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Focus on Regulatory Law

The latest developments in regulated sectors throughout France

The Regulatory Letter is increasing its scope and this edition N°4 is enhanced by a section on Economic Public Law. The past three months have seen many new decisions of the French Supreme Administrative Court (*Conseil d'État, CE*) especially in the field of public procurement, freedom of trade as well as the powers to sanction conferred to the regulatory authorities. The Court of Justice of the European Union also confirmed that the unlimited guarantee in favor of *La Poste* as a result of its status as a publicly-owned establishment constitutes a state aid.

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Regulatory Authorities

SECURITIES AND MARKET AUTHORITY - *Autorité Des Marchés Financiers* (AMF) – Administrative judge notes that an appeal against a financial penalty ordered by the AMF may actually increase the fine

If an appeal is lodged against an AMF decision to levy a financial penalty, the appeal judge has to verify that the penalty is proportionate in relation to the breaches and the financial situation of the fined party. The *Conseil d'État* has noted in a recent case that this means there is a possibility that the judge may in fact find that the fine should be increased.

In this recent case, the *Conseil d'État* considered that the amount of the fines ordered by the AMF originally should be increased, because two failures to respect the professional rules had been wrongly rejected by the AMF's fines commission.

Source: CE 12 March 2014, Company GSD Gestion, no. 360642, in the Tables

AUTHORITY FOR THE REGULATION OF ELECTRONIC COMMUNICATIONS - Autorité De Régulation Des Communications Électroniques (ARCEP) – Order restores its power of discipline

Order no. 2014-329 of 12 March 2014 relating to the digital economy restores to the ARCEP its power to discipline telecommunications companies, which had been censured by the Constitutional Council in its decision no. 2013-331 QPC of 5 July 2013.

The Council had judged ARCEP's disciplinary powers as unconstitutional on the grounds that, within ARCEP, the separation of its investigatory arm and its disciplinary arm was not guaranteed.

The Order has instituted a restriction that means ARCEP's disciplinary arm can only order certain penalties or conditions and its Board can only order certain other penalties, thereby splitting the powers.

Source: Order no. 2014-329 of 12 March 2014 related to the digital economy

DATA PROTECTION AUTHORITY - Commission Nationale Informatique et Libertés (CNIL) – CNIL should respect the right to a fair trial

Having been notified of an appeal against CNIL issuing a warning to the *Pages Jaunes* (Yellow Pages), the *Conseil d'État* noted that when the CNIL exercises its powers on the basis of Article 45 of the law of 6 January 1978 relating to information technology, files and freedoms, it

> *Must exercise this power within the meaning of the European Convention for the Safeguard of Human Rights and Fundamental Freedoms. It follows from this that, regardless of jurisdiction, the CNIL should respect the principle of impartially enshrined in Article 6 of the Convention with regard to the nature, composition and characteristics of this body, in support of an appeal against its decision.*

In the present case, the *Conseil d'État* found that the procedure that led to warning did not infringe the principles of impartiality and Pages Jaunes' rights to a defence.

Source: CE 12 March 2014, Company Pages Jaunes, no. 353193

COMMISSION NATIONALE INFORMATIQUE ET LIBERTÉS (CNIL) – Investigators must inform the CNIL if it finds failures in compliance with the provisions of the law of 6 January 1978 relating to information technology, electronic files and freedoms

Part VI of Article L. 141-1 of the Consumer Code states that agents authorised to proceed with an investigation into a potential breach of competition rules are also qualified to confirm violations of the provisions of the law of 6 January 1978 relating to the lawfulness of processing personal data contained in the electronic files under investigation.

Article 76 of the law of 17 March 2014 relating to consumers has modified Part VI of Article L. 141-1 so investigators must now notify the CNIL of any violations of, and failure to comply with, the law of 6 January 1978.

Source: Law no. 2014-344 of 17 March 2014 related to consumption

Energy

NUCLEAR PLANTS – INSTALLATIONS NUCLÉAIRES DE BASE (INB) – Third parties have the right to challenge approvals for Nuclear Plant installation

The *Conseil d'État* has ruled that third parties situated close to a site authorised for the processing or storage of radioactive waste can contest the authorities' decision to authorise a processing plant on that site, provided they have a sufficiently direct and certain interest that justifies their request for its annulment.

In assessing third parties' claims, the *Conseil d'État* will take into account certain issues such as the purpose of the activities authorised to take place on the site, the characteristics of the plant and the distance of the applicants from the site.

The *Conseil d'État* found that, in this case, the site doesn't produce energy, manufacture or enrich nuclear fuels and is located 60 kilometres from the third parties. It therefore ruled there was no proof of a direct and certain interest and rejected the application to contest the authorisation to create the INB.

