

Government Relations 2021

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MJ Alves & Burle Advogados e Consultores

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Government Relations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Marcos Joaquim Gonçalves Alves and Fernanda Burle of MJ Alves & Burle Advogados e Consultores, for their continued assistance with this volume.



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FORM OF GOVERNMENT

Constitution

- 1 | What is the basic source of law? Describe the scope of, and limitations on, government power relevant to the regulation of lobbying and government relations.

France is a civil law system, which means it places a greater emphasis on parliamentary laws and regulations, as found within various codes, than on case law. The primary sources of law are the laws passed by Parliament. There are also regulations that are issued by the executive branch.

Parliament can only legislate on a limited number of subjects that are primarily listed in article 34 of the Constitution. All matters that are not explicitly reserved to Parliament fall within the responsibility of the executive branch.

Regarding the regulation of lobbying and government relations, Parliament has the power to pass laws, and the government has the power to take implementing measures.

In any case, parliamentary laws and regulations must comply with the Constitution (which includes the 1789 Declaration of the Rights of Man and of the Citizen) and international treaties, including the European Convention on Human Rights.

French law ensures the right to petition the National Assembly and the senate, the Economic and Social Council and the territorial collectivities.

Legislative system

- 2 | Describe the legislative system as it relates to lobbying.

Parliament is made up of the National Assembly and the senate, and both chambers pass laws. Each chamber conducts legislative sessions at a separate location in Paris. The National Assembly (the lower house) includes 577 members who are elected by direct universal suffrage with a two-round system by constituency, for a five-year mandate, subject to dissolution. The senate (the upper house) includes 348 senators who are elected by indirect universal suffrage by a panel of 'electors', for a six-year mandate.

Regulatory power is generally exercised by the prime minister, who may delegate the exercise of this power to his or her ministers. Regulatory agencies and territorial collectivities are also vested with regulatory powers.

National subdivisions

- 3 | Describe the extent to which a legislative or rule-making authority relevant to lobbying practice also exists at regional, provincial or municipal level.

France is divided into territorial collectivities, which include regions (divided into departments and then into communes), overseas collectivities and other collectivities with a specific status. They have regulatory power in specific areas (mainly urbanism, housing and environment for the communes, social welfare for the departments, and economic development, planning and transport for the regions). They also collect local taxes.

Consultation process

- 4 | Does the legislative process at national or subnational level include a formal consultation process? What opportunities or access points are typically available to influence legislation?

There are several consultation processes available under French law, the most significant being the referendum requiring the public to vote on a draft law or regulatory act (either at the national level for legislation or the local level for regulation), the consultation (the government, the territorial collectivities and the public institutions have the possibility to organise a public consultation on www.viepublique.fr prior to the adoption of a regulatory act) and the receipt of public enquiries on any major project to collect comments.

Recently, there have been citizen consultations, formalised at the prime minister's initiative by the organisation of a citizen's convention for ecological transition, to gather the opinions of randomly selected citizens in respect of propositions relating to the reduction of greenhouse gas emissions in France. In the context of the covid-19 pandemic, specific committees focusing on the management of the health crisis or designed to find innovative scientific, technological and therapeutic solutions have been implemented to assist public authorities.

Judiciary

- 5 | Is the judiciary deemed independent and co-equal? Are judges elected or appointed? If judges are elected, are campaigns financed through public appropriation or candidate fundraising?

The judiciary is deemed independent. The courts in France are divided into two types: the judicial courts (those dealing with criminal and civil law); and the administrative courts. Procedures for the appointment, promotion and removal of judges vary depending on whether it is for the judicial or the administrative courts. In both types of courts, the judges are public servants. As an exception, there are elections for some specific courts, such as the commercial and labour courts, for which there is no significant campaign activity and where judges are laypersons.

REGULATION OF LOBBYING

General

- 6 | Is lobbying self-regulated by the industry, or is it regulated by the government, legislature or an independent regulator? What are the regulator's powers? Who may issue guidance on lobbying? What powers of investigation does the regulator have? What are the regulators' or other officials' powers to penalise violators?

