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A PERSPECTIVE ON ONLINE DONATIONS IN THE ELECTION CAMPAIGN

Mihai LUPU¹

Abstract

The online donations, a payment method that has become commonplace in contemporary society, can raise a bunch of problems referring to the electoral campaign. The online platform can be managed by an association or a company, both legally constituted as legal entities. The administration involves costs to be covered by commissions. The impediment is the fact that donations to candidates in elections can be made only by natural persons, the donations of legal persons being expressly prohibited by law. The donations being collected by the legal entity, through the platform, the amounts will be transferred to the candidate / financial agent's account by the association. Thus, the competent authority to verify the legality and, possibly, to reimburse the expenses, can draw the conclusion, considering that the law does not expressly regulate this situation, that the donations were made by the legal person and not by the natural persons. But I should point out that there are a number of consequences: non-reimbursement of expenses, contravention liability of the one who received the donations, confiscation of the amounts received as a donation and spent in the election campaign.

The aim of this paper is to confirm the lawfulness of online donations for a certain candidate or political party.

Keywords

Online donations; electoral campaign; lawfulness.

I. Introductory considerations

The development of the means made available to citizens for the exercise of their constitutional rights and freedom often hinders public authorities. We refer, first of all, to the Parliament, as a legislative body, then to the Permanent Electoral Authority, within the sphere of the

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executive, but also to the courts, which are meant to settle disputes arising in connection with the execution of the law. One of the problems raised during the election campaigns can be framed in the previously mentioned theme. This is that of online donations, a payment method that has become commonplace in contemporary society. The habit of paying in such a way makes it difficult to physically move, with all the bureaucracy and time-consuming assumption of a payment in classic terms. The allocation of time is burdensome for both parties: the donor and the donor. If the donor's interest is easy to understand, the donor will try to minimize as much as possible. Through an online platform, the donation can only take a few minutes. The online platform can be managed by an association or a company, both legally constituted as legal entities. The administration involves costs to be covered by commissions. The impediment is the fact that donations to candidates in elections can be made only by natural persons, the donations of legal persons being expressly prohibited by law. The donations being collected by the legal entity, through the platform, the amounts will be transferred to the candidate / financial agent's account by the association. Thus, the competent authority to verify the legality and, possibly, to reimburse the expenses, can draw the conclusion, considering that the law does not expressly regulate this situation, that the donations were made by the legal person and not by the natural persons. But I should point out that there are a number of consequences: non-reimbursement of expenses, contravention liability of the one who received the donations, confiscation of the amounts received as a donation and spent in the election campaign.

II. Applicable texts of law

1. Law no. 334/2006:

- art. 28 paragraph (8) The contributions for the electoral campaign that can be submitted by the candidates or the financial representative can only come from donations received by the candidates from natural persons, from their own incomes or from loans from natural persons or contracted with credit institutions.
- art. 42 paragraph (5) The documents and information that the Permanent Electoral Authority may request may be related exclusively to the activities of the political parties regarding the obtaining of incomes and the realization of expenses.

- art. 48 paragraph (11) The following shall not be reimbursed:

a) the amounts of money that exceed the ceilings established according to art. 37;

b) the amounts of money that come from sources of financing other than those provided by this law;

c) the amounts of money used in the electoral campaign in violation of the provisions of art. 38 paragraph (2)

2. The guide approved by the Decision of the Permanent Electoral Authority no. 19/2016 (Permanent Electoral Authority no. 19/2016):

- art. 16. The donations received by the candidates as contributions for the election campaign must meet the following conditions:

a) be received only from natural persons;

b) the donation received from a natural person cannot exceed the value of 210,000 lei (200 minimum gross basic salaries in the country, at the value existing on January 1 of the respective year $\times 1,050 \text{ lei} = 210,000 \text{ lei}$);

c) the donations with a value of more than 10,500 lei can be received by the candidates only through their own bank accounts.

