

**Non-State Actors Claims on Climate Law Before French Courts:
Les Amis de la Terre France, and the Coalition that Made the State Look Bad.**

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I. Introduction

I'm going to suggest key features of a rather interesting case on air pollution brought before the French Conseil d'Etat, which in my opinion has to do with the design and implementation of climate policies. I'll try to give an overview of the case also known as Les Amis de la Terre France case, since the ruling of the Assembly of the Conseil d'État on July 10, 2020.

It is worth recalling that the application as formulated by non-state actors, involving both non-profit organizations and individuals working in the field of environmental protection, was filed on October 2, 2018, at the registry of the secretariat of the Report and Studies Section of the Conseil d'Etat. The coalition of applicants, including 67 associations and 9 individuals, was led by the association Friends of the Earth – France also Les Amis de la Terre France. Let us have a quick look on the associations that participated in the application. The coalition was composed as follows:

The association Les amis de la Terre - Paris, Association de défense contre les nuisances aériennes (ADVOCNAR), Association France nature environnement - Ile de France, Association Les amis de la Terre - Val de

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Bièvre, Association France nature environnement - Provence Alpes Côte d'Azur, Association France nature environnement - Bouches du Rhône, le Collectif anti nuisance L2, Association Cap au nord, Association de défense du site du Réaltor et de son environnement, Association RAMDAM, Association Sauvons la Mathilde, Association NOSTERPACA, Association CIRENA, Association Rires sans frontière, Association nature du nogentais (ANN), Association Les amis de la Terre - Loire Atlantique, Association Autrement pour les aménagements des contournements (motorways and railways) de l'habitat et de l'Est, Association Les amis de la Terre - Côte d'Or, Association Défense des intérêts des riverains de l'aérodrome de Pontoise-Corneilles en Vexin,.., Association SOS Paris, Association Nos villages se soucient de leur environnement (NOVISSEN), Association Champagne-Ardenne nature environnement (CANE), Association Les amis de la Terre - Dunkerque, Association pour la sauvegarde du patrimoine et de l'environnement à Antony, Association Greenpeace France, Association de défense de l'environnement et de la population de Toussieu (ADEPT), Association Val de Seine vert, Association pour la Sauvegarde de Boulogne Nord-Ouest (ASBNO), Association Toulon Var déplacements, Association inter village pour un environnement Sain (AIVES), Association Marennes contre les nuisances, Association COFIVER, Association Respect environnement, the Fédération Fracture, the Association Union française contre les nuisances des aéronefs (UFCNA), Association Forum sud francilien contre les nuisances aériennes, Association Environnement 92, Association Chaville Environnement, Association Comité riverains Aéroport Saint-Exupéry (CORIAS), Association France nature environnement - Centre Val de Loire, Association Les amis de la Terre - Nord, Association Actions citoyennes pour une transition énergétique solidaire (ACTEnergieS), Association de concertation et de proposition pour l'aménagement et les transports (ACPAT), Association Comité des intérêts de quartier (CIQ) Saint Jean de Tourette Protis, Association vexinoise de lutte contre les carrières cimentières (AVL3C), Association Alertes nuisances aériennes (ANA), Association Nord écologie conseil, Association France nature environnement - Guadeloupe, Association Notre affaire à tous, Association de protection des collines peypinoises (APCP), Association France nature environnement - Bourgogne Franche-Comté, Association Respire, Association Vivre et agir en Maurienne, Association Alofa Tuvalu, Association Les amis de la Terre - Landes, Association Les amis de la Terre - Meurthe et Moselle, Association France nature environnement - Paris, Association Sommeil et santé, Association niçoise pour la qualité de l'air et l'environnement et de la vie, Association Réseau vert Provence, Association

Fédération Alsace nature, Association de défense de l'environnement de Chaponnay, Association Défense des riverains de l'aéroport de Paris, Association Union des calanques littoral, Association Collectif régional associatif nord environnement (CRANE) solidaire, Association Virage énergie, Association Le fer autrement, Association Collectif contre les nuisances aériennes de l'agglomération toulousaine et la commune de Marennes.

