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Launch of the public participation process

The public is now better informed than ever before.

And the public has never been so much worried with respect to environment-related matters. In this context, how should we understand the process of public participation in decisions affecting the environment that had been extended and regulated by the Law n° 2012-1460 of December 27, 2012, and then completed by the Order n° 2013-714 of August 5, 2013?

This public participation process is derived from an international principle, more precisely from Article 6 of the Aarhus Convention signed on June 25, 1998 that stipulates that the public should participate in the decisions authorizing certain activities. As a signatory to this Convention, the European Commission has implemented this principle through a number of various Directives[1]. These rules are also modelled on the so-called "Notice-and-comment" rulemaking procedure that has been in force in the USA for more than 60 years.

In France, some specific processes had been put in place, such as impact studies, public inquiries and public consultations, and the Law of February 23, 1995 on the protection of the environment, known as the "Barnier Law". This principle was really enshrined in French law with the adoption of the 2004 Charter for the Environment (Article 7) – that was incorporated into the French Constitution in 2005 – and implemented in the so-called "Grenelle 2" Law of July 12, 2010 (Article L. 120-1 of the French Environmental Code, hereinafter the "FEC").

On several occasions, the French Constitutional Council held that several processes provided for in the FEC and similar to that set forth in the above-mentioned Article L. 120-1 were inconsistent with the French Constitution.[2]

It even ultimately held that Article L. 120-1 itself[3] was inconsistent with the French Constitution. As such, the FEC ought to be amended.

This was precisely the purpose of Law n° 2012-1460 of December 27, 2012 (the "Law") and Order n°2013-714 of August 5, 2013 (the "Order") applicable to provisions concerning individual decisions made by the State and by its public institutions, as well as all decisions – whether regulatory, isolated (*"décisions d'espèce"* in French administrative law*)* or individual – made by local authorities[4].

The scope of application of the public consultation process is obviously very broad. This new process applies to

all public decisions, whatever their nature and whatever the issuing authority. Thousands of daily decisions are at stake. Substantial human and technical resources are needed. And litigation will rise up if the public consultation process is not complied with.

What does "public" mean?

The FEC does not provide a definition of the term "*public*" but the underlying idea of the process is to allow any person, not only the "*public concerned*", as defined by the Aarhus Convention[5], to participate in decision-making. In this respect, the Charter for the Environment specifies indeed that "*any person*" has the right to access information and does not make any reference to the concept of "*public concerned*".

To what types of decisions does the public participation process apply?

The legal framework governing the public participation process depends on the categories of decisions, as set forth by French public law.

However, such categories are not always easy to distinguish: so-called "*individual decisions*", as set forth in Article L. 120-1-1 of the FEC, on the one hand, and so-called "*decisions other than individual decisions*", as set forth in Article L. 120-1 of the FEC, on the other hand.

Because of the diversity and multiplicity of individual decisions, it appeared appropriate not to apply the same public consultation process to individual decisions and decisions of a regulatory nature.

We understand that "*decisions other than individual decisions*" means regulatory decisions or isolated decisions (isolated decisions are defined as decisions that are neither individual nor regulatory, e.g. a site classification decision or a pre-emption decision).

On the other hand, the public participation process is no longer limited to decisions made by "*State authorities, including independent administrative authorities, and public institutions*" but extends to decisions made by "*public authorities*".

Decisions subject to the public consultation process are those that have an "*impact on the environment*", it being specified that "*shall not be considered as having an impact on the environment decisions that have an indirect effect or a non-significant effect on the environment*".[6]

Determining whether a decision has a direct or significant effect and, therefore, an "*impact*" on the environment or only an indirect or non-significant effect and, therefore, no "*impact*" on the environment could be an endless topic…

This is indeed a vague notion but, according to the explanatory notes to the Law**, "***It does not mean, however, that a decision likely to have any effect on the environment will fall within the scope of the [public consultation] process; the effect must be sufficiently characterized, in conditions that courts will determine, to*

be considered as an "impact" within the meaning of Article 7".

In case of dispute on the effect that a decision is likely to have on the environment, it is thus administrative courts that will be responsible for determining what conditions should be fulfilled to characterize the "*impact on the environment*".

The French Constitutional Council has already confirmed that "*certain decisions (whether individual or regulatory) could be viewed as having a too small impact on the environment for the public consultation process to be constitutionally required*"[7].

