

Legal Newsletter N°5: Public and Administrative Law - Energy

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Public and Administrative Law

- **Decree n° 2016-1480 dated 2 November 2016:** The decree extends the requirement to obtain preliminary decisions for public works disputes and compensatory remedies. It extends the requirement to engage a lawyer for public works and occupation of public lands disputes. The decree also enables the judge to set a date from which the parties cannot raise new pleas.
- **Conseil d'Etat (Council of State) 3 November 2016, Association France Nature environnement, pet. n°360212:** The national judge is entitled to uphold national provisions contrary to the directive of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment, within the limits fixed by the Court of justice of the European Union.
- **Conseil d'Etat (Council of State) 9 November 2016, Société Fosmax LNG, pet. n°388806:** The administrative judge is competent for deciding upon applications against grants of exequatur or arbitration awards made in France insofar as the arbitration concerns the performance or the termination of a public contract, performed on the French territory but involving international trade interests. During this review, the judge shall ensure that the arbitration award is compliant with the "public order".
- **Conseil d'Etat (Council of State) 10 November 2016, Mme M. et autres, pet. n°s 384691:** Pursuant to *Farvesta* et *Numericable* rulings, the Council of State admits *ultra vires* claims against, on one hand, a deliberation of the Higher Council for Broadcasting (*Conseil supérieur de l'audiovisuel*) and, on the other hand, press releases announcing this decision.
- **Tribunal des conflits (Jurisdiction dispute court) 14 November 2016, Association Mieux vivre à Béziers et son agglomération, tourisme et loisirs, pet. n°4068 :** The Tribunal applies in advance the public domain rules for assets attributed to public utility but not yet arranged for this purpose. The Tribunal only applies in advance public domain rules for acquisitions prior to the entry into force of the general code of the ownership by public entities (i.e. 1st July 2006).
- **Conseil d'Etat (Council of State) 16 November 2016, Société SNEF, pet. n°401660 :** The contracting authority is not bound to inform the candidates in the tender documentation that the scoring of the price criteria will be based on a "fictional order" drawn by lot.
- **Conseil d'Etat (Council of State) 16 November 2016, Commune d'Erstein, pet. n°401321 :** The administrative interim injunction judge held that a resumption of contractual relations would excessively infringe the general interest even though the seriousness of the party's breaches do not justify a termination the party shall be exclusively responsible for.

- **Conseil d'Etat (Council of State) 2 December 2016, Min. c/ Société Export Press, pet. n°s 387613, 387631, 387632, 387633, 387635, 387636, 387637, 387638** : *Ultra vires* claims against tax rulings cannot be introduced unless their application by taxpayers have "*noticeable effects other than fiscal*".
- **Conseil d'Etat (Council of State) 5 December 2016, Université de la Nouvelle-Calédonie, pet. n°380763** : An administrative penalty which is an illegal individual decision and which creates rights neither for the beneficiary nor any third party can be rescinded without delay by its author.
- **Conseil d'Etat (Council of State) 5 December 2016, Chambre syndicale des cochers chauffeurs de voiture de place CGT-Taxis, pet. n° 395086** : The regulatory authority can derogate from the principle of freedom of pricing and fix taxi fares for both the cruising activity and the prior reservation activity, even though taxis are in competition with other operators on the latter.
- **Conseil d'Etat (Council of State) 9 December 2016, Société Foncière d'Europe, pet. n° 391840** : The unilateral breaking, by the public entity and for a general interest justification, of prior negotiations for the conclusion of a contract cannot engage its responsibility unless the public entity prompted its partner to operate expenses making him legitimately believe that a contract will be signed. However, it is necessary that its partner could legitimately not ignore the risk he exposed himself to.
- **Conseil d'Etat (Council of State) 9 December 2016, Electricité Réseau Distribution France, pet. n° 395228** : The work pursuing the general interest on public road are public works even though the client is a mixed investment company holder of a public domain occupancy agreement.
- **Law n° 2016-1691 dated 9 December 2016 relating to transparency, fight against corruption and modernization of the economic life**: The law ratifies Ordinance n°2015-899 dated 23 July 2015 on public procurement contracts and entitle the government to adopt, by ordinance, the legislative part of the public procurement law. Besides, the law entitles the government to simplify and modernize, by ordinance, the public domain occupancy rules and rules governing the transfer of ownership between public entities.
- **Conseil d'Etat (Council of State) 23 December 2016, Association Etudes et consommation CFDT du Languedoc-Roussillon et Association ATTAC Montpellier, pet. n° 392815**: Third parties to a public contract may introduce an *ultra vires* claim against the administrative act approving the contract, insofar as the performance of the contract infringes their interests in a direct and certain way and insofar as they rely on pleas alleging the illegality of the act itself. This claim can be brought irrespective of the claim against the contract itself under the conditions of the ruling of the Council of State dated 4 April 2014, *Département de Tarn-et-Garonne*, n°358994.
- **Administrative court of appeal of Bordeaux 12 January 2017, Société Bricorama France SAS, pet. n° 14BX00643**: The national commission for commercial development can oppose the building of large surface supermarkets because it would lead to the of the road traffic.
- **Conseil d'Etat (Council of State) 26 January 2017, Commune de Port-Vendres, pet. n° 395413**: The manager of the public domain can dismiss, for a public general justification, the request for a public domain occupancy authorization.
- **Conseil d'Etat (Council of State) 27 January 2017, Société Baudin Châteauneuf Dervaux, pet. n°397311**: The client and the contractor cannot reduce the right for direct

