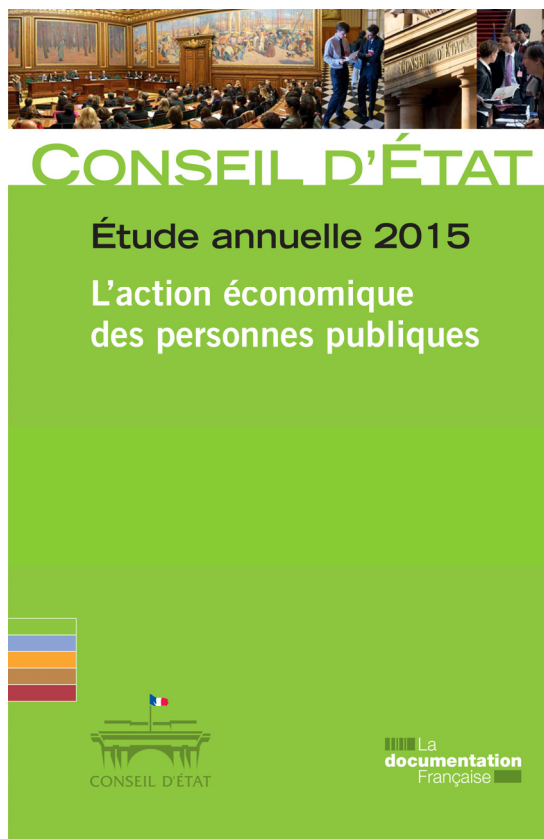


Conseil d'Etat Annual Review 2015

The economic action of public persons



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Conseil d'Etat

Annual Review 2015

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Conseil d'Etat

Annual Review 2015

The economic activities of public bodies

1. A study by the Conseil d'Etat on economic activities of public bodies: why, how ?

What can public bodies do in terms of economic action?

This simple question, albeit vast and controversial, is the subject of the Conseil d'État's 2015 annual review. It replies to this question in a manner appropriate to its function, i.e. without taking sides in terms of the government's choices or making economic policy recommendations but rather by analysing public decision-makers' room for manoeuvre from a legal and institutional point of view.

- The thesis of this study is that there is substantial room for manoeuvre.

The economic activities of public bodies are as important as they have ever been despite the monetary and fiscal transfers on a European level, the globalization of economies and the dilution of economic issues among the various public policies.

These activities are based on solid legal foundations, at once constitutional, legislative and regulatory, but also and more so than one might think, on conventional foundations with European Union law in particular offering numerous possibilities.

To be efficient, these activities must comply with certain methodological precepts: have recourse to a small number of players; take account of the complexity and specific timing characteristics of economic issues; choose the most relevant tools to achieve the goals pursued.

- The importance of the choices underlying the economic activities of public bodies is not fully appreciated by these same public bodies.

This review sets out **52 proposals** to help public bodies use or regain control over their capacities to act.

One of them is implemented in the very framework of this review: a "*Guide to economic action tools for public bodies*" has been drafted and is available as of now to public bodies. It will continue to be enriched and updated over time.

2. How can France carry out economic action now that the major monetary and fiscal macroeconomic levers have been substantially transferred to the European level ?

Monetary and fiscal policies are the two traditional attributes of national sovereignty, but also the two main cyclical macroeconomic levers. It is not surprising therefore that the transfers in these two areas in favour of European institutions have given rise to fears in France, as in other Member States of the euro zone, that economic policy would lose its independence at a national level.

This fear is however unfounded.

- The transfer of monetary authority does not prevent Member States from determining and conducting their own economic policy.

The treaties set the priority objective of price stability for the ECB, but this does not mean that monetary policy is isolated from economic policy. The ECB is directly involved in the real economy, as shown yet again by the unconventional policy it implemented in 2015 to ward off the risk of deflation.

The sovereignty transfers granted for the purpose of creating the euro do not deprive France of its room for manoeuvre in conducting economic policy. This has even been strengthened by the stability provided by the single currency. But to fully benefit from this, it is important to ensure that the effects of this policy are "passed on" to the French economy in the best possible conditions, without excessive interference from certain laws and regulations (*Proposal No. 1*).

