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Transparency Serbia comments related to ODIHR 2020 recommendations and announced legislative changes (campaign finance and public officials' campaigning)

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On November 25th, a public debate was announced for the Draft Law on Financing Political Activities (the debate was announced as if it were of passing a new law, although in essence these are only changes to the existing law). Similarly, public debate is opened for several other election related laws, while one act is already proposed by the Government (amendments to the Law on electronic media).

Transparency Serbia gave brief comments on ODIHR Special Election Assessment Mission Final Report, specifically on Chapter IX, which dealt with campaign finance. In these comments we referred to some other shortcomings that the law contains (or does not contain), but also suggested some of the possible solutions to improve the situation in this particular area. The ODIHR findings are presented below, followed by TS comments.

CAMPAIGN ENVIRONMENT

Authorities should undertake measures to prevent misuse of office and state resources. The monitoring of compliance should be effective, and sanctions imposed should be proportionate and dissuasive.

Transparency Serbia points out that the proposed amendments to the Law on Electronic Media and the Law on Prevention of Corruption, although useful, do not solve the problem of intensive "functionary campaign", which is much more represented in the media than presenting election participants programs and paid advertising.

According to the Government's proposal, the electronic media, in the ten days before the elections, will not be able to report on official public gatherings where infrastructure and other facilities are opened or mark the beginning of construction of such facilities, "if public officials who are candidates for President, people's deputies, deputies in the assemblies of the autonomous province and councillors in the assembly of the local self-government unit take part in those gatherings". As the TS pointed out in a commentary on the Agreement on Improving Electoral Conditions, this ban is insufficient for the following reasons: 1) The agreement and the draft law do not cover the print media; 2) the ban is valid only in the last 10 days, and not during the entire election campaign; 3) the ban is related exclusively to public gatherings where infrastructure and other facilities are opened (roads, bridges, schools, hospitals, factories, etc.), or marks the beginning of construction of such facilities, and will not apply, for example, when public officials during the campaigns visit works that have already started and not been completed, even when they visit already existing public and private facilities; 4) the ban does not apply to all public officials, but only to those who are candidates in the elections. Instead, in this way, current public officials who are "seen" for the position of future prime minister or minister, and are not candidates for deputies, will be able to promote themselves and their electoral list. We especially emphasize that this norm was not part of the draft amendments to the law that were presented for public discussion.

The provision of the Law on Prevention of Corruption, which refers to the separation of public from political function, is also changing, but to a very limited extent, and the public debate is still ongoing. Thus, this Law will undergo the fourth change in 30 months. Based on these changes, an obligation will finally be introduced for the President of the Republic to always and unequivocally present to his interlocutors and the public whether he states the position of the state body or political

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party he heads. However, the draft does not provide for the establishment of the same obligation for the presidents of assemblies and parliamentary working bodies, which is also necessary.

Although useful, these amendments to Article 50 of the Law on Prevention of Corruption are far from sufficient to address the problem of an intensive "functionary campaign". To solve this problem, it is necessary to establish rules on the basis of which the promotional activities of public officials in the pre-election period would be reduced to the necessary minimum, i.e., only to situations when it comes to urgent activities that only these officials can perform to meet legal obligations or maintaining international relations. This certainly does not include visits to schools, hospitals, social centres, factories, construction sites and the like. In addition, it is necessary to expand the notion of public resources whose use is prohibited for the purposes of political promotion, to include not only existing public property, but also the waiver of future public revenues and budget commitments (e.g., emergency social assistance, debt forgiveness). utilities and the like). The Coalition prEUgovor, of which Transparency Serbia is a member, pointed out the shortcomings and sent proposals for improving this norm, as a contribution to the public debate on the Draft Law on Amendments to the Law on Prevention of Corruption, which lasts until December 13, 2021.

There were no other efforts to improve legal environment when it comes to the abusing of public resources. Findings of Transparency Serbia monitoring and recommendations are presented in other documents delivered to ODIHR.

