GIDE

GIDE LOYRETTE NOUEL

2

newsletter

LEGAL UPDATE | FRANCE | OCTOBER 2014

IN THIS ISSUE :

editorial

Roland Vandermeeren, Senior Counsel
Member of Gide's Scientific Council, State Councillor

Yes, you can! Parties involved in litigation can bring down a "bad" law

"Bad laws" are not only those that act to the detriment of legitimate non-pecuniary, proprietary, economic or social interests. They also, above all, include laws that fail to respect certain legal norms applicable, whether international treaties, rules of EU law or constitutional principles, all of which have "supra-legislative" force. Indeed, the law has long since lost its status as an infallible sovereign act.

Individuals, businesses, professional organisations, etc. all now have at their disposal a variety of tools enabling them to present truly effective challenges to a law.

Admittedly, they do not have direct access to the "ultimate weapon" i.e. constitutional review of a law recently passed by Parliament. Only a group of 60 members of parliament or 60 senators are entitled to apply directly to the Constitutional Court for such a review[1]. However, individuals or businesses affected by the "objectionable" law are often in fact the true instigators behind such applications, and a number of law firms make valuable contributions to the preparation of submissions for constitutional review.

1 Article 61 of the French Constitution

Conversely, there is nothing to prevent a party involved in a "standard" case from arguing that a law applicable to the case should be held invalid. This can be achieved by means of a plea of nullity (known in French law as an "*exception*"), claiming that, regardless of the conditions under which the provision in question has been applied (whether lawful or otherwise), said provision is, in itself, contrary to international law (duly ratified or approved and published conventions), European law (EU law or the European Convention on Human Rights) or the "rights and freedoms guaranteed by the Constitution"[2].

Such strategy is available to both plaintiffs (who can base their claim on the argument that the law applied by the defendant should be held invalid) and defendants (who can argue the invalidity of the law on which the plaintiff's claim is based).

When the issue is an incompatibility with treaty law or European law, the procedure is simple, but its effects are limited to the case at hand. The court hearing the case between the parties has jurisdiction to rule on the validity of the statutory provisions in question. If the court deems such provisions to be contrary to the international or European norms, it rules that the said provisions do not apply to the case pending before it.

When a constitutional incompatibility is at stake (and especially if it involves an infringement of constitutional rights or freedoms), the procedure is slightly more complicated, but its effects are more far-reaching.

The parties can submit specific pleadings to the court hearing their case for a priority preliminary ruling on constitutionality (*question prioritaire de constitutionalité – QPC*), i.e. a challenge of a statutory provision pursuant to the principles guaranteeing fundamental rights and freedoms (the right to own property, the freedom to conduct business, the principle of equality, etc.). The French Supreme Court (*Cour de cassation*) or Supreme Administrative Court (*Conseil d'État*), as applicable, must first review the relevance of the application. If it appears to merit a "referral" to the Constitutional Court, the latter then rules once again on the provision. If the Constitutional Court holds the QPC to be well-founded, it "repeals" the statutory provision in question (i.e. rules that it will no longer apply in future) as from either the date of publication of its judgment or a later date[3].

The case is then returned to the court hearing the original claim and the party that initiated the QPC necessarily wins the case.

The QPC procedure is available to trial lawyers both at first instance and on appeal, and even, in some cases, in proceedings before the *Conseil d'État*. QPC applications before the Constitutional Court are admissible in all circumstances.

Recourse to this new legal procedure should gain in popularity as its effectiveness becomes more widely demonstrated. The Constitutional Court has already handed down 64 rulings on QPCs. A significant number of them (23 rulings) repealed the statutory provisions in question, sometimes with significant effects in the fields of civil law, criminal law, commercial law, labour law, tax law, environmental law, etc.

