

ARTICLE

THE “SAPIN II ACT”: STRICT TRANSPARENCY IMPOSED BY THE DRAFT DECREE ON THE REGISTER OF INTEREST REPRESENTATIVES

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The implementing decree on the functioning of the new French Anti-Corruption Agency was published on March 14, 2017. A plethora of other implementing texts are expected for the application of Act No. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and on the modernization of economic life (aka the “Sapin II Act”). Below we will focus on a draft decree we were able to consult regarding the register of interest representatives requiring lobbyists to be completely transparent.

The Sapin II Act provided for the publication of several decrees by the *Conseil d'État* to specify the functioning and role of the French Anti-Corruption Agency. They will define the conditions of implementation of the French-style deferred prosecution agreement or DPA (*convention judiciaire d'intérêt public*) and will also specify the new requirements in terms of the “*transparency of the dealings between interest representatives and the public authorities*” required under sections 25 through 33 of same.

These provisions have attracted far less commentary than the new duty to prevent the risk of corruption and the creation of the DPA. Yet their importance should not be underestimated. In effect, prior to the passage of the Sapin II Act no general legislative or regulatory provisions existed in French law regulating the conditions under which interest representatives interacted with the executive branch or with independent authorities.

The Sapin II Act created a public register of interest representatives and imposed rules of ethics on them. The text relies on a double mechanism: identifying persons who qualify as interest representatives (1) regulating their activities by placing them under reporting requirements and ethical rules (2) and sanctioning, as applicable, failure to comply with those rules (3).

We reviewed a draft decree on the register of interest representatives, which seems to attempt to impose strict transparency on lobbyists and companies.

1. Very broad definition of interest representatives

The Sapin II Act targets legal persons operating under private law rules, State-controlled entities or public groupings with an industrial and commercial activity, chamber of industry and commerce and chambers of trade and crafts in the region, of which a director, employee or member has as their main or regular activity influencing the public decision-making process, in particular the content of a law or of a regulatory instrument through contacts with the public decision-makers listed by it. These are, in particular (i) members of Government and of ministers' offices, (ii) MPs, Senators, and parliamentary assistants, (iii) assistants/advisors to the President of the French Republic, (iv) directors of independent authorities, (v) persons appointed by the Council of Ministers, or (vi) leaders and elected officials of regions, departments and the largest territorial collectivities, as well as the mayors of municipalities with more than 20,000 inhabitants.

Interest representatives are also individuals who engage in professional activities in an individual capacity meeting the same conditions.

Interest representatives are not elected officials acting in the performance of their duties, political parties and groups, trade union organizations and employer organizations in their role as actors in the social dialogue as well as associations with a religious purpose.

The draft decree to which we had access specifies that legal persons whose director, employee or member dedicates more than half of their activity to interest representation activities or those who have been led to enter into contact, of their own initiative and as part of an interest representation outreach with the public decision-makers indicated above, at least three times over the course of the past twelve months qualify as interest representatives. The draft specifies that individuals who are not employed by a legal person are also considered interest representatives when their professional activity meets these criteria.

In contrast, in the draft decree, interest representation activity does not consist in requesting the delivery of a license or authorization or a benefit to which the persons are entitled by law, or in filing an administrative appeal or carrying out a formality that is, under applicable law, necessary for the delivery of the license or authorization, for the exercise of a right or grant of an advantage.

2. The heavy duties placed on interest representatives

2.1. The first duty imposed on interest representatives is that to register with and disclose to the High Authority for Transparency in Public Life (HATVP):





- 1) their identity;
- 2) scope of their activities;
- 3) the interest representation activities conducted, by specifying the amount of the expenditures related to all of these activities);
- 4) number of persons employed and, as applicable, revenues for the prior period; as well as
- 5) professional [i.e., industry or employer] or trade union organizations or associations with ties to the interest representation and to which the interest representative belongs.

The Sapin II Act specifies that a decree passed by the *Conseil d'État* shall specify the contemplated periodicity and methods of disclosure.

The draft decree we consulted provides that the information listed in 1), 2), and 5) must be declared within a period of two months following the date when one of the criteria to qualify as an interest representative has been met. Within that same period of two months, interest representatives working on behalf of third parties must declare the identity of that third party. Any change in any of the above information must be the subject of an update made within a period of one month of such change.

