




# Loi Sapin II

DRAFT LAW ON TRANSPARENCY, COMBATING CORRUPTION AND MODERNISATION OF ECONOMIC LIFE

ARTICLES RELATING TO INTEREST REPRESENTATIVES



The draft law on transparency, combating corruption and modernisation of economic life.

It is based on a range of studies and leading national reports including that of Jean-Louis Nadal, President of the High Authority for Transparency in Public Life.

The aim is to ensure French legislation is at the forefront of European and international standards, thus contributing to the creation of a positive image of France on the international stage.

# The High Authority for Transparency in Public Life

- ▶ This is an independent administrative authority with a public service role: to promote integrity and exemplary behaviour in the public sector.
- ▶ It was created in January 2014. It replaced the Commission for Financial Transparency in Public Life.
- ▶ It has a wide range of powers granted by law. Its independence is also guaranteed by its collegiate structure and its administrative and financial autonomy.
- ▶ Its staff has grown from 50 to 100 people.
- ▶ The President is the former prosecutor general for the Court of Cassation, Jean-Louis Nadal, whose non-renewable mandate runs for six years.



The other members are:

- ▶ Two Councillors of State, elected by the General Assembly of the Council of State
- ▶ Two Councillors from the Court of Cassation, elected by high judges sitting in the Court, two Special Advisers from the Court of Auditors, elected by the chambers
- ▶ Two qualified individuals appointed respectively by the President of the National Assembly and the Senate, with the agreement of the Permanent Committee of the assembly in question, responsible for constitutional laws, based on a majority of three-fifths of the votes cast.
- ▶ The six elected members are elected on the basis of male-female parity. Their mandate is non-renewable and lasts six years.

# The Council of State

- ▶ The Council of State is a French public institution created in 1799 by Napoleon Bonaparte as a successor to the former institutions which held this name under the monarchy.
- ▶ It is a public institution responsible for advising the French government and is the highest of all the administrative courts.
- ▶ The Council of State is presided over by the Vice-President (Jean Marc Sauvé since October 2006). Its General Assembly may be presided over by the Prime Minister or the Minister for Justice, although this has taken place only under exceptional circumstances.
- ▶ The Council of State is the highest level of the administrative court, which rules on cases taken against public authorities or between public authorities. It is called upon to rule both as a first and last resort, as a judge of appeal and of cassation.
- ▶ There are exactly 350 members of the Council of State, 100 of which are posted, and which form a body of civil servants of various grades.

# Michel Sapin

Minister of Finance and Public Accounts since April 2014

- ▶ born on 9 April 1952 at Boulogne-Billancourt (Hauts-de-Seine)
- ▶ In the past, he has held several different Ministerial portfolios including: Minister for the Economy and Finance from April 1992 to March 1993 and Minister attached to the Ministry of Justice from May 1991 to April 1992.
- ▶ He was also Mayor (of Argenton-sur-Creuse, Indre, from 1995 to 2001, from 2002 to 2004, and from 2007 to 2012); a member of Parliament (for Indre, from 2007 to 2012); President of the Regional Councillor for the Centre, from 1998 to 2000 and 2004 to 2007; Regional Councillor for the Île de France from 1992 to 1994, etc.

## What is the 'Loi Sapin II'?

The Law of 29 January 1993 relating to the prevention of corruption and transparency in economic life and public procedures, known as the 'Loi Sapin', made advances in five areas:

- ▶ transparency in the funding of electoral campaigns and political parties
- ▶ advertising services
- ▶ commercial urban planning
- ▶ public service outsourcing
- ▶ public sector tenders





## The three parts of the draft Loi Sapin II

### ▶ Part 1: **Transparency**

The draft law aims to instil transparency in the process of reaching public decisions and economic life with, notably, the creation of a digital directory of interest representatives, better protection of whistleblowers, etc.

### ▶ Part 2: **Combating corruption**

The draft law aims to better combat corruption, particularly on the international level with preventative and punitive elements.

### ▶ Part 3: **Modernisation of economic life**

The draft law also proposes measures to modernise economic life while ensuring the protection of savers and investors.



# Chronology

## ► 7 January 2015

Jean-Louis Nadal, former prosecutor general for the Court of Cassation and President of the High Authority for Transparency of Public Life submitted his report on public sector integrity to the French President.

## ► 20 January 2015

The French President announced that Michel Sapin, Minister for Finance and the Public Accounts, had been given the task of drafting a law on monitoring lobby groups and economic life.

## ► 22 July 2015

In a Communication to the Council of Ministers, Michel Sapin presented the broad outline of the draft law on transparency and economic life.

## ► 25 February 2016

The draft law was submitted to the Council of State.