Seven Individuals were also involved in these proceedings. France was the defendant.

II. The Matter

The purpose of the application by the non-state actors was to obtain a ruling from the French administrative court, in particular the Council of State, that the State had failed to execute its decision no. 394254 of July 12, 2017, in which the Council of State had quashed "(...) the implicit decisions of the President of the Republic, the Prime Minister and the ministers in charge of the environment and health refusing to take all appropriate measures and to draw up plans in accordance with Article 23 of Directive 2008/50/EC of May 21, 2008, on ambient air quality and cleaner air for Europe making it possible to bring concentrations of fine particulate matter and nitrogen dioxide throughout the national territory below the limit values set out in Annex XI to that Directive."

Moreover, it is important to recall that this decision had enjoined the French Prime Minister and the Minister in charge of the environment to adopt measures aiming at the implementation of a plan relating to the quality of the air in conformity with the European rules in certain identified zones. In addition to the fact that the collective asked the Council of State to note this non-execution, it expected the judge to pronounce against the State a penalty of 100,000 euros per day of delay, within a period of one month, if it did not justify having adopted measures when the decision was made. Finally, the collective requested that the French State be ordered to pay 3,000 euros in costs.

III. Before the court

On October 26, 2015, a petition had been registered against the French State at the secretariat of the litigation department of the Council of State, on behalf of the association Les Amis de la Terre France. In its petition, the association Les Amis de la Terre France first asked the Council of State to annul for excess of power "the implicit decisions of rejection resulting from the silence kept by the President of the Republic, the Prime Minister, the Minister of Ecology, Sustainable Development and Energy and the Minister of Social Affairs, of Health and Women's Rights on its request for the implementation of all appropriate measures to bring concentrations of fine particles and nitrogen dioxide throughout France within the limit values set out in Annex XI of Directive 2008/50/EC of the European Parliament and of the Council of May 21, 2008, on ambient air quality and cleaner air for Europe. Secondly, "to annul, on the grounds of ultra vires, the implicit rejection decisions resulting from the silence kept by these same authorities on its request to draw up one or more plans relating to air quality, the purpose of which is to define the appropriate measures to reduce, in each of the zones and agglomerations of the national territory concerned, the concentrations of fine particles and nitrogen dioxide to within the limit values laid down in Annex XI of the same directive."

Also, "to enjoin the Prime Minister and the competent ministers to order, within a period of one month from the notification of the decision to intervene, the revision of all the plans for the protection of the atmosphere which do not comply with the requirements set out in articles 13 and 23 of the same directive insofar as they do not provide for the reduction of concentrations of fine particles and nitrogen dioxide within the limit values as quickly as possible." Similarly, "to enjoin the President of the Republic, the Prime Minister and the competent ministers to order any useful measure allowing to bring back on the whole national territory, the concentrations of fine particles and nitrogen dioxide within the limit values fixed by this directive." Finally, to order the State to pay the sum of 3,000 euros as costs.

This request had given rise to a decision of the Council of State on July 12, 2017, in which the Council of State, ruling on the dispute, had pronounced, on the one hand, the annulment of the implicit decisions of the President of the Republic, the Prime Minister and the ministers responsible for the environment and health, which prevented them from taking the necessary measures leading to the elaboration of plans concerning the quality of the ambient air in accordance with article 23 of the directive 2008/50/CE of the European Parliament and of the Council of May 21, 2008, concerning the quality of the ambient air and a clean air for Europe, and which, on the other hand, had enjoined the Prime Minister and the minister in charge of the environment to take the necessary measures leading to the elaboration of plans concerning the quality of the ambient air in accordance with article R. 221-1 of the environment code. 221-1 of the Environment Code within the shortest possible time and to transmit it to the European Commission before March 31, 2018.

Following this decision, it had been observed that the State had not taken any action to comply with a court decision that required it to respect its own international obligations. In this regard, the delegate for the execution of court decisions of the report and studies section of the Council of State had sent a letter dated June 20, 2018, to the Minister of State, Minister of Ecological Transition and Solidarity, in which he drew his attention to the fact that he was not aware of the measures taken by the State's services to ensure the execution of the decision and that they should be communicated to him. In response to this address, the Minister of State, Minister of Ecological and Solidarity Transition, had sent, by comments registered on July 16, 2018, the list of measures adopted by the State for this purpose.