Source: CE 24 March 2014, Republic and Canton of Geneva, no. 358882, in the Tables

ELECTRICITY PLANTS CLASSIFIED AS RENEWABLE ENERGY FACILITIES – Order allowing trial period for single authorisation published in the Official Gazette of 21 March

The order of 20 March 2014 allows a trial period of three years, starting in April 2014, for single authorisations of electricity plants classified as renewable energy facilities. The trial period applies to plants generating electricity from wind or biogas and all the renewable energy plants in two regions.

Previously, renewable energy plants needed to obtain a number of separate authorisations. Under the order of 20 March 2014, the authorisation issued by the Prefect will serve as the authorisation to construct and operate the plant, the authorisation in terms of the energy code and provide a protected species waiver. For other types of

renewable energy plants, the single authorisation will serve as an authorisation to operate and provide a protected species waiver.

Source: Order no. 2014-355 of 20 March 2014 relating to a trial period for the single authorisation of renewable energy plants for the protection of the environment

HYDROCARBON PROSPECTING – Administrative Court of Melun annuls Prefectural Order authorising drilling for hydrocarbons

The Administrative Court of Melun has annulled a Prefectural Order authorising a company's exploratory drilling for liquid or gaseous hydrocarbons.

The Court gave three reasons for its decision.

1. Under Article L. 121-1 of the mining code, only the holder of an exclusive prospecting permit could undertake mine prospecting research. This is the case regardless of whether or not certain rights granted by the permit had been transferred to a third party company and whether or not the third party had followed up a request for the exchange of the permit. The authorities are therefore not authorised to permit works to be undertaken jointly by the holder of the permit and the company applying for the request to transfer the permit.
2. From an examination of the facts, the objective of the permit-holder was to search for non-conventional hydrocarbons for future exploitation. This objective could not be fulfilled in accordance with current knowledge of and techniques for hydraulic fracking. The permit-holder's objective was therefore in breach of Article 1 of the law of 13 July 2011, which imposes a general ban on hydraulic fracking
3. The order was based on the provisions of Decree no. 2006-649 which had been judged illegal by the Conseil d'Etat in an order of 17 July 2013, thereby making the order unlawful. The Decree was cancelled on the grounds that it only required a simple declaration—rather than obtaining an authorisation—for all speculative hydrocarbon mining, whatever its importance or effects, even though such works are likely to present serious danger to the environment.

Source: Administrative Court of Melun 12 March 2014, local authority of Nonville, no. 1210920

Public Economic Law

FREEDOM OF TRADE AND INDUSTRY – Conseil d'État suspends the execution of the decree of 27 December 2013 relating to pre-booking chauffeur-driven tourism vehicles (VTCs)

VTC companies raised a number of concerns with the *Conseil d'État* about the Decree, particularly the introduction of a deadline of 15 minutes from the client's booking to the arrival of the VTC. In looking into the issues the companies raised, the *Conseil d'État* t found there was serious doubt as to the legality of the decree.

The authorities had intended the decree to distinguish VTCs from normal taxis. The *Conseil d'État* found however, that this intention was not sufficient to justify a number of measures in light of the principle of freedom of trade and industry. The *Conseil* noted in relation to the deadline that this was fulfilled as a result of the investments made by VTC companies and the potential risk of loss of clientele for normal taxis resulting from the decree.

Source: CE 5 February 2014, SAS Allocab, no. 374524

ABUSE OF A DOMINANT POSITION – An order authorising the creation of a professional association of notaries does not automatically constitute an abuse of a dominant position

A group of notaries complained to the *Conseil d'État* about the creation of an association of Notaries that arose from the merger of two practices and had been authorised by the Attorney General. The plaintiffs argued that the order automatically created an abuse of a dominant position.

The *Conseil d'État* dismissed the action on the grounds that

> *An action that does not restrict the relevant market can only be rejected if the action has the object of, or automatically means the association arising from the merger is, abusing a dominant position.*

The *Conseil* found that was not the case in this situation and rejected the plaintiffs' complaint.

Source: CE 5 February 2014, SCP Gagnebien and Galibert, no. 365968

PAVEMENT TAX – *Conseil d'État* rules that the public occupation of public property that does not prevent the right of use for all, does not need to be authorised nor subject to the payment of a charge

The *Conseil d'État* has upheld a ruling by the Administrative Court of Appeal of Marseille that had annulled a decision by the Avignon local authority. Avignon had initiated a charge for the use of public property for all automatic bank machines installed on the front of a building and directly accessible from public property (pavements).

The *Conseil* found that the presence of the bank's customers on public property for the time of a banking or commercial transaction did not constitute private use of public property by these establishments, any more than it exceeded the right of use for all.

Source: CE 31 March 2014, local authority of Avignon, no. 362140

Contracts

REVERSAL OF JURISPRUDENCE – *Conseil d'État* allows third parties direct recourse against a contract likely to be harmful to them

The *Conseil d'État* has reversed its ruling in Martin (EC, 4 August 1905, no. 14220), by deciding that third parties can in fact contest the validity of a contract or some of its clauses.

