McDermott Will & Emery

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Focus on Regulatory Law

SUMMARY

Several decisions handed down by the French Supreme Administrative Court (the Conseil d'État) and the Court of Justice of the European Union (CJEU) have drawn our attention in the last three months.

Among these decisions, special attention should be paid to the new rules governing the commercialisation of plasma in France and the subsequent end of the French Blood Agency's monopoly. The Conseil d'État has also clarified the consequences of the condemnation of France by the European Court of Human Rights (ECHR) concerning an administrative sanction that still has effect, and the rules that apply to the protection and restitution of artworks stolen by the Nazis during World War II.

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REGULATION AUTHORITIES

FRENCH COMPETITION AUTHORITY – Conseil d'État refuses to refer to the Constitutional Council a Priority Preliminary Ruling on Constitutionality concerning the power of the Competition Authority to fine a company that did not give prior notice of a merger.

The applicant claimed that the provisions of I, Article L. 430-8 of the French Commercial Code, which allows the Competition Authority to fine companies that fail to give prior notice of a merger, infringed a number of constitutional principles. The applicant argued that failure to give prior notice constitutes no more than a simple omission of declaration, rendering the imposed fine disproportionate.

The Conseil d'État ruled that the claim was not of a serious nature.

The Conseil found that the failure to give prior notice to the Competition Authority of a merger constituted a serious breach of the obligations laid out in the Commercial Code, and not a simple omission of declaration. The fine levied on the applicant was therefore proportionate.

Source: Conseil d'État (CE), 16 July 2014, Société Copagef, no. 375658.

ADMINISTRATIVE SANCTION – Conseil d'État rules on the consequences of the condemnation of France by the ECHR over an administrative sanction.

In its ruling on the ECHR's condemnation of France, the Conseil d'État first noted that it is incumbent upon a condemned State to adopt the measures necessary to end any violations of the European Convention of Human Rights.

The Conseil then found that the ECHR ruling did not, however, imply that the competent administrative authority should revoke the sanction in question, which would have had the effect of depriving court judgments relating to a sanction of their enforceability.

The Conseil found that the competent administrative authority is only obliged to assess whether or not the sanction violates the European Convention and, if so, to wholly or partially end it, if the sanction is still in effect at the date of the ECHR ruling.

Source: CE, 30 July 2014, M. B., no. 358564.

RADIO FREQUENCIES – The management of radio frequencies on public land is confirmed to be under the competence of the Prime Minister.

On 9 July 2014, the Conseil d'État clarified the allocation of competences between the Prime Minister and the regulatory authorities, particularly the Authority for the Regulation of Electronic Communications and the Audiovisual Council, to establish the conditions of use of radio frequencies on the public domain.

The Conseil noted that radio frequencies are part of the public domain, and it was therefore the Prime Minister's responsibility to establish the general conditions of their use. The competence of the regulatory authorities is limited to the technical and operational conditions applied to the use of these frequencies.

Source: CE, 9 July 2014, Société Bouygues Télécom, no. 367376.

AUTHORITY FOR THE REGULATION OF ELECTRONIC COMMUNICATIONS – New sanctioning procedure for the Autorité de Régulation des Communications Électroniques et des Postes (ARCEP).

A decree of 1 August 2014 has given the ARCEP a new sanctioning procedure that aims to clearly separate its investigation and judgement functions.

The decree was issued in response to a Constitutional Council judgment that found the sanctioning power of the ARCEP unconstitutional because it did not guarantee the separation within the ARCEP of the functions of investigation and judgment (see Focus on Regulatory Law no. 4).

Source: Decree no. 2014-867 of 1 August 2014 relating to the sanctioning procedure of the Regulation Authority of Electronic and Postal Communications.

ENERGY

INSTALLATION OF COGENERATION IN OPERATION – Constitutional Council rules Article L. 314-1-1 of the Energy Code is not compatible with the Constitution as it ignores the principle of equality.

On 18 July 2014, the Constitutional Council ruled that Article L. 314-1-1 of the Energy Code is not compatible with the Constitution, particularly the principle of equality enshrined in Article 6 of the Declaration of the Rights of Man and of the Citizen.

The constitutional judge did, however, limit the effects of the Council's annulment of Article L. 314-1-1 by stating that payments related to contracts entered into before 1 January 2015 would still be valid.

