



# Exemption of Interreg Europe from the SEA

Communication from the French authorities dated 17 February 2021

## English translation

Following exchanges and work carried out with the General Commission for Sustainable Development (CGDD) of the Ministry of Ecological Transition, we would like to inform you of current developments concerning strategic environmental assessments for ETC programmes, particularly when the managing authority is located in France.

### I. Content and timeline of the draft "ASAP decree":

A draft decree in application of law n° 2020-1525 of 7 December 2020 on the acceleration and simplification of public action (known as the "ASAP" law) is currently being prepared. It aims in particular to shift European Territorial Cooperation Operational Programmes (ETC OPs) from the list of plans and programmes subject to systematic environmental assessment to the list of plans and programmes subject to a case-by-case examination with regard to the impact they are likely to have on the environment.

Public consultation on this draft decree is scheduled from **12 February to 4 March 2021**, and will be followed by a referral to the French Council of State ("Conseil d'Etat"). The French Council of State is expected to give its opinion within approximately two months, which means that the decree can be published, in the best case scenario, in **early May**.

### II. Clarifications on the provisions of the draft decree relating to European territorial cooperation operational programmes

The draft decree (4° of article 2) modifies article R. 122-17 of the environment code as follows:

in 1° of I, after the words: "*for the European Regional Development Fund*" the words: "*with the exception of European territorial cooperation operational programmes,*" are inserted;



*point II is supplemented by a paragraph worded as follows:*

*"14° European territorial cooperation operational programmes which meet the criteria mentioned in III of Article L. 122-4 of the Environment Code. »*

The point I of this article corresponds to the list of plans and programmes subject to systematic environmental assessment: an exception for operational programmes is introduced only for European Territorial Cooperation Operational Programmes (ETC OP).

The point II corresponds to the list of plans and programmes subject to examination on a case-by-case basis: ETC OPs are introduced in this list. The wording chosen allows for the exemption from environmental assessment and case-by-case examination of certain ETC OPs that do not meet the criteria of III of article L.122-4 of the Environment Code.

The point III of Article L. 122-4 of the Environment Code provides that:

*"Are subject to a systematic environmental assessment or after examination on a case-by-case basis by the environmental authority:*

*1° The plans and programmes mentioned in point II which concern small areas if they are likely to have significant environmental impacts;*

*2° Plans and programmes, other than those mentioned in point II [1], which define the framework within which the implementation of projects may be authorised if these plans are likely to have significant impacts on the environment;*

*3° Amendments to the plans and programmes mentioned in point II and in 1° and 2° if they are likely to have significant impacts on the environment.*

*Where the environmental authority decides to submit a plan or programme to environmental assessment after examination on a case-by-case basis, the decision shall specify the specific objectives pursued by carrying out the environmental assessment of the plan or programme. »*

By providing for such an exception and by referring to point III of Article L. 122-4 of the Environmental Code, the aim is to exempt from environmental assessment in particular **those ETC OPs that do not constitute frameworks for authorising projects [2] and are not likely to have significant environmental impacts** (2° of point III of the aforementioned article). Thus, this allows for the explicit exclusion of programmes which only



concern support in terms of expertise, exchange of good practices, stakeholders' networks activities, intangible cooperation, etc.

Conversely, the ETC OPs that constitute project authorisation frameworks and are likely to have significant environmental impacts will have to be examined on a case-by-case basis.

In addition, the draft decree includes a provision in Article 2(1) that exempts ETC OPs from referral to the National Commission for Public Debate (CNDP) when they cover at least three regions. Indeed, the ETC OPs drawn up for each new programming period could be considered as "new plans and programmes" within the meaning of the last paragraph of Article R. 121-1-1 of the Environmental Code and fall within the scope of referral to the CNDP.

### **III. Entry into force of the decree and linkage with the adoption of the CTE OPs**

It is foreseen that the provisions of 1° and 4° of article 2 of the decree will come into force upon publication of the decree, i.e., in principle, barring unforeseen postponement, at the **beginning of May 2021**.

#### **A. Several hypotheses regarding the environmental assessment can be considered:**

1) the ETC OP will be exempt from environmental assessment under the draft decree, but the environmental authority has already been asked for an opinion on the quality of the environmental report and the draft programme: the environmental assessment process should be continued until completion. Since the environmental authority has already been asked for an opinion on the quality of the environmental report and the draft ETC OP, all the provisions associated with submission for environmental assessment must be complied with, in particular those relating to public participation and information on the adoption of the programme.

2) the ETC OP will be exempted from environmental assessment within the framework of the draft decree, the environmental authority has not been asked for an opinion on the quality of the environmental report and the draft programme: in order to regularise the situation, the ETC OP can only be submitted to the European Commission after the ASAP decree has come into force.

3) the ETC OP will be subject to a case-by-case examination within the framework of the draft decree and no longer to a systematic environmental assessment, but the environmental authority has already been asked for an opinion on the quality of the environmental report and the draft programme: cf. point 1: it is recommended to continue the process to its completion. Since the environmental authority's opinion has been sought, all the provisions associated with the submission to environmental assessment must be respected, particularly those relating to public participation and information on the adoption of the programme.



4) the ETC OP will be subject to a case-by-case examination in the framework of the draft decree and no longer to a systematic environmental assessment, the environmental authority has not been asked for an opinion on the quality of the environmental report and the draft programme: a request for a case-by-case examination can only be submitted to the environmental authority after the decree has been published.

**B. With regard to public participation**

Where a plan or programme is subject to environmental assessment, it is subject to obligations in terms of public participation arrangements:

- **in the "upstream" phase during the preparation of the plan or programme [3]:** at the very least, it must be the subject of a declaration of intent or prior consultation with the guarantor (see attached sheet and example) ;
- **in the "downstream" phase when the plan or programme is defined and the environmental authority has given its opinion:** it must be the subject of public participation by electronic means in accordance with the provisions of Article L. 123-19 of the Environment Code.

The draft ASAP decree does not derogate from these provisions, which fall under the legislative level and the environmental charter, which has constitutional value. ETC OPs are therefore not exempt from these provisions as long as they are subject to an environmental assessment. The competent managing authorities will ensure that their implementation is respected.

*[1] The plans and programmes mentioned in II of Article R.122-17 of the Environment Code are subject to systematic environmental assessment.*

*[2] Article L.122-1 of the Environmental Code defines a project as: "the carrying out of construction work, installations or works, or other interventions in the natural environment or landscape, including those intended to exploit soil resources".*

*[3] unless the plan or programme is referred to the CNDP pursuant to the provisions of IV of Article L. 121-8 and Article R. 121-1-1 of the Environmental Code. For CTE OPs, the ASAP decree provides for this case to be ruled out.*

We remain at your disposal for any further information you may require.

Kind Regards,

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