would be more useful in helping economic operators self-assess their draft agreements than issuing opinions on a case-by-case basis. The opinion identified potential key competition concerns and made recommendations to the public authorities, including in particular the regulator responsible for issuing licences (Autorité de régulation des jeux en ligne). An upstream referral that looks at general concerns rather than case-by-case referrals examining individual decisions or private law agreements can also be supplemented, if necessary, by a later referral if the public administration or the sector-specific regulator observes certain behaviour that it considers may restrict competition.

1.3.4. When should such questions or draft provisions be submitted to the Autorité?

39. Whenever a public administration asks the Autorité to issue an opinion on draft statutory provisions, the referral must be made sufficiently in advance and in any event before the draft text is sent to the Conseil d’Etat. In addition, the Autorité must be fully informed about the objectives of the provisions, including any approach adopted or considered during preparation of the implementation documents. Compliance with these referral conditions will determine whether the Autorité is able to carry out a fair and thorough analysis of the matter referred to it and to propose to the public authorities effective solutions that offer the requisite level of legal security.

40. When a referral concerns competition-related issues, the appropriate moment to make the referral should be assessed on a case-by-case basis, taking into account the time needed to receive information from the parties involved and to gather any necessary economic data and statistics.

1.4. What questions should be raised upon conducting competition impact assessment?

41. The questions that should be raised upon conducting competition impact assessment of draft statutory provisions will depend on the type of government intervention proposed: a direct intervention by public authorities on a market (1.4.1) or new economic legislation (1.4.2).

1.4.1. Public authorities’ direct intervention on a market

42. The public authorities may intervene directly on a market by supplying goods or services, either directly or indirectly through the intermediary of persons over whom they exercise a decisive influence and who may, in some cases, be granted
exclusive or special rights. They may also authorise operators holding exclusive or special rights to diversify their activities outside the scope of such rights.

43. The third series of questions set out below may be useful when assessing the need for public authorities to supply goods or services and when examining the terms and conditions of such an intervention with a view to minimising the risk of distorting competition. Paragraphs 85 to 160 (available only in the French version) may also be of assistance when conducting a more detailed analysis of these questions, as they contain examples of the Autorité’s opinions on this topic.

**Questionnaire no. 3**

**Supply of goods or services by public authorities**

**Question no. 1**

Do the products or services that are not currently supplied by the market or for which supply is insufficient fall in the scope of national sovereignty?

*If so, the rest of the questionnaire does not apply. Otherwise, you are advised to move on to the following questions.*

**Question no. 2**

Is private supply non-existent? If so,

- Is this situation temporary or is it likely to last? Does it affect the entire national territory or only certain areas?

- Is this situation due to the limited availability of certain intermediate public goods or resources? If so, could a system be created by the State or by an existing independent administrative authority in order to allocate these goods or resources in an efficient, fair and non-discriminatory manner? If this is not the case, could a tax incentive or subsidies, which may need to be notified to the European Commission, remedy or partially remedy the complete lack of supply from the private sector?

**Question no. 3**

Is supply by the private sector insufficient?

- If so, is this situation temporary or is it likely to last?

- Does it affect the entire national territory or only certain areas?

- Has any alternative intervention to supply by public authorities been considered, such as:
  - Direct transfers to individuals (vouchers, reductions, etc.), which may need to be notified to the European Commission? Do such transfers affect the freedom of the beneficiaries to choose the offer that is, in their opinion, best suited to their wishes and needs?
  - The execution of agreements between companies in the sector and the public authorities (charter of objectives, modification of the offer in favour of certain users in exchange for a subsidy)?
  - Tax incentives or financial incentives, which may need to be notified to the European Commission?
**Question no. 4**

If none of the alternatives proposed in questions 2. and 3. would effectively remedy the situation, and if supply of goods or services by public authorities is being considered for any other public interest reason due to particular circumstances of time or place:

- Have current market prices been verified and will the public offer apply comparable prices?
- Will an activity-based accounting system be set up?
- Are the proposed prices, excluding any subsidies, higher than the average total cost?
- Will supply by public authorities be directed to all customer categories without discrimination?

