

# REFLECTIONS ON THE EFFECTIVENESS OF THE BRAZILIAN ELECTORAL PUBLIC FUNDING

Rômulo Hannig Gonçalves da Silva<sup>1</sup> Gustavo Fernando Fröhich<sup>2</sup>

**Abstract:** The article makes some considerations about the purposes that justified and outlined the creation of the Special Public Funding of Campaign, analyzing the original proposal, presented by the author, and the main changes that the legislative text underwent during its processing in the National Congress. The methodology used, which involved the prospecting of documents specific to the legislative process and open data on the electoral process, allowed the listing of the main objectives of the legislator with the implementation of the Special Fund and, preliminarily, their contrast with reality. Despite the legislator's initial aspirations, the data analyzed demonstrated that all secondary objectives of implementing the Electoral Fund were frustrated.

Keywords: Public Funding of Campaign; Trade-offs; Public Budget; Electoral financing.

### 1 Introduction

Until the 2014 election process, which culminated with the victory of former President Dilma Rouseff, Brazilian companies were legally allowed to donate a portion of their income - the equivalent of 2% of their gross revenues - relating to the previous fiscal year to electoral campaigns. From that year on, Operation Lava-Jato (Car Wash) and its developments, such as Operation Black Blood and Operation Brazil Cost, exposed the existence of several criminal cells that took advantage of the relationships between companies that made campaign donations, political agents, and bureaucrats.

On September 17th, 2015, when evaluating the Direct Action of Unconstitutionality No. 4650, the Supreme Court declared the unconstitutionality of the legal provisions that allowed campaign donations made by legal entities, until that moment. In the same month, Ordinary Act No. 13,165/2015, known as the electoral mini-reform, was approved, amending the Electoral Code: among the most relevant changes was the absence of the possibility of legal entities making electoral donations and the definition of limits campaign spending.

Before the enactment of the predominantly public model of electoral financing, most

<sup>&</sup>lt;sup>1</sup> Law Student from the University of Brasília (UnB); Executive Director of the Study Group in Law and Economics (Grupo de Estudos em Direito e Economia – GEDE) UnB/IDP (Instituto de Direito Público - Institute of Public Law); intern at the Federal Public Defender's Office. Orcid (Open Researcher and Contributor ID): https://orcid.org/0000-0002-3208-0493 E-mail: romulohannig@gmail.com

<sup>&</sup>lt;sup>2</sup> Technologist in Public Management at the Federal Institute of Brasília (Instituto Federal de Brasília - IFB); Law Student, from the University of Brasília (UnB); special student of the Master's Course in Legislative Power at Center for Formation, Training, and Improvement of the Chamber of Deputies (Centro de Formação, Treinamento e Aperfeiçoamento da Câmara dos Deputados – CEFOR). Commissioned servant at Chamber of Deputies. E-mail: gusfer.f@hotmail.com

funds were raised from corporate donations. With the prohibition of donations made by legal entities, resources were used at first from the Special Fund for Financial Assistance to Political Parties, also known as the Party Fund. By way of comparison: in 2014, R\$371,955,594 were spent with the maintenance of the fund; in 2015, the amount increased by 130% to R\$867,569,220. The increase in this expense was insufficient since the amount was still far from that obtained with the support of companies. Although considerable, this increase was unable to replace the amount received so far from corporate entities, which in 2014 was approximately R\$3,090,795,950.22 (SPECK; 2016).

In this context, the Special Fund for Campaign Financing (Fundo Especial de Financiamento de Campanha - FEFC) was established under Ordinary Act No. 13.487/2017. This research work seeks to list the arguments presented in the legislative sphere, by congressional representatives and jurists, which led to the establishment of the aforementioned fund and, consequently, to the enactment of a predominantly public model of electoral financing.

## 2 Regarding the origin and objectives of a campaign finance fund

The predominantly public financing of election campaigns is a recent fact that resulted from a court decision that aimed to combat the shady relationships between private legal entities and the exchange of favors resulting from investment in parties that assumed strategic positions in public power.

Therefore, given the need to supply the resources previously contributed by the companies, the Special Fund for Campaign Financing (Fundo Especial de Financiamento de Campanha - FEFC) was created, established by Ordinary Act No. 13.487/2017, whose origin dates back to Bill No. 8703/2017 and to the Complementary Bill 206/2017. The FEFC or Electoral Fund, thus, was created for the particular purpose of covering campaign expenses in an election year, so that its resources cannot be used for other purposes.