Lobbying activities towards public authorities are subject to transparency and control regulations under the Law on Transparency in Public Life (No. 2013-907 dated 11 October 2013), as amended by the Law on Transparency, Anti-Corruption and Modernisation of Economic Life (No. 2016-1691, known as the Sapin II Law, dated 9 December 2016).

An independent administrative authority, the High Authority for Transparency in Public Life (HATVP) is in charge of enforcing ethical obligations, preventing conflicts of interests, counselling and advising public officials or administrations, and promoting transparency in public life.

Upon request of an association, a public official, a representative of interests (ie, a lobbyist) or, on its own initiative, the HATVP has powers to force the production of any relevant document to accomplish its objective. Upon request to the liberty and custody judge of the Paris Court of First Instance, the HATVP may also carry out verifications on-site.

Whenever it finds that a representative of interests has violated its obligations (reporting, integrity, etc), the HATVP may summon the representative to respect its obligations. The HATVP may also address a confidential opinion to any public official who has been in contact with the breaching representative of interests, advising him or her of the situation.

Definition

- 7 | Is there a definition or other guidance as to what constitutes lobbying?

Under the Law on Transparency in Public Life, as amended by the Sapin II Law, the notion of lobbying derives from the definition of 'representatives of interests', which means any private legal person, public entity or public group exercising industrial and commercial activities, or any craftsperson, whose executives', employees' or members' main or recurring activity consists of influencing public decisions, in particular the content of a law or of a regulatory act, by making contact with any of the public officials listed in the Law on Transparency in Public Life.

Registration and other disclosure

- 8 | Is there voluntary or mandatory registration of lobbyists? How else is lobbying disclosed?

A representative of interests must register to a unique register (the Register) established by the HATVP, within two months of the date it fulfils at least one of the conditions set by the Law on Transparency in Public Life (ie, when lobbying accounts for more than half of its activity or when it has had at least 10 instances of contact with a public official over the past 12 months). If its information changes, the representative of interests must update it on the Register within a month. The Register is common to the government, the senate, the National Assembly and the territorial collectivities.

Activities subject to disclosure or registration

- 9 | What communications must be disclosed or registered?

The scope of activities subject to registration covered by the Law on Transparency in Public Life applies to any representative of interests

who attempts to influence a public official mentioned in the list of specific persons, including, without limitation, government members, members of ministers' offices, members of Parliament, collaborators of the president, political advisers and administrative entities' directors, and local public servants.

Pursuant to Decree No. 2017-867 on the Electronic Register of Representatives of Interests, dated 9 May 2017, any representative of interests must disclose to the Register all the actions it has taken to influence a public official, in particular:

- organising informal discussions or face-to-face meetings;
- arranging an interview with a public officer at the request of a third party;
- inviting people to or organising events, meetings or promotional activities;
- establishing a regular correspondence (by email, mail, etc);
- sending petitions, open letters and leaflets;
- organising public debates, marches and strategies of influence on the internet;
- organising hearings, formal consultations on legislative acts or other open consultations;
- providing suggestions to influence the drafting of a public decision; and
- communicating information and expertise to public officials with the aim of convincing them.

Entities and persons subject to lobbying rules

- 10 | Which entities and persons are caught by the disclosure rules?

A representative of interests is considered to be any private legal person, public entity or public group carrying out industrial and commercial activities, or any individual or craftsperson, whose executives', employees' or members' main or recurring activity consists of influencing public decisions, including the content of one or more legislative or regulatory measures, by making contact with a public official listed in the Law on Transparency in Public Life. The representative of interests may either lobby for itself or for a third party.

The Decree on the Electronic Register of Representatives of Interests further clarifies the practical scope of the representation of interests by providing that a representative of interests is considered as having a main or recurring lobbying activity when lobbying accounts for more than half of its activity or when it has had at least 10 instances of contact over the past 12 months with a public official mentioned in the Law on Transparency in Public Life.

The Law also applies to non-profit organisations, associations and professional unions; however, it excludes from its scope of application any elected persons and organisations representing elected representatives in the exercise of their missions, political parties, specific professional unions and any religious associations.

Lobbyist details

- 11 | What information must be registered or otherwise disclosed regarding lobbyists and the entities and persons they act for? Who has responsibility for registering the information?

