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Proposal for the panel discussion: Four current topics of election campaign financing in Serbia and the experience of the Czech Republic

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Introduction

Transparency Serbia has been monitoring the financing of political parties and election campaigns in Serbia since the adoption of the Law on Financing of Parties from 2003 and the actions of state bodies responsible for controlling the financing of election campaigns. The central part of the monitoring is the independent collection of data on the most important costs of the election campaign and comparison with the data reported in the reports. In this way, we monitored the elections held in 2004, 2007, 2008, 2012, 2014, 2017, 2018 and 2020. During the last year, together with colleagues from Transparency International in the Czech Republic, we surveyed the transparency of election campaign financing.[1]

As for the financing of political parties and election campaigns, significant problems were identified as early as 2013 in the National Anti-Corruption Strategy. The Action plan for Chapter 23 of Serbia's EU Accession Negotiation from 2016 took over, with modifications, part of these measures. However, these plans were not fulfilled within the set deadlines or later. The current revised Action Plan for Chapter 23[2] envisages that the Law on Financing Political Activities will be amended in the last quarter of 2020. In addition to the fact that these planning documents were not implemented, the problem is that they do not identify all of the issues in this area that are reasons for a change to the law or practice, but only some (insufficiently precisely set duties of state bodies and insufficient transparency of data), Also, the planning documents do not have sufficiently precise indicators to assess performance.

The dialogue on election conditions 2019/2020 resulted in amendments to four laws, including the Law on Financing Political Activities. These changes were very limited in scope so that critical law's shortcomings were not eliminated. The Government of Serbia missed the opportunity to request the opinion of the ODIHR before the amendments, as TS proposed. The result was the following conclusion TS made after the elections: *Earlier critical recommendations of the ODIHR and the Council of Europe Group of States against Corruption (GRECO) on campaign finance remained not considered, including the recommendation to reduce the limit for grants[3]; introduction of a ceiling on costs; financial reporting and publication of data before election day; as well as sanctioning according to the principle of proportionality with the effect of deterring from repeating the sanctioned action. In general, the current regulatory framework, as applied, does not provide transparency, integrity and accountability for campaign finance.*

Transparency Serbia has also concluded in its monitoring reports[4] that changes in regulations have not led to solutions to previously known problems. The only move is that the Agency for the Prevention of Corruption during the campaign considered the reported suspicions of violating the rules in a short time. In early June 2021, it was announced[5] that a Government Working Group had submitted to the ODIHR draft amendments to the law. Although there is a legal obligation, the draft has not been presented for public discussion.

[1] https://www.transparentnost.org.rs/index.php/sr/projekti/189-transparentnost-finansiranja-izborne-kampanje
[2] https://www.mpravde.gov.rs/files/Revidirani%20AP23%202207.pdf
[3] In the Serbian version of the report, it was mistranslated as "introduction of a lower limit for donations".
[4] https://www.transparentnost.org.rs/images/publikacije/KONTROLA%20FINANSIRANNJA%20IZBORNE%20KAMPANJE%202020.pdf
https://www.transparentnost.org.rs/images/publikacije/Transparentnost%20finansiranja%20kampanje.pdf
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https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Funkcionerska_kampanja_2020_jun_2020_-_konacni_izvestaj.pdf
[5] https://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/pod-lupom/12006-izmena-pravila-o-finansiranju-kampanje-bez-javne- rasprave

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Transparency of campaign finance data while it lasts

The Law on the Financing of Political Activities provides the public with only some information on the election campaign financing before election day. As a result, citizens interested in campaign costs and financial sources are deprived of the opportunity to obtain this data before deciding when to support the elections.

Based on the existing legal solutions, the public has insight only into the following: 1. How many funds will be allocated from the budgets of the Republic of Serbia, AP Vojvodina, city or municipality (after determining the final electoral list, it can be calculated how much money each political entity will receive bail); 2. Who gave to a political subject contributions more valuable than the average monthly salary in the Republic. Based on these provisions, during the campaign for the June parliamentary elections, voters were aware of the sources of income for only about 12% of the costs that parties, coalitions and citizen groups later reported in their financial statements. That 12% refers to budget grants distributed before the elections, while the number of major contributions published was negligible.

The current law does not oblige election participants to publish any information about expenses during the campaign. Moreover, there is no obligation to present an outline campaign plan, and in practice, only one electoral list has published (and partially adhered to) it.

Following the previous parliamentary elections, the ODIHR recommended, inter alia[6], the following:

5. To increase transparency, the law could be amended to prescribe the obligation to report and disclose election campaign revenues and expenditures before election day…

18. To increase the transparency of campaign financing, attention should be paid to the previous recommendations of the ODIHR and GRECO, including ... the introduction of the obligation to submit and publish financial reports before election day.

