McDermott Will & Emery

Focus on Regulatory Law

The latest developments in regulated sectors

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This issue, we welcome contributions from our Italian offices. These consist of several decisions from Italian administrative courts, including decisions on State aid and regulatory matters.

We also cover long-awaited decisions in France concerning trade secrets, public contracts and public health.

REGULATORY AUTHORITIES

FRENCH COMPETITION AUTHORITY – It is now possible to directly challenge before the French Supreme Administrative Court (Conseil d'État) decisions made by the General Rapporteur to refuse to protect trade secrets, or to reveal trade secrets.

According to Article R. 464-29 of the French Commercial Code, the decisions of the General Rapporteur of the French Competition Authority concerning protection of trade secrets or revealing trade secrets cannot be directly challenged before a court. Such a claim can only be brought as part of a substantive claim against an Authority decision.

Owing to the extended effects of such decisions and their potential irreversibility, the Conseil d'État ruled that Article R. 464-29 infringed the right to an effective remedy as provided by Article 16 of Declaration of the Rights of Man and of the Citizen, and therefore ordered the Prime Minister to revoke it.

Source: CE, 10 October 2014, Syndicat national des fabricants d'isolants en laines minérales manufacturées, No. 367807.

FRENCH COMPETITION AUTHORITY – Conseil d'État clarifies conditions for assessing "collective dominance" in the case of a merger.

Collective dominance exists where the operators in an oligopolistic market can, without an explicit agreement, implicitly coordinate behaviours, as they would consider it possible and economically rational to adopt the same policies with the aim of selling at above-competitive prices, without any actual or potential competitors, customers or consumers being able to react effectively. To determine whether or not the companies that were part of the merger at issue coordinated their behaviours, the Conseil d'État used the three conditions laid down by the EU Court of First Instance in AirTours (CFI, 6 June 2002, T-342/99):

1. The market must be sufficiently transparent, allowing each undertaking to know accurately and immediately how the behaviour of the other undertakings will evolve.

2. The undertakings must have established some form of deterrent to ensure they all comply.

3. The reactions of customers and undertakings that do not participate in the coordination, such as current or future competitors, should not be capable of jeopardising the outcome expected from the coordination.

The Conseil d'État clarified that the Authority does not have to analyse the market against each of these criteria in order to determine whether or not the merger can be authorized. Instead, it must assess whether or not there is a risk of coordinated behaviours by looking at the wider economic effects of a potential coordination, with regard to these criteria.

Source: CE, 5 November 2014, Société Wienerberger, No. 373065.

FRENCH DATA PROTECTION AUTHORITY – The Decree that authorises the implementation of automatic processing of personal data related to disability pensions complies with the French Law of 6 January 1978 on Information Technology, Data Files and Civil Liberty.

The Conseil d'État has ruled that the Decree authorising the Ministry of Defence to automatically process personal data in order to manage applications for disability pensions and monitor the payment of pensions, was justified by public interest. It was therefore not subject to Article 8 of the French Law of 6 January 1978 that forbids, in principle, automatic processing of personal data related to health.

The Conseil d'État also specified that the communication of information on health to the administrative services responsible for processing applications for invalidity pensions, whose staff are bound by confidentiality requirements, did not infringe Article 6 of 6 January 1978. This Article provides that personal data must be collected and processed in a lawful manner that respects the data subject's privacy.

Source: CE, 15 October 2014, Union national du personnel en retraite de la gendarmerie, No. 358876.

ENERGY

PUBLIC SERVICE TAX ON ELECTRICITY – The Constitutional Council and the Conseil d'État rendered two new decisions.

The public service tax on electricity is paid by electricity consumers in order to compensate the cost of public service obligations born by electricity providers. Because it is complex to understand, its legal regime recently gave rise to two decisions: the first one rendered by the Constitutional Council, and the second by the Conseil d'État.

On 8 October, the Constitutional Council considered that the rules concerning a potential challenge to the tax before French courts were clear enough and therefore did not infringe any constitutional provision.