2 Article 61-1 of the French Constitution

3 Article 62 of the French Constitution

TAXATION OF REAL ESTATE CAPITAL GAINS IN FRANCE: AMENDMENT TO THE FRANCE-LUXEMBOURG TAX TREATY

By Bertrand Jouanneau and Nicolas Planchot

On 5 September 2014, the French and Luxembourg authorities signed a new amendment to the France-Luxembourg tax treaty of 1 April 1958, which will attribute to France the right to tax capital gains realised by Luxembourg companies upon the sale of shares in companies (whether French or foreign) whose assets consist primarily, directly or indirectly, of real estate situated in France.

Such capital gains were previously taxable only in Luxembourg, and were thus often exempted from corporate income tax locally under the participation-exemption regime.

If the Parliaments of both countries ratify the amendment before 1 December 2014, the new provisions will apply to capital gains realised as from 1 January 2015. Otherwise, they will apply to capital gains realised only as from 1 January 2016, thus leaving an additional one-year window during which disposals of shares in companies predominantly invested in real estate situated in France could still benefit from the corporate income tax exemption.

This amendment does not affect the other provisions of the treaty. Luxembourg will therefore remain an attractive jurisdiction for foreign investors wishing to invest in OPCIs[4] set up as SPPICAVs[5]. Dividends distributed by OPCIs to Luxembourg residents can benefit from the reduced withholding tax rates provided for under the France-Luxembourg treaty (either 5% or 15% depending on the stake held by the investor), despite the fact that OPCIs are not generally eligible for treaty benefits due to the fact that they are exempt from corporate income tax (and are thus in principle subject to the 30% withholding tax on dividends provided for under national law). A joint press release issued by the tax authorities of both countries nonetheless indicated that they would continue to work together to modernise the provisions of the France-Luxembourg tax treaty.

STATE AID - AID FOR RESCUING AND RESTRUCTURING FIRMS IN DIFFICULTY

By Sophie Quesson

As part of its drive to modernise its policy on State Aid, on 9 July 2014 the European Commission adopted new Community guidelines on State aid for rescuing and restructuring firms in difficulty, other than financial establishments[6].

These new guidelines lay down the criteria under which Member States can grant public financing to enterprises in financial difficulty without infringing the rules regarding State aid. Although some of the main principles under the previous Guidelines remain unchanged, a number of amendments have nonetheless been made: (i) new rules allowing temporary assistance for restructuring SMEs, (ii) better filters to make sure that State aid goes to those enterprises that really need it, and (iii) new rules to ensure that private investors assume their fair share of the enterprise's restructuring costs.

These new Guidelines entered into effect on 1 August 2014.

---

4 Non-listed real estate investment trusts (*Organismes de Placement Collectif Immobilier*)

5 Variable-capital companies predominantly invested in real estate (*Sociétés à Prépondérance Immobilière à Capital Variable*)

6 OJEU no. C 249 dated 31/07/2014

GOODWILL AND PUBLICLY-OWNED LAND

By Sylvain Bergès and Etienne Amblard

On 18 June 2014, a law was passed confirming the right to operate a business on public land when it can be demonstrated that the operator has a loyal client base[7]. This right does not extend to areas of natural public land.

The *Conseil d'Etat* had until present refused to acknowledge the existence of such business goodwill in cases where the authorisation to occupy public land was granted on a personal, non-transferable and revocable basis[8]. Certain exceptions had nonetheless been made, such as, for example, in the case of "wholesale markets of national importance" (*marchés d'intérêt national*).

Occupants of public land can now benefit from an indemnity in the event of loss of goodwill subsequent to the non-renewal, cancellation or termination of their authorisation to occupy the land. The method for valuation of the goodwill is still to be confirmed, to take into account the specific characteristics of the regime governing publicly-owned land.

