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COMPENSATION FOR LOSSES ARISING FROM THE EARLY TERMINATION OF PUBLIC CONTRACTS FOR REASONS OF PUBLIC INTEREST

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ABSTRACT

Can a public contract be terminated early on the ground that it is in the public interest to do so, without the contractor being able to claim any compensation? The question might come as a surprise because its two terms seem so inseparable. Early termination in the public interest is anchored every bit as firmly in administrative contract law as the principle of compensation, a variant of liability without fault for sovereign acts, which is its corollary. Being a rule applicable to all administrative contracts, including contracts between public entities, the early termination of a contract in the general interest cannot be the subject of any waiver by the administration and consequently can only be varied by legislation. There has thus long been enshrined in law, as in some foreign legal systems, the idea that matters in the general interest entitle the administration to require of its contractor the early termination of contracts to which it is party in exchange for fair compensation.

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Can a public contract be terminated early on the ground that it is in the public interest to do so, without the contractor being able to claim any compensation? The question might come as a surprise because its two terms seem so inseparable. Early termination in the public interest is anchored every bit as firmly in administrative contract law[1] as the principle of compensation, a variant of liability without fault for sovereign acts, which is its corollary. Being a rule applicable to all administrative contracts[2], including contracts between public entities[3], the early termination of a contract in the general interest cannot be the subject of any waiver by the administration[4] and consequently can only be varied by legislation[5].

1. G. Péquignot claims this power is 'one of the least contested rights of the administration' (*Théorie générale du contrat administratif*, Pédone, 1945, p. 391).
2. CE, Ass., 2 mai 1958, Distilleries de Magnac-Laval : Rec. CE, p. 246 ; *Les grandes décisions*, 14e éd., p. 572 ; AJDA 1958, II, p. 282, concl. Kahn ; D. 1958, p. 730, note de Laubadère.
3. CE, 21 déc. 2007, Région Limousin : AJDA 2008, p. 7 ; JCP A 2008, 2050, note J.-M. Pontier ; Dr. adm. 2008, comm. no 16.
4. CE, 6 mai 1985, Association Eurolat : Rec. CE, p. 141 ; RFDA 1986, p. 21, concl. B. Genevois ; AJDA 1985, p. 620, note Moreau et Fâtome ; RDP 1986, p. 21, note Llorens.
5. Cons. const., 18 janv. 1985, no84-185 DC : RFDA 1985, p. 624, note Delvolvé ; RDP 1986, p. 395, note Favoreu.

There has thus long been enshrined in law[6], as in some foreign legal systems[7], the idea that matters in the general interest entitle the administration to require of its contractor the early termination of contracts to which it is party in exchange for fair compensation.

The traditional power of rescission for reasons of the general interest can probably be likened to the frustration of administrative contracts which have become incompatible with legislative norms that have arisen during the course of performance. True enough, contracts continue to be governed, in principle, by the legislative and regulatory provisions applicable at the time they were formed[8]. The new statute therefore has no effect, in principle, on contractual situations which were entered into before it came into force. By extension, any regulatory provision supposedly coming to apply to current contracts must be considered illegal as it is contrary to the principle of administrative measures being non-retroactive[9]. However, there are instances where the new statute does apply to ongoing contracts. Apart from instances where the contract itself provides for such immediate application, express legislative provisions, or in the absence of any such provisions, sufficiently compelling reasons of public policy may provide a basis for applying new legislative or regulatory provisions to extant contracts. The retroactivity organized by the legislation is ring-fenced three times since it must be warranted by the general interest and it must not unduly infringe either the freedom to contract[10], or the principle of unfettered administration by local authorities[11]. As for the retroactivity based on a ground of public policy that is mandatory or sufficiently compelling, it is enshrined both by the *Conseil d'État*[12] and the *Cour de cassation*[13] and finds application in particular in the domain of public economic law[14]. A public policy requirement derived from public services being subject to change may thus provide a basis for the application of new legislative provisions to current contracts and frustrate the said contracts by a rebound effect. Being fully compatible with the principles discovered by the *Conseil d'État* in its important KPMG ruling ('a new legislative or regulatory provision cannot apply to contractual situations current at the date it comes into force without thereby taking on a retroactive character; it ensues from this, subject to the general rules applicable to administrative contracts, that only a legislative provision can, for public policy reasons, albeit implicitly, authorize the application of the new rule to such situations […]')[15], and which are applicable to private contracts only, this solution might compel the parties to an administrative contract to adapt their contract, or even to terminate it early, as those parties are unable to lawfully maintain their contractual relationship to the extent it is contrary to statute. This solution was expressly enshrined by the *Conseil d'État* in an important combined court decision (*arrêt d'Assemblée*) of 8 April 2009, bearing on what was to become of agreements for the delegation of public services entered into before the enactment of the 'Sapin' law no. 93-122 of 29 January 1993, for a duration in excess of

