FINANCING THE 2009 – 2010 PRESIDENTIAL ELECTIONS IN CROATIA: CONFLICTING INTERPRETATIONS OF CAMPAIGN FINANCE LAWS**

*Professor Robert Podolnjak, Ph. D.**

UDK: 342.849.2(497.5)
324.511(497.5)
Izvorni znanstveni rad
Primljeno: kolovoz 2010.

The author discusses two fundamental problems relating to the funding of election campaigns in the recent presidential election in Croatia. The first problem derives from the incongruence of two election campaign financing acts in Croatia – the 2004 Act on Financing the Election Campaign for the Election of the President of the Republic of Croatia and the 2007 Act on the Financing of Political Parties, Independent Lists and Candidates. The latter and the more important problem in funding the latest presidential election campaign was that the competent state bodies, authorized to implement the regulations dealing with the funding of the election campaign, were deeply divided on the question which of the two acts is relevant in regulating specific issues. The differences in the way the State Electoral Commission, the Constitutional Court, the State Audit Office and the Ministry of Administration interpreted legal regulations precluded the effective sanctioning of offences in the latest presidential election campaign in Croatia.

Key words: presidential elections, Croatia, funding of the election campaign

According to the final report of the OSCE mission in Croatia, the latest presidential elections in Croatia (first round in December 2009 and run-off in January 2010), generally speaking, fulfilled the international electoral standards. However, one of the strongest reservations expressed was about the regulation of the electoral campaign financing. It was suggested that it is necessary for

* Robert Podolnjak, Ph. D., Professor, Faculty of Law, University of Zagreb, Trg maršala Tita 14, Zagreb

** Paper presented at the IPSA RC 20 Conference on Political Finance and Political Corruption held in Ljubljana, July 24 – 27, 2010.

the Croatian parliament to prescribe more carefully the issues of transparent financing and effective sanctions for the candidates violating the law.[1]

In this paper I would like to discuss two fundamental problems relating to election campaign funding, observed during the recent presidential campaign in Croatia. The first problem derives from the incongruence of the two election campaign financing acts in Croatia. The first one is the Act on Financing Election Campaign for the Election of the President of the Republic of Croatia (hereafter: AFEP) dating from 2004, and the second one is the latest act dealing generally with the funding of political parties and candidates, namely the Act on the Financing of Political Parties, Independent Lists and Candidates[2] (hereafter: AFPP) from 2007. The new law regulates in more detail the manner and terms for funding political parties and the necessary supervision and transparency for acquiring and spending such funds, and furthermore it is the first such law specifying sanctions and requiring that the authorized bodies should initiate a misdemeanour procedure before the competent court. The problem with this second act is that it only implicitly regulates election campaigns and it was therefore doubtful whether it was relevant for the presidential elections.

The second and more important problem in the latest presidential election campaign financing was that the competent state bodies, authorized to implement the regulations dealing with the financing of election campaign, were deeply divided on the question which of the two acts is relevant in regulating specific issues. The differences in the way the State Electoral Commission, the Constitutional Court, the State Audit Office and the Ministry of Administration interpreted legal regulations precluded the effective sanctioning of offences in the latest presidential election campaign in Croatia.

CAMPAIGN FINANCE LEGISLATION IN CROATIA

At the beginning of this century Croatia did not have any legislative regulations of political financing in general or election campaign financing, except for a few general articles in the Act on Political Parties dealing with the public

[1] OSCE/ODIHR Limited Election Observation Mission, Final Report on Presidential Elections in Croatia 27 December 2009 and 10 January 2010, Warsaw, 7 April 2010, p. 24, available at http://www.osce.org/documents/odihr-el/2010/04/43364_en.pdf (accessed at 30 June, 2010).

[2] The Act on the Financing of Political Parties, Independent Lists and Candidates, *Official Gazette,* no. 1, 2007.

funding of the parties.[3] When mentioned by scholars, Croatia was singled out at the time as a country with many campaign finance scandals.[4]

Just a few months before the 2005 presidential elections the first campaign finance law for presidential elections was enacted[5] prohibiting donations from foreign states, foreign political parties, foreign legal persons, public companies, legal entities vested with public authority and other companies in which the state or a local and regional self-government unit holds majority ownership, workers' and employers' associations, budgets of local and regional self-government units etc. It also required from candidates to report the amount and sources of campaign funds to the State Electoral Commission (hereafter: SEC) within 15 days of the polling day. However, this short law did not specify any sanctions for irregularities.[6]

The National program for the suppression of corruption 2006 – 2008, enacted in the Croatian Parliament in March 2006, stated that:

---

[3] That is the main reason why Croatia was not among 111 countries included in the matrix on political finance laws and regulations in the IDEA *Handbook on the Funding of Political Parties and Election Campaigns* published in 2003. On party and campaign finance in Croatia see Josip Kregar, Draft Act on Financing of Political Parties (Prijedlog zakona o financiranju političkih stranaka), *Informator*, No. 5493-5494, 2006, p. 1-3; Mario Jelušić, Novelties in the Act on the Financing of Political Parties, Independent Lists and Candidates (Novine u Zakonu o financiranju političkih stranaka, nezavisnih lista i kandidata), *Informator*, No. 5518, 2007, p. 1-2; Zdravko Petak, A Comparative Analysis of Financing Parties and Elections in Croatia and in Other Countries, *Croatian Political Science Review*, Vol. 38, No. 5, 2001, p. 18-33; Zdravko Petak, Financing the 2005 Presidential Elections: The Role of Regulative Institutions, *Croatian Political Science Review*, Vol. 42, No. 5, 2005, p. 75-85.

[4] Pinto-Duschinsky mentioned Croatia in his sampling of campaign finance scandals because of fact that the governing party, the Croatian Democratic Union, had raised most of its funding in the 1990s through "racketeering" schemes in which government contractors would be paid only in return for substantial contributions to party coffers. See Michael Pinto-Duschinsky, Financing Politics: A Global View, *Journal of Democracy*, Vol. 13, No. 4, October 2002, p. 73. Some other scandals were mentioned in Josip Kregar, Đorđe Gardašević and Viktor Gotovac, Party and Campaign Finance in Croatia, and in Daniel Smilov and Jurij Toplak eds., *Political Finance and Corruption in Eastern Europe: the Transition Period*, Ashgate, Aldershot, 2007, p. 60-62.