A representative of interests must disclose specific information to the Register, including its identity if it is a natural person. If it is a legal person, the representative must disclose: the identity of its executives and the people in charge of the representation of interests within the entity; the field of its representatives of interests' activities; the actions taken towards the public officials mentioned in the Law on Transparency in Public Life and the amount of expenditure dedicated to these actions; the number of persons employed in the representation of interests; its

sales revenue for the previous year; the professional federations or associations in relation to the interests represented and of which the representative of interests is a member; and, if it is representing a third party, the client's identity.

When the representative of interests is a natural person, he or she must register on the HATVP's website. Whenever the representative of interests is a legal person, a natural person must be appointed as the operational contact to proceed with the registration. Upon the initial registration, the operational contact may then designate one or more other contacts responsible for the production of the relevant information required by the HATVP.

Content of reports

12 | When must reports on lobbying activities be submitted, and what must they include?

Any representative of interests must provide, at the latest three months after the end of its fiscal year by electronic means to the HATVP, specific information concerning the previous year, including:

- the nature of the public decisions that its actions were targeted towards;
- the type of actions taken;
- the subjects of the actions, identified by their object and field of intervention;
- the categories of public officials mentioned in the Law on Transparency in Public Life with whom it had contact;
- if applicable, the identity of the third parties for whom the actions were performed;
- the amount of expenditure it dedicated to representation activities for the year; and
- if applicable, the amount of the sales revenue of the previous year derived from its representation activities.

Financing of the registration regime

13 | How is the registration system funded?

The Register is the responsibility of the HATVP, which is an independent administrative authority (ie, it acts on behalf of the state but is not subject to the government's authority). As such, it is affiliated to the government for budget matters but has financial autonomy. The registration system depends on public funding.

Public access to lobbying registers and reports

14 | Is access to registry information and to reports available to the public?

The Register is freely accessible on the HATVP's website to any user. For each representative of interests, the HATVP makes a document available that includes all the information the representative of interests has provided. The information provided by a representative of interests to this Register remains public for five years.

Code of conduct

15 | Is there a code of conduct that applies to lobbyists and their practice?

The Law on Transparency in Public Life provides guidelines that any representative of interests must commit to respecting during the course of its activity. In particular, a representative of interests must, in all circumstances, behave with probity and integrity, and, in particular, it must:

- declare its identity, the organisation for which it works and the interests or entities it represents in its relations with the public officials mentioned in the Law on Transparency in Public Life;

- refrain from proposing or giving to public officials any presents, gifts or benefits of any significant value;
- refrain from paying any remuneration to employees of the president, members of ministers' offices and employees of a member of the National Assembly, senator or parliamentary group;
- refrain from inciting those persons to violate the ethical rules applicable to them;
- refrain from engaging in any action with these persons to obtain information or decisions by fraudulent means;
- refrain from obtaining or attempting to obtain information or decisions by deliberately communicating to those persons erroneous information or by resorting to manoeuvres designed to deceive them;
- refrain from organising colloquia, demonstrations or meetings, in which speeches by public officials mentioned in the Law on Transparency in Public Life are linked to the payment of remuneration in any form;
- refrain from using, for commercial or advertising purposes, the information obtained from a public official mentioned in the Law on Transparency in Public Life;
- refrain from selling to third parties copies of documents from the government, an independent administrative or public authority, or from using the letterhead and the logo of those public authorities and administrative bodies; and
- strive to comply with all the rules provided by the Law on Transparency in Public Life in their relations with the direct entourage of public officials.

In addition to the Code of Conduct it adopted on 31 May 2017, the senate issued, on October 2020, a guide on ethical conduct for senators, containing guidelines applicable to the relations between representatives of interests and senators.

The National Assembly's Code of Conduct, updated on 9 October 2019, also regulates the relations between representatives of interests and members of the National Assembly. On 20 January 2021, the National Assembly also adopted a specific Code of Conduct applicable to representatives of interests.

Media

16 | Are there restrictions in broadcast and press regulation that limit commercial interests' ability to use the media to influence public policy outcomes?

