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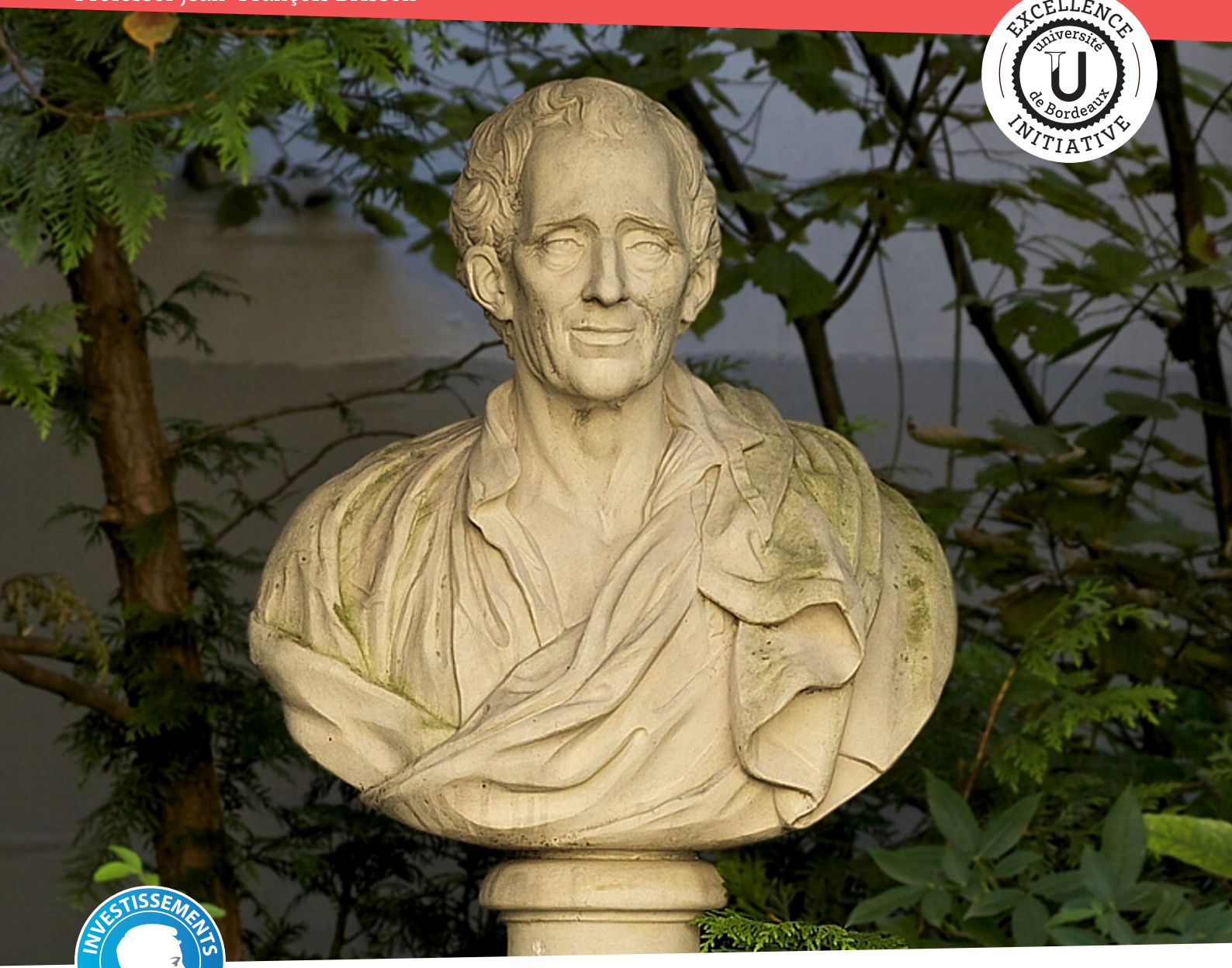

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Administrative law:

Recent changes in administrative litigation concerning contracts: on third-party remedies against administrative contracts

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Cases brought before French administrative courts are governed by the distinction, established in the 19th century by Edouard Laferrière (1), between the *contentieux de l'excès de pouvoir* (essentially, judicial review proceedings) in which strict issues of objective legality are raised before the administrative court; and the *plein contentieux* (or full remedy proceedings), in which the court is called upon to rule on the applicants' subjective rights arising in particular from a contract. This distinction, built around judicial review, is of paramount importance in terms of its theoretical scope. It provides a framework and has historically made French administrative cases famous overseas (2). The recent developments in French administrative case law now highlight the extent to which its virtues have tended to wane, as shown by the actions brought by third parties against administrative contracts.