6. CE, 9 déc. 1927, Gargiulo : Rec. CE, p. 1198.
7. See for example part 43 of the US Federal Acquisition Regulation (F.A.R.), which sets out the conditions on which a contract to which the Federal State is party may be terminated for 'convenience of the Government'. On arrangements for compensation see especially F.A.R. article 49.201(a).
8. CE, Sect., 29 janv. 1971, Emery et autres : Rec. CE, p. 80. On this point see Concl. Genevois sur : CE, Sect., 19 déc. 1980, Revillod : Rec. CE, p. 479 ; D. 1981, p. 398, concl. Genevois.
9. CE, 7 déc. 1973, Le Couteur et Sloane : Rec. CE, p. 704.
10. Cons. const., 10 juin 1998, n°98-401 DC : RFDA 1998, p. 640, note Favoreu ; LPA, 2 déc. 1998, p. 18, note Mathieu et Verpeaux. – Cons. const., 23 juil. 1999, n°99-416 DC : AJDA 1999, p. 7000, note J.-E. Schoettl ; RFDC 1999, p. 809, note Gay.
11. Cons. const., 30 nov. 2006, n°2006-543 DC : LPA, 7 et 8 déc. 2006, p. 3 et p. 16, note J.-E. Schoettl ; JCP A 2007, pp. 30, note Drago ; CJEG 2007, n°639, p. 41, note Molina ; RFDA 2007, p. 596, note Rambaud et Roblot-Croizier, RDP 2007, p. 845, art. Gadhoum.
12. CE, Sect., 11 déc. 1970, Sté des Établissements Sonauto : Rec. CE, p. 748. – CE, 30 déc. 1998, Entreprise hagnaud et autres : Rec. CE, p. 721. – See also: CE, Sect., 3 nov. 1997, Sté Intermarbres : Rec. CE, p. 293, concl. J.-H. Stahl ; Dr. adm., 1997, comm. n° 372.
13. Cass. Civ., 1re, 18 avril 1989 : Bull. civ., I, n°160.
14. See for example: CE, Sect., 16 nov. 1962, Syndicat intercommunal d'électricité de la Nièvre : Rec. CE, p. 612 ; CJEG 1963, p. 18, concl. Henry et CE, Sect., 2 juin 1972, Syndicat national de la production autonome d'électricité : Rec. CE, p. 409 ; CJEG 1972, p. 241, concl. Rougevin-Baville. On this question: P. Delvolvé, « Le principe de non-rétroactivité dans la jurisprudence économique du Conseil d'État », in *Mélanges offerts à Marcel Waline*, LGDJ, 1974, p. 355.
15. CE, Ass., 24 mars 2006, Sté KPMG : Rec. CE, p. 154 ; *Les grandes décisions*, 14e édition, p. 215 ; RFDA 2006, p. 463, concl. Aguila et note Moderne ; AJDA 2006, p. 1028, chr. Landais et Lénica ; Europe 2006, comm. n°142, note Simon ; D. 2006, chr., p. 1190, note Cassia ; JCP A 2006, 1120, note Belorgey ; BJCP 2006, p. 173, concl. Aguila et note Terneyre.

the duration authorized by the said statute[16], in the version of it arising from the 'Barnier' law no. 95-101 of 2 February 1995[17]. The *Conseil d'État* thus adjudicated that 'in the event it [the statute] has not expressly provided for […] the application of the new rules it lays down to a contractual situation which is current at the date it comes into force, the statute cannot be construed as implicitly authorizing such application of its provisions unless a reason of the general interest which is sufficiently related to a public policy requirement so warrants and so long as there is then no undue infringement of the freedom to contract', the existence of such a reason of general interest being appreciated, with respect to administrative contracts, by taking account of the rules applicable to such contracts, and in particular the principle of susceptivity to change. In accordance with conditions set out in the decision ('clauses of a public service delegation agreement purporting to allow its performance for an outstanding term, as from the date the statute comes into force, in excess of the maximum term authorized by the statute, can no longer be duly implemented beyond the date at which that maximum term is reached'), the *Conseil d'État* infers that contracts which have exceeded their term with respect to the rules laid down by the Sapin law, especially when there are no investments still to be recouped, are frustrated.

Rescission in the general interest and frustration by supervening legislation because of public policy requirements thus allow the anticipatory discharge of administrative contracts, in the name of the principle that public services are subject to change and in the absence of any breach by the parties. It remains for us, however, to enquire into the consequences of these two hypotheses about the early termination of contractual relations, especially with respect to compensation.

The incontrovertible character of the possibility the administration has of unilaterally rescinding an administrative contract has as its corollary the no less incontrovertible principle that the contract must be financially balanced. As D. Pouyaud points out 'the public policy character of the susceptivity to change of administrative contracts extends to the compensation that is its counterpart'[18]. The *Conseil d'État* for that matter raised the right to financial balance in the contract[19] to the rank of a general rule applicable to administrative contracts, with the contracting administration being entitled by law to exercise the powers it has under these general rules, in particular the power of rescission in the general interest, 'subject to the contractor's rights to compensation' only[20].

There is *a priori* no reason this principle should not extend to the hypothesis whereby the early termination of the administrative contract stems from the frustration induced by a legislative provision introduced after the contract was formed and which, for compelling public policy reasons, comes to apply to existing contractual situations. In other words, whatever its origin, whether a unilateral decision of the administration or the inevitable consequence of a legislative provision, the anticipatory discharge of the administrative contract is acceptable only if it complies with the financial rights of the contractor, which themselves derive from the right that the contract be financially balanced.

The aforecited decision of the *Conseil d'État* of 8 April 2009 does, though, raise the question of whether in the event of early termination of the contract, those financial rights are not in the process of being transcended by the ever more pressing requirements for transparency and the opening up of public contracts to competition[21]. The general principles of public procurement, laid down by the *Code des marchés publics* and consolidated by the *Conseil constitutionnel*[22], hem round the rules governing

16. C. Bonnotte , « Les conventions de service public et le temps », RFDA 2005, p. 89 suiv.
17. CE, Ass., 8 avril 2009, Compagnie Générale des Eaux et Commune d'Olivet, Req. nº271737 et 271782 : Contrats et marchés publ. 2009, comm. nº164, note Eckert.
18. D. Pouyaud, La nullité des contrats administratifs, LGDJ, 1991, p. 254.
19. CE, 2 févr. 1983, Union des Transports Publics Urbains et Régionaux : Rec. CE, p. 33 ; Les grandes décisions, p. 557 ; RDP 1984, p. 223, note Auby ; RFDA 1984, p. 45, note Llorens.
20. CE, 16 févr. 1996, Syndicat intercommunal pour la collecte et le traitement des déchets et résidus ménagers de l'arrondissement de Pithiviers : Req. nº 082880.
21. C. Maugüé, « La portée de l'obligation de transparence dans les contrats publics », in *Mouvement du droit public, Mélanges en l'honneur de Franck Moderne*, Dalloz, 2004, p. 609. See also: L. Richer, « La transparence et l'obstacle », in *Mélanges en l'honneur du Professeur Michel Guibal*, 2006, p. 175.
22. Déc. nº 2003-473 du 26 juin 2003. On the scope of these principles: CE, Sect., 30 janv. 2009, A.N.P.E., Req. nº 290236,

public contracts in the same way as the general principles underlying Community treaties[23] with respect to public contracts presenting a cross-border interest[24]. Those principles, which assume, for example, that the duration of these contracts should be fixed so that potential holders are periodically allowed to compete for them, contribute, through sophisticated litigation instruments made available to claimants (see the recent creation by order no 2009-515 of 7 May 2009, of the new 'contractual' interlocutory procedure laid down in sections L. 551-13 to L. 551-23 of the *Code de justice administrative*) and in the absence of any truly operative mechanism for rectification or compensation, to rendering these contracts unsafe in some sense.

