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REGULATION OF PROMOTIONAL ACTIVITIES OF PUBLIC ENTITIES IN THE MEDIA SECTOR

Transparency Serbia

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INTRODUCTION

Relationship between public advertising and co-financing of media programmes

In previous attempts at media reform, insufficient attention has been paid to the issue of public advertising and public announcing. During the drafting of the laws affecting the media sector, it could often be heard that this area had remained unregulated, although significant funds were allocated to the media outlets through various forms of business interactions with the state. Due to the amount of these funds and the significant share in the revenues of certain media, on the one hand, and the unregulated way of allocating funds, there is a possibility of endangering the independence of the media outlets and creating an unequal position of actors in the media market.

Funds intended for public advertising should be considered together with various types of state aid, and especially with project co-financing, because only in this way can a complete picture be seen, both of state benefits for the media outlets and the policy in this area. However, in the current planning, normative and analytical documents, far more attention has been paid to the project co-financing. Certain documents even reduce the problem of state funding of the media to a more precise regulation of the project co-financing system and regulation of issues, and emphasize the need for transparency and this type of benefits from public funds to the media sector.[1] In other documents, public advertising is recognized as a kind of a "danger" to the project co-financing system.[2]

Although the legal bases and purpose of media financing by public entities are different in public advertising compared to project co-financing, there is a connection between them, both from the viewpoint of the state, as a donor, and from the viewpoint of the media outlets, as recipients. Advertising of public entities also includes the types of activities aimed at realizing a segment of public interest defined in regulations (e.g. mandatory advertising of public sales or recruitment for open positions), or activities aimed at informing citizens about particularly important issues related to their

[1] See the document Contributions for drafting of the Strategy for the Development of the Public Information System in Serbia for the period 2018 - 2022, Joint views of the Independent Association of Journalists of Serbia, the Independent Association of Journalists of Vojvodina, the Association of Independent Electronic Media Outlets, the Association of Local Independent Media “Local Press” and On-line Media Association, August 2017.

[2] See, for example, the document Public Procurement in the Media Sphere, created within the project "Public Money for the Public Interest", jointly implemented by BIRN, the Slavko Ćuruvija Foundation and NUNS, which is available on the website kazitrazi.rs, via the following link: https://bit.ly/2TlOnW9

field of work (e.g. promotion of new legal mechanisms, informing citizens about changes in procedures). In these cases, the public entity is the one who determines the content of advertising and the public interest that is realized by that advertising. On the other hand, when it comes to project co-financing, the media outlets are the ones to realize the public interest, through the production and placement of (missing) media content presenting their planned programmes to public entities and asking for budget support.

Although the total amount of funds that will ultimately reach the media in one way or another is not limited, nor is it formally co-dependent, in practice there is certain influence of one allocation on another. If public entities spend large amount of available public funds on advertising, sponsorships and other forms of media financing, there will be less money that can be used to finance all other requirements, including co-financing media content of public interest. This applies not only to budget beneficiaries, but also indirectly to the funds available to public enterprises - if they allocate more money than is really needed for advertising (including sponsorships), there will be less of the surplus revenue that will be eventually transferred to their founders' budget.

Similarly, through other types of public funding of the media outlets, their needs for other forms of funding will be reduced. When revenues from public advertising, for the priorities stipulated by the public entities, become a significant or dominant source of funding, that reduces the need to seek funding to support quality public interest programmes whose content is created by the media outlets themselves.

Previous proposals of the organization Transparency Serbia

Transparency Serbia has been dealing with these issues intensively since the adoption of the valid package of media laws and the 2015 Law on Advertising. In a special analysis[3], a need has been recognized, among other things, to set stronger guarantees for the transparency of the work of state authorities, to exclude unjustified exceptions from the Law on Public Procurement and regulate the particularities of state advertising in a separate legal enactment, to reduce discretionary decision-making in advertising and sponsorship of public companies and to establish the oversight in companies that are not monopolists. In a special study, Transparency identified serious inconsistencies, irrational management of public resources, insufficient transparency of data and oversight, as well as individual cases of violations of existing laws by national public companies.[4]

[3] The vicious circle of public sector advertising - long-known problems and unknown solution time, Transparency-Serbia, 2017, available on the Transparency Serbia website, via the following link: https://bit.ly/2TwCJYL, accessed on 28 October 2020

[4] Political Influence on Public Companies and Media, Transparency Serbia, 2017, available on the Transparency Serbia website, via the following link: https://bit.ly/2HxTVLb, accessed on 28 October 2020

The proposals made in the process of enacting the new Law on Public Procurement have only been partially accepted.[5] TS also views the regulation of these issues as one of the 15 priorities for the Government and the Parliament of Serbia to fight corruption.[6]

Identifying problems in Media Strategy

The Public Information System Development Strategy in the Republic of Serbia for the period 2020 to 2025[7] (Media Strategy) recognizes different types of allocation of funds to the media sector. The strategy indicates that disturbances in the media market, i.e. in the functioning of market mechanisms are conditioned by various types of allocation of public funds, especially actual or potential public expenditure or reduction of public revenue, by which media publishers gain a more favourable position in the market than their competitors, the manifestations of which can be different.[8]

In order to overcome the problem of disturbances in the media market, the Media Strategy proposes a measure to reduce and make transparent the influence of the state on the media market, so that there are equal market conditions for all media outlets.[9] Indicators for the implementation of this measure refer primarily to creating or amending of the regulatory framework. Among other things, it is planned to create a regulatory framework in the field of public announcing and advertising of public authorities and companies majority owned or financed by the state, as well as to prescribe restrictions on the allocation of funds to media publishers in the form of donations and sponsorships by public authorities and public companies, public institutions and other enterprises majority owned by public authorities.

Therefore, one of the indicators for achieving the goals of the Media Strategy is the creation of a regulatory framework for public advertising and public announcing (and sponsorship, which is a type of advertising), which have not been specifically regulated so far, being subject to various (general) laws whose primary focus is not on solving the problems recognized by the media strategy.

Namely, in the field of public announcing and public advertising, the problem, as with all other types of allocation of public funds to the

[5] More about this: Comments and proposals for supplementing the LPP proposal, available on the Transparency Serbia website, via the following link: https://bit.ly/3kFfJCW, and Comments on the Draft Law on Public Procurement, available on the Transparency Serbia website, via the following link: https://bit.ly/3kDfVCq, accessed on 28 October 2020

[6] Priorities in the fight against corruption in Serbia 2020-2024 and main tasks for 2020/2021, Transparency Serbia, 2020, available on the Transparency Serbia website, via the following link: https://bit.ly/35NsSUi, accessed on 28 October 2020

[7] Official Gazette of the RS, No. 11/20

[8] Media Strategy, page 19.

[9] Ibid, page 54.

media outlets, is reduced to the problem of potential "purchase of media influence" (in terms of corrupt potential of public funds for the media), and thus indirect negative impact on media pluralism. On the other hand, the problem also refers to the potential adverse impact on the market, i.e. to the realistic possibility that the allocated funds will lead to inequality of market actors, or to favouring certain media outlets, and thus to the market disturbances.

If we look at the previous attempts to legally regulate this area, it can be concluded that there were regulations that regulated some of the advertising segments of public entities. However, when looking at the problem of "purchasing influence in the media", i.e. the potential negative impact on editorial independence and media pluralism, it seems that very little has been done in the regulatory field. In this document, we will therefore list those earlier attempts at regulation, which contain solutions that can be used as a possible direction for regulating certain segment of public advertising / announcing. We will also analyse the current framework that regulates the issue of public announcing / advertising, and then offer proposal for certain legislative solutions.