The association Les Amis de la Terre France, which was the plaintiff and which was closely following the execution of the decision of the Council of State of July 12, 2017, had been able to gather around itself the collective of associations and individuals reported above. This collective will then refer the matter to the Council of State on October 2, 2018.

IV. The Request for a Penalty Payment

The argument of Friends of the Earth-France was therefore that the State was obliged to respect the jurisdictional decisions rendered by the Council of State in climate matters. In this sense, when the State had not enforced, it was normal that associations could force it to such an obligation before the jurisdictions that had rendered such decisions. In this respect, the first problem that the judge resolved was that of the admissibility of the request due to the large number of applicants.

In its decision, the Conseil d'Etat recalled that, by virtue of the provisions of articles L. 911-4 and R. 931-2 of the Code of Administrative Justice, it can only impose a fine in the event of non-execution of a decision it has rendered, when the matter is referred to it by the parties to the proceedings or by the parties referred to in the act that led to the proceedings. In this respect, the Conseil d'Etat had excluded from the procedure several non-State actors who, in view of their corporate purpose, could not be considered as interested parties, in accordance with the provisions of articles L. 911-4 and R. 931-2 of the Code of Administrative Justice. It is thus of the Association nature du nogentais, the association Les amis de la Terre - Loire Atlantique, the association Les amis de la Terre - Côte d'Or, the association NOVISSSEN, the association Les amis de la Terre - Dunkerque, the association France nature environnement - Centre Val de Loire, the association Les amis de la Terre - Nord, the association Nord écologie conseil, the association France nature environnement - Guadeloupe, the association France nature environnement - Bourgogne Franche-Comté, the association Alofa Tuvalu, the association Les amis de la Terre - Landes, the association Les amis de la Terre - Meurthe et Moselle, the association CRANE solidaire, the association Virage énergie, the association Rires sans frontière, whose territorial scope of action does not cover any of the areas concerned by the injunction issued by the decision of July 12, 2017, on the other hand, the NOSTERPACA association, the Toulon Var déplacements association, the AVL3C, the Sommeil et santé association, the Le Fer

autrement association, the Sauvons la Mathilde association as well as the Réseau vert Provence association.

However, the Conseil d'Etat had retained the admissibility of the request with regard to the association Les amis de la Terre-France, which had already been a party to the proceedings that gave rise to the decision of July 12, 2017, but also the rest of the collective of non-State actors, including the natural persons requesting it, which it had considered could be considered interested parties within the meaning of these same provisions.

V. The Arguments for a Penalty Payment

Friends of the Earth-France had argued that the State had not executed the decision of July 12, 2017. That in this respect, the non-execution of the decision of the Council of State had to be sanctioned by a penalty payment or the “astreinte” pronounced against the State. However, the decision of July 12, 2017, pronounced the annulment of the implicit decisions of the President of the Republic, the Prime Minister and the ministers in charge of the environment and health, which impeded the preparation of plans in accordance with Article 23 of Directive 2008/50/EC of May 21, 2008, aimed at containing the concentration thresholds of fine particles and nitrogen dioxide, at the national level, below the limit values set out in Annex XI of the said Directive.

An injunction was made to the Prime Minister and the Minister in charge of the environment to take measures leading to the elaboration of a plan relating to the quality of the air likely to reduce the concentrations of nitrogen dioxide and fine particles PM10 to values below the limits fixed by the article R. 221-1 of the code of the environment within the shortest possible time. This plan had to be transmitted to the European Commission before March 31, 2018. The Council of State also concluded that the State should pay the association Friends of the Earth France a sum of 3,000 euros under Article L. 761-1 of the Administrative Justice Code.