GOVERNANCE AND CAPITAL TRANSACTIONS FOR COMPANIES WITH PUBLIC SHAREHOLDERS

By Cira Caroscio, Alexis Pailleret and Annabelle Raguenet de Saint-Albin

The French order (*ordonnance*) of 20 August 2014[9] (together with the decree of the same date) has simplified the rules on governance and capital transactions for companies in which the State or a public establishment holds a majority or minority stake, whether alone or jointly and directly or indirectly. Said *ordonnance* amends certain rules derived from the law on the democratisation of the public sector, dated 26 July 1983, and the legislative decree of 30 October 1935 organising State control over entities that have benefited from State financial support.

The first section of the *ordonnance* aims to give the State, as shareholder, a genuine influence, whilst simultaneously aligning the rules for governance of publicly-held companies with the standard corporate governance rules. The principle of representation of the State on the entity's governing boards in proportion to its shareholding threshold is maintained in certain cases, and the State may now propose the appointment of directors that are not civil servants. Furthermore, the specific rules on board size and term of office have been repealed.

The second section clarifies the rules applicable to capital transactions. In particular, it gives the State greater control over disposals, including when there is no resulting privatisation of the company. The following now require authorisation by decree: (i) disposals that reduce the State's shareholding to less than one-third or two-thirds of the capital and (ii) disposals of "essential assets" by a company in which the State is the majority shareholder. Lastly, the *ordonnance* defines the new remit of the French Privatisations Board (*Commission des Participations et Transferts*).

---

7 Articles L.2124-32-1 *et seq.* of the French Public Property Code, as resulting from Article 72 of Law no. 2014-626 dated 18 June 2014.

8 *Conseil d'Etat*, 19 January 2011, application no. 323924

9 *Ordonnance* no. 2014-948 of 20 August 2014 on governance and capital transactions for companies with public shareholders

FAST-TRACK SAFEGUARD: A NEW TOOL FOR DISTRESSED DEBTORS

By Thomas Binet

The French order (*ordonnance*) of 12 March 2014[10] came into force on 1 July 2014. One of its main innovations is the creation of a new procedure known as a "fast-track safeguard" (in French, a *procedure de sauvegarde accélérée*). This is not strictly speaking a new collective insolvency procedure complete with its own regime, but rather a new tool for debtors to help them impose on their minority creditors a solution that federates most of their creditors, as part of a conciliation procedure. This procedure is only accessible to a debtor (i) that is the object of an on-going conciliation procedure, (ii) that has federated most of its creditors around a project that will ensure the survival of the company, and (iii) that has not been the object of a payments suspension order for over 45 days.

Like all mutual agreement settlements, the conciliation procedure pre-supposes a unanimous agreement of the creditors concerned. It is not uncommon for such a procedure to fall through due to a single creditor's refusal, even though such creditor bears a symbolic or residual debt.

Debtors in this situation will now be able to request the opening of a fast-track safeguard procedure, in which the solution outlined during the conciliation procedure may be approved faster (the fast-track safeguard procedure lasts three months at most) through the implementation of a safeguard plan adopted by the creditor committees in a majority vote. This solution can then be imposed upon the recalcitrant minority creditors.

NEW REGIME APPLICABLE TO SOLAR PANEL WASTE

By Marie Bouvet-Guiramand

Since the entry into force of decree no. 2014-928 dated 19 August 2014 on Waste Electrical and Electronic Equipment (WEEE) and Used Electrical and Electronic Equipment, used photovoltaic modules are now classified as WEEE and must therefore be processed by their producer.

Additionally, a draft decree classifies such waste as originating from "household" EEE (as opposed to "professional" EEE). EEE producers may no longer transfer the waste processing obligation to a third party, with such transfer being binding on the public authority.

This is a new regime applicable to solar panels whose waste, up until now, was processed as ordinary waste according to the general waste regime, involving processing by the holder of the waste. That said, nothing currently stops EEE producers (be they professionals or households) from passing the cost of waste disposal onto their customers.

