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THE PUBLIC INSTITUTION OF LOBBY IN THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

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Abstract

The Treaty of Lisbon comes with considerable gains by recognizing the European Union as a legal personality which must be assumed by all its signatories. The Treaty brings unexpected opportunities for the active involvement of citizens and civil society, through representation, in the European Union's decision-making process. The compulsory new legal obligation to observe the provisions and values of the Treaty comes with the ex-ante political control tool of national parliaments supplemented with ex-post judicial control.

The newly brought opportunities for the civil society to be actively involved in establishing the European Union's agenda have developed, being backed up by the principle of subsidiarity. It brings provisions on the democratic functioning of the Union by delimiting competences, introducing control procedures and legal obligation for respect of the Charter of Fundamental Rights of the Union. This article is devoted to the identification and subsequent analysis of the Treaty on the Functioning of the European Union towards the permissiveness of lobbying, as a public institution, acting through the principles of participatory democracy.

INTRODUCTION

The Covid-19 Pandemic has fuelled the political scene and shook the values of democracy in the EU member States by conflicting situations with pros and contra democratic restrictions with healthy prudential role. The European Economic and Social Committee, on March 2020 “calls for exceptional policy coordination and coherence at European level. The exceptional situation calls for exceptional measures”. Such calls show the lack of common coordination and tolerance in the democratic exercise of power, as well as of a proper legislative framework for the exercise, in full transparency, of the democratic political decision-making during emergency situation. “This crisis calls for a change in our modus operandi: it must be an opportunity to show solidarity, coordination and action. This is a step for European unity. Now is the time to show whether we are a real Union or not”, mentions the European Economic and Social Committee statement under the title “Now, we are either a Union or we are nothing, whatever it takes” (<https://www.eesc.europa.eu/en/news-media/presentations/covid-19-now-we-are-either-union-or-we-are-nothing-whatevertakes>).

The European Economic and Social Committee has made steps in defining the restructuring needs of the European Union. Thus, the post – Covid 19 crisis reconstruction and recovery, is promoted by the Committee under four main pillars: protecting human and social rights, democratic values and the rule of law is among the most important ones. The Committee believes that “the economic and social partners and civil society organizations should be seen as having an important role in this process” (<https://www.eesc.europa.eu/en/documents/resolution/eesc-proposals-post-covid-19-crisis-reconstruction-and-recovery-eu-must-be-guided-principle-being-considered-community>).

Having in mind the above stated by the European Economic and Social Committee, acting under the principle of participatory democracy, I will refer here the lack of specific text of law that recognizes lobbying as a regulated activity based on the principle of good faith and good practice in the field. In Romania, member of European Union, lobby is a tool that is needed but not well understood or practiced. The large number of criminal trials which have as their basis the so-called lobbying actions show that the legislative framework may be exceeded by the social and economic reality. The 11 legislative initiatives towards regulating the lobby during the past 15 years confirm the need for lobby’s regulation. The decision-making process has already met the lobbying results by civil society success in lobbying the harmonizing of local legislation with the E.U. Directives. The lobbying activity, mainly

supported by the groups of interests organized in professional nongovernmental organizations, was successful both in Bucharest and in Brussels.

The Covid-19 Pandemic has strongly challenged the basement of the democratic institutions as well as the role of the civil society in trying to act towards preserving its rights and values. The role of lobby has become more important as a recognition of its exercise during crises situations. Such situations ask for direct and stronger cooperation of the business associations with political decision makers, aimed at preserving the democratic values.

The scope of this article is to show that the officials in the European institutions transparently interact with lobbyist due to the provisions of the TFEU. The lack of similar provisions in the Romanian legislation creates the risk of practicing lobby under the perception that this is illegal and may be perceived as traffic of influence. The statistics show, for the year 2015, in Romania the following figures: “total convictions - 112, total years with execution - 403, total years with suspension - 78, longest file - 3882 days, shortest file- 225 days, the greatest sentence - 22 years, the most common deed - trafficking in influence”. (See maricorupti.ro website). The present legal framework (Law 62/2011 of Social Dialogue with amendments) may generate the risk of perception that the direct involvement of the civil society into the decision making process at political level may lead to the penalty of trafficking influence (art.291, Criminal Law 286/2009)

Such risks that may go deep into affecting the reputation of the institutions themselves have generated, during the last decade, legislative initiatives in Romania, coming out from the political majority of the Parliament, dedicated to clarifying aspects related to lobbying – a clear definition, a frame of action and theory.