On the basis of this decision, on 6 November the Conseil d'État refused, in a subsequent case, to refer to the Constitutional Council a Priority Preliminary Ruling on Constitutionality concerning the methods used to assess the rate of the tax. It considered that the question at stake was neither new nor of a serious nature.

Source: Constitutional Council, 8 October 2014, Société Praxair SAS, decision QPC No. 2014-419; CE, 6 November 2014, Association Hôpital Paul Desbief, No. 383495.

LIQUID AND GASEOUS HYDROCARBONS – Shell did not infringe the French Mining Code while prospecting for liquid and gaseous hydrocarbons off the coast of Guyana.

Several environmental organizations challenged before the Administrative Court of Cayenne two prefectural orders that acknowledged Shell's declaration to start prospecting for liquid and gaseous hydrocarbons off the coast of Guyana.

The Court had to determine whether hydrocarbon prospecting was subject to a prior authorization by the relevant authority, as the applicants claimed, or a simple declaration that is then acknowledged, as Shell claimed.

In a previous decision, the Conseil d'État had ruled that a Decree providing that prospecting for liquid gaseous hydrocarbons was always subject to a simple declaration, regardless of the potential dangers and harm the prospecting could cause, infringed Articles L.161-1 and L.162-3 of the French Mining Code. Under these Articles, drilling works

that can cause serious dangers and harm to the environment or to human health are subject to a prior authorization.

Following this decision, a new Decree was adopted on 11 February 2014 that required a prior authorization for hydrocarbons prospecting.

In this case, the Administrative Court of Cayenne ruled that this provision did not apply to the prefectural orders at stake, as these orders were adopted before 11 February 2014. The Court then considered that the Prefect's acknowledgment of Shell's declaration to start drilling was compatible with Articles L. 161-1 et seq. of the French Mining Code and therefore dismissed the applicants' claim.

Source: Administrative Court of Cayenne, 2 October 2014, France Nature Environment, No. 120120.

PUBLIC ECONOMIC LAW

ECONOMIC REGULATION – Legal provisions related to pre-booked chauffeur-driven tourism vehicles conform with the Constitution.

On 17 October, the Constitutional Council ruled that Articles L. 231-1 to L. 231-4 of the Tourism Code, which establishe a new legal regime for pre-booked chauffeur-driven tourism vehicles (VTC), are compatible with the Constitution.

Taxi drivers claimed that, as they themselves are subject to a specific regulation, competition with VTCs, which are not subject to the same regulation, infringed the principle of equal treatment.

The Constitutional Council first noted that providing transport in response to a booking can be freely undertaken by both VTCs and taxis. It therefore ruled that the principle of equal treatment did not apply differently to VTCs and taxis in relation to this activity.

Under French Law, the principle of equal treatment requires that two people in the same situation are treated the same way. It does not require, however, that two people in two different situations are treated differently.

In this case, taxis and VTCs were not in the same position because taxis are subject to an authorization regime because, unlike VTCs, they not only provide transport in response to a booking, but are also available to hail.

Applying the definition of the principle of equal treatment, the Constitutional Council ruled that, even if taxis and VTCs are not in the same situation, they can be treated the same way with regard to the activity of providing transport in response of a booking.

It also ruled that the contested legal provisions did not infringe the freedom of trade and industry, the right to property or the protection of the environment.

Source: Conseil constitutionnel, 17 October 2014, Chambre syndical des cochers chauffeurs CGT-taxis, QPC No. 2014-422.

OPERATORS OF ELECTRONIC COMMUNICATIONS The Minister for the Economy is authorized to oblige operators of electronic communications to deliver, for free and before any payment is made, a detailed paper invoice.

The Conseil d'État confirmed the legality of an Order of 31 December 2013 by which the Minister for the Economy instituted an obligation on operators of electronic communications to deliver, for free and before any payment is made, a detailed paper invoice at their clients' request.