Can these principles, nestling in the code of public procurement, in the case law of the *Conseil constitutionnel* or the European Court of Justice, give rise to cases where the early termination of an administrative contract would exclude, even in the absence of any breach, any compensation of the contractor? In other words, must the contractor's rights, which have hitherto been considered untouchable, yield to the requirements of the general principles of public procurement, whether of national or Community origin?

At the crux of the answer to this question lies the necessity to see emerge what is both regulatory and balanced control of the effects of the early termination of public contracts. This pathway must leave greater scope not just for pragmatism which imposes some allowance for requirements derived from the general interest, especially when those requirements are related to the stringencies of transparency, but also for the ever growing concern to protect the public purse and above all the financial interests of the contractors.

In this perspective, while the constraints of regulating the life of a contract, related to the transparency surrounding it or to it being subject to change, justify it being possible to rescind it before its term (I), the protection of the contractor's financial rights provides a basis in any event for an inalienable right to financial balance and therefore to fair compensation for any loss caused by the early termination of contractual ties (II).

1. THE LEGITIMATE REGULATION OF THE LIFE OF THE CONTRACT

The right of the administration to rescind administrative contracts to which it is party is an instance of the unequal character of administrative law and the reflection of the susceptivity to change of administrative contracts, which itself derives from the principle that public services are adaptable[25]. Being in charge of the general interest, the administration must be able to release itself from its contractual obligations when the general interest so dictates. It has discretionary power in this matter which L. Richer makes no bones about calling 'quasi immunity'[26]. The general principles of public procurement are likewise founded on requirements as to the general interest related, among other things, to the proper use of public monies or the protection of open competition. The eminently changing character of the general interest and the general principles of public procurement thus transcend the will of the parties and place constraints on the freedom to contract to the point that they can legally put an end to the contract (1.1).

Contrats et marchés publ. 2009, comm. n°121, obs. W. Zimmer; Dr. adm. 2009, comm. n°50 ; JCP A 2009, Act., 142 ; RD Imm. 2009, p. 242, obs. S. Braconnier ; AJDA 2009, p. 183).

23. CJCE, 7 déc. 2000, Telaustria Verlag GmbH, AJDA 2001, p. 106, note L. Richer ; Contrats et marchés publ., 2001, comm. n° 50, note F. Llorens ; BJCP, 2001, p. 132, concl. N. Fenelly, et p. 145, note Ch. Maugüé ; JCP G, 2001, I, p. 318 ; CJCE, ord., 3 déc. 2001, Bent Mousten Vestergaard, Contrats et marchés publ. 2002, comm. n°207, obs. F. Llorens ; Dr. adm., 2002, comm. n° 83 ; CJCE, 21 juil. 2005, CONAME C-231/03, Contrats et marchés publ., 2005, n° 11, p. 17, note Zimmer ; BJCP, 2005, p. 414, note E. Glaser et p. 446, concl. Stix-Hackl , JCP A, 2005 p. 1786, note Katz ; Europe 2005, n° 338, p. 23, note Idot.

24. CJCE, 15 mai 2008, SECAP SpA c/ Commune de Turin : Aff. n°C-147/06 et C-148/06 : JCP A 2008, 2125, note F. Linditch ; RD imm 2008, p. 501, note R. Noguellou.

25. CE, 10 janv. 1902, Compagnie nouvelle du gaz de Deville-Lès-Rouen, Rec. CE, p. 5 ; S., 1902, III, p. 17, note Hauriou ; *GAJA*, p. 57 ; *Les grandes décisions*, 14e édition, p. 436.

26. L. Richer, « La résiliation unilatérale : motifs et procédures de rupture », ACCP 2002, n° 16, p. 27.

But in spite of the fact that, unlike other principles governing the organization and operation of public services, the principle of adaptability confers more rights on the administration than it imposes duties on it[27], it cannot legitimately be reflected in the law of administrative contracts unless stayed by fair compensation for the contractor as the logical counterpart of the administration's inordinate powers (1.2).

1.1. Heterogeneity in the means of terminating public contracts in the general interest.

The pursuit of any administrative contract is subject to chance events the occurrence and consequences of which largely escape from the control of the parties. Some of those chance events arise from what the general interest requires. They manifest themselves, as the case may be, either by frustration of the contract or by its rescission.

1.1.1.

The frustration of certain contracts, the principle of which has long been enshrined by the *Conseil d'État* when external circumstances prevent performance of the contract[28], obeys the same rationale, when it occurs further to a legislative provision[29] underpinned by a public policy requirement, as holds for the administration when it decides to rescind a contract on the grounds that it is in the general interest to do so.

For example, it is because the Sapin law of 29 January 1993 meets a public policy requirement consisting in ensuring economic operators have open access to public service delegations and that procedures are transparent[30], by opening them up to competition again from time to time—to which could have been added the right to state aid and competition law—that it has been possible to consider the provisions of this statute on the duration of such agreements as applicable to current contracts and, by a knock-on effect, that it is liable to terminate them. It is indeed then a public policy ground, which is an integral part of the general interest, that explains in the case in point the early termination of the contract. Although the channels followed by this early termination are plainly different from those followed when the administration exercises its power to rescind a contract in the general interest, the mainsprings are identical in both cases. The contract comes to an end before the term defined by the parties because of a general interest requirement that is alien to the parties and that legitimately trumps their freedom to contract.

While the hypothesis enshrined by the *Conseil d'État* in *CGE-Commune d'Olivet* appears, *prima facie*, to escape from all of the academic categories for the early termination of a contract, it has to be acknowledged that the dynamic of that termination lies in what has for decades been the basis for the power of rescission, that is, general interest requirements. It is simply that, those requirements, which were until then but substitutes for the adaptability of public services, have been enhanced by all of the principles of both national and Community public procurement.

