

## France Reforms Lobbying Rules: Government to Impose Criminal Penalties

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***Significant changes in the lobbying rules will implicate both individuals and entities that may not consider themselves as primarily lobbyists.***

### Key Points:

- Lobbyists must comply with particularly constraining declaratory and ethical requirements under penalty of criminal sanctions.
- A significant number of persons and entities may qualify as lobbyists as the new legal definition of lobbying activities is quite broad.

The decree No. 2017-867 dated 9 May 2017 completed the Sapin II Law No. 2016-1691 on transparency, the fight against corruption and modernization of the economy (the Law). The Law is part of the French government's efforts to strengthen transparency, which first affected politicians and which is now also applying to lobbyists.

The Law also reflects the wider European Union actions aiming to regulate lobbying in the European Union. In fact, and although a common European framework is missing within the Member States (only five Member States fully regulate lobbying activities), the European Commission has recently proposed a new version of the Transparency Register for lobbying of the European Union institutions, with the goal of making registration legally binding for all contacts with an European institution.

### Who can be considered a lobbyist?

Lobbyists can be: (1) legal entities governed by private law; (2) public institutions and groupings with a commercial and industrial activity; (3) chambers of commerce and industry and chambers of trade, of which a director, employee or member has a main or regular activity of influencing public decision-making, notably the content of a legislative or regulatory act, by interacting with at least one of the following persons:

- A government official, or a cabinet member
- A member of Parliament (deputy, senator), a collaborator of (i) the President of the National Assembly, (ii) the President of the Senate, (iii) a member of the National Assembly, (iv) a member of the Senate or (v) a parliamentary group, as well as the Chambers duty officers
- A collaborator of the President of the French Republic
- A chief executive, a general secretary or that individual's assistant, a board or a committee member of an independent administrative or public authority with sanctioning powers
- Any person holding a position at which he/she has been appointed by a decree of the Council of Ministers
- Some local elected officials holding an office or a mandate, or with a delegation of authority or of signature
- Public officials holding a position mentioned in article 2 to 4 of the Council of State decree No. 2016-1968

Persons can also be considered lobbyists if they are not employed by a legal entity (as referred to above) and if they practice on an individual level a lobbying activity as mentioned above.

The decree on the register of lobbyists specifies the meaning of the phrase "*main or regular activity of influencing public decision-making*" - without taking into account the recommendation of the "*Haute Autorité pour la Transparence de la Vie Publique*" (Supreme Authority for Transparency in Public Life, HATVP) dated 5 April 2017 which considered that this term was understood too narrowly to cover all lobbyist actions. Thus, a director, employee or member of a lobbyist, or a lobbyist acting individually, is considered as:

- Having a *main activity* of lobbying if he/she dedicates more than half of his/her time to an activity which consists in conducting interventions, on his/her initiative, with the persons listed above in order to influence one or several public decisions
- Having a *regular activity* of lobbying if he/she interacts, at least 10 times within the last 12 months, on his/her initiative, with the persons listed above in order to influence one or several public decisions.

However, the following acts do not constitute an activity of influencing public decision:

- Requesting the granting of an authorization or the benefit of an advantage for which attribution constitutes a right for the persons which fulfill the required legal conditions, pursuant to legal or regulatory provisions
- Presenting an administrative appeal or conducting a procedure for which implementation is necessary, pursuant to applicable law, to the granting of an authorization or of an advantage or the exercise of a right.

The list of persons left outside of the scope of the regulation is very limited, including only:

- Elected representatives in the context of their elective mandate

- Political groups or parties
- Unions representing public servants, and, when the law requires social dialogue, unions representing both employees and employers
- Religious associations in the context of their relationship with the minister of worship
- Representative associations of elected officials for the purpose of the missions provided for under their statutes

## **What are the duties of a lobbyist?**

The Law creates an electronic register in order to inform citizens about the relations between lobbyists and public authorities. This register is made publicly available by the HATVP (a French independent administrative authority created by the Law No. 2013-907 of 11 October 2013 on the transparency of public affairs), which, until now had aimed at controlling and publishing statements of assets from political representatives and insuring the absence of conflicts of interests.

Lobbyists must communicate to the HATVP the following declaratory information:

- Within two months from the day they can be considered as lobbyists:
  - Their identification details
  - The scope of their lobbying activities
  - The number of employees dedicated to the lobbying activities
  - The name of any professional organization, union or association of they are a member of, in connection with their lobbying activities
  - When the lobbyist acted on behalf of third parties, the identity of these third parties.
- Within three months from the closing day of their accounting year:
  - The following information:
    - The type of public decisions on which lobbying actions have been implemented (for example: laws, orders, regulatory acts, decisions which are neither individual nor regulatory, public procurement and concession contracts above a certain threshold, authorizations to temporarily occupy publicly owned land, emphyteutic leases, contracts for the purchase of publicly owned real estate, etc.)
    - The type of implemented lobbying actions, notably:
      - Organizing informal discussions or one-to-one meetings
      - Scheduling an interview for a third party with a public official
      - Inviting to or organizing events, meetings or promotional activities