CAMPAIGN FINANCE

Campaign finance is regulated by the LFPA, the ACA law, the election law and the ACA rulebook. Key prior recommendations by ODIHR and the Council of Europe's Group of States Against Corruption (GRECO) on campaign finance remain unaddressed, including introducing lower donation limits; an expenditure ceiling; financial reporting and disclosure prior to election day; as well as proportionate and dissuasive sanctions. Overall, the current regulatory framework, as implemented, does not ensure transparency, integrity and accountability of campaign finances.

To enhance the transparency of campaign finances, previous ODIHR and GRECO recommendations should be addressed, including lowering donation limits, and introducing requirements to submit and publish financial reports prior to election day.

TS brief comments:

Lowering donation limits would not bring substantial improvements for transparency of campaign finance. As it may be seen from all campaign finance reports, reported donations of high value (close to the current threshold) do not constitute significant source of reported income of campaign.

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What is problematic in the Law, when it comes to the donations, is the fact that there is no limit for donations of several related persons (e.g., several legal entities established by the same person). Furthermore, the problem in the Law is the fact that there is only an absolute limit of contributions' value, but not the one that would be relative to the total value of election campaign. For example, the current threshold of legal entities' donations, that is close to 100.000 EUR, would affect quite differently political party that invested in the campaign 5 million EUR in total and the one whose campaign value is 150.000 EUR only. Finally, the limit is the same for any natural person (including presidential candidates themselves). It would make sense to enable individuals running campaigns to support such campaigns to greater extent (if they have evidence of legitimate property / income when doing this).

What the problem in reality is, is that donations are allegedly paid by individuals to the party (e.g., thousands of equal donations paid to SNS in earlier elections), whereas their income data do not support probability that it was their own money. However, it is rather issue of oversight than the problem of legislation (it is already criminal offence to forge data on income sources).

When it comes to the submission/ publishing of campaign finance reports prior to the election date, TS fully support the idea. However, there are several important issues here:

Serbian law already provides for duty to collect all campaign income to the special bank account and to pay all campaign expenditures from that bank account. It would be therefore advisable to make exactly that bank account info transparent (i.e., not to create special reports). The provision of that kind already exists e.g., in Czech Republic ("transparent accounts"). Otherwise, political subjects in Republic of Serbia may publish on daily basis extracts from their special bank accounts (they receive such reports in e-banking system on daily basis for previous days' transactions).

However, even that would not solve the problem of transparency. Namely, due to the system of campaign financing in Serbia, the majority of public funds is distributed based on election results (80% on parliamentary elections, or 70% after announced changes, 50% on presidential). Since the budget in total constituted 60% of total reported income on last parliamentary elections, it means that at least 48% of total expenditures were paid *after elections.* In practice, the total amount of expenditures paid after elections is probably much higher (no such data is available), as there is no restriction in the Law on paying expenditure costs after election date but before submission of the report, 30 days after elections (it exists only implicitly when it comes to paying such expenditures after submission of campaign expenditure reports). In order to ensure transparency during the campaign, another type of reporting would be needed: parties, coalitions and citizens' groups should collect records of all *committed expenditures,* but not paid during the campaign. For example, they have contracts for TV and billboard advertisements, so they can collect and publish information on total value of such costs, even if not being paid before the election date.

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Draft of the new LFPA (article 29), currently on public debate, will introduce duty for parties and other election participants to submit "preliminary report", with status of expenditures 15 days before elections. Expected effects of this new duty for transparency will be negligible, for the reasons stated before.

A. INCOME AND EXPENDITURE

Political parties represented in parliament receive annual public funding.[1] Additional public funding totalling RSD 745 million (around EUR 6.34 million) was allocated for election campaigns to contestants, provided that they had paid an electoral bond prescribed by law.[2] Of this amount, 20 per cent was allocated as an advance payment, equally to all contestants, prior to election day. While 20of the 21 contestants applied for the advance payment, it was allocated only to the 18 contestants who had paid the electoral bond, in line with the law. Each contestant received RSD 7.45 million (around EUR 63,400). The remaining 80 per cent (SRD 610 million; around EUR 5.19 million) has to be allocated within five days after the proclamation of the final election results proportionally to the number of seats won. Contestants who fail to obtain one per cent of votes cast (0.2 per cent for minority lists) must refund the advance payment.

