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Focus on Regulatory Law

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New decisions of the French Supreme administrative Court (*Conseil d' État, CE*) further defined the scope of the powers of regulatory authorities. This edition no.5 pays also specific attention to price regulation in the field of energy, drugs and water.

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REGULATION AUTHORITIES

FRENCH COMPETITION AUTHORITY – Statements of reasons cannot be disassociated from the operative part of a decision and therefore do not qualify for appeal

Having been notified of an appeal against the Competition Authority's decision regarding a joint acquisition of retail trade warehouses, the *Conseil d'État* stated that the assessments the Competition Authority made in the decision's statements of reasons cannot be disassociated from the operative part of the decision, which such statements support.

This ruling is consistent with well-established jurisprudence, according to which a plaintiff may not attack the statements of reasons of a decision in its favour, even if such statements are not to the plaintiff's likes (CE, 7 June 1950, Rougier, Rec., p. 347; R. Odent, Administrative disputes – Volume II, 2007, p. 257). In other words, the validity of an action against an administrative decision can be assessed only in relation to the operative part of the decision, and not in relation to its statements of reasons.

Source: CE, 9 April 2014, Association of distribution centres Edouard Leclerc, no. 364192.

SECURITIES AND MARKET AUTHORITY – *Autorité Des Marchés Financier*s (AMF) – The provisions of the Monetary and Financial Code (MFC) related to the AMF do not infringe the principle of impartiality

On 6 June 2014, the *Conseil d'État* refused to refer to the Constitutional Council a Priority Preliminary Ruling on Constitutionality (QPC) concerning several MFC articles related to the organisation of the AMF's board and sanctions commission, as well as the recusal of one of its members.

The applicants claimed that some MFC provisions ignored the constitutional principle of impartiality by failing to prohibit members of the AMF board from being simultaneously appointed as members of the sanctions commission, or vice versa. According to the *Conseil d'État*, however, "*the law cannot be regarded as infringing the principle of impartiality taking into account the obligations of abstention and modification as well as the possibilities of recusal of the members of the Board of the AMF stated in the MFC*".

The applicants also claimed that the MFC provisions infringed the principle of impartiality by referring to statutory power to establish the conditions according to which the recusal of a sanctions commission member can be requested. On this matter too the *Conseil d'État* ruled that the principle of impartiality was not infringed.

Source: CE, 6 June 2014, M.A., no. 366463.

AUDIOVISUAL COUNCIL – *Conseil Supérieur de l'Audiovisuel* (CSA) – The *Conseil d'État* issues three decisions on the CSA

The *Conseil d'État* recently ruled on three matters related to the CSA. First, it ruled that an organisation representing radio operators has cause to take action against the CSA's approval of an acquisition of radio service companies by a company authorised to provide radio services in the same category.

Second, having been notified of an appeal against the CSA's deliberation of 24 July 2012 related to television channel numbering, the *Conseil d'État* affirmed that, in the absence of legislative or statutory provisions establishing rules for numbering, the provisions of law no. 86-1067 of 30 September 1986 (in particular Article 30-1) imply that the CSA is qualified to organise television broadcasting services by establishing rules for logical channel numbering. Per the *Conseil d'État*, the CSA may adjust the terms and conditions of currently valid authorisations to broadcast, as well as the assignment of channel numbers, as long as neither the existence of the authorisations nor the essential conditions of their implementation is jeopardised.

Third, the Conseil d'État dismissed an appeal against the authorisations granted by the CSA at the end of a bidding process for the operation of radio services. Even if the CSA did not list certain frequencies as available, and had no legal grounds for such an action, the legality of the authorisations would not be affected.

Sources: CE, 11 April 2014, Syndicate of national radio networks, no. 348972; 11 April 2014, Association Bocal and others, no. 362916; 11 April 2014, Caledonian Association for freedom of expression and pluralism of the media, no. 358223.

AUTHORITY FOR THE REGULATION OF ELECTRONIC COMMUNICATIONS – *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP) – The ARCEP has the authority to modify the current contracts of an operator exercising significant market influence

On 11 September 2012, the ARCEP ordered TDF (*TéléDiffusion de France*, France's main provider of radio and television transmission services) to fulfil various obligations, including giving mandatory access to some of its broadcasting sites and standardising its conventions with the provisions of the ARCEP's decision.

The *Conseil d'État* rejected TDF's application for an appeal against this decision. In particular, the *Conseil d'État* noted that under Article 8, paragraph 2 of the directive 2002/21/EC of 7 March 2002 and Articles L. 32-1 and L. 38 of the Electronic Communications Code (CPCE), ARCEP has "*the power to enjoin an operator exercising a significant*

influence on a market of the electronic communications sector to modify contracts pending execution entered into by this operator, when the modification of these contracts complies with grounds of sufficient general interest linked to the imperative requirement of public order with a view to the establishment of effective and fair competition on the market".