- Establishing a regular correspondence
  - Sending petitions, open letters and leaflets
  - Organizing public debates, walks and influencing strategies
  - Organizing hearings and formal consultations on legislative acts or other open consultations
  - Submitting suggestions in order to influence the drafting of a public decision
  - Submitting to public decisions-takers information and expertise in order to convince them
- The questions on which these actions have been implemented, identified by their object and area of intervention
  - The categories of contacted public officials
  - When the lobbyist acted on behalf of third parties, the identity of these third parties
  - The amount of expenditures the lobbyist spent on lobbying activities for the previous year (*i.e.*, human, financial and material resources mobilized in order to influence public decision-making) as well as, as the case may be, the amount of turnover of the previous year related to lobbying activities
- When the lobbyist declares itself/himself/herself in the course of the year, the above types of transmitted information relate to the period between the declaration date and the closing date of the next accounting year
  - The French Constitutional Council specified that neither the object nor the effect of these dispositions is to impose an obligation for lobbyists to specify every action they implement or every related cost. These dispositions would therefore only impose the communication of general information and global amounts related to the previous year, in order not to infringe on the freedom of entrepreneurship.

The HATVP will deliberate and specify the technical aspects of how this information will be communicated through a teleservice. Information on lobbying activities will remain publicly available for a period of five years.

In addition, when lobbyists interact with public authorities, they are expected to act with probity and integrity and to apply a certain number of ethical rules, including to:

- Declare their identity, the entity for which they work and the interests or the entities they represent
- Refrain from offering any gifts, donations or advantages of significant value
- Refrain from encouraging the aforementioned public officials to break the ethical rules applicable to public officials
- Refrain from soliciting information or decisions by fraudulent means

- Refrain from conveying false information, or using any schemes intended to deceive in order to obtain decisions or information
- Refrain from arranging seminars, conferences or meetings where authorities would speak in exchange for any form of financial compensation
- Refrain from disclosing the obtained information for commercial or advertising purposes
- Refrain from selling copies of any document issued by the government, an administrative or a public independent authority, or using their letterhead papers and logotypes
- Respect and observe these ethical rules with the people within the immediate circle of the aforementioned public officials.

The Law provides that ethical rules applicable to lobbyists when they interact with the Parliament are laid down by the Senate and the National Assembly. As a reminder, rules already exist and are listed in codes of conduct specific to each House of the Parliament. The existing rules are similar to the one described above and are monitored, in each assembly, by a body called “*Bureau*”.

Likewise, the ethical rules may be specified in a code of ethics for lobbyists defined by a future Council of State decree.

## **What are the powers of the HATVP?**

The HATVP ensures that lobbyists comply with the above mentioned rules, with the exception of the ethical rules applicable to lobbyists when they interact with the Parliament — which are monitored by Parliament’s ethics-related bodies.

The HATVP is allowed to request that lobbyists provide any documentation in line with its mission (professional secrecy cannot be invoked). In order to verify information, the HATVP can also proceed to verifications in the lobbyists’ offices with an order from the judge of liberties and detention of the Paris District Court.

The HATVP protects the professional secrecy and the confidentiality of the information and documents to which it has access, with the exception of those that are supposed to be published according to the Law.

## **What are the applicable sanctions?**

For the first time, lobbyists that do not comply with the set of obligations regarding their interactions with public officials face criminal sanctions and penalties (except for the ethical rules applicable to lobbyists when they interact with the members of the Parliament, for constitutional reasons).

Sanctions apply to lobbyists within the meaning of the Law. Therefore, a lobbyist that fails to comply, on its/his/her own initiative or following a request from the HATVP, with its/his/her obligation to communicate the aforementioned declarative information to the HATVP, can be condemned to a penalty of up to one year imprisonment and a fine of €15,000 (€75,000 when the lobbyist is a legal person).

The same sanctions apply to lobbyists that, after having received a first formal notice from the HATVP ordering them to comply with their ethical obligations, disregard once more the same ethical obligation over the next three-year period.

The HATVP notifies the lobbyist of his/her/its alleged breaches. The lobbyist has one month to address his/her/its remarks and then the HATVP can issue a formal notice (which can be made publicly available) subject to appeal within two months from its receipt.

The HATVP and the ethics-related bodies of Parliament can also address their observations (which are not published) to governmental, administrative and local authorities, when those authorities favorably answer to any solicitation from a lobbyist which did not comply with its aforementioned obligations.

## **Entry into force**

The Law provides for the following dates of entry into force:

- On 1 July 2017 regarding ethical requirements
- Before 2 September 2017 regarding the obligation to declare themselves to the HATVP for lobbyists which already fulfill the required conditions, or within the two months from the date on which they fulfill these conditions
- On 30 April 2018 regarding the information on lobbying actions implemented from 1 July 2017 (1 July 2018 regarding the information on lobbying actions implemented with certain public officials).

Given the criminal sanctions or penalties the Law now imposes on lobbyists, the HATVP should issue guidelines in order to specify the modalities of implementation of the Law and the decree. Even if the decree contains appendices which are intended to enlighten lobbyists, these guidelines will be helpful because a number of gray areas remain.

In the meantime, individuals or entities that engage in any of the designated lobbying activities — even if they do not consider themselves primarily lobbyists — should begin gathering the information of which publication will be required by the Law.

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