[5] The Act on Financing Election Campaigns for the Election of the President of the Republic of Croatia, *Official Gazette,* no. 105, 2004.

[6] The limited positive impact of the first law on campaign funding was reflected in Croatia's improved ratings for the electoral process (3,25 compared to 3,00 in the 2005 Freedom House Report for Croatia for 2005). The Report is available at http://www.freedomhouse.org/template.cfm?page=47&nit=360&year???=2005 (accessed on 20 June, 2010).

"Unclear and ill-defined obligations regarding control of how political parties are funded opens the way to potential corruption in politics. Anonymous donations and donors should be regulated in harmony with European practices. This matter should be regulated by a special law on the funding of political parties, which would lay down permitted sources of party funds and specify legitimate means. The proposed Act will draw on the best practices of EU countries."[7]

The Act on the Financing of Political Parties, Independent Lists and Candidates was enacted at the end of 2006, and it was perceived at the time as a significant step forwards in regulating political financing, although in some aspects it was not at the level of best practices of EU countries.

The Act provides transparency in terms of the sources of funding and political parties' expenses. Political parties are required to manage their finances in accordance with valid regulations on financial transactions of non-profit organisations, and state the source and the way collected funds are spent. For the first time, this Act prohibits donations from unidentified (anonymous) sources. Also, the Act limits the amounts of donations from natural and legal persons. The total amount of donations by a natural person to a political party may not exceed 90,000 Croatian HRK (approximately 15,000 $) in a calendar year, and the total amount of donations by a legal person to a political party may not exceed 1,000,000 Croatian HRK (approximately 166,000 $) in a calendar year. Political parties must report any donation exceeding these ceilings to the State Audit Office and the Ministry of Finance Tax Administration, as well as any anonymous donation, and must pay such donations into the State Budget. Should a political party fail to comply with this regulation, it shall be held responsible for committing a violation for which it may be sanctioned with a pecuniary penalty. The Act prescribes prohibitions of financing in a text similar to an earlier one in the AFEP. Article 26 of this Act prescribes that the provisions regulating voluntary contributions, prohibition of financing and preferential treatment, as well as supervision and financial operations, shall apply accordingly to independent lists and candidates. Independent list holders and candidates must keep a separate account for financing electoral campaign costs. Voluntary contributions (donations) for financing electoral campaign costs of independent lists and candidates must be paid into a special account.

[7] The National program for the suppression of corruption 2006 – 2008, *Official Gazette,* no. 39, 2006.

For the first time, criminal sanctions are stipulated for political parties (and independent list holders and candidates) if they use the funds in contravention to this Act, specifically if they fail to keep records of membership fees (only political parties) and voluntary contributions; if they receive funds and fail to issue receipts thereof; if a political party fails to keep business books and to publicly display the origin of the funds and the way they have been spent (this applies also to independent list holders and candidates); if a political party, independent list holders and candidates exert political or any other pressure against natural and legal persons, or promise political or any other counter services, benefits or personal gains to natural and legal persons when collecting voluntary contributions (donations); if independent list holders and candidates fail to open a separate account for the financing of electoral campaign costs; and if independent Members of Parliament and independent members of representative bodies of local and regional self-government units fail to open a separate account for the regular financing of their work.

At the time of its enactment, the AFPP was perceived in the public as a general law the applied to the financing of all the political activities of all possible actors – political parties, independent lists and independent candidates – in all possible elections (parliamentary, presidential, and local). This was also our opinion. However, other regulations dealing with the financing of election campaigns have not ceased to have effect by virtue of the entry into force of that Act. This is especially valid for the AFEP.[8]

The opinion of the foreign experts who drew up the Evaluation Report on Croatia on Transparency of party funding just before the presidential elections in December 2009 had been that:

"the election laws (in Croatia) contain some rather fragmentary regulations on election campaign funding, whereas the AFPP establishes the main legal framework for transparency, supervision and sanctions in the field of political financing. Most of the provisions of this act apply to both political parties and to independent lists and candidates for election, thus also covering certain aspects of their campaign funding (except for campaigns of presidential

[8] There are provisions in different election laws with fragmentary regulations on election campaign funding which are of no relevance for our subject. These laws are the 1999 Act on the Election of Representatives to Parliament, the 2001 Act on the Election of Members of Representative Bodies of Local and Regional Governments, and the 2007 Act on the Election of Heads of Municipalities, Mayors, County Governors and the Mayor of the City of Zagreb.

candidates which are addressed exclusively by the aforementioned specific act of 2004)...The GET notes that the current system based on numerous laws is very complicated and contains some incoherencies. Whereas the general transparency rules of the AFPP also apply to parliamentary and local elections, those of the President of the Republic are solely governed by the specific provisions of the AFEP."[9]

In their report The GRECO Evaluation Team, unfortunately, did not explain their opinion that the AFPP applies to parliamentary and local elections, and not to presidential elections, so we don't know if that was their opinion or that of the Croatian officials whom they met in April 2009?[10]

It was precisely because of the coexistence of two laws on the same matter, albeit with important textual differences, that there were differences of views during the latest presidential election as to which law was relevant for that particular election when it came to financing the election campaign? Is it the AFEP as a *lex specialis*, or is it the AFPP according to the principle *lex posterior derogat legi priori*?

What were the arguments favouring the latter position? There are, in our opinion, two kinds of arguments: one relating to the legislative history and the intent of the lawgiver, and the other relating to the textual analysis of the Act.

THE LEGISLATIVE HISTORY OF THE ACT ON THE FINANCING OF POLITICAL PARTIES, INDEPENDENT LISTS AND CANDIDATES

The legislative history and the intent of the legislator the process of the enactment of the AFPP strongly supports the argument that the Act was meant to be a general law regulating all aspects of political financing and specifically of election campaigns in various elections. The first draft of this act from August 2006, made in the Central State Office for Administration (later transformed into the Ministry of Administration), was named the Act on the

[9] GRECO, Evaluation Report on Croatia on Transparency of party funding, adopted at the 45th Plenary Meeting, Strasbourg, 30 November – 4 December 2009, Greco Eval III Rep (2009) 1E, p. 16 and 19, available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2009)1_Croatia_Two_EN.pdf (accessed on 20 June, 2010).