The Government's Working group for cooperation with the ODIHR stated that "the implementation of recommendations that would lead to changes in that law (Law on Financing of Political Activities) would not be expedient and would not contribute to more transparent control of financing of political activities".[7] Such an opinion is explained by the fact that reports on the campaign expenses are published after the elections since if published earlier, they would be incomplete, etc.

Transparency Serbia agrees with the Working group's view that submitting periodic reports would be impractical. However, we believe that the existing situation should not continue and that the recommendation should be implemented another way. Publicity of campaign financing data during the campaign should be ensured by publishing data on revenues and expenditures (from a special campaign financing account) and records of commitments made during the campaign, which will be paid after the election.

[6] https://www.osce.org/files/f/documents/6/e/467232.pdf

[7] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Komentari_i_predlozi_u_vezi_sa_ODIHR_preporukama_-_mart_2021.pdf

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The introduction of the obligation to publish information on campaign revenues and expenditures from a special account for its financing should not additionally burden participants in the election process. The precondition for that is the technical and legal solutions that exist in the Czech Republic - based on the legal obligation, i.e. the consent of the user, the bank with which the account is kept enables public insight into transaction data. This venture would be even more accessible in Serbia since most participants use the account opened with the Treasury to finance the campaign. In doing so, it is essential to ensure that some protected private data do not become public (e.g. current account number or donor ID number). Essentially, participants in the campaign would not be obliged in this way to disclose any information that is not already (in principle) publicly available. The only difference is that data on revenues and expenditures would become public as soon as these transactions occur and not after submitting a report to the Agency for the Prevention of Corruption.

The introduction of the obligation to publish information on unpaid costs (commitments) would be an important novelty and a possible burden for political entities. However, the introduction of such a rule is critical in applying the current regulations on campaign financing. Namely, the experience from all previous elections shows that the vast majority of campaign expenses are paid only later, upon receipt of budget grants based on election success, and that a significant part of costs remains unpaid even after the submission of campaign expenses although all campaign activities end two days before the election. Therefore, it is necessary to provide publicly available information about the costs paid before the election and the obligations assumed towards suppliers in that period (e.g. the value of broadcast TV commercials, rented billboards, etc.). At least for the highest costs, disclosure of this information should not be an excessive burden for election participants, as they already have contracts or purchase orders related to promotional activities.

The practical significance of publishing such data is immense for citizens and the control performed by the Agency for the Prevention of Corruption. Publishing these data would significantly narrow the possibility of adjusting the information on revenues, and especially on campaign expenses, to the future uncertain circumstance, that is, the success of a political entity in elections, with the aim to avoid the legal obligation to return the unspent part of budget grants to the budget or for other forms of violations of the law.

The experience of the Czech Republic

Czech election law stipulates that an election campaign is any type of regularly paid promotion of a candidate / political entity. By law, campaign finance includes all money-related campaign expenses. Only funds deposited in the account can be used for payment. The use of the services of consultants, marketing agencies and experts, PR experts, social networks and the like, which serve to promote candidates, can be considered an integral part of the election campaign.

The so-called voting account (election account) is established according to the election laws separately for all elections and is used to finance the election campaign. The account must be transparent. By law, this means that remote free-of-charge and uninterrupted access to third parties must be allowed to accommodate an overview of payment transactions. For a bank account to be considered transparent, it must at all times enable an overview of all transactions that the bank is currently posting.

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A technical solution that shows transactions only retroactively in a specific time interval is not considered a transparent account.)

For all transactions from these accounts, the purpose of the payment must be stated. Neither the election laws nor the law on political parties specifies the content of this communication. It is necessary to clearly state in the description of the purpose which transaction is in question or for what purpose it is carried out (e.g. donation for the election campaign, transfer to the election account, transfer to the operating account, etc.) The scope of communication is at the discretion of the client.

Political parties are encouraged to ensure that they have a transparent bank account that meets legal requirements. Failure to open such an account in a situation when its opening is mandatory is a violation for which sanctions are prescribed.

Control of election campaign financing

The 2011 legal solutions entrusted the control of the financing of the election campaign to an independent state body – the Agency for the Prevention of Corruption. To this end, the Agency was given broad powers to gather information from all other authorities, banks, political parties, their foundations, financiers and service providers. Also, it was allowed to hire external experts and institutions for the control and guaranteed funds in the budget for these needs. For violating the law, criminal offence, numerous misdemeanours, and additional measures are prescribed – a denial of the right to budget financing to convicted political entities. On the other hand, the law did not set clear obligations to the Agency - what scope of control it should carry out and within what deadline, or even the duty to publish a report on the conducted control. In the 2020 elections, the Agency faced a new obligation for the first time – it had had five days to decide on the submitted application referring to the violation of the rules on campaign financing.