PUBLICATION OF THE LAMY REPORT ON 470-790 MHZ FREQUENCIES

By Marta Lahuerta

On Monday 1 September, Pascal Lamy submitted to Neelie Kroes, European Commissioner for the Digital Agenda, his first report on the future use and allocation of ultra-high frequencies (between 470 and 790 MHz), which are currently used for terrestrial broadcasting, particularly DTT. This research took place against a backdrop of quickly developing new mobile technologies, whose needs as regards this rare resource put pressure on other technologies, it being understood that several technologies cannot use a same frequency.

---

[10] *Ordonnance* no. 2014-326 dated 12 March 2014 reforming the prevention of distressed enterprises and collective proceedings

The High Level Group on the future use of the UHF band, comprising nineteen leading representatives drawn from the telecommunications and audio-visual broadcasting sectors (such as Orange, the BBC, TDF and Mediaset), having not been able to come to a consensus, this document is but the personal opinion of Former European Commissioner Pascal Lamy. It is nonetheless important, as the report could be adopted as is by the Commission.

The Lamy report identifies the 700 MHz band as the frequency that could be the object of a transfer towards mobile technologies, and thus support their development.

Most importantly, the report provides a schedule based on the "20-25-30 model". Its author thus aims to free up band 700 MHz by 2020 as a first step, giving countries with high DTT penetration ample time to reallocate this frequency.

Alongside this move, terrestrial television would be guaranteed to be able to use frequencies below 700 MHz until 2030. 2025 would be the year in which the Commission makes a final decision as to the reallocation, after 2030, of the 470-670 MHz spectrum frequencies. The 20-25-30 model thus intends to meet the challenge of quickly finding the resources necessary for the development of mobile technologies, while at the same time offering certain guarantees to the terrestrial broadcasting sector.

THE LEGAL INTEREST RATE

By Laetitia Lemercier

By French order (*ordonnance*) of 20 August 2014[11], article 313-2 of the French Financial and Monetary Code modified the legal interest rate.

From 1 January 2015, the legal interest rate will be set every semester in a decree issued by the minister in charge of the economy (instead of once a year, as is currently the case).

The object of this change is to make the legal interest rate more representative of a creditor's cost of refinancing. It is currently very low considering its indexation on the yield of Treasury bills (itself close to zero).

The main change, other than its method of calculation, consists in shifting from a single rate to two rates, the former applying when creditors are physical persons not acting for professional needs, and the latter applying in all other cases.

The method of calculating these rates will be set by decree, but it has already been established that they will be calculated based on the reference rate set by the ECB for main refinancing operations, and on the rates applied by credit and financing companies as regards the two categories of creditors. The weighting of the ECB's reference rate against the average two-year spread between its reference rate and the average effective refinancing rate applied to each category of creditors is under consideration. These calculation methods aim to smooth the statistical effects discernible from one period to another.

[11] *Ordonnance* no. 2014-947 of 20 August 2014 on the legal interest rate

RECOMMENDATION NO. 2014-R-01 DATED 3 JULY 2014 RENDERED BY THE ACPR ON AGREEMENTS REGARDING THE DISTRIBUTION OF LIFE INSURANCE CONTRACTS

By Charles-Eric Delamare-Deboutteville

The French order (*ordonnance*) of 5 December 2008[12] rendered compulsory the drawing up of agreements between insurers and life insurance contract distributors. Such contracts organise the correct information by the insurer of the insured as regards the commercialisation of the contracts, and provide for the inspection by the insurer of the compliance of the promotional material used by the insurance contract distributor.

In its recommendation dated 3 July 2014[13], the French Prudential Control Authority (ACPR) specifies the insurer's and the intermediary's obligations, as well as the information that must be present in such agreements, particularly in the context of distribution patterns involving several intermediaries.

All distribution agreements pertaining to life insurance products must be modified in application of these new requirements. ■

12 *Ordonnance* no. 2008-1271 of 5 December 2008 on the implementation of codes of conduct and conventions governing relations between producers and distributors, in the marketing of financial instruments, savings products and life-insurance products

13 Recommendation no. 2014-R-01 of 3 July 2014