Thus contracts for the delegation of public services which, as from the entry into force of the law, exceed the duration laid down by the Sapin law, as gauged by the requirements for opening them up to competition again from time to time, must be ended before the term laid down by the parties, under the conditions defined by the courts.

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27. On this question see S. Braconnier, *Droit des services publics*, PUF, 2e édition, p. 321.
28. CE, 30 juin 1937, Commune d'Avrieux : Rec. CE, p. 648 ; CE, 19 juin 1970, Commune de Berre-L'Etang c/ Ville de Marseille et Sté des Eaux de Marseille : Rec. CE, p. 1098
29. CE, 8 août 1958, Société des chemins de fer du Var et du Gard : Rec. CE, p. 475 ; AJDA 1958, p. 405, note de Laubadère. – CE, Ass., 8 avril 2009, CGE et Commune d'Olivet, préc.
30. CE, 20 oct. 2006, Communauté d'agglomération Salon-Etang de Berre-Durance : Contrats et marchés publ. 2006, comm. no322, note Eckert ; AJDA 2007, p. 311, note Videlin.

1.1.2.

The general interest thus governs the life of the contract, in part and above and beyond the exercising of the freedom to contract, either by the means of rescission or by legislative frustration. Apart from this shared line of descent, there are several factors that bring legislative frustration and rescission closer together.

The first of these factors is related to it being impossible for the administration to operate any waiver. The administration cannot under any circumstances waive its power of rescission. No more than it can escape from the public policy requirement to enforce, with respect to ongoing contracts, a legislative provision inducing the early termination of contracts to which it is party. Frustration due to supervening legislation, because it is based on a reinforced public policy ground, and like rescission in the general interest, does not leave the administration any way-out. Even so, as concerns contracts that have become incompatible with the Sapin law of 29 January 1993, their frustration is only required in the absence of investments remaining to be amortized which warrant a longer period of public service delegation. Otherwise, performance of the contract may indeed be pursued.

A second factor bringing the two mechanisms together lies in their time effects. In both instances, the effects of the contract are terminated with respect to the future alone. Neither rescission in the general interest nor frustration by legislative effect induce a return to the *status quo ante*. The future alone is burdened by the early termination of the contract. Frustration of the contracts by legislative effect is for that matter clearly opposed, in the name of the principle of non-retroactivity, to the retroactive avoidance of contracts formed before the enactment of the statute and that have become incompatible with that statute.

Lastly, a third and final factor of this coming together lies in the necessary amortization of the effects of these instances of anticipatory discharge. The rescission of contracts in the general interest is, given its long standing nature, a risk that is perfectly well understood by contractors. In public-private partnership contracts, this risk is an integral part of the economic equation, derived from the optimal distribution of risk, leading to the determination of the price the administration pays to the contracting company. In other words, the inordinate power of rescission is not synonymous with the harshness of its effects. Administrative law places the power of rescission at the 'confluence' of the principles of legal certainty, enshrined by the *Conseil d'État*[31], and susceptivity to change[32]. Such is the purpose, in particular of the right to compensation, which is the corollary of the power of rescission.

In parallel, the administrative tribunals have invariably taken care to offset the frustration of contracts by regulatory mechanisms, whether by compensatory mechanisms[33] or by appropriate ('delayed action') modulation of the frustration[34].

With the result that in both instances the impact of early termination of contractual relations is softened by mechanisms that are of the same essence as legal certainty, guaranteeing the contractor some degree of security in its economic operations[35].

1.2. Homogeneity of the mechanisms for providing security in economic operations

Legal certainty and security in economic operations, which are firmly entrenched in administrative law in general and in administrative contract law in particular, are the foundations nowadays of most coun-

31. CE, Ass., 24 mars 2006, Sté KPMG, préc.
32. D. Costa, « Le droit administratif entre mutabilité et sécurité », in *Terres du droit, Mélanges en l'honneur d'Yves Jégouzo*, Dalloz, 2009, p. 431.
33. See especially: CE, 31 juil. 1996, Sté des Téléphériques du Massif du Mont-Blanc : Rec. CE, p. 33 ; JCP G 1997, II, 22790, concl. Delarue; AJDA 1996, p. 788, note Gilli.
34. CE, Sect., 28 janv. 1955, Consorts Robert et Bernard : rec. CE, p. 54, concl. Grévisse. – CE, Sect., 5 déc. 1958, Carné c/ Ville de Neuilly : Rec. CE, p. 612. – CE, Ass., 30 janv. 1959, Melge : Rec. CE, p. 89.
35. P. Delvolvé, « Contrats publics et sécurité juridique », in *Le contrat, mode d'action publique et de production de normes*, Rapport public du Conseil d'État pour 2008, EDCE nº59, La Documentation Française, 2008, p. 329. See also on the KPMG case: F. Moderne, « Sécurité juridique et sécurité financière », RFDA 2006, p. 483.

terweights to the inordinate power the administration has in the performance of its contracts. Beyond this, they are the foundations for the amortization mechanisms for negative effects related to the early termination of an administrative contract.

Being tied to an ever more potent principle of legal certainty, the security of economic transactions is the legitimate counterpart to the taint of inequality that still stigmatizes administrative law when it comes to the general interest. From this perspective, the contractor's right to compensation is at least as important as the administration's power to put an early end to contractual relations.

Thus, while the administration cannot validly waive its power of rescission, neither can the contractor waive its right to compensation to cover losses arising from the contract being rescinded in the general interest. From this standpoint, there is a twofold control on the compensation the contractor may claim. First, and generally, such compensation is capped so as not to dissuade the administration from resorting to its power of rescission[36]. Next, unless the contract specifies otherwise[37], compensation must be set at a level that does not amount to denying the contractor's right to any compensation. In terms of rescission in the general interest, compensation as the 'inalienable counterpart to the inordinate powers the administration wields'[38] therefore fits in with the rationale of the sovereign act that demands full reparation of the loss caused in the name of the right to the financial balance of the contract[39].