The French media is diversified, primarily because of the end of the state monopoly in 1982. Most media outlets are owned by private economic interests.

The independence and the pluralism of the media are principles of French law. However, the law strictly regulates the advertising and communication developed in the media around products from specific industries, such as tobacco, alcohol and medicine.

POLITICAL FINANCE

General

17 | How are political parties and politicians funded in your jurisdiction?

In France, political parties are funded by private and public resources.

Private resources include subscriptions of political parties' members and private donations. These donations can only be made by individuals and are capped at €7,500 per individual (€15,000 per tax household) per year.

Public resources are subject to certain conditions, in particular to a certain amount based on the votes expressed for each political party

whose candidates reach at least 1 per cent of expressed votes in a legislative election, as well as to a certain amount based on the number of parliamentarians from the relevant political party sitting in the National Assembly and the senate (around €40,000 per elected representative).

Elected representatives' revenues (which include benefits in kind) are capped, no matter how many mandates they hold. In practice, elected representatives usually grant between 10 per cent and 30 per cent of their revenue to their political party.

Registration of interests

- 18 | Must parties and politicians register or otherwise declare their interests? What interests, other than travel, hospitality and gifts, must be declared?

Members of the National Assembly and senators, ministers and elected representatives must solemnly, exhaustively and sincerely declare their financial situation, as well as the financial situation of their spouse and all assets held in joint tenancy.

They must also disclose their interests, which may arise in relation to their own or to their spouse's professional activity, to the shares they hold in any company, to the board of a company or to any volunteer activities likely to cause a conflict of interest.

This declaration is reviewed and published by the High Authority for Transparency in Public Life.

Contributions to political parties and officials

- 19 | Are political contributions or other disbursements to parties and political officials limited or regulated? How?

Political contributions to parties and political officials are regulated and limited.

Sources of funding for political campaigns

- 20 | Describe how political campaigns for legislative positions and executive offices are financed.

Funding comes from individuals' donations, political parties' donations and personal loans. Individuals' donations are capped at €4,600 per individual per election. Political parties' donations are capped at €7,500 per year per political party. Only personal loans are not capped.

For all elections, each candidate must name a financial agent, who will hold an account register that lists every source of funding. This account register is then certified by a chartered accountant and verified by the National Commission for Campaign Accounts and Political Financing.

Lobbyist participation in fundraising and electioneering

- 21 | Describe whether registration as a lobbyist triggers any special restrictions or disclosure requirements with respect to candidate fundraising.

French law forbids any lobbyist participation in fundraising and electioneering.

According to the Electoral Code, legal entities, except political parties or groups, may not contribute to the financing of a political campaign by providing grants in any form or by providing goods, services or other direct or indirect benefits at prices lower than those usually applied.

Independent expenditure and coordination

- 22 | How is parallel political campaigning independent of a candidate or party regulated?

Individuals or groups not directly related to or controlled by a candidate or political party may operate a parallel media advertising or grassroots

campaign to support (or oppose) a candidate, either by speaking online, writing a book or talking on a radio show. They can be political analysts, researchers, authors or journalists.

The main limitation results from the Superior Audiovisual Council, which regulates the amount of broadcast time that is provided to each candidate, and the speaking time of candidates and parties during the election period.

ETHICS AND ANTI-CORRUPTION

Gifts, travel and hospitality

- 23 | Describe any prohibitions, limitations or disclosure requirements on gifts, travel or hospitality that legislative or executive officials may accept from the public.

According to the National Assembly's Code of Conduct, gifts that may cause a conflict of interest and whose value exceeds €150 received by members of the National Assembly must be disclosed to the Compliance Officer of the National Assembly, who may decide to put them in escrow.

According to the senate's Code of Conduct, gifts, donations, benefits in kind and externally funded invitations of which the value exceeds €150 received by senators must be disclosed either to the delegation in charge of the conditions governing the exercise of the mandate of the senator or to the delegation in charge of international activities.

All gifts received by the president during his or her term of office are kept in Paris in a facility called Alma Storage. At the end of his or her five-year term, the pieces of art are disseminated to French museums. Each gift is registered with the name of the donor, the place where it was given and the circumstance of the gift.