Starting from the goals of the Media Strategy, it seems that the basic challenges that should be addressed in the process of amending or adopting new regulations can narrow down to the following questions:

- Defining public announcing and public advertising that should be regulated by specific regulations;
- Transparency: Making available information on public announcing and public advertising through existing registers or through new records;
- Objectivity and justified reasons for public advertising / announcing and prohibition of discrimination: through consideration of what would be objective and verifiable criteria for the selection of media outlets through which public advertising and public announcing will be placed, as well as the answer to the question whether some types of these promotions are allowed and justified at all;
- Defining illegal forms of promotion, which can often be found in the practice of allocating public funds, to be discussed below;

There is an additional question concerning the law which would regulate these issues, who would be the official proponent of that law, and, ultimately, who would be authorized to supervise the law. These issues are not secondary and formal, as they seem at first glance, since in the previous period, especially after the adoption of media laws (2014), the disagreements between two ministries intensified - the Ministry of Culture and Information (which is the authorized proponent of media laws) and the Ministry of Trade, Tourism and Telecommunications (which is the authorized proponent of the law on advertising). Besides, the provisions of numerous other regulations are of great importance for regulating the issue of public advertising, and other bodies are responsible

for their adoption, amendments and implementation.

Possible ways of implementing the measure 2.3. from the Media Strategy

In anticipation of the adoption of the Action Plan for the implementation of the "Strategy for Development of Public Information System in the Republic of Serbia for the period 2020 - 2025", Transparency Serbia presented in October 2020 a brief analysis of the factors that should have been kept in mind. Comments on the adopted Action Plan are presented in the next chapter.

The safest way for successful implementation of activities within measure 2.3. "The influence of the state on the media market shall be reduced and made transparent so that there are equal market conditions for all media outlets", which would provide the highest possible level of coordination of their implementation and the best understanding of specific problems to be solved, is one in which the leading role would be assigned to a public authority competent for issues related to the work of the media outlets - the Ministry of Culture and Information. Other line ministries and other state bodies would play a very important role in such reforms, i.e. to provide for the solutions to be consistent with the rest of the legal system, but cannot be expected to properly identify the specific challenges that need to be addressed in the media sphere.

The reforms needed in this area concern an issue that is systematically regulated by several laws. Among other things, these are the areas of state aid, public procurement, public-private partnerships and advertising. However, the goal of reforms based on the Media Strategy is not to regulate these areas in a systematic way, but only those issues that need to be resolved from the point of view of satisfying the public interest in the media sphere. At the same time, this should be done so as not to hinder the achievement of the goals for which the Law on Public Information and Media was adopted, and above all the system which, when it comes to financing the work of media outlets from public sources, gives priority to financing media content of public interest realized through the media outlets. All problematic phenomena in this area, which were identified during the development of the Media Strategy and which should be addressed during its implementation, have in common that they disrupt the achievement of this goal.

Therefore, the reforms needed in this area would be appropriately regulated either by a general law governing the work of the media outlets, the Law on Public Information and Media, or by a special law that would deal only with these issues. Other solutions are also legally possible, that is, to implement reforms by amending certain systemic laws (amendments to the Law on State Aid Control, Law on Public Procurement, Law on Advertising, etc.), but they would be far more difficult to implement. Experience in the implementation of the previous Media Strategy shows that it is significantly more difficult to secure an appropriate level of understanding of specific media problems and the will to solve them when adopting systemic laws in certain areas for which other public authorities are

responsible. In addition, any change in systemic laws in these areas is subject to the harmonization process, where relevant international organizations (e.g. international financial institutions, the European Union) have a significant role beside the state bodies of the Republic of Serbia and interested national public, which is why these processes are necessarily slower. This set of factors can significantly hinder the achievement of the Media Strategy goals.

Thus, under point 2.3.1[10] (from the Strategy) the problem solving would require an amendment to the Law on State Aid Control[11], which was adopted less than a year ago, after a long process of harmonization. Instead, it would be better to regulate issues through amendments to (or enactment of a special) law concerning media sphere, prescribing only the rules that are specific to the media outlets, without interfering with the general system of granting and controlling the granting of state aid. Regulating these issues in the media law would make it possible to include also the issues that are excluded from the general state aid control regime due to the value or manner of funds allocation, without major interventions in the systemic Law on State Aid Control. The holder should therefore be the Ministry of Culture and Information, and the Ministry of Finance would be the implementing partner.

The situation is similar when it comes to activity 2.3.2[12], because special rules on public advertising and public announcing would constitute a legal intervention on issues that the current Law on Advertising almost does not regulate at all. Beside the Ministry of Trade, Tourism and Telecommunications, other state bodies should also play a significant role here, as the main partner institutions, because legal intervention would interfere with issues of obligations or independent decisions of state bodies and state-owned enterprises to perform advertising, and only subsequently of the way in which it will be done (the content of the advertising message). This wider circle of partner public authorities would include the ministries competent to prescribe the obligation to advertise or to enable the public sector bodies and organizations to advertise. Among them, the Ministry of Public Administration and Local Self - Government and the Ministry of Economy should be singled out (due to their competencies in the field of public enterprises and other state-owned companies).

Due to the need to harmonize these norms with other obligations to inform citizens about important issues regarding their work (not only via paid or unpaid advertising), it would make sense to include in consultations other institutions, such as the Commissioner for Information of Public Importance and Personal

[10] Amendments to the regulations shall improve the system of state aid in the media sector, which would be based on the principles of transparency, objectivity, predictability, accuracy and non-discrimination (equal treatment of all media outlets), without disturbing market mechanisms, especially with regard to establishing clear, transparent and non-discriminatory lending conditions for tax liabilities and other liabilities towards the public sector;

[11] Official Gazette of the RS, No. 73/19

[12] Create a regulatory framework in the field of public announcing and public advertising of public authorities and enterprises that are majority owned or financed by the state.

Data Protection, as well as Government services and offices dealing with issues of reforms in the field of electronic communications.

With regard to activity 2.3.3[13], similar to point 2.3.1, the application of the Law on Public Procurement[14] has only recently started (1 July 2020), after many years of waiting for the adoption of the new enactment and consultations, with both national and international stakeholders. During the reforms, not all justified objections and initiatives of the media sector were taken into account. The harmonization of the Law with the EU rules was stated as the main reason, although the representatives of the EU Delegation repeatedly pointed out that the fact that the regulations were harmonized with those rules at one point did not mean that they could not be amended and improved. In this regard, it should be emphasized that the EU rules do not regulate all important issues and specific problems identified in the Republic of Serbia concerning procurement of media services. Undoubtedly, the Ministry of Finance and then the Public Procurement Office (public authority with the status of a special organization) should be recognized as partners of the Ministry of Culture and Information in the legislative reform in this area, but also other bodies that regulate certain issues relevant to this area (e.g. Ministry of Public Administration and Local Self-Government in connection with certain types of procurement of services performed by state authorities and local self-governments, Ministry of Economy, when it comes to public companies, Ministry of Health, when it comes to health care institutions, etc.).

In connection with this point, it would also be useful to coordinate the work on amendments to regulations with the Ministry of Economy, which is responsible for drafting, i.e. amending the Law on Public-Private Partnerships and Concessions[15], in order to introduce in that Law the necessary restrictions to the freedom of contracting for public sector partners and obligations to carry out pre-contractual procedures. Amendments to the law have been planned here for years[16], primarily due to harmonization with EU regulations[17], but not even a draft has been prepared yet. Given the experience with the adoption of the Law on Public Procurement, it would be more

[13] Regulate the area of public procurement in the media sector with the amendments to the regulations, in particular: 54- ensure that all data on funds allocated to the media outlets and legal entities, i.e. entrepreneurs engaged in the production of media content in procurement procedures, to which public procurement regulations do not apply, are registered in the appropriate register, - determine the range of services that can be procured by contracting authorities, in terms of the Law on Public Procurement, from the media outlets and legal entities, i.e. entrepreneurs engaged in the production of media content, - limit cases in which contracting authorities (public partners) may conclude contracts on business-technical cooperation and other types of public-private partnership with media publishers and legal entities, i.e. entrepreneurs engaged in the production of media content, - specify the criteria for the selection of media outlets and legal entities, i.e. entrepreneurs engaged in the production of media content, that provide services to contracting authorities;

[14] Official Gazette of the RS, no. 91/19

[15] Official Gazette of the RS, no. 88/11, 15/16 and 104/16.

[16] According to the latest current work plan of the Government, the deadline was October 2020, available on the Government's website via the following link: https://bit.ly/37NXGGX, accessed on 26 October 2020

[17] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, available on the EUR-Lex website, via the following link: https://bit.ly/37OfLEX , accessed on 26 October 2020

appropriate to regulate the area through a special enactment, when it comes to the media sphere, but to harmonize the changes with the amendments to the Law on PPP and concessions, if they occur in the same period.