The frustration of administrative contacts based on a compelling reason of public policy is in truth part of the same logic. Admittedly, it can readily be conceived with Waline that a sovereign act[40] and early termination in the general interest 'are two very different situations for a state's co-contractor'[41]. It is not the same thing, indeed, 'for example for a supplier to be compelled either to perform its obligations on more expensive terms than were agreed or on the contrary to discontinue entirely both from enjoying the advantages procured by the contract and from performing obligations under it'[42]. However, as Waline himself acknowledges, 'it is a question in both cases of an administrative measure thwarting or preventing the application of the contractual clauses'. To my mind, the absence of any negligence or wrongdoing by the parties, combined with the early discharge in part or in full of the contract for reasons deriving from higher requirements, dictate, *prima facie* and in a parallel manner, that full compensation be made for the loss. Whatever the cause from which they materialize, the contractor generally ought not to have to bear the consequences of decisions which, even if taken in the general interest, adversely affect the financial balance of the agreement. There again, if particular interests, notably the contractor's economic and financial interest, must legitimately yield to the requirements of the general interest, it can only be at the price of fair and prior compensation.

Regulating the early termination of an administrative contract by compensation is besides an essential guarantee for the satisfactory development of contractual relations involving public entities. These mechanisms of regulation via compensation mean that in the largest contracts the risk of the contract being ended in the general interest can be optimally shared. The partnership contracts entered into on the basis of order no. 2004-559 of 17 June 2004, as amended, thus mandatorily include clauses on 'the circumstances under which certain aspects of the contract may be modified or it may be termi-

36. See also L. Richer, « La résiliation unilatérale : motifs et procédures de rupture », préc., p. 27. – V° par ex. CAA Versailles, 7 mars 2006, Commune de Draveil : Contrats et marchés publ. 2006, comm. n°136, note Delacour ; AJDA 2006, p. 1044, concl. Bresse ; Dr. adm. 2006, comm. n°74, note Alonso-Garcia ; ACCP 2006, n°56, p. 72, note Le Bouëdec. For a more nuanced position: N. Symchowicz, « L'indemnité de résiliation », ACCP 2002, n°16, p. 35. That author thinks there is no 'crude power' of termination in the general interest.
37. CE, 7 mai 1952, Eloy : Rec. CE, p. 225 et CE, 10 déc. 1982, Loiselet : Rec. CE, p. 669.
38. N. Symchowicz, « L'indemnité de résiliation », p. 35.
39. CE, 23 mai 1962, Ministre des Finances et des Affaires économiques c/ Sté financière d'exploitations industrielles : Rec. CE, p. 342 : « En l'absence de toute faute de sa part, l'entrepreneur a droit à la réparation intégrale du préjudice résultant pour lui de la résiliation anticipée du contrat ».
40. For a particularly illustrative example: CE, Sect., 8 nov. 1957, Sté Chimique et routière Nord-Africaine : RDP 1958, p. 981, note Waline.
41. Note under: CE, Sect., 15 juin 1959, Sté des alcools du Vexin : RDP 1960, p. 325.
42. Ibid.

nated by a supplementary agreement or, should agreement not be reached, by a unilateral decision of the public entity, in particular to take account of the changing needs of the public entity, of technological innovations, or of changes in the financial terms secured by the contractor' (art. 11-h and CGCT, art. L. 1414-12-h), and clauses on 'the consequences of the termination, whether anticipatory or not, of the contract, especially with respect to the ownership of constructions, plant and equipment, or intangible property' (art. 11-k and CGCT, art. L. 1414-12-k).

Such clauses are intended to apportion the consequences of the risk of early termination of the contract with the party which is best able to bear them, so as to optimize the cost of the contract without maximizing the transfer of risk to the private-sector partner[43]. But these clauses and the optimal apportionment of the risk of rescission from which they arise are only relevant insofar as the risk is sufficiently well regulated, especially by compensation mechanisms, in economic and financial terms. Contractualization, ahead of time, of the consequences of any early termination of contractual relations is meaningless unless it is backed by a right that is sufficiently well established and consolidated to full compensation for losses caused, whatever the origin and form of that anticipatory discharge. A risk of early termination that is not offset by a well enough established right to compensation could not be taken on in any seriousness under economically acceptable circumstances by any of the parties.

It is hard therefore to imagine that a statute which, for pressing reasons of public policy, applies to contracts formed before the statute came into force, might entail by way of a rebound effect the frustration of such contracts without the contractors who were harmed by such early termination being duly and fairly compensated. Like contractors incurring a loss because of a rescission in the general interest or for contractors confronted with the extinction of a whole category of contracts by means of a general measure[44], contractors injured by the frustration of contracts brought about by a legislative rule must be entitled to compensation. Any challenge to this mechanism of regulation by compensation reveals itself to be illegitimate with respect to the financial rights the contractor enjoys.

2. THE ILLEGITIMATE EROSION OF THE CONTRACTOR'S FINANCIAL RIGHTS

The contractor's financial rights have long been enshrined by administrative case law[45] and sometimes even considered by scholarship as almost exclusive rights. R. Chapus observes that the contractor's rights 'are essentially pecuniary rights'[46]. These financial rights have been fully consolidated by a better understanding, with the development of public-private partnerships, of the economic mainsprings of public contracts[47], combined with the growth in the field of public action of subjective rights related in particular to the potential of the Convention for the Protection of Human Rights (ECHR). It has to be accepted that neither the economic equation (2.1) nor fairness authorize the erosion of the right to compensation that follows from any early termination of a public contract, where that termination does not arise from some negligence or wrongdoing by the contractor.

2.1. The permanence of the economic equation of the contract

The general character of the right to compensation in the event of the early break-off of an administrative contract has effects at several levels and means that the economic equation initially agreed upon by the parties can be maintained. The right to compensation pertains to all public contracts, however they

43. F. Bergère et al., *Le guide opérationnel des PPP*, Le Moniteur, 2e édition, 2007, p. 213 s.
44. CE, Ass., 2 mai 1958, Distilleries de Magnac-Laval, préc.
45. See for example CE, 23 mai 1936, Commune du Vésinet : Rec. CE, p. 591.
46. DAG, I, no 1380.
47. On the question of termination, see for example Th. Kirat (Dir.), *Economie et droit du contrat administratif*, La Documentation française, 2005, p. 51.

are put together. Whether they be public procurement contracts, partnership contracts or concessions, or even authorizations to occupy public land[48], the right to compensation is enshrined in law.