Thus, I have found bitterly the acceptance of a large majority overlapping lobbying with the influence of trafficking and other categories of facts that criminalize corruption. As direct consequence, the legislative initiatives are not voted yet and lobby remains an action not well understood or legally defined in Romania. The National Agency for Integrity reports that “the Prosecutor's Office attached to the High Court of Cassation and Justice and the National Anticorruption Directorate have already expressed their categorical disagreement with reference to a similar previous calendar initiative to legislate lobbying in Romania” (Ahciarliu Kyriakidis, 2018, page 79).

THE LOBBY AMONG THE LINES OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

a. Adequate internal organization & cohesion: The Covid-19 Pandemic has proven that the federalization of Europe depends on the ability of the European Union to adapt accordingly to external challenges by maintaining adequate internal organization and cohesion, without claiming to describe a single, perfect, and immediately applicable model. The future of the European Union is for Dusan Sidjanski "a continuous search for the most appropriate method of governance" (Sidjanski, 2010).

The Treaty started at different speeds in terms of economic convergence on the one hand and the development of a European social model. Articles 8, 9, 10, 11, 12 of the TFEU build a framework for the European social model through gender equality, consumer protection, non-discrimination, environmental protection, protection of services of general interest and by providing instruments in the sense of the constitutionality of the role of social interlocutors by art. 152 TFEU (Treaty of the Functioning of the European Union – Consolidated Version, 2012). The article highlights the obligation to maintain an institutional framework allowing the permanent dialogue of civil society representatives with decision-makers under the condition of maintaining their autonomy. It reminds the role of the Tripartite Summit as a tool that can contribute to the construction of social dialogue. The article generates awareness on the European social model with respect to the diversity of the national citizenships and consequent rights. It is an approach that basically invites the citizen to "absorb" his/her rights with self-power and on his/her own will. The "Flash Eurobarometer 485 Report on European Union citizenship and Democracy – July 2020" based on a survey conducted by Kantar Public in February- March 2020 and published in July 2020 indicates that "more than a third of respondents feel that they are informed about what they can do when their rights as EU citizens are not respected, which is an increase by 11 percentage points since 2015." The steps of implementation of the provisions of Art. 152 need more than awareness, they are to be supported by the necessary harmonization at economic and administrative level. Article 197 of the TFEU complements this "self-criticism" induced by Article 152 and states that "the effective application of European law is a matter of common concern." This recognizes the unequal administrative capacity at Member States' level and induces the Union to intervene with "measures in support of states' efforts to improve their administrative capacity". I acknowledge that the provisions of art. 197 prove the lack of convergence in the administrative field. Yet, this current

formulation remains only a finding and an expression of intent.

b. Consequences of lack of adequate internal convergence: The lack of convergence in the administrative field may create problems that incite the lack of trust in the values of the Union for its citizens. The active representation of the citizens in the political decision-making process needs transparency, confidence, and respect for the principle of subsidiarity. A national administration, of the newly enrolled in EU Central & Eastern European countries – for ex. Romania - maybe slowed down by ultra-bureaucratized and excessively regulated former communist practices. These practices may not be able to offer the same rapid benefits to the Romanian citizen compared to the traditional democracies in the EU. Yet, the TFEU offers the tool for all the citizens of the European Member States to gain their rights at equal level of access to administrative and judicial procedures. We may take the example of compared administrative procedure in Romania and Germany – the one of car's registration, where, by full use of European rights, a Romanian citizen has the right to address a complaint to the European Commission with regard to ultra-bureaucratization of the procedure with the consequent costs that may breach the provisions of Title VII of the TFEU on Common norms on competition, taxations and legislative harmonization. Thus, the official response of the European Commission has to show the evidence of the lack of harmonization at European level of the mentioned procedure, supported by lack of will toward harmonizing it by the Member States when there is the case: "It is noteworthy that , the Commission proposed in 2005 a directive on passenger car taxes, which was designed to gradually eliminate taxes on car registrations and replace them by annual circulation taxes, with a refund system for the transitional period. In 2006, the European Parliament adopted the proposal with amendments. However, the Member States have not yet reached the unanimity required for the adoption of this proposal by the Council." (Proposal for a Council Directive on passenger car related taxes. COM/2005/0261).

