

Air pollution: The French State fined again

After ordering the French State in 2017 to comply with air quality standards, and in 2021 to pay a penalty payment of €10 million for the period from January 11 to July 11, 2021, the *Conseil d'Etat* (French Administrative Supreme Court) ordered it to pay two new penalty payments of €10 million each for the two periods from July 2021 to January 2022 and from January to July 2022 for persistent breach of the authorized nitrogen dioxide concentration limit.

It should be preliminarily recalled that Article 13 of European Directive No. 2008/50 of May 11, 2008 on ambient air quality and cleaner air in Europe imposes limit values for ambient air quality, and in particular limit values for the concentration of pollutants such as nitrogen dioxide and fine particulate matter PM₁₀, set out in its Annex XI. In the event of non-compliance with these limit values by the date set for their application (which has now expired), Article 23 of said Directive requires Member States to take appropriate measures to ensure that the period of exceedance is as short as possible.

These obligations have been implemented into the French Environmental Code in Articles L. 221-1 and R. 221-1, in particular. They provide for the establishment of plans for the protection of the atmosphere (PPAs) which aim to reduce, within a defined area, the concentration of pollutants in the atmosphere to a level below the limit values.

In 2015, the association “*Friends of the Earth France*” asked the French authorities to ensure that the above-mentioned provisions were complied with, and, in particular, that concentrations of nitrogen dioxide and fine particles were brought below the thresholds set throughout the country. Given the absence of a response, it asked the *Conseil d'Etat* to annul the implicit refusal decisions and to order the government to take all the necessary measures to ensure that a plan be drawn up and implemented to bring concentrations of nitrogen dioxide and fine particles below the limit values.

In a decision dated July 12, 2017, the *Conseil d'Etat* held that the abovementioned provisions of the French Environmental Code implementing the abovementioned Directive had been breached and that the plans established in the areas concerned were inefficient, and, therefore, granted the association's requests. It ordered the French Government to take all necessary measures to ensure that, for each of the 13 zones

concerned by exceedances of limit values for nitrogen dioxide (NO₂) and fine particles (PM₁₀), a plan relating to air quality be drawn up and implemented to bring these concentrations below the limit values set by Article R. 221-1 of the French Environmental Code within the shortest possible time and to provide such plan to the European Commission before March 31, 2018^[1].

At the European level, the European Commission decided to bring an action against France before the Court of Justice of the European Union (CJEU) for failure to comply with the limit values for nitrogen dioxide (NO₂) and for failure to take appropriate measures to shorten the periods of exceedance as much as possible. In its judgment of October 24, 2019, the CJEU found that France did not comply with the limit values for nitrogen dioxide (NO₂) concentrations in twelve air quality zones^[2]. Then, the Commission decided to bring a similar action before the CJEU again regarding poor air quality due to high levels of particulate matter (PM₁₀). In its judgment of April 28, 2022, the CJEU also found that France did not comply with the limit values applicable to concentrations of microparticles (PM₁₀) in two air quality zones^[3].

At the national level, the enforcement of the abovementioned July 12, 2017 ruling of the *Conseil d'Etat* has resulted in several decisions. First, the *Conseil d'Etat* decided to apply a penalty of 10 million euros per half-year until the date of enforcement after noting that three years later the measures taken were insufficient to achieve the aforementioned objectives^[4]. Then, in a second phase, it ordered the French State to pay a €10 million fine for nitrogen dioxide pollution in five areas and PM₁₀ pollution in the Paris urban area for the period from January 11 to July 11, 2021^[5].

While improvements over time have been noted, the thresholds for nitrogen dioxide pollution – which are supposed to be complied with since 2010 – still exceeded in several areas in France, including the Paris, Lyon and Marseille urban areas.

In its ruling of October 17, 2022, the *Conseil d'Etat* again ordered the French State to pay two new penalty payments of €10 million each for the two periods from July 2021 to January 2022 and from January to July 2022.

Persistence of exceedances

Following the analysis of the new elements provided by the French Ministry of Ecology, the administrative judge noted that the situation has improved overall but remains fragile or poor in four zones:

- the situation in the Toulouse area remained fragile in 2021 with an annual average concentration of nitrogen dioxide just below the limit value but increasing compared to 2020;
- for the Paris, Lyon and Aix-Marseille zones, although the annual average concentration of nitrogen dioxide has decreased overall in 2021 compared to 2019, the limit values have been exceeded.

Insufficient measures

The administrative judge considered that the measures taken are not likely to reduce, in the shortest possible time, the concentration of nitrogen dioxide below the limit value in the areas concerned.

On the one hand, it noted that the measures taken by the French Government in the transport sector (aid for the acquisition of less polluting vehicles, development of so-called soft mobility, deployment of recharging stations) and in the building sector (ban on oil or coal-fired boilers) should have positive effects on the levels of concentration of nitrogen dioxide in the ambient air for the whole of the national territory. However, it noted that the actual contribution of these measures to the objective of reducing the duration of exceedance in the areas concerned has not been ascertained.

On the other hand, it observed that the development and strengthening of “low emission mobility zones” (*zones à faibles émissions mobilité* or “ZFE-m”) provided for by the Climate and Resilience Law of August 2021, with the possibility of restricting the circulation of the most polluting vehicles, may make it possible to significantly reduce nitrogen dioxide concentration levels. However, it noted that low-emission zones (*zones à faibles émissions* or “ZFE”) have already been introduced in the past in Paris and Lyon and that no new measures have been taken for these zones (the timetable for the implementation of restrictions on the most polluting vehicles has even been postponed in Paris). At the same time, the Toulouse ZFE-m has only been in effect since February 2022 and the Aix-Marseille ZFE-m only since September 1, 2022.

Finally, the *Conseil d’Etat* noted that although procedures for revising several air pollution control plans (*plans de protection de l’atmosphère* or “PPA”) have recently been initiated or are in the process of being initiated, the objective of complying with the limit values remains a long way off (as set at 2025 for Lyon and Paris, and “as soon as possible” for Aix-Marseille) and is not accompanied by any element that would allow these deadlines to be considered as being the shortest possible ones.

Two €10 million penalties

The applicants asked the *Conseil d’Etat* to increase the penalty imposed by the decision of July 10, 2020. However, the *Conseil d’Etat* decided not to modify the amount of the half-yearly penalty.

The penalty remains fixed, for the period from July 12, 2021 to July 12, 2022, at €10 million per semester of non-compliance, as provided for in the decision of July 10, 2020, which leads to a total amount of €20 euros for the two semesters.

The penalty payment is divided between the association “*Friends of the Earth*”, which initially brought the case before the *Conseil d’Etat* in 2017, and several organizations and associations involved in the fight against air pollution.

The *Conseil d’Etat* is expected to review in 2023 the actions carried out by the French State from the second half of 2022 (i.e., for the period from July 2022-January 2023).

[1] *Conseil d'Etat*, July 12, 2017, No. 394254

[2] CJEU, *Commission/France*, C-636/18

[3] CJEU, *Commission/France*, C-286/21

[4] *Conseil d'Etat*, July 10, 2020, No. 428409

[5] *Conseil d'Etat*, August 4, 2021, no. 428409

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