**Question no. 5**

If none of the alternatives proposed in questions 2. and 3. would effectively remedy the situation and if it is contemplated, to respond to a public interest, to contract out the supply of goods or services to public or private companies:

- Have all legal and factual circumstances been taken into consideration, including economic operating conditions?
- Would special or exclusive rights be granted to one or several operators? If so:
  - Has a “pay or play” system been considered? Is it suitable for the particular case?
  - Will the rights be granted after proper tender procedures, in compliance with the appropriate notification and publication requirements? Are the rights granted for a set time period? Does the contracting public authority consider several allotment formulas so that several candidates can tender?
  - Has it been verified that the beneficiary of the rights will actually be able to supply the goods or services?

**Question no. 6**

If the answer to question 5. is yes, and if an operator may be granted special or exclusive rights in order to remedy the situation referred to in questions 2. and 3., have measures been considered to prevent any adverse effect on competition, more specifically, by:

- Not entrusting both regulatory powers (e.g. access to an essential facility, issue of technical standards) and the task of supplying goods and/or services to the same operator?
- Requiring activity-based accounting that distinguishes between, on the one hand, activities relating to the supply of goods or services in the sector for which exclusive or special rights are granted and, on the other hand, other activities relating to the supply of goods and services?
  - If this is the case, has the need for a functional unbundling that would allow a better and more cost-efficient monitoring of risks of crossed subsidies been assessed? What are the obstacles, if any? Do they justify ruling out this option?

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36. A “play or pay” system requires operators to either take part in all or part of a general interest service as defined by the public authorities (play) or to pay a financial contribution if they do not wish to take part (pay), which will reflect the cost of providing the service for the operators that do agree to provide the service.
– If a legal unbundling has been put in place, has the need for an unbundling of assets been assessed in order to avoid any risk of conflict of interests between the various categories of activities conducted by the operator and to prevent any anti-competitive practices (e.g. refusal to allow access to essential facilities, crossed subsidies, gathering information on competitors’ commercial strategies)? What are the obstacles or disadvantages, if any? Do they justify ruling out this option?

- Requiring the operator, if applicable, to guarantee third party access to essential facilities in its possession or under its control? By guaranteeing the non-discriminatory disclosure of key information in its possession?

- Including an obligation to use tender procedures between operators on related or upstream markets, especially if the operator that has special or exclusive rights is a vertically integrated operator?

- Avoiding any confusion in the minds of users/customers between, on the one hand, activities relating to the supply of goods or services for the public interest in the sector for which exclusive or special rights are granted and, on the other hand, other activities relating to the supply of goods and services?

- Setting up systems to ensure non-discriminatory access to the public domain by all competing operators, if such access is necessary in order to perform the relevant economic activities?

**Question no. 7**

If the answer to question 4. is yes, and if an operator may be granted special or exclusive rights in order to remedy the situation referred to in questions 2. and 3., have measures been considered to prevent anti-competitive pricing practices, more specifically, by:

- Imposing that prices be cost-oriented while allowing, if the activities are not performed by a public entity, a reasonable profit margin?

- Ensuring that the operator will not be in a position to engage in predatory practices or margin squeeze (see paragraphs 135 to 146 [available only in the French version])?

- Ensuring that any surplus resources obtained through an activity that is subject to an exclusive right are not used to subsidise an offer on another market?

44. Some of the questions raised above will also be relevant when considering whether an incumbent operator should be allowed to diversify its activities or when considering the appropriateness of opening a market segment to competition while maintaining exclusive rights for one operator. In such cases, the fourth series of questions set out below may also be of use. They will help establish whether the maintenance of exclusive or special rights for one operator might disrupt competition in the sector that was recently opened to competition or in a related sector and, in that case, consider measures that could remedy the situation. Paragraphs 85 to 160 (available only in the French version) may also be of assistance when conducting a more detailed analysis of these questions, as they contain examples of the Autorité’s opinions.
## Questionnaire no. 4

**Diversification by incumbent operators and opening new economic sectors to competition**

### Question no. 1

Do the draft statutory provisions allow an incumbent operator to diversify its activities or to perform horizontal or vertical integration? Does the draft text allow an operator who may have an interest in entering or remaining in the sector to be opened to competition to retain its exclusive or special rights?