Area of donations, to which the activity 2.3.4.[18] refers is not currently adequately and systematically regulated for the entire public sector, regardless of whether the recipients are the media outlets or some other entities. Such a reform is needed, but it is not known whether there is a willingness and plan to undertake it. In that sense, it is necessary to determine whether there is an intention among public authorities to carry out such activities in the following period, especially when it comes to the Ministry of Finance (for donations from budget funds), or the Ministry of Economy (responsible for public enterprises and other state-owned companies and which is currently preparing through mechanisms for reporting on the work of public companies, while the Government is adopting, via regulations, certain recommendations and rules that public enterprises should adhere to, under threat of refusal of their plan). If the answer is no, it would be more advisable to now cover by the reforms only those donations whose recipients are the media outlets and their founders, until the adoption of comprehensive regulations in this area, if at all. The partners for this activity should also include the State Audit Institution and the Anti-Corruption Agency, due to their experiences gained so far in identifying problems in this area.

When it comes to point 2.3.6.[19] (according to the Strategy), it is necessary to ensure that data on all funds allocated to legal entities, i.e. entrepreneurs engaged in the production of media content, become visible. That can be done by introducing a new register, based on amendments to the Law on Public Information and Media, whereby it is necessary that in addition to the relevant Ministry of Culture and Information, all other state authorities that collect and possess such information participate in the preparation of that register. One of the goals of the reform activities should be to burden both publishers and state bodies as little as possible through the creation of a single register, i.e. to enable the automatic download of as much data as possible from already existing databases and registers (e.g. from the Public Procurement Portal).

Measure 2.3. in the adopted Action Plan

Certain activities within Measure 2. 3. of the Action Plan adopted by the Government on 3 December 2020[20] differ significantly from the activities that were planned when the Strategy was adopted.

[18] Amendments to the regulations shall prescribe the conditions (i.e. restrictions) for the allocation of funds to media publishers in the form of donations and sponsorships by public authorities and public enterprises, public institutions and other companies that are majority owned by public authorities;

[19] Amendments to the regulations to ensure that the data on funds allocated to legal entities, i.e. entrepreneurs engaged in production of media content will be visible in the appropriate register.

[20] https://www.srbija.gov.rs/extfile/sr/504041/akcioni-plan-strategija-sist.informisanje-RS-20-25-period-20-22-0010-cyr.zip

Thus, the first planned activity does not refer at all to the regulation of the issue of state aid granting, but to the way of calculating the property tax.

Item 2.3.2. now reads:

> *after conducting an analysis of the regulatory framework in the field of advertising, with special reference to problems related to advertising, public authorities and enterprises majority owned or financed by the state shall propose or submit an initiative to adopt new or amend existing regulations, as a precondition for creating a level playing field for all media outlets*

The responsible authority for this activity is the Ministry of Culture and Information, with the support of the OSCE Mission, and the deadline is the last quarter of 2021. It seems that the document in the reader's hands could serve as a starting point for the mentioned analysis of the regulatory framework in the field of advertising, since it identifies problems related to advertising of public authorities and enterprises in which the state is the majority owner or mostly finances them. By planning activities related to public advertising in this way, resolving the dilemmas that arose during the development of the Action Plan was (partially) postponed for the period after the analysis. Although at the moment the Ministry of Culture and Information is not designated as the authority in charge of legislative changes, as we proposed, it is still envisaged that it will have the role of a body that will initiate changes, and the possibility that this body will eventually prepare the wordings of amendments to the law is not ruled out.

Activity 2.3.3 now reads:

amendments to the Law on Public Procurement shall regulate the area of public procurement in the media sector, in particular they shall:

> *- ensure that all data on funds allocated to the media outlets and legal entities, i.e. entrepreneurs engaged in production of media content in procurement procedures, to which the public procurement regulations do not apply, are registered in the appropriate register,*
>
> *- establish the scope of services that contracting authorities, in terms of the Law on Public Procurement may procure from the media outlets and legal entities, or entrepreneurs engaged in production of media content,*
>
> - specify the criteria for the selection of media outlets and legal entities, i.e. entrepreneurs engaged in the production of media content that provide services to contracting authorities

Its text remained unchanged, but one item was omitted: "limit cases in which contracting authorities (public partners) may conclude contracts on business and technical cooperation and other types of public-private partnerships with media publishers and legal entities, i.e. entrepreneurs engaged in the production of media content."

The problem to which it referred was partially addressed through the new item 2.3.4. The deletion of activities related to the restriction of the possibility for public partners to conclude business and technical cooperation contracts with media service providers will not have harmful consequences if the amendments to the Law on Public Procurement establish rules that will make this type of contracting impossible. Namely, if the contracting authorities are obliged to conduct a public procurement procedure for each service they procure from media service providers, including those that are currently below one million dinars threshold, then any other type of contracting will be inadmissible.

The Ministry of Finance has been appointed as the implementing entity, and the deadline is the end of 2021.

The new item 2.3.4 refers precisely to the PPP:

> *continuously monitor the implementation of the Law on Public Private Partnerships and Concessions. In case of occurrence of practice that is contrary to the commitment of this strategic document, undertake adequate activities that include the initiative to amend the Law on Public Private Partnerships and Concessions and other regulations in this area*

As the previously planned restriction on the possibility of establishing PPPs with media service providers is no longer foreseen, it remains to be seen whether there will be attempts at such arrangements in practice and whether it will be interpreted that PPPs would be inadmissible given the nature of services in the public information area, or not. The position expressed in the AP clearly indicates the commitment that PPPs are not used to disrupt the public information system. In the event that such a danger arises, an amendment to the law is envisaged. The responsible entity is the Ministry of Economy. The set deadline is the end of 2022, and this probably refers to possible amendments to the law. On the other hand, no deadlines have been set for "continuous monitoring" nor has the method of implementation been described in detail. That could be a significant omission. Namely, oversight should be performed already at the stage when public bodies are considering whether to propose a PPP project. Currently, such projects are approved by the Government of Serbia, the Government of AP Vojvodina or the Assembly of the local self-government unit, and the opinion on the project is provided by the Commission for Public Private Partnerships.[21] However, it is not envisaged that the Ministry of Economy (in charge of the oversight according to the Action Plan) will be notified about possible projects in the field of media services provision. Moreover, even if the Ministry of Economy has information on the planned PPP in the media sphere, it has no expertise to assess whether this partnership would be contrary to the commitments of the Media Strategy. Finally, if the Ministry of Economy did receive the data and then consult the Ministry of Culture and Information on this issue, it would not have the authority to stop the existing PPP implementation plans, but only the

[21] http://jpp.gov.rs/

opportunity to try to prepare amendments to the law before the PPP is realized. Having all that in mind, the only possibility left is for the Ministry of Culture and Information and the Ministry of Economy to make an agreement with the PPP Commission, in order to receive timely notifications from it about the submitted PPP proposals in the media sphere.

Former item 2.3.4. now became the item 2.3.5. which reads:

> *amendments to the Law on Donations and Humanitarian Aid shall prescribe the conditions, i.e. restrictions for the allocation of funds to media publishers in the form of donations and sponsorships by public authorities and public enterprises, public institutions and other companies that are majority owned by public authorities*

Only the Ministry of Finance is listed as the authority in charge, which should perform this activity by the end of 2021. As already mentioned, the need to regulate donations given by state authorities and public enterprises exists regardless of who their recipient is. We have suggested that the State Audit Institution and the Anti-Corruption Agency be involved in the preparation of these enactments due to their previous experiences, which is not stated here. Also, the role of the Ministry of Economy is not mentioned, which is significant because some donations and sponsorships are not granted from budget funds, but from the funds of state-owned enterprises. A special chapter in this analysis is devoted to the issue of donations and sponsorship.

Items 2.3.6 to 2.3.9 refer to privatization, which was not considered in this analysis.

