

Legal Opinion on “Volunteering legal framework and its implementation”

For the purposes of this Opinion, the content of Law 45/2016, relevant draft law report during the process of its approve, the relevant bylaws which have already been adopted, and other applicable provisions of the Albanian legislation have been analyzed.

Object and purpose of the law 45/2016

The Law 45/2016 is the main legal act for the specific formal regulation of volunteering in the Republic of Albania. Article 2 of the law 45/2016 clearly foresees that this law aims to legally regulate volunteering, in order to increase civic engagement and participation of individuals in social life to improve the quality of life in the community, as well as the development of values of human solidarity.

Regardless of the regulation according the Law 45/2016, it should be specified that volunteering is a constitutional and legal right that each of Albanian citizens can exercise as a right to give his/her contribution to the needed ones and /or the interest of the public. Regarding the activity in the interest of the public that is also related to the purpose of volunteering, we want to remind that Law no. 8788, dated 7.5.2001 "For NON-for- PROFIT ORGANIZATIONS", amended, in Article 2 point 5 provides the meaning of activity in the good and interest of the public.

The activity “activity in the good and interest of the public “ means any activity that supports and develops spiritual and other humanitarian values for the individuals and society, protects human life or health, secure and realizes public and social services, help and support in case of disasters, protects the environment and develops culture and education about it, supports and develops cultural and historical values traditions, science, education, physical and spiritual education, help in development of good habits and democratic values, as well as any other aspects for the good and interest of the public.

According to the definitions provided in the Law 45/2016, it aims to regulate the formalization of the relationship between the Volunteer Recipient and the Volunteer Provider and, above all, the latter with the Volunteer.

Contributions of the Volunteer through volunteering

Volunteering is a right that anyone can exercise as a right to offer unpaid contributions in money, nature or services to anyone in need and / or in the interest of the public.

According to Law 45/2016, volunteering is defined as the provision of free time, knowledge and skills to complete activities or services by the volunteer to the benefit of the volunteer provider and or beneficiary (Article 4 (1)). Article 4 (2) expressly foresees that “*Volunteering is done free of charge, without a compensation or any other material gain, besides the cases when the law defines it differently*”.

Subjects of Volunteerism

Law 45/2016 foresees subjects of volunteerism:

- Article 9 states that “1. *Volunteer provider can be a public body, religious organisation or non-governmental organisation.* 2. *Volunteer providers can be an Albanian or foreign juridical person, who offer volunteering according to this law does not seek any profit-making activity*”. From the analysis of Article 9 of the Law, it is clear that the object of voluntary activity is in none of the cases the profit. This conclusion results not only from point 1 of this article, which lists the subjects that do not have the object of profit, but also from point 2 of Article 9 which stipulates that volunteering service can be provided by legal entities, here also the company, is excluded from profit.
- According to Law 45/2016, beneficiaries of Volunteering can be all natural persons (individuals) or legal entities, local or foreign (Article 10 (1)) as well as the Volunteer Provider itself (Article 10 (2)).
- According to Article 5 of Law 45/2016, a Volunteer is any person, local or foreign, who enjoys full capacity to act and who voluntarily performs volunteering, any person with disabilities and any minor aged 15 to 18 old.

The above is important in the frame of the analysis of Law 45/2016.

Volunteering Relationship

As per above, the Law 45/2016 aims, above all, to regulate the formalization of the relationship between the Volunteer and the Volunteer Provider.

According to the provisions of Law 45/2016, volunteering can be interpreted as similar to the legal employment relationship, as well as that of the service, as long as it aims to make available skills and knowledge to perform a certain service, but there are essential differences of them.

These differences arise from the specific nature of volunteerism, which is materialized in a special law that distinguishes this activity from that of labor (which is regulated by the Labor Code and civil service legislation or that of political servants of public administration) and the legal relationship of the service (provided based on the Civil Code or Law 66/2016 "On services in the Republic of Albania"). Law 45/2016 aims to make this distinction from the employment and the service relationship, but the relevant provisions are not clear and it is not possible to identify what special legal or contractual relationship is established between the Volunteer and the Volunteer Provider.

