



## NEWS REPORT

<b>Update of</b>	576 – FR - 75
<b>Date:</b>	22 March 2011
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<b>Title:</b>	Law on the Defender of Rights
<b>Country:</b>	France
<b><u>Context</u></b>	
<b>Issue at stake:</b>	The law on the Defender of Rights integrating the HALDE adopted
<b>Ground of discrimination:</b>	All
<b>Source:</b>	Legislation
<b>Field:</b>	All
<b>Legislative provisions:</b>	Law creating the Defender of Rights , and Organic Law creating the Defender of Rights

### Content

On 16 March 2011 a joint commission of the Senate and the National Assembly voted the final text of the Law relating to the 'Defender of Rights' (ordinary law) and the Organic Law relating to the defender of Rights (organic law) to implement the new institution provided for by the Constitution following the revision of Article 71-1. The role of the Defender of Rights is to ensure that the State and bodies exercising its prerogatives respect individual rights and liberties.

This provision initially extended the French Ombudsman (*Médiateur de la République*)'s scope of competence. However, in the course of the adoption process, the Government and the majority in the Commission of the Senate responsible for the two bills proposed further amendments in order to incorporate a number of independent public authorities dealing with fundamental rights (Article 4 of the organic Law), such as the Defender of the Child, the Commission for Ethics in the Security Services and finally the HALDE. The Commission of the Senate did not provide other justifications for this proposal than the objective of efficiency. However, some commentators suggested that the Government and the Senate wanted to reduce the influence of these independent authorities.

As regards the Defender of the Child, an amendment was adopted to eliminate this structure from the reform and the Minister of Justice intervened to send the Senators back in session and have the vote recanted in order to maintain the integration of the Defender of the Child.

The amendment was adopted on 2 June 2010 in first reading by the Senate and confirmed in second reading by the National Assembly on 18 January 2011.

Mr. *Pierre Morel à L'Huissier*, designated as rapporteur, proceeded to thorough consultations and prepared an entire new version of the text. It was then resubmitted to the Senate, where it was voted in second reading on 1 February 2011 and voted again by the National Assembly on 4 March 2011. The joint commission from the Senate and the National Assembly negotiated and adopted the final amendments on 16 March 2011.

The integration of all bodies will be effective one month after the promulgation of the laws, except for the Ombudsman which will integrate the new institution immediately. A decision by the Constitutional Council on the conformity of the text to the Constitution is expected before the end of March, a nomination of the first Defender of Rights by 1 April, and an effective integration of the HALDE for early May 2011. As regards the body competent for conditions of custody (CGLPL), amendments of the texts in second reading have led to the decision not to integrate it into the Defender of Rights.

### **The texts:**

All references relate to the organic law unless otherwise mentioned.

The Defender of Rights has legal personality, and is appointed by the President of the Republic (Article 13 of the Constitution). Claimants can directly address their complaints to the Defender of Rights, as well as NGOs (Article 4) or members of Parliament or institutions of the Parliament (Article 7). The Defender of Rights can also decide on his own initiative to intervene (Article 8). Its scope of competence is similar to the one of the administrative authorities it integrates: claims of citizens against the State regarding access to and the functioning of public service, complaints relating to children rights, abuse of violence by security forces and the entire scope of HALDE's competence in the field of discrimination. Article 4

paragraph 3 of the organic bill, as amended by the National Assembly, expressly establishes its competence toward private persons in matters of discrimination. This issue was widely debated considering that competence of investigation towards private persons is not provided for in Article 71-1 of the Constitution. For all activities not carried out by the Ombudsman, a specific deputy is nominated by the Prime Minister to assist the Defender of Rights, who can act under a delegation of power (Article 11A). The deputy responsible for the rights of children keeps the title Defender of the Child (Article 13 of the organic bill).

The Defender of Rights manages together its missions, the Ombudsman's missions and others for which he or she will be assisted by a consultative commission (Article 12 bis), which must be consulted only on matters that have never been decided on in the past. Moreover, it can proceed with every subject either in equity or in law (Article 21), meaning that it may decide to treat them in equity in his capacity as Ombudsman or investigate the claim under discrimination law.