The *Conseil* first recalled that any third party to a contract whose interests are likely to be harmed by that contract has the right to contest its validity or any specific, non-statutory clauses. Third parties may also request the suspension of the contract, as long as they do so within two months.

The *Conseil* clarified that this two month period only applies to requests for suspension and additional objections cannot be raised after the initial challenge.

The *Conseil d'État* has thus resurrected third parties' ability to take legal action, but it is worth noting that third parties can only contest a contract they can show that it directly injures their interests.

The judge can either decide to allow the contract, invite the parties to take measures to change clauses within a deadline that he establishes or, after having verified that his decision will not have an excessively adverse effect on the general interests, terminate or annul the contract. If the third parties are not satisfied with the judge's ruling, they have the option to appeal.

Source: CE 4 April 2014, Department of Tarn et Garonne, no. 358994, Lebon

PUBLIC-PRIVATE PARTNERSHIPS (PPP) - Administrative Court of Appeal of Paris validates recourse to a PPP for the completion of the future Palace of Justice of Paris

Under the terms of Article 2 of the order of 17 June 2004, "recourse to a partnership agreement constitutes a waiver of the common law of public order and is reserved only for situations that fulfil the criteria for general interest defined in that law".

In this case, the Administrative Court found that the urgency and complexity of this project met the criteria of supporting the general interest. At present, the various departments of the High Court of Paris are dispersed in various locations, which prevents efficient service, and the project is made complex by its sheer size – the new premises are exceptionally large.

Source: CAA Paris 3 April 2014, Association "Justice in the City" and Mr. Bourayne, no. 13PA02769, no. 13PA02766 and no. 13PA02770

CANDIDATURE – *Conseil d'État* confirms a company placed in receivership after the closing date for submissions can still participate in a public tender procedure

The *Conseil d'État* has ruled that companies that go into receivership after applying for a public tender can still be included in the tender procedure.

The *Conseil* clarified, however, that a company in this position first needs to prove its ability to fulfil the contract for its full term. A judge must then assess the company and determine whether or not it can continue with the tender procedure or annul the company's application.

Source: CE 26 March 2014, Local authority of Chaumont, no. 374387

PRE-CONTRACTUAL SUMMARY LITIGATION – Request to annul contracts rejected, as awarding body only informed of original request to annul the awarding procedure after the contracts were awarded

The *Réunion* region launched several invitations to tender to complete the new coast road. Eiffage TP tendered for the contract for two stages. Its applications were rejected and it presented the the Administrative Court judge with two requests to annul the tendering procedure. Eiffage did not, however, inform *Réunion* that it was challenging the region's rejection of its applications until after *Réunion* had awarded the contracts to other companies.

Eiffage TP subsequently presented the judge with two summary requests to annul the contracts, arguing that *Réunion* should have delayed the signing of the contracts in light of Eiffage's challenge to the procedure. The Administrative Court ruled these second requests inadmissible because Eiffage TP had not informed *Réunion* of its first challenge in time.

The *Conseil d'État* agreed with the Administrative Court that Eiffage TP had not informed *Réunion* of the pre-contractual challenge in time which therefore also prevented Eiffage TP from bringing the second challenge.

Source: CE 5 March 2014, Company Eiffage TP, no. 374048

TERMINATION – Fault committed by a contractor is likely to justify termination to its exclusive blame

The *Conseil d'État* has ruled that a contractor can be held exclusively responsible for the termination of a public contract as a result of a serious fault on the part of the contractor.

In this case, the *Conseil* noted that, as Environnement Services was not able to execute the services constituting the object of the contract, it had committed a fault sufficiently serious to justify termination to its exclusive blame, even though the contract did not mention a completion deadline.

Source: CE 26 February 2014, Company Environnement Services, no. 365546

DIRECTIVES ON CONCESSIONS AND CONTRACTS – Directives on the execution of public contracts and concessions published in the Official Journal of the European Union on 28 March

New Directive 2014/24, relating to the execution of public contracts revokes Directive 2004/18. Directive 2014/24 simplifies the tendering procedure, provides easier access for small and medium sized businesses to public contracts and combines the awarding bodies that assess the tenders.

New Directive 2014/23 introduces for the first time a juridical framework for the awarding of concessions across both the public and private sectors. The one exception is concessions for the provision of drinking water.

Contrary to French law, the directive requires the publication of notices of the availability of the concession and its subsequent awarding in the Official Journal of the European Union. It also requires the establishment of a hierarchy of the criteria used in the allocation of contracts and the conditions under which the modifications made to a concession pending implementation must require a new contract.

These Directives must be transposed by Member States no later than 18 April 2016.