Item 2.3.10 reads:

> *amendments to the Law on Public Information and Media shall ensure that data on funds allocated to legal entities, i.e. entrepreneurs engaged in the production of media content are visible in the newly formed Register of Productions*

The previous item 2.3.6 is defined in more detail here, by envisaging the establishment of the Register of Productions. Earlier, we pointed out that in addition to the Ministry of Culture and Information, it is necessary to include other bodies in the formation of this register, in order for the register to be formed with as little burden as possible on publishers and state bodies. However, the Ministry of Culture has been designated as the sole implementing authority and the deadline for fulfilling the obligation is the end of 2021. The content of the future Register of Productions has not been specified, so it remains unclear whether it will also contain data on bilaterally onerous operations (e.g. through public procurement) or only information related to contributions for co-financing media programmes.

Earlier attempts at regulation

The previously valid Strategy for the Development of the Public Information System

in the Republic of Serbia until 2016[22] dealt with the problem of public advertising and public announcement in several places. Among the goals of media policy proclaimed in this document, it was envisaged that:

• The Republic of Serbia and local self-government units, as advertisers, shall distribute advertisements (public calls, competitions, advertisements, etc.) in a public and non-discriminatory manner in accordance with the public interest, equally treating privately owned and partially and fully state-owned media outlets, while the advertising of the state, or its bodies shall be efficiently regulated by the rules of participation in public competitions, which will prevent the concentration of advertising budgets, i.e. their monopolization by certain media outlets or advertising agencies, and thus precluding possible influence of the state on professional and financial integrity of the media[23];

• the state shall endeavour to establish specific incentive measures, inter alia, in relation to the obligation of state authorities to purchase advertising space in the media directly from the media outlets, without intermediaries.[24]

Of the measures envisaged by the Action Plan, only the possibility of reviewing the amendments to the Law on Advertising is specifically mentioned in this area, without specifying in which direction those amendments should go.[25]

Although this document recognizes that the problem of state influence on the professional and financial integrity of the media outlets exists, and that there is a need to solve this problem through transparent and non-discriminatory procedures, the regulatory level did not improve much during the previous Media Strategy. However, it is worth mentioning that almost a decade ago, the planning document of the Republic of Serbia recognized the problem of non-transparency and concentration of advertising budgets, and that, at least in principle, the possibility of specific incentive measures for overcoming the problem was mentioned.

The previously valid Law on Advertising[26], specifically regulated advertising through public broadcasting services, as one segment of state advertising. This law thus prescribed restrictions on the "sale of TV advertising and TV sales services" in the programmes of broadcasting service institutions, prescribing restrictions on the concentration of advertising budgets in the hands of one or more related parties, both with the period in which the service could be sold to third parties, and with quantitative restrictions for both the public broadcasting service and the individual that acquired the right to further assign the right to

[22] Official Gazette of the RS, No. 75/11.

[23] Strategy for the Development of the Public Information System in the Republic of Serbia until 2016, Chapter II Objectives, Part V Media outlets, Section 1, Printed media outlets and news agencies.

[24] Ibid, Chapter VII State Aid, Section 3. Specific incentive measures (item 5).

[25] Ibid, Chapter IX Action Plan, item 8.

[26] Official Gazette of the RS, No. 79/05, prior to the amendments that followed the entry into force of the Law on Electronic Media.

broadcast advertising messages or TV sales (prohibition of "resale" of advertising space at a price higher than the price determined by the price list).[27]

In addition to this provision, the same law prescribed restrictions on the broadcasting of advertising messages and TV sales in public broadcasting programs by prescribing restrictions on the total advertising time (10% of the total broadcast program), as well as a limit on full hour broadcasting (6 minutes), and with the time frame for broadcasting TV sales (only in the period from 00:00 to 06:00).[28] Violation of both of these provisions entailed misdemeanour liability.

Also, the law regulated the issue of "advertising of state bodies and organizations"[29] which it defined as: state bodies and organizations, bodies of territorial autonomy and local self-government, public services and public companies. These provisions use the terms advertising and announcing, and they prescribe that the mentioned public entities "inform about their activities" in accordance with the law, and that they can advertise activities and measures that are of importance for citizens, for the majority of citizens or for a minority social group[30], that an advertisement may not use the name, character, voice or personal capacity of an official, nor that it may directly or indirectly recommend a political party or politician. This provision did not stipulate any sanction, nor did it prescribe who supervised its application.

The provisions on the manner of sale of TV advertising and TV sales services on the programmes of public broadcasting service institutions ceased to be valid in August 2014, by the enactment of the Law on Electronic Media, even before the formal enactment of the current Law on Advertising. These provisions were without much consideration, automatically "removed" from the Law on Advertising. As the proposer in that regulation fully followed the normative part of the EU Directive on audio-visual media services[31], there was no place for provisions that were not prescribed by that normative part of the Directive. Provisions on state advertising remained in the Law on Advertising even after the enactment of media laws, but they were not retained in the new law either.[32] During the public debate in January 2015, some participants (primarily the Association of Independent Electronic Media - ANEM) pointed out that it is necessary to keep these provisions

[27] Law on Advertising ("Official Gazette of the RS", No. 79/05), Article 20.

[28] Ibid, Article 16

[29] Ibid, Article 86

[30] As an example, it is stated that these public entities may announce 1) elections, i.e. a referendum if the advertising message recommends participation in elections, or a referendum; 2) measures for citizens to act in case of general danger, such as flood, fire, earthquake, epidemic, terrorist attack, etc.; 3) humanitarian action, i.e. action for protection and improvement of health, and a call for assistance to directly endangered persons; 4) competition and invitation for enrolment of pupils and students; 5) economic activities such as the purchase of commodity reserves, the purchase of wheat, if the advertisement contains the invitation to participate in these activities.

[31] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive) (Text with EEA relevance).

[32] Official Gazette of the RS, 06/16 and 52/19.

in the new law[33], but also indicated to the need for additional regulation of public advertising and suggested the direction in which the law should be amended. The Ministry of Trade, Tourism and Telecommunications, as the proponent of the law, only casually reflected on these comments, together with the comments of other participants that it did not accept, explaining that the proposals "were not accepted because they are contrary to positive legal regulations or are not the subject regulated by this law."[34]

Apparently, the proposals concerning public advertising were not accepted due to the tendency of the proponents to regulate exclusively commercial advertising by the Law on Advertising, which, although not explicitly stated, can be concluded from the explanatory memorandum to the Draft Law.[35] Thus, after the new media laws and the law on advertising, this area, paradoxically, remained even less regulated than it had been until that moment.

Notwithstanding this fundamental opposition to explicit regulation of public advertising, the new Law on Advertising has nevertheless touched on this topic. Namely, at least in principle, the Law on Advertising applies to other types of promotion that do not fall under the concept of (commercial) advertising, even to: "public announcements performed by state authorities, or other public authorities, as part of the performance of tasks within their purview (e.g. public calls, public advertising for the sale of decommissioned weapons and military equipment, notices, public campaigns, etc.), in accordance with the law regulating the field of public announcing and other types of activities which, in order to promote and present their programs, projects, actions, works, etc. are performed by the Republic of Serbia, the Autonomous Province, local self-government units, as well as institutions and other legal entities that are predominantly state-owned or that are wholly or mainly financed from public revenues."[36]

This definition of promotion in relation to "public announcing" is broad enough to cover various types of promotion of public entities, and it is interesting that the Law on Advertising also mentions the determinant "in accordance with the law governing the area of "public announcing", thus indirectly accepting the proposals in the public debate that the area of public advertising must be regulated, by a special law, which is in turn indirectly indicated by the new Media Strategy, mentioning "creation of a regulatory framework".