Contestants may also receive funding from private sources, as well as loans. An individual may donate up to approximately RSD 1.1 million (EUR 9,350) annually, whereas a legal entity may donateup to RSD 11 million (EUR 93,500); these limits are doubled in an election year.[3] Donation limits remain high and allow for undue impact of financial interests on political agendas. Notwithstanding,in past elections parties indicated that only some three per cent of their income originated from private sources.[4] The law prescribes bans on income from certain sources, including companies with public procurement contracts. However, there is no effective mechanism for verifying compliance with these bans due to limited powers of the ACA.[5] The use of candidates' own funds and third-party campaigning are not regulated by law, allowing for possible circumvention of the rules.

A party may have more than one bank account but linked with the same tax identification number. However, contestants must open and use only one bank account dedicated to campaign income and expenditure. For these elections, all donations over RSD 54,571 (EUR 464) had to be received bybank transfer, whereas donations below this amount could be received in cash but had

[1] In 2019, the total annual party funding was some RSD 1,035 billion (some EUR 8.8 million).
[2] A contestant wishing to use public funds for campaigning must deposit a bond of the same amount with the Ministry of Finance. Contestants who fail to obtain one per cent of votes cast (or 0.2 per cent for minority lists) must refund the advance payment.
[3] The annual donation limit is 20 and 200 average monthly salaries for individuals and for legal entities, respectively (40 and 400 average monthly salaries in an election year). The net average salary in May 2020 amounted to RSD 54,571 (approximately EUR 464).
[4] For instance, according to research by Transparency Serbia, for the 2016 parliamentary elections, political parties reported that only 3 per cent of their income came from individuals, and 0 per cent from legal entities.
[5] Paragraphs 220 of the 2010 ODIHR and Venice Commission Guidelines on Political Party Regulation refer to good practice that "legislation should grant regulatory agencies the ability to investigate and pursue potential violations".

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to be deposited to the campaign account within five days of receipt. Donations exceeding the limit or from impermissible sources have to be returned by the beneficiary party to the donor or transferred by the beneficiary to the state budget if the donor is anonymous. In addition, contestants may transfer funds from their regular party accounts to their campaign fund, without revealing the origins of such fundsin their campaign finance reports. Contrary to prior ODIHR and GRECO recommendations, there is no campaign spending limit. This undermines the equality of opportunity of contestants and allows foroverspending, which may potentially have an undue impact on the will of voters. Moreover, there is no legal requirement for imprints on print or electronic campaign materials, which does not allow for traceability of expenditures and for identification of unreported expenditures.

Consideration could be given to introducing a legal requirement for imprints on all print and digital campaign materials, as well as sanctions for non-compliance and effective enforcement, including confiscation of campaign materials without imprints.

TS comment:

This recommendation is very good and related to another problem that Serbian law does not address – third party campaigning. For example, imprints on campaign material would make clear who paid for some campaign. However, there is no clear restriction in the law for third parties to run their own campaigns that may effectively have either positive or negative influence to the campaign of political subject. If someone is running such campaign of its own, there is no legal requirement to be registered, nor to submit financial report. In practice, on last elections Regulatory body for electronic media banned some adds on last elections (promoting boycott of elections), but there was no legal ground for such decision, as there is no rule prohibiting advertisements of third parties.

Furthermore, "confiscation" may work with leaflets and similar material, but not with adds promoted on social networks and a like.

Draft of the new LFPA, in Article 23 provides for duty to "political subjects" to provide information on material distributed by them for the purpose of campaign (service provider). However, there is no clear duty to ensure naming of the political subject as well nor specific campaign that material relates to (i.e., Presidential, parliamentary, city of Belgrade elections). Furthermore, this new legal duty does not affect distribution of advertising material on-line, through social media, nor distribution of such material by other legal and natural persons.