The Conseil d'État stated that Article L. 113-3 of the Consumer Code authorized the Minister for the Economy to determine under which conditions the consumer is informed about the price and specific terms of a sale.

The Conseil then recalled that Article D. 98-5 of the Code for Post and Electronic Communications obliges operators of electronic communications to send detailed invoices to their clients, for free and at their request.

For these reasons, the Conseil d'État concluded that the Minister was authorized to institute the obligation.

Source: CE, 31 October 2014, Sociétés Free et Free mobile, No. 376072.

WORKS OF ART – The legal provisions that enabled the French Government to retain works of art infringed the Constitution.

Article 2 of the Law of 23 June 1941 enabled the French Government to retain, at a price defined by the exporter, works of art that were refused authorization to be exported owing to their national interest for art or for history.

The Law of 23 June 1941 was actually revoked in 1992 but, before its repeal, the French Government took the decision to retain some works of art

belonging to a French citizen. In order to obtain the withdrawal of this decision, he challenged the conformity of Article 2 with the French Constitution.

According to the Constitutional Council, by enabling the forced acquisition of such works of art, which had already been prevented from leaving French territory, the law instituted a deprivation of property without justifying it by public necessity. The contested legal provision therefore violated Article 17 of the Declaration of the Rights of Man and of the Citizen, which establishes a right to property.

Source: Constitutional Council, 14 November 2014, QPC No. 2014-426.

HIGH-SPEED TRAIN FARE – Diverse fares do not violate the principle of equality.

The Conseil d'État was notified by regional authorities that the new fares for the high-speed train on the Lille-Paris route were much higher than the price per kilometre paid on other high-speed train routes.

In considering its judgment, the Conseil recalled that the SNCF, the French National Railway Company, was able to establish specific fares where the route presented certain benefits in terms of comfort and travel time.

After having stated that the principle of equality did not prevent the establishment of different fares for different routes, the Conseil d'Etat ruled that the services rendered to the passengers were superior on the Lille-Paris route to those on other lines, which justified the difference in fares.

Source: CE, 10 October 2014, Région Nord-Pas-de-Calais, No. 368206.

ILLEGAL EXPROPRIATION – Administrative Court of Appeal of Bordeaux rules administrative courts have jurisdiction over claims for damage related to infringements of the right to property involving public authorities and private businesses that undertake public works

The plaintiff in this case was seeking reparation for the damage caused on her property by the establishment of a utility pole by Électricité de France.

The Administrative Court of Appeal of Bordeaux ruled that administrative courts have jurisdiction over actions for damage where those actions are directed not only towards public authorities, but also towards private businesses that undertake public works, even when the public works infringe the right to property and cannot be attached to any power that belongs to public authorities.

It should, however, be noted that in case of an illegal and definitive dispossession by public authorities, the judiciary courts would have jurisdiction over such an action.

Source: Administrative Court of Appeal of Bordeaux, 13 November 2014, No. 13BX00121.

CONTRACTS

PUBLIC CONTRACTS – Clarification of the definition of the "exorbitant clause" in public contracts.

In a decision of 13 October 2014, the Tribunal des Conflits defined more precisely the notion of "exorbitant clause". This is a highly unusual clause under French law which, if it appears in a contract with a public authority, causes the contract to be governed by administrative law.

One example of an "exorbitant clause" is a clause providing for the possibility for the public contracting authority to unilaterally terminate the contract, or to direct, supervise or monitor the execution of the contract.

At issue in the case at hand was the nature of a contract entered into between the city of Joinville-le-Pont and a rowing club to which the city had leased a building for rowing practice, for a period of 79 years and a rent of €1.

The Tribunal des Conflits found that the contract did not constitute an occupation of public property. It also did not constitute a perpetual lease governed by administrative law, because the club was only using the premises for rowing and the investments required to maintain the property were to be borne solely by the city.

The Tribunal also ruled that the contract in question did not contain any clauses that could be considered to be exorbitant, given the prerogatives granted to the co-contracting public authority, while no general interest could justify that the contract is governed by administrative law. The contract was instead governed by ordinary law.