[10] The GRECO Evaluation Team met with officials from the SEC, the Central State Office for Administration, the State Audit Office and the Ministry of Finance (Tax Administration). As we shall see later, it was precisely these institutions which had different views as to the valid political finance regime for the presidential elections in December 2009.

Financing of Political Parties. In it independent lists and candidates, or the words "election campaign" were not even mentioned. Only in Article 26 was there a paragraph stating that "the provisions of this Act shall apply accordingly to independent lists and representatives", meaning the representatives of the Croatian Parliament.

The first reading of the draft Act in Parliament took place in late November 2006. The draft was introduced by the then Minister of Justice Ana Lovrin. In her introductory speech she said that "it is important to note that the Act on the Financing of Political Parties entirely solves the question of election campaigns, because one of the main areas of activities of political parties is actually going to the polls and the election campaign". She also said that "with the provisions of this Act applying to independent lists and independent candidates the question of financing the campaigns of independent candidates and independent lists has been solved".[11] Immediately after her introductory statement an MP from the opposition (Nenad Stazić) remarked that it was not correct to say that the Draft Law applied also to independent lists and candidates, because in "the Act it is clearly stated that it applies to independent lists and independent representatives". The next speaker addressing this question was Dražen Bošnjaković, the MP from the same party as the Minister of Justice. His ambiguous statement was that the issue of election campaigns could be solved in a separate law, in an election law, or even in the law presently before the Parliament, and that was an issue which should be carefully considered before the second reading of the law. Željko Pavlic, an opposition party MP insisted on changing the title in the Draft Act on Financing Political Parties and Election Campaigns, because "this law must also cover election campaigns, as this issue is now covered only in elections for the President of the Republic". However, opposition parties in the Croatian Parliament did not speak with one voice when it came to regulating election campaigns in the law dealing with the financing of political parties – the representative speaking in the name of the Croatian People's Party (Jozo Radoš) argued for an integral law covering all issues of political financing, but MP Mato Arlović, speaking for the Social Democratic Party the main opposition party, argued against this solution.

The debate on the Draft Law on the Financing of Political Parties showed that there were huge differences between parties and MPs in Parliament over these two questions. The first one was: does the Draft Law cover the issue of

[11] The Croatian Parliament, 23rd session in the 2003-2007 term of office, Debate on the Draft Act on Financing Political Parties, first reading, 23 November 2006.

the election campaign, and the second one: does this issue belong to an act regulating the financing of political parties.

In an article, written after the parliamentary debate in a Croatian weekly, it was stated that no party explicitly required the enactment of a law which would deal exclusively with election campaigns, that major parties had no interest in regulating this question just before the next parliamentary elections due in 2007, and that the debate had confirmed only that "the Croatian Parliament has legalized electoral corruption".[12]

Just two weeks later, the Croatian Parliament debated the Final Draft. Its title was changed into the Act on the Financing of Political Parties, Independent Lists and Candidates. Antun Palarić, the Head of the Central State Office for Administration, responsible for the drafting of the Act, emphasized to the MPs that the title of the Act had been changed because

"With this Act we wanted to cover all possible situations which might occur in political life, in elections for the President of the Republic, in elections for representatives of the Croatian Parliament, and in elections of members of representative bodies of local and regional self-government units".[13]

If this is still not enough to prove that the Act was meant to be an all-encompassing legislative regulation dealing with political financing, there is a statement explaining the changes that were made between the first and the second reading: "The view that this Act does not include the financing of the election campaign was not accepted, because the financing of election campaigns is an area of political party funding, and even though the Act does not explicitly mention the financing of election campaigns, the provisions of this Act for those issues not otherwise regulated in other specific acts, also cover the financing of election campaigns".[14]

The title of the Act shows that it covers financing not only of political parties, but also of independent lists and candidates, and Article 26 explicitly states that "the provisions of this Act regulating voluntary contributions, prohibition of financing and preferential treatment, and supervision and financial

---

[12] Sabor legalizirao izbornu korupciju (The Croatian Parliament has legalized electoral corruption), *Nacional*, 27 November 2006.

[13] The Croatian Parliament, 23rd session in the 2003-2007 term of office, Debate on the Draft Act on Financing Political Parties, second reading, 11 December 2006.

[14] This explanation was actually not correct, because the words "financing of election campaign" were inserted in Articles 21 and 26. The words "differently regulated in particular acts" could relate to the AFEP, but this was not explicitly stated.

operations shall apply accordingly to independent lists and candidates". If the Act speaks of "independent lists and candidates", this means that it applies to financing not only of regular political activities, but also to financing of election campaigns. This is also explicitly confirmed in the second paragraph of Article 26 which obliges independent list holders and candidates to keep a separate account for financing electoral campaign costs. The Act does not state which candidates Article 26 refers to. At the time of the enactment of the Act, the term "candidate" could relate to candidates for members of Parliament representing ethnic minorities or candidates for the Presidency.[15] As to independent lists, they are possible in parliamentary elections as well as in those for local representative councils.

Another important thing is that the Act would be absurd if it would forbid donations from anonymous sources in regular political financing of political parties (as it does in Article 5), but it would allow them at the time of presidential elections, because the AFEP does not prohibit such donations. Similarly, the Act would be useless in limiting the total amount of contributions by an individual or a corporation in a *per annum* if this limit did not apply during the period of the presidential election campaign. It is obvious for scholars that "since political parties play a crucial part in electoral campaigns... it is hard to draw a distinct line between the campaign costs of party organizations and their routine expenses".[16] As we shall see, this simple fact was not obvious to all actors in the latest presidential elections in Croatia.

