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Constitutional council censors the annual contribution to access to law and justice

Interview with Bernard Baujet, President of CNAJMJ

On 29 December 2016, the Constitutional Council censored the annual contribution to access to law and justice in its decision no. 2016-743 DC.

What was the genesis of this contribution?

Article L. 444-2, paragraph 3, of the Commercial Code, resulting from Article 50 paragraph V of Law No. 2015-990 of 6th August 2015 for growth, activity and equality of economic opportunities known as "Loi Macron", provides that: *"(...) can be provided a redistribution between professionals, to promote the coverage of the entire territory by the legal profession and legal access for the greatest number. This redistribution is the main purpose of a fund called "Interprofessional Fund for Access to Law and Justice""*.

This interprofessional fund for access to law and justice (FIADJ) is intended to distribute aid to the installation or maintenance of professionals in certain areas, to avoid "legal deserts". It was to be financed by a "contribution for access to law and justice" whose proceeds would be allocated to this FIADJ.

However, by an earlier decision of 5th August 2015, the Constitutional Council had already censored this contribution for access to law and justice. In fact, it should have been voted in a finance law so as to empower the regulatory power to set the rules concerning the basis of the tax in question, the legislature being guilty of negative jurisdiction (no. 2015-715 DC, § 48 to 52).

This is why the government had to question itself as early as November 2016: an article 35 of the amended finance bill for 2016 provided for a new contribution to access to law and justice. However, despite the hostility of the Senate Commission for Finance, this contribution was reinstated in final reading by the National Assembly and then adopted on 22nd December 2016, as Article 113.

This provision created in particular in its paragraph IV a new article 1609 octotricies of the General Tax Code which states that: "The contribution to the access to the law and justice is based on the total amount excluding taxes of the sums collected in payment of the benefits performed by the professionals mentioned in II during the previous calendar year or the last closed fiscal year.
"*Its rate is 0.5% on the fraction of the base between 300 000 € and 800 000 € and 1% on the fraction of the base that exceeds 800 000 €.*"
"*For legal persons, the thresholds mentioned in the second paragraph of the present IV are multiplied by the number of partners exercising within the legal person one of the professions mentioned (...)*".

What was the CNAJMJ's position on this contribution?

The CNAJMJ was very hostile to this new contribution which follows a significant reduction (5%) and lump sum of the tariff of court-appointed administrators and court-appointed liquidators provided for by the Decision of 28th May 2016.
The financing method envisaged for the Interprofessional Fund for Access to Law and Justice has indeed undergone a significant change.
It was originally envisaged a tax to weigh on the beneficiaries of services performed by professionals. The contribution initially envisaged by Article 50 of the aforementioned Act of 6th August 2015 was thus, according to the Government's own admission, to be "*passed on to the clients of legal professionals, under the same conditions as those applicable to value added tax. Thus, if the professionals are the ones responsible for the contribution, it will, in fact, be paid by the customers*"[1] .

[1] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis1959/2015/2015-715-dc/observations-du-gouvernement.144236.html

However, the philosophy of the rectifying finance law for 2016 was different and totally different from the VAT model: at the end, Article 113 of the rectifying finance law purported to establish a new tax, categorical and weighing on certain legal professions only (auctioneer, clerk of commercial Courts, bailiff, notary, court-appointed administrators and court-appointed liquidators) and not all.
Consequently, the contribution had to weigh in full on the public or ministerial officers and the persons exercising the activity of court-appointed liquidators or court-appointed administrators in the form of a new tax intended to finance the policy of access to the law by a levy on the turnover.

Introducing such a tax without taking into account all the professions authorised to deliver legal services could already appear debatable.
But this was far more questionable because the envisaged mechanism was in breach with Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789 in that it did not take into account the contributory capacities of the taxpayers concerned while it is a constitutional requirement.

Moreover, the CNAJMJ had insisted to the public authorities on the nonsense of the territorial grid for the court-appointed administrators and the court-appointed liquidators who, once registered on the lists, have a national competence and can be designated by any commercial Court.
The risk that litigants will not be able to have access to a nominee of justice is totally non-existent
as far as any Court has AJMJ which it is able to appoint to intervene in collective proceedings it opens: there could be no “judicial desert” in the cities where a competent Court exists to open collective proceedings and where there are necessarily nominees of justice.
It should be recalled here that AJMJs are distinguished from other legal professions because they have no customers: indeed, they receive their mandates from the Courts only so that it

is the judicial grid itself that determines the access of the litigants to preventive and collective proceedings.

What reasons motivated censorship of the contribution by the Constitutional Council?

These reasons are close to those that were formulated jointly by the five professions likely to be subject to this new tax and, in particular, criticisms developed by the CNAJMJ, which is to be welcomed.

So again the constitutional council has censored in its decision no. 2016-743 DC of 29th December 2016 (§ 23 to 29), amended *Finance Law for 2016*[2], an ill-thought contribution and adopted by a government which does not fear to make weigh the financial burden of citizens' access to the law only on ... the legal professionals! The petitioning members of Parliament had usefully insisted that the legislator could not subject this contribution to professionals who could not benefit from the subsidies paid by this Fund, including the clerks of the commercial Courts, the court-appointed administrators and the court-appointed liquidators, in consideration of the purpose of interprofessional equalization assigned to the Fund.

Moreover, the proposed contribution did not take sufficiently into account the contributory capacities of the taxpayers of the contribution for access to the law and justice.

But the foundation of a misunderstanding of the principle of equality before the public charges was enough to declare contrary to the Constitution the third paragraph of paragraph IV of article 1609 octotricies of the General Tax Code, created by Article 113 of the deferred law. Indeed, it introduced an unjustified difference of treatment between taxable persons according to whether they exercised individually or collectively and, in the latter case, according to the number of partners.

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[2] www.conseil-constitutionnel.fr/decision/2016/2016743dc.htm

The Constitutional Council indeed underlined that "*while the number of partners operating within the company may have an influence on its level of activity, the possibility of recruiting employees performing the same tasks as partners may enable companies or those who work as individuals to achieve the same level of activity as a company with more partners. Therefore, in view of the purpose of the law, which is to subject professionals to a contribution corresponding to their level of activity, there is no difference in the situation of taxable persons according to the number of partners within the structure*"(§ 27).

The Constitutional Council immediately noted the absence of any ground of public interest justifying such a difference in treatment. The key to the unconstitutionality was therefore that the legislator took no account of the possible use of employed professionals, for the purpose of determining the thresholds of contribution and turnover. Indeed, the Council noted that the use of employees would similarly increase the level of activity. In doing so, the legislator has created an unjustified difference in treatment between taxable persons according to whether they exercise individually or collectively and, in the latter case, exclusively according to the number of partners.

Could this contribution for access to law and justice be instituted anyway in the near future?

It has been twice that the government has been censored by the Council on this contribution ...

In the short term, it is unlikely that an adapted legislative vehicle will be able to resurrect this contribution: indeed, both the finance law for 2017 and the amended finance law for 2016 (expurgated from this contribution) were published in the Official Journal.

However, a new legislative provision should fine-tune the contribution to the contributory faculties of the professionals concerned and take into account the possible presence of employed professionals for the determination of turnover levels. However, the end of the parliamentary session is near, set at the end of February. The question will probably be sent back to the next majority!
The CNAJMJ will continue to follow vigilantly this issue...