*If the answer to either of these questions is yes, you are advised to move on to the rest of the questionnaire.*

### Question no. 2

May the operator who retains its exclusive rights benefit from its monopoly in the sector that is to be opened to competition or from entry into this sector, e.g. through any of the following:

- Regulatory powers that it already holds or that it is to be granted?
- The possibility of subsidising an offer in the sector that is open to competition with resources coming from its monopoly? Of benefitting, in the sector that is open to competition, from other economic or financial advantages deriving from the monopoly?
- The use for its own and sole benefit of facilities (see definition in paragraph 127 [available only in the French version]) or information that are essential to perform the activities in the sector that is open to competition and that cannot be reproduced under reasonable economic conditions by competitors or potential entrants?
- Tie-in sales between products or services supplied under a monopoly position and products or services supplied in the sector that is open to competition?
- Discounts attached to bundled offers?
- Cross-selling?
- The use of its trademark, trade name, business name or, more generally, its reputation acquired in the sector that remains under monopoly, for activities in the sector to be opened to competition?
- Its distribution network, if the economic sector in which it operates is the same as the one which is opened to competition?

### Question no. 3

If the answer to the first point of question 2. is yes, will these regulatory powers be transferred to:

- an entity that is fully unbundled?
- public authorities?
- or an independent administrative authority?
**Question no. 4**

If only the answer to the second point of question 2. is yes, will the operator arrange for an accounting and functional unbundling? Will the unbundling be monitored by public authorities? An independent administrative authority?

**Question no. 5**

If the answer to the third point of question 2 is yes, will measures be taken to guarantee transparent and non-discriminatory third party access to this essential facility and information? If applicable, are the prices charged for accessing the facility cost-oriented? Is access to essential information guaranteed free of charge when such information is derived from activities performed as a monopoly and when the operator holding exclusive rights does not incur any additional costs to obtain or reprocess such information for the purpose of its activities in the sector open to competition? When access to essential information is provided for a fee, is this fee based on the incremental costs incurred by the holder of the exclusive rights to reprocess information for third party access?

**Question no. 6**

If the answer to the fourth or to the fifth point of question 2. is yes, will measures be taken to prevent such practices?

**Question no. 7**

If the answer to the sixth point and/or the seventh point and/or the eighth point of question 2 is yes:

- Is it contemplated to provide for accounting, commercial and functional unbundling? Will this unbundling be monitored by public authorities? by an independent administrative authority? Is it contemplated to rule out the business names, trade names or trademarks used in the sector that remains under monopoly?
- If the answer to the previous question is yes, will a legal unbundling be put in place in order to enhance the efficiency and cost-effectiveness of monitoring? What are the obstacles, if any? Do they justify ruling out this option?
- Is it contemplated to allow competitors to use, for a fee if justified, all or part of the distribution network set up for activities which remain under monopoly and, if applicable, subject to compliance with certain quality criteria?
- Is it contemplated to forbid cross-selling?

**Question no. 8**

Is it contemplated to regulate prices charged by the operator retaining exclusive rights in connection with the points discussed in the seventh point of question 2.?

**Question no. 9**

Would the diversification by the operator holding exclusive rights into, for example, the audit, consulting or engineering sectors enable it to obtain confidential information about its competitors? If so, will any measures be taken to prevent this situation?
1.4.2. Economic regulation

45. As illustrated in diagram no. 2, public authorities may decide not to intervene directly on a market and instead to introduce a new statutory rule to restrict access to (1.4.2.1.) or performance (1.4.2.2.) of certain economic activities. Draft statutory provisions on prices that depart from the principle of full and free competition will be examined separately (1.4.2.3.).

1.4.2.1. Regulating access to an economic activity

46. The fifth series of questions set out below, which more specifically concern administrative authorisation systems, may be of use when assessing the competitive impact of provisions governing access to an economic activity. Paragraphs 162 to 177 (available only in the French version) may also be of assistance when conducting a more detailed analysis, as they contain examples of the Autorité’s opinions.