Source: Constitutional Council, 18 July 2014, Société Roquette Frères, decision QPC no. 2014-410.

REGULATED ELECTRICITY TARIFFS – Conseil d'État partially annuls the order of 20 July 2012 concerning regulated electricity tariffs, but doesn't suspend the order of 28 July 2014.

The Conseil d'État has annulled the order of 20 July 2012, which fixed regulated tariffs for the sale of electricity. The Conseil judged that these tariffs, which were intended to recover the average full costs of the electricity distributed by Électricité de France, particularly by taking into account future development, were too low to satisfy this obligation.

As a consequence, a new order, leading to a tariff adjustment that will be borne by consumers, was adopted on 28 July 2014.

In a separate order, also issued on 28 July 2014, the Minister of Ecology annulled the 5 per cent increase to the regulated tariffs for electricity that had been established in an order of 26 July 2013. This rate freeze was challenged by an association of electricity suppliers before the Conseil d'État, which ruled there was no emergency that would justify the suspension of the 28 July 2014 freeze. The Conseil will shortly rule on the legality of the rate freeze and decide whether or not to annul it again.

Source: CE, 11 April 2014, National Association of Retail Energy Operators (ANODE), no. 365219; 12 September 2014, no. 383721.

PUBLIC ECONOMIC LAW

LOOTING OF JEWISH PROPERTY – Conseil d'État clarifies the restitution of artwork stolen during World War II.

After World War II, works of art suspected of having been stolen by the Nazis were listed on a registry called the Musées Nationaux Récupération (MNR registry) and stored in French museums until they could be returned to their rightful owners. On 30 July 2014, the Conseil d'État, clarified the legal framework that applies to the restitution of artwork listed on the MNR registry.

The Conseil noted that the State was merely the guardian of the artworks listed in the MNR registry. It was therefore incumbent upon it to return these works to their legitimate owners, upon their request. No statute of limitations could be imposed on this request for restitution.

In this regard, however, the Conseil d'État stated that the restitution of works listed on the MNR registry was only mandatory when it could be proved that the art had been stolen, or where it could be presumed to have been stolen on the basis of consistent evidence drawn particularly from the date of the transactions, the parties to the transaction, and the conditions, grounds and aims of the transaction.

In the present case, the Conseil found that the claimants requesting the restitution of several drawings were not their rightful owners, as they acquired them after the paintings had been initially sold under duress to a gallery owner working on behalf of the Nazis. The Conseil therefore confirmed that the French authorities were permitted to refuse to return the art to the claimants.

The Conseil also confirmed that the refusal of the State to return a work of art acquired by looting was not in breach of the respect of property right enshrined in Article 1 of the first additional protocol to the European Convention of Human Rights. (See 9.18. 2014 On The Subject)

Source: CE, 30 July 2014, Mrs. D. and Mrs. B., no. 349789.

PUBLIC HIGHWAYS – Conseil d'État clarifies grounds on which authorities can refuse electronic communications network operators the right of way on public highways.

The Conseil d'État has ruled that the authorities in charge of the management of public highways may refuse to give right of way to electronic communications network operators.

The authorities can only, however, refuse to give right of way when an operator's occupation of the public highway is not compatible with its allocation. Public authorities cannot refuse to give right of way at their discretion.

Source: CE, 2 July 2014, Société Colt Telecommunications France, no. 360848.

STATE AS SHAREHOLDER – An order and a decree renew the legal framework of the State as a shareholder.

An order of 20 August 2014 and its accompanying decree have modernised the rules relating to the State's role as a shareholder. The order brings together the rules applicable to public and private shareholding, and simplifies the rules that apply to capital transactions.

Source: Order no. 2014-948 of 20 August 2014 related to governance and operations on the capital of public shareholding companies. Decree no. 2014-949 of 20 August 2014 implementing the application of the order no. 2014-948 of 20 August 2014 related to governance and operations on the capital of public shareholding companies.

PUBLIC SUBSIDIES – "Public subsidy" finally defined by law.

For the first time, the legislator has given a legal definition of "public subsidies". They are optional contributions made by administrative authorities or bodies responsible for managing public industrial and commercial services. They must be justified by a general interest and intended to ensure the completion of an investment or project, to contribute to the development of activities.