This chapter aims to compare the objective of PLS – Projeto de Lei Complementar (Complementary Bill) No. 206/2017, presented by the then-Senator Ronaldo Caiado DEM-GO, its initial propositions with the insertion of Art. 16-C in Act No. 9,504/97 (Election Act), which provides for the creation of the FEFC, with the act effectively approved after the most relevant legislative amendments and adjustments that culminated in its creation as it is known today.

According to the justification of the bill's author, the creation of the FEFC aimed to discipline the budgetary instruments of public campaign financing, since electoral campaigns are expensive and, by prohibiting private financing through corporate entities, the judiciary depleted the resources used in the electoral period by approximately R\$ 2.8 billion. However, the creation of the FEFC should occur without taking even more public resources from essential areas or causing extra costs to the treasury.

For this, Ronaldo Caiado proposed to extinguish the obligation of free electoral and party advertisement in communication channels (radio and TV) that are not under the control of public power. The resources from the tax compensation destined to electoral and party advertising (600 million in an election year and 300 million out of election years, according to studies he presented), would then be redirected to the FEFC - which would guarantee another 900 million every election campaign year.

Thus, it proposed that the fund be annually revised by the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística – IBGE)'s National Consumer Price Index – (Índice Nacional de Preços ao Consumidor – INPC), and that its budget allocation be composed of: (i) an amount equivalent to the tax compensation that benefited radio and television broadcasters in the year of the general election immediately preceding the enactment of the law (in 2016) added to the tax compensation of the last free party advertisement made before the act became effective; and (ii) fines and penalties imposed on political parties under the Electoral Code and related laws.

After the submission protocol of PLS 206/2017, it received 32 amendment proposals in the Federal Senate and 12 in the House of Representatives, so that significant changes were accepted and other points not initially foreseen in the scope of the project were added to modify several others provisions of electoral legislation. However, in the present essay, we will stick only to those actually approved and which concern the analysis of the FEFC.

The first significant change concerns the **fund composition** itself. This is because the text of the rapporteur, Senator Armando Monteiro, has had excluded from the calculation basis the fines and penalties imposed on the parties, as well as the budgetary compensation for electoral propaganda. From the original proposal, only the forecast of redirecting to the FEFC the amounts previously reserved for compensation for party propaganda was maintained, which, it should be emphasized, is not to be confused with electoral propaganda.

However, in order to supply the resources that would be obtained through the tax compensation for electoral advertising, it was established that exclusively in election years, a percentage of the amounts intended for the mandatory state caucus amendments must be set aside in the Annual Budget Act (Lei Orçamentária Anual - LOA) to cover the cost of electoral campaigns. Initially, the text approved in Act 13,487/2017 set this percentage at 30% of the mandatory caucus amendments, but Act 13,877/2019 again amended Art. 16-C, II of Act 9,504/97 to provide that this percentage will discretionally be set at the legislature when approving the LOA.

For the moment, it is explained that the amendments of the state or district caucus, as the name suggests, are those proposed by the caucus of senators and deputies of a particular state, regardless of the party to which they belong, reporting the most urgent needs of that unit of the federation. Art. 166, § 12 of the CRFB/88 supports them, which states the guarantee of

obligatory execution of the programs included by all the amendments of the representatives, in the amount of up to 1% (one percent) of the net current revenue (Receita Corrente Líquida - RCL) of the previous year. Thus, redirecting a percentage of these resources allocated to each state or to the Federal District to finance electoral campaigns certainly presents an opportunity cost: by investing resources in one area, it necessarily takes away from another.

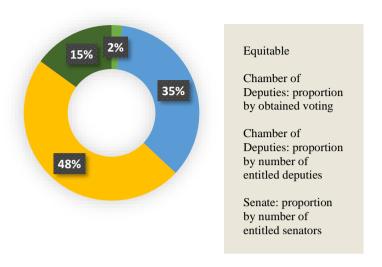
Another noteworthy change concerns the administration and management of the FEFC, as well as voter autonomy and participation in its distribution. It should be noted that both in the initial proposal and the act approved, it was determined that the Superior Electoral Court (Tribunal Superior Eleitoral - TSE) would be responsible for establishing the general guidelines for the management and distribution of the resources of the Electoral Fund, after all, regulated by TSE Resolution No. 23,605.

However, Paragraph 3 of Art. 16-C originally presented by Senator Ronaldo Caiado estimated that the TSE would disclose the amounts available in the FEFC reserving 20% of the total for the second round. Then, the number of voters regularly registered to exercise citizenship in the election, guaranteeing each one a share of these resources, would divide the remaining 80% into equal parts. Paragraph 4 proposed, then, that each voter could allocate the resources to whom he is entitled to the candidate and party of his choice, through a platform developed by the TSE. This was an attempt to encourage citizens' participation in the public resources allocated to campaigns.