In the context of this study, "third parties" not only means candidates who have been unsuccessful in the tender process, but also local elected representatives who are members of the deliberative assembly that authorised the signature of the contract (3); the Prefect, as the representative of the State; and, more widely, any local citizen, individual or tax payer (4), and associations, public service users allowed to bring grievances concerning the public service's operating conditions before the administrative courts (5).

Traditionally, with the exception of actions brought by the Prefect against local authority contracts, as provided by law, third parties could not challenge administrative contracts directly. Actions against administrative contracts were open only to parties who could have such contracts declared null and void in full remedy proceedings. However, administrative case law has taken account of the fact that administrative contracts, concluded for public service purposes and in the context of missions organised by the law, can raise questions of legality. To this end, in its famous decision in *Martin* of 4 October 1905, the *Conseil d'Etat* accepted that third parties could use an action for judicial review to challenge unilateral acts related to the disputed contractual situation, which the court then identified as not being intrinsically connected to the contract (6). The theory of *l'acte détachable* (or "separable administrative decision") was born. This case-law strategy allowed applications to be made to administrative courts for the annulment of decisions authorising or preparing for the signature of an administrative contract and, through an additional legal artifice, even the annulment of the decision to sign the contract which, while it is only materialised in the signature of the contract, can be separated from it at least on an intellectual level. In the context of such proceedings, third parties could thus obtain the annulment of an *acte détachable* on grounds of its *vices propres* (inherent defects) or *vices résultant du contrat lui-même* (defects in the contract itself), the content of its clauses or the procurement process.

French legal theorists were not slow in pointing out that the annulments pronounced by administrative courts in judicial review proceedings were more often done so on grounds of form, as they did not necessarily – and in practice, only exceptionally – render the contract null and void (CE 10 Dec. 2003, *Institut de recherche pour le développement*, Rec., p. 501). Some scholars, including Marcel Waline (*Manuel de Droit administratif*, Sirey 1946), even argued in favour of allowing actions for judicial review against administrative contracts.

The *Conseil d'Etat*'s case law gradually became more aware of this demand for greater effectiveness and disputes involving contracts have become increasingly sophisticated in such a way as to ensure that annulments pronounced in judicial review proceedings not be purely symbolic but also have effects on illegal contracts. The parties to a contract were thus permitted to cite the annulment of the *acte détachable* in order to refuse to enforce an illegal contract (CE, 1 October 1993, *Société Le Yacht-club international de Bormes-les-Mimosas*) while third parties were finally permitted to make submissions in judicial review proceedings petitioning the court either to order the parties to apply for a ruling on the invalidity of the contract, or to cancel the contract itself where regularisation measures are not possible (CE, 21 February 2011, *Société Ophrys, Communauté d'agglomération Clermont-Communauté*, Rec. p. 54).

It is this hundred year-old line of authority, made up of successive adjustments and technical compromises, which was overturned by the *Conseil d'Etat*'s decision of 4 April 2014 in *Département de Tarn-et-Garonne*. Henceforth, any interested third party may bring full remedy (rather than judicial review) proceedings before an administrative court with a view to cancelling the contract itself. However, the fact that this action belongs to the "full remedy proceedings" category means that any improvement to the litigation position of third parties in contractual matters is only very relative: indeed, depending on the facts of the case before it, the court hearing the full remedy action finds itself in a position strictly to define an interest in bringing proceedings before it; to restrict the bringing of such actions to interested third parties; to strictly define the interest in bringing an action in contractual cases; to render void some of the legal grounds raised by third parties; and to modulate the consequences arising from the illegality of the contract in such a way as to safeguard the stability of contractual relations – to the detriment of the strict respect for legality, where necessary.

I. A new kind of legal action

The stage for the solution adopted in the decision of 4 April 2014 had been set by an earlier case which, under the influence in particular of European case law (7) and Directives (8), had opened the possibility of directly challenging a signed contract to those candidates who had been unsuccessful in a tender process (CE, Ass. 16 July 2007, *Société Tropic Travaux Signalisation*). The 2014 decision extends this solution to all third parties but within the framework of a new litigation configuration which completely stands apart from the traditional balances found in the *Conseil*'s case law.