Friends of the Earth France's argument is that the French administrative judge can impose a fine in order to obtain the execution of its decisions under articles L. 911-3, L. 911-4 and L. 911-5 of the administrative justice code. In this respect, the Conseil d'Etat could impose a penalty payment on any legal person under public law or any organization under private law responsible for the management of a public service. It could render such a decision when ruling on the merits of the parties' claims or when the decision it had rendered had not been executed. However, the very purpose of the *astreinte* is to obtain from the legal person of public law or the organization of private law in charge of the management of a public service that it carries out the obligations which the court decision puts at its charge. However, such a penalty payment does not apply to the State when the latter is the debtor of the penalty payment. Consequently, the court may choose to allocate this fraction either to a legal person governed by public law, enjoying the necessary autonomy with respect to the State, and whose object is related to the dispute, or to a legal person governed by private law, with a non-profit purpose, whose object covers actions of general interest.

It is important to note that the directive of the European Parliament and of the Council of May 21, 2008, on ambient air quality and cleaner air for Europe creates obligations for the States concerning the definition of objectives concerning ambient air quality. Its objective is to avoid, prevent or reduce harmful effects on human health and the environment. Under its Article 13, which sets limit values and alert thresholds for the protection of human health, the directive provides that:

"1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

In the case of nitrogen dioxide and benzene, the limit values laid down in Annex XI may not be exceeded from the dates specified therein.

Compliance with these requirements shall be assessed in accordance with Annex III.

The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).

2. The applicable alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be the thresholds specified in Annex XII, Section A."

This results in a dual obligation. It concerns first of all fine particles, since the texts applied on January 1, 2005, as well as the provisions of article 13 of the directive of the European Parliament and of the Council of May 21, 2008, then its annex XI. On the one hand, that in all their zones and agglomerations, the levels of fine particles PM10 in the ambient air of each State are maintained under the threshold of 40 µg/m³ on average per calendar year. On the other hand, that in the same zones, the levels of fine particles PM10 in the ambient air may in no case exceed 50 µg/m³ per day more than 35 times per calendar year.

This obligation then applies to the level of nitrogen dioxide, which must be kept below the threshold of 40 µg/m³ on average per calendar year, in accordance with the provisions of the directive, which sets January 1, 2010, as the starting point for limiting concentrations. Again, in order to prevent exceedances in zones or agglomerations, the authorities must ensure that predicted exceedances do not occur and, above all, that they do not exceed the periods specified in the directive.

Article 23 of the directive therefore specifies that measures must be taken immediately when the above-mentioned exceedances occur. It is provided that Member States shall ensure that air quality plans are adopted when, inter alia, the levels of pollutants in ambient air exceed the limit values or target values in a zone or agglomeration on their national territory. The purpose of these plans is to enable the States to recover the corresponding limit value or target value provided for in Annexes XI and XIV. However, it is especially important that these air quality plans contain "appropriate measures to ensure that the period of exceedance is as short as possible."

Indeed, it appears that the objective here is necessarily twofold: on the one hand, to reduce the extent of air pollution risks over time and, on the other hand,

to ensure that targeted action is taken. In this respect, the plan must also cover the information listed in Annex XV of the directive. In two rulings by the Court of Justice of the European Union, including its judgment C-404/13 of November 19, 2014 and its judgment C-636/18 of October 24, 2019, the Court indicated that when the requirements that result from Article 13 had not been met, the states must indeed put in place an air quality plan in accordance with Article 23. However, the Court admitted that the states actually had a "margin of appreciation" to choose the measures to be adopted, while ensuring that the period during which the limit values were exceeded was as short as possible.

The coalition of actors also argued that, in addition to European law, the French state was obliged to comply with its own domestic law. It results indeed from article L. 221-1 of the environment code, that " (...) Air quality standards defined by decree in the Council of State are set, after advice from the National Agency for Food, Environmental and Occupational Health Safety, in accordance with those defined by the European Union and, where appropriate, by the World Health Organization. These standards are regularly re-evaluated to take into account the results of medical and epidemiological studies (...)."

It is in this sense that the provisions of article 23 of the directive had been transposed by articles L. 222-4 and L. 222-5 of the environment code. These stipulate that an atmospheric protection plan must be drawn up whenever—in all agglomerations of more than 250,000 inhabitants—measures concerning air quality are not respected. These include the air quality standards provided for in Article L. 221-1 of the Environmental Code, or the specific standards provided for in 2° of I of Article L. 222-1 of the Environmental Code.