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**Questionnaire no. 5**

**Administrative authorisations, licenses, special rights**

**Question no. 1**

Will special rights be granted to certain operators? If so, is this justified by a non-economic reason of general interest? If so, given the number of operators, their distribution, their activities and their areas of expertise, are these operators likely to collectively hold a dominant position? Will such special rights be reviewed from time to time and potentially extended after an assessment of their impact? Is it contemplated to set up an administrative authorisation system rather than special rights?

**Question no. 2**

Will the proposed provisions create an administrative authorisation system? If so,

- Is this system justified by a non-economic reason of general interest?
- Is the authorisation process clear, transparent, predictable and accessible at reasonable costs? Is it based on objective criteria? May it have the effect of forcing certain operators to exit the market? Of cutting the supply of certain products or services? Of influencing certain customers to switch operators?
- Does the authorisation system indirectly increase the cost for customers of switching operators, for example, because of the risk of incurring additional charges or of enhancing the effects of contractual penalty clauses?

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37. Note that new administrative authorisation systems must also meet the conditions laid down in Articles 9 to 15 of Directive no. 2006/123/EC of 12 December 2006 on services in the internal market and by the case law of the Court of Justice of the European Union on freedom of establishment and freedom of provision of services.
Is access to authorisation more difficult for operators established in another Member State of the European Union or the European Economic Area as compared to national operators? or for new entrants compared to incumbent operators? or for certain categories of operators compared to others? Are any transitional measures planned? If so, do they create a material imbalance between incumbent operators and new entrants that comes as a disadvantage for the latter? Will the new system be introduced gradually for new entrants, or in a more gradual way than for incumbent operators?

In practice, is it significantly more expensive to obtain the authorisation for operators established in another jurisdiction compared to national operators? Or for new entrants compared to incumbent operators? Or for certain categories of operators compared to others? Is this cost difference based on objectively different situations or might it be discriminatory in certain cases?

Do the criteria for granting authorisations exclude any economic considerations? Are they clear and have they been defined in a single instrument that may be challenged before a court? Will information on criteria for granting authorisations be easily obtainable at a distance?

Do the authorities or bodies responsible for granting authorisations have any interest whatsoever in granting authorisations to certain categories of operators rather than others, independently of the criteria defined by statutory provisions?

If the criteria to obtain an authorisation are based solely on professional qualifications, are they determined in application of the reference framework deriving from European Union law? Do they apply only to persons effectively supplying the goods or services, or to any other person, such as senior executives or any person who might acquire a minority interest in a company operating in the relevant sector? If these criteria also apply to persons who might invest in a company operating in the relevant sector, is this justified by a compelling reason of general interest? If so, is a distinction drawn between persons exercising a decisive influence or who are likely to subsequently exercise influence and other categories? Why?

Are the criteria to obtain an authorisation likely to result in the de facto creation of monopolies in certain areas of national territory? Have any measures been put in place to prevent this situation?

Are the criteria to obtain an authorisation more restrictive than those used in comparable sectors? Are they all necessary and proportionate in light of the general interest objectives and the assessment of the functioning of the economic sector by supervisory bodies or independent authorities?

Will the administrative authorisation system be reviewed on a regular basis? Have public authorities put in place clear business and price indicators for assessing the effects of this system and will the results be made public on a regular basis?

Could a less restrictive system replace the prior authorisation system, such as:
- A prior notification system?
- An obligation to be listed in a register or to declare the company’s activities after it has started up its operations?
- An obligation to inform consumers? An obligation to provide information and to report to public authorities?
- New statutory provisions regulating the quality of the service or the product on the market, combined with a suitable monitoring system?
- The introduction of an independent public supervisory body for the sector in question?
- A tradable permit market?
- A self-regulation system, as described in question 13. of Questionnaire no. 6?
1.4.2.2. Regulating the performance of an economic activity

47. The public decision-maker may prefer to regulate the performance of an economic activity or profession rather than the access to it. In this case, the new statutory provisions must achieve a balance between general interest requirements and the risk that the number of operators may be restricted as an indirect consequence. This may occur, for example, as a result of raising entry barriers and/or reducing incentives to competition in the economic sector. The sixth series of questions set out below may be used as guidelines when assessing these aspects. Paragraphs 201 to 226 (available only in the French version) may also be of assistance when conducting a more detailed analysis, as they contain examples of the Autorité’s opinions.