A. A specific action justified by the rejection of the judicial review litigation model in contractual matters

The *Conseil d'Etat* chose not to open the possibility of bringing judicial review proceedings to third parties. The reasons for this refusal lay in the *Conseil*'s judicial policy as, technically, such a solution would have been possible. Since 1982, French law on decentralisation has provided that

the Prefect of a *département* may bring an appeal against local contracts. This appeal has historically been compared to actions for judicial review; it is only recently that, in order to prepare for the turnaround already under way, case law re-characterised it as a *recours de pleine jurisdiction* or full remedy action (CE, 23 December 2011, *Ministre de l'Intérieur, de l'Outre-mer, des collectivités territoriales et de l'immigration*, Rec p. 662). Furthermore, it is still possible to bring an action for judicial review of certain clauses contained in administrative contracts, namely those that the court characterises as regulatory in that, contained as they are in the contract, their purpose is to define not the relationship between the parties to the contract, but rather the organizational conditions for the public service delegated by government (CE. Ass., 10 July 1996, *Cayzeele*, Rec. p. 274). As they set the law governing the service in question, they could very easily feature in a separate document adopted unilaterally by the delegating authority. Finally, French case law again allows actions to be brought for judicial review of civil service staff contracts insofar as the content of these formally contractual acts is directly and entirely dictated by regulatory texts (CE sect., 30 October 1998, *Ville de Lisieux*).

The obstacles to the expansion of actions for judicial review in contractual matters are the result of the *Conseil d'Etat*'s efforts to safeguard the judicial review paradigm and maintain a distinction between the two actions that is other than strictly formal in its scope. Indeed, it was not feasible to extend the action to third parties without making a number of adjustments as to admissibility: specifically, as to the understanding of "interest in bringing an action", traditionally very broadly understood in judicial review proceedings; and as to the nature of the legal grounds likely to be raised in challenging the contract (Jacques-Henri Stahl, RFDA 1999 p. 128, *Conclusions sur Conseil d'Etat, Section, 30 octobre 1998, Ville de Lisieux*). Proceeding with such adjustments in respect of actions for judicial review would have rendered the two different actions indistinguishable, which the *Conseil d'Etat* did not want. Attached as it was to the classification of the various actions and upholding the position adopted in 2007 (9), it therefore opted to open the possibility of a full remedy action, the contours of which it could define as it saw fit, stating as much in one of its longest ever *obiter dicta* in its decision of 4 April 2014.

B. A full remedy action better suited to the specific features of contractual litigation

The security of the contract, which guarantees the continuity of the public service in particular, includes a filter for access to the contract judge. Indeed, the situation in which the contract, as a bilateral commitment (this is itself important), is pointlessly exposed to third-party claims should be avoided. This is precisely what the Assembly of the *Conseil d'Etat* set out to do, giving details of the procedural arrangements for the new action.

Firstly, the new action replaces those actions against *actes détachables* previously open to third parties, which may no longer be brought as they fall within the remit of the exception known as a *recours parallèle*, or parallel remedy. Under this exception, owing to the facilities of a judicial review action, the latter may not be brought while another procedural route is not specially provided before the administrative court. Thus only signed contracts may be challenged in full remedy actions, and even then only within a period of two months following the completion of the advertising formalities attached to the contract. It is now only during this sole action against a contract that third parties may challenge acts prior to the contract, such as procedural acts before a contractor is selected, unless such challenges are brought as part of a *référé contractuel* or a *référé précontractuel* (summary proceedings relating to contractual or pre-contractual matters)

provided under French public procurement law (Articles L.551-1 to 3 and L.551-13 to 16 of the *Code de justice administrative*), the illegality of which matters affect the contract as a whole. Secondly, it falls to the court to assess the applicants' interest in bringing an action in a manner adapted to the scope of the contractual situations in question. The *Conseil d'Etat* gives a particularly restrictive reading of the same, which includes companies tendering for contracts covered up until now by the *Société Tropic* decision. The judgment of 4 April 2014 identifies two categories of third party: the *requérants privilégiés* – priority third parties – and *requérants ordinaires*, or ordinary third parties. Priority third parties do not have to establish any interest in bringing an action; their standing will suffice. This concerns Prefects in their capacity as State representatives, owing in particular to the powers that they hold under Article 72 of the Constitution giving them responsibility for overseeing the acts of local authorities. It also applies to elected representatives, members of the deliberative assembly of the local authority that signed the contract, for reasons not explicitly mentioned by the *Conseil d'Etat*, but which undoubtedly result from the possibility offered to opposition representatives to overcome failures on the part of Prefects and use the full remedy action as a legal weapon for the purposes of political debate.

