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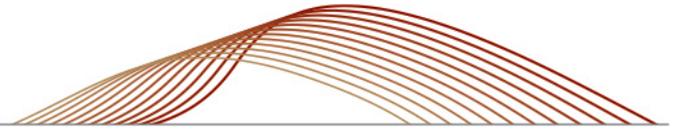


Legal Newsletter N°4: Public and Administrative Law—Energy

By [Sylvain Bergès](#)

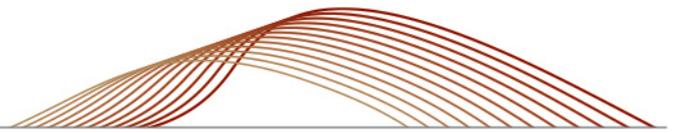
Public and Administrative Law

- **Administrative Court of Appeal of Bordeaux 23 June 2016, *Syndicat intercommunal Agence de gestion et de développement*, petition n° 14BX02263:** The Court held that a resolution authorizing a government agency to enter into a public contract without setting forth the identity of the co-contracting party and the financial details may be rectified by passing a new resolution.
- **Administrative Court of Appeal of Lyon 23 June 2016, *Commune de Valence*, petition n° 15LY03127:** The Court held that the grant of quotas for greenhouse gasses not having been contemplated in the public service concession agreement with Omnitherm, but made in the course of performance, could not be characterized as returnable assets ("*biens de retour*"). The quotas, like the revenue resulting from the sale thereof, are solely the property of the concession holder.
- ***Conseil d'Etat* (Council of State—highest administrative court) 29 June 2016, *Mme B.*, petition n° 389278:** The obligation to provide for the option of a professional outplacement agreement in a job protection plan—which must be offered to employees who may be terminated—does not apply, when the job protection plan provides for such employees to benefit from redeployment leave.
- **Council of State, 1 July 2016, *Cne d'Emerainville*, petition n° 363047:** When it is found by a governmental authority that a decision by it to grant a government subsidy was tainted by a mistake of form or procedure, it has the right to rectify the payment of such subsidy. In such circumstances, the cancellation of the grant of the subsidy does not necessarily imply that it must be refunded to the governmental authority by the association. The governmental authority, for reasons of legal security, may rectify payment of the cancelled subsidy.
- ***Tribunal des Conflits* (Court for Resolution of Jurisdictional Conflicts), 4 July 2016, *Métropole de Lyon v. Caisse d'épargne et de prévoyance de Rhône-Alpes*, petition n° 4059:** This case, arising from performance of an autonomous completion guarantee between a bank and a real property company responsible for construction of a development zone not acting on behalf of a government entity, falls within the jurisdiction of the civil courts.
- **Amiens Administrative Court, 7 July 2016, *Société Citelum*, petition n° 1300403:** In connection with signature of a public-private partnership agreement, issuance by the *Conseil municipal* (Town Council) of an inadequate evaluation report is a particularly



serious defect affecting agreement by the town and justifying cancellation of the agreement at issue. The party that contracted with the town has grounds for seeking an indemnity on a quasi-contract basis.