In addition to this general provision on the standard application of the law to various forms of promotion of public entities, it should be noted that the law regulates the exclusion of "public interest announcements" from the total

[33] See ANEM's Contribution to the Public Debate on the Draft Law on Advertising of February 2015, available on ANEM's website, via the following link: https://bit.ly/2IZ6EHb, accessed on 22 October 2020

[34] The report on the conducted public debate is available on the website of the Ministry of Trade, Tourism and Telecommunications, via the following link: https://bit.ly/3meNQlA, accessed on 22 October 2020

[35] The draft Law on advertising is available on the website of the Ministry of Trade, Tourism and Telecommunications, via the following link: https://bit.ly/37xZvYy, accessed on 22 October 2020

[36] Law on Advertising, Article 3, paragraph 2, item 2).

duration of advertising in electronic media, by which the state authorities or other public authorities, within their purview, perform public announcements of activities and measures that are important for citizens (e.g. public calls, notices, public campaigns, etc.)[37], and a ban on sponsorship of media services and program content by state authorities and organizations.[38]

It could be concluded that the existing Law on Advertising does not solve the problem of "buying influence" in the media outlet through advertising or protection of free market competition, since this Law regulates mostly restrictions of the content. However, some institutes of the Law can "help" in the future regulation of the field of public advertising, which will be discussed below. Finally, the time frame for advertising through public broadcasting services was maintained.[39]

We should also note the general obligation of media service providers (electronic media) to transmit announcements of public authorities of an urgent nature relating to the threat to life, health, safety or property[40], and the ban on advertising for public entities in the media outlets that are not registered in the Media Register[41], and the obligation to register data "on the amount of funds received from public authorities, which means state authorities, authorities of territorial autonomy, authorities of local self-government units, organizations entrusted with the exercise of public authority, and legal entities established or financed entirely, or predominantly by the Republic of Serbia, by an autonomous province or a local self-government unit".[42]

In the following text, the issues of defining public announcing and public advertising, transparency of these activities, the need to determine objective and non-discriminatory criteria for allocating funds on the basis of public announcing and public advertising, and defining illegal forms of promotion of public authorities will be discussed. With each of these issues, appropriate solutions will be proposed so that they can be specifically regulated. In addition, bearing in mind that the area of public announcing and public advertising is intertwined with other regulations, primarily Law on Public Procurement, Law on Advertising and Law on Public Information and Media, these regulations will be referred to in appropriate places. Also, these regulations will serve as a model for formulating certain proposals.

[37] Law on Advertising, Article 36, paragraph 4.
[38] Law on Advertising. Article 65, paragraph 6
[39] Law on Advertising, Article 35.
[40] Law on Electronic Media, Article 47, paragraph 2, item 2).
[41] Law on Public Information and Media, Article 44, paragraph 2.
[42] Law on Public Information and Media, Article 39, paragraph 1, item 10.

1 DEFINITIONS AND ASPECTS OF PUBLIC ADVERTISING AND PUBLIC ANNOUNCEMENT

As already stated, in the regulations governing advertising there are definitions only for commercial advertising. According to the definitions, advertising is "*representation in any form related to business or professional or business activity, in order to encourage the sale of goods and services, sale of real estate, as well as the transfer of rights and obligations*" [43], while the advertiser is an entity that *advertises, which has the status of a trader in accordance with the regulations governing trade or works in the name and on behalf of the trader, or which performs professional or business activities of selling goods and services, real estate, as well as the transfer of rights and obligations, in accordance with special regulations"*[44]. As a trader is a person who trades, it is clear that promotional activities of public entities that do not relate to "encouraging the sale of goods and services, sale of real estate, as well as the transfer of rights and obligations" have been excluded from the definition of the law.

The document Public Advertising Legal Analysis and Recommendations[45] from December 2019, defines within the recommendations various forms of activity of public authorities, which could be a good starting point for determining definitions of public announcing and public advertising, the common element of which is the presence of public authorities and the existence of certain media content.

The mentioned document thus recognizes in practice the following phenomena:

1. public announcement that represents a legal obligation;
2. commercial advertising for the purpose of stimulating the sale of goods and services;
3. commercial advertising of economic operators that are the only provider of a certain service in a certain market (for example, the activities of a public utility company established for the purpose of providing green market services);
4. advertising that would in fact be prohibited, on the basis of applicable media regulations, and which is reduced to various forms of media coverage of the work of public entities, regardless of the legal basis for such coverage;

[43] Law on Advertising, Article 2, paragraph 1, item 1).

[44] Law on Advertising, Article 2, paragraph 1, item 1).

[45] The document was created within the project "Public Money for the Public Interest", jointly implemented by BIRN, the Slavko Ćuruvija Foundation and NUNS, available on the website kazitrazi.rs, via the following link: https://bit.ly/3kr7iec, accessed on 22 October 2020

5. paid media coverage of issues that should fall under the regular activity of the media outlets;
6. broadcast sessions of the assemblies of local self-governments;

In addition to the mentioned six phenomena, due to the specifics of the contractual relationship, the conclusion of agreements on business and technical cooperation between public entities and media service providers should be singled out as a special phenomenon.

As for the aspect referred to in item 1, which is performed by public authorities as their legal obligation, it does not aim to promote the sale of goods and services, but to fulfil the obligations under the law, so it would fall under public announcing. Depending on the value of both individual advertising and total advertising performed by the public authority on an annual basis, in this type of contracting, the public procurement procedure must be applied when selecting a service provider. With regard to the selection of bidders, the regulation itself, which creates an obligation to advertise in some situations, directs the contracting authority to the type of media outlet in which the advertising will be performed (e.g. distribution throughout the Republic). There is still room for discretionary decision-making in this type of advertising, when it comes to additional criteria on the basis of which the selection will be made, but also when formulating the subject of procurement (e.g. the size of the leased advertising space). Besides, the regulations do not always ensure that this advertising message is published on the website of the contracting authority.

In addition to situations in which public entities advertise because they have to do so by law or regulation, there are a number of situations in which they do not have such an obligation, nor a ban on using in that manner a part of the public funds at their disposal. There is room for discretionary decision-making here, and thus the risk of corruption or the purchase of influence in the media is much higher, because the public authority itself decides whether to advertise at all, when to do so, to what extent, in which type of media outlet and the like. Similar to the mandatory advertising described above, public procurement procedures apply if the value of services is higher than the prescribed thresholds. However, although according to the general rules such services should be contracted in a way that will provide the highest value for money, and the conditions set before service providers and criteria for selection of bidders should be appropriate to the subject of procurement, existing legal mechanisms do not provide sufficient guarantees that it will be so. Among other things, controversial issues may arise in these procurements such as whether these authorities are authorized to spend public resources in this way (e.g. whether there is a legal basis to conduct public information campaigns on certain issues), whether the procurement of the services is expedient (is it necessary to perform it having in mind that citizens and economic operators should be informed also in another way about the same issues, e.g. by notifications on the web pages, organizing expert meetings within the competence of the authorities), how the purpose of advertising is determined (target

group which the body addresses), how the conditions and criteria for selection of media outlets are related to that purpose, how the achievement of the goals of the promotional campaign is measured, etc. Bearing in mind that such campaigns also promote public authorities with public funds, the issue of the time of their implementation is especially important due to possible misuse of public resources for political and promotional purposes (e.g. during the election campaign).

In principle, the commercial advertising of public entities from item 2, which is accompanied by some kind of market logic, has the potential to be corrupt, if it affects the editorial independence of the media, or if the money is used to "buy influence" or for other misuse of public resources. (for example, "outflow" of public resources to media publishers associated with public sector decision makers. However, it could hardly be justified to subject this type of advertising to prohibitions or rigid restrictions. This does not mean that it is not possible to introduce some kind of additional requirements that do not exist for non-public entity advertisers.

There are already examples of such restrictions in media laws. Thus, for example, the legislator introduced a restriction on the placement of advertising in media that are not registered in the Media Register.[46] This restriction is justified with the need to provide the public with transparent information about the media outlet through the register, "due to forming one's own opinion on the credibility and reliability of information, ideas and opinions published in the media outlets, in order to consider the possible influence of the media outlet on public opinion, as well as to protect media pluralism".[47] Thus, even by invoking the same goal, certain restrictions can indisputably be introduced in the commercial advertising of public entities, even those that are corporate-like, in order to prevent undue influence on the editorial policy of the media outlets or to reduce the possibilities for it to occur. In that sense, the subject of regulation to a certain extent can and should be the commercial advertising of public entities. So, the minimal intervention refers to ensuring basic transparency and introducing measures to prevent discrimination against media publishers. In the other type of commercial advertising, the question may be asked whether commercial advertising of a public enterprise or a publicly owned company with regard to the promotion of goods and services is really necessary, but in principle there is no big difference in terms of their regulation, so they will be considered together.

Given that the form of paid promotion from item 4 is approximate to the concept of covert advertising, and the form from item 5 to the paid media coverage, which is actually prohibited, we believe that these forms should not be included in the definition of public advertising. These forms actually only imitate advertising, and are very often disguised as media content. In that sense, these forms should be banned. The media coverage of promotional activities of public authorities

[46] Law on Public Information and Media, Article 44, paragraph 2.