- The enhanced surveillance of fiscal policy on a European level does not deprive States of their powers.

However, it is necessary to reflect on the consequences for national economic policies of the emergence of an autonomous EU budgetary lever.

The financial crisis led to the development of a monitoring framework resulting from the *Six-pack* in 2011, the Treaty on Stability, Coordination and Governance (TSCG) in 2012 and the *Two-pack* in 2013, which helped cope with emergencies but which is as yet unfinished. While too recent to be reformed, it can still be interpreted flexibly, building on the initiatives taken by the European Commission and the recommendations in the report of the "five presidents" in June 2015 (*Proposal No. 2*).

This enhanced coordination at a European level does not take away fiscal responsibilities from national authorities. These responsibilities must be conducted in line with a more restricted process, marked by numerous external controls, leading to the timetable being revised (*Proposal No. 3*).

- The emergence of a budgetary lever specific to the European Union.

The idea came about to complement this coordination with the Union's own budgetary lever which may be called upon even outside the sharp crises that the European stability mechanism must help to address. This prospect of a stabilisation budget is still far off but France should examine the conditions and consequences of this budget as of now (*Proposal No. 4*).

For now, financial interventions by the Union to support the economy are gaining momentum with the new Commission's investment plan ("Juncker Plan") announced earlier this year. France will be all the more capable of taking advantage of these interventions to the extent that it has specified how this new European investment policy could interact with its national programmes (investments for the future in particular) *(Proposal No. 5)*.

3. How effective can economic action by public bodies be in the context of an open economy: global competition, competition between systems, defence of national interests ?

While it is obvious that the internationalisation and globalisation of trade has changed the relationship, not to say the balance of power, between public bodies and economic players, public action is not however doomed to be impotent. Public bodies can still assert their authority even in the face of mobile players. France can also mobilise substantial diplomatic resources. Finally the economic activities of public bodies can boost the competitiveness and appeal of the country in international competition.

- Preserving territoriality of law and national interests

The mobility of players weakens the authority of the national framework. States are not neutral in this competition through law: they are the ones who determine the territorial scope of their rules and they may decide to include operations that only have a very weak connection to their territory, their citizens or their economy, as practised by the United States. The European Union has no instrument of comparable effectiveness to assert the economic law of the Union and Member States.

Furthermore, while economic patriotism that focuses solely on national operators is a dead-end both from a practical point of view (it becomes impossible to identify the nationality of operators) and a legal one (principle of non-discrimination, freedom of movement in the TFEU), the defence of strategic national interests in case of foreign investment is not prohibited by international and European law. It would be useful to provide for such strategic interest defence mechanisms throughout the Union, notably by setting up a watch on such investments in sensitive sectors and companies (*Proposal No. 6*).

- Placing diplomacy at the service of the economy

France is a major diplomatic power and has gradually taken to using its network for economic purposes as economic power becomes an essential part of power itself.

France has strong advantages in a world of increasingly fragmented multilateral diplomacy between the large organisations (United Nations Security Council, IMF, WTO or OECD) and informal multilateral bodies (G20 and specialised technically oriented bodies that play a central role in preparing future international "standards"). France's influence within the economic giant that is the European Union is also a key asset.

Finally, it can benefit from its language links but also its legal ties with other states through bilateral diplomacy. Promoting continental law is becoming an important goal of economic diplomacy, especially to resist the bias of economic players in favour of *common law* (*Proposals No. 7 and No. 8*).

- Attractiveness and competitiveness policies but no "dumping"

International rankings exacerbate competition between systems. This is particularly true in terms of competitiveness with the World Bank's "*Doing Business*" ranking. It is futile to fight the principle of these rankings. Efforts would be more usefully deployed by focusing on improving their methodology if necessary and promoting the performance of the French government and legal system (*Proposal No. 9*).

If it is necessary to further strengthen attractiveness and competitiveness, this should be done by maintaining a balanced approach without being drawn into a general weakening of the rules applicable to businesses or a race to be the "lowest bidder". Aggressively pursuing this type of policy can quickly lead to forms of '*dumping*' that are potentially damaging for stakeholders as shown in the recent "*tax rulings*" events (***Proposals No. 10 and No. 11***).