Conversely, ordinary applicants will have to establish a sufficiently characterised interest in bringing the action and prove to the court that their personal situation is "likely to be adversely affected in a sufficiently direct and definite way" by the conclusion of the contract in question. This admissibility requirement is halfway between the definition of the interest in bringing an action in judicial review proceedings and that of the *droit lésé* or infringed right encountered in disputes concerning rights. It concerns, first of all, candidates who have been unsuccessful in the tender process. Actions brought by such parties, which may also include a *référé-suspension* (or application for suspension) as for any other third party, will now be examined subject to conditions similar to those of the *référé précontractuel* and, therefore, more restrictively than the *Conseil d'Etat* had considered up until then following the decision in *Tropic*, which had admitted actions brought by companies that had simply intended to tender for the contract in question.

Secondly, it concerns all other third parties: third parties with no particular standing, citizens, service users, taxpayers, associations, all of whom will however have difficulty in satisfying the subjective requirements of the interest condition. They may then find themselves deprived of any possibility of challenging an illegal contractual situation. Quite beyond the regression in terms of democratic life that would result from such a restrictive approach, it is in no way certain that contractual litigation stands to make any gains in terms of consistency: either third parties will turn to the criminal courts to denounce illegal contractual practices, or they will ensure that their challenge to the contract in question is brought by sympathetic elected representatives released from any specific requirements. One can imagine that the contract judge will have to give a broad assessment of their interest, failing which the option of bringing an action for judicial review of the *actes détachables* will be open to them once more.

II. A new definition of the role played by the administrative contract judge

The subjectivisation of disputes carries with it a decline in issues of legality brought before the administrative court dealing with an illegal contractual situation. It emerges from the recommendations drawn from the decision of 4 April 2014 that the principle of legality has not been "erased" as such, but must instead be reconciled with other requirements, in particular the clarity of contractual situations. It is for the contract judge to undertake a permanent exercise in

proportionality, taking account of the relationship between the interest affected and the alleged illegality, together with the seriousness of the illegality in light of the contractual situation. There follows a sort of assertion of variable legality: variable because, as a function of the applicant's situation, not all illegalities are enforceable against the administration; and variable because, as a function of the gravity of the *vice* or defect affecting it, not all illegal contracts will be censured.

A. Not all grounds of illegality can necessarily be relied upon before the contract judge

This decline in issues of legality in disputes brought before the contract judge is reflected in the fact that third parties are no longer permitted to rely upon all sorts of illegalities. This is undoubtedly one of the most notable innovations introduced by the *Département de Tarn et Garonne* decision. Third parties may only rely on defects relating directly to the interest affected. The consequence is that the applicants' interest in bringing an action is no longer assessed in light of their submissions – the application made to the judge for the cancellation of the contract – but rather in relation to the grounds argued in support of those submissions. This solution is taken directly from the *référé précontractuel* regime (*Code de Justice administrative*, Article L.551-1 and subsequent) under which the *Conseil d'Etat* has, since 2008, required an unsuccessful candidate applying to the interim relief judge to rely solely on those breaches which, in light of their scope and the stage in the tender process to which they relate, "are likely to have affected or run the risk of affecting them, be it indirectly, by giving an advantage to a rival business" (10). This is the exact opposite of the *Conseil d'Etat*'s ruling in the context of its *Tropic* case law (CE, opinion, 11 April 2012, *Société Gouelle*). There are now only two exceptions to the limits imposed on the grounds to be argued. Firstly, the rule does not apply to priority third parties who do not have a specific interest in bringing an action before the contract judge. Secondly, the decision reserves a particular fate for particularly serious defects: insofar as the court may raise them of its own motion, third parties are also invited to rely on them. This concerns the illegality of contractual clauses, defects of consent and, more widely, any other defect as the judge may identify as being particularly serious. The issue of whether breaches of the rules relating to advertising and competition constitute a particularly serious defect will be one of the first for case law to decide, as answers given by the court in the context of actions for invalidity brought by the parties (CE Ass., 28 December 2009, *Commune de Béziers,* GAJA, *supra*, p. 939) are not transferrable, other than to consider that the same reasoning will guide the judge who must necessarily consider the seriousness of the defect, and not solely in light of the circumstances in which it was committed.