payment of the subcontractor when there was no modification of the subcontract clauses relating to the volume or the amount of the services planned to be subcontracted.

- **Conseil d'Etat (Council of State) 27 January 2017, Société Tahitienne de construction, pet. n°396404:** The claim brought before the administrative interim injunction judge for provisional compensation against the contracting authority under article R.541-1 of the administrative justice code shall be regarded as the claim brought before the competent administrative tribunal according to article 7.2.3 of the General conditions of works contracts (*CCAG-Travaux*).
- **Conseil d'Etat (Council of State) 10 February 2017, Société Campenon Bernard Côte d'Azur, pet. n°391722:** The ten-year limitation period for extracontractual civil liability actions applies for actions in warranty instituted by a builder against another builder.
- **Conseil d'Etat (Council of State) 10 February 2017, Société Pimiento Music, pet. n°404291:** The administrative interim injunction judge may justify the lack of urgency of the request for summary proceedings if the substantive request is planed within the months followings the current ordinance in summary proceedings.
- **Conseil d'Etat (Council of State) 14 February 2017, Société de manutention portuaire d'Aquitaine et Société Grand Port Maritime de Bordeaux, pet. n°s 405157 et 405183:** The Council of State held that both the container terminal convention and the provisional public management convention concluded to operate the terminal are concession contracts under the ordinance n°2016-65 of 29 January 2016.
- **Administrative Tribunal of Besançon ord. 16 February 2017, M. Silvestre et autres, pet. n°1700272 :** The administrative interim injunction judge is competent to rule on summary proceedings for the suspension of the termination decision of a public domain occupancy agreement insofar as such decision infringes a fundamental freedom under article L. 521-2 of the administrative justice code.

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- **Order dated 3 November 2016:** The order lays down the rules relating to the power purchase obligation and the contract for difference for cogeneration power plants established on the metropolitan territory and with determined energy performance.
- **Decree n°2016-1518 dated 9 November 2016 relative to natural gas-intensive sites eligible for a reduced tariff for using public electricity transmission and distribution networks:** The site of a company is eligible for a reduced tariff for using public electricity transmission and distribution networks if he complies with the requirements laid down in the decree.
- **Administrative tribunal of Bastia 17 November 2016, pet. n°s 1501122 et 1600835:** EDF may change the feed-in tariff during the performance of the purchase agreement when the tariff is lower or superior to that which he is entitled to.
- **Conseil d'Etat (Council of State) 5 December 2016, Association sauvegarde du Trégor, pet. n°394592:** A mining concession project may be changed at the end of the public inquiry assuming that such change neither undermines the general economic balance of the project nor arises from the public inquiry itself.

