

# Focus on Regulatory Law

*The latest developments in regulated sectors throughout France*



This bi-monthly Regulatory Newsletter synthesizes news in the energy, electronic communications, public health and public procurement legal sectors. The decisions and judgements of the French Supreme Administrative Court (*Conseil d'Etat*, hereafter *CE*) or of the Administrative Courts are referenced at the end of each news.

We hope that you enjoy these legal news updates and that they will be informative and useful to you as you look to stay abreast of changes and news developments in the law.

**Sabine Naugès**  
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## Regulatory Authorities

### **FRENCH AGENCY FOR THE SAFETY OF HEALTH PRODUCTS (AFSSAPS) – Advisory letters of this Agency can be challenged**

AFSSAPS's advisory letters giving recommendations for the use of medication to health care professionals shall be taken into account by physicians while prescribing medication. Thus, such recommendations might represent grounds for a complaint and may be challenged by pharmaceuticals companies before administrative courts.

*Source: CE, Oct. 4, 2013, Société Les laboratoires Servier*

### **AUTORITE DE CONTROLE PRUDENTIEL (PRUDENTIAL SUPERVISORY AUTHORITY) – The Autorité's refusal to exercise its supervisory powers can be challenged**

The *Autorité de contrôle prudentiel* acts as an independent administrative agency to oversee the financial system and to maintain stability. It cannot refuse to exercise its supervisory powers when asked to do so. Thus, the *Autorité* is obliged to cooperate upon request and shall examine each requirement to enforce its supervisory powers. Refusal to act may be challenged before administrative courts.

*Source: CE, Oct. 9, 2013, National Union for social security for government workers and teachers, of National Education*

### **CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL - CSA (AUDIOVISUAL COUNCIL) – Communication of a priority preliminary ruling on constitutionality related to the CSA's powers**

The *Conseil d'Etat* referred a priority preliminary ruling on constitutionality to the *Conseil Constitutionnel* (the French Constitutional Court) on the September 30, 1986 law related to the power of the CSA to give notice to editors and providers of audiovisual communication services and satellite network operators to comply with their obligations.

The *Conseil d'Etat* noted that lack of separation between the functions of investigating and judging might lead to a breach of the constitutional principles of independence and impartiality raises a serious question as to the constitutionality of this law.

*Source: CE, Oct. 7, 2013, Société Sud radio services*

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**HAUTE AUTORITÉ DE LA SANTÉ (FRENCH HIGH AUTHORITY ON HEALTHCARE) – The Conseil d’Etat discussed the issue of conflicts of interest involving investigators and members of the Autorité and the need for transparency within the Autorité**

A member of the *Autorité* cannot address issues he/she has worked in in his/her investigatory work for conflict of interest reasons. However, investigative work on a medicament for the treatment of blood pressure where the investigator served as a secondary investigator and then adjudicates whether this medicament must be covered by health insurance does not rise to the level of a conflict of interest.

Source : CE, Nov. 13, 2013, *Société Novartis Pharma*

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## Contracts

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**EXCLUSION FROM PARTICIPATING IN A BIDDING PROCESS – Eligibility of a public entity to participate in a bidding process outside of its territorial jurisdiction**

A public entity hoping to participate in a bidding process for the award of a public procurement contract outside its territorial jurisdiction must demonstrate a public interest for stepping into another geographical market.

By stating that the award of such a contract would help the entity to develop a new business activity, stabilize profits and investments in the area, and better utilize its personnel, the entity still does not demonstrate such a public interest.

Source : Adm. Tribunal Grenoble, Sept. 23, 2013, *Société SAUR*

**CONCESSION OF PUBLIC SERVICE – The duration of the contract is an essential element**

The duration of a concession is an essential element of the contract. Thus, any modification of the contractual duration by an applicant is prohibited and must lead to the rejection of the applicant's candidature.

Source: Adm. Tribunal Lyon, Oct. 21, 2013, *SA GDF Suez Energie services-Cofely*

**BIDDING PROCESS – The indemnity arising from a lost bid as a result of a faulty bidding process depends on the chances of obtaining the contract**

An improper bidding process could result in liabilities for the breaching party. The damages will be determined based on the loss to the party who would have had an opportunity for business had the contract been performed. If a company had a real opportunity to win the bid, it is entitled to damages.

Source: Adm. Court of Appeal Lyon, Oct. 17, 2013, *Communauté urbaine de Lyon*

**SCORING PROCEDURE – The scoring procedure which results in awarding the contract to the applicant which tenders offers the highest price is vitiated**

The scoring procedure chosen by the contracting authority cannot be challenged before the administrative judge except in cases of mistake of law or illegal discrimination.

In this specific case, the judge held that the scoring procedure resulting in assigning the highest score to the highest price would constitute unlawful discrimination of the applicant tender based on the lowest tender price.

Source: CE, Oct. 29, 2013, *Office public d’habitat Val d’Oise Habitat*

**ABNORMALLY LOW OFFER – Explanation requirement for the rejection of an abnormally low offer**

The contracting authority that decides that one of the tenders appears to be abnormally low or insufficient must ask for the applicant to provide an explanation. If the bidder is notified of the reasons for rejection within due time, and if the bidder was given ample opportunity to contest the ruling, there is no violation.

Source: CE, Oct. 29, 2013, *Department of Gard*

**AWARD OF A PUBLIC CONTRACT TO A PUBLIC ENTITY – The judge may ask for further documents to ensure that competition among candidates has not been distorted**

Such a request is allowed in order to ensure that a public entity submitting a bid in response to an open call for tender did not take any unfair advantage of resources granted with respect to its public service mission.