Anti-bribery laws

- 24 | What anti-bribery laws apply in your jurisdiction that restrict payments or otherwise control the activities of lobbyists or holders of government contracts?

French anti-bribery regulations have been significantly strengthened by the Sapin II Law, which provides for the expansion of French jurisdiction over acts of corruption committed abroad, the creation of an anti-corruption agency, whose role is to monitor the implementation of anti-corruption compliance programmes (now mandatory for certain companies), and the extension of whistle-blower protection.

Regarding the activity of representatives of interests, the Sapin II Law has amended the Law on Transparency in Public Life by introducing guidelines that any representative of interests must commit to following during the course of its activity. The guidelines stipulate that a lobbyist must refrain from proposing or giving to public officials any presents, gifts or benefits of any significant value and refrain from paying any remuneration to employees of the president, members of ministers' offices and employees of a member of the National Assembly, deputy, senator or parliamentary group.

Government contracts are strictly regulated. A transparent, fair, equitable and non-discriminatory process must be followed to select a government contractor. Depending on the purpose and estimated value of the contract, public procurement is subject to a specific process and advertising, to avoid bribery and comply with competition rules.

Revolving door

- 25 | Are there any controls on public officials entering the private sector after service or becoming lobbyists, or on private-sector professionals being seconded to public bodies?

The Law on Transparency of Public Life forbids any former government member from joining private companies that he or she worked with

during his or her term of office. The High Authority for Transparency in Public Life ethically controls any departure to the private sector.

Working in the private sector after having served as a public agent for years is strictly regulated in France and controlled by the Ethics Commission of Public Service, which must first give its opinion on the compatibility of the career change.

Former public agents may not carry out a private activity, if:

- the activity jeopardises the dignity of their previous functions;
- it may call into question the regularity, independence and impartiality of the public service;
- it does not comply with the ethical principles of public service; and
- it can lead to illegal acquisition of interest.

Prohibitions on lobbying

26 | Is it possible to be barred from lobbying or engaging lobbying services? How?

According to the Electoral Code, legislative representatives are barred from lobbying during their term of office.

There is no specific prohibition for senators, but they are barred from any consulting activity and from running certain companies (including those linked to the state) during their term of office.

RECENT CASES AND SANCTIONS

Recent cases

27 | Analyse any recent high-profile judicial or administrative decisions dealing with the intersection of government relations, lobbying registration and political finance?

There have been no relevant final high-profile decisions; however, some of the latest opinions rendered by the High Authority for Transparency in Public Life in 2020 (mainly on individuals moving from the public to the private sector) have been released on its website.

Remedies and sanctions

28 | In cases of non-compliance or failure to register or report, what remedies or sanctions have been imposed?

As of 1 January 2018, any violation of the reporting obligation may be sanctioned by a fine of up to €15,000 and one year of imprisonment.

UPDATE AND TRENDS

Key developments of the past year

29 | Are there any emerging trends or hot topics in government relations, lobbying or related law and regulation? Have changes occurred recently or are changes expected in the near future (through either legislation or court decisions) that will have an impact on the practice of government relations or lobbying disclosure?

In January 2021, a report for the promotion of more reliable and transparent lobbying was presented to the National Assembly. It led to the adoption of the National Assembly's Code of Conduct applicable to representatives of interests. Other measures may be adopted at the National Assembly level in 2022.

On 1 February 2021, the High Authority for Transparency in Public Life (HATVP) issued new ethical guidelines relating to the detection and prevention of conflicts of interests of public officials and elected representative. They present the HATVP's doctrine on the risks of conflicts of interests and offer a summary presentation of the ethical procedures

that must be complied with by public servants or officials throughout their career.

Coronavirus

30 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Owing to the covid-19 pandemic, several regulations have been adopted to support individuals and legal entities, including financial assistance and support based on government backed-loans and a moratorium on debts and interests.

In respect of lobbying specifically, pursuant to a law dated 17 June 2020 relating to several provisions concerning the health crisis, other urgent measures and Brexit, the obligation for representatives of interests to declare in the Register established by the HATVP their lobbying activities with local elected representatives has been postponed to 2022. Having initially been supposed to be applicable as from 2021.

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