In the report, the ODIHR pays significant attention to the issue of control and sanctions:

5. *… Consideration could be given to making the Agency conclusions mandatory and to publish them at a later stage.*

20. 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' campaign finance reports

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

The part of recommendation number 5, which mentions the "conclusions of the Agency", refers actually to "conclusions based on the conducted control". In other words, it should be interpreted that the ODIHR requested that the Agency's obligation to make certain conclusions regarding the submitted reports on campaign expenditures should be prescribed and then to publish them.

When it comes to recommendation number 20, neither the translation nor the purpose is clear enough.

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Namely, the Agency is already authorized to collect the necessary data from the participants in the elections (including bank statements) and the banks themselves (Article 32 of the Law).

In order to argue the implementation of recommendation 21, it would be necessary for the Agency and other competent bodies (public prosecutor's offices, misdemeanour courts, courts of general jurisdiction) to publish all data on the application of the law so far - in which cases proceedings have been initiated, what penalties were imposed, in which cases the Agency adopted measures on the loss of the right to financing from public sources and the like. Since information on these issues is not published (individual decisions), and the data are only partially available only in the form of aggregated statistics, it cannot be concluded to what extent and how the legal framework should be changed. The text that precedes this recommendation also refers to measures the Agency imposed in cases where violations of the rules during the 2020 election campaign was noticed. Since some of these decisions are contested, it would be of great importance if the Administrative Court made decisions on the lawsuits as soon as possible.

Restriction of total campaign costs and individual revenue

The Law on the Financing of Political Activities places significant restrictions on the sources of income of political entities. Also, there is a limit on the amount of contribution for one natural or legal person during a calendar year (20 or 200 average salaries in the Republic), whether it is contributions or membership fees. When it comes to the election year, one legal or natural person can donate as much. There are no special rules for contributions from several related parties (e.g. several companies owned by the same person, members of the same household, all employees in one company), so the legal limits can be relatively easily circumvented.

The law does not set limits on the sum of campaign expenses. In the period 2003 - 2011 (former Law on Financing of Political Parties), the restriction existed but was misconceived (it depended on the funds the party received from the budget), and the penal norm was awkwardly formulated and could not be applied.

In its latest report, the ODIHR notes the following: *Key prior recommendations by ODIHR and the Council of Europe's Group of States Against Corruption (GRECO) on campaign finance remain unaddressed, including the recommendation to reduce the grant limit[8]; introduction of a ceiling on costs;*

Therefore, one of the recommendations reads: 18. ... *previous ODIHR and GRECO recommendations should be addressed, including lowering donation limits...*

Transparency Serbia considers that the recommendation to reduce the limit for donations of one natural or legal person is not a priority. Namely, the contributions participate in the reported income of the participants in the elections in a relatively modest share. Thus, in the last parliamentary elections, the Agency for the Prevention of Corruption determined that the contributions of natural persons accounted for 6 per cent and of legal entities for 2% of the total reported campaign revenues.[9] They were somewhat significant only in the two electoral lists (SPS-JS and POKS, with 26.5 and 14.5 million dinars, respectively), and a total of only 189 donors were registered. Significant income of legal entities was shown by only one

[8] In the Serbian version of the report, it was mistranslated as "introduction of a lower limit for donations".

[9] https://www.acas.rs/wp-content/uploads/2021/04/Izvestaj-verzija-V-Kampanja-konacno.pdf

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list (POKS - about 23 million dinars). The restriction in these elections amounted to 1,098,380 dinars for individuals, or 10,983,800 dinars for legal entities (9,340, or 93,400 euros). There were significantly higher contributions from individuals reported in previous election cycles. However, at that time, there were thousands of identical contributions of natural persons whose individual value was far below the limit. Such a situation may cast doubt on the veracity of the presented sources of income (e.g. when the providers are persons who otherwise receive social assistance), but the solution to this problem cannot be found in reducing the amount of allowed contributions, but in more thorough control.

However, the thing to consider is to introduce a limit on the participation of contributions coming from one or more related parties in the total revenue of an election campaign. Suppose the purpose of setting legal limits is to prevent political parties become dependent on their financiers. In that case, it is not the same whether the 100,000 euro contribution will be received by an electoral list whose entire campaign is worth 5 million euros or one whose entire campaign costs only a little more than the value of the received contribution. Finally, when it comes to limiting donations, it should be considered the possibility that such limits do not apply when a person who is a candidate in the presidential election wants to invest his own money, which has a proven origin, in his own campaign. In that case, the restriction could not be justified by the danger of creating dependence on the financier.