Source: CE, 11 June 2014, Société towerCast and others, no. 363920.

ENERGY

PURCHASE OF WIND ELECTRICITY – Ministerial orders establishing the tariff scheme for wind electricity purchase are annulled as illegal State aid

In a 15 January 2012 decision, the *Conseil d'État* referred a preliminary ruling to the Court of Justice of the European Union (CJEU). The point at issue concerned whether or not the French mechanism for compensation of extra costs resulting from the requirement that *Electricité de France* (EDF) or local distribution businesses purchase wind electricity had to be regarded as State intervention or State resources pursuant to the terms of Article 107 of the Treaty. In a 19 December 2013 decision, the CJEU concluded that the tariff mechanism, set in place by French law no. 2003-8 of 3 January 2003, constituted "*an intervention by means of State resources*".

Based on this CJEU decision, the *Conseil d'État* annulled the Ministerial orders establishing the purchase conditions for wind energy, on the grounds that they instigated State aid which was not notified to the European Commission. Upon reading this decision, the Minister of Ecology announced her intention to issue as soon as possible a new order on wind energy purchase tariffs within a framework already notified to the European Commission (Press communiqué of Ms. Ségolène Royal, Minister of Ecology, Sustainable Development and Energy, 28 MAY 2014)

The question of interest payment remains, however. If an instance of State aid is compatible with the rules of the European Union but is declared illegal because it has not been notified, the CJEU requires the aid beneficiaries to pay interest covering the period of illegality, *i.e.*, the period from the first aid payment to the Commission's decision declaring the aid illegal (*CJEC, 12 February 2008, matter C-199/06, Celf v Slide*).

Sources : CE, 28 May 2014, Association Vent de colère! and others, no. 324852; CJEU, 19 December 2013, Association Vent de colère!, matter C-262/12

WIND FARM BUILDING PERMITS – Such permits do not require an authorisation to occupy public land

The Administrative Court of Appeal of Douai annulled a prefectural order authorising the construction of six wind farms on the grounds that burying electrical cables required an authorisation to occupy the public domain.

On 4 June 2014, the *Conseil d'État* censured the court's reasoning, stating that the managers of the public electricity transmission and distribution grids are responsible for connecting electricity production structures to those grids. The connection of an energy production plant to the electricity grid is therefore unrelated to the construction of the plant. A wind farm building permit therefore does not require prior authorisation, unless the plant itself is to be wholly or partially situated on public land.

Source : CE, 4 June 2014, Company Ferme Éolienne de Tourny, no. 357176.

PUBLIC ECONOMIC LAW

HIGH-SPEED NETWORKS (4G) – The *Conseil d'État* validates Bouygues Télécom's right to transmit 4G in the 1800 MHz frequency band

In response to an appeal against the Authority for the Regulation of Electronic Communications' (ARCEP's) decision authorising Bouygues Télécom to roll out 4G networks in the 1800 MHz frequency band, the *Conseil d'État* noted that neither the Electronic Communications Code (CPCE) nor Article 4, paragraph 3 of the Treaty on the Functioning of the European Union require the ARCEP to consult with the French Competition Authority before re-examining mobile telecommunications operators' authorisations to use frequencies.

On the substance, the *Conseil d'État* ruled that in adopting the attacked decision, the ARCEP took appropriate measures to safeguard the principle of equality between operators and ensure the conditions necessary for effective competition. Additionally, even if Bouygues Télécom had a competitive advantage from the date the attacked decision

was enforced, additional factors would have contributed to such an advantage, such as other mobile telecommunications operators' strategic, technological and economic choices.

Source: CE, 18 June 2014, Company Orange France, no. 369077.

USER CHARGES FOR PUBLIC SERVICES – The competent authority may retroactively set user charges and issue new enforceable orders in order to recover debts

The *Conseil d'État* ruled that if a decision establishing the amount of user charges for public services is declared illegal, that decision is not void retroactively, nor is the previously applicable decision reinstated. Consequently, no tariff is legally applicable for the period in question.

A declaration of illegality, however, cannot exonerate users from the obligation to pay for the service from which they effectively benefited. Because the previous water charges were declared illegal solely because they were adopted via an irregular procedure, the local authority was able to legally adopt a new order by regularising the procedure. The authority retroactively established the applicable water charges and set the water price at the same level as that of the previous order.

