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LOBBYING – AN INSTRUMENT OF PARTICIPATORY DEMOCRACY IN THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION. A CASE STUDY OF THE INFRIGEMENT PROCEDURE

Keywords
Ex post judicial control;
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European social model

Abstract

The Treaty on the Functioning of the European Union (TFEU) provides the framework for the European social model through gender equality, consumer protection, non-discrimination, environmental protection, protection of services of general interest. It also provides instruments regarding the constitutionality of the role of social interlocutors. The establishment of ex-post judicial control provides the framework for infringement intervention. The technique of lobbying intervention is the subject of the case study, which is based on a comparative method of legislation and practice at EU and Romanian levels and an empirical analysis of lobbying in Romania from a legislative point of view.

INTRODUCTION

As Romania is making its first post-accession steps towards full legislative harmonization, civil society through professional non-governmental organizations (NGO) has started being active at the level of the European decision-making process; this has been possible through the intervention of the respective European Federations, directly through the application of "the integrative theories" and through lobbyists registered in the EU Transparency Register.

The reference to a certain professional association in this article is intended to keep its name confidential, yet the disclosure of the field of activity – the financial services – is necessary for the pupose of his article.

The study refers to an NGO that represents the interests and practices of financial multinational groups, active at European and regional level and represented in the professional financial European Federations. These groups have become an active player in identifying and promoting the good practice ensuring full respect of the European regulations in the field of their economic activity.

The specific case refers to the modification of an article of the Fiscal Code -officially acknowledged as already harmonized by the Romanian Government. This article refers directly to the right of complaint at the level of the European Commission against the Ministry of Public Finance within a E.U. Member State, based on art. 258 TFEU.

The procedure itself, however, involves several steps that are under a theoretical and regulatory framework, normative, which are to be placed within the principles of the integration theory.

THE ROLE OF CIVIL SOCIETY IN DECISION MAKING PROCESS THEORETICAL FRAMEWORK

The study refers to the compulsory harmonization calendar for Romania with direct analysis of the financial services legislation, mainly represented by the Fiscal Code. This step was supported and officially reported as a solved one by a liberal parliamentary majority. Following the provisions of the T.F.E.U. the legislative process in Romania, as a newly associated member state of the E.U., recognizes the civil society as a dialogue partner, as a know-how source. This recognition may be perceived as proof of the dynamics induced by the Maastricht Treaty through the principle of subsidiarity. In his book "The New Europe - Identity and European Model", chapter "Integration theories and models" professor Iordan Bărbulescu describes integration models into which this case study could be integrated. Thus, analysing neo federalism Professor Iordan Gheorghe Barbulescu interprets Sidjanski as follows: “Federalism, Sidjanski says, leads to the efficiency of institutions, which means: exercise of autonomous powers (regions, states) and their involvement in the whole; greater participation of individuals and organizations in decisions and functioning of the political community; guarantee of complex diversity and the search for a dynamic balance between the basic units and the global community, between the parties and the whole (..)”.

In the same context, the author points out the following: "Federalism must be viewed from the normative point of view, too, and here we consider the distribution of competences between the global level and the constituent parts, but also their participation in the formation of the common will (...) modern federations are open to cooperation between different decision levels of one and the same domain, and not to the exclusive allocation of domains. Therefore, there is a "vertical cooperative federalism." (Bărbulescu, 2015).

The above-mentioned theoretical approach is aimed at offering a prespective on the VAT Directive that includes and imposes a set of principles that embody a general formula for applying the tax policy. Thus, the principle of subsidiarity, the principle of loyalty and the prohibition of discrimination based on nationality are the basis at the methodology for applying the tax policy in all the Member States. One should also add to those listed above other general principles that underpin the support of correct legislative harmonization with respect to the integration and federalism theory: the principle of equivalence and efficiency, that of legitimate trust, the prohibition of abuse of law and neutrality. It is obvious that many of the rulings of the European Court of Justice are based on a “de jure and de facto” imposition of the principle of fiscal neutrality in the sense of implementation and integrating a common value added tax system that complies with the essence of its definition: VAT is a general tax on goods and services directly proportional to their price - according to a nationally defined tax rate - the cost of which is recognized after deduction of the amount of VAT directly borne by the cost of the goods and / or services.