[47] Law on Public Information and Media, Articles 7 and 38.

should be reduced to legitimate presentation of the activities of public authorities with restrictions modelled after the provisions of the former Article 86 of the Law on Advertising from 2005. Also, the broadcast of the sessions of local self-government assemblies, since they do not have a direct element of promotion, could not be included in the definition of public advertising, but rather have the character of public announcing aimed at enabling transparency of the highest local self-government authorities. However, in the context of this document, this form does not have an independent nature, so it will be considered together with other types of public announcing.

PROPOSED DEFINITIONS

Within the meaning of this law, certain terms have the following meaning:

1) ***Public advertising*** *means the promotion of commercial and other activities of public authorities, as well as public authorities themselves, for the sale of goods and services, or for the promotion and presentation of their programmes, projects, actions, works, socially responsible campaigns, etc.;*
2) ***Public announcement*** *means activities of announcing to the public the activities performed within the purview of the public authority for the purpose of fulfilling legal obligations or for the purpose of achieving other goals not related to promotion;*
3) ***Public authority*** *means the Republic of Serbia, Autonomous Province, a local self-government unit, as well as institutions, public enterprises and other legal entities that are in public ownership to such an extent as to enable effective control by the Republic of Serbia, Autonomous Province, local self-government unit or other founder which is a public entity, or legal entities that are entirely or predominantly financed from public revenues;*

Alternatively:

"Public authority" means a body of the Republic of Serbia, territorial autonomy, local self-government, public institution and public enterprise founded by them, as well as another legal entity that is predominantly in public ownership, or in which other public authorities are in possession of stocks or share to an extent that allows for effective control. A public authority is also another holder of public authorizations, as well as an entity predominantly financed from public revenues, when carrying out activities related to the exercise of public authorizations, i.e. the implementation of activities financed from public revenues.

4) ***An official*** *means any elected, appointed or nominated person in a public authority.*

2. TRANSPARENCY

The requirement for transparency of funds allocated by public entities on various bases to the media outlets is one of the fundamental commitments of media reform, including the earlier Media Strategy of 2011, media laws of 2014 and the new Media Strategy of 2020.

Essentially, transferred to the field of public advertising and public announcing, transparency requirements are reflected in:

- **initial transparency** where the public authority should make publicly available data on the funds provided for advertising/announcement at the level of the calendar year, which will be placed through the media outlet[48];
- **transparency of the criteria for selection of media outlets in which advertising will be placed,** by publishing in an appropriate manner information on what will be taken into account when selecting media outlets;
- **transparency of allocation of funds**, through public disclosure of data on how much funds the media outlet received, from which public authority, on the basis of which enactment, with an explanation of how the evaluation of the criteria for the allocation was performed, etc.

The Law on Public Information and Media[49] prescribes a number of rules for ensuring the transparency of media data, including funds received by the media from public authorities, but it could be concluded that it regulates in detail only funds not allocated by public authorities under the rules of project co-financing / individual contributions. Thus Article 39 of the Law prescribes that data on the amount of funds received from the public authorities are entered in the Media Register, and that the applicant for the entry of the data is the public authority, and not a media publisher. The wording of this article is broad enough to include the funds that a media publisher receives for public advertising /announcing. Article 4 The Rulebook on Documentation attached in the procedure of media registration in the Media Register[50] stipulates that the registration application shall be accompanied by an enactment of a public authority "on the basis of which the funds are

[48] See ANEM's Contribution to the Public Debate on the Draft Law on Advertising of February 2015, available on ANEM's website, via the following link: https://bit.ly/2IZ6EHb, page 4, accessed on 22 October 2020, proposing the publication of data on the allocated funds for advertising for one calendar year.

[49] Official Gazette of RS, No. 83/14, 58/15 and 12/16 - authentic interpretation.

[50] Official Gazette of RS, No. 126/14, 61/15 and 40/19.

allocated to the media outlet, as well as the amount of funds received on any basis, directly or indirectly, which are not granted on the basis of the rules on granting state aid".

Therefore, this category should also include funds obtained on the basis of public announcement/advertising, regardless of whether these activities are of a commercial nature or aimed at achieving some other goal, for all public authorities, including public enterprises and publicly owned companies. However, the practice of the Media Register, although it has improved in previous years in terms of the form of presentation, shows that these "other funds" are not actually shown, which may indicate that either public authorities do not provide this information assuming that it is not an allocation, but rather a payment for a service that implies consideration, or that they submit data, but that the Register does not display them publicly. Regardless of the cause, it is evident that certain clarifications in the regulations are necessary.

Another type of transparency that exists in the current legal system refers to the publication of information on procurements. In that sense, some of the public authorities, i.e. those that in terms of Article 3 of the Law on Public Procurement have the status of contracting authority[51], have the obligation to prepare a public procurement plan, to perform procurements that are above the threshold set by the Law[52] in one of the prescribed public procurement procedures and to publish the required information (tender documentation, notices on the selection of bidders, etc.), to regulate in a special enactment[53] the manner of planning, implementation of the public procurement procedure and monitoring of the execution of public procurement contracts (communication, rules, obligations and responsibilities of entities and organizational units), the manner of planning and conducting procurements to which the law does not apply, as well as the procurements of social and other special services. Written communication is set as a rule in public procurement, which should enable those documents that were not initially published to become publicly available on the basis of requests for free access to information. Similarly, the Law on Public Private Partnerships and Concessions (Article 20) prescribes the obligation to conduct a public procurement procedure before awarding a public contract whose value is above the same threshold as for public procurement, and thus the application of numerous rules that ensure transparency of such a procedure.

The requirement of transparency can be applied through general rules to both public announcement and public advertising.

[51] LPP, Article 3.

[52] LPP, Article 27 prescribes a threshold of 1,000.00 dinars for the procurement of services, below which, except for the principles of law, according to the circumstances, the provisions of the LPP do not apply.

[53] LPP, Article 49 para. 2

PROPOSED NEW PROVISION:

General rules of transparency

ARTICLE X1

(1) The public authority shall ensure the transparency of public advertising and public announcement.

(2) The public authority is obliged to make publicly available in an appropriate manner and in an understandable form, on its own website, or on the website of the authority that supervises its work:

1) data on the total funds allocated for public advertising and public announcement, as well as data on the amount allocated for public advertising and for public announcement respectively, in the current calendar year, no later than 31 January of the current year;

2) information on the amount of funds allocated for advertising through the media outlets, in terms of the definitions of the law governing public information and the media in one calendar year, no later than 31 January of the current year;

3) conditions and criteria for selection of media outlets through which advertising/announcing will be placed, no later than 31 January of the current year;

(3) *The public authority shall submit to the Media Register information on the funds allocated to the media outlet in the name of public advertising and public announcement,* for each category separately, in the manner and the time frame prescribed by the law governing narea of public information.

Principle of availability on the website

ARTICLE X2

(1) Any public announcement and public advertisement that is made by other means must also be published on the website of the public authority, i.e. on the website of the immediately higher authority or the authority that supervises its work.

(2) Advertisement referred to in paragraph 1 of this Article must be identical to the advertisement published by other means, and whenever possible published in the same form or in a form that represents a true copy of the original.

(3) The authority shall publish on its website the information on the time and place of the other type of announcing and advertising referred to in paragraph 1 hereunder.

(4) Advertisement referred to in paragraph 1 of this Article, as well as the data referred to in paragraph 3 of this Article shall be made permanently available by the public authority on its website or the archives of the website.

(5) The public authority shall be obliged to enable the advertising message to be available for publication in any other media, provided that the publication is done in unchanged form, free of charge and with indication of sources and other data relevant to the recipients of the message (duration of the advertisement).

MISDEMEANOUR PROVISION: A fine ranging from____ dinars to___ dinars shall be imposed on a responsible person in a public authority for

a misdemeanour[54] if the public authority does not publish the data referred to in Article X1 paragraph 2 of this Law or if the public authority does not publish public announcement and public advertising carried out by other means via the website of the public authority in accordance with Article X2.