In another recent decision, the *Conseil d'État* ruled that *Voies Navigables de France* had the right to issue orders enforcing the collection of tolls on use of the public river sector. The previous inadequate toll enforcement does not exonerate users who contested the toll amounts from the obligation to pay them.

Sources : CE, Sect., 28 April 2014, Mrs. A. and others, no. 357090; CE, 28 May 2014, Compagnie des Bateaux Mouches, no. 359738.

PETROLEUM PRODUCTS – The Prefect of Reunion Island did not err in establishing petroleum product pricing

Two orders of the Prefect of Reunion Island establishing the price of certain liquid hydrocarbons and gas recently were contested before the Administrative Court. The Court ruled that the Prefect, in the exercise of his regulatory power, is not required to recover in his maximum established prices all of the fluctuations that could have been noted in the price of imported petroleum products, according to Article L. 410-2 of the Commercial Code. On the contrary, the Code allows the Prefect to take into account both the price of imported products and the island's economic situation (in particular, consumers' purchasing power and the state of businesses). Therefore, the Prefect did not commit any error of law in taking into account the interests of households and businesses when establishing the maximum prices for the sale of petroleum products on Reunion Island.

Source: CAA Bordeaux, 1 April 2014, Company Engen Reunion, no. 12BX02573.

CONTRACTS

DELEGATION OF PUBLIC SERVICE (DPS) – The excessive duration of a DPS contract has no bearing on the legality of a decision to reject a candidate's offer

Confirming the judgment of first instance, the Administrative Court of Appeal of Marseille has ruled that the local authority, by issuing a DPS contract for an excessive period of 12 years, effectively ignored of law applicable to DPS contracts.

According to the *Conseil d'État*, however, the Court of Appeal committed an error of law in that the excessive duration of the DPS was only relevant in an appeal if that duration had influenced which company the local authority delegated the DPS contract to, not in an appeal from a company whose offer was rejected.

Source: CE, 4 June 2014, Company Opilo and EURL Paris Plage, no. 368254.

SELECTION OF CANDIDATES IN A BIDDING PROCESS – Adjudicating authorities may request only the information and documents listed in the Public Procurement Code

Having been notified of a summary judgment annulling a tendering procedure organised by the Ministry of Home Affairs, the *Conseil d'État* highlighted Articles 45 and 52 of the Public Procurement Code, which state that when an

adjudicating authority decides to limit the number of candidates admitted to present an offer, it can request only a restrictive list of information and documents from candidates.

In this case, the Ministry of Home Affairs had requested a note outlining the composition of the project team, the organisation put in place during the different phases of the contract's execution, and the roles and responsibilities of the team members as well as their work methodology. Because this information is not included in the restrictive list prescribed by the Code, the annulment of the procedure to enter into the contract was confirmed.

Source: CE, 11 April 2014, Minister of Defence, no. 375245.

TERMINATION OF A CONTRACT – The annulment of a disproportionate indemnity clause can cause detriment to the public

When a public establishment terminated a contract on the grounds of general interest, citing the irregular procedure by which the contract was entered into, the public establishment was sentenced to pay its co-contractor the indemnity stated in the contract. The public establishment appealed.

Applying the jurisprudence *Manoukian* (CE, 12 January 2011, no. 338551), the Administrative Court first held that failure to abide by the rules for entering into contracts was not, in the case in point, of a serious enough nature to require the contract to be discarded. Therefore, it was possible to settle the dispute on the basis of the contract.

Next, on the basis of the principles taken from *CCI* of *Nîmes* and *CCI of Montpellier* (CE, 4 May 2011, no. 334280; 22 June 2012, no. 348676), the Administrative Court ruled that, in order to prohibit public entities from accepting gifts, an administrative contract cannot legally allow a termination indemnity that would harm the public entity in an amount disproportionate to the prejudice actually incurred by the co-contractor. According to the Court, the disputed clause allows for an indemnity in excess of that which would have been withdrawn under the normal execution of the applicant company's contract. In this situation, the disputed clause does not affect the general economics of the contract, is divisible from the rest of the contract, and must be regarded as null and void.

Finally, regarding the amount of the indemnity, the Administrative Court sentenced the public establishment to pay the co-contractor a sum corresponding to the loss of earnings calculated on the basis of the net margin that the complete execution of the services stated in the terminated contract would have generated.

Source: Administrative Court of Appeal of Nantes, 11 April 2014, Agrocampus Ouest, no. 12NT00053.