The subsidised actions, projects or activities must be initiated, defined and implemented by the beneficiary.

To be classified as a public subsidy, these optional contributions cannot consist of remuneration for services provided to the authorities granting the subsidy.

Source: Article 59 of the law no. 2014-856 of 31 July 2014 related to the social and cooperative economy.

RAIL SYSTEM REFORM – Final adoption of rail reform law.

The law relating to the reformation of the French rail system was passed on 4 August 2014. It modifies the organisation of the rail system by creating a public railways group consisting of three public industrial and commercial bodies.

The first is the SNCF, which is in charge of ensuring satisfactory control and running, economic coherence, industrial integration, and the unity and social cohesion of the group. Under the SNCF's control is the SNCF Réseau, which is in charge of access to, and maintenance of, the railway infrastructure. The third body is the SNCF Mobilité, which is in charge of operating the network and managing stations.

Source: Law no. 2014-872 of 4 August 2014 related to railways reform.

STATE AID

SOCIÉTÉ NATIONALE CORSE-MÉDITERRANÉE (SNCM) – CJEU confirms partial annulment of State aid granted to SNCM by France.

Compagnie Générale Maritime et Financière (CGMF), a public company that held 80 per cent of the capital of the SNCM, gave SNCM financial support totalling €76 million.

In its decision of 8 July 2008, the European Commission found that this support was compatible EU State aid law. The CJEU, however, partly annulled this decision on 11 September 2012. On 4 September 2014, the CJEU rejected appeals from the SNCM and the French government, and forced the SNCM to pay €220 million back to the French State.

Source: CJEU, 4 September 2014, Société Nationale Corse-Méditerranée SA and France v European Commission, Joint matters C-533/12 P and C-536/12P.

RECOVERY – Member States are obliged to recover any State aid the European Commission considers to have been paid unlawfully.

The Conseil d'État has ruled that a European Commission decision requiring Member States to recover a subsidy unlawfully granted to a local authority by the European Regional Development Fund is mandatory for national authorities and jurisdictions when the Commission decision was not challenged by the aid beneficiary before the relevant deadline.

The Conseil also confirmed that national authorities have no power to assess whether or not the request to return the aid is valid.

Source: CE, 23 July 2014, Local Authority of Vendranges, no. 364466.

CONTRACTS

COMPLETION DEADLINES – Conseil d'État rules that, even without a contractual deadline for the completion of construction work, the prime contractor may claim that the construction work was not completed within a reasonable deadline.

On 4 July 2014, the Conseil d'État ruled that, despite there being no completion deadline in a contract, the prime contractor can make a claim against the contractor in charge of the delegated work and the project management for the construction work that should have been completed within a reasonable deadline.

Source: CE, 4 July 2014, Société Orme, no. 371633.

DELEGATION OF PUBLIC SERVICE – Modifications to selection criteria for tenders only legal in certain circumstances.

According to the Conseil d'État, the public authority is not obliged to inform potential suppliers of the conditions for implementing the selection criteria for tenders. They are not, however, permitted to make any changes to these conditions once tenders have been submitted. To do so would put the authority in breach of the principle of transparency of procedures.

If a public authority does inform the potential suppliers of the conditions for implementing the selection criteria, it is obliged to inform them of any subsequent modifications, and must do so within a reasonable time.

Source: CE, 30 July 2014, Société Lyonnaise des eaux France, no. 369044.

PUBLIC-PRIVATE PARTNERSHIPS – Administrative Court of Appeal defines "average global cost" and the criteria for an autonomous agreement to be valid.

In two separate appeals brought before it this summer, the Administrative Court of Appeal of Bordeaux has made two rulings that have clarified key terms relating to public-private partnerships.

In the first appeal, the Court clarified the concept of the "average global cost" of a partnership contract. The Court ruled that the average global cost takes into account the payments made by the public authority to the contractor and the income generated by the contract and returned to the public authority.

In the second appeal, the Court ruled that an autonomous agreement is not a prohibited benefit, as long as it guarantees to repay the expenses incurred by the contractor to enable the contractor to fulfil the terms of the contract satisfactorily.

Source: Administrative Court of Appeal of Bordeaux, 17 June 2014, M. R., no. 13BX00563 and no. 13BX00564.