Only afterward, if there were residual resources not distributed by the voters, the amounts would be divided among the parties and candidates, as provided in the bill. However, both provisions that guaranteed greater voter control over the FEFC's resources were completely changed while still in the legislature and were later vetoed by the then-president of the Republic, Michel Temer. The substitute that proposed the reservation of 10% of the resources for the second round was also vetoed, and later laws regulated the matter.

Finally, the current distribution of the FEFC was established by Act No. 13,488/2017, which inserted Art. 16-D disciplining the following:

**Graph I** – Distribution of Resources in the 1<sup>st</sup> Round



Source: Own elaboration, 2021.

As can be seen, by legal determination, 2% of the FEFC budget must be equally allotted among all parties registered with the TSE, regardless of whether there is a representative elected to the National Congress. 15% should be allotted among the parties in proportion to the number of representatives in the Federal Senate, considering the legends of the incumbents. 35% should be allotted among the parties that have at least one representative in the National Congress, in proportion to the percentage of votes they obtained in the last general election. Moreover, finally, 48% should be allotted among the parties, in proportion to the number of representatives in the National Congress, considering the legends of the incumbents.

The original bill also vetoed the provisions of §§ 5 to 14, except for the substitute wording presented in § 7, which concentrates the distribution of each party's resources in the hands of their respective national executive boards. Thus, it is noteworthy the exclusion of the original provision of § 9, which previously determined the form, the percentage, and the proportion that the TSE should be guided to deposit the resources directly in local campaigns.

Thus, as approved, the legislation systematizes that the TSE must redistribute the resources as decided by the party leaders, approved by an absolute majority of the members of the national executive board of each party. The only requirement is that the criteria adopted by the national executive are previously disclosed on their websites, that the 30% reserved for women's candidacies is respected, and that the amounts can be collected by the TSE (see Art. 6, §§ 1 to 3 of the Court's Resolution 23.605/2019).

Likewise, it is pertinent to point out that precisely because it extinguished both partisan and electoral advertising, the preliminary text did not forbid the purchase of electoral advertising time by political parties and ruled that, in respect for isonomy, broadcasters could

not discriminate prices among "party-clients" when selling paid electoral time. However, the insertion of Art. 43-A, which disciplined paid electoral advertising, was rejected. In an opposite direction, the insertion of § 2 into Art. 36 was approved, in order to completely prohibit any kind of paid electoral propaganda on radio and TV stations.

In light of the above, it can be seen that the initial idea of creating a Special Fund for Campaign Financing without creating greater costs to the Treasury was substantially altered. That is, besides removing a percentage of the resources destined to the amendments of the state and district caucuses, the obligation of "free" electoral propaganda was maintained (from which there would be fiscal compensation). Below is a comparative table between the initial objective, the legislative proposal, and the instrument approved by the National Congress.

Table I – Purpose of the legislative proposal and approved instruments

Goal	Author's Proposition	Instrument Adopted
	Art. 16-C, I and II budget allocation:	Art. 16-C, I and II, budget allocation:
Instituting the FEFC to supply the resources previously applied by private law legal entities without creating additional costs to the	resources from the extinction of tax compensation for: (i) party advertisements; (ii) election advertisements	termination of tax compensation for party advertisements
public treasury.	+	+
	Fines and pecuniary penalties applied to the parties.	percentage of the state/ district caucus amendments.
Generate greater voter autonomy in the distribution of resources.	Art. 16-C, §§ 3 and 4 Creation of a platform managed by the TSE so that each regular voter could allocate the resources of his or her quota share to the candidate or party of his or her preference.	Omission of a proposal to control resources by voters according to political party identification.
Decentralize the distribution of resources	Art. 16, § 9 Resources allotted proportionally by the TSE among the states and municipalities, with a percentage range defined by law.	Art. 16-C, § 7 Distribution by the TSE as decided by the National Executive Board of each party.
	Art. 43 - A	Art.36, § 2
Extinction of free electoral propaganda in vehicles granted to private broadcasters and possibility of paid political propaganda	It defines that the purchase of election time is allowed as long as the radio and TV stations do not promote price differentiation between "client-parties".	It does not allow any kind of paid political advertising on radio and television.