4. Why and how should the economic activities of public bodies be identified, measured and controlled ?

The dilution of economic issues among all public policies could result in these precise actions being no longer distinguished and in deeming that attempts at overall management are vain. However this management is both necessary and possible, provided the scope of these activities is precisely identified and a stringent assessment of its results carried out.

- Formalising a national economic strategy

The "Nation plan" which first came about after the war started to decline in the 70s and totally disappeared in the 90s. But public prospective however remains very dynamic, especially in public institutions. Sector strategies exist (such as the 34 plans for the new industrial France in 2013) and formalised planning is being developed at the local level.

While the national economic strategy is discussed on numerous occasions, particularly in the context of the European Semester, setting it down formally in a document intended to be used as the reference for other sector-based programming or planning, while remaining flexible and adaptable, would have numerous benefits (*Proposal No. 12*).

- Mapping economic action for this purpose

For a lawyer, the economic activities of public bodies are defined by their purpose. The activity is economic when it has, at least partially, the aim of directly influencing the production, distribution, trade or consumption of goods and services.

Based on this criterion, it is possible to draw a concentric circle-based zoning system: the first circle includes action with companies and action on markets; the second circle corresponds more directly to mixed actions which pursue both economic and non-economic objectives, a mix characteristic of sectoral actions and policies; the third circle covers all actions that do not initially pursue economic goals but whose economic impact can be measured and taken into account as a positive or negative source of externalities.

Such mapping of the economic activities of public bodies is only useful if it is sufficiently precise to be operational. The development of this mapping can be based on initiatives and work already underway and can be conducted with the various stakeholders (*Proposal No. 13*).

- Clarifying the methods for assessing the overall performance of the economy

Despite the proven reliability of the statistical system, the debate over numbers is still a hot topic. But it has taken on a new dimension because of the role that the legal texts give to these figures. The necessarily "compiled" nature of statistics, based on conventions and corrections, and the ensuing use made of them, become the focal point of a legal and political debate.

The overall measure of economic performance that is GDP is also coming under increasing criticism. To explore these issues, a committee was formed in 2008 under the leadership of J. Stiglitz, A. Sen and J.P. Fitoussi. Their report, released in 2009, made a dozen proposals to improve GDP as a tool to measure economic performance, while adding other complementary indicators to it. But it was not until the Act of 13 April, 2015 that the inclusion of such indicators was prescribed. However the ways and means of taking account of them have yet to be found (*Proposal No. 14*).

5. What room for manoeuvre is provided by the constitutional framework in economic matters? In what areas is greater vigilance required ?

The "constitutional block" is generally flexible and leaves Parliament with substantial elbow room when passing economic legislation. However this relative flexibility should not lead one to underestimate the requirements arising out of constitutional control over economic matters.

- A weighted economic constitution

The Constitution postulates the existence of economic action. Several of its provisions organise and steer economic actions by public bodies. The three declarations of rights that are part of the constitutional block (the Declaration of 26 August 1789; the Preamble to the Constitution of 27 October 1946 and the 2004 Environment Charter) are the three generations of fundamental rights whose inspirations (liberal, social, environmental) tend to balance each other out, thereby contributing to the **plasticity of the constitutional framework**. In any case these documents address the economic activities of public bodies in a relatively discreet manner. The debate on the need to complete constitutional texts, in particular in order to explicitly set down the right to free enterprise, however also remains very limited.

Meanwhile the constitutional court has always been careful not to oppose constitutional norms to the fundamental economic policy orientations taken by successive majorities. The **moderation of the constitutional court** in economic action issues was clearly shown in its attitude when dealing with movements that affected the size of the public sector (case law on nationalisation and privatisation). The principles established by the Constitutional Court also leave some freedom to the legislator, whether this be the right to free enterprise or the right to property, freedom to contract and the principle of equality in economic matters.

- Extensive constitutional control

The history of constitutional control has been marked by dramatic declarations of unconstitutionality on major aspects of economic policy. It is therefore necessary to better integrate the constitutional risk into the decision-making process, but also to learn the lessons of declarations of unconstitutionality both for the texts to which they refer and for similar texts (*Proposal No. 15 and 16*).