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

The Conseil d'État has ruled that recourse to a PPP is only possible in three situations:

1. Having taken the complexity of the project into account, the public authority is not itself able to establish the technical or financial scope of the project, nor set the legal framework.

2. The project is being undertaken on an emergency basis.

3. The decision to have recourse to a PPP has been taken after balancing the advantages and disadvantages of other public contracts.

In a case relating to the Biarritz Local Authority, the Conseil d'État ruled that none of these conditions had been met and, accordingly, annulled the Biarritz City Council's authorisation of the Mayor to sign the PPP agreement.

Source: CE, 30 July 2014, Local Authority of Biarritz, no. 363007.

PUBLIC PROCUREMENT DIRECTIVE – The "in-house exception" does not apply to private institutions undertaking non-profit activities.

In Teckal Srl v Comune de Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (C-107/98) [1999] ECR I-8121, the CJEU ruled that the procurement directive does not apply to contracts concluded between a contracting authority and a legally distinct company if

1. The contracting authority exercises a control over the company similar to that which it exercises over its own departments.

2. The contracting authority carries out the company's essential its activities.

This is known as the "in-house exception."

With regard to the first condition, the CJEU specified in *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und. Energieverwertungsanlage TREA Leuna* (C-26/03) that a public authority cannot exercise control over a company with which it has a contract, if that company is owned, even to a very small extent, by private entities.

In accordance with its previous jurisprudence, on 19 June 2014 the CJEU refused to apply the "in-house exception" to a not-for-profit public utility association that had both private institutions and public sector entities among its members.

It will be interesting to see if the adoption of the new Directive 2014/24/EU of 26 February 2014 on public procurement will have an effect on future decisions in this area.

Article 12 of the new Directive 2014/24/EU of 26 February 2014 on public procurement allows the in-house exception in cases where the participation of specific private economic operators in the capital of a controlled legal person is made compulsory by national law, as long as the participation is non-controlling and non-blocking and does not create a decisive influence over the controlled legal person.

Source: Court of Justice of the European Union, 19 June 2014, Centro Hospitalar de Setubal EPE, matter C-574/12.

PUBLIC HEALTH

COMMERCIALISATION OF PLASMA IN FRANCE – The end of the French Blood Agency's monopoly.

On 23 July 2014, the Conseil d'État annulled a decision of the French Agency for the Safety of Health Products, which had reserved the collection, preparation and distribution of plasma to the monopoly held by the French Blood Agency, the Établissement Français du Sang. The consequence of this annulment is the authorisation, under certain conditions, of the distribution of plasma by other organisations.

Pharmaceutical companies may now market in France a plasma that has been prepared by a method involving an industrial process, on the condition that they have followed the procedure applicable to blood-derived medicaments as stated in the Public Health Code, *i.e.*, they have obtained a marketing authorisation; respected the requirements concerning the voluntary, anonymous and unpaid character of blood donations; ensured that all donors are adults; and screened the plasma for transmittable diseases.

Source: CE, 23 July 2014, Société Octopharma France, no. 349717.

STATE LIABILITY – French State liable because the French Agency for the Safety of Health Products did not suspend or withdraw the marketing authorisation for Mediator.

On 3 July 2014, the Administrative Court of Paris ruled that the failure to suspend or withdraw the marketing authorisation for Servier's weight loss drug Mediator constitutes a wrongful shortcoming on the part of the French Agency for the Safety of Health Products.

The Agency's failure is so substantial as to make the French State ultimately responsible. This responsibility had been backdated to 7 July 1999, which is the date when the National Pharmacovigilance Commission revealed the dangers of benfluorex, the active substance in Mediator

Source: Administrative Court of Paris, 3 July 2014, Mrs. A., no. 1312345.

IN BRIEF

McDERMOTT PARIS REINFORCES ITS PUBLIC LAW PRACTICE – Charlotte Michellet.

We are pleased to announce that a new associate has joined our Regulatory Law Department in the Paris office. Charlotte Michellet worked for three years at the legal department of the Audiovisual Council (Conseil Supérieur de l'Audiovisuel). She was responsible for public, private and pay-to-view television, and for economic and European issues. Her arrival will strengthen our practice and expand it to cover additional regulatory sectors, such as the audiovisual sector.

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