Source : Adm. Court of Appeal Bordeaux, Nov. 25 2013, *Chambre de commerce et d’industrie de Bayonne-Pays basque et Grand port maritime de Bordeaux*

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## Responsibility

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**REFUSING TO USE THE POLICE FORCE TO CARRY OUT EVICTIONS – Details on the State’s liability**

The injury suffered as a consequence of the public authority’s refusal to carry out evictions will be measured in damages based on the last possible accounting by the claimant at the date the claimant files the case.

Sources: CE, Oct. 7, 2013, *Mr. and Mrs. A., n°351368* and CE, Nov. 6, 2013, *Minister of the Interior*

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## STATUTE OF LIMITATIONS – Four-year Statute of Limitations in litigation concerning evolving damages claims

When bringing actions against the administration, damage claims' statute of limitations periods are set at four years.

However, the total damages may be measured over time, as the damages continue to occur and evolve. This case involved a multi-media facility which caused a noise nuisance to a neighbor. The neighbor had a right to continued damages, evaluated each year the damages were incurred.

*Source: CE, Nov. 6, 2013, Mme. A., n°354931*

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## Environment and Zoning

### PRECAUTIONARY PRINCIPLE – A mayor cannot implement further requirements, based on the Precautionary principle, beyond what is required in legislation

The mayor is not allowed to invoke the precautionary principle to request for more documents than legally required regarding the construction of mobile phone relay antennas.

*Source: CE, Oct. 21, 2013, Société Orange France*

### PRELIMINARY PUBLIC INVESTIGATION – Scope of application

The order setting the rules applicable to installations classified for the protection of the environment shall be subject to a preliminary public investigation pursuant to the French Environmental Code.

Thus, the Court should rule in favor of the suspension of such an order if it has not been subject to this prior investigation.

*Source: CE, Oct. 18, 2013, Association Centre national d'information indépendante sur les déchets et autres*

### WINDMILLS – Municipalities do not have standing to challenge a refusal to issue a windmill construction permit

Municipalities have no standing to challenge a refusal by another public authority to issue a windmill construction permit to a company.

The Court held there was no direct or personal interest, either in the plaintiffs' argument that they would miss out on an opportunity to collect further tax revenue or in the plaintiffs' argument for the need to fight climate change, for granting the municipalities standing to file a case where a private company was denied the permit.

*Source: Adm. Court of Appeal Douai, Oct. 24, 2013, Commune d'Iron et Communauté de communes de la région de Guise*

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## In Brief

### BIENS DE RETOUR (RETURNABLE ASSETS) – Returnable assets are the property of the public entity from the time the assets are manufactured or purchased

The concessionaire is not subject to the property tax regarding properties that were constructed for a public purpose under a public contract (returnable assets). From the time they are manufactured or the time they are purchased, those properties are deemed to be returnable assets belonging in all situations to the public entity.

*Source: CE, Oct. 21, 2013, Ministre du Budget*

### ACCESSIBILITY AND COMPREHENSIBILITY OF LEGISLATION – The Conseil d'Etat cancelled a disposition of a decree which did not adhere to this principal

The Court has held that an argument based on a constitutional violation for failure of the law to be clear and understandable is acceptable.

In this case, the Decree in question referred to an inexistent provision of another regulation, thereby breaching the constitutional principle of legislation's accessibility and comprehensibility.

*Source: CE, Oct. 29, 2013, Association les amis de la rade des calanques et autres*

### SHALE OIL – No urgency to suspend a refusal to transfer a license an oil and gas permit

The *Conseil d'Etat* ruled that the absence of objection of the Ministry to the notification of a transfer of rights according to article 43 of the 2 June 2006 Decree does not create a legitimate expectation for the applicant to actually obtain the transfer of the right to operate the permit pursuant to article 52 of the same Decree. By saying so, the *Conseil d'Etat* has taken a stance opposite to the first instance judges, who held that the refusal of the ministry to finally grant the transfer of the title placed the oil companies in a situation of legal uncertainty justifying a judicial injunction to grant the title.

Moreover, the *Conseil d'Etat* held that there is no urgency to grant the right to operate the permit as the applicant company owns 80 % of the rights arising from the permit. Thus, the refusal does not affect either investment already made in view of its partnership with the permit holder nor cause serious and immediate harm to its financial interests.

*Source: CE, Nov. 28, 2013, Ministère de l'Ecologie c. Société Hess Oil France*

## EVENTS

### 15 January 2014

Roundtable in collaboration with the EU Commission on Minority Shareholdings, speakers: Jacques Buhart, Lionel Lesur and Andrea Hamilton, partners of McDermott. Venue: McDermott Brussels (to register: [mberteau@mwe.com](mailto:mberteau@mwe.com))

### 22 January 2014

Conference in collaboration with the Review Conferences on the selective distribution. Venue: McDermott Paris (to register: [mberteau@mwe.com](mailto:mberteau@mwe.com))

### 6-7 February 2014

IBA 2nd IBA European Corporate and Private M&A Conference, speakers: Antoine Vergnat and Jacques Buhart, partners of the Paris office. Venue: Maison du Barreau, Paris (to register: [mberteau@mwe.com](mailto:mberteau@mwe.com))

### 11 February 2014

French M&A Executive Club 2014, speakers: Thibaud Forbin and Jacques Buhart, partners of the Paris office. Venue: Le Meurice, Paris (to register: [mberteau@mwe.com](mailto:mberteau@mwe.com))

### McDermott Paris reinforces its Public law practice

McDermott Will & Emery is pleased to announce that Laurent Ayache has joined as Counsel the Paris Regulatory team.

Questions concerning the information contained in this newsletter may be directed to your regular McDermott Will & Emery lawyer or the editors listed below:

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