B. REPORTING AND DISCLOSURE

Contestants are required to submit financial reports to the ACA annually and within 30 days after the final elections results have been established; however, no financial reporting is required

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beforeelection day. Moreover, there is no legal deadline by which the ACA must publish these financial reports. The ACA only publishes campaign-finance reports months after an election, accompanied by conclusions, which are not mandatory by law. These shortcomings limit transparency and are at odds with international commitments.[6]

To enhance transparency, the law could be amended to require reporting and disclosure of campaign income and expenditure prior to election day. Consideration could be given to making the ACA conclusions mandatory and to publish them at a later stage.

TS Comments:

When it comes to the submission/ publishing of campaign finance reports prior to the election date, an amendment is envisaged that obliges the political entity participating in the election campaign to submit to the Agency a preliminary report on the expenses of the election campaign up to seven days before the day of voting. The preliminary report on the expenses of the election campaign shall be published on the website of the Agency within three days from the day of receipt of the duly submitted report. This change is certainly a useful novelty that we support, but the effects will be negligible for the reasons stated above. The effects could be slightly better in case that it is mandatory to incorporate committed (but not paid yet) expenditures. This will be defined by the act of Agency's director.

When it comes to ACAS "conclusions" the recommendation is not very clear. It seems that recommendation urge to address the problem that TS identified in the practice – absence of duty in the Law for Agency to conduct its control of campaign finance reports within some deadline, absence of description what the control should incorporate, absence of duty to initiate sanctioning actions when wrongdoing is identified within the clear legal deadline, absence of duty to inform public about all initiated procedures against parties and about imposed measures when parties are punished, absence of duty to publish information about Agency's own monitoring and additional information collected during the control etc. So, the only way to resolve the problem would require extensive elaboration in the Law.

As an illustration, we are providing analyses of the latest control process of the Agency, along with the list of potential wrongdoings, identified by TS, that Agency failed to address (in Serbian only):
https://transparentnost.org.rs/images/publikacije/KONTROLA%20FINANSIRANNJA%20IZBORNE%20KAMPANJE%202020.pdf

[6] Article 7.3 of the 2003 United Nations Convention against Corruption provides that states should "consider taking appropriate legislative and administrative measures […] to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties."

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The newly proposed Article 33 of LFPA envisages duty of Agency to prepare its control plan for campaign finance reports and to publish it five days after the elections are announced. The plan's changes should be also published within the 3 days' deadline. Agency will also have to publish the report on conducted control within the 120 days deadline.

While useful, these changes are insufficient to resolve problems:

1) The scope of control (mandatory elements) is not defined by the Law, but left for Agency to decide on ad hoc basis (in the plan for each election);
2) The content of the report (mandatory elements) is not defined;
3) Elements of the control plan are not defined;
4) There is no duty to publish information collected by the Agency in their process of election monitoring;
5) There are no deadlines to initiate sanctioning procedure upon finding that the law was violated;
6) There is no duty for election participants to submit corrected report, based on Agency's findings during the control process;
7) There is no duty for Agency to prepare and publish follow-up reports, in case that some facts are established after publishing the initial one.

C. OVERSIGHT AND SANCTIONS

The ACA is mandated with the oversight of political finance and misuse of state resources. For these elections, it deployed 120 observers across the country to collect data on campaign materials, campaign events and campaigning in the media. The ACA monitors compliance with the regulations only after receiving the financial reports of the contestants, after the elections. It informed the ODIHRSEAM that it plans to cross-check these reports against the reports of ACA observers to identify potential irregularities. The ACA may also request access to the bookkeeping records of the partiesand information from banks and other institutions, but it is not obliged to do so.

Consideration could be given to introducing mechanisms for effective oversight, including mandatory receipt of bank statements that would enable the verification of the accuracy of contestants' campaignfinance reports.