Let us take, for example, the issue of illuminated signs: in a decision rendered in 2012[8], the French Constitutional Council held that: "*decisions related to the location of advertising banners and to the installation of oversized advertising structures in the framework of temporary exhibitions are not decisions having an impact on the environment, within the meaning of Article 7 of the Charter for the Environment", but specified, however, that "while the definition of the regime governing the installation of illuminated signs is a decision having an impact on the environment within the meaning of Article 7 of the Charter for the Environment, (…) each decision authorizing the installation of such signs has not, in itself, a significant impact on the environment".*

Thus, the balance between public participation and legal certainty is precarious. For example, with regards to plant protection products, the Minister of Agriculture has decided to subject "*the authorizations, modifications of authorizations, and withdrawals, having a direct and significant impact on the environment*" to the public participation process, but not "*the decisions of administrative modifications, those leading to a market sharing or a minor use of a PPP, and those related to lower risk products*".

Also, with regards to authorizations of mining research works in New Caledonia, the constitutional judge has indicated that considering the nature of the searched minerals (cobalt, nickel, chrome) and the techniques used (air-core and core drillings), they were not public decisions having an impact on the environment.[9] *A contrario*, under other circumstances, depending on the searched substances and the techniques used, they could have an impact on the environment.

Lastly, as the Law became effective on January 1, 2012 and the Order on September 1, 2013, and in the absence of transitional provisions, should we consider that this legislation immediately applies to files that were pending on these effective dates and for which no decision had yet been rendered?

What is the scope of the public consultation process?

The public consultation process is merely auxiliary, i.e. it applies only to administrative actions that are not subject to other types of public consultations, public inquiries, French national public debate commission, etc.).

It does not apply to (i) "*decisions which amend, maintain, withdraw or repeal a decision belonging to such a category*"[10], (ii) "*decisions made by public authorities in accordance with a decision other than an individual decision or to drawings, sketches, programs or any other planning documents that has been subject to public participation, when such drawings, sketches, programs or other planning documents, by their very terms, enable the public to assess the impact that decisions likely to be made on their basis has on the environment*", and (iii) "*individual decisions made in the framework of guidelines in which the competent administrative authority has defined criteria for exercising the power of assessment that results from these decisions, to the extent that such guidelines have been subject to public participation in conditions consistent with those set forth in Article L. 120-1[of the FEC], that their formulation enable the public to assess the impact that the relevant individual decision will have on the environment and that there has not been any derogation therefrom*" (Article L.120-2 of the FEC).

Quite logically, the public participation process is excluded for the preparation of "*decisions for which the public authorities do not have any power of assessment*" and "*decisions having the force of a formal demand or sanction*" (Article L.120-1-1, I of the FEC).

It does not apply either when a reason of emergency, justified by the need to protect the environment, public health or public order, precludes the organization of a public participation process (Article L.120-1-2 of the FEC). In case of emergency, it is also possible to shorten the applicable time-lines.

According to Article L. 120-1-3 of the FEC, the public consultation process can also be adapted if such adaptation is necessary to protect some interests listed in Article L. 124-4 of the FEC, e.g. for reasons related to national defense secrets, public safety and safety of individuals, protection of privacy or business and industrial secrecy. Concerning specifically individual decisions, the protection of these interests can justify that the public consultation process be excluded (Article L. 120-1-4 of the FEC).

It will be interesting to see how this provision will be applied in practice. The Court of Justice of the European Union has issued rulings that provide extensive protection of the right of access to information and public participation in environmental decisions. For example, in its judgment dated January 15, 2013, the Court of Justice of the European Union held that the public must have access to an urban planning decision concerning the location of a facility having significant effects on the environment and that the protection of trade secrecy may not be relied upon to refuse this access.

How will the public consultation process be implemented?

The question is to know what does "participation" of the public in decision-making require in concrete terms.

On this specific point, the French Constitutional Council has already had the opportunity to clarify that "*submitting comments does not necessarily require participation in the decision-making. But it is still necessary to implement a procedure that enables public authorities to take into account the submitted comments.*"[11]

An effective participation of the public raises two types of difficulties: how to organize public participation and how to take into account the comments of the public?

Concerning the first difficulty, public participation by electronic means seems to be the most appropriate solution. The Ministry of Environment has a web site dedicated to public consultations (www.consultations-publiques.developpement-durable.gouv.fr) but it is possible to access such consultations via other web sites (www.vie-publique.fr/forums/, or even through the website of the Ministry of Agriculture: agriculture.gouv.fr/consultations-publiques).