TERMINATION ON GROUNDS OF GENERAL INTEREST – Facts invoked by a public entity support its decision to terminate a contract

A local authority unilaterally terminated a contract pertaining to the management and maintenance of its water intake plants. In reviewing the case, the *Conseil d'État* evaluated the Court of Appeal's legal characterisation of the facts in order to determine whether grounds of general interest existed to justify the unilateral termination. Within this framework, the *Conseil d'État* affirmed the Court's judgment that the local authority's choice to directly operate its water source—and the subsequent deterioration of relations with the co-contracting party—could not be regarded as grounds of general interest sufficient to justify the termination.

Source: CE, 4 June 2014, Local authority of Aubigny-les-Pothées, no. 368895.

PUBLIC HEALTH

SENSITIVE MEDICAL DATA – The Data Protection Authority's (CNIL's) authorisation of the collection and treatment of sensitive data must be appropriately motivated

The *Conseil d'État* ruled that the CNIL's decision to authorise the processing of personal data taken from anonymous electronic treatment files for the purpose of completing epidemiological research constituted an exception to the prohibition on collecting or processing health-related personal data.

The *Conseil d'État* also held that such a decision was one of the actions that must be appropriately motivated per the law of 11 July 1979, and found that in this case, the decision was appropriately motivated.

Source: CE, 26 May 2014, Company IMS Health, no. 354903.

PHARMACEUTICALS – The *Conseil d'État* issues a referral on whether the deletion of a speciality from the list of medicines covered by social security is compatible with Directive 89/105/EEC

The plaintiff contested the removal of a medicine from the list of pharmaceutical specialities covered by social security. First, the *Conseil d'État* ruled that the absence of statements by the authority with statutory power over the criteria for registration on the list of pharmaceutical specialities covered by social security did not prevent the ministers from exercising their authority in accordance with Articles L. 162-22-7 and R. 162-42-7 of the Social Security Code.

Second, the *Conseil d'État* stated that an infringement of Article 6 § 1 of the European Convention on Human Rights cannot be invoked against Social Security Code Articles L. 162-22-7 and R. 162-42-7.

Third, according to the *Conseil d'État*, when the Hospitalisation Council formulates recommendations regarding the addition or deletion of medicines on the list covered by social security, such recommendations do not contain any instruction to the Minister of Health. Even so, without being bound by these recommendations, the Minister of Health can abide by their criteria. Thus, with regard to the Hospitalisation Council's recommendation of 27 January 2012, which the Minister of Health implemented, the deletion must be regarded as motivated by the weakness of the medical service rendered by the deleted pharmaceutical speciality.

The *Conseil d'État* deferred its decision until the CJEU issues a pronouncement on whether "*the provisions of point 5, Article 6 of the directive 89/105/EEC of the Council of 21 December 1988, concerning the transparency of measures governing the establishment of prices of medicaments for human use and their inclusion in the field of application of health insurance systems, require the motivation of a decision to delete a speciality from the list of medicines dispensed to patients hospitalised in health establishments that may be undertaken by the obligatory health insurance schemes in addition to the hospitalisation services undertaken within the framework of lump sums for hospital stays and treatment established for each homogenous group of patients*".

Source: CE, 14 May 2014, Company LFB Biomédicaments and other, no. 358498.

ORPHAN DRUGS – When establishing the sale price of an orphan drug, the Economic Committee of Health Products (CEPS) must take into account the costs incurred by the laboratory that commercialises the drug

Addmedica requested the *Conseil d'État* to annul the CEPS's unilateral establishment of the price of two orphan drugs on the grounds that the sale price did not allow the company to achieve a profitability threshold sufficient to continue the drugs' manufacture.

Based on an expert report assessing the expenses involved in the drugs' production, the *Conseil d'État* stated that the CEPS, when pricing drugs for which there is no pharmaceutical equivalent in France, must take into consideration the laboratory's costs for putting the drug on the market, including research and development costs.

Source: CE, 14 May 2014, Company Addmedica, no. 363195.

PHARMACEUTICALS SUBJECT TO THE NARCOTICS SCHEME – The Minister of Health's submission of a medicine to the narcotics scheme is a statutory act over which a judge exercises normal control

The *Conseil d'État* ruled that the order whereby the Minister of Health should decide, upon the proposal of the Director General of the National Agency for the Safety of Medicines and Health Products (ANSM), to wholly or partially submit a pharmaceutical to the narcotics scheme is statutory in character. Under the narcotics scheme, a submitted medicine is evaluated for any risk of dependency, abuse or inappropriate use.

The *Conseil d'État* also ruled that the ANSM Director General's proposal is not required to be sent to the businesses concerned, and that a judge exercises normal control over the adequacy and character of the measures

taken by the Minister of Health in proportion to the objective to protect health.

Source: CE, 30 April 2014, Les Laboratoires Servier, no. 364789.

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