- A control made more demanding by Priority Questions of Constitutionality (QPC)

The introduction on 1 March 2010 of these Priority Questions of Constitutionality strengthened the grip of constitutional control over the economic activities of public bodies. Businesses rapidly took advantage of the QPC system to challenge the economic actions of public bodies.

The coming of this new remedy has not led to a disruption of economic constitutionality control, but it has helped deepen it. It is therefore necessary to take care to prevent the QPC risk through a more systematic examination of draft bills (*Proposal No. 17*).

6. European Union law against economic action ? A misperception.

The position of conventional standards with regards to economic action has grown steadily over the last thirty years, mainly driven by European Union law and the dynamic of ever greater single market integration. A growing number of international standards also apply to public economic action, including the European Convention on Human Rights, increasingly referred to in economic disputes.

- European law is not hostile to States' economic activities

Economic activities by public bodies was at times perceived as challenging the very principles of European integration, both in their regulatory function with respect to the activities of economic players and when they act as market operators.

However European law has gradually evolved and the leeway for public bodies depends mainly on how the treaties are interpreted and applied, whether this concerns the content of the derived legislation (as in public contracts) or the Commission's approach with regard to State aid which is now refocusing on the most significant operations.

- Investing in the development of EU legislation and taking better account of it

France can first promote European law favourable to Member States economic activities through its contribution to the process of drafting European legislation but also to the development of case law by intervening in the procedure for preliminary issues (*Proposals 18, 19 and 20*).

It is also necessary to ensure that national measures comply with EU law from the time they are drafted without waiting for a possible litigation. An adaptation of the French system for coordination of EU affairs would serve this strategy of influence by associating companies and economic regulators more. A strengthening of French presence in European institutions would also be useful (*Proposal No. 21 and 22*).

Similarly, rather than entrust European issues to dedicated structures, it would be better to improve understanding of these issues by all agents through more robust initial training and more systematic continuing education, particularly in terms of State aid. More accessible European law would furthermore promote its recognition by French authorities (*Proposals No. 23, 24 and 25*).

- The rise of other international standards

The European Convention for the Protection of Human Rights and Fundamental Freedoms is integrated by public bodies into their economic activities through the very broad protection it offers in terms of property rights and the high level of its requirements as regards repressive procedural law which must be taken into account by economic regulators. It is therefore important that public bodies take full account of the requirements of this convention in their economic action (*Proposal No. 26*).

The proliferation of other acts, agreements or treaties in the economic arena also brings public bodies face to face with a large quantity of laws and rules of different origins, often applied transversally and that are difficult to be aware of and sometimes to reconcile. It is therefore again necessary to take better account of these international commitments to legally secure the economic activities of public bodies (*Proposal No. 27*).

7. How to reduce the proliferation and dispersal of rules and how to improve the handling of disputes with respect to economic action ?

The underlying overall design of national laws and regulations as well as administrative and judicial jurisprudence is broadly favourable to the very principle of economic action by public bodies. The main subject of concern is the mushrooming of applicable texts, the way they are articulated and their often uncertain scope and especially the increasingly intense jurisdictional control over public economic actions.

- Economic action has long been accepted by case law

At a very early stage, the courts accepted the principle of Public initiatives, be this a question of public bodies supervising private economic activities or themselves conducting economic activities.

But they remain vigilant as to attacks on freedom of trade and industry, in particular by ensuring that the rules set by public bodies do not excessively restrict private initiative and that public economic activities is justified by sufficient public interest. Any restrictions must also, to be lawful, respect other principles such as the principle of equality, the principle of non retroactivity and the principle of legal security that public bodies must now take fully into account (*Proposal No. 28*).

- Mushrooming of legislation

The legislation applicable to economic action by public bodies is highly dispersed. While a code of economic action by public bodies would not present a significant advantage, a minimum grouping of autonomous provisions would be appropriate. Moreover, the broadly sector-based approach to economic regulation has led to the adoption of a large number of texts in "silo" form from EU law. While it is not possible to effectively remedy this fragmentation by a purely national initiative, the way these rules interact must be improved.

The application of competition law to the actions of public bodies is now broadly covered by legislative texts and case law, but solutions are not so evident for other components of common economic law. The more systematic adoption of specific provisions on the conditions under which the law or the economic regulations apply to public bodies would help clarify the legal situation (*Proposal No. 29*).