FINANCING THE ELECTION CAMPAIGN FOR THE PRESIDENCY 2009 – 2010

Croatia had only two presidents during the first two decades of independence – Franjo Tuđman and Stjepan Mesić. Mesić was the only one to serve full two five-year terms (2001 – 2010). After the expiration of his second term and with no incumbent in the elections, 12 candidates participated in the fifth

[15] It is possible that the lawgiver has thought also on future candidates for mayors and county governors which are, according to the law enacted in 2007, elected directly.

[16] Michael Pinto-Duschinsky, Financing Politics: A Global View, p. 70. Karl-Heinz Nassmacher similarly concludes that "it is not easy to differentiate between the day-to-day operations of parties and their campaign activities". See Nassmacher, Introduction: Political Parties, Funding and Democracy, in R. Austin and M. Tjernstrom eds., *Funding of Political Parties and Election Campaigns*, IDEA, Stockholm, 2003, p. 9.

direct elections for the Presidency.[17] For the first time in the history of Croatian presidential elections there were more independent candidates (seven) than political party candidates (five). What is even more extraordinary is that in the first round these independent candidates received almost the same number of votes as the candidates of the two strongest parties in Croatia.[18] One of them – Milan Bandić, the Mayor of Zagreb, the capital of Croatia – who was expelled from the Social Democratic Party (SDP) because of his decision to run for Presidency against the official party candidate Ivo Josipović, faced his former party colleague in the run-off on 10 January 2010. However, Josipović won in the second round with approximately 60% of the votes.

Campaign funding issues were discussed by candidates, the bodies controlling the electoral process, non-governmental organizations and the media. The most important issues were campaign income reports of the candidates, perceived differences between actual and reported spending of some candidates, receiving anonymous donations, overstepping limits for donations, and, above all, the different attitudes of relevant state bodies to some of these issues, particularly legal regulation of campaign funding.

To begin with, a few words on the reporting of the candidates' campaign income. The AFEP prescribes only two obligations for the candidates. At least 7 days before the election they must submit to the SEC preliminary reports on the scope and sources of funds received for the election campaign, and 15 days after the polling day submit to the SEC data on the scope and sources of expenditures for the election campaign.

Candidates were required to file preliminary reports on amounts and sources of funds collected by 20 December. The SEC issued a sample disclosure form for candidates, requiring that cash contributions be reported as well as services and goods in-kind, specifying contributions from natural and legal persons and the candidate's own resources, although the AFEP does not prescribe reporting of such details. It was noticed by the OSCE/ODIHR Limited Election Observation Mission that "the SEC thereby addressed a shortcoming

[17] On this presidential election see Miroslav Antić, The presidential election in Croatia, December 2009 and January 2010, *Electoral Studies* (2010), doi:10.1016/j.electstud.2010.04.013.

[18] In the first round the independent candidates received 42,8% of valid votes, and the candidates of the Social Democratic Party (SDP) and the Croatian Democratic Union (CDU) together received 44,4% of valid votes.

in the campaign financing system, which does not specify or define these particular sources of campaign finance."[19]

Table 1 – The candidates and their overall campaign finance income

No.	Candidates and their party affiliation or independent status	Overall campaign finance income in HRK (6 HRK = cca 1$)
1	Milan Bandić (independent)	8,618,965.41*
2	Andrija Hebrang (HDZ)	6,379,846.83
3	Ivo Josipović (SDP)	8,950,325.05
4	Josip Jurčević (independent)	171,700.00
5	Damir Kajin (IDS)	590,624.16
6	Boris Mikšić (independent)	3,247,163.00
7	Dragan Primorac (independent)	3,853,500.00
8	Vesna Pusić (HNS)	1,977,725.89
9	Vesna Škare Ožbolt (independent)	1,057,345.37
10	Miroslav Tuđman (independent)	177,143.15
11	Nadan Vidošević (independent)	6,823,266.69
12	Slavko Vukšić (DSSR-SR)	217,000.00

* Milan Bandić reported that he spent 15,278,984.26 HRK.

Source: The State Electoral Commission, The Complete Report on the scope and sources of campaign finance expenditures of candidates for the President of the Republic Croatia, *Official Gazette*, no 15, 2010.

However, the candidates' final reports differed substantially when it came to revealing sources of their campaign income. For example, the candidate of the governing HDZ party reported that almost all of his contributions had come from his party (approximately 94%), and because the law does not require specifying of details on funds from the nominated party his report does not give any specification on the contributions given to the party for his campaign. Similarly, the candidate of the second largest party (SDP) reported that more than 70% of his campaign income had come from his party. On the other hand independent candidate Boris Mikšić reported that all of his campaign funds had come from his personal resources. Among all the candidates for the Presidency, only independent candidate Nadan Vidošević did not reveal the names of persons and companies which had made contributions to his campaign, although he had publicly revealed the names of some of his donors

[19] OSCE/ODIHR Limited Election Observation Mission – Presidential Elections, 27 December 2009, Statement of Preliminary Findings and Conclusions, p. 7.

early in the campaign.[20] One of the greatest scandals associated with the final report is the discrepancy of received and spent campaign funds of independent candidate Milan Bandić. He reported that contributions to his campaign totalled cca 8.6 million HRK, but that his overall campaign expenditures were over 15 million HRK. Bandić did not give any explanation for the gap of over 6 million HRK between raised and spent campaign funds. On the list of his contributors there were several anonymous persons and some of them donated Bandić the maximum amount of 90,000 HRK. It is interesting (and I would say strange) that Bandić received more than 90% of his campaign funds from natural persons, and that many ordinary men and women contributed to his campaign with large amounts.[21] The discrepancy of raised and spent campaign funds of Milan Bandić, officially recognized in the final report, was obvious all along to GONG and Transparency International, domestic non-governmental organizations. They estimated, by analyzing the amount of paid advertising used by the candidates and other expenditures, that overall campaign expenditure of all presidential candidates was as much as 70 million HRK, 20 million HRK more than officially acknowledged.[22] However, as remarked by OSCE, due to the lack of audit and investigative powers as well as enforcement mechanisms, campaign finance reports are not independently verified and their accuracy depends exclusively on the information provided by the candidates.[23]

As we said before, the AFEP does not prescribe the limits on donations to parties and candidates. The limits are stipulated only in the AFPP – 90,000 HRK for individual and 1 million HRK for legal entities in a calendar year. So, if the AFEP is the only relevant law for the campaign financing of presidential elections one would expect that at least some of the candidates would disregard the limits prescribed in the AFPP.