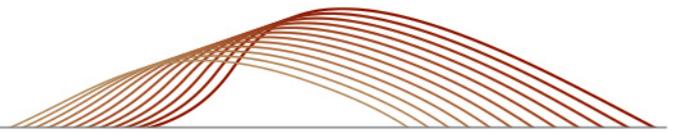
- **Council of State, 11 July 2016, Centre hospitalier Louis Constant Fleming, petition n° 391899:** In the area of notifying official documents, for the time periods set forth in the code between the civil service and the public (*code des relations entre le public et l'administration*) to be enforceable against the public, the notice of denial of the administrative action or the acknowledgement of receipt of the application from which it arises, if it is implicit, must indicate the existence of a prior mandatory action to the *Commission d'accès aux documents administratifs* (Commission on Access to Official Documents), as well as the time period in which such appeal may be taken.
- **Council of State, 13 July 2016, M. C..., petition n° 387763:** The principle of legal security is inconsistent with the idea that a particular administrative or governmental decision may be subject to indefinite challenge. Even where there can be no objection based on failure to meet deadlines, it must occur within the reasonable time of one year from the date on which the addressee became aware of the decision.
- **Administrative Court, Châlons-en-Champagne, 2 August 2016, SAS EVTP, petition n° 1300076:** Giving to a factoring company the task of dealing with invoices to be collected from a city in connection with a public contract creates a right for the factoring company to obtain direct payment of the invoices from the city. This right does not create an obstacle, furthermore, to the right of the contracting party of the city, which derives its rights as a creditor from a public contract with it, also to take legal action against the city in court.
- **Council of State, 19 September 2016, M. P..., n° 383781:** A court is not required to grant a motion for additional time to serve a brief, unless the right to adversarial due process so requires. In addition, it is not required to state the grounds for any denial.
- **Paris Administrative Court, 20 September 2016, Société FN Herstal SA, petition n° 1612871:** In connection with a public contract, a bid is unacceptable when it results in lack of compensation for the contract holder.
- **Council of State, 21 September 2016, Syndicat intercommunal pour les transports urbains de la région de Valenciennes, petition n° 398231:** On account of the legal and financial autonomy that a company, like any legal entity, has, it is generally not appropriate for a court sitting in summary proceedings, where a decision has financial consequences, to take into account the financial capacity of its shareholders or status as part of a group in analyzing whether such decision could seriously and immediately compromise its situation.
- **Council of State, 21 September 2016, Communauté urbaine du Grand Dijon et Société Kéolis, petition n° 399656:** No statutory or general provision [of law] requires a local authority granting management of the services for which it is responsible to an economic operator to enter into as many agreements as it has separate services. But the authority may not make grants with a scope that is clearly excessive or cover in the same agreement services that clearly have nothing to do with each other without misapprehending the requirements of proper administration and general obligations for competitive bidding by which it is bound. In addition, a public service concession agreement may impose ancillary services on the service provider, when they have a character that is complementary to the purpose of the grant.



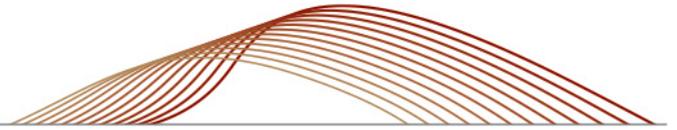
- **Council of State 3 October 2016, *Fédération française de tennis*, petition n°398589:** The classification of a site on the basis of the Environmental Code is not intended to have the purpose or effect of prohibiting an installation or completion or conduct of equipment, construction, or economic activity within the scope of the classification, but only to require authorization of any installation that might change the premises. The legality of a ministerial permit must be analyzed in light of the concrete consequences (character, extent, and characteristics) of the contemplated work on the site of the authorized operation taking into account the surface area of the site affected by the interior work at the site as well, if appropriate, as the character of the improvements provided in connection with the transaction and contributing to improvement or enlargement of the site where the work takes place or elsewhere at the site.
- **Bordeaux Administrative Court of Appeal, 11 October 2016, *Hôpital local de Capesterre-Belle-Eau*, petition n°16BX00695:** The running of the limitations period on a claim against a governmental authority in connection with improper exclusion from a contract is tolled, when the contract award is challenged.
- **Council of State, 17 October 2016, *Commune d'Hyères-les-Palmiers*, petition n°400172:** A court sitting in summary proceedings may seek clarification from a party claiming business secrecy to refuse to produce certain documents. If it concludes that this principle has been erroneously claimed against it, it can order the affected party to produce the requested documents.

Energy

- **Decisions by the CRE (*Commission de Régulation de l'Énergie*—Energy Regulatory Commission), dated 2 June 2016:** The CRE published minutes relating to decisions on changes, as of 1st August 2016, in use rates for a high tension public electricity grid ("*tarifs d'utilisation d'un réseau public d'électricité*"—TURPE) in the HTB and HTA-BT areas. The HTB and HTA-BT rates will change as of 1st August 2016 by +1.4% and +1.1, respectively, compared to rates presently in effect.
- **Administrative Court of Appeal of Douai, 2 June 2016, petition n°14DA00881:** In connection with a challenge to a building permit authorizing construction of a wind farm, the time period and standing to act are to be analyzed for each wind energy installation and each applicant. In addition, in the event of omission of the document accompanying the project decision submitted in connection with the impact study, there is no effect on the time period for the challenge.
- **Decision of the CRE (*Commission de Régulation de l'Énergie*—Energy Regulatory Commission), dated 16 June 2016, on the services performed on an exclusive basis by operators of natural gas distribution systems:** The purpose of this decision is to include the new services for transmitting the data made possible by Gazpar's advanced meters, to cause the rates for the services by the operators of natural gas systems to change by application of indexation formulae, and to take into consideration the applications of the GRDs ("*Gestionnaire de réseaux de distribution*"—natural gas distribution operator) for changes in their services.
- **Administrative Court of Appeal of Douai, 16 June 2016, petition n°15DA00079:** People living in the municipalities identified in the wind power identification plan have standing to challenge the *préfet's* order ("*arrêté préfectoral*") establishing the plan, even though the municipalities themselves are in favor of developing wind energy.