**Questionnaire no. 6**

Regulating the performance of an economic activity

**Question no. 1**
Will the draft provisions substantially increase the cost of entry or exit from the market? Does this mean they may benefit certain categories of operators or suppliers and disadvantage others? Will the cost of compliance be higher for operators or suppliers located in another State than for national operators? Will these costs be allocated as fixed or variable costs?

**Question no. 2**
Will the draft provisions introduce de facto geographic barriers? May they disadvantage imported products or services? Do they take into consideration standards applicable in other States? Are they substantially stricter than in other Member States?

**Question no. 3**
Are the draft statutory provisions sufficiently clear? Do they provide a stable framework for the relevant operators or suppliers?

**Question no. 4**
Will the draft statutory provisions enhance the cost of switching operator or supplier?

**Question no. 5**
Do the draft statutory provisions apply to a market with a high level of product or service differentiation? If so, may they have the effect to harmonise certain aspects of the offer of goods or services that are decisive for the competitive positioning of operators or suppliers? May it have the effect of evicting the offer of certain products or services for which there is a demand from certain consumers?

**Question no. 6**
Will the draft statutory provisions result in fewer incentives to innovate?
**Question no. 7**

Will the draft statutory provisions result in restricting distribution channels that may be used by operators or suppliers?

**Question no. 8**

Will the draft statutory provisions result in restricting marketing channels available to the operators or suppliers? Do they apply uniformly to substitutable products or services? Do they merely aim at regulating misleading advertising? comparative advertising? If the regulation applies beyond the aforementioned objectives, why is this?

**Question no. 9**

Will the implementation of the draft statutory provisions require exchanges of information between competing operators or suppliers? If so,

- Is the market on which such exchanges will take place concentrated?
- Does the market have high entry barriers?
- Will the information exchanged be disclosed to operators/suppliers or customers on a selective basis or in accordance with variable terms and conditions?
- Will the information exchanged be in relation with important parameters of the companies’ commercial strategy, contemplated prices, indicative prices, elements that would make it possible to piece together whole or part of the costs incurred by the operators?
- Will the information exchanged be disaggregated?
- Will the information exchanged be nominative?
- Will the information be exchanged at frequent intervals?

*If the answer to any of the points of question 9. is yes, and especially if the answer to the sixth point is yes, it is likely that the information exchange will restrict competition. If the exchange of certain information is essential for the system to be set up, the collection and analysis of the information should preferably be entrusted to the public authorities or an independent administrative authority to ensure it remains strictly confidential.*

**Question no. 10**

Will the draft statutory provisions result in officially recognising a private technical standard? If so, will certain categories of operators or suppliers benefit from this recognition while others may be disadvantaged? Is the standard the result of an open, clear, transparent and non-discriminatory process? Is the private standard compliant with the requirements listed in questions 1. to 9.? Do the draft provisions grant a certifying body any specific advantages? Does this body satisfy the conditions referred to in questionnaire no. 4 on the diversification by incumbent operators and the opening of new economic sectors to competition?

**Question no. 11**

If the answer to any of the previous questions is yes, are any measures planned to reduce or eliminate the adverse effects on competition? Are these provisions essential in order to achieve the general interest objective and are they proportionate? Has any supervisory body
or independent authority already assessed the operation of the economic sector and has it identified any specific issues that justify the proposed provisions? Are these provisions more restrictive than those in comparable sectors?

**Question no. 12**

Will the impact of the proposed regulatory system be assessed on a regular basis? Will a battery of aggregated indicators be used? Will the values of the various indicators be made public on a regular basis?

**Question no. 13**

Could the draft statutory provisions be replaced by a less restrictive system, such as:

- A technical standard satisfying the conditions referred to in question no. 10?
- A code of conduct?
- A professional accreditation system based on a private initiative, use of which is not restrictive and which satisfies the conditions referred to in question no. 10?