In its final report on the presidential elections in Croatia the OSCE/ODIHR Limited Election Observation Mission indicated that it was advised by the

[20] Nadan Vidošević prvi predstavio donatore kampanje (Nadan Vidosevic first introduced donators of the campaign), available at http://www.nadanvidosevic.com/home/nadan-vidosevic-prvi-predstavio-donatore-kampanje (accessed on 20 June, 2010).

[21] I would say it is odd that ordinary people donated to Bandić as much as 90.000 HRK, and that amount is equal to approximately 20 average monthly wages in Croatia.

[22] Top 6 sramota predsjedničkih izbora (Top 6 disgraceful things of the presidential elections), available at http://danas.net.hr/hrvatska/page/2010/01/29/0394006.html (accessed on 20 June, 2010) .

[23] OSCE/ODIHR Limited Election Observation Mission – Presidential Elections, 27 December 2009, Statement of Preliminary Findings and Conclusions, p. 2.

SEC that the AFPP does not apply to presidential elections as the AFEP is more specific and takes precedence. However, after that comment they noticed that "both candidates in the second round respected the provisions of the AFPP. Their campaign staff informed the OSCE/ODIHR LEOM that they assumed that these caps also applied to the financing of presidential campaigns."[24] The fact is that all candidates (and their donators) respected the limits for donations, with only one exception. Independent candidate Dragan Primorac received a donation from an individual in amount of 2 million HRK, which is more than 20 times in excess of the limit prescribed for individual donations.[25] On the limits for donations we may therefore conclude that all parties and the independent candidates (except one) thought that the AFPP is the law relevant for presidential campaign finance.[26]

There is another instance of the AFPP as a relevant law for the presidential finance campaign. Two candidates (Milan Bandić and Vesna Pusić) wanted to raise campaign funds via telephone or SMS. Campaign staff of Bandić opened a "donation telephone". By calling this number a telephone account would be charged with a certain amount, and the revenue would be shared by the candidate and the company providing this service. Non-governmental organizations like GONG and Transparency International reacted immediately with warnings that such donations via telephone do not enable identification

[24] *Ibid*., p. 13.

[25] After the elections there were some interesting questions raised in the media regarding the campaign financing: Does Milan Bandić actually owe more than 6 million HRK, who does he owe it to, and how will he pay it? Is it true that some unknown persons paid to his account the amount of 90,000 HRK? What are the motives of hundreds of ordinary people to donate to a presidential candidate such large sums for his campaign? Is this the money really owned by these people? Could anybody give 2 million HRH to a candidate, disrespecting the limits set by the law? The SEC or the State Audit Office have not given any answers to these questions. It was evident to the public that there were at least some open issues in the financing of some of the presidential candidates, but there was no institution responsible for controlling the financial reports, nor for sanctioning those who did not respect the law. Only the General State Attorney Mladen Bajić said that his office is investigating the campaign financing of some of the candidates. See Silvana Perica, Čisti računi nedostižni kao božja čestica, *Večernji list*, 29.01.2010.

[26] Zdravko Petak, one of the distinguished scholars of party finance in Croatia, also noticed that the rule of limiting the amount of donations was applied for the first time in the 2009/2010 presidential elections. See Z. Petak, Financiranje predsjedničke kampanje: kako dalje? (Financing presidential campaign: what next?), *Političke analize*, No. 1, February 2010, p. 11.

of the donor. They emphasized that the money could be donated only by a known individual or a legal entity. However, in this case the donor is not a person making a call, but is in fact a telephone number. It would be possible, for example, that a person working for a city administration or a public company makes a call to a "donation telephone", and it would be impossible to identify that person.

This particular problem of legality of donations by "donation telephone" and the related issue of the application of the AFPP (especially Article 5 forbidding anonymous donations) was the source of the most important legal conflict of institutions responsible for the implementation of the law during elections.

CONFLICTING INTERPRETATIONS OF THE INSTITUTIONS ON THE ISSUE OF THE APPLICATION OF THE AFPP TO THE FINANCING OF PRESIDENTIAL CAMPAIGNS

Within a day the SEC reacted with the opinion that raising funds via "donation telephones" or SMS is inadmissible. What was the basis for such an opinion? The SEC noticed that the sources of the campaign income of presidential candidates are of public interest, and this interest is fulfilled by disclosing the scope and sources of the candidates' campaign income, as prescribed by Article 6 of the AFEP. On the basis of this statement the SEC gave the following opinion:

"The later law, prescribing the financing of political parties, independent lists and candidates...contains principles of transparent financing of the election campaign which should also be respected by a presidential candidate.

Namely, transparency and verifiability of financing an election campaign demands that the public must be immediately informed clearly about all the sources of donations raised, so that it is aware of the existence of such a report and its truthfulness.

In specific cases, raising donations using automatic speakers, SMS and other similar ways indisputably offers a large number of possibilities for concealing the identity of the donor and thereby makes it harder to verify the real donor."[27]

[27] Press release dated 30 November, issued by the SEC and posted on its website. See http://www.izbori.hr/izbori/izbori09predsjednikfiles.nsf/0/6A73207CCCA7129CC125767E00527AD6/$FILE/Priopcenje_o_prikupljanju_donacija_putem_govornih_automata.pdf (accessed on 20 June, 2010).

From the legal point of view it is evident that the SEC based its opinion primarily on Article 6 of the AFEP (prescribing that sources of campaign income must be made known to the public), and then on the principle of transparent financing of political activities, which is stated in Article 1 of the AFPP. It did not explicitly mention the prohibition to receive voluntary contributions (donations) from unidentified (anonymous) sources as prescribed in Article 5 of the AFPP, but this prohibition is implicitly included in Article 1 of the AFPP.