Source: TC, 13 October 2014, SA AXA France Iard, No. C3963.

UNILATERAL RIGHT OF TERMINATION – Application of a unilateral termination clause by a party contracting with a public authority.

The Conseil d'État has specified the conditions under which a party contracting with a public authority can unilaterally terminate a contract.

According to the Conseil, the parties can freely determine these conditions, as long as the contract is not for the execution of a public service and the public authority can still refuse the termination of the contract by invoking reasons of public interest.

When the public authority invokes a reason of public interest, the other party must keep performing the contract. If it fails to do so, this could lead to the termination of the contract at the exclusive fault of the other party.

The other party can, however, contest before a court the reason of public interest that had been invoked by the public authority.

Source: CE, 8 October 2014, Société Grenke Location, No. 370644.

PUBLIC-PRIVATE PARTNERSHIPS (PPP) – PPP illegal as Conseil d'État rules project not complex enough.

The Minister of Environment entered into a PPP to build and operate 63 maintenance and intervention centres on national roads. The Administrative Court of Cergy-Pontoise subsequently ruled that this project was not complex enough to justify the recourse to a PPP.

The complexity criterion requires the public authority to demonstrate that it is not able, by itself, to establish the technical or financial scope of the project, nor set the legal framework. The Court added that the complexity must be demonstrated by the public authority, and that neither the conclusion of the final screening assessment, nor the report by the Minister of the Economy's PPP support committee, could not be considered as proof of complexity.

Source: Administrative Court of Cergy-Pontoise, 6 November 2014, Conseil national de l'ordre des architects, No. 120530.

DAMAGES – If a candidate's offer does not conform with the requirements of the tendering procedure, the candidate cannot be compensated when the offer is rejected, even if the rejection does not conform with the requirements of the rules provided by the French Code on Public Procurement.

On 8 October, the Conseil d'État ruled that, when a candidate's offer, which was itself irregular, has been irregularly rejected from a tendering procedure, the candidate could not be considered as having been deprived of a serious chance to be awarded the contract.

This reasoning also applies when the selected offer is also irregular.

Source : CE, 8 October 2014, Syndicat intercommunal à vocation multiple de Saint-François-Longchamp Montgellafrey, No. 370990.

CONFLICT OF INTEREST – The fact that a public contract concluded by a French town was awarded to a company of which the Deputy-Mayor is a member of the board of directors does not necessarily infringe the principles of impartiality and equality of treatment.

The town of Saint-Louis awarded a public contract concerning the exploitation and maintenance of the heating system of the town buildings to EBM Thermique.

The Deputy-Mayor of Saint-Louis was a member of the board of directors of the Swiss company EBM, the parent company of EBM Thermique. EBM is a cooperative company, which means its customers are also its shareholders and also function as board members.

The Conseil d'État refused to annul the tendering procedure, finding that the Deputy-Mayor had been elected to the board in his role as customer/shareholder of the cooperative company, and there was no proof that he could have had a personal interest in the tendering procedure or any particular power to influence it. As a result, the Conseil d'État ruled that, in this case, the principles of impartiality and equality of treatment had not been infringed.

Source: CE, 22 October 2014, Dalkia, No. 382495.

PUBLIC PROCUREMENT – The Conseil d'État clarified the situations in which the obligation to communicate the characteristics and advantages of the selected offer in a public procurement procedure extends to the sub-criteria.

According to Article 80 of the French Code on Public Procurement, the public authority must inform the rejected candidates of the name of the selected candidate, and the reasons behind the authority's choice. According to Article 83 of the Code, the public authority must also pass on to the rejected candidates, at their request, the characteristics and advantages of the selected offer.

The Conseil d'État was informed by a rejected candidate that they did not receive an answer to a request to be informed of the score achieved by the selected candidate for each of the sub-criteria taken into account by the public authority. The Conseil d'État ruled that, owing to the nature and importance of the sub-criteria, they could have influenced the selection of the offers and must, as such, be considered as selection criteria.