It is also provided that interest representatives must send to the HATVP, within three months from the end of their financial year and by no later than April 30th of every year, a report outlining the different interest representation actions carried out between January 1st and December 31st of the previous year. The draft decree requires complete transparency and states that the report must indicate:

- 1) the public decision-makers with whom the interest representative has been in touch;
- 2) the type of action performed and the subject matter of such action;
- 3) when the interest representative has carried out actions on behalf of a third party, the identity of such party.

The report is also required to indicate, based on the "range of brackets" established by the HATVP, the amount of the expenditures dedicated to interest representation actions during the previous year by the interest representative, as well as, if applicable, the amount of revenue for the previous year associated the interest representation activity.

The draft decree defines as expenditures dedicated to interest representation actions, "all human, material and financial resources mobilized" by the interest representative so as to, directly or through the intermediary of a third party, carry out a lobbying action determined or requested by that person.

In accordance with the provisions of the Sapin II Act, this information will be made public by the HATVP. They will remain public for a period of five years. If an interest representative ceases to act as such, he or she shall inform the HATVP and the latter will include this information in the register.

The draft decree also provides for practical arrangements for the use of the teleservice to file their reports.

2.2. The second duty placed on interest representatives consists of respecting the rules of ethics detailed in section 25 of the Sapin II Act, and in particular, to refrain from:

- Offering or giving their contacts any gifts, donations or benefits whatsoever having a significant value, and any inducement to such persons to breach the rules of ethics applicable to them and any action with them with a view to fraudulently obtaining information or decisions;
- Obtaining or attempting to obtain information by intentionally providing them with false information or by using misleading tactics;
- Organizing conferences, events or meetings where the public speaking arrangements by representatives of public authorities are tied to the payment of any form of compensation;
- Using, for commercial or publicity purposes, the information obtained;
- Selling copies of documents originating from the Government or from an authority or using the official stationary or the logo of such authorities.

The Sapin II Act provides that a decree passed in the *Conseil d'État* may create a Code of Ethics for interest representatives. The current draft does not address this issue, which will possibly be the subject of a separate decree.

3. The High Authority for Transparency in Public Life's power of control and sanctions

The HATVP may (i) obtain any document without business secrecy being asserted against it, and (ii) carry out on-site inspections, after having obtained authorization from the custodial judge (JLD) of the civil court of Paris.



The draft decree specifies that the custodial judge to whom a referral is made has 48 hours in which to make his or her decision. During the inspection at the premises, a copy of the court order will be provided to the manager or director of the premises or to his or her representative. This order will state the address of the premises to be visited, the name and position of the officials authorized to carry out the inspection and the times when they can perform it. The notice of the court order will indicate the possibilities and time periods for appeal (*i.e.* a non-suspensive appeal to the head of the Paris Court of Appeal within 15 days). It will also state that an application to order the suspension or end of such visit may be made to the custodial judge (such application not having suspensive effect pursuant to the draft decree). The custodial judge may visit the premises during the inspection and suspend or put an end to it at any time.

It is important to note that the draft decree expressly addresses the case of an inspection carried out at an attorney's law office and provides that any such inspection may only be carried out in the presence, as the case may be, of the President of the Bar Association of the Council of State and to the French Supreme Court or his or her deputy, or of the President of the Bar Association where the attorney is registered. These representatives will be informed in writing at least three days beforehand and may apply for an order to suspend or put an end to the visit. Unless this procedure is followed, the attorney will be entitled to refuse the inspection.

The Sapin II Act also provides that the HATVP may be consulted for its opinion (handed down within two months of the referral) by a public authority representative on whether the person is an interest representative and by the interest representatives themselves on the issue of their compliance with their ethical obligations. The draft decree specifies that this referral must be made in writing.

In case of breach, the HATVP may send a notice to the interest representative (which it may decide to make public) or observations to the public decision-maker having responded favorably to a request (but without making such observations public). The draft decree adds that the interest representative may send his or her observations in response within a period of one month. The notice of breach may, for its part, be appealed within a period of two months.

It should be borne in mind that the content of this implementing decree is all the more important in that failure to disclose the required information to the HATVP is an offense punishable by one year in prison and a fine of EUR 15,000. In the event of repeat offense by interest representative, within a period of three years following a notice of breach, the same penalties shall apply.