This transposition into French law makes it possible, above all, to achieve the objective of reducing the concentration of pollutants in the atmosphere within the zone in question to a level that complies with these standards. At the very most, it allows public actors a significant margin of action, since it provides for the use of alternative measures under the second paragraph of I of Article L. 222-4 of the Environmental Code. In this respect, it is exceptionally possible to resort to

measures in another framework, i.e. other than an air pollution control plan, which, because of their effectiveness, make it possible to contain the exceedances.

The whole point of this argument is that there is nothing to prevent other measures being taken to achieve the same result. In reality, the public authorities have a real power of choice concerning the process that allows them to reduce pollutant emissions to a level compatible with the air quality standards provided for in Articles L. 221-1 and R. 221-1 of the Environmental Code. In other words, it is accepted that the plans for the protection of the atmosphere take the place of plans relating to air quality, but it is not excluded that the authorities can resort to other types of measures contributing to the same result. Especially those that are proven to be effective. However, for such a quality, that of plan relating to the quality of the air, is retained, it is necessary in any case that the adopted measures mention all the information envisaged in the article R. 222-15 of the code of the environment, quite specifically "the information on all the engaged or planned actions tending to reduce the air pollution with the foreseeable evaluation of their effect on the quality of the air (...)."

This is not enough, because it must also include "indicators of the means, particularly financial means, necessary for their implementation," the "timetable for their implementation" and "the estimated improvement in air quality that is expected and the timeframe for achieving these objectives." Despite the strict appearance of the above, it must at most be demonstrated that the period during which the pollutant concentration limits are exceeded has been reduced.

It is important to emphasize that the coalition of non-state actors has brought to light a very crucial fact. Indeed, the data provided by the French government to the Conseil d'Etat confirm this. Originally, twelve administrative air quality monitoring zones (AQMA) were affected by the injunction issued by the July 12, 2017, decision. These include: Grenoble Rhône-Alpes, Lyon Rhône-Alpes, Marseille Provence-Alpes-Côte-d'Azur, Montpellier Languedoc-Roussillon, Nice Provence-Alpes-Côte-d'Azur, Paris Ile-de-France, Saint-Etienne Rhône-Alpes, Strasbourg Alsace, Toulon Provence-Alpes-Côte-d'Azur, regional urban zone (ZUR) Champagne-Ardenne, Toulouse Midi-Pyrénées and ZUR Rhône-Alpes.

Between 2016 and 2018, the maximum annual average concentration of this pollutant had only decreased for nine of them.

While the limit value of concentration in calendar annual average, that the article R. 221-1 of the code of the environment provides, remained exceeded in ten of them in 2018. In 2019, the new terminologies used in the context of the division of regions into administrative zones for monitoring ambient air quality have allowed to observe the exceedance of this limit value in eight ZAS, including the zone at risk - outside agglomeration (ZAR) Arve Valley, zone at risk - agglomeration (ZAG) Grenoble, ZAG Lyon, ZAG Marseille- Aix, ZAG Paris, ZAR Reims, ZAG Strasbourg and ZAG Toulouse.

In this regard, the Conseil d'Etat's ruling emphasizes that:

"Moreover, on the three zones concerned by the injunction issued with regard to the concentration of fine particles PM10 (ZUR Martinique, Paris - Ile de France and ZUR Rhône-Alpes), if the concentration limit value in annual average was exceeded in 2018 only in the ZAG Paris, the limit value of 50 µg/m³ in daily average was exceeded more than 35 times in two ZAS (up to 68 days in the ZAG Paris and 44 days in the ZAG Fort-de-France), these data being confirmed by provisional data for the year 2019."

VI. The execution of the judgment of July 12

In order to execute the decision of the Council of State of July 12, 2017, the French government had taken a series of measures. These are in fact fourteen "roadmaps" published on April 13, 2018, before being transmitted to the European Commission on April 19, 2018. It is recognized that the documents prepared for this purpose constitute an effort by their nature. They give more or less precise details of the information on each area concerned, the concrete actions to be carried out, in terms of reducing pollutant emissions, the timetable for the implementation of these actions as well as the means likely to be mobilized.