## ► 30 March 2016

The Council of Ministers adopted the draft Law on Transparency, Combating Corruption and Modernisation of Economic Life.

# Outlook

- ▶ Committee work within the National Assembly in mid-May will lead to a vote in June, the Senate in July, a definitive reading in September and entry into force in January 2017.
- ▶ The register will be established in January 2017, the first report will be submitted after six months and one year on 1 January 2018 and the control and sanction regime will be established.

## Suggestion from AFCL

- ▶ create a single register for the Executive and then the two assemblies
- ▶ a single controlled declaration which is first made by the High Authority and then by each assembly.

# Introduction

- ▶ The latest version of the draft 'Law on the Transparency of Economic Life' heralded significant changes in the French punitive mechanism in terms of corruption and international compliance.
- ▶ Although the practical modalities have not yet be specifically ordered (and should, in any event, be discussed by the National Assembly and the Senate), the outlines of the reform in terms of combating corruption appear to be clear.
- ▶ They are based on the monitorship provided for by the US Foreign Corrupt Practices Act (FCPA).

# 'Interest representatives'

## AFCL's definition and position

- ▶ The text distinguishes two categories of interest representatives:
  1. 'natural and legal persons under private law (...) on the one hand;
  2. and 'public interest groups and public sector establishments when they meet the conditions set out in paragraph 1 and when they exercise an industrial and commercial activity, except when the communication falls within the context of the relationship of administrative supervision between the establishments and the competent Ministers' on the other

*The AFCL is proud that its request for natural persons and public actors to be recognised as interest representatives was included in the latest version of the draft law.*

It can also be understood that this second category of actors must naturally communicate with the body it is supervised by without being considered to be an 'interest representative'.

The term 'regularly' was added to refine the definition of interest representatives: 'natural and legal persons under private law who regularly exercise an activity with the aim of influencing public decision making.'



However, the current wording presents two problems:

1. On the one hand, a certain number of actors who are legal persons under private law also hold public capital and are under administrative supervision (EDF, Air France, etc.) which requires a relationship with the supervising body.
  2. On the other, there is no need to exclude relationships with public establishments and public interest groups with the supervising body 'when the communication falls within the context of the relationship of administrative supervision between the establishments and the competent Ministers' because, in this case, it does not have the 'aim of influencing (...) the drafting of a law or regulation' as set out in the first paragraph.
- **It would, therefore, be clearer and more in line with the intent of the text if the definition of interest representatives was not based on the nature of the organisations or individuals in question but the aim of the contacts made**, as set out in the first paragraph: 'to influence, on their own behalf or on behalf of a third party, the drafting or implementation of a law or regulation'.



# A digital directory of interest representatives in relation to the government

- ▶ Article 18 aims to create a digital directory of interest representatives lobbying the government, as exists in certain other countries in relation to the European institutions and, in France, in relation to the National Assembly and the Senate.
- ▶ This article defines the representation of interests in the sense of the present law and the parameter of public actors towards which the exercise of this activity involves compulsory registration in the directly, which is held by the High Authority for Transparency in Public Life (HATPV) and which is made public.
- ▶ In addition, this registration will involve a certain number of ethical requirements for these representatives, aiming to ensure the transparency of their relations with the aforementioned public actors, violation of which may lead to financial penalties imposed by the High Authority of €30,000 (a first violation will give rise to a formal notice, followed by a financial penalty in the event of an observed violation within the next five years).



This digital directory will be publicly accessible on the internet.

All interest representatives will communicate to the HATVP, within one month of the start of activities, the following information:


- ▶ Its identity when it is a natural person, or that of its managers and natural persons responsible for lobbying activities within it when it is a legal person.
- ▶ The scope of activity of the interest representatives.
- ▶ The identity of the third party on whose behalf it is working.



# Ethical rules for interest representatives


This registration involves complying with the ethical rules in their relationships with public authorities:

- ▶ to declare their identity, the body which they are representing, and the interests or entities which they represent in their relations with individuals participating in the work of government.
- ▶ to refrain from offering or giving these individuals gifts, donations or advantages of any kind of significant value
- ▶ to refrain from encouraging these individuals to transgress the ethical rules applying to them
- ▶ to refrain from obtaining or attempting to obtain information or decisions by deliberately communicating erroneous information to these individuals or by employing methods which are likely to mislead them

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- ▶ to refrain from organising conferences, demonstrations or meetings in which the participation of individuals involved in the work of government is connected to the payment of a financial fee in any form
  - ▶ to refrain from divulging information obtained to third parties for commercial or advertising ends
  - ▶ to refrain from selling to third parties copies of documents belonging to the government, an administrative authority or independent public body, or from using the headed paper or logo of these public authorities and administrative bodies
  - ▶ to agree to respect all of these rules in their relationships with those in the immediate entourage of individuals participating in the work of government.