- **Administrative court of appeal of Lyon 13 December 2016, *Ministre du logement, de l'égalité des territoires et de la ruralité*, pet. n° 15LY00920:** In order to justify building permit issuance for photovoltaic power plants by way of derogation from the principle of continuing urbanization in mountain zones, the local state representative shall present sufficient detailed statements relating to the specific situation of the municipality concerned.
- **Decree n° 2016-1726 dated 14 December 2016 relating to the commissioning, the monitoring and the sanctions applicable to certain power plants:** The decree establishes the monitoring rules for power purchase obligation contracts or contracts for difference and the sanctions which may be ordered. The decree also provides for a transition phase between the power purchase obligation and the contract for difference regime.
- **Ordonnance n° 2016-1725 du 15 December 2016 relating to closed distribution systems:** The ordinance transposes article 28 of the directive of 13 July 2009 and creates a legal regime for the operators of closed distribution systems. They may only supply non-residential customers which carry out industrial, commercial or sharing activities. By way of exception, the operator of a closed distribution system may supply residential customers insofar as they are employed by or associated with the system owner and stay in the area supplied by the system.
- **Administrative court of appeal of Paris 16 December 2016, *SNC Yack Energie*, pet. n° 14PA00715:** The connection contract to the transmission or the distribution system for a photovoltaic power plant concluded between the producer and EDF is not the accessory contract of the power purchase agreement. Therefore, this contract is not an administrative contract.
- **Conseil d'Etat (Council of State) 16 December 2016, *MEEDE c. Société SJS*, n° 393293:** The Council establishes the calculation method for the « legal consistency » of a hydropower plant whose ownership rights do not result from a concession i.e. the driving force of water that the plant owner may use under the title he holds.
- **Conseil d'Etat (Council of State) 16 December 2016, *Société Ligérienne Granulats SA*, pet. n° 391452:** The administrative judge shall assess the legality of planning permission under the planning document in force at the time of the issuing of the permit, and examine whether potential violations of the planning document have not been regularized by subsequent changes of the document. Besides, the Council of state confirms that, in a claim brought against an authorization for facilities classified for environmental protection (« ICPE »), the claimant may challenge the illegality of the planning document in force at the time of the issuing of such authorization.
- **Court of appeal of Paris 12 January 2017, *Société Valsophia S.A.R.L.*, pet. n° 2015/15157:** Private facilities supplying electricity to final customers are distribution systems. Before the entry into force of the ordinance n° 2016-1725 of 15 December 2016 relating to closed distribution systems, only the companies legally designated and the entities operating a "direct line" can operate a distribution system.
- **Conseil d'Etat (Council of State) ord. Réf. 18 January 2017, *Assoc. Observatoire du nucléaire*, pet. n° 406244 :** The Nuclear Safety Authority may, in order to authorize the restart of three nuclear reactors, rely on a file sent by EDF which suggest provisional operating measures.

- **European Commission press release dated 10 February 2016:** The European Commission has approved three schemes to support solar and hydropower energy producers in France under EU state aid rules.
- **Order dated 13 February 2017 relating to various provisions of the regulatory part of the energy code on energy concessions:** The order set the rules for the creation of hydropower concessions, the award of energy concessions, the grouping of concessions and the as-built drawing.
- **Law n°2017-227 dated 24 February 2017 ratifying the ordinance n°2016-1019 dated 27 July 2016 relating to electricity self-consumption:** The law ratifies and modifies the ordinance of 27 July 2016. Both individual and collective electricity self-consumption are now authorized and regulated. The law imposes on network operators an obligation to facilitate self-consumption.
- **Order dated 24 February 2017 modifying the power purchase agreement term for biogas power plants:** The power purchase agreement term is increased to twenty years as of the in-service date, compared to fifteen years before. The agreement concerned are those signed under order of 10 July 2006 or of 19 May 2011 relating to the power purchase obligation for electricity generated from biogas plants.