In addition, the bill, as adopted, presents some difficulties relating to the following issues:

- The commissions will not have to be consulted on all claims, will only have consultative value and can be overturned by the Defender, as it is a personal institution (Article 12 bis).
- Moreover, contrary to HALDE, the Defender can choose the claims he decides to investigate and on which he wishes to intervene (Article 20). Given the scope of his competence, this may open the way to interventions in opportunity which could hinder the effective independence and value of the decisions adopted and alter the scope of subject matters and ground of discrimination effectively addressed by the institution.

His powers of investigation are similar to those of HALDE (Articles 15, 16, 17, 18). It can also consult the Council of the State (Conseil d'Etat) on issues relating to legislative interpretations (Article 24). The efficiency of its investigative powers is increased by the explicit possibility to request an order from a judge in case of non-compliance (Articles 17 bis, and 18 paragraphs II and III), by allowing access to the premises without prior authorisation from a judge in case of emergency, by reason of its competence on children and conditions of custody– (Article 1 *septies* of the ordinary law) and creating an offence of non-compliance with the requests of the Defender (Article 5 of the ordinary law).



The new institutions otherwise maintains the HALDE's powers (to mediate- Article 21 bis – to proceed to a penal transaction- Article 22- to pursue disciplinary action – Article 23 and 23 bis- to present observations before the courts – Article 26- and make recommendations regarding legislative and regulatory evolutions - Article 25). In second reading, the National Assembly reintroduced the HALDE's competence in matters regarding research, promotion of good practices and of equality in Article 26. The Defender of Rights continues to report every year to Parliament and Governmental institutions regarding the situation on discrimination in France - Article 27 II. In this context, all the functions of equality bodies set out in Article 13 Paragraph 2 of the EC Directive are respected with the Defender of Rights.

The bill as discussed before the National Assembly introduced a reform creating a possibility for collective action before administrative courts initiated by the Defender of Rights (Article 24 bis). This possibility had been removed for later versions of the text and does not remain the law.

Its power to assist Government in international negotiations relating to the fight against discrimination has however been omitted and the Defender does not integrate a consultative committee representing stakeholders of civil society as does HALDE.

### **Reactions to the Bill:**

In its report of 15 June 2010, ECRI has underlined the significant role of HALDE in the fight against discrimination in France.

The CERD in its report on the situation of racial discrimination in France presented on 27 August 2010, stressed its preoccupation with the disparition of HALDE.

On 14 January, 2011, the President of one of the main trade unions in France, the CGT wrote to the President of the Commission in order to alert the Commission on the necessity to maintain HALDE as a separate entity to deal with discrimination claims.



After five years of activity, HALDE has showed its efficiency and independence, creating some opposition concerning its doctrine relating to implementation of discrimination law on the ground of religion, and its recommendations on the situation of Romas and Travellers. Moreover, employers feel threatened by its presence in Court. They consider that it has had a significant impact on the favourable outcome of claims relating to discrimination in relation to remuneration, career evolution and dismissal. They feel that it is not fair for governmental institutions to assist victims.

Many political and economic actors have manifested their wish that HALDE's action be refocused on the promotion of good practices. In France, the efficiency of legal claims to fight against discrimination has always been a subject of disagreement, and these commentators, such as former Commissioner Yasid Sabeg, are dissatisfied by HALDE's choice to focus on claims and implementation before the courts. The choice of Government to integrate discrimination in the missions of the Defender of Rights answers these criticisms.

NGOs have indicated that this reform generates worries for the future treatment of discrimination claims and the efficiency of the French equality body. The integration of HALDE and the Defender of the Child appear to be improvised and have not been part of the conception of the new institution. They criticise the scope of the Defender's competence and its capacity to face the multiplicity and variety of its missions and to implement and reflect the specialised approach provided by discrimination law in the French context. A lot will depend upon its budget, its capacity to maintain HALDE's expertise and the organisation of its various departments. For 2011, each of the agencies to be merged have seen their budget reconducted and the Defender of Rights will operate with the combination of these budgets.

**Internet link source and additional information:**

National Assembly legislative file on the Organic and ordinary legislation:  
[http://www.assemblee-nationale.fr/13/dossiers/defenseur\\_droits.asp](http://www.assemblee-nationale.fr/13/dossiers/defenseur_droits.asp)