When there is no respect for the above mentioned theoretical and legal framework, both in harmonization and in practice, the procedure for accepting a complaint based on Article 258 T.F.E.U. may be a solution to correct the deviations. This procedure, in theory, obliges the complaining party to demonstrate that all steps at

national level have been taken in order to correct the text of the law with respect to the principles of the Directive and of the T.F.E.U. The response of the European Commission that certifies the receipt of the petition as well as its registration under a specific number indicating the chance of accepting the complaint, includes a classic message informing the petitioner about the rights, guarantees and benefits of the procedure. Thus, the message clearly indicates that, following the registration of the application by the Commission, the complaint / petition received an official reference number, a number to be mentioned in any subsequent correspondence regarding the petition. However, the message clearly indicates that the allocation of a reference number does not necessarily indicate the Commission's assumption of the initiation of the infringement procedure against the concerned Member State. Another important aspect of the message is related to confidentiality. Thus, it is mentioned that the petitioner has the right to demand full confidentiality of his/her identity in the negotiations the Commission is dealing with the Member State in the accepted case of the respective petitioner. If he/she has failed to refer to his/her option for confidential treatment, the Commission will treat the petition's identity confidentially. By the same message, the Commission, procedurally, sets a maximum of 12 months from the issuing date of the reference number for a decision in the respective case - either opening the infringement procedure or closing the case. In this context, the complainant is directly notified by the relevant department on the Commission's proposal to close the case or will be notified on the progress of the infringement proceedings in respective case.

THE INFRINGEMENT PROCEDURE

The procedure is supported by the assumption that each member of the European Union is directly responsible for the implementation of the harmonized legislation according to the assumed timetable. The European Commission acts as the guardian of the correct implementation, with respect to the principles of Community legislation and to the agreed timetable. As a consequence, when a Member State is late or fails to harmonize in accordance with the assumed obligations under national law, the Commission is entitled to take steps to enforce the correction either by self-inquiry or following a complaint received under the provisions of the Article 258 of T.F.E.U. and only after it has surely detected the criteria that have been violated by that Member State. Violation can be defined either by action or by omission, regardless of the local or central responsible administrative category. The first phase of the procedure is the admission of the complaint. An essential condition for this admission is its content and purpose. First, the complaint may not contain personal disputes. The expression in the petition must be complete and correct with reference to the facts of the Member State as the subject of the complaint. It must include a description of the steps and efforts made to correct the error at all horizontal and vertical levels in relation to the decision-making structures of the Member State. The petition must also provide a clear description of and reference to the European law that the petitioner considers the Member State is violating. For the entire period of the infringement, the following steps can be taken:

1. investigation of the case itself - the Commission may consider it necessary to undertake its own research to add to the information submitted by the petitioner. Depending on the results of its own research, the Commission decides whether to continue the infringement procedure on the already filed petition.
2. The opening of the infringement procedure is de facto manifested at the time when the Commission decides to enter into direct contact with the authority of the Member State against which the petition was filed. This is translated by sending a formal notice to that State requesting it to submit its observations on the petition on an exact date. The Member State is obliged to reply to the Commission within the mentioned period.
3. Based on the response received or its absence, the Commission may decide to send a reasoned Opinion to that Member State clearly stating why it considers that Member State breaches the legislation that is the subject of the petition. It is important to mention that during the procedure, if the petitioner decides to ask for confidentiality of identity, the Commission keeps the name of the process initiator confidential.
4. The purpose of the direct dialogue with the State concerned is to determine at the Commission’s level whether the infringement is indeed justified. If so, it seeks to solve the problem identified as a fault of the State concerned in an amicable way without going through at the request of the European Court of Justice. Thus, in the light of the response to the statute in question, the Commission may also decide at this stage not to continue the procedure, where the Member State can provide clear evidence and assurances that it harmonises the subject matter of the infringement in the time and terms communicated by the Commission.
5. If, however, the State chooses not to comply with the conditions communicated by the Commission, the European Commission’s (respective) Directorate-General opens the infringement procedure and makes use of its institutional right to address the European Court of Justice.