2.1.1.

Moreover, it is a very old established point[49] that compensation for loss must always be in full. It must secure for the contractors 'all the benefits they would have derived from full performance of the contract'[50]. That means that all of the losses incurred by the contractor because of the early termination of the contractual obligations must be compensated. In this respect, two main categories of losses are traditionally identified:[51] losses suffered (*damnum emergens*)[52] and loss of profit (*lucrum cessans*)[53]. Loss of profit, in long-term agreements, especially concessions and, virtually, public-private sector partnership contracts, makes up the lion's share of the indemnifiable loss. To this end, concession contracts, for example, often provide 'buy-out compensation' the purpose of which is 'to allow the concession holder, after the buy-out and until the end of the concessionary period, to continue to enjoy profits analogous to those it would derive from the concession'[54].

The right to compensation so conceived allows the contractor to cover the losses related, say, to the value of construction work that has not yet been recouped at the date of termination. In the context of public-private sector partnerships, in which the financing contract entered into by the company is specific to the investment made, the compensation is calculated rather by reference to the financial package that made the investment possible rather than by reference to the unrecouped value of the assets. That is compounded by the cost of terminating the subsequent contracts the contractor entered into to perform the missions assigned to it. As concerns loss of profit, only direct and liquidated losses can be compensated. It is precluded that the contractor's compensation could result in its unfair enrichment[55] or that the level of compensation provided for by the contract should dissuade the administration from implementing its power of rescission.

Compensation therefore allows the administration to reconstruct the financial equation that should have held had the contract been pursued. In this sense, the compensation is directly associated with the right of financial balance of the contract[56] and reflects the court's concern to protect the financial interests of the contractor with respect to the risk arising from the inordinate powers the administration enjoys. The court acts realistically in this area, loss of profit is not compensated if, for example, the contractual arrangements are upset by some factor outside of the parties' control[57].

2.1.2.

The position is no different in the case of contracts that are frustrated by supervening legislative provision based on a compelling reason of public policy. In this event, the contractor who has committed

48. See for example, CGPPP, art. L. 2122-9 al. 3 : 'However, should the authorization be withdrawn before the planned term, for any ground other than the non performance of its clauses and conditions, the holder is indemnified for the direct, material and liquidated loss arsing from the early termination [...]'.
49. CE, 7 août 1874, Hotchkiss et Koolidge : Rec. CE, p. 825
50. See for example: CE, 23 mai 1962, Ministre des Affaires économiques c/ Société financière d'exploitations industrielles, préc.
51. N. Symchowicz, « L'indemnité de résiliation », p. 32.
52. CE, 24 févr. 1971, Société des téléphériques français : Rec. CE, p. 163.
53. CE, 6 mai 1955, Société Chabal et Cie : Rec. CE, p. 244. – CE, 5 juil. 1967, Commune de Donville-les-Bains : Rec. CE, p. 297. – CE, 24 janv. 1975, Clerc-Renaud : Rec. CE, p. 55. – CAA Paris, 25 avril 1996, Société France 5 : Rec. CE, p. 572.
54. CE, 20 mai 1952, Gleize : Rec. CE, p. 268. – See also on this question the traditional Saint-Paul conclusions on: CE, 23 févr. 1906, Compagnie Générale des Eaux : Rec. CE, p. 175.
55. CE, 3 mai 1967, Réautre : RDP 1967, p. 1011.
56. CE, 11 mars 1910, Compagnie Générale Française des Tramways : Rec. CE, p. 216, concl. Blum ; *GAJA*, n° 22 ; *Les grandes décisions*, 14e éd., p. 557 ; D. 1912, 3, p. 49, concl. Blum ; S. 1911, 3, I, concl. Blum, note Hauriou ; RDP 1910, p. 270, note Jèze. – CE, 12 mars 1999, Commune de Méribel : BJCP 1999, p. 444.
57. Compensation for unforeseen circumstance excludes any compensation of *lucrum cessans*. CE, 9 déc. 1932, Compagnie des Tramways de Cherbourg : Rec. CE, p. 1050, concl. Josse ; *Les grandes décisions*, 14e éd., p. 565 ; D. 1933, 3, p. 17, concl. Josse, note Pelloux ; RDP 1933, p. 117, concl. Josse, note Jèze ; S. 1933, 3, p. 9, concl. Josse, note Laroque. See also: CE, Sect., 14 juin 2000, Commune de Staffelfelden : Rec. CE, p. 227 ; CJEG 2000, p. 473, concl. Bergeal ; LPA 2000, n°245, p. 14, note Jégouzo-Viénot ; BJCP 2000, p. 434, concl. Bergeal.

no culpable or negligent breach of contract, is 'taken by surprise' by the discharge, before the planned term, of the contract from which he hoped to continue to benefit. Therefore, like the contractor who is a 'victim' of rescission, it must be entitled to full redress for the loss caused. This loss includes not just any non-recouped value of construction work, including for works that were the subject matter of supplementary agreements, but also the cost of terminating subsequent contracts (subcontracts, maintenance contracts, etc.). Likewise, the recovery of intangible investments the contractor might have been forced to incur when the contract was formed, for example, the payment of import duties, must be taken into account in evaluating the compensation.

The indemnifiable loss shall also include, in principle, loss of profit, especially if the financial equation resulting from the contract was based in a substantial amount on the length of the contract. The element of consideration for the length of the contract does not always lie in the amortization of the tangible and intangible investments made or in the financial arrangements decided upon but sometimes in the reduction of the service prices for the benefit of users. In other words, even if the loss of profit has in some sense become incompatible with the legislation that frustrated the contract[58], it does count as a direct and liquidated loss. It is therefore indemnifiable, above all if it is the basis for the financial equation of the contract in question and for the reduction in the price of the service.

Besides, in the event of frustration caused by legislation, were the contractor to claim on the grounds of strict legislative liability[59], provided it met the conditions for bringing an action in liability on this count, it could secure full compensation for its abnormal and special loss, which would certainly include a substantial share of the loss of profit. The chances of bringing a successful claim are that much greater nowadays because the general interest relating to the enactment of a statue is no longer sufficient to exclude any compensation[60]. The loss caused by the statute takes precedence[61].