Yet, the question arises as to whether providing access to the files and materials only via the Internet could result in litigation and, ultimately, in the nullification of the process if some people argue that they were prevented from participating in the public consultation. If one document only is missing in a *sous-préfecture* (local State administrative sub-office) would entail the nullification of the whole process. This is why it has been decided to use hard copy materials in *sous-préfectures* and *préfectures* (local State administrative offices).

Concerning the second difficulty, in order to ensure that the public will not feel that it has expressed its views without being heard, it has been planned that the summaries of public consultations taking place in the framework of the public participation process would mention the comments that have been taken into account.

This provision might give rise to litigation even though one can consider that the phrase "*take into account*" does not bind the administrative authorities and that the summaries must only highlight the positive elements.

Proposals that went one step further and that suggested disclosing the motives of the decisions fell through. They raised a problem of inconsistency with applicable public law rules on the motives of administrative decisions. The Law of July 11, 1979 on the motives of administrative decisions imposes on administrative authorities the obligation to disclose the motives of certain types of unfavorable individual decisions, and no general principle providing for the obligation to state the motives of all administrative decisions has ever be enshrined in French law.

What are the applicable timelines?

A minimum consultation period of 15 days for individual decisions and 21 days for other decisions has been set. This is reportedly the average duration of public consultations. This provision would thus merely formalize the practices that currently exist.

The decision following a public participation process may not be made earlier than 3 days as from the expiry of the consultation period for individual decisions and 4 days as from the expiry of the consultation period for other type of decisions.

[1] Mainly Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment, Council Directive 96/61/EC of September 14, 1996 concerning integrated pollution prevention and control and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

[2] French constitutional council, decision no. 2011-183/184 QPC of October 14, 2011, *Association France Nature Environnement* (Draft nomenclature and general requirements relating to classified facilities for the protection of the environment); decision no. 2012-262 QPC of July 13, 2012, *Association France Nature Environnement* (Draft rules and technical requirements applicable to classified facilities for the protection of the environment subject to a requirement for authorization); decision no. 2012-269 QPC of July 27, 2012, *Departmental Union for the Safeguarding of Life, Nature and the Environment and others* (Exceptions from measures to preserve biological heritage and the principle of public participation); decision no. 2012-270 QPC of July 27, 2012, *Departmental Federation of Trade Unions of Agricultural Operators from Finistère* (Delineation of protection zones for feeder areas for drinking water abstraction and the principle of public participation); decision no. 2012-283 QPC of November 23, 2012, *M. Antoine de M.* (Classification and declassification of sites).

[3] French constitutional council, decision no. 2013-282 QPC of November 23, 2012, *Association France Nature Environnement* (Authorization to install advertising banners and other advertising devices).

[4] Some commenters have underlined that, while the bill related to the implementation of this public participation principle was being discussed, it was paradoxical to deprive the Parliament of its legislative powers by asking it to authorize the Government to legislate by decrees and orders for the provisions concerning individual decisions made by the State and by its public institutions, as well as all decisions – whether regulatory, isolated or individual – made by local authorities. Urgency was invoked, due to the fact that the repeals ordered by the French Constitutional Council were to become effective on January 1 and September 1, 2013. A draft legislation to ratify the Order dated August 5, 2013 was submitted to the National Assembly on October 30, 2013.

[5] As per Article 2 of the Convention, "*public*" means "*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*".

[6] The draft legislation ratifying the Order provides for the harmonization of the notion of the impact of the environment, by adding the very same specification, provided for in Article L. 120-1-1 of the FEC (individual decisions), to Article L. 120-1 of the FEC (other decisions).

[7] French Constitutional Council's comment on decision n°2012-282 QPC of November 23, 2012, *Association France Nature Environnement et autre* (Authorization to install advertising banners and other advertising devices).

[8] French Constitutional Council's comment on decision n°2012-282 QPC of November 23, 20122, *Association France Nature Environnement et autre* (Authorization to install advertising banners and other advertising devices).

[9] French constitutional council, decision no. 2013-308 QPC of April 26, 2013, *Association "Ensemble pour la planète"* (New Caledonia – Authorizations of mining research works).

[10] The draft legislation ratifying the Order incorporates the very same exclusion, already provided for in Article L. 120-1-1 of the FEC (individual decisions), into Article L. 120-1 of the FEC (other decisions).

[11] French Constitutional Council's comment on decision n°2012-283 QPC of November 23, 2012, *M. Antoine de M.* (Classification and declassification of sites).