Law 45/2016 explicitly stipulates that volunteering is regulated by the Volunteering Contract, which defines the rights and obligations of the volunteer and the conditions and criteria necessary for performing voluntary activities and services (Article 14). Article 15 also sets out the mandatory elements that the Volunteering Contract must contain. Article 16 stipulates that “1. With the conclusion of the volunteering contract, the rights arising from unemployment are not lost. 2. Volunteering contracts, which are concluded to avoid binding into an employment contract, are invalid”. From the analysis of this provision, it is clearly evidenced that the legal

relationship of volunteering does not interfere in any case with the legal employment relationship and cannot be equated with one. In Article 16 (1) stipulates that this contract does not replace the rights arising from unemployment, which are rights of a socio-economic nature. Part of these rights is also social insurance. This provision provides grounds for interpreting that the Service Provider does not have obligations for social health insurance, but 45/2016 does not clarify this aspect. We must keep in mind that in the social insurance scheme a person has the status of either contributor or beneficiary. Law no. 7703, dated 11.05.1993 "On social insurance in the Republic of Albania", amended, Article 8 (paragraph 3), provides that the period of protection from social insurance for purpose of old age pension, disability pension and family pension is also the period when the person receives income from social security due to [... unemployment]. Contributions in their favor will be transferred from the accounts of the respective branches". Based on this provision, in view of Article 16(1), a volunteer who is not employed, will continue to benefit from social insurance protection, as the period for which he continues to be unemployed is recognized as a valid period for purpose of old age pension. As long as Law 45/2016 explicitly states that the Volunteer does not lose the rights arising from unemployment, then the interpretation is made that for this volunteer no social insurance should be paid, for the time when he works as a volunteer. However, Article 22 adds to the confusion when it provides for contributions, insurance, etc., to be made for the Volunteer (see below). In relation to Article 22, this article is not clear on what is the coverage the Volunteer Provider should provide to the relevant Volunteers. First, no distinction is made between the payment of contributions and insurance (ie through a policy) and, second, if the payment of contributions is intended, it is not clarified which contributions should be paid taking into account Article 14 of Law 7703, dated 11.05.1993 "On social insurance in the Republic of Albania", amended:

Distribution of contributions

1. Contributions paid in respect of employed persons shall be distributed among three branches, which administer the social insurance fund:
 - a) sickness insurance branch, 1.5% of payroll,
 - b) maternity insurance branch, 2.8% of payroll,
 - c) pensions insurance branch, 31.7% of payroll.
2. The employer shall moreover pay to the:
 - a) employment accidents/occupational diseases insurance branch 0.5% of payroll,
 - b) unemployment insurance branch 6.0 % of the payroll.
3. SII shall differentiate the contribution rate concerning accidents insurance, in conformity with level of life danger, several branches of economy represent.

Furthermore, Article 16 (2) of Law 45/2016 provides that the use of a voluntary contract to cover an employment relationship is a condition of absolute invalidity. This is because there is an essential division between these two relationships. This provision is unclear and gives discretion to the relevant bodies as the latter may declare a volunteering contract invalid and qualify it as an employment or service contract and, on this basis, impose penalties on the Volunteering Provider, etc. The above provision should be removed from Law 45/2016 as long as the conditions of invalidity of contracts are ascertained and declared according to the conditions and provisions in the relevant codes of the Republic of Albania.

Obligations of the Volunteer Provider towards the Obligations of the Employer or the

Buyer of Service

From the analysis of the provisions that define the rights of the volunteer (Article 19) and the obligations of the volunteer provider (Article 21) it results that, in no case is the obligation of the Volunteer Provider to pay the social insurance in favor of the Volunteer. This because, if the latter is employed, the insurance is paid within the employment relationship and, if he is unemployed, the insurance rights are covered according to Law 7703/1993. The only insurance that is paid in favor of the volunteer is the health insurance for the volunteer according to Article 22 of Law 45/2016 (to insure the Volunteer from accidents and diseases; then, it is written that the Volunteer Provider must give the Volunteer a copy of the contract health and accident insurance). This provision it is not clear in determining what coverage the Volunteer Provider should provide for Volunteers. Furthermore, in the Article 9 of the Law 7703/1993 is provided that “Employed persons and their employers shall be liable to pay contributions in respect of sickness, maternity and pensions of an amount depending on their total wage (gross). The contribution cannot be awarded under a minimum and over a maximum monthly wage. The employers shall pay contributions in respect of employment accidents & occupational diseases and unemployment. Economically active persons shall be liable to pay monthly contributions in respect of maternity and pensions at a flat-rate level. Unpaid family workers who work and cohabit with the self-employed shall pay maternity and pension contributions on the basis of the national minimum wage. The self-employed persons in agriculture shall be liable to pay contributions in respect of maternity and pensions. The amounts and criteria are to be determined by Council of Ministers. The state shall pay contributions in respect of citizens, performing their compulsory military service as well as for all categories of persons determined by laws and decisions of the Council of Ministers, depending on their economic activity prior to such a service.”