TS Comments:

It is not clear what this recommendation refers to. Agency already may request all data needed from banks. It would make sense only to make such requests mandatory for the Agency.

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The ACA can issue warnings and initiate misdemeanour or criminal proceedings for possible violations. However, the sanctions prescribed by law are not graduated and allow for inconsistent implementation.[7] The ACA rejected as unsubstantiated most of the 25 complaints received on misuseof state resources and campaign finance irregularities. The ACA issued warnings in four cases.[8]

The law should prescribe a graduated system of proportionate and dissuasive sanctions, and irregularities should be sanctioned.

TS comments:

The system for sanctions in the Law could be improved significantly. The main problem when it comes to the Law relates to the Criminal offence. Criminal Offence Law, in Article 38 provides for the criminal offence for some types of wrongdoing. Interestingly, the criminal offence has no title, which is a unique example in Serbian legal practice. Also, there are at least two different criminal offences within this one. First, whoever gives, and/or provides for and on behalf of the political entity, funds for financing of the political entity contrary to the provisions of LFPA with intent to conceal the source of financing or amount of collected funds of the political entity, shall be punished with imprisonment from three months to three years. If the offence involved giving or receiving more than one million and five hundred thousand dinars, the imprisonment may be between six months and five years. Illegal funds shall be confiscated. Second type of illegal action performs the one who commits violence or threatens violence, places in disadvantageous position or denies a right or interest based on law to a natural person or legal entity based on giving donation to a political entity. Such crime may be punished by imprisonment of three months to three years. Transparency Serbia proposed amendments to this article soon after the law was adopted. As elaborated in these proposals, the amendments and formulation of two criminal offences are necessary to include this offense in the Criminal Code and to correct existing problematic provisions. Current provision sanctions any person who, in the name and for the account of the political entity, obtains funds for financing political entity, contrary to the provisions of the law and in order to disguise the source of funding or the amount of funds collected for the political entity. The disadvantage of this legislative solution is that the precisely defined intention is stipulated as a condition of criminal responsibility. The intention that can be expected to exist in

[7] For instance, the fine for a party receiving income from impermissible sources, misusing state resources, using multiple bank accounts, failing to submit or publish financial reports or to publish donations ranges from RSD 200,000 to RSD 2 million (around EUR 17,000 to 170,000), which is significantly lower than the limit of a single donation. At the same time, a party may be deprived of the annual public funding for the same irregularities. Paragraphs 224-225 of the 2010 ODIHR and Venice Commission Guidelines on Political Party Regulation underline that sanctions against political parties found in violation of the law must at all times be objective, enforceable, effective and proportionate.

[8] Two warnings were issued to the SNS, for an election campaign video broadcast on the official SNS YouTube channel on 10 June, which showed a statement by an employee wearing a uniform of the public electricity company, and a second video featuring a statement by a doctor at a public health institution; one warning to the SPS for an election campaign video recorded in the premises of water supply and heating plants; and one warning to "For a Better Serbia" for an election campaign event held at a primary school in Topola municipality.

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illegal allocation of benefits is in fact quite different from the one that is incriminated - in case of donors, it is to exercise some influence on decision-making by means of a political entity to whom they give a contribution, and in case of a political entity, it is to raise the funds needed to carry out his activities. In both cases, the concealment of the source and amount of funding is just a way or means to obtain donations (e.g., because a certain person is not allowed to make contributions according to the Law or because he may not give more than the legal limit). Another type of criminal activity currently prescribes sanction for the person that commits violence or threatens with violence, put at a disadvantage or denies a right and legitimate interest to a person or a legal body and due to the fact that he contributed to a political entity. This solution is flawed because it stipulates the punishment of only those persons who discriminate or threaten the suppliers of benefits. However, the same situation may apply to any person who did not give favour to a political entity, but there is only a conviction about it by the perpetrator of the crime. Also, the providers of services to political entities may be endangered the same as the providers of donations.