ADMINISTRATIVE GUARANTEES

Under the above described procedure, there are the following administrative safeguards for the benefit of the citizen or legal person submitting the complaint by administrative means: a) after registration by the Commission, an official reference number of the complaint is issued that practically opens the door to the following procedures and must, therefore, be mentioned in any correspondence. However, assigning an official reference number does not necessarily mean that infringement proceedings will be opened against the concerned Member State. b) where the Commission services make statements to the authorities of the Member State to which the complaint was made, the Commission will consider the choice of the complainant as to the disclosure of the complaint. In the absence of a choice for "confidential" or "public", the Commission services will assume that a "confidential" treatment has been chosen. c) The Commission endeavours to take a substantive decision (either to open proceedings or to close the case) within twelve months for filing the complaint.
d) The petitioner will be notified in advance by the relevant department if the Directorate intends to propose the closure of the case to the Commission. The Commission services will inform the person concerned about the course of any infringement proceedings from the date of its opening until the final decision on administrative or follow-up closure at the level of the European Court of Justice. The legislative correction is, however, only at the discretion of the national bodies that are primarily responsible for ensuring that the state complies with the Community law. That is why the Commission encourages citizens to choose, first and foremost, the harmonization procedures available at the local level. It is worth noting that such an approach is better received and supported by the Commission, which aims not only to comply with legislative texts but also to comply with the implementation practice. It is important to note that the Commission's decision only works for the future, while the correction of the impact produced during the wrong application of the law can only be made by a decision of the local court.
All of these above mentioned steps are the practical proof of what professor Gheorghe Iordan Barbulescu defines as the „normative" view and perception of federalism (see chapter on "Theoretical Framework"). The procedure of infringement transparently shows the "division of competences between the global level and the constituent parts and also their participation in the formation of the common will (...) it also shows how the powers of the central bodies that gather the particular wills and transform them into common will" (Bărbulescu, 2015) may work together. The infringement procedure presented in this study followed exactly the way described above. The VAT dossier prepared and presented to the European Commission - The DGTAXUD Directorate provided all the information necessary for the admission of the complaint and the research phase without, however, choosing a confidential treatment. Therefore, the communication of the procedural stages to the local press was considered as a transparent communication tool and a public relations exercise meant to inform the large number of players affected by these legislative changes. The client of the lobbying process also considered that such transparent communication could put some pressure on local authorities to speed up the decision towards correcting the text of the law and reducing the costs of failing to correctly apply VAT Directive to Romanian economy. The effect of choosing a public treatment, meaning no protection by the procedural confidentiality provided by the European Commission, was costly but predictable. In the desire to impose a strong position but also to attract as much money as possible to the public budget during the mandate of the Government in question, The Fiscal National Authority (ANAF) decides thematic controls on all the companies directly affected by the legislative modifications described in the petition. Although the information provided by the professional NGO regarding the negative budgetary impact that such a disharmonized application of the VAT Directive may produce, the Romanian Government chooses to further abusive application of the disharmonized VAT law. From direct and informal discussions with governmental decision-makers as well as from the tax audits planned for that period, it transpires that the authorities acknowledged the breach of the Directive in the described case and encouraged fiscal controls aimed to collect fines under the wrong applicable rules as quickly as possible, which is subject to infringement procedure. In order to try to understand decision makers' behaviour one should apply the simple electoral logic that a future governmental team will be the one to later assume the cost and the deficit related to the repayment with interest and penalties of the sums attributed abusively to the petitioner (represented in this study by the NGO founded by the economic agents active in Romania and directly interested in the case).

CONCLUSIONS TOWARDS A THEORETICAL PARADIGM

Taking into consideration the tax law analysis already developed and submitted to the Romanian authorities, the professional association sends its

proposal in a formal letter to the Romanian tax authorities; the proposal focuses on the way the legal provisions regarding the described case (stipulated in the Romanian legislation on value added tax) should be corrected for proper alignment with the relevant EU Directive. This approach proves to be constructive in order to avoid a situation of infringement for both the industry that the professional NGO represents and the presumed interest of the authority.