Strictly linked to this example, the analysis goes deeper into Title VII of the TFEU dedicated to competition, a field that puts the social model in the forefront and chooses to consider that the principles of free competition underpinning the market economy are just an instrument in building the social model and not a goal. In relation to this Title VII of the TFEU and in the context of practical application of infringement procedures initiated by faulty model of vehicle registration, the analysis is leading to the general provisions of Article 258 (see Case C 76/14. curia.europa.eu/juris/document/document.jsf)Under this article 258 of the TFEU the Commission

has the power to decide on the issue of a reasoned opinion directly referring to the breach of obligations by a Member State only after prior consultation with that State, giving it the opportunity to present its objections and giving the intention to repair the case. If that State decides not to comply with the opinion delivered by the Commission within the time limit set by the Commission, the Commission may decide on the referral to the European Court of Justice. The right of a member state's citizen (art. 152 of TFEU) to address the European Commission for the application of Art. 258 is a proof of the fact that social dialogue towards political decision, being it named lobby or not, works with positive results in the E.U institutions, even if the national legal framework is not always prepared to transparently accept the public institution of lobbying.

c. Lobbying as a tool towards internal EU cohesion
It is obvious that at European level, lobbying can be a tool to analyse and support new theories of European integration by intervening in the decision-making process based on "the feeling of belonging to the same community of values, the existence of supra-state institutions, the flow of transnational communications and economic interdependencies." (Bărbulescu 2015).

According to the definition of lobby as "a group of people who represent a particular organization or campaign, and try to persuade a government or council to help or support them (<https://www.collinsdictionary.com/dictionary/english/lobby>) one may perceive this "tool of legitimate influence of political decisions" (<https://en.wikipedia.org/wiki/Lobbying>) is well framed within the provisions of article 152 of the TFEU. It works through high-level professional communication techniques and with the support of legislative expertise on a case-by-case basis duplicated by strategic and rhetorical skills, legitimizing thus the role of lobbying in European Union. By the recognition and promotion of the social partners role in the Union's decision-making process, lobby plays the role of a public institution of the participatory democracy. This interpretation is also supported by the provisions of art. 156 and 160 of the TFEU aiming at creating the widest possible framework for the observance and implementation of participatory democracy devoted to cohesion in all dimensions at the level of the European social model. It recognizes the integration gaps between Member States, offering room for lobbying towards diminishing these gaps. The establishment of the Social Protection Committee with advisory role is a clear demonstration of the Commission's concern to encourage permanent cooperation between Member States in the field of social policies, with a view to promoting the right to association, creating thus a bargaining framework

between employees and entrepreneurs. Moreover, art. 160 clearly states that "for the fulfilment of its mandate the Committee establishes appropriate contacts with the social partners." The lobby is a process dedicated to "influencing" the decision-making process in supporting and integrating the opinion it represents within the rule of participatory democracy. The participation of the social partners in a "consultative" committee at the level of the European Union decision-making process is already a step in the legitimate recognition of lobbying among the TFEU lines.

THE PUBLIC INSTITUTION OF LOBBY - A DECISION-MAKING TOOL IN THE PROCESS OF THE EUROPEAN LEGISLATIVE HARMONIZATION

Starting 1993 (signing the European Association Agreement) until 2005 (signing the Treaty of Accession of Bulgaria and Romania to the European Union, June 2005) and 2007 (the year of accession to the Union), Romania had at its disposal 15 years to take the necessary steps to implement the *Acquis Communautaire*. The art. 52 and 53 of the Act state that the date of accession is the T ZERO time from which Romania is bound to fully respect the directives and decisions of the Treaty which have already been addressed to all Member States on an equal footing.

Because of the provisions of Article 52 of the Accession Treaty: „(...) it is considered that Bulgaria and Romania have been notified (...) accordingly. " Analysed under the text and spirit of Article 258 of the TFEU, this notification is equivalent to the reasoned opinion sent by the Commission. In practice it establishes the Commission's right to apply the administrative or judicial noncompliance. The Act of Accession identifies the political, legislative, and administrative obligations of Romania and places them in time as assumed at least satisfactory for accession until the date of accession. Under the terms of the sanctioning right of the European Court of Justice as a strong guarantor of the values and principles underpinning the institutions of the Union - Romania, as a new state of the Union, had to ensure the respect of the assumed obligations as a Member State. Consequently, it had to initiate those measures that support the immediate application of the European social model, the European citizenship and the social dialogue. The European Union has maintained its right, especially based on the provisions of the safeguard clauses, to monitor Romania during the pre-accession as well as the first years of accession.