The recommendation to limit campaign costs is very significant. In conjunction with several other factors, the absence of such a restriction leads to more extensive, and therefore more expensive, promotional activities during the election campaign than is necessary to present electoral lists, programs, and candidates to voters. In addition to the lack of limits on the total (or individual) costs of the campaign, the following factors lead to this situation: 1) a legal solution according to which electoral lists receive 80 per cent of budget grants (50 per cent in the case of presidential elections), based on election success. In situations when one political entity has a strong dominance – as it is the case in Serbian elections from 2014 to 2020 – it is an incentive to plan a more expensive campaign and spend all the funds expected from the budget on it; 2) a legal solution that allows budget funds obtained for another purpose to be invested in the election campaign (financing regular work, that is, everything *that is not* an election campaign).

The mentioned reasons related to the provisions of the law, as well as the fact that other electoral lists, based on electoral success forecasts, were not particularly attractive to private sector donors, led to the ruling SNS participating in the last parliamentary elections with 56 per cent, the SPS-JS list with 17 per cent, while the remaining 19 lists accounted for just over a one-quarter of total expenditures. The reported spending for the SNS campaign was 686 million dinars (over 5.8 million euros). Setting possible restrictions on campaign financing (e.g. in the Czech Republic, a country with a slightly larger population and a more developed economy than Serbia, this limit is around 4.5 million euros) would have the effect of somewhat greater equality of participants' election presentation to voters. Such restrictions could result in savings in the Republic's budget as well, as it is, directly or indirectly, the primary source of funding for election campaigns in Serbia. However, setting any restrictions of this kind should be accompanied by establishing strict rules and an adequate control system for the direct financing of the campaign by third parties.

The Experience of the Czech Republic

Restrictions for Czech election campaigns were set in 2016 according to GRECO recommendations. In the

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general elections, where voters elect members of the House of Representatives (lower house of the Czech Parliament), the total campaign limit was set at 90 million Czech crowns (approximately 3.5 million euros). For other election campaigns, there were also fixed limits that corresponded to the expected campaign costs. The only exceptions were the elections for local assemblies, where it would have been inconvenient to regulate in the same way the campaign in the village of 100 voters and the polls in the city of Prague.

Financial constraints on election campaigns can prevent people or groups with seemingly unlimited resources from spending money without a ceiling in order to gain political power through the money invested. When political parties know their maximum campaign spending in advance, they tend to avoid spending millions just to run a more grandiose campaign than their opponents. Setting limits leads parties to think about how to prepare an effective campaign.

Any restriction on campaign funding would not work without the tools to control the costs of parties and candidates. The oversight body plays a crucial role in monitoring overall campaign spending, but such a body cannot rely solely on data provided by parties. It must be able to determine the actual cost, attribute value to in-kind contributions, track down sponsors of political advertising, and sanction those who exceed set limits or break the law to reduce their spendings. Otherwise, the restrictions would exist only on paper and could not bring the desired effect.

Direct financing of the election campaign by third parties

According to the rules adopted by the current Law on Financing Political Activities (2011), and similarly, according to the solutions from the previous Law on Financing Political Parties (2003), all funds intended for financing the election campaign are paid into a special account for financing the campaign, and all payments of election campaign expenses are made from that account (Article 24, paragraph 3). Therefore, it seems that in Serbia, there is no possibility at all for someone else to directly pay the cost related to the election campaign of a political entity and to be in accordance with the law.

However, the law recognizes the possibility for a natural or legal person to provide a free service or to give something to a political entity as a gift. Such gifts and services are campaign funds not collected in a special account or paid from it. Thus, for example, a company might rent 100 billboard places for the campaign period without specifying the purpose and then gives that advertising space to the participant in the elections – although examples of this kind have not been noticed in practice. For this type of contribution to be allowed, both donors and political entities should meet legal requirements: donors (e.g. if it is not a foreign person, association, company that performs certain activities or owes taxes, submission of statements to a political entity, etc.) and political entities (obligation to keep records of non-monetary contributions, publication of contributions of higher value).

The fact that direct payment of campaign expenses is prohibited, and in some situations may be a criminal offence does not mean that it does not happen in practice. Such situations are especially possible when an activity not completely obvious is carried out in a campaign. For example, if a party conducts internal training of its activists, and accommodation and transportation costs are paid by a sponsor who does not want to be in the campaign cost report or should not be a campaign donor, it will represent a violation of the law. However, since there is no obligation to keep records of activities, but only of campaign revenues and expenditures, neither the Agency for the Prevention of Corruption nor the public will likely be aware that there has been direct funding of the campaign by a third party.