- The increasing importance of litigation

Increasingly important and varied, litigation on economic action by public bodies is attractive to companies, particularly due to the increasing effectiveness of the courts with respect to economic activities.

Despite the technical nature of the litigation, the courts no longer hesitate to exert full control over the technical choices of the administration. The courts are increasingly present as a player in the process and are ultimately called on to rule on the relevance of economic action, by becoming a sort of ultimate regulator. The very technicity of these issues and the importance of the stakes in play argue in favour of increased specialisation of jurisdictions accompanied, if necessary, by specific training for judges (*Proposal No. 30*).

Other ways to handle disputes are becoming increasingly important. This is the case of recourse to criminal courts but these remedies must remain exceptional. The non-judicial modes that are mediation and conciliation are also growing and should be encouraged (*Proposal No. 31*).

8. Ministries, regulators, agencies, local authorities: are the number and competences of the various public players adapted to the needs of economic action ?

The number of players is still very high on a national level but also at the decentralised level despite a consolidation effort. Between these two levels, the most efficient interaction has yet to be found.

- The risks of a proliferation of national players

Economic issues are fragmented in central government due to the fact that some of them report to the Prime Minister but also due to hesitation as to their distribution between economic ministries and sector-based ministries. In the economic field more than elsewhere, stability in the distribution of powers between different ministerial departments must however be preserved (*Proposals No. 32 and 33*).

Several independent or autonomous bodies also intervene in public economic action: the major historical institutions (Caisse des Dépôts et Consignations, Banque de France), independent regulators and state agencies. Their growth in numbers and resources affects the balances between the different players, creating boundary problems and may weaken the consistency of the government's economic actions. In this area it is important to maintain the necessary balance (*Proposal No. 34*).

- Better articulating "national" and "local"

The State must encourage and support local economic action and not hinder it through an excessively strict regulatory framework or excessive financial constraints. The subsidiarity principle must govern territorial economic action to prevent State territorial actions from competing with local economic actions. A clearer division of powers in the field of economic action is needed, similar to the way the NOTRe Act operates between levels of local government. State controls over local action must also be accompanied by support and backing for their economic action (*Proposal No. 35*).

It is on the regional level that the State's economic actions must be performed in tandem with those of local authorities in a partnership approach. This partnership takes shape through action, with an increased use of contracting and shared local planning, but also through the development of laws and regulations. It must also be based on increased financial responsibility for regions, either through the management of European structural funds, or by increasing the share of "economic taxation" in their resources (*Proposal No. 36*).

- A Region-city pair that will not solve all issues

While the regions have gradually established themselves as the leading local authorities in economic matters, the current movement towards "metropolisation of growth" reveals the strategic importance of large urban centres in economic development. This polarisation of economic action around the region/city pair organised by the NOTRe Act must be given every chance to succeed.

Other local authorities have powers that are of interest to the economic sphere and that could not be transferred to the regions. The negative effects of this dispersion may be contained by the development of pooling and sharing of projects or experiences (*Proposal No. 37*).

9. How can better decisions be made in economic matters? Evaluate, discuss, experiment

Despite its political dimension and sometimes its media impact, economic decision-making is first and foremost technical and implies meticulous examination upstream. The decision-making process must be tailored to the recipient, in particular businesses. Once the decision is implemented, it is important that its effects be accurately assessed.

- Better appraisal of economic decisions

Economic decisions are still insufficiently scrutinised, for lack of knowledge about the work carried out by experts that is available or in progress. Access by examining departments and decision-makers to various reports, including those that are not made public, should be facilitated (*Proposal No. 38*).

The process of preliminary assessments of draft bills initiated by the constitutional revision of 2008 can be improved by strengthening the analysis made by these assessments of the economic impact of the project and by submitting them to some form of external quality control. The preliminary assessment approach could also be usefully extended, in an appropriate manner, to some proposed bills and amendments concerning the economic sphere, to orders, decrees and regulations of significant economic importance and finally to the most significant investments by local authorities (*Proposals No. 39 and 40*).