The campaign staff of Milan Bandić requested from the Constitutional Court to conduct a supervision of legality of the press release of the SEC, claiming that the SEC had acted contrary to the Constitution and the AFPP, and that similar donations via SMS were used by some candidates in the local elections held in May 2009. The Constitutional Court dismissed the application for formal reasons – firstly, the request was not submitted by the candidate himself, and secondly, according to the Constitutional Act on the Constitutional Court and the laws regulating presidential elections the Constitutional Court is not in any way involved in procedures of controlling the regularity of financing election campaigns which are carried out by the SEC.[28] However, the Constitutional Court gave its opinion in the unusual form of a public letter to Milan Bandić's campaign staff, in which it said that the SEC acted in accordance with the Constitution and relevant laws. The Court also emphasized that the press release of the SEC was of an "abstract and general nature", and it was not directed to any particular person. It was addressed to an undefined circle of people – to all candidates for the Presidency, and also to all citizens who might find themselves in a situation to behave in a way considered to be inadmissible by the SEC. Therefore, according to the Constitutional Court, it is not right to say that the candidate Milan Bandić was brought into an unequal position in relation to the other candidates.

Even though there did not exist formal ground for starting the procedure of supervision of constitutionality and legality of the election in this particular case, the Constitutional Court deemed it necessary to warn Milan Bandić's campaign staff that their interpretation of Articles 5 and 6 of the AFPP is one-sided. Namely, they argued that the law does not define admissible or inadmissible ways of receiving voluntary donations but only forbids accepting dona-

[28] The Constitutional Court, Letter to the applicant, U-VII/64395/2009 of 15 December, 2009. Available at http://sljeme.usud.hr/usud/praksaw.nsf/Ustav/C12570D30061CE53C125768D0035DCFD?OpenDocument (accessed on 20, June, 2010).

tions from anonymous sources. Therefore, according to this interpretation, it is not against the law to accept voluntary contributions by telephone, if these calls are not anonymous, it is only against the law to retain anonymous donations and not transfer them into the state budget. The Constitutional Court noticed that such an interpretation is harmful because it does not takes into consideration the fact that when the candidate for the Presidency receives an anonymous donation which he didn't want, legally speaking this is one thing, but it is quite a different matter when this candidate deliberately organizes and prepares a "system" for receiving anonymous donations, and makes it known to the public that such a system (as the one using calls on the fixed line) exists where anonymous donors are called to support his presidential campaign. The Constitutional Court has concluded that, legally speaking, it is neither logical nor reasonable to believe that a candidate for the Presidency would prepare and organize all those actions only to transfer all the money received from anonymous telephone calls to the state budget. Such a legal interpretation would represent a distortion of the meaning and purpose of the law, which is primarily motivated by the need to guarantee and respect the principle of transparency.

The SEC was not certain that the AFPP was relevant for the financing of the presidential campaign and therefore it asked the Ministry of Administration to give its opinion as to the meaning of the provision of Article 26 of the AFPP, stating that "the provisions of this Act regulating voluntary contributions, prohibition of financing and preferential treatment, and supervision and financial operations shall apply accordingly to independent lists and *candidates.*" Does the word "candidates" include also candidates in presidential elections, despite the fact that there exists another law which explicitly regulates the financing of the presidential the campaign? Does the State Audit Office have the obligation to control the financing of the electoral campaign of presidential candidates? Finally, the SEC asked the Ministry what it thinks of the possibility of asking for an authentic interpretation of the Parliament on this matter. The Ministry was asked because it was the legal successor of the Central State Office for Administration, which was responsible for drafting the AFPP. In its short reply the Ministry answered that:

"Considering that the financing of the presidential election campaign in Croatia is regulated by a specific act (the Act on Financing the Election Campaign for the Election of the President of the Republic of Croatia), which does not refer to the application of another act, and that the Act on the Financing

of Political Parties, Independent Lists and Candidates does not explicitly state that for questions differently regulated by a specific act it also applies to the financing of the presidential election campaign in Croatia, it is the opinion of this Ministry that the Act on the Financing of Political Parties, Independent Lists and Candidates does not apply to the financing of independent candidates for the election of the President of the Republic of Croatia.

Respecting the general legal rules that the later act makes irrelevant the earlier act, but also that a specific act makes irrelevant the general act, in this particular case, involving both a general and specific act, this Ministry cannot, legally speaking, take a different standpoint, despite the opinion that for the assurance of transparency and equality it would be good to ensure unique rules for financing all kinds of elections."[29]

With this opinion the Ministry of Administration had implicitly confirmed that it would not submit the initiative for an authentic interpretation of Article 26 by the Parliament, making itself the final interpreter of the intention of the legislator.

As I said earlier, the Ministry of Administration is the successor of the Central State Office for Administration, but it was not the same person that was responsible for the drafting of the AFPP in 2006 and gave the opinion of its meaning in 2009.[30] However, this is not a matter of legal significance. What is significant is that the Ministry of Administration overlooked the simple fact that the Parliament and the public had been informed in December 2006 that with the AFPP "*we wanted to cover all possible situations which might happen in political life, in elections for the President of the Republic*, in elections of representatives of Croatian Parliament and in elections of members of representative bodies of local and regional self-government units".[31]

There is another feature in the Ministry's opinion which was not noticed in the public at the time, and which confirms the absolute absurdity of its opinion. The Ministry said that the AFPP "does not apply to the financing

[29] The opinion of the Ministry of Administration on the initiative of giving the authentic opinion to the meaning of the Article 26 of the Act on the Financing of Political Parties, Independent Lists and Candidates of 2 December 2009.

[30] At the time of the drafting and enactment of the AFPP the head of the Central State Office for Administration was Antun Palarić. After he was elected justice of the Constitutional Court, Davorin Mlakar was named as his successor.