- art. 17. (1) If the candidate receives more donations from the same natural person, and their total value exceeds 10 gross minimum wages per country, then the sum of money exceeding the amount of 10 gross minimum wages per country will be collected only through the bank.

(2) When accepting donations, regardless of the manner and form in which they were made, the candidate must verify and properly register the identity of the donors in the form provided in annex no. 1.

3. The donations received by the candidates must be accompanied by declarations of the donors regarding their source, if they do not come from their own income.

- art. 18. (1) The donations received by the candidates as contributions for the electoral campaign must be accompanied by supporting documents.

2. There are supporting documents of the donations received by the candidates any documents under private signature that record the value of the amounts of money that are subject to them, as well as the identity of the parties, accompanied by the copies of the identity documents of the donors.

3. In the case of donations made through a bank account or through online payment systems, documents of any kind, including electronic ones, can be used as proof of the offer of the donation and its

acceptance. These are accompanied by copies of payment orders / payment sheets, bank statements of donor accounts, as well as copies of donor identity documents.

III. Interpretation of the Permanent Electoral Authority

Interpreting the art. 33 paragraph (2) and (3) of Law no. 334/2006, the PEA considered that, in order to be considered as contributions for the electoral campaign, in order to use for the electoral expenses that are subject to reimbursement, the donations received by the independent candidates from individuals as a contribution for the electoral campaign, must be deposited in the account opened for the election campaign, by the candidate or by the designated financial representative. This is a mandatory condition to ensure the legality of the financing of the electoral campaign and the use of these funds under the conditions of the law, being prohibited the financing of the electoral campaign by an association. Based on these interpretations, the amount requested for reimbursement was invalidated, since it came from donations from an association, a legal person, who, for the service provided, received a percentage commission from the total value of the contributions transferred to the candidate, the provisions being violated mentioned above. In this regard, it is specified that the provisions of art. 33 paragraph (2) do not distinguish with respect to the purpose for which the associations are constituted or used, being a norm with a prohibitive character regarding their participation in the electoral campaign of the electoral competitors. According to the principle of *ubi lex non distinguished law*, not our distinction debemus, as long as the legislator did not make any distinction regarding the role of associations or foundations in the electoral campaign, establishing only the imperative norm of financing, in any way, the electoral campaign. It turns out that the use of an association to finance the election campaign is prohibited. The receipt of a commission for the service provided generated a difference between the donated amount and the transferred amount. Also, collecting donations through the online platform does not allow the verification of the conditions provided in art. 18 paragraph (3) of the Guide for the financing of the electoral campaign at the local elections in 2016, approved by the AEP Decision no. 19/2016.

Because of the provisions of art. 48 paragraph (11) letter b) of Law no. 334/2006, republished, with the subsequent modifications and completions, the amounts of money that come from sources of financing other than those provided by this law are not reimbursed. The sources of financing are those provided in art. 28 paragraph (8) of Law no. 334/2006, respectively art. 28 of the Methodological Norms of Application, approved by the Government Decision number 10/2016 in which donations is also included. For their validity and use according to the law for the election campaign, they must fulfill the conditions provided by law, which do not allow their collection through associations, on the one hand, and the financing in any way of the election campaign by an association, being prohibited on the other side.

IV. Functioning of the online platform

The collection of donations through an online platform is done on the basis of a service contract concluded between the political party / candidate and the administrator - the legal person.