# Creation of a national agency for the prevention and detection of corruption

- ▶ The draft law on 'Transparency, Combating Corruption and the Modernisation of Economic Life' created a new independent body, under the authority of the Ministers of Justice and Finance, with the role of controlling, training and sanctioning corruption.
- ▶ This National Agency for Preventing and Combating Corruption replaces the current Central Service for the Prevention of Corruption, increasing its staff from 16 to 70 officers.

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- ▶ **The Agency's first mission**, which is general in nature, consists notably of establishing a map of risks, defining a multi-annual plan to combat corruption and coordinating France's position within international bodies. The Agency also takes on a supporting role (in cases of financial need) for whistleblowers.
  - ▶ **The Agency's second mission** concerns public actors. It will be responsible for issuing opinions on the integrity of public body's co-contractors and for producing guidelines on the internal procedures to prevent and detect corruption within public institutions. It will control and advise public institutions on these issues.
  - ▶ **The third mission** will specifically target economic actors. The Agency will issue guidelines relating to the new obligation to prevent corruption and control compliance. It will be competent for ruling on the validity of plans which are implemented to prevent and detect corruption as well as compliance programmes. Finally, it will be responsible for controlling compliance with the Law No. 68-678 of 26 July 1968 (known as the 'blocking statute') in the event of an external compliance procedure.




► **The Agency** will dispose of very extensive powers in light of its missions:

it may hear any person, receive any document and conduct verifications on site. It may receive information on decisions of justice as well as procedures underway, notably to formulate opinions on the integrity of the co-contractors of public persons.


# The creation of an obligation to prevent the risks of corruption

- ▶ The draft Loi Sapin II creates an obligation to prevent the risks of corruption. It imposes obligations upon companies with more than 500 employees and companies belonging to a group with more than 500 employees and whose turnover is higher than 100 million euros (and their directors).
- ▶ They must take 'effective' measures to prevent and detect the commission in France or abroad, of corruption or influence-peddling, namely:



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1. Adopt a code of conduct setting out the behaviour to be prohibited
  2. Establish an internal alert mechanism
  3. Establish a map of risks (regularly updated and setting out the risks of external demands depending on the sector of activity and geographic area)
  4. Implement a procedure to check the integrity of clients, suppliers, partners and intermediaries
  5. Conduct internal or external accounting controls
  6. Provide training to company managers and members of staff who are most exposed to corruption
  7. Establish a disciplinary sanction policy



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- ▶ As mentioned above, the Agency will issue guidelines, including best practice to guide companies in setting up this plan.
  - ▶ In the event of violation, a formal notice may be issued to the transgressor.
  - ▶ By default, the Agency's Sanctions Committee may issue compliance injunctions and sanctions (up to €200,000 for natural persons and €1,000,000 for legal persons, potentially combined with publicity obligations).

# The creation of an ancillary punishment to ensure compliance

- ▶ Alongside these flagship measures, the draft introduces an offence of influence peddling of a foreign public representative and aims to encourage the prosecution of influence peddling and corruption violations which take place abroad, as it removes certain prior conditions: the need for the offences to be outlawed in the country where the events took place and the need for a prior complaint to have been made to the court.

# Conclusion

- ▶ Although numerous French companies which are subject to the provisions of the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act have already demonstrated their maturity in terms of compliance, this text marks a real revolution in French anti-corruption legislation. The focus is upon prevention and the increasingly predominant position of the 'whistleblower'.
- ▶ The transparency register specifically for interest representatives was somewhat relaxed during its approval by the Council of Ministers. The AFCL, however, highlights the significance of qualifying an action of influence not by the nature of those involved by rather by the aim of the contacts made by the individuals.
- ▶ The text imposes very heavy obligations upon companies. It is hoped that by complying with these obligations, companies and their directors will be protected from prosecution.

The subject of clubs or Parliamentary lunches (Senators/company directors), was widely debated before the assemblies.

One of the significant debates is around the adverb 'regularly' which means neither 'principally' nor 'from time to time', which poses a problem for communication agencies in particular.

### The AFCL wishes to

- re-establish the balance between public actors and interest representatives (reciprocity)
- as well as the balance between legal persons under public and private law
- launch a debate on conflicts of interest and public-to-private sector crossovers, as well as on unjustified exceptions

We have asked a lawyer to look at the constitutionality of this text and its compatibility with the Directive on trade secrets (the European Directive on the protection of trade secrets was adopted by a large majority on Thursday 14 April, by the European Parliament).

As well as 'how to define erroneous information'.