Based on the above, even in view of Article 9 of Law 7703/1993, it turns out that the legal relationship of volunteerism is not an employment relationship and in no case replaces the effects of the latter in relation to the social benefits of the volunteer. Under these conditions, it is not subject to the obligation/ liabilities to pay social insurance in favor of the volunteer, nor other obligations of a fiscal nature. If such a scheme were applied, it would not only go beyond the framework of volunteering, but would transform the legal relationship of volunteering into a legal situation with elements of absolute invalidity. In such circumstances, the Volunteer Provider is not obliged/ liable to pay social insurance contributions in favor of the Volunteer as long as the legal relationship of volunteering is not defined in the purpose of Article 9 of Law 7703/1993.

In relation to this point it is also important to clarify that, from a strictly legal point of view, an organization cannot contract a service contract with an individual who does not have a commercial registration. Under these conditions, no analogy can be made with the service relationship for the volunteer relationship.

Legal Entities as Volunteer Providers

Point 2 of Article 9 of Law 45/2016 stipulates that the volunteering service can be provided by legal entities, including companies, but that does not aim at profitable activities through the

provision of volunteering.

Of course, companies are also contributors to the public interest, but in the classical form the for-profit entities can contribute to the public interest through donations, etc. The provision of volunteerism by companies must be accompanied by relevant bylaws to define the boundary between for-profit and non-profit activity when for-profit entities appear as Volunteer Providers. Law 45/2016 has not explicitly provided a space for the above clarification to be done by bylaws.

The ambiguity in what has been written above, indirectly brings difficulties for the exercise of volunteerism by NPOs, which may be prejudiced by analogy with companies by the relevant bodies and be subject to obligations and penalties (see below in the section 'Conclusions' regarding penalties).

Conclusions

1. The law makes efforts to regulate engagement as a volunteer, while this engagement is by free will and must be by free will¹ and voluntarism is expressed whenever a person thinks that can contribute for the good and interest of the public.
2. Maintaining the Register of Volunteers (database) according to the provisions of Law no. 45/2016 has no added value and is not an effective mean to motivate volunteering in Albania. The law does not specify the purpose of maintaining the Register of Volunteers. This purpose should be explicitly defined in law and the Register should be used only for the purpose of evaluating the voluntary work of the respective individuals, thus being in line with the purpose of Law no. 45/2016 set out in Article 2 thereof.
3. The function of the Register of Volunteers should not serve as a means of evidence and source of evidence to charge financial and fiscal obligations, contributions, etc., the Volunteer Provider organizations. The law should be clear in this regard.
4. Law 45/2016 aims to distinguish volunteering from the employment and service relationship, but the relevant provisions are not clear and it is not possible to identify what special legal or contractual relationship is established between the Volunteer and the Volunteering Provider. However, no analogy can be made between the volunteer relationship and the employment and service relationship, to legitimize the burden of the volunteer relationship with financial, fiscal obligations, etc.
5. Law 45/2016 does not clarify the relationship that is built between the Volunteer and the Volunteer Provider. The law should aim to build a relationship where the volunteer is free to contribute and not do 'forced labor' as defined by the European Convention on Human Rights and Jurisprudence², or the relevant ILO Conventions and organizations volunteer provider to act in accordance with the object of activity for which it was created and to maximize the benefit for the public interest from the voluntary work of individuals.
6. As long as Law 45/2016 explicitly states that the Volunteer does not lose the rights arising from unemployment, then the interpretation is made that for this volunteer no social insurance

¹ The instruments of the International Labor Organization in relation to forced labor are: a) Convention no. 29 "Over forced" of 1930; b) Convention no. 105 "On the prohibition of forced labor", in 1957.

² Van der Musselle v. Belgium

should be paid, for the time when he works as a volunteer. Article 22 adds to the confusion when it provides for contributions, insurance, etc., to be made for the Volunteer (see below).