PROPOSAL FOR AMENDMENTS TO THE LAW ON PUBLIC INFORMATION:

ARTICLE 39[55]:

Article 39, paragraph 1, item 10) is amended to read as follows:

"10) data on the amount of funds received on other bases than project co-financing / individual grants of public authorities, implying state authorities, authorities of territorial autonomy, authorities of local self-government units, organizations vested with public powers, as ***well as state-owned legal entities,*** *legal entities founded or funded, fully or predominantly by the Republic of Serbia, the autonomous province, or a local self-government unit (hereinafter: public authority),* ***including*** *tax exemptions and financial incentives, media services based on the application of regulations in the field of public procurement, free lease services provided by public authorities to media publishers, public advertising and public announcing, other grounds that include providing funds to media publishers.*

In Article 39, paragraph 4 is amended to read as follows:

"The financial information referred to in paragraph 1, items 9) and 10) of this Article shall be entered into the Register within 15 days from the day the decision on the allocation of funds was made. ***The application shall contain at least the following information: the name of the media publisher to which the funds were awarded, the amount of funds allocated, an indication of the basis on which the funds were awarded (tax exemptions and financial incentives, media services based on the application of public procurement regulations, free lease services provided by public authorities to media publishers, public advertising and public announcing,***

[54] Pursuant to Article 17, paragraph 2 of the Law on Misdemeanours, the Republic of Serbia, territorial autonomies and local self-government units and their authorities may not be liable for a misdemeanour, provided that the law may stipulate that a responsible person in a state authority, territorial autonomy authority or authority of the local self-government unit shall be liable for a misdemeanour. Therefore, the misdemeanour liability of the responsible person in the public authority is prescribed. However, we believe that it is possible to prescribe misdemeanour liability for legal entities other than the Republic of Serbia, Autonomous Province, local self-government units, state authority, authority of territorial autonomy and local self-government. Therefore, we leave open the possibility for this type of public authorities to be liable for misdemeanours as legal entities.

[55] The Law on Public Information and Media, among other things, regulates the Media Register and the availability of data on media in that register, as well as the data on funds received from public authorities. Since "data on funds received from public authorities" refers to different categories of monetary contributions to the media, not only to public advertising and public announcing, this proposal of the provision is more extensively set to cover the forms of public contributions to the media, in line with the new Media Strategy. Therefore, this provision should cover all such contributions, not just public announcement and advertising, so in this part, the proposal goes beyond the scope of this document.

other grounds involving provision of funds to media publishers), type of enactment allocating the funds (decision, resolution, contract, etc.), number of the enactment and date of its adoption, documentation confirming the data, other relevant data."

"The data referred to in paragraph 1, item 1) of this Article are publicly available, except in the case of personal data that is not personal name".

3. OBJECTIVITY AND JUSTIFIED REASONS FOR PUBLIC ADVERTISING / ANNOUNCEMENTS AND DISCRIMINATION PROHIBITION

In addition to requirements regarding transparency, it is necessary to prescribe minimum criteria for selection of media outlets to place public advertising and public announcements. Uniform regulation of criteria cannot be set equally for all types of public advertising and public announcements, especially when it comes to restrictions, having in mind the different legal nature of individual contracting authorities.

However, as already mentioned, there are restrictions in media laws that affect the advertising area, in relation to the specific nature of the media. Namely, Article 44, paragraph 2 of the Law on Public Information and Media in order to improve transparency of the data on media prescribes prohibition of advertising in media outlets not entered into the Register.

That provision is equally applicable to all public authorities, irrelevant whether it concerns regular public authority, public enterprise, institution or state-owned company, and irrelevant whether those economic operators perform any commercial business activities or not. Having in mind this existing restriction, it is clear that it is possible to prescribe the obligation to take into consideration, beside the criteria that a public authority that appears as a trader and in that capacity promotes its activities, the criteria that will be related to the attainment of a certain goal of public interest.

The most suitable criteria in this regard would refer to a guarantee of commitment to professional and ethical media standards, i.e. whether the measures were imposed by the regulator and the behaviour of the media outlet upon the measure imposed (for electronic media) and the measure imposed by the Press and Media Conduct Council after that imposed measure (for print and electronic media). These criteria are already prescribed for project co-financing, in Article 23. of the Law on Public Information and

Media and Article 36, paragraph 1, item 2 and paragraph 3 of the Rulebook on co-financing of projects of public interest in the field of public information.[56]

In addition, from the aspect of promoting responsible provision of media services, the content that the media outlets place should also be taken as a criterion for media selection, which would actually constitute further elaboration of criteria for commitment to ethical and professional standards. In this sense, consideration could be given to establishing a criterion that is equally applicable to both public announcements and public advertising, while other criteria would be specifically determined for each of these two forms.

In relation to public announcements, the document Public Advertising Legal Analysis and Recommendations[57], for example, cites provisions from various laws that prescribe the obligation to publish certain data, and states that the common feature of these randomly selected examples is "the need to ensure transparency of a particular process implemented by a public authority"[58], and that these laws lack "more detailed criteria for selecting the media outlet through which these public calls will be distributed".[59] It is also interesting to observe that every public authority is obliged to have its own website, and hence the question of the justification of this way of advertising is raised. These examples show that numerous laws, even in the conditions of significant technological progress and diversification of platforms and media, continue to insist on "daily newspapers with national coverage".

The essence of the placement of public announcements is for the message to reach the widest possible circle of citizens to whom it is addressed. In that sense, the criterion of the direction of the announcement stands out. This is especially applicable to announcement that is not a legal obligation, and whose effectiveness might also be questioned.[60] Therefore, the criterion for distinguishing mandatory notifications from those that are not is important, and the latter should be limited in some way.

In relation to public advertising, the selection of an advertising platform is, in the regular course of events, guided by various criteria, such as circulation, media coverage, the share

[56] Official Gazette of the RS, no. 16/16 and 8/17.

[57] The document was created within the project "Public Money for the Public Interest", jointly implemented by BIRN, the Slavko Ćuruvija Foundation and NUNS, which is available on the website kazitrazi.rs, via the following link: ,https://bit.ly/3kr7iec, accessed on 22 October 2020.

[58] Ibid.

[59] Ibid.

[60] For example, the Public Advertising Legal Analysis and Recommendations document cites parts of a 2018 BIRN survey conducted on a sample of public institutions at the central and local levels, including 20 local self-governments, where it was found that significant funds placed by these public authorities towards the media "go" for broadcasting holiday greeting cards, for which the question of the appropriateness of their placement through the media can certainly be raised, especially if we take into account that most public authorities have a website but have the opportunity to use other communication platforms through which to send that message without engaging the media.

of a particular media outlet in the audience (audience share, i.e. readership, listenership and viewership, number of visits), through media interaction (related to on-line media), the presence of media outlet on multiple platforms, the discount provided by a particular media outlet, etc. In this sense, any imposition of strict and restrictive limitations on commercial advertising by public authorities could easily constitute a restriction on their freedom of business operations. Therefore, the imposition of restrictions should be approached with caution.

PROPOSED VERSION OF ARTICLE

Application of the rules on public procurements

Article X3

(1) Public authority, as a contracting authority in terms of the law regulating public procurements, shall procure public announcements and public advertising in the public procurement procedure as set by the law regulating public procurements, as well as in line with the provisions hereunder.

(2) Public advertising and/or Public announcement subject to public procurement rules in the sense of this Law shall be performed in a way to convey the desired information to its intended recipients, with the most rational use of public funds and with the application of public procurement principles.

(3) Legal protection in the contract awarding procedure referred to under paragraph 1 hereunder, monitoring and supervision over the execution of the contract shall be provided in accordance with the law governing public procurements.

(4) In connection with the contract awarding procedures and the execution of contracts referred to in paragraph 1 hereunder, the penal provisions prescribed by the law governing public procurements, as well as the penal provisions prescribed by this Law, shall apply.

(5) The contracting authority shall be obliged to closely regulate under its enactment the methods of planning, conducting of public procurement and monitoring of the public procurement contract execution, and all issues of importance for planning, conducting and monitoring of procurements, i.e. procurement contracts referred to in paragraph 1 of this Article.