- **Decree n°2016-944, dated 11 July 2016, Relating to Various Provisions of the Energy Code adapting it to European Union law in the area of electricity generation from renewable or regeneration sources:** This regulation provides that, when a request for tenders relates to construction of cogeneration facilities, its specifications require compliance with the minimum characteristics of energy efficiency of the facilities. In addition, it organizes a system of precedence for co-generators in connection with the adjustment mechanism.
- **Decision, dated 7 July 2016, taken under Articles D. 141-12-5, D. 142-9-2, D. 142-9-3, and D. 142-9-5 of the Energy Code:** The decision provides for what is to be recorded in the National Registry of Production and Storage Facilities as well as the terms and conditions for transmitting the information to the operator of the electricity distribution and transportation system.
- **Council of State, 13 July 2016, Société GDF Suez, petition n°388150:** A position taken by the CRE may be submitted to the court for reviewing abuse of authority (*"juge de l'excès de pouvoir"*), when it is of a type that could have significant effects, in particular economic ones, or have the purpose of significantly influencing the conduct of the people for whom it is intended. In such case, the publication of the action on the authority's web page causes the time period for filing a legal challenge to begin running. In the instant case, the petitioner was barred from attacking the "release" under review, but could challenge the refusal to abrogate it (*compare* to Council of State decision handed down on 21 March 2016, *Société Fairvesta International GmbH et autres*, petition n°368082).
- **Decree n°2016-972, dated 18 July 2016 on confidentiality of information held by natural gas operators and by managers of public systems or networks for transporting or distributing electricity:** This document excludes from the scope of confidentiality information about annual production and consumption by system managers as well as information about connected power and injection capacity, on the one hand, and, in the area of natural gas, information the disclosure of which is necessary for application of statutes and regulations.
- **Decree n°2016-973, dated 18 July 2016, relating to availability to public entities of data relating to transportation, distribution, and generation of electricity, natural gas, and biomethane, petroleum and heating and cooling products:** To limit breaches of business secrecy, commercial secrecy, and statistical secrecy, the Decree sets forth the information to be made public in the electricity, natural gas, and petroleum as well as in the heating and cooling industries.
- **Council of State, 27 July 2016, Sté Lundin International, petition n°398028:** Unregulated actions may be subject to challenge in an administrative court in the jurisdiction in which the facility or operation may be found and the business of which is the cause of the dispute, even if several administrative courts might have jurisdiction over the case.
- **Decree n°2016-1128, dated 17 August 2016 relating to deposits or surety bonds in the event of failure to comply quality levels in the area of interruption and supply of electricity:** This document sets forth the conditions on which an authority responsible for organizing a public electricity distribution grid may require that an amount be deposited by the manager of the system for the purpose of re-establishing the quality level of the electricity distributed. The amount of such deposit is to be



proportional to the volume and cost of the work to be performed. It may be refunded if justification therefor is provided.

- **Decree n°2016-1129, dated 17 August 2016 relating to the bidding and negotiating procedure for facilities generating electricity:** This document sets forth a new bidding procedure that may be triggered, when generation capacity does not meet the objectives of the multi-year energy plan.
- **Decree n°2016-1132, dated 19 August 2016, amending the provisions of the regulatory part of the Energy Code relating to uptake of electricity consumption:** This document sets forth the methodology to be used to adopt rules making it possible to value the uptake of electricity consumption on energy markets and the adjustment mechanism.
- **Decree n°2016-1272, dated 29 September 2016 relating to investments in renewable energy projects:** This document sets forth the amounts of offers, the nominal value of securities, the classes of securities, and the classes of investors for which offers may be made to invest in the share capital or financing of companies organized to produce renewable energy that do not constitute a public offering for purposes of Article L. 411-1 of the Monetary and Financial Code.
- **Administrative Court of Appeal of Bordeaux, 18 October 2016, petition n°16BX00728:** The Court confirmed that the Public Contracts Code does not apply to bid tenders or requests for proposals made by the Ministry for Energy for the purpose of developing land-based wind power installations in overseas *départements* (administrative districts) and in Corsica. Only the Energy Code applies to such competitive bidding process.

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In the event of questions relating to this subject, please contact:

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