Speaking of the theoretical concepts of the political sciences that fund the European Union, Professor Iordan Gheorghe Bărbulescu notes a "lack of unity regarding the concept of European integration"

(Barbulescu, 2015) Precisely in this context we can confirm, analysing the steps and procedure to be followed by Romania to and for accession, that the process of integration at the level of the European Union is one "through which the member states of the European Union understand to gradually transfer from national to supranational level a series of competences related to the national sovereignty , accepting to exercise them jointly." (Bărbulescu, 2009)

The European Commission's Reports, both on pre- and post-accession, prove today their fairness, objectivity and visionary spirit. Most of these reports praise the progress in the field of legislative harmonization but criticize the small and even wrong steps in strengthening Romania's administrative capacity for full harmonization.

The legitimate lobby among the TFEU articles, the social dialogue and the strengthening of the civil society construction as a mandatory social partner in the decision-making and legislative process are causes delayed in this process for Romania by the date of accession. The drafting of legislative texts is criticized by the fact that they do not respect the principles of social dialogue and do not assume the obligation of interdepartmental corroboration, especially with economic decision-makers. Impact studies of legislative texts subject to the decision-making process are absent and the model of the subsidiarity record is totally ignored. The decision-making process, both during the pre-accession and post-accession period, is criticized as a one-sided of the Executive that undermines the democratic principles that imply the involvement of the national Parliament in the legislative process. Thus, the Report in 2005 issues recommendations for immediate actions "that are needed to strengthen the administrative capacity of all the bodies involved at national, regional and local level." (C.E. Report 2005)

Social inclusion is another criticized key area in the E.C. reports. Romania has taken a step forward in this context by assuming its own mechanism to monitor the timely implementation of the social protection and social inclusion strategy. Prof. Iordan Gheorghe Barbulescu briefly describes this mechanism as follows: "The Open Method of Coordination (OMC) is a process through which EU member states agree to coordinate their policies through a process of mutual learning and structured exchange of information." (Bărbulescu, 2009). Bărbulescu mentions the importance of the sectoral areas in which the OMC is applied, with a focus on public policy where the provisions of the Treaties of the European Union do not provide full competence to the Union.

Having in mind the above mentioned and revisiting the scope of art. 2, 3, 4 and 6 of the TFEU (EU OJ 2012) that are setting out and defining the three categories of EU exclusive competence, (mixed /

shared competences in the area of support, coordination and complementary actions for the establishment of the Open Method of Coordination) I would add to what Professor Iordan Bărbulescu said, that the establishment of the Monitoring in the years after accession is a proof of the awareness of the slippage in the harmonization with the community legislation and practice. It is also a wise decision to activate the provisions of art. 6 of the TFEU with the scope to demonstrate Romania's competences in supporting, coordinating and complementary actions. The completion is precisely in the sense that the process of monitoring the stage and degree of implementation of the *acquis* was largely assumed by the Commission and less by the Executive in Bucharest. Such an approach by the authorities in Bucharest, without an active involvement in timely moments in the prudential monitoring of harmonization, is faulty and may be suspected as being interested in maintaining permissiveness of slippages, especially at the administrative, justice and home affairs level. The Cooperation and Verification Mechanism Reports (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0378>) as well as the evidence of the moral status of the political class involved in the pre and post accession period in the decision-making process may be an argument in this respect.

Nevertheless, one of the gained steps toward awareness of the European social model, of the rights of European citizens and consequent obligations within the conscience of the Romanian citizen is reflected, partly, in the large number of processes initiated at the European Court of Justice (Court of Justice of the European Union, Press Release No.82/21) and complaints to the European Commission by civil society. The purpose is to correct, post-facto, the slippages assumed- with or without intent by the decisional factor in the pre-accession and post-accession period of Romania to the European Union. "The effects of the principle of the primacy of the EU law are binding on all the bodies of a member State, without provisions of the domestic law relating to the attribution of jurisdiction, including Constitutional provisions." (Court of Justice of the European Union, Press Release No.82/21)

Another equally important aspect is the current level of involvement and representation of civil society within the decision-making process of the European Union. Employers' organizations and trade unions, professional associations in Romania are mostly affiliated with European federations and have representation - either direct or indirect- in the consultative process at the European Parliament and European Commission level.

This is already evident in the EU Transparency Register (ec.europa.eu), where some of these organizations are registered as active actors in

legitimizing influence on the decision-making process at the level of the European institutions, in other words, are recognized as lobbyists.

A similar opinion on the involvement of economic actors under the umbrella of the lobbying process in the construction of a united Europe has Jürgen Habermas who states, when analysing the chances of a European constitution in the context of intergovernmental erosion of democracy, that "they (the defenders of the national state) have lost in the current crisis, the coverage of an economic lobby that had so far been interested in a monetary union, as well as the single market, as independent as possible from political interference." (Jurgen, 2012).