As a result, the Conseil found that the public authority that refused to answer to the candidate's request had failed fulfil its obligation to ensure a transparent and competitive process in the tender procedure.

Source: CE, 7 November 2014, Syndicat départemental de traitement des déchets ménagers de l'Aisne, No. 384014.

PUBLIC PROCUREMENT – When defining the method for scoring the offers in a tendering procedure, public authorities must not equalize the weighting of each criterion.

The Conseil d'État ruled that the scoring method that has been defined by a public authority in a tendering procedure is considered unlawful if it reduces the significance of certain selection criteria, or equalizes their weighting, leading to a situation where the best score is not given to the best offer.

This rule applies whether or not the public authority makes the scoring method public.

Source: CE, 3 November 2014, Commune de Belleville-sur-Loire, No. 373362.

WORKS CONCESSION – Early transposition of an amendment's provision.

By a Decree of 6 November, which will enter into force on 1 January 2015, the French Government transposed in advance subsection b, paragraph 1) of Article 43 Directive 2014/23/EU, which focuses on amendments to contracts for public works concessions, concluded by the French State and public entities without commercial or industrial purposes.

This Decree defines the criteria that allow the modification of a public work contract that is currently being executed.

An amendment to a public works contract could be introduced for additional works or services if they were not included in the initial concession but have become necessary, as long as the amendments fulfil all the following criteria:

- The change of the original concession holder is not in response to economic or technical reasons.
- The change of the original concession holder would not cause significant inconvenience or substantial duplication of costs.
- The amount of additional works or services does not exceed 50 per cent of the value of the original concession.

In addition, where several successive modifications are made, the limit of 50 per cent applies to each modification. Even if the Decree does not make the point explicitly, the Directive specifies that consecutive modifications must not be aimed at circumventing this Directive.

Finally, even if no new concession procedure is undertaken, the change in contract must be advertised.

Source: Decree No. 2014-1341 of 6 November 2014 modifying Decree No. 2010-406 of 26 April 2014 related to contracts of public works concession and introducing various provisions on public procurement.

DIRECTIVE ON PUBLIC CONTRACTS – Early transposition of urgent measures

By a Decree of 26 September 2014, the French Government transposed in advance some provisions of the Directive 2014/24/EU of February 26th 2014 on public procurement related to

simplification measures fostering innovation and access to public purchasing.

Amending the French Code on Public Procurement and the Order No. 2005-649 of 6 June 2005, this Decree improves access to public contracts by providing that the public purchaser cannot require that the candidate have a minimum turnover that exceeds twice the estimated value of the public contract or lots, except if a higher turnover is necessary with regard to the object of the contract.

This Decree also added innovation partnerships to the French Code on Public Procurement. Innovation partnerships are public contracts that focus on research and development (R&D), and the acquisition of works, supplies or innovative services resulting from such research.

Within the meaning of the Decree, "innovative" refers to a new or significantly improved product, service or process that meets a need that cannot be met by solutions already available on the market.

Innovation partnerships result from a transparent competitive tendering procedure that works alongside the progress of R&D and the acquisition of the product, service or works resulting from the research.

Source: Decree No. 2014-1097 of 26 September 2014 related to simplification measures in public contracts.

PUBLIC HEALTH

MEDICAL BIOLOGY ANALYSIS - Article L. 6211-21 of the Code of Public Health is compatible with the French Constitution.

On 1 October, the Conseil d'État referred to the Constitutional Council a Priority Preliminary Ruling on Constitutionality concerning Article L. 6211-21 of the Code of Public Health. This Article, which sets the price for analyses of medical samples, provides the possibility to set up discounts, but only for those medical laboratories that are part of health care facilities, or have signed cooperation agreements in compliance with Article L. 6212-6 of the Code of Public Health.