In this respect, if all the investments were not recouped by the date as of which the contract could be held to be frustrated, the contract holder could also bring an action in liability against the delegating authority in the event it refused to rectify the duration of the delegation.

Apart from the adverse effects it might have on the development of public-private sector relations or on the charges for certain public services, precluding compensation for loss of profit in the event of frustration of administrative contracts would without fail raise the issue of its compatibility with the body of law derived from the ECHR, by which the individual rights of the contractor may be effectively protected.

2.2. The prevalence of the contractor's individual rights

Many developments in recent years have resulted in a very clear emphasis of individual rights in litigation over administrative contracts. The contractors, their rights and duties, are thus placed at the centre of the remedies open to them and ring fence the conditions for implementing remedies. The creation by the courts of an appeal to challenge the validity of the contract[62] open to the 'ousted competitors' alone, the tightening up of the conditions for implementing the pre-contractual interim application

58. As was the case in *CGE-Commune d'Olivet* cited above.

59. CE, Ass., 14 janv. 1938, Société anonyme des produits laitiers « La Fleurette » : Rec. CE, p. 25 ; *GAJA*, n°52 ; *Les grandes décisions*, 14e éd., p. 116 ; S. 1938, 3, p. 25, concl. Roujou, note Laroque ; D. 1938, 3, p. 41, concl. Roujou, note Rolland ; RDP 1938, p. 87, concl. Roujou, note Jèze.

60. CE, 2 nov. 2005, Société coopérative agricole Ax'ion : Rec. CE, p. 468 ; AJDA 2006, p. 142, chr. Landais et Lénica ; RFDA 2006, p. 349, concl. Guyomar et note Guettier.

61. V° CE, Sect., 30 juil. 2003, Association pour le développement de l'aquaculture en région Centre : Rec. CE, p. 367 ; RFDA 2004, p. 144, concl. Lamy, note Bon et Pouyaud ; AJDA 2003, p. 1815, chr. Donnat et Casas ; D. 2003, p. 2527, note Guillard.

62. CE, Ass., 16 juil. 2007, Société Tropic Travaux Signalisation Guadeloupe : Rec. CE, p. 360 ; RFD adm. 2007, p. 696, concl. Casas, p. 917, note Moderne, p. 923, note Pouyaud et p. 935, note Canedo-Paris ; AJDA 2007, p. 1497, obs. Braconnier et p. 1588, chr. Lénica et Boucher ; RJEP 2007, p. 267, note Delvolvé ; Contrats et marchés publ. 2007, comm. n° 154, note Piétri ; JCP A 2007, 2212, note Linditch ; BJCP 2007, p. 391, obs. CM, Terneyre et Schwartz ; D. 2007, p. 2500, note Capitant ; Dr. adm. 2007, comm. n°142, note Cossalter ; RD publ. 2007, p. 1383, note Melleray ; JCP G 2007, II, 10156, note Ubaud-Bergeron et 10160, note Seiller ; JCP G 2007, I, 193, chr. Plessix ; LPA 2007, n° 167, p. 3, note Chaltiel et n°181, p. 6, note Glatt ; RDC 2008, p. 465, note Rolin ; RD imm. 2007, p. 429, note Dreyfus.

around the idea of the aggrieved claimant[63], the creation of a contractual interim application open to the same claimants (CJA, art. L. 551-13 to L. 551-21, arising from order nº 2009-515 of 7 May 2009) and the possibility for the courts to vary the exercise of the powers they have with respect to these various remedies, are evidence of this shift towards more rights-based litigation over contracts.

This process stems in part from the greater prominence of the case law of the European Court of Human Rights in French administrative law[64]. The law on public contracts does not escape this phenomenon.

The European Court of Human Rights has accepted that the administration's power to rescind its contracts is consistent with the requirements of Article 1 of Protocol No. 1 (p. 1-1) to the ECHR only subject to there being fair compensation for the contractor[65]. The contractor's financial rights, when the contract ends prematurely for reasons of the general interest, are thus afforded protection.

The 'entitlement to the peaceful enjoyment of one's possessions', that the European Court of Human Rights holds to be a 'traditional and fundamental aspect of the right of property'[66], authorizes three types of limitation, subject to conditions: deprivation of possessions, control of the use of property, and as a catch-all judge-made category, interference with the substance of the right of property[67].

2.2.1.

The extensive notion of 'property' adopted by the Court has allowed it to extend the protection of Article 1 (p. 1-1) to claims, which, like possessions, are valuable assets[68]. A loss of profit arising from the legislative extinction of a future income may constitute a claim, and therefore property within the meaning of this article, if the claimant has a 'legitimate expectation that its claim would be realised', in short, if it is certain enough[69]. For that matter, the French administrative courts take a similar approach to the European Court on the characterization of claims relating to future income[70].

Once it is accepted that Article 1 (P 1-1) applies to claims arising because of loss of profit due to the early discharge of a contract, in the absence of any wrongdoing or negligence, it remains to be seen whether such discharge can be effected without any compensation. In other words, on what conditions can municipal law legitimately, with respect to the right to property, dispense with compensation related to such discharge?

The first thing to do is to investigate the nature of the interference that the frustration or rescission of a contract causes to the 'property' at issue. The measures or decisions causing the early termination of a contract and thereby depriving the contractor of the income it could hope to derive from performing that contract are plainly neither 'control over the use of property' nor 'interference with the substance of the right of property'. They bring about the mere deprivation of ownership of the property, constituted in the case in point by the elided claim. There is no doubt that the deprivation is of a permanent character since, as from the date of termination or frustration of the contract, the contractor is permanently deprived of the future income it could legitimately hope to receive.

