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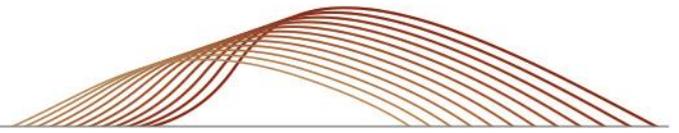
Legal Newsletter N°6 : Public and Administrative Law – Energy

By [Sylvain Bergès](#)

- **Conseil d'Etat (Council of State) 3 March 2017, Commune de Clichy-sous-Bois, pet. n° 398901** : Principles of continuity of public service and equality among users of public service only apply to the concessionaire within the limits of the subject matter of the concession and according to the terms defined by its clauses.
- **Conseil d'Etat (Council of State) 3 March 2017, Société Leasecom, pet. n° 392446** : In a claim for damages for termination of the contract for reasons of public interest, the co-contractor can, in response to the other part's plea alleging that the indemnity clause is illegal, seek damages on the grounds of the general liability rules applicable to administrative contracts.
- **Conseil d'Etat (Council of State) 15 March 2017, Commune de Cannes, pet. n° 388127** : The public domain owner is entitled to seek damages for illegal occupation from the person who constructed the building or acquired the constructor's rights from the person who illegally occupied the building or both of them.
- **Conseil d'Etat (Council of State) 17 March 2017, Ordre des avocats, pet. n° 403768** : The *Conseil d'Etat* partly rescinded the Decree dated 25 March 2016 relating to public procurement contracts, but did not rescind the €25,000 threshold below which public procurement contracts are exempted from a formalized procedure.
- **Conseil d'Etat (Council of State) 20 March 2017, Région Aquitaine-Limousin-Poitou-Charentes, pet. n° 401751** : If the Railway and Highway Authority has to follow its own guidelines to make a decision, the Authority must also take into account all the relevant circumstances of the situation that have been brought forward.
- **Conseil d'Etat (Council of State) 31 March 2017, Savoie Lac Investissement, pet. n° 392186** : The administrative authority must always check that the public domain occupancy application is consistent with the Law dated 3 January 1986 related to coastal land use planning, even when the Local Urbanism Plan would already be compatible with this law.
- **Administrative tribunal of Lyon 4 April 2017, Préfet de la Loire, pet. n° 1406859** : An implied administrative decision which does not mention the legal remedies and periods allowed for appeals can be challenged within a one-year reasonable delay as from the day the decision became known to the applicant, according to the ruling from the *Conseil d'Etat*, Assembly, 13 July 2016, *Czanaj*, pet. n° 387763.



- **Decree n° 2017-493 dated 6 April 2017 modifying the administrative justice code** : The decree simplifies the procedure for the enforcement of the *Conseil d'Etat* decisions, especially by removing the non-jurisdictional procedure of « enforcement assistance ».
- **Decree n° 2017-516 dated 10 April 2017 containing various provisions concerning public procurement** : The decree modifies the decree dated 25 March 2016 related to the public procurement contract in order to take into account the latest legislative developments from both the Law dated 7 July 2016 related to architecture and the Law dated 9 December 2016 related to anti-corruption measures.
- **Interministerial direction related to deliberations and acts of local authorities imposing the use of the French language when executing the public procurement contract, the so-called "Molière" clauses, NOR: ARCB1710251** : Jointly signed by the Minister for Economic Affairs and Finance, the Minister of Labour, the Minister for Local Authorities, and the Minister of Interior, the direction calls on the local state representatives—the *préfets*—to consider as illegal the so-called « Molière » clauses in deliberations, public procurement contracts, or concessions.
- **Conseil d'Etat (Council of State) 28 April 2017, Commune de l'île de Batz, pet. n° 393801** : The owner of a non-constructed land is entitled to bring an *ultra vires* action against a building or demolition permit if the projected construction can directly affect the enjoyment of their land.
- **Conseil d'Etat (Council of State) 24 May 2017, Ville de Paris, pet. n° 407047** : The action for pre-contractual summary proceedings brought by an unsuccessful candidate is inadmissible after the contract signing, even though the contracting authority did not respect the self-imposed standstill period because the action was initiated three days after this standstill period.
- **Conseil d'Etat (Council of State) 24 May 2017, SIVU de la station d'épuration du Limouxin, pet. n°407264** : The contracting authority must establish a hierarchy of award criteria and must indicate this hierarchy in the contract notice, the invitation to tender, or any other documents of the consultation.
- **Conseil d'Etat (Council of State) 7 June 2017, Société Le Muselet Valentin, pet. n° 386627** : The recovery, even belated, of sums declared as constituting a State aid incompatible in the sense of the Treaty establishing the European Union ("TFEU") cannot constitute grounds for liability of the State.
- **Conseil d'Etat (Council of State) 9 June 2017, Société Keller Fondations Spéciales, pet. n° 396358** : When the subcontractor is remunerated directly by the project owner, the latter can control the effective execution of the works by the subcontractor and ensure that the works carried out match what was provided by the public procurement contract.
- **Administrative tribunal of Amiens 13 June 2017, SARL Croisille, pet. n° 1403491** : The unanswered request for the drawing-up of final accounts is not, in the absence of prior notice, the previous complaint provided under Article 50 of the General Conditions of Public procurement contracts which entitle the co-contractor to bring an action before the administrative judge.