[31] The Croatian Sabor, 23rd session in the 2003-2007 term of office, Debate on the Draft Act on Financing Political Parties, second reading, 11 December 2006.

of *independent* candidates for the presidential election". This means that the candidates of the political parties have to obey the provisions of this act, but not the independent candidates. It is doubtless an absurd situation that you can have two categories of candidates with different obligations in the financing of the election campaign. The logic behind the Ministry's opinion was that the AFPP is regulating the financing of political parties, and therefore all party candidates are indirectly bound by the rules and regulations of this Act. For example, it is forbidden for political parties to receive anonymous donations (Article 5 of the AFPP), and there are also limits for donations made to a political party during a calendar year (Article 4). Therefore, any individual or corporation wanting to make a donation to a party candidate for the Presidency must respect these rules, because it gives a donation to a party account. And, as the law proclaims, political parties must inform the State Audit Office and the Ministry of Finance Tax Administration about any amount of voluntary contributions (donations) exceeding the amounts specified in Article 4 of the AFPP, as well as about any possible payments of voluntary contributions by unidentified (anonymous) sources, and such voluntary contributions and payments must be paid into the state budget within 8 days from the day the payment was made. On the other hand, the same person needs not respect these same rules when donating an independent candidate for the Presidency, because the AFPP, according to the Ministry, does not regulate the election campaign of these candidates.

Bearing in mind the Ministry's opinion (and also the statement of the State Audit Office that it is not authorized to control the campaign funding of presidential candidates[32]) it is now obvious why the independent candidates did not show greater respect for the AFPP than did the party candidates for the Presidency. Just to name a few of the most flagrant violations of the AFPP made by the independent candidates:

– receiving of anonymous donations (Milan Bandić);

[32] According to the State Audit Act, the State Audit Office is authorized to audit public incomes and expenditures, financial statements and financial transactions of government units and local and regional self-government units, legal entities being partly or wholly financed from the budget, public enterprises, companies and other legal entities largely owned in major part by the Republic of Croatia or local and regional self-government units. Therefore, the SAO is authorized to control financial receipts and transactions of political parties, but not of independent candidates as they are natural persons.

- distribution of money to some families (gift to potential voters) during a visit to Banja Luka in Bosnia and Herzegovina (Milan Bandić);
- receiving of a donation of 2 million HRK from an individual donor which is 22 times more than the limit set by the AFPP (Dragan Primorac);
- not revealing the names of persons and companies which had made contributions to the election campaign (Nadan Vidošević);
- the discrepancy between received and spent campaign funds in the final report (Milan Bandić).

It is difficult to argue that these violations had helped the appointed independent candidates in any way to receive a larger share of votes in the elections. However, these three independent candidates spent, according to their official reports, more than 25 million HRK, which is almost 10 million HRK more than the combined amount spent by the candidates of the two largest parties in Croatia, and in the first round these independent candidates received 32% of votes, which is equal to the vote share of Ivo Josipović (32.4%), and two and a half times larger than the vote share of Andrija Hebrang (12%), the candidate of the ruling HDZ. It could be said that the candidate of the ruling party was the main victim of the success of independent candidates, because the party did not qualify for the run-off, for the first time in the history of the presidential elections in Croatia.

CONCLUSIONS

In May 2010 the Croatian government proposed the Draft Act on Financing Political Activities and the Election Campaign, which passed its first reading in Parliament in June. This act is supposed to replace the AFPP, the AFEP and also all the provisions in the other electoral laws dealing with campaign finance.

The fact that the candidate of HDZ had suffered the strongest defeat in a presidential election, and the rise of independent candidates with huge financial resources as new strong players in elections, might be one possible explanation why it was so soon after the presidential elections that the ruling party began with the procedure of enacting a new law, which would regulate the funding of all the political activities of all possible political subjects (political parties, independent lists, candidates and elected representatives), in all elections on national and local levels. The provisions of the Draft Act prescribing

for the first time the limits of expenses in election campaigns and lowering the ceiling of donations of individuals to parties and candidates (from 90 to 50,000 HRK in a calendar year) indicate that the ruling party wanted to limit the influence of money spent in the election campaign on the result of elections. This influence was highly visible in the latest presidential elections and was, in my opinion, one of crucial factors of the strong electoral performance of some independent candidates.

There are some other possible explanations. One is the clearly negative evaluation of campaign finance in the latest presidential elections in view of the numerous scandals, observed by non-governmental organizations[33], scholars, and the media, but not sanctioned, because of the conflicting legal interpretations of relevant state bodies.

Another one is based on the simple fact that such a fragmented campaign finance regime, as witnessed in the presidential elections, is incomplete, discrepant, and ambiguous and for all these reasons to a large extent inapplicable.

This was stated by the SEC in its opinion on the improvement of electoral legislation in Croatia sent to the Ministry of Administration in April 2010. In this opinion the SEC noticed that the AFEP is too short and does not answer numerous questions related to the financing of the presidential election campaign. The special problem, according to the SEC, is the fact that the AFPP, as the later law, does not prescribe the corresponding application of its provisions on the financing of the election campaign in the presidential election, especially regarding "the issues of the authorized body for the implementation of control, and numerous other questions, such as anonymous donations, limits of donations (for individuals and corporations), control and sanctions". Therefore, this particular law, or a new one, must answer these questions.[34]

OSCE/ODIHR also noticed the inadequacy of the legal framework to regulate campaign financing of presidential elections and it recommended that consideration should be given to establishing a limit on the size of a donations from individuals and corporations to a political party or a candidate

[33] See for example GONG, Konačni izvještaj o izborima za predsjednika Republike 2009/2010. (The Final Report on the Presidential Elections), Zagreb, March 2010.

[34] The State Election Commission, The Opinion on adding and improving the electoral legislation in the Republic of Croatia, April 2010. Available at http://www.izbori.hr/izbori/dipfiles.nsf/0/16F4B809378A6D82C12577040049F30F/$FILE/1_%20Misljenje_za_dogradnju_i_unaprjedjivanje_izbornog_zakonodavstva_u_RH.pdf (accessed on 30 June, 2010).

during presidential election campaigns and to include "goods and services" as a component of overall campaign income. Also, the law should provide clear rules on reporting on campaign expenditures between both rounds of an election as well as final reporting of political parties and candidates. Such reporting should include itemization of their expenditures as well as information about sources and amounts of the funds raised. Finally, an independent body responsible for the receipt, monitoring, audit and reporting on campaign finances should be designated. This body should have the authority to conduct or initiate investigations and to issue effective and proportionate sanctions for violations and non-compliance with regulations.[35]