Given that the situation of a Member State being delayed by a European Commission can be induced not only by the text of the legislation it promotes, but also by the way in which Community legislation is implemented by any level of administrative organization - local or central - the professional association also comes up with a proposal to avoid a retroactive application of an incorrect tax provision and suggests the solution by which any change accepted by the Government should be applied according to the Fiscal Code throughout the prescription period. Given that the Fiscal Central Commission, responsible for the uniform application of the law, operates within the Ministry of Public Finance, and given that its decisions have retroactive effects, the Fiscal Central Commission may issue a decision stating that the provision of the above mentioned law must apply from 1 January 2007 (date of Romania's accession into European Union).

This latest proposal considers the concrete infringement procedure and its implementation modalities. The EU Commission has already drawn attention to a disadvantage of this procedure, namely the lack of effect on the incorrect application of legislation in the past.

In other words, the European Commission's decision to initiate infringement proceedings on a Member State only takes effect at present and in the future, but it cannot require modification and correction of misconduct in the past. In terms of business cases, this is a sad reality with reference to the level of intervention of the central authority of the European Union at executive level -it cannot intervene in correcting the historical effects of a breach of Community law by that Member State. Simply modifying the text of the law by the Commission's intervention only produces effects in the future and therefore does not cancel out the abuses and all the immoral and costly effects of that behaviour. That is precisely why the European Court's of Justice intervention becomes compulsory because its decisions are also transposed to the correction of the Member States' misleading historical practice. The steps taken by the professional association in the lobbying process of an infringement procedure - from the point of view of the modality practiced in decision making- interfer with the theory and the art of negotiation, with the principles of communication and the European integration model of federalism and institutionalism. The procedure involved the detailed analysis of the provisions of the Community legislation as compared to the local one, the assessment of the business and economic impact - both micro and macro - of the incorrect application of the Directive. The assessment has considered both the impact on the history of the abusive VAT practice and the estimated impact on a short-term future. The outcome of the assessment concluded the need to address the following methodology: a) testing a correction in direct dialogue with the Romanian authority, b) submitting a complaint based on Art. 258 T.F.E.U. addressed to the European Commission / Directorate, c) initiation of legal proceedings at the level of the European Court of Justice.

It was decided that the dialogue at the local level take place at two levels - one direct negotiation with the authority and the second, indirectly communicating via public press releases and press conferences. The direct negotiations did not prove to be successful, thus the NGO chooses to make the results transparent via a press release showing the following: "...we believe that a detailed discussion on this topic from a historical perspective is relevant to highlight that the intentional change of legislation tax on leasing companies is not warranted. (...) with reference to the area of interest of our subject we can see:1) a general tendency to arbitrarily deal with contractual relations, 2) lack of interest and even contempt for compliance with the moral and legal principles governing human and contractual relations. " (ALB Press release)

In conclusion, due to the unsuccessful negotiations at local level, the press communication may be analysed as a solution, serving one procedural purpose in the lobbying practice, i.e. the ticking of needed procedures.

While focusing on the procedure within the European integration models - not only on institutionalism but also on constructivism – lobbying may be considered as a social agent according to Thibault (1998) as quoted by Prof. Iordan Barbulescu. Thus, as a conclusion, lobbying may rely on Alexander Wendt's (1992) definition of constructivism: "Constructivism preaches the possibility of" constructing ", intervening in the way of integration, to change society starting from the elite and touching society itself. Constructivism allows reconstruction not only for states but also for social forces or regions." (Bărbulescu, 2015). In this context, the author describes the impact of this model of integration on any type of state organization or groups of people or interest groups as a construction solution through open, transparent dialogue to new forms of integration. Even if Professor Iordan Barbulescu's interpretation of Alexander Wendt's (1992) criticism in "Anarchy is what states make of it: the social construction of

power politics", it is clear that "applied to European studies, constructivism cannot be regarded as a theory, being rather considered a theoretical approach characterized by great internal diversity ". The lobbying procedure presented in this case study supports the thesis of constructivism through open dialogue of new forms of integration. The procedures used in institutional lobbying for the purpose of legislative harmonization of Community law imply above all, the shaping and assuming of a real agenda. This will serve integration in the sense of a comparative scientific analysis, both in the field of national law and the prevalence of Community law. It will be a reconstruction for the purpose of integration not only of the Member States but also of the social dimension at vertical and horizontal hierarchical levels. The social factor, the social agent called lobbying, is the one that intervenes by appealing to the European institutions and the structure of integration of the decision-making process, thus intervening directly in this process.

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