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Disputed situations occur even when the activities are noticeable in public. Through monitoring the financing of the 2020 campaign, Transparency Serbia noticed that several political entities advertised on social networks and made phone calls to citizens and that the submitted financial reports did not mention these types of costs at all. This indicates that part of the campaign cost was paid directly by third parties, i.e. hidden donors. There was also a famous case from the 2016 parliamentary elections when TV Happy broadcast ads for SNS worth about half a million euros, but the party did not show that cost in the financial report, claiming that it did not order those ads.[10]

Third-party campaign funding can be viewed from yet another angle. These are situations when a natural or legal person advertises in connection with an election campaign, thus helping or retaliating against an electoral list or a candidate, but he does so in his name and not in the name and on behalf of a political entity. Conducting a campaign of this kind in Serbia is not regulated. Some rules exist only for advertising on electronic media, but they are vague. For example, according to the REM Rulebook for the 2020 elections (which referred only to the public broadcasters RTS and RTV, while for other media there were no rules but rather recommendations), "Political advertising is a public statement aired in the form of an advertisement in exchange for a monetary or other compensation, recommending a submitter of an electoral list or a candidate, or their activities, ideas and standpoints with the intention of succeeding in the elections." During the 2020 campaign REM took the position that only "declared electoral lists" have the right to political advertising[11] - despite the lack of a legal basis for such a claim.

When it comes to other types of advertising, only general rules apply (use of personal property, prohibition of comparative advertising, protection of minors, etc.) For example, Article 15 of the Law on Advertising provides that a third party would not be allowed to put up a billboard with the image of a candidate in the elections without his consent. Finally, there are no rules for conducting other campaign activities by third parties. Thus, there would be no obstacles for the farmers' association to organize a rally during the election campaign with a request to increase state subsidies. Although the demands of such an association would coincide with the political program of an imaginary "Agricultural Party", that party would not have to include in its financial report the costs of the rally organized by the association.

In connection with this issue, one of the ODIHR recommendations is number 19. *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.*

The fact that the financing of the campaign by third parties has not received much attention so far can be interpreted as an indicator that the existing scope of control over the set rules is insufficient. It is to be believed that if the controls were comprehensive, the participants in the elections would more often resort to this way of circumventing the rules.

In addition, at the global level, the issue of running and financing third-party campaigns has become critical concerning online and social media advertising. Therefore, it is necessary to clearly regulate third parties'

[10] https://pescanik.net/sns-duguje-pola-miliona-evra-za-reklame/
[11] https://www.cenzolovka.rs/drzava-i-mediji/zabrana-emitovanja-bojkot-spotova-zakonski-neutemeljena-rem-posvecen-stvaranju-iluzije- o-ravnopravnosti/

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right to campaign advertising (whether they can do it and under what conditions) and establish rules on record-keeping for election campaigns conducted by third parties, funds that can be used for this purpose and reporting on revenues and expenditures of such campaigns. In this regard, Serbia should consider models that already exist in other countries, including the Czech Republic.

This issue is also very important in the context of the need to regulate the financing of the referendum campaign. Namely, there are no official participants in that type of campaign. The proposal for the referendum question comes from state bodies, but they should not influence the citizens' decision by promoting one of the possible answers with budget money. All other proponents of one of the offered answers (e.g. political parties, associations, companies) are "third parties" in the referendum campaign, and the financing of their campaigns should be subject to rules. Considering the possibility of calling a national referendum already this year, this is another reason to regulate the financing of the campaign by third parties, not only in the Law on Financing Political Activities but also in the Law on Referendum and People's Initiative.

The experience of the Czech Republic

There are always non-partisan actors in political campaigns who can significantly support political candidates, even financially. Therefore, it makes sense to regulate the role of "third parties" to ensure the legitimacy of their presence in the campaign and the legality of their actions.

The Electoral Code limits campaign costs to third parties in the Czech Republic and requires them to open an online transparent bank account and an official website. The "third party" campaign must also be signed. Authorities can suspend an unsigned campaign and open the door to investigation and sanctions. The registered third party entity receives a registration number, and the Office for the Supervision of the Financing of Political Parties and Movements publishes relevant data on them.

On the one hand, these provisions formalize all campaign actors' political activities (including civic movements, etc.) On the other hand, it effectively prevents anonymous "black" campaigns, crypto campaigns and rigging of campaigns by foreign influence groups. However, it also opens a rift between the parties and their campaign tools and resources.