The Conseil d'État's question concerns whether or not this provision infringes the freedom of trade and industry, as it prohibits most laboratories from setting a price for analyses of medical samples below the regulated price set by Article L. 6211-21 and, as a result, makes them less competitive.

On 5 December, the Constitutional Council ruled that Article L. 6211-21 of the Code of Public Health is compatible with the French Constitution. It noted that the Article established different prices in order to promote the development of medical laboratories within health care facilities, as well as reduce their costs by helping them to share their resources. The difference in price was therefore justified by an objective of public interest.

As a result, the Constitutional Council ruled that the contested provision did not infringe the freedom of trade and the principle of equal treatment.

Source: CE, 1 October 2014, Société de laboratoires de biologie médicale Bio Dôme Unilabs, No 382500 ; Constitutional Council, 5 December 2014, Société de laboratoires de biologie médicale Bio Dômes Unilabs, QPC No. 2014-434.

PROTECTIVE MEASURES – The French State can pass protective measures for public health, but it must repeal those measures as soon as they become contrary to European law.

By an order of 14 November 2000, the French Government suspended the use of fish meal to feed farmed animals, in order to protect public health. When the Council of the European Union forbade the use of animal protein to feed farmed animals from 1 January 2001, it did not include fish meal. The French Government did not repeal the ban on fish meal until 15 February 2001.

In a case brought by a French company that imported and exported fish meal, the Conseil d'État ruled that national authorities had the right to pass temporary protective measures to protect human and animal health, but were required to end such measures as soon as European measures that were contrary to the national ones came into force.

Source: CE, 20 October 2014, SAS Sopropêche, No. 361686.

BLOOD DONATION – The retention of a blood donor's personal data relating to health or sexual orientation, without the donor's explicit consent, does not infringe the Constitution.

The applicant in this case claimed that the provision of Article L. 1223-3 of the French Code of Public Health, which allows the French Blood Agency to adopt rules permitting a blood donor's file to include personal data related to his or her health and

sexual orientation without the donor's explicit consent, infringed the Constitution.

The Constitutional Council noted that it is allowed to provide exemptions to the prohibition on collecting personal data related to health and sexual orientation without the person's explicit consent.

It therefore ruled that Article L. 1223-3 only required the French Blood Agency to adopt rules of good practice, and did not in itself infringe any right or freedom protected by the French Constitution.

Source: Constitutional Council, 19 September 2014, M. Laurent D., No. 2014-412 QPC.

GENERIC MEDICINAL PRODUCTS – The manufacturer of a reference medicinal product can contest the marketing authorization granted to a generic version in order to protect the manufacturer's legal rights.

According to Article 47 of the Charter of Fundamental Rights of the European Union, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.

As a result, the Court of justice of the European Union ruled in this case that the manufacturer of a reference medicinal product must be allowed to protect the rights it holds under Directive 2001/83 on the Community code relating to medicinal products for human use.

The holder of a marketing authorization for a medicinal product has the right to demand that

- The medicinal product is not to be used as a reference product by another manufacturer until a period of eight years has elapsed from the date on which the marketing authorization was granted.
- The generic medicinal product is not to be marketed until a period of 10 years since the marketing authorization of the reference product was granted has elapsed. This period may, where appropriate, be extended to 11 years,
- The medicinal product is not to be used for the purpose of obtaining a marketing authorization for a generic medicinal product where this original medicinal product cannot be regarded as a reference, or where the generic product is not similar to the medicinal product in terms of its composition in active substances and pharmaceutical form.

These are, however, the only rights the manufacturer of a reference medicinal product has to contest a marketing authorization granted to the generic medicinal product.

Source: Court of Justice of the European Union, 23 October 2014, Olainfarm AS, C-104/13.

COMPARATIVE LAW

ITALIAN COMMUNICATIONS AUTHORITY – The Administrative Court of Appeal in Rome has referred to the Constitutional Court the Italian Communications Authority's (AGCOM) Regulation on copyright protection on electronic communication networks.