- Get businesses involved in decisions to enable them to anticipate them

To strengthen the quality and effectiveness of dialogue with companies, it is recommended that a single legal framework for all activities with public authorities by interest groups be defined (*Proposal No. 41*). The dialogue could also be strengthened by more frequent recourse to open consultations on draft texts that have an economic impact (*Proposal No. 42*).

The instability of law prevents companies from planning for the future and from reasonably anticipating the consequences of their management choices or the profitability of their investments. The remedies are to refrain from regularly tinkering with systems, to examine every alternative to modification when carrying out preliminary assessments, including the "zero option" and to apply "moratoriums" to the most important economic systems (*Proposal No. 43*). On the other hand, economic action must be able to benefit from rapid decision-making and implementation processes when urgency so requires. In this regard, the negative effects of purely dilatory litigation should be contained, while respecting the right to appeal (*Proposal No. 44*).

To enable companies to prepare for the effective implementation of measures, we must pay special attention to the conditions in which legislation comes into force but also make efforts to support companies in enforcing this legislation. (*Proposal No. 45*).

- Developing testing and assessment *ex post*

Despite its usefulness, experimenting is only rarely used in the economic sphere. An expansion of his practice is possible without changing the legal texts. Experiments must also be conducted more meticulously: if the results prove to be below expectations, this is not a reason to discontinue them abruptly, thereby losing information that may have enabled a more suitable system to be developed (*Proposal No. 46*).

Ex post assessments, which are also too little used, could learn from the European practice of "review clauses" (or even "sunset clauses") requiring a comprehensive assessment of economic mechanisms in order to change them if the assessment shows results are insufficient. *Ex post* assessments could be conducted by the department that devised the measure but based on an independent expert opinion, the results of which would be made public. This after-the-fact assessment could also be developed as an extension of the RGPP (general review of public policies) and the MAP (modernisation of public action) for regulated sectors, going as far as reviewing the appropriateness of recourse to a sector-specific regulation, in light of the goals already achieved (*Proposal No. 47*).

10. What tools for efficient action? A method and a guide

Choosing the appropriate tools is a prerequisite for efficient economic activities by public bodies. The very notion of tool is not the subject of a shared definition or classification. The palette of tools and their consistency are also very changing. They must regularly adapt to the changing context and needs. The wide range of economic action tools and their implications are not well known to the public bodies that use them. This is where the most significant progress can and must be made.

- Defining the concept of economic action tool

The tool is what remains of an action when we disregard the objectives pursued, the bodies or organisations who decide to take the action and the procedures followed to initiate it. Economic action tools are all the generic mechanisms that can be used by public bodies when developing specific measures in a given field and context to achieve microeconomic objectives.

These tools are very heterogeneous and many classifications are possible. The study proposes a typology organised around eight families: tax incentives, financial assistance, public ownership, conducting economic activities, public companies and investment, economic legislation and regulations, public declarations and support.

- Tools that are open-ended by nature and which must remain so

The range of tools must change with needs. These tools have evolved considerably over the past thirty years with the rise in regulation. The financial and sovereign debt crises since 2008 have led to a comeback for old tools but also to the development of innovative tools to address new risks. There must be awareness of changing tools in order to anticipate future developments. It is important to keep watch so the tools can be changed when necessary.