A new conception of the principle of legality is emerging. Legality in contractual matters is now split in two with, on the one hand, public order in contractual matters; and, on the other, an attenuated legality which depends on the situation of the third parties who rely on it, a legality that is in some ways subjective and does not exist *per se* but rather in light of the dispute to be ruled upon by the judge.

B. Not all illegalities identified will result in the cancellation of the contract

This duplication of the principle of legality is supported by the powers and prerogatives that the *Conseil d'Etat*'s Assembly has given to the new contract judge, to whom it falls when identifying an illegality "to assess the importance and consequences thereof". This discretion is not an innovation: it had already been granted in 2009 to judges hearing applications for the cancellation of a contract brought by the parties themselves. The *Conseil d'Etat* has therefore pursued its endeavours to unify contractual litigation. On that basis, it allows the contract judge hearing an

application brought by a third party to modulate the effects of any declaration on the invalidity of the contract. A number of solutions are consequently open to the judge. It is possible, first of all, to find that the illegalities committed do not prevent the execution of the contract, as these have in no way influenced the content of the contract or deprived third parties of a procedural guarantee. Otherwise, it falls to the judge to invite the parties to take remedial action where the continuation of the contract nonetheless seems possible. This relates in particular to certain formal or procedural defects, which case law already allows to be remedied. It is only where no remedial measures are possible that the contract judge will have to consider terminating the contract. However, the cancellation of the contract may only be considered subject to extreme caution: the immediate cancellation of the contract is thus reserved for sanctioning the most serious defects. The judge must check beforehand that such a decision, which is necessary in order to restore legality, does not have an excessive adverse effect on the general interest; failing which, the judge may order either the prospective termination of the contract or the cancellation thereof (in whole or in part) but with a deferred effect so as to allow the contracting authority to take the measures necessary for the proper management of the service in question. In any case, even when inviting the parties to take remedial measures, the judge may also grant a third party's request for damages, thus turning what had been an issue of legality into one of compensation – with the proviso (and it is an important one) that undoubtedly, just as before, only those candidates who were unsuccessful in the tender process will be able to establish compensable damage.

While it highlights the inexorable decline of actions for judicial review, the expansion of the administrative court's role ultimately conceals a particular form of constancy in the *Conseil d'Etat*'s judicial policy. Contract security remains the judge's priority. It was before, in a kind of fool's bargain which saw third party actions succeed without the life of the contract necessarily being threatened, *even when the contract was defective and when the judge ruling on the legality thereof would have acknowledged as much for the moral satisfaction of the interested third party* (11). And it is now, in a manner more clearly claimed, since the new action has been expressly calibrated by the Assembly of the *Conseil d'Etat* to allow illegal contracts to be safeguarded as far as possible. However, this is a kind of democratic conception of administrative litigation which, together actions for judicial review, tends to disappear only to be replaced by a more managerial approach to economic issues raised by the survival of contracts concluded by public administrations.

Notes:

(1) *Traité de la juridiction administrative et des recours contentieux*, 2nd ed. 1896 (reprint LGDJ 1989)

(2) This, at least, is the opinion held by French legal scholars – and in particular by Gaston Jèze, in "*Les libertés individuelles*", Annuaire de l'institut international de droit public, 1929, p. 180, according to whom judicial review is "the most effective, economic and practical weapon in the world to defend individual liberties".

(3) CE, 4 August 1905, *Martin*, in *Grands arrêts de la jurisprudence administrative* (GAJA), 19th édition, 2013, p.88. The *Conseil d'Etat*'s most important decisions are also available in French at http://www.conseil-etat.fr/Decisions-Avis-Publications/Selection-contentieuse while a search facility is available in English at http://english.conseil-etat.fr/Judging

(4) CE, 29 March 1901, *Casanova*, GAJA, p. 50

(5) CE, 21 December 1906, *Syndicat des propriétaires et contribuables du quartier Croix de Seguey -Tivoli*, GAJA p.98
(6) CE, 4 August 1905, *Martin*, above, GAJA, p. 88
(7) Case C-503/04, *Commission v Germany* [2007] ECR I-06153, Opinion of Advocate General Trstenjak
(8) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 with regard to improving the effectiveness of review procedures concerning the award of public contracts, transposed to Articles L.551-1 and subsequent of the *Code de Justice administrative* (Administrative Justice Code), available in French and in English at http://www.legifrance.gouv.fr
(9) See D. Casas, *conclusions sur CE, Ass. 16 juillet 2007, Société Tropic Travaux Signalisation*, Rec. p. 360
(10) CE sect., 3 October 2008, *SMIRGEOMES*, conclusions by Dacosta, Rec. p. 324
(11) Conclusions by Stalh, above.