By order of 26 September 2014, the Administrative Court of Appeal in Rome referred to the Italian Constitutional Court AGCOM's Regulation No. 680/13/CONS of 12 December 2013 on copyright protection on electronic communication networks (including audiovisual media services).

The referral was made in the context of a number of proceedings brought by several consumers and providers' associations, challenging AGCOM's Regulation No. 680/13/CONS before the Administrative Court of Appeal, on the grounds, inter alia, that AGCOM would lack the power to issue precautionary measures (such as the removal of alleged infringing digital works from a website, or to order ISPs to disable access to a website), which instead would belong to the judiciary.

The Administrative Court of Appeal has now referred the case to the Constitutional Court in order to verify whether or not such powers granted to AGCOM to issue precautionary measures may raise doubts in relation to their compatibility with the freedom of expression and the right to be heard in court, as recognized by the Italian Constitution.

In the meantime, Regulation No. 680/13/CONS is still effective and will remain in force unless the Italian Constitutional Court rules that it is contrary to the Italian Constitution.

In a similar case, the French Constitutional Council ruled that the provisions of the Law of 12 June 2009 to promote the dissemination of, while protecting the creation of, creative works on the internet were unconstitutional as they entrust the government-run High Authority for Transmission of Creative Works and Copyright Protection on the

Internet with the power to sanction internet users by blocking their internet access, which infringes the freedom of expression (Constitutional Council, 10 June 2009, No. 2009-580 DC).

Source: T.A.R. (Roma), Sezione I, order No. 10016 of 26 September 2014.

ITALIAN COMPETITION AUTHORITY AND ITALIAN COMMUNICATIONS AUTHORITIES (AGCOM) – Report on the joint inquiry into broadband and ultra-broadband technologies.

On 8 November 2014, the Italian Competition Authority and AGCOM published the results of their joint inquiry into broadband and ultra-broadband technologies.

According to the Authorities, the development of ultra-broadband technology in Italy is still insufficient owing to the lack of infrastructural investments in many geographic areas of the country. They have noted that the development of ultra-broadband networks is essential to meet the objectives of the EU Digital Agenda and for the growth of the economy. They therefore call for public investments, and incentives to encourage private investments, as an indispensable means to meet such objectives.

The Authorities also highlight the current antitrust issues in the broadband technology market in Italy. According to the report, the presence in Italy of a single, vertically integrated operator, which controls the essential input, makes it necessary for fixed network operators, which supply their services through their own broadband infrastructure, to purchase the wholesale access services from the vertically integrated operator. The vertically integrated operator may therefore potentially abuse its dominant position by adopting alleged discriminatory conducts aimed at putting competitors at a disadvantage on the downstream retail market. According to the Authorities, such issues may be dealt with through the use of regulatory tools, either by establishing a single operator with the sole purpose of supplying the other operators with access services in a neutral way, or by setting up joint ventures among several operators, which is considered the second best option.

ITALIAN AUTHORITY FOR ELECTRICITY AND GAS (AEEG) – The Council of State ruled on the nature of the regulatory acts adopted by the AEEG and their compliance with the principle of the rule of law.

In a judgment dated 1 October 2014, the Council of State ruled on the nature of the regulatory acts adopted by administrative independent authorities, such as the AEEG. The judgment clarifies the extent to which acts implementing the relevant regulations are bound by the principle of the rule of law (which requires a prior legislative act to set out the scope and the purpose of the regulatory act), notwithstanding their highly technical subject matter.

The case concerned a decision by the AEEG, which deprived certain small electricity suppliers located in a number of small Italian islands (known as small, non-interconnected electricity companies, or SNIECs) of their special status as exclusive suppliers of electricity at a below-cost price in each island, for which they were subsidised through an ad hoc public fund. Consumers located on those islands could not be supplied by other electricity operators. In 2009, following the 2007 liberalisation of the energy market, the AEEG adopted the contested decision, which set out the legal and technical provisions for granting users of non-interconnected grids the same rights as the other users of the national grid.