7. Law 45/2016 when provides for the insurance of volunteers, it is not clear whether the Volunteer Provider must pay social and health insurance contributions, whether it should be limited to insurance for protection from accidents at work, etc., or should pay an insurance policy for life insurance, etc. With regard to accident insurance at work, life insurance, etc., Article 22 is not clear what kind of coverage the Volunteer Provider should provide for the relevant volunteers. The relevant obligation of the Volunteer Provider should be explicitly written in law, to avoid any kind of misinterpretation, and in accordance with the principle of legal certainty, as an important part of the constitutional principle of the rule of law.

8. Article 16 (2) is unclear and gives discretion to the relevant bodies as the latter may declare a volunteering contract invalid and qualify it as an employment or service contract and, on this basis, impose penalties on the Volunteering Provider, etc. This provision should be removed from Law 45/2016.

9. The provision of volunteerism by companies should be accompanied by relevant bylaws to determine the boundary between for-profit and non-profit activity when for-profit entities appear as Volunteer Providers. Law 45/2016 has not explicitly provided a space for the above clarification to be done by bylaws.

10. The law does not stipulate expressed penalties and does not refer to any specific law to enable the legitimacy of imposing penalties on a Volunteer Provider, Volunteer or Volunteer Recipient. In these circumstances, any legal qualification by the Labor Inspectorate, tax authorities, of violations related to volunteering, is unfounded in law and should be opposed with appropriate legal remedies depending on the qualification that can be done in the administrative acts to be issued by these bodies when penalizing certain subjects.

11. The law should provide flexibility for cases of mass volunteering, such as: cleansing campaigns, assistance in cases of force majeure circumstances, etc. In these cases, the organizations should only have the obligation to keep records of volunteers, but this should not be accompanied by any financial obligation, etc., for the volunteers themselves or the Volunteer Provider organizations.

Recommendations:

1. We recommend that the General Director of Taxes to issue a Technical Decision with the official –position- statement of the tax administration, pursuant to tax legislation, for specific circumstances of the taxpayer related to the effects of Law 45/2016 "On volunteering", above all, in regard to the Obligations of Volunteer Providers for the insurance of relevant volunteers. Also, in this technical decision to be clarified the nature of the formal relationship established by contract between the Volunteer and the Volunteer Provider, in cases where the relationship is stable.

2. In order for Law 45/2016 to effectively promote volunteerism, this law must be submitted to amends, which focus on the following points:

(i) Enable mass volunteering without formal barriers and financial obligations for Volunteers and Volunteering Providers.

(ii) Regulation of volunteerism by law is to avoid regulating of volunteers in the frame that

they must be registered in order to provide volunteering.

(iii) The legal regulation of volunteerism and, in particular, the use of the Register of Volunteers should be done in order to evaluate the contribution of volunteers in society and to avoid the potential misuse of the information of the Register for financial, fiscal, etc. burdens, for Volunteers and Volunteer Provider organizations. The law should clearly and explicitly define the purpose and function of the Register.

(iv) To clarify the nature of the legal and contractual relationship between the Volunteer and the Volunteer Provider, with the aim of clarifying, above all, the relevant tax obligations, contributions, etc., and legal evasions from these obligations. The volunteer relationship can be neither an employment relationship nor a service relationship.

(v) The provision of Article 16 (2) should be removed from Law 45/2016. The conditions of invalidity of contracts are ascertained and declared according to the conditions and provisions in the Civil Code of the Republic of Albania.

(vi) The nature and type of insurance for Volunteers under Article 22 should also be clarified in order to pave the way for the proper implementation of the law by all stakeholders (so that the clarification does not remain merely explained by a technical decision of GDT - see recommendation 1 above). Volunteer insurance in the social security scheme from accidents at work and for old age pension seems appropriate in the voluntary relationship; this insurance can be provided by the state.

(vii) Without opposing to point (vi) above, judging by the purpose of Law no. 45/2016³ on the support and promotion of volunteerism, it is recommended that the law provide for effective support for Volunteers; through support schemes, the state should become the bearer/provider of social insurance, health, etc. obligations for Volunteers for the time and effort that Volunteers dedicate to the public interest, and to avoid this burden passing to Volunteer Providers, except when The Volunteer Provider is a public body.

(viii) Law 45/2016 should provide clarity for the provision of volunteerism by companies and explicitly provide that details of further clarification of the provision of volunteerism by companies be made by sub-legal act.

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³ Article 2 of Law no.45 / 2016