- **Conseil d'Etat (Council of State) 19 June 2017, Syndicat des copropriétaires de la résidence Butte Stendhal et a., pet. n° 398531** : When the judge issues a stay of proceedings to allow the regularization of the building permit, the parties cannot bring another *ultra vires* action against the new permit.
- **Administrative judge of Montreuil (summary proceedings) 22 June 2017, pet. n° 1704369** : The procedural documents dropped on the "Telerecours" platform must be renamed by their complete title, failing which the action will be inadmissible.
- **Administrative court of Bordeaux 22 June 2017, Société Clairienne, pet. n° 16XB01833** : The local state representative—the *préfet*—can modify the land cleaning authorization after the granting of the building permit as long as the project has not been substantially amended, which is especially the case when the land cleaning surface is reduced.
- **Conseil d'Etat (Council of State), Section 30 June 2017, Syndicat mixte de promotion de l'activité transmanche, pet. n° 398445** : Third-parties to an administrative contract who might be directly and certainly affected in their interest by a decision refusing their request to terminate the contract are allowed to bring an action before the administrative judge seeking the termination of the contract.

Energy

- **Regulation (EU) 2017/459 of the Commission of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013** : In order to harmonize the gas market rules in the European Union, the Commission established a network code containing the operating rules of the capacity market in gas transmission systems.
- **Regulation (EU) 2017/460 of the Commission of 16 March 2017 establishing a network code on harmonized transmission tariff structures for gas** : In order to harmonize the gas market rules in the European Union, the Commission established a network code containing the rules on setting the transmission system's fares and on setting the rate of return for transmission system operators.
- **European court of justice ord. 15 March 2017 (reference for a preliminary ruling from the Court of Appeal of Versailles), Enedis SA/Axa Corporate Solutions SA, Ombrière Le Bosc SAS, C-168/24** : The feed-in tariff set up for power plants using radiative power which is funded by the final consumers of electricity is not considered as a State intervention or through State resources for the purpose of Article 107 paragraph 1 of the TFEU.
- **Competition authority, decision n° 17-D-06 of 21 March 2017 related to the practices implemented in natural gas and electricity supply and energy services** : The Competition authority sentences the company ENGIE S.A. to a total penalty of €100,000,000 for abuse of dominant position. The company abusively used the data related to its eligible customer when the gas and electricity supply market opened up to competition.
- **Decree n° 2017-437 dated 29 March 2017 related to energy savings through demand side management** : The decree specifies that energy savings obtained through demand side management are considered as « significant » for the purpose of Article L. 271-3 of the French Energy Code when the energy saving rate is above 40%.



- **Conseil d'Etat (Council of State) 26 April 2017, Société Enedis, pet. n°407516 :** The *Conseil d'Etat* refuses to refer to the *Conseil constitutionnel* (Constitutional council) regarding the priority preliminary ruling on the constitutionality of Article L. 341-3 of the French Energy Code, which grants authority to the Energy Regulatory Commission to lay down the rate-setting methodology regarding the use of the electricity transmission and distribution system, to Article 21 of the Constitution.
- **Order dated 6 May 2017 related to the contract for difference scheme :** The order determines the conditions under which wind power plants on land with a maximum six wind turbines below 3MW can benefit from the contract for difference.
- **Order dated 9 May 2017 related to the contract for difference scheme :** The order determines the conditions under which power plants using biogas coming from industrial and domestic wastewater treatment methanization can benefit from the contract for difference.
- **Order dated 9 May 2017 related to the feed-in tariff scheme for photovoltaic solar power plants :** The order determines the conditions under which photovoltaic solar power systems on buildings with an installed peak power lower or equal to 100kW can benefit from feed-in tariffs.
- **Tribunal des conflits (Jurisdiction Dispute Court) 15 May 2017, Société EDF, pet. n° C4080 :** The jurisdiction dispute court judged that the competent jurisdiction to rule on the liability of an EDF agent for a fault he committed during the construction of an electrical transformer which does not have any link whatsoever with the execution of the transformer installation works is the judicial jurisdiction.
- **Conseil d'Etat (Council of State) (summary proceedings) 28 June 2017, Conseil du commerce de France et a., pet. n°411578 :** The *Conseil d'Etat* suspended the execution of the decree n° 2017-918 dated 9 May 2017 related to energy efficiency improvement obligations in tertiary buildings because the decree could infringe the principle of legal certainty.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Paris lawyer:

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