Using the platform, Romanian citizens can make electoral donations, taking into consideration the legal rigor and the funding guidelines issued by the Permanent Electoral Authority

In short, the platform works according to the following steps:

1. During the campaign, the donor visits the site and chooses to donate a certain amount to a certain party or independent candidate, among those registered on the platform;
2. Along with the donation offer, all the necessary data are required, including a photo / scan after the identity card;
3. The donation offer reaches the candidate / political formation;
4. The candidate verifies each donation, the validity of the identity documents, the amounts offered for donation, as well as the fulfillment of the other conditions provided by law;
5. After the verification, the donation is accepted;
6. Authentication of the identity of the donor and of the account from which the donation has come is further exercised by means of a direct processor of the banking operations, verification that ensures the payment from the donor's account;
7. Money does not go directly from each donor to the candidate's account, but (for the validated and accepted donations) they first arrives in an account of the legal person, who, periodically, transfers the

campaign candidate's account (declared to the Permanent Electoral Authority) the total donations;

8. Accessing the platform, the candidate / political group has access at all times to all information, knowing clearly what that money represents, from which donors has come and that their source is only from validated and accepted donations.

The file prepared for reimbursement contains the following documents: the donor identity processing form, the identity document, the account in which the donation was to be received, belonging to the candidate / political party, the transaction number through mobile Pay (service provided by the processor). The sums are transferred from the account of the candidate of the formation to the account from which the payments for the electoral expenses were made.

So, the platform generated for each donor Annex 3 required by the Permanent Electoral Authority, with all the personal information of the donor and the details of the donation (the amount of money, date and time at which it was performed, etc.).

V. Criticism of the interpretation of the Permanent Electoral Authority

By drawing up the documents provided by the law and aiming at the substantive conditions for the electoral donations, it is clear that the legal person is only the intermediary of the donations made by natural persons and that the donation was not performed from the personal income of the legal person.

The destination of the donated amounts is, without any doubt, the financing of the election campaign. The legal entity cannot decide to change the destination of these amounts. It is only the online platform the one which may facilitate the access of potential donors. Therefore, the legal person is only a service provider who makes available to the candidate / political group the instrument for verifying the fulfillment of the conditions provided by law for the financing of the election campaign, especially those regarding the identification of donors.

The term for registration under private signature used in the law, under the current technological conditions, cannot be limited to paper and classic writing instrument. By writing under a private signature is meant any decipherable format for expressing the agreement from which the defining elements of the legal act can be identified: the identity of the

parties; the object; closing date. Online documents and transactions (payment orders) fulfill these conditions. Any contrary interpretation would constitute an unjustified and unlawful restriction of the exercise of the rights provided by the laws regulating the field (local elections, financing of the electoral campaign).

Taking into account the principle where the law does not distinguish ..., the authority applies abusive discretion when adding to the law the consideration that associations / societies cannot be involved in any way in the electoral campaign. The associations / societies cannot finance the election campaigns from their own funds. The contradiction is all the more evident as the authority recognizes that a commission has been received for the services provided.

The argument to the aspect of collecting through online platforms does not allow the necessary checks against the text of the normative act itself, art. 18 paragraph (3) of the Guide, which, in the second thesis, obviously establishes the ease of receiving donations through online platforms. However, in the interpretation of the Permanent Electoral Authority, which demands the same documents in this case as in the case of bank transfers, the legal text is devoid of any purpose.

The law provides for substantive conditions regarding the exercise of exclusively political rights (the right to vote and the right to be elected) and the social - political rights (freedom of conscience and freedom of expression, which can be exercised including by financial support of political parties). In the execution of the law, the authorities can issue administrative acts with a normative character. These acts must be issued in the spirit of the law and must make it possible to exercise the guaranteed rights, establishing form conditions that converge with the substantive limitations imposed by the law.

However, for the financing of the electoral campaigns, the conditions are very clear being registered in two directions (art. 16 of the Law no. 334/2006, point 10):

- the act of financing should be done only by individuals;
- the amounts of money donated by individuals are limited.

Obviously, in order to prove the fulfillment of the conditions, including for the purpose of reimbursing the electoral expenses, the authorities do not have to establish disproportionate rules, impossible to fulfill and without any connection with the socio-economic realities.