Of importance have been also, although not directly related to the latest presidential elections, the recommendations of GRECO stated in its Evaluation Report on Croatia on Transparency of party funding adopted in December 2009, just shortly before the elections. The report concluded that Croatia is to be commended for the adoption of the AFPP, but that there are still deficiencies in the legal framework and practice, especially the lack of regular disclosure of donations made to political parties and candidates; the fragmentary regulations on transparency of election campaign funding as contained in the various election laws; the lack of pro-active and in-depth monitoring; and the limited arsenal of sanctions for violations of political financing regulations. Therefore, the GRECO Evaluation Team recommended to the Croatian authorities:

- to harmonise the provisions on election campaign funding contained in the various election laws and to align these provisions with the standards set by the AFPP, addressing, *inter alia*, the level of detail, the frequency of reporting on and the publication of donations received by parties, lists and candidates, including during the electoral campaign period;
- that the supervision of the annual financial reports of political parties, independent lists and candidates be complemented by specific monitoring of their campaign financing, to be effected during or shortly after presidential, parliamentary and local elections;
- to ensure that an independent mechanism/bodies is/are in place for the monitoring of the funding of political parties, independent lists and candidates and of their electoral campaigns, and which is/are given the

[35] OSCE/ODIHR Limited Election Observation Mission, Final Report on Presidential Elections in Croatia 27 December 2009 and 10 January 2010, Warsaw, 7 April 2010, p. 24.

mandate, the authority, as well as the financial and personnel resources to effectively and pro-actively supervise such funding, to investigate alleged infringements of political financing regulations and, as appropriate, to impose administrative sanctions;

– to establish, in addition to the existing criminal sanctions, a) more flexible sanctions with regard to the infringement of rules concerning the funding of political parties, independent lists and candidates, including administrative sanctions, and b) effective, proportionate and dissuasive sanctions for infringements of existing and yet-to-be established regulations concerning election campaign funding under the various election laws.[36]

The Draft Act on Financing Political Activities and the Election Campaign fulfils in many ways the above–mentioned recommendations, although there are still evident, in my opinion, some deficiencies in the provisions for safeguarding the effective sanctioning of infringements of political financing regulations and the non-existence of an adequate independent regulatory agency capable of monitoring and guaranteeing the rule of law in the sphere of campaign finance. However, having in mind that it is too early to speak of final solutions still to be adopted, we can, nevertheless note that with this new law Croatia will begin to apply a new political finance regime.

[36] GRECO, Evaluation Report on Croatia on Transparency of party funding, adopted at 45th plenary Meeting, Strasbourg, 30 November – 4 December 2009, Greco Eval III Rep (2009) 1E, p. 22-23.

Sažetak

Robert Podolnjak*

FINANCIRANJE PREDSJEDNIČKIH IZBORA 2009. – 2010. U HRVATSKOJ: SUKOBLJENE INTERPRETACIJE ZAKONA O FINANCIRANJU IZBORNE PROMIDŽBE

Autor elaborira dva fundamentalna problema prisutna u posljednjim predsjedničkim izborima u Hrvatskoj s aspekta financiranja izborne promidžbe. Prvi problem proizlazi iz nesukladnosti dva zakona kojima je regulirano financiranje izborne promidžbe – Zakona o financiranju izborne promidžbe za izbor predsjednika Republike Hrvatske iz 2004 i Zakona o financiranju političkih stranaka, nezavisnih lista i kandidata iz 2007. godine. Drugi i značajniji problem u financiranju promidžbe u posljednjim predsjedničkim izborima je bio u tome da su državna tijela ovlaštena da provode propise vezane uz financiranje izborne promidžbe bila duboko podijeljena po pitanju koji od navedena dva zakona je mjerodavan u reguliranju specifičnih pitanja. Sukob između Državnog izbornog povjerenstva, Ustavnog suda, Državnog ureda za reviziju i Ministarstva uprave spriječio je učinkovito sankcioniranje prekršaja počinjenih tijekom izborne promidžbe.

Ključne riječi: predsjednički izbori, Hrvatska, financiranje izborne promidžbe

* Dr. sc. Robert Podolnjak, profesor Pravnog fakulteta Sveučilišta u Zagrebu, Trg maršala Tita 14, Zagreb

Zusammenfassung

Robert Podolnjak*

DIE FINANZIERUNG DER PRÄSIDENTSCHAFTSWAHLEN 2009-2010 IN KROATIEN: GEGENSÄTZLICHE INTERPRETATIONEN DER GESETZE ÜBER DIE FINANZIERUNG DES WAHLKAMPFS

Der Autor bearbeitet zwei fundamentale Probleme, die während der letzten Präsidentschaftswahlen im Zusammenhang mit der Finanzierung des Wahlkampfs im Raume standen. Das erste ergibt sich aus der Diskrepanz zwischen den beiden Gesetzen, die die Finanzierung des Wahlkampfs regeln, nämlich dem Gesetz über die Finanzierung des Wahlkampfes für die Wahl des Präsidenten der Republik Kroatien von 2004 und dem Gesetz über die Finanzierung der politischen Parteien, unabhängigen Listen und Kandidaten aus dem Jahr 2007. Das zweite, tiefer gehende Problem im Zusammenhang mit der Wahlkampffinanzierung für die letzten Präsidentschaftswahlen lag in der Tatsache, dass die staatlichen Behörden, die für die Umsetzung der Vorschriften zur Wahlkampffinanzierung zuständig waren, bezüglich der Frage, welches der beiden genannten Gesetze in der Regelung spezifischer Fragen anzuwenden ist, gespaltener Meinung waren. Dieser Konflikt zwischen der Staatlichen Wahlkommission, dem Verfassungsgericht, dem Staatlichen Rechnungshof und dem Verwaltungsministerium verhinderte eine wirksame Sanktionierung der Rechtswidrigkeiten, die im Wahlkampf begangen worden waren.

Schlüsselwörter: Präsidentschaftswahlen, Kroatien, Wahlkampffinanzierung

* Dr. Robert Podolnjak, Professor an der Juristischen Fakultät in Zagreb, Trg maršala Tita 14, Zagreb