1.4.2.3. Regulating prices

48. The following questionnaire may be useful when conducting a competition impact assessment of regulatory provisions from the principle of free competition. Paragraphs 130 to 157, 182 to 200 and appendix 2 (available only in the French version) may also be of assistance when conducting a more detailed analysis, as they contain examples of the Autorité’s opinions.

**Questionnaire no. 7**

**Derogation from the principle of free price-based competition**

**Question no. 1**

Do any of the following situations apply to the proposed regulatory system?

- Price-based competition is limited due to the existence of a monopoly or long-standing supply shortages.
- Excessive price increases or decreases need to be addressed due to exceptional or clearly unusual circumstances on a temporary basis for a maximum period of six months.
- Uniform prices need to be imposed for services of general interest within the meaning of EU law, i.e. services pertaining to national sovereignty, e.g. to ensure the fair and equal treatment of all citizens.
- The prices charged for general economic interest services need to be regulated for social reasons, in order to protect certain specific categories of consumers because they are particularly vulnerable.

*If prices are regulated in any other circumstances, the detailed reasons for such regulation must be clearly established.*
Question no. 2
Are the criteria chosen to determine prices objective and stated clearly, comprehensively and precisely in the proposed regulatory system? Do the criteria meet general interest objectives? May private operators be entrusted de jure or de facto with the task of setting prices?

Question no. 3
Are the parameters chosen to set prices defined in absolute terms with respect to market conditions, so that price-competition is not completely eliminated, or in relative terms with respect to market conditions, e.g. on the basis of the average or median economic performance in the sector?

Question no. 4
Will the proposed regulatory system fix a minimum price? If so,
- If the objective is to prevent potential predatory practices by more than one operator, why has this solution been favoured over ex post competition regulation by the Autorité?
- If the objective is to address excessively low prices due to exceptional or clearly unusual circumstances, is a sunset clause or a phase-out contemplated? If so, will it be automatic or quasi-automatic? Are the phasing-out criteria clear and precise? Has temporary public income support for affected individuals been considered as an alternative solution?
- Are the criteria chosen to set prices determined on the basis of average market prices? If not, may the draft provisions disadvantage sales of imported products for any other reason? disadvantage the provision of services by operators established in another State of the European Economic Area? Has any less restrictive solution that would meet the general interest objectives behind the government intervention been considered?
- May a minimum price have differentiated effects on upstream operators, thus creating indirect discrimination?
- Will the system be assessed on a regular basis and will the findings be made public?

Question no. 5
Will the proposed regulatory system set a maximum price? If so,
- Does the service or product with a regulated price play a decisive role in competition in the overall economic sector involved?
- Is the maximum price higher than the costs incurred to produce the goods or supply the services involved?
- At what level will the maximum price be set? Will it be higher or lower than the average market price? than the median price? Does current price dispersion above the contemplated maximum price reach a high level?
- May the maximum price result in prohibiting economic operators from offering products or services that are partial substitutes for the products or services in the scope of price regulation? Is such an effect likely as regards substitutes of a substantially better quality?
- Will a sunset clause or phasing-out mechanism be set up? Will it be automatic or quasi-automatic? Are the phasing-out criteria clear and precise?
Will the system be assessed on a regular basis and will the findings be made public, in particular to verify that not all the operators are charging the maximum price or a price that is close to the maximum price?

Has any less restrictive solution that would meet the general interest objectives behind the government intervention been considered?
Guide for competition impact assessment of draft legislation

The new constitutional legal framework introduced on 23 July 2008, clarified by the organic law of 15 April 2009, laid the basis for an obligation to conduct regulatory impact assessments of draft bills in France. Legislators must be able to verify that the introduction of a new rule of law is justified and proportionate. They must have access to all the necessary information in order to gain an overall perspective of the various reasons specified as being in the general interest, which includes competition.

In order to participate in the definition of a methodology to be used for these preliminary assessments, the Autorité de la concurrence proposes questionnaires to facilitate the assessment of the competitive impact of proposed new statutory or regulatory provisions in this guide.

The Autorité therefore provides public authorities with the necessary tools to be able to assess and rank all the relevant options for government intervention, and to identify, where applicable, any additional measures that may be necessary to minimise possible distortions of competition.