Transparency Serbia also stressed the need to improve legal environment for ensuring criminal liability. Namely, as explained in details here: https://transparentnost.org.rs/images/dokumenti_uz_vesti/Grand_Corruption_and_Tailor-made_Laws_in_Serbia.pdf current legal and institutional framework for suppression of corruption, does not envisage competence of special prosecutorial units in charge for corruptive offences when it comes to the illegal party and campaign funding. Consequently, it wouldn't be possible to use special investigative techniques when investigating this type of crime.

The newly proposed Article 40 of LFPA does not envisage changes of criminal offence definition, nor punishments.

A political party shall be fined from 200,000 to 2,000,000 RSD (app. 1700 to 17.000 EUR) for 19 types of misdemeanours listed in the article 42. **However, some of prohibited actions of political parties are omitted. Furthermore, there is no such liability when it comes to the "citizens' group", but only political parties as only one type of political entities.** There is another fine, for the responsible person of a political party, but also of any other political entity (from 50,000 to 150,000 RSD, i.e. 400 to 1.200 EUR). Funds obtained through commission of misdemeanours shall be confiscated. Separate Article (40) regulates misdemeanours by donors. A legal entity shall be fined with 200,000 to 2,000,000 RSD for three types of wrongdoing and their responsible persons shall also be fined with 50,000 to 150,000 RSD. If there is wrongdoing of an entrepreneur, the fine would be between 100,000 to 500,000 RSD. Finally, any other natural person shall be fined with 50,000 to 150,000 RSD. Illegal funds also have to be confiscated. Misdemeanours from this law have longer statute of limitation than the most of other petty offences. It is as much as five years, while the ordinary deadline is one year only.

Newly proposed articles 41 and 42 of LFPA do address some of above-mentioned weaknesses, i.e., by prescribing misdemeanours in some cases where it was previously omitted. Still, there are no changes when it comes to the liability of "citizens' groups".

The main **problem is however implementation, that ODIHR rightfully stressed in its recommendations.** Even information about number of such cases is scarce. Agency do not regularly publish information about all criminal charges / misdemeanour procedures they initiated. Some information is published, but no one could claim that all cases are covered. Furthermore,

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from Agency's reports and statements it is not always visible which offences were identified by which political subject. Misdemeanour courts do not publish information about punished political parties either (individually), but only aggregate statistical data for previous year (if anything, e.g., there is no such report available for 2020). Public prosecution publishes only aggregate data annually as well, so it is not visible who was prosecuted in individual cases. Agency do not publish pro-actively information on political subjects where measures of denial of public funds is imposed. Even when one obtains such a list (e.g., through free access to information requests) it wouldn't be possible to draw conclusion on whether Agency imposed such measures in all cases where it should and whether Agency applied same principles when imposing such measures. Furthermore, as it may be concluded, among other from Transparency Serbia's monitoring of campaign finance and analyses of campaign finance reports, Agency fails to investigate and address all instances of possible wrongdoings (e.g. the fact that some political subjects called citizens during the campaign, but reported no costs of communication; the fact that some political subjects had adds on social networks, but failed to report such costs; suspicion that political subject inflated certain costs in order not to repay received subsidies to the budget etc.)

Additional penalty for the violation of this law is "loss of right for public resources" (LFPA, Article 42). Such measure should follow conviction for a criminal offence or misdemeanour. The political party will lose the right to funds from public sources dedicated for financing of the political entity in the amount that may not be less than the amount of funds acquired through commission of a criminal offence or misdemeanour, and not less than 10% of the amount of funds from public sources allocated for financing political entity operation for the coming calendar year. The amount of funds is determined pro rata to pronounce punishment for criminal offence or misdemeanour, and decision is issued by the Agency. While criminal or misdemeanour procedure is ongoing, budget funds may be temporary suspended, based on Agency's request. The suspension decision may be challenged before the Administrative Court, which has to issue decision within the 30 days.

New article 45 of LFPA does not bring any changes in that regards. In practice, Agency is not publishing information about political subjects that are punished in that way, and there is no duty in the LFPA to do so.