Recognizing that online donations are legal, evidence for such donations must be tailored to the field, in a systematic and teleological interpretation of the law. Thus, in relation to the set of legal provisions, for the "validation" of online donations, only the evidence attesting the donation by the natural persons and the compliance with the limits (the statement of account of the legal person who administers the platform regarding the specific operation - electoral donations, the statement of the platform) are required. online, the identity document, the account statement of the donor-candidate). In such cases, there is no payment order or transfer order, so these documents cannot be produced.

The Permanent Electoral Authority lacks of content the legal provisions when it considers that, in order to reimburse the spent amounts, the conditions of art. 18., paragraph (3) of the Guide. Legal is to fulfill the conditions provided by art. 16 of the law n. 334 / 2006 (Law no. 334/2006).

Online donations can only be received through a specialized, authorized entity, which establishes relationships with banking institutions and verifies / operates the personal data of the donor, attesting the identity of the account holder of the transactions from which the transactions are carried out. In order to carry out the operations it is necessary to obtain authorizations inaccessible to individuals.

The law prohibits the financing of political parties by an association from its own funds. Interpreting the law in the sense that it is forbidden to involve associations in electoral campaigns in any way adds to the law. The legal person is only a service provider, receiving a commission similar to bank commissions, electoral expenses provided by law.

The legal person does not finance from his own funds, activity prohibited by law, the electoral campaign, but offers against cost a legal instrument, the online donation platform, so that the natural persons can exercise their social-political rights, through amounts destined to support the campaign. . The persons did not donate to the legal person, who could have discretionary donations, but to the candidate / political party for the election campaign. This activity is legal, the legal relationship being born, in the online field, regarding the donations, between the candidate-donor and the natural persons-donors, the purpose of the funds being clearly established, without any other right of the administrator of the platform outside the collection of the agreed commission.

In conclusion, the legal person is a third party to the actual donations, concluded in the form provided by law, in contractual relations with the political party / candidate, having the right and obligation to receive, verify and accept the donations.

VI. Consequences of interpretation and the competence of dispute resolution

Considering illegal donation through an online platform has the following consequences: non-reimbursement of expenses; contravention sanction; confiscation of donated amounts.

Regarding the annulment by the courts of the decision of non-reimbursement of the electoral expenses the competence is clearly determined by Law no. 554/2004 of the administrative litigation, the Code of civil procedure and Law no. 334/2006. Establishing the competence for resolving the complaint according to the contravention minutes and the other acts prepared for sanctioning may generate some discussions.

In the first case, being an administrative act of a central public authority, the competence belongs to the administrative contentious section of the court of appeal in the territorial area of the candidate's domicile or the headquarters of the political party.

For the second situation there are two categories of administrative acts: one sanctioning, the contravention report, and the other by which the deed is characterized and the report is executed. Their censorship by the courts, if considered separately, would determine different competences. The issued documents form a common body. The decision and the decision are preparatory acts for issuing the main act, the contravention report. The payment notification is given in the execution of the main administrative act, having accessory character.

The contraventions provided in art. 52 are stated by the representatives of the Permanent Electoral Authority, and the sanction is applied by decision of the authority due to art. 54, paragraph (1) of Law no. 334/2006 (Law no. 334/2006). Subsequently, according to the art. 53 paragraph (1) the offender pays to the state budget the amounts of money and / or the cash value of the goods and services that were the

object of the contravention, based on the decision of the Permanent Electoral Authority.

The acts that are issued in committing the contravention liability are the minutes of finding the contraventions, prepared by the investigating agencies, the decision to apply the main sanction and the confiscation decision, as a complementary sanction, all of them constituting a common body.

The provisions of the act of the Law no. 334/2006 is supplemented by the provisions of Government Decision no. 2/2001 regarding the legal regime of contraventions, which in art. 32 paragraph (1) and (2) provides that the complaint against the contravention report shall be submitted to the court in which the district was committed the crime. In conclusion, in view of the relationship between the issued documents, the minutes being the main document, the competence to solve the complaint against all the acts will be returned to the court.

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