However, beyond their apparent ambition, these documents do not provide any estimates related to the improvement of air quality, let alone details on the timeframe for achieving the objectives. In the eyes of non-state actors, this will not comply with the requirements of Article R. 222-15 of the Environmental Code, in other words Annex XV of the Directive of 21 May 2008.

VII. The Revision of Plans for Protection of the Atmosphere

Of the twelve administrative monitoring zones (ZAS) of air quality were concerned by the injunction issued by the decision of July 12, 2017, only two plans for protection of the atmosphere had been revised. These include the Arve Valley and the Ile-de-France. As for the rest of the areas, no action had been initiated regarding the revision of the plans. However, the two revised plans still posed various problems. The Ile de France atmosphere protection plan, adopted on January 31, 2018, is based on a series of twenty-five challenges assigned to different sectors of activity, identifies the competent public persons and the emergency measures to be taken, including the objectives and means of implementation. The plan refers to 2025 as the deadline for a return to the NO₂ and PM₁₀ concentration limits. Such an argument, however, is not likely to meet the requirement of the directive and the provisions of the environmental code that the periods of exceedance should be as short as possible.

On the other hand, adopted on April 29, 2019, the plan for the protection of the atmosphere of the Arve Valley is presented as including "precise and detailed measures," "credible modeling of their impact allowing to expect compliance with the limit values of concentration of nitrogen dioxide NO₂ and fine particles PM₁₀ in this area by 2022." Thus, this plan had been considered likely to promote proper implementation of the decision of July 12, 2017.

This double situation alone is indicative of the problems in the implementation of the 2017 decision, without even taking into account the other zones covered, which have not given rise to any concrete measures.

VIII. The Failure to Execute the Ruling of July 12

In this relentless effort, the coalition of actors was able to lead the Council of State to conclude that "the State cannot be considered to have taken sufficient measures to ensure the full execution of the decision of July 12, 2017. In other words, that the State has not executed the decision of the Council of State which enjoined it to comply with both European law and French domestic law. In this respect, it is concluded that only the Arve Valley Atmosphere Protection Plan can be considered to be in conformity with Article 23 of the 2008 Directive and Article R. 221-1 of the Environmental Code.

As for the rest, the French State, despite an apparent effort concerning the revision of the Ile de France atmosphere protection plan, has not undertaken anything concerning each of the administrative monitoring zones in which the NO₂ and PM₁₀ concentration limit values are set. These include the ZAS Grenoble and Lyon, for the Auvergne - Rhône-Alpes region, Strasbourg and Reims, for the Grand-Est region, Marseille-Aix, for the Provence-Alpes-Côte-d'Azur region, Toulouse, for the Occitanie region, and Paris, for the Ile-de-France region, with regard to nitrogen dioxide concentration levels. In conclusion, this minimal effort does not allow in any case to bring "the concentration levels of these two pollutants below these limit values in the shortest possible time."

IX. The Penalty Payment against the State

In this case, the State Council reached the conclusion that as of July 10, 2020, the State had only partially executed the decision of July 12, 2017. All of the exhibits provided during the proceeding and the evidence of execution of said decision all converge towards this conclusion. Due to the time elapsed since the intervention of the decision of the Council of State, it is only a partial execution, which implies that the State has not complied with the requirements arising from European Union law and its domestic law.

But also, that the State has literally disregarded "the seriousness of the consequences of the partial failure of execution in terms of public health and the particular urgency that results from it." That this situation by nature had led the Council of State to pronounce against the State "a penalty of 10 million euros per semester until the date on which the decision of July 12, 2017, will have received execution. Provided that the State justifies the complete execution of the decision of July 12, 2017, within six months from the notification. The amount of the penalty payment may be revised every six months when the penalty payment is settled.

Thus, to ensure effective execution of the decision, "the Prime Minister shall communicate to the Report and Studies Section of the Council of State copies of the acts justifying the measures taken."