Source: Own preparation, based on information extracted from legislative reports, 2021

## 3 Regarding the impact and opportunity cost of the Electoral Fund

In the 2014 elections, the last held with corporate donations allowed, it is estimated that R\$ 3,090,795,950.22 was received (SPECK; 2016). In the presidential campaign alone, the revenue obtained from corporate donations was R\$ 609,367,883.97 - an amount equivalent to 93.92% of the total R\$ 648,786,513.97 in revenue. As the database - consolidated in the table below - shows, approximately 94% of the funds that were received by the presidential candidates were raised from corporations, while only 6% were obtained from private donations and resources from the Party Fund.

**Table II** – 2021 Presidential Campaign Revenues

Candidate Name	Funding Source		Total
	Corporate	Another	
Aécio Neves	R\$210.166.070,51	R\$16.689.546,76	R\$226.855.617,27
Dilma Rouseff	R\$336.997.850,35	R\$13.495.551,35	R\$350.493.401,70
Eduardo Campos	R\$17.612.440,56	R\$9.300,00	R\$17.621.740,56
Eduardo Jorge	R\$0,00	R\$7.110.893,44	R\$7.110.893,44
Everaldo Pereira	R\$1.038.385,40	R\$393.100,00	R\$1.431.485,40
Levy Fidelix	R\$95.090,32	R\$46.032,94	R\$141.123,26
José Maria	R\$14.998,13	R\$156.678,62	R\$171.676,75
José Eymael	R\$365.195,35	R\$33.000,00	R\$398.195,35
Luciana Genro	R\$56.080,00	R\$345.438,87	R\$401.518,87
Marina da Silva	R\$43.021.773,35	R\$1.068.000,00	R\$44.089.773,35
Muro Iasi	R\$0,00	R\$60.554,69	R\$60.554,69
Rui Pimenta	R\$0,00	R\$10.533,33	R\$10.533,33
Total	R\$609.367.883,97	R\$39.418.630,00	R\$648.786.513,97
	93,92%	6,08%	100,00%

Source: Superior Electoral Court, 2021.

An analysis of the information made available in the system for consulting donors and suppliers, maintained by the Superior Electoral Court, shows that the three (3) slates that concentrated the most votes also concentrated the most corporate donations: approximately

99.7% of corporate donations. On the other hand, the less competitive candidates relied almost exclusively on resources from the party fund and donations from individuals.

Moreover, the data show that among the largest donors to the presidential campaign were many of the companies investigated in the scope of Operation Lava-Jato, especially those inserted in the civil construction industry, such as: OAS, which donated R\$ 20,000,000.00 directly; Queiroz Galvão, which donated R\$ 3,500,000.00 directly; and UTC, which donated R\$ 7,500,000.00 directly. In addition to direct donations - which went into the candidate's account without intermediaries, the survey showed that R\$ 286,285,903.00 were sent with the help of party entities, which passed the funds on to the candidates.

The Special Fund for Campaign Financing, not even created yet, sought to occupy the space until then occupied by large companies. The original intention of the legislator, as mentioned, was to prevent the expansion of public spending using the resources derived from the extinction of party advertising – funded with tax waivers. According to the Tax Expenditure Statements (Demonstrativos dos Gastos Tributários - DGT) made available by the Brazilian Federal Revenue Service, it was estimated that the two-year period before the approval of the fund (2015-2016) would have had tax expenditures of R\$ 858,429,820.00 due to the waivers that financed the free electoral time - which included party and electoral advertisements. It is worth pointing out that the amount exclusively allocated to party advertising is uncertain, since the DGT is an estimate that does not individualize spending per advertising category.

As shown in the 2018 budget allocation, the year after the fund was created, R\$1,716,209,431.00 were allocated for financing election campaigns. Although this amount is lower than the amount raised from legal entities, three considerations are necessary: (i) the amount was supplemented with resources from the Party Fund and private donations, which in the 2018 election added R\$ 1,050,368,699.37 in private revenues and R\$ 374,295,014.71 in public revenues; (ii) that the amount of the fund was higher than the tax expenditure arising from tax waivers that funded party advertising; and (iii) the amount was still higher than the sums of investments under the responsibility of several of the budget agencies of the Federal Executive Branch - as shown below.

**Table III** – Comparison between the amount allocated to the funding of the Special Campaign Finance Fund and the ministries' investments, in 2018

Budgetary Body	Investments (R\$)
Ministry of Defense	8.539.147.252,00
Ministry of Infrastructure	8.428.047.373,00
Ministry of Health	5.416.571.103,00
Ministry of Regional Development	4.578.079.109,00
Ministry of Education	4.322.191.693,00
Ministry of Cities	3.814.962.805,00
Ministry of Justice and Public Security	1.799.567.408,00
Electoral Fund	1.716.209.431,00
	1.218.035.443,00
Ministry of Agriculture, Livestock, and Supply	

Source: Federal Budget Panel, 2021.