Annex: Excerpt from CE, 4 April 2014, *Département du Tarn et Garonne*, Application n°358994
On actions available to third parties challenging the validity of the contract:

2. Whereas, independently of actions available to the parties to an administrative contract and available actions for judicial review challenging the regulatory clauses of a contract or the *référé contractuel* judge on the basis of Article L. 551-13 and subsequent of the *Code de justice administrative*, any third party to an administrative contract whose interests are likely to be adversely affected in a sufficiently direct and definite way by the conclusion thereof or by its clauses may bring a full remedy action before the contract judge challenging the validity of the contract or of some of its non-regulatory clauses which are separable therefrom; this action before the contract judge is also open to members of the deliberative body of the local authority or group of local authorities concerned, as well as the State representative in the *département*, in exercising a review of legality; the applicants may potentially include in the action brought and on the basis of Article L. 521-1 of the *Code de justice administrative*, an application to suspend the execution of the contract; such an action must be brought, even when the disputed contract relates to public works, within a period of two months as of the completion of the appropriate advertising formalities, in particular by giving notice mentioning both the conclusion of the contract and the arrangements for consulting the same whilst respecting confidential matters protected by law; the legality of the choice of contractor, the deliberative process authorising the conclusion of the contract and the decision to sign it, may only be challenged by bringing the action defined above; however, when reviewing the legality of an administrative contract, the State representative may bring an action for the judicial review of the legality of such acts until such time as the contract is concluded, upon which date ongoing actions which have yet to be tried become devoid of purpose;

3. Whereas the State representative in the *département* and the members of the deliberative body of the local authority or of the group of local authorities concerned, given the interests that they represent, may rely on any grounds in support of the action defined above; other third parties may only rely on defects in direct relation with the interest that they claim has been affected, or defects so serious that the court would identify them of its own motion;

4. Whereas, when a third party brings an action in the circumstances defined above, with submissions challenging the validity of the contract or some of the clauses thereof, it falls to the contract judge, having verified that the party bringing the action other than the State representative in the *département* or a member of the deliberative body of the local authority or of the group of authorities concerned claims to have an interest likely to be affected in a sufficiently direct and definite way and that the irregularities criticised are amongst those upon which they may rely, where the judge notes the existence of defects affecting the validity of the contract, to assess the importance and the consequences thereof; it therefore falls to the judge, taking into consideration the nature of such defects, either to decide that these do not prevent the execution of the contract, or to invite the parties to take remedial measures within a timeframe set by the judge, with the exception of terminating or rescinding the contract; in the presence of irregularities that cannot be covered by a remedial measure and which do not allow a contract to be executed, it falls to the judge to order, where necessary with delayed effect, having verified that his decision will not have an excessive adverse effect on the general interest, either the termination of the contract or, where the content of the contract is illegal or the contract is affected by a defect of consent or by any other defect of such seriousness that the court should identify it of its own motion, the cancellation of the contract in whole or in part; finally, even where he has invited the parties to take remedial measures, the judge may grant a request, if made, for the compensation of damage resulting from the infringement of adversely affected rights;

5. Whereas in theory it falls to the judge to apply the rules defined above which, taken as whole, do not impose restrictions on the fundamental right that is the right to turn to the courts; however, in light of the imperative to ensure legal certainty and so prevent any excessive infringement of existing contractual relations, the action defined above may not be brought by third parties who did not benefit therefrom and, in accordance with the abovementioned modalities, said action may only be brought against contracts signed as of the date on which this decision is handed down; the existence of an action against administrative contracts which, aside from prefectural referrals, was open only to unsuccessful candidates prior to this decision, does not render devoid of purpose any actions for judicial review as may be brought by other third parties against separable administrative acts related to contracts prior to the date of this decision; as a result, the present case has retained its purpose [...].