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63. CE, Sect., 3 oct. 2008, Syndicat mixte intercommunal de réalisation et de gestion pour l'élimination des ordures ménagères du Secteur Est de la Sarthe (SMIRGEONES) : RFD adm. 2008, p. 1128, concl. B. Dacosta et p. 1139, note P. Delvolvé ; Contrats et marchés publ. 2008, comm. nº264, note J.-P. Piétri ; RD imm. 2008, p. 499, obs. S. Braconnier ; AJDA 2008, p. 2161, chr. E. Geffray et S.-J. Lieber ; Dr. adm. 2008, comm. nº 154, comm. B. Bonnet et A. Lalanne
64. On this question see S. Braconnier, *Jurisprudence de la Cour européenne des droits de l'Homme et droit administratif français*, Bruylant, 1998.
65. *Stran Greek Refineries and Stratis Andreadis v Greece* Series A no 108 (1994); Dr. adm. 1995, comm. nº20 ; JCP 1995, I, 3823, obs. Sudre.
66. *Marckx v Belgium* Series A no 31 (1979); F. Sudre et al., Les grandes décisions de la Cour européenne des droits de l'Homme, PUF, nº 42 ; RBDI 1980, p. 53, note Bossuyt ; AFDI 1980, p. 317, obs. Pelloux ; JDI 1982, p. 183, note Rolland.
67. *Sporrong et Lönnroth v Sweden* Series A no 88 (1982).
68. *Pressos Compania Naviera SA and Others v Belgium* Series A no 332 (1995). See also: *Van Marle and Others v The Netherlands* Series A no 101 (1986).
69. *Anheuser-Busch Inc. v Portugal* Case no 73049/01 (2007) and *S.C. Ghepardul SRL v Romania* Case no 29268/03 (2009).
70. See for example, CAA Bordeaux, 6 sept. 2007, Mutuelles de Poitiers Assurances : JCP A 2008, 2012, obs . Pacteau.

2.2.2.

Yet takings are not contrary *per se* to Article 1 (p. 1-1) ECHR. They may be consistent with the ECHR if (i) they pursue a public purpose, (ii) are carried out under conditions laid down by law, and above all (iii) are in proportion to the legitimate purpose the taking is meant for. For the Court, 'a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights […]'[71].

In matters of public purpose, the Court only actually sanctions 'manifest errors of appreciation' that may be committed by the national legislature[72], notably when that legislature interferes in existing contracts[73]. Control by the Court is consequently limited, with some commentators even thinking that the public purpose arguments made by states to justify interference with property rights enjoy a 'near irrebuttable presumption'[74] of compliance with Protocol No. 1. In any event, it has to be admitted that a public policy argument drawn from transparency and open competition in the formation of public contracts plainly pursues this public purpose, even if, with respect to the few hundred agreements for the delegation of public services affected by *CGE-Commune d'Olivet* of 8 April 2009, public purpose pertaining to the periodic opening up of those contracts to competition justifies more the principle of a limitation of the duration accorded by statute than the frustration of agreements for the delegation of public services that have become contrary to law and which the administrative tribunals thought they ought to rely on.

After checking that the taking was made on the conditions laid down by law 'and the general principles of international law'[75], the Court crucially queries the relationship of proportionality between the general interest and particular interests of the complainant about a violation of Article 1. Out of concern, however, to leave states a substantial margin of appreciation in achieving such balance, the Court demands only a 'fair balance' be struck, and appreciated rather liberally[76].

2.2.3.

At this stage, the nice question of the variation or even the negation of compensation for the aggrieved contractor is posed. The rationale of compensation is at the crux of the relationship of proportionality scrutinized by the Court[77] which, in this matter, adopts a concrete review of the interests involved. In the important case of *James and others v. the United Kingdom* (1986)[78], the Court noted that 'the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (p. 1-1). Article 1 (p. 1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value' [...] (par. 54).

However, the deprivation of all compensation is plainly the most radical form of taking of property based on a public purpose. To be admissible within the framework of the system of protection by degrees of Article 1 (p. 1-1) such taking must consequently be able to rely on particularly compelling public interests at issue. In other words, the justification of the taking being so much more difficult to

71. *Sporrong and Lönnroth v Sweden* para. 69.
72. On this question: F. Sudre, « La protection du droit de propriété par la Cour européenne des droits de l'Homme » : D. 1988, p. 76.
73. *Mellacher and Others v Austria* Series A, no 169 (1989); AFDI 1991, p. 610, obs. Coussirat-Coustère ; JDI 1990, p. 742, obs. Rolland et Tavernier. – See also: *Bäck v Finland* Application no 37598/ 97 (2004).
74. J.-F. Flauss, « Actualité de la CEDH », AJDA 1995, p. 219.
75. Here again, in the case of the agreements for the delegation of public services covered by *CGE-Commune d'Olivet*, it is not sure that the automatic avoidance drawn from the Sapin law by the court can be considered to be 'provided for by the statute', that is, as being sufficiently and reasonably foreseeable.
76. F. Sudre, *Droit européen et international des droits de l'Homme*, PUF, 9e éd., 2008, p. 243.
77. *Lithgow and Others v The United Kingdom* Series A, no 102 (1986) para. 120.
78. *James and Others v The United Kingdom* Series A no 98 (1986).

establish when the taking is radical, the negation of any damages in the context of frustration induced by a legislative provision that is otherwise quite legitimate, seems to have to be deemed a violation of the right to property[79], contrary to Article 1 (p. 1-1). Only exceptional circumstances[80], and perilous ones at that, might, as the case may be, successfully justify a total taking.

And so, the legislative, regulatory or jurisprudential mechanisms that would lead to the contractor being deprived of any compensation for the loss incurred because of the early termination in the general interest of a contract to which it is party ought to be considered contrary to ECHR Article 1 (P1-1) unless warranted by exceptional circumstances. The taking then induced by the total deprivation of the claim appears almost inevitably disproportionate to the legitimate aims pursued. That is the European Court of Human Rights once more consolidates the mechanisms for correcting the balance in relations between the general interest and particular interests, thereby contributing to the erosion of the inordinate character of administrative law[81].

79. On this point: S. Pavageau, *Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales*, LGDJ, 2006, p. 341 ff.
80. *The Former King of Greece v Greece* Case no 25701/94 (2000). See especially para. 98.
81. S. Braconnier, 'Exorbitance du droit administratif et droit européen', in F. Melleray (Ed.), *L'exorbitance en question(s)*, LGDJ, 2004, p. 90 ff.