It is known that the collective needs of a nation are countless, from building hospitals to promoting free trade and financing cultural initiatives. In a pandemic context, such needs become even more evident, since they highlight society's weakest points when it is most in need of the social assistance it requires. However, not every collective need, i.e., which is in the common interest of a group of people, carries the seal of public interest: of general interest, regulated by public law and governed by strict legality as opposed to private law relationships, governed by the autonomy of the will (HARADA, 2020, p. 3).

The most significant distinction, therefore, concerns the order of priority that the state allocates to each of these activities and, above all, the public or private legal regime it adopts. Without a doubt, as a pillar of democracy, the electoral process in which free elections are guaranteed is in the public interest. However, the strictly public budget allocation of finite and even more essential resources to other areas should be subject to broad questioning: the public budget is an instrument of planning, management, and financial control of the state, which has scarce resources (ABRAHAM, 2021, p. 312).

The circumstances found in 2018 repeated in 2020, as shown below. Even if we disregard the donations made by individuals and the resources coming from the Party Fund, the updated amount - of R\$2,034,954,824.00 - in a pandemic year demonstrates the legislator's will to mobilize more resources for the Electoral Fund than the amount invested in ministerial

offices whose institutional mission is the promotion of social and diffuse rights - such as the Ministry of Environment and the Ministry of Women, Family and Human Rights.

**Table IV** – Comparison between the amount destined to the funding of the Special Campaign Financing Fund and the Ministries' investments, in 2020

Budgetary Body	Investments (R\$)
Ministry of Regional Development	11.886.431.604,00
Ministry of Infrastructure	8.450.015.694,00
Ministry of Defense	7.726.418.312,00
Ministry of Health	6.160.946.348,00
Ministry of Education	4.351.657.589,00
Ministry of Justice and Public Security	2.985.675.016,00
Electoral Fund	2.034.954.824,00
Ministry of Agriculture, Livestock, and Supply	1.745.421.797,00
Ministry of Tourism	868.417.269,00
Ministry of Citizenship	650.378.883,00
Ministry of Economy	597.109.010,00
Ministry of Women, Family and Human Rights	161.534.616,00
Ministry of Environment	72.037.340,00

Source: Federal Budget Panel, 2021.

There is a trade-off expressed in the opportunity cost between allocating public resources in areas such as health and education, or allocating them to finance electoral campaigns. In this sense, government authorities can compare, for example, which represents a more serious damage and urgently require the allocation of resources such as representatives' amendments. As an example: considering that the average price of a Covid-19 vaccine is R\$ 36.84, according to data from the Price Panel made available by the Ministry of Economy, it would be possible to purchase 55,237,644 vaccines - enough to immunize 71% of the members of priority groups with the first dose of the vaccine.

#### 4 Conclusion

As the documents that integrate the legislative process show, the implementation of the Special Fund for Campaign Financing (FEFC) resulted from the need to replace the resources that private legal entities had invested. In this shift, the political agents listed three secondary objectives, namely (i) the creation of this fund could not increase the expenses; (ii) it should expand the voter autonomy in the distribution of resources; and (iii) it would need to decentralize the distribution of resources.

Despite these aspirations, the data collected indicate that the implementation and maturation of the Electoral Fund increased public spending and, consequently, created a budgetary demand that competes with the needs presented by the budgetary units of the Federal Executive Branch for making investments. In this same sense, it is worth pointing out that the data collected was not enough to attest that the Electoral Fund increased voter autonomy in the distribution of resources and decentralized the distribution of resources.

Preliminarily, the normative approved by the National Congress allows one to argue that the other secondary objectives of the Electoral Fund were also frustrated: the increase in the autonomy conferred to the voter at the time of distribution of resources, as well as the decentralization of resources, come up against Art. 16-C, § 7 of Act N° 9.504/1997, according to which it is up to the national executives - party bodies coordinated by the top leadership of the parties and under little influence of the electorate - to stipulate the criteria for apportionment of the Special Fund for Campaign Financing (FEFC).

Bearing in mind that this hypothesis is still preliminary, it is considered necessary to further analyze the information presented in order to broaden the understanding of the process of allocation of these public resources. Using this and the normative text, it will be possible to demonstrate whether the Electoral Fund was able to increase voter autonomy in the distribution of resources and decentralize the distribution of resources, as well as to list possible solutions for the non-observance of these original objectives of the fund.

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