

Brussels, the 4th of December 2020

Frans Timmermans, Executive Vice-President

Virginijus Sinkevicius, Commissioner for environment, oceans and fisheries

Dear Executive Vice-President Frans Timmermans,

Dear Commissioner Virginijus Sinkevicius,

At the outset of the Covid-19 sanitary crisis, on April 8th the French government issued decree n°2020-412. This wide-ranging decree aims at durably ascertaining prefects' derogatory powers through a mechanism allowing them to grant regulatory exemptions. It enables prefects to allow projects to be pursued without having to abide by certain regulations. These exemptions are likely to be granted whenever a prefect considers that a project is of public interest.

The experimental phase of this decree highlighted that it will, for instance, exempt impact-studies from being carried out on projects prior to their implementation, thus preventing the possibility of any public investigations. Furthermore, the lack of a clear framework establishing specific conditions to be met seems to pave the way for countless derogatory authorisations.

Although the decree does provide that the prefect grants exemptions “in accordance with obligations stemming from European law”, the mechanism appears in inherent contradiction with European law and more specifically, with directives pertaining to the principle of public participation and information.

Les amis de la Terre, Notre affaire A Tous, Maiouri Nature and Wild Legal, civil society organisations, submitted a request before the Council of State requesting the annulment of the decree. While the State did not respond within the statutory time limit, the contentious decree is still being enforced whereas a widespread use of such derogations jeopardises the rights of civil society.

The derogatory mechanism was originally enforced in December 2017 on a trial basis in selected departments and regions when it was challenged in court for the first time. The decree generalises the application of the mechanism throughout the entire French territory. Since it was first enforced, at least 183 derogatory orders were granted among which some concerning cases: as a result, a methanation unit was installed in a protected area of the *Yonne* department and, a dyke was constructed and windmills were set-up in *Vendée*, regardless of the obligation to carry out environmental impact studies.

Article 1 of the decree allows prefects to use their derogatory powers to take non-regulatory decisions. Accordingly, only non-regulatory orders are concerned: those are individual or collective decisions pertaining to one or several individuals specifically designated (for instance, an order granting an environmental authorisation in accordance with “Classified Installations for the Protection of the Environment” (CIPE), an

order allowing the disregard of rules pertaining to a protected species, a formal notice order to comply with the prescriptions ordered by the administration, etc.)

Thus the decree generalises a right to individual derogations, in areas such as land management and city planning, environment, agriculture, and forestry or construction, habitat and town planning (article 1, 2° to 4° of the decree). This also applies to other sectors including employment and economic activities, protection and enhancement of cultural heritage, health and socio-educative activities, and community work.

All derogations should only be granted on grounds of public interest and local distinctive features or if aiming at alleviating bureaucratic formalities. It should also be compatible with international and European commitments. Announcing one's willingness to respect its European commitments does not justify the lack of transposition of a European Directive, neither for it to be poorly done. Such transposition must establish a clear and precise legal framework, which can solely ensure an efficient and coordinated application of the rules it provides for.

The decree was enacted without prior public participation and does not provide for third party agencies consultation whereas such referral is mandatory regarding the enactment of many orders granting authorisations. In regards to the principle of formal parallelism, such referrals are necessary prior to granting derogations.

Consequently, the contentious mechanism is in blatant breach of the European Projects, Habitats and Water directives. Indeed, the decree does not contain any safeguards ensuring that no derogations will be granted to projects listed in Appendices II of the Project Directive, despite their adverse environmental impacts. Nor will it ensure the fulfillment of impact studies prior to the destruction of protected habitats. This is in breach of article 6.3 of Council Directive 92/43/EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora. A similar issue arises regarding the impact studies of human activity on surface and ground waters, as certain activities can be allowed in violation of article 5.1 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000, establishing a framework for Community action in the field of water policy.

In addition, the contentious decree violates the Charter of fundamental rights of the European Union. The granting of such derogations is solely based on prefects' decisions which is in violation of the principle of equality before the law as enshrined in article 20 of the Charter. In addition, there is no systematic judicial review of decisions authorising such derogations, in violation of article 47 which provides that *“[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”*

Finally, Honorable Commissioners, we would like to draw your attention to the fact that this decree is not an isolated attempt to undermine environmental law in France. Through the Climate law and the guarantee that *“the Green Deal is not a luxury that we drop when we hit another crisis. It is essential for Europe's future”* as Vice-Presid-

ent Timmermans underlined in the ENVI Committee on 21 April 2020, Europe is surely evolving towards a global protection of the environment while France is, unfortunately, moving backwards.

Since April, ready-made projects eased by accelerated procedures were announced, prefects are entrusted to decide on a case-by-case examination whether an impact study is deemed necessary, the nomenclature pertaining to classified installations has been altered and the ASAP legislation of October 2020 has transformed public investigations into online procedures. Considering these constant threats to environmental protections under French law, we have no choice but to share with you our concerns, while also sharing with you the fact that today an NGO, *Notre affaire à tous*, is submitting a complaint to the Commission against a breach of EU law on the same issue.

Honorable Commissioners, from the reasoning provided hitherto, we would like to inform you of the violation of the EU rule of law and urge you to take action against the deregulation of the environmental legislations in France. We must not allow setbacks in democratic procedure nor in environmental protection.

We ask you to ensure full implementation of environmental laws in the European Union.

We thank you in advance for your consideration.

Yours sincerely,

MARIE TOUSSAINT, GREENS / EFA

MOUNIR SATOURI, GREENS / EFA

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TILLY METZ, GREENS / EFA

DAMIEN CARÊME, GREENS / EFA

ERNEST URTASUN, GREENS / EFA

MANUEL BOMPARD, EUROPEAN UNITED LEFT - NORDIC GREEN LEFT

SARA WIENER, *GREENS / EFA*

ROSA D'AMATO, *MOVIMENTO 5 STELLE*

MANON AUBRY, *EUROPEAN UNITED LEFT - NORDIC GREEN LEFT*

AUORE LALUCQ, *PROGRESSIVE ALLIANCE OF SOCIALISTS AND DEMOCRATS*