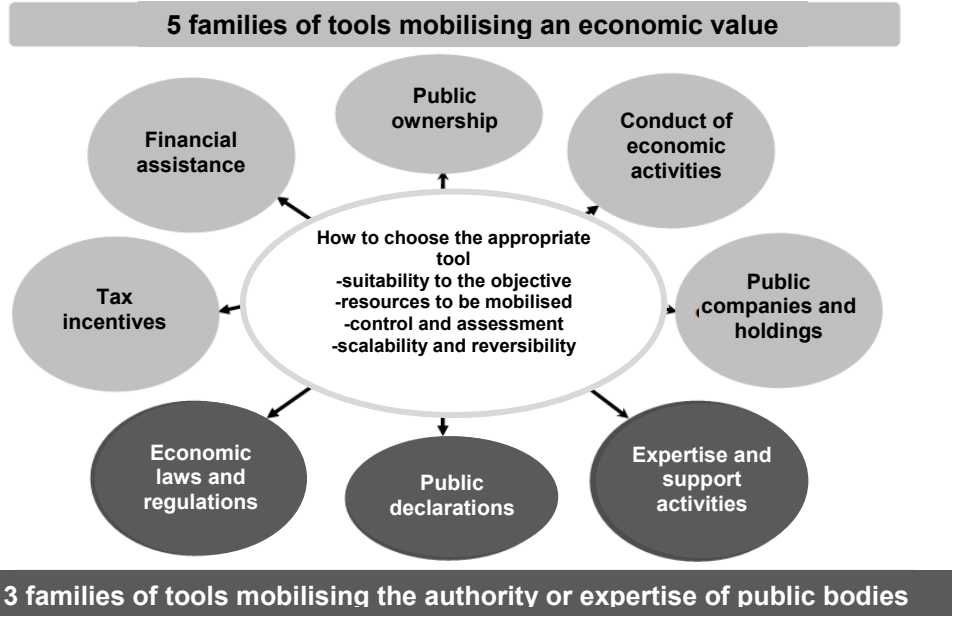
The tool framework also changes as demonstrated in several recent or current reforms. Other developments are needed, particularly with regard to public ownership (granting authorisations, intangible property) and public companies (governance and the "implicit guarantee" provided by public industrial and commercial companies, management and operating rules) (*Proposals No. 48 and 49*).

- More efficient use of tools

Two principles follow on from the "Tinbergen Rule" (Dutch economist) according to which economic policy must be based on as many instruments as it has objectives: firstly define the objective and only assign one objective to each tool used. The "Mundell rule" (Canadian economist) states that to achieve its objectives, economic policy must apply each instrument based on the comparative advantage it has over other instruments available. Yet while public bodies have a vision, albeit imprecise, of their economic objectives, they only have fragmentary information as to the range of tools at their disposal. The development of a guide to economic action tools would help remedy this problem (*Proposal No. 50, see sheet No. 11 for a detailed presentation*).

Furthermore, the comparative merits of each tool must be objectified. Indeed biases influence the choice of tools: fads or image, the temptation to avoid binding rules or to escape expenditure norms. This choice must instead be commanded by a rational analysis based on four groups of criteria: appropriateness to the objective pursued; the public resources mobilised; monitoring and assessment possibilities; scalability and reversibility of the tool (*Proposal No. 51 and 52*).

8 families Economic Action tools



11. The guide to economic action tools for public bodies developed in the framework of the study: content, accessibility, scalability.

As part of the study, the Conseil d'État specifically examines the question of the tools available to public bodies to act on the economy (v. Page 10). Among the 52 proposals set out in this study is the development of a guide to better inform public bodies about these economic action tools.

The Conseil d'État has implemented this proposal itself. The guide is thus enclosed with the 2015 annual review published and made public on 21 September 2015.

- The guide has 24 tool sheets

"Tax incentive" family

1. Tax incentives

"Financial assistance" family

2. Subsidy
3. Repayable loans and advances
4. Investment Fund
5. Guarantees

"Public ownership" family

6. Domain
7. Contracts dedicated to construction operations
8. Public brands
9. Intangible assets of public bodies

"Economic activities" family

10. Performance of economic activities by public bodies
11. Direct management
12. Public contracts
13. Public service delegations

"Public companies and holdings" family

14. Public industrial and commercial companies
15. Public companies and holdings
16. Local companies with specific status
17. Groups

"Economic laws and regulations" family

18. General framework of economic activities (I): purpose of the framework
19. General framework of economic activities (II): implementation modalities
20. Protection of strategic interests in companies
21. Economic city planning

"Public declarations" family

22. Public positions
23. Economic Communication

"Support in economic matters" family

24. Support in economic matters

Each tool is the subject of a sheet that defines its mechanism, the usage that can be made of it for economic purposes and the internal and European legal frameworks.

- A freely accessible and open-ended guide

This guide can also be freely consulted on the Conseil d'État's website :

<http://www.conseil-etat.fr/Actualites/Communiqués/L-action-economique-des-personnes-publiques>

It is intended to be enhanced and updated over time, particularly as legislation and case law changes, but also, where appropriate, as new tools emerge.