Source: Directive no. 2014/23/EU of 26 February 2014, Directive no. 2014/24/EU of 26 February 2014, Directive no. 2014/25/EU, Press Communiqué of Pierre Moscovici of 12 March 2014 no. 1141

Public Health

MEDICAL DEVICES – Serious doubt cast on the legality of a ministerial order relating to the reimbursement of the cost of medical treatment

The *Conseil d'État* has suspended the execution of an order that meant patients would only be able to claim the cost for a medical device for sleep apnoea if they used it "correctly" under certain conditions.

Certain conditions, such as the urgency of the project, have to be fulfilled for the Conseil to suspend an order. In addition to noting that the situation fulfilled the urgency criterion because of the potential financial

consequences of the order on users of the device, the Conseil d'Etat suggested there was also serious doubt as to the competence of the ministers in charge of health and the budget to make such an order.

Source: CE Ord. 14 February 2014, National Union of Domiciliary Health Associations and others, no. 374699

TRANSPARENCY – New draft decree modifying certain provisions of decree no. 2013-414 of 21 May 2013 relating to the transparency of the advantages granted by companies producing or commercialising products for health and cosmetic purposes

The draft decree postpones to 1 August 2015 the date by which conventions involving health professionals and the advantages that were granted to them or paid in 2012 and during the course of the first semester of 2013 must be posted on a website set up specifically for this purpose. The obligation to forward this information to the National Council of the Order has been removed.

The information relating to conventions and advantages received should be posted on the public website no later than 1 August in the case of conventions and advantages related to the first semester of the current year, and no later than 1 February in the case of conventions and advantages related to the second semester of the previous year.

The draft decree sets out the information that must be included in contracts entered into with health professionals with a view to the organisation of a conference. The businesses concerned must publish on the website the identity of the organiser and the name, date and venue of the event

Source: Draft decree modifying the provisions of the Public Health Code relating to the transparency of connections of interests in the field of health

State Aid

UNLIMITED GUARANTEE GRANTED BY A STATE – The status of public industrial and commercial establishment (EPIC) is likely to constitute State aid under European law

The Court of Justice of the European Union (CJEU) has confirmed that the unlimited guarantee provided by the French State to companies that have the status of an EPIC, constituted State aid under Articles 107 and 108 of the Treaty on the functioning of the European Union.

The European Commission had noted in 2010 the existence of an unlimited implicit guarantee by the French State in favour of La Poste, which was structured as an EPIC. According to the Commission, this guarantee attached to EPIC status created a two-fold advantage. First, the creditors of these businesses are in a more favourable position than the creditors of private individuals as the French State would bail out their debts, thus preventing the bankruptcy of public companies formed as an EPIC. Second, this guarantee allows EPIC businesses to obtain more favourable credit terms.

The Commission concluded that this unlimited guarantee granted by the State to La Poste constituted unlawful State aid. The CJEU agreed, stating that in order to prove the advantage gained by such a guarantee, it is sufficient for the Commission simply to establish its existence, it doesn't have to demonstrate its effects.

This confirmation of the link between the status of EPIC and State aid places a question mark over the continuation of this status for several public companies, such as RATP or SNCF.

Source: CJUE 3 April 2014, France vs. Commission, C-559/12 P

PUBLICATION – Review of the European Union Chronicle of State Aid 2013

The chronicle is a summary of the national and EU decisions given during the course of 2013 in relation to State aid.

Two important decisions from 2013 directly concerned French schemes: aid granted to France Telecom in 2002 and the obligation to purchase wind-generated electricity at a price exceeding its market value.

Source: Laurent Ayache and Quentin Lejeune, Chronicle of jurisprudence related to State Aid for the year 2013, Review of the European Union, March 2014, no. 576

AIR TRANSPORT – Three categories of aid authorised by the European Commission in its new guidelines

The European Commission published new guidelines on 20 February 2014 on State aid for regional airports and airline companies. The guidelines include two categories of authorised aid.

1. State aid in favour of investments in airport infrastructure is authorised if there is a real need for

transport and the granting of public aid is necessary to guarantee the accessibility of a region. This aid may not exceed 75 per cent of the "eligible costs" for airports that accommodate fewer than one million passengers per year, 50 per cent for those accommodating between one and three million passengers and 25 per cent for those accommodating between three and five million.

2. Aid for running regional airports that accommodate fewer than three million passengers per year is authorised for a transitional period of 10 years. The maximum amount of the authorised aid for each year of the transition period will be 50 per cent of the initial operating deficit of the airport. For airports with fewer than 700,000 passengers per year, the maximum amount of the authorised aid will be 80 per cent of the initial operating deficit for the first five years of the transition period, at the end of which the situation will be reassessed by the Commission.

Source: Communication from the Commission, Guidelines on State aid to airports and airlines, IP/14/172 20/02/2014