CONCLUSIONS

The lobby activity - having multiple names and definitions, being recognized or not at Member State level, is de facto found in the day-to-day work of European institutions, being integrated as a procedure through the text of the TFEU lobby, as a public institution creates the connection between the decision-makers and the citizens represented as civil society, with full respect of the principle of transparency. Lobby applies the citizen's right to be informed, to participate directly or through representation in the decision-making process in the spirit of the text of the TFEU. The recognition of lobby as a public institution with an important role in the decision-making process of the European Union is an exercise of perception and analyses both of the text of the Treaty and of the permitted dedicated practices. The purpose of this article is to analyse and focus on those texts of the TFEU that recognize lobbying in influencing political decision-making at the level of European institutions as a tool of participatory democracy within the concrete framework of neo-institutionalist governance. In addition, the article aims to clarify the perception of the national citizen over his/her rights as a European citizen using lobby as a public institution for enhancing the civil European rights.

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REFERENCES

- [1] [Curia.europa.eu/jcms/uplod/doc/application/pdf/2021-05/cp210082en.pdf](https://curia.europa.eu/jcms/uplod/doc/application/pdf/2021-05/cp210082en.pdf)
- [2] Council Directive 2006/112/EC of November 2006 on the Common system of the Value Added Tax (OJL347,11.12.2006, p.1-118)
- [3] Criminal Law nr. 286/2009, Romanian Official Journal no. 510/2009
- [4] Flash Eurobarometer 485 – European Union Citizenship and Democracy July 2020 - <https://www.europarl.europa.eu/cmsdata/214273/Eurobarometer%20Report%20Summary%20-%20EU%20Citizenship%20&%20Democracy%20-%20July%202020.pdf>
- [5] European Parliament legislative resolution on the proposal for a Council directive on passenger car related taxes (COM (2005) 0261 - C6-0272/2005 - 2005/0130(CNS)) pag.85, Official Journal 305 E, 14/12/2006 P. 0085 - 0091
- [6] <https://www.collinsdictionary.com/dictionary/english/lobby>
- [7] <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm>, page 5
- [8] https://europa.eu/rapid/press-release_CJE-11-33_en.htm
- [9] <https://www.eesc.europa.eu/en/news-media/presentations/covid-19-now-we-are-either-union-or-we-are-nothing-whatevertakes>
- [10] <https://www.eesc.europa.eu/en/documents/resolution/eesc-proposals-post-covid-19-crisis-reconstruction-and-recovery-eu-must-be-guided-principle-being-considered-community>
- [11] <https://en.wikipedia.org/wiki/Lobbying>
- [12] Law 62/2011 of Social dialogue, Romanian Official Journal 625,2011
- [13] Thibault, J. F. (1998). L’idée de société et l’étude des relations internationales, (The Idea of the Society and the Study of International Relations), in L.Olivier, Epistemologie de la science politique, Sainte Foy, Presses de l’Université du Québec.
- [14] Treaty of the Functioning of the European Union – Consolidated Version, Official Journal of the European Union, C326/47, 26.10.2012
- [15] The Treaty of Accession of Romania and Bulgaria to the European Union, Official Journal no. 465/June 2005
- [16] Wendt, Alexander (1992). Anarchy is What States Make of It: The Social Construction of Power Politics”, International Organizations, vol. 46, no.2.
- [17] [www.mdpl.ro/_documente/dialog_Ro_UE/Monitoring Comprehensive Report 2005, pg.68](http://www.mdpl.ro/_documente/dialog_Ro_UE/Monitoring%20Comprehensive%20Report%202005.pdf)

Books

- [18] Ahciarliu Kyriakidis Adriana Liuba (2018). The lobby between political decision and technicality in harmonizing European directives in a Member State of the European Union, PhD Thesis, scientific coordinator prof. Bărbulescu Iordan Gheorghe, National School of Political and Administrative Studies, Bucharest.
- [19] Bărbulescu Iordan Gheorghe (2009). Trilingual Explanatory Dictionary of the European Union, Polirom.
- [20] Bărbulescu Iordan Gheorghe (2015). New Europe -. European Identity and Model, Polirom.
- [21] Dusan Sidjanski (2010). The Federative Future of the European Union from its Origins till Treaty of Lisbon, Polirom, Iași, pg.203- 229, translation in Romanian by R. Brad și D. Răpan
- [22] Habermas Jurgen (2012). About the European Constitution, translation into Romanian by Paul Gabriel Sandu, Editura Comunicare.ro 2012