The appellants argued, inter alia, that the decision at issue was unlawful, because i) the 2007 energy liberalisation law did not envisage such power for the AEEG and, therefore, ii) the AEEG lacked the power to adopt a regulatory act, the effect of which was to change SNIECs' legal status and their subsidisation.

The Council of State confirmed the judgment by the Administrative Court of Appeal, which dismissed the SNIECs' arguments. It held that, in highly technical matters such as the one at issue, it is sufficient for the law to set out the purpose, general principles and limits of the acts to be adopted by the regulatory authorities, without the need to set out the scope of the act in detail. Regulatory authorities therefore exercise administrative as well normative powers, provided that interested parties have the opportunity to participate in the process for the adoption of the regulatory act concerned. The Council of State found that the AEEG decision complied with the legislative provisions concerning

the AEEG's regulatory powers as regards the national energy policy, and dismissed the appeal.

Source: Consiglio di Stato, Sezione VI, judgment No. 4874 of 1 October 2014.

EXTRAORDINARY BANKRUPTCY PROCEDURES

The Supreme Court of Italy confirmed that the extraordinary bankruptcy procedure for large insolvent companies, set out in the "Prodi Law" of 1979, comply with EU rules on State aid.

On 3 September 2014, the Supreme Court held that the application to a company of an extraordinary bankruptcy procedure (such as the one provided by the Law of 3 April 1979 No 95, the "Prodi Law") may amount to State aid within the meaning of Article 107 TFEU only if

- The company can continue to carry out its business in circumstances that would be precluded by the ordinary rules on bankruptcy proceedings, or
- The company benefited from one or more advantages, e.g., a State guarantee, a lower tax rate or an exemption from pecuniary fines that could not be granted to other insolvent companies under the ordinary rules on bankruptcy proceedings.

French law permitted a similar tax exemption for companies that bought undertakings suffering financial difficulties, but the European Commission qualified this exemption as State aid in its Decision 2004/343/CE of 16 December 2003. Not convinced by the Commission's decision, the Administrative Court of Appeal of Nantes referred a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU considered that the question was manifestly inadmissible (CJEU, 18 April 2013, C-368/12). Following this decision, the Administrative Court of Appeal of Nantes again referred this question to the CJEU in February 2014.

Source: Corte di Cassazione, Sezione I Civile, judgment n. 18580 of 3 September 2014.

UNFAIR COMMERCIAL PRACTICES – The Administrative Court of Appeal in Rome rules on the jurisdiction for damages actions for TV advertising of tobacco and smoking products.

On 24 September 2014, the Administrative Court of Appeal in Rome ruled on a damages action brought by two consumer associations against two TV broadcasting companies (including the national public broadcasting company) for an alleged infringement of Law 10 April 1962 No 165, Law 6 August 1990 No 223 and Law 29 December 1990 No 428, which prohibit the advertising of tobacco products. The claimant argued that the two TV broadcasting companies allegedly advertised tobacco products during sports programs and therefore sought damages.

The damages action was brought before the administrative judge on the grounds that the alleged infringement of the tobacco advertising prohibition would have occurred in the framework of the performance of a public service by the national public broadcasting company. According to the claimants, therefore, the administrative court had jurisdiction to rule on the damages claims arising from the breach of legitimate interests.

According to the Administrative Court of Appeal, the provisions allegedly infringed by the TV broadcasting companies are aimed at protecting consumers, and therefore confer individual rights upon them. Such claims therefore fall under the jurisdiction of the civil judges. In addition, the fact that the parties included the national public broadcasting company was not sufficient to trigger the jurisdiction of the administrative court. According to the Administrative Court of Appeal, no activity carried out by the company amounts to a public service obligation, since it also carries out private activities.

On these bases, the Administrative Court of Appeal dismissed the damages action, citing lack of jurisdiction.

Source: T.A.R. (Roma) Sezione III-ter, judgment of 24 September 2014.