(6) Public procurement of services referred to in paragraph 1 of this Article shall be conducted even when its estimated value exceeds 500,000 dinars, but is under the thresholds for the application of the public procurement procedure determined in the law governing public procurements.

(7) The contracting authority is not entitled to purchase air time for television or radio broadcasting, nor air time for broadcasting programme content from media service providers, in order to avoid the application of the provisions of this Law.

(8) A contract on the procurement of public announcement and public advertising services concluded contrary to the provisions of this Law, as well as a contract concluded by the

contracting authority on other legal basis, with the scope of procuring the public announcement or public advertising services within the meaning of this Law, shall be null and void and no payment can be made under it.

Mandatory public announcement and public advertising

Article X4

(1) Mandatory public announcement and/or public advertising shall constitute the publication of a certain announcement in the media, which a public authority must perform in a certain situation, on the basis of the law or other regulation.

(2) When a public authority is obliged to make public announcement and/or public advertising on its website, i.e. on the Internet page or a special portal maintained by another authority, the publication on its own website shall be made no later than on the same day.

(3) When the obligation to publish it in the official gazette or in the media outlet is prescribed, the announcement shall also be published on the website of the public authority no later than on the day of publication in the official gazette, i.e. in the media outlet.

(4) Announcement referred to in paragraph 1 of this Article shall be composed so as to contain the elements necessary for the fulfilment of the prescribed obligation, with the use of the usual length and manner of presentation for a certain type of media outlet.

Selection of media outlets for mandatory public announcement and public advertising

Article X5

(1) The public authority shall determine in the tender documentation objective and non-discriminatory criteria for the qualitative selection of the economic operator, criteria for awarding the contract, as well as criteria for selecting the media outlet in which mandatory public announcement and public advertising shall be made.

(2) The authority must determine in its tender documentation the geographical dimension of the announcement, the profile of the recipients that should receive the mentioned announcement, an indication that a certain type of media outlet, or media outlet with certain properties is an adequate means of informing those recipients, i.e. that via such media outlet it is possible to achieve the purpose of public announcement/advertising, as well as whether that purpose can be provided in an appropriate manner, all in accordance with the provisions of this and the special laws prescribing that obligation.

(3) When preparing the tender documentation, and in order to formulate objective and non-discriminatory criteria referred to in paragraph 1 hereunder, the authority shall determine whether there is relevant information on the extent to which certain media outlets gain access to recipients (e.g. members of a particular profession, residents of a particular place), and before

conducting the public procurement market research shall be conducted.

(4) In the tender documentation, the authority will envisage the exclusion of the economic operator due to accountability for a severe form of unprofessional conduct, as in cases when there are no guarantees of commitment to the professional and ethical media standards of a particular media outlet. The reason for exclusion shall be the existence of evidence that in the year preceding the publication of the announcement / advertisement, a measure was imposed by the regulatory body (for electronic media) or the Press Council (for print and on-line media), which determined that the media in which such announcement / advertisement would have been published violated legal provisions, or the standard of professional ethics in relation to the protection of human rights (such as violation of the right to presumption of innocence before a court decision in the media content, violation of the right to privacy by publishing personal data that does not serve public interests, violation of the provisions concerning the special protection of minors, as well as violation of other provisions protecting human rights), that the publisher of the media outlet where the announcement would have been published has outstanding obligations based on the court decision to publish responses to information and/or corrections in terms of the law governing public information and media, as well as that it has due and outstanding liabilities based on the use of funds from public sources to co-finance media programmes of public interest.

(5) A public authority may not impose conditions on economic operators in terms of financial and economic capacity, nor require certain references.

(6) Within 48 hours from the publication of the public call, the public authority shall send a notification on the initiated procurement procedure to all registered media outlets for which it has determined by market research that are able to provide the service, using the publisher's e-mail address published in the register of companies.

(7) Criteria for qualitative selection of an economic operator must include the ability of the media outlet to transmit the announcement to the recipients in a certain territory.

(8) In order to increase competition, the public authority shall use other criteria from paragraph 1 primarily as criteria for awarding the contract, except when the subject and purpose of the procurement do not require to be determined as criteria for the selection of the economic operator.

(9) Public procurement of advertising services may not be carried out under the same public procurement procedure as the procurement of advertising campaign creation services (including the production of advertising messages).

Optional public announcements and public advertising

Article X6

(1) Optional public announcements and / or advertising is any public announcing, i.e. public advertising, which is not public announcement / advertising referred to in Article X4 of this Law, and which is undertaken by the authority that is the contracting authority in terms of the law governing public procurement.

(2) The public authority shall always make optional public announcement /advertising via non-media communication channels (e.g. by publishing on its own website).

(3) Exceptionally, a public authority may conduct optional public announcement /advertising through the media outlet provided that the following conditions are met:

1) a public authority is expressly authorized by the provisions of a special regulation to perform tasks within its competence in that way;

2) prior to initiating the public procurement procedure, the public authority conducted market research and published information in the tender documentation that showed that announcement is necessary to achieve a certain goal and that that goal could not be achieved to the necessary extent without procurement of public announcement, or public advertising service;

3) the public authority has determined in the tender documentation measurable indicators for the achievement of the goal and the manner of monitoring the achievement of the goal that must be in direct connection with the public announcement, i.e. public advertising.

(4) If the conditions referred to in paragraph 3 of this Article are met, the provisions of Article X5 of this Law shall apply accordingly to optional public announcement/ advertising.

(5) A public authority may award several contracts within one procurement of optional public announcement/advertising services, i.e. it can award one contract arranging such announcement/advertising on several media outlets, if in that way the purpose of public announcement/advertising is achieved to a greater extent and if at the same time the rational use of public funds is ensured.

Restrictions on conducting procurements

Article X7

(1) A public authority may not initiate the public procurement procedure referred to in Article X6 of this Law from the day of launching to the day of holding elections for members of parliament and elections for the President of the Republic.

(2) A public authority founded by the Republic of Serbia may not initiate the public procurement procedure referred to in Article X6 of this Law from the day of launching to the day of holding elections for councillors in

more than half of the local self-government units on the territory of the Republic.

(3) A public authority founded by the Republic of Serbia, territorial autonomy and local self-government unit from the autonomous province territory cannot initiate the public procurement procedure referred to in Article X6 of this Law from the day of launching to the day of holding elections for members of the Autonomous Province Parliament.

(4) A public authority founded by a local self-government unit cannot initiate the public *procurement procedure referred to in Article X6 of this Law from the day of launching to the day of holding the elections for councillors in that local self-government unit or elections for councillors on the territory of the town municipality which is a part of that local self-government unit.*

(5) When the public announcement service is contracted, it may not be performed during the ban on initiating the public procurement procedure referred to in paragraphs 1 to 4 of this Article.

Public advertising of public authorities founded to satisfy the industry and commercial needs

Article X8

(1) A public authority founded to satisfy the industry or commercial needs in terms of the definition of the law governing public procurement, operating under regular market conditions, with the aim to make a profit and to bear its own losses arising from its activities, shall apply, in public advertising, the principles of the law governing public procurement and the rules of this law.

(2) The public authority referred to in paragraph 1 of this Article shall be obliged to prescribe objective and non-discriminatory criteria for the selection of media outlets to place its public advertising.

(3) The criteria referred to in paragraph 1 of this Article must include a guarantee of commitment to professional and ethical media standards of a particular media outlet, which is proven by obtaining information from competent authorities that in the year preceding the placement of advertising no measure was imposed by the regulatory body (for electronic media) or the Press Council (for print and on-line media), establishing that a particular media outlet violated legal provisions, or ethical professional standard in relation to the protection of human rights (such as violation of the right to presumption of innocence before a court decision is rendered in the media content, violation of the right to privacy by publishing personal data that does not serve the public interest, violation of the provisions concerning the special protection of minors, as well as violation of other provisions that protect human rights).

(4) The public authority, by carefully assessing all the criteria from this Article, shall make a decision on the selection of media through which the advertising message will be placed, provided that the person whose right

or interest is endangered or violated by such decision has the right to claim damages in accordance with general regulations governing obligations and torts.

(5) The application of the rules referred to in this Article shall be monitored by the authority exercising the founding rights and reporting to the public on the matter once a year.

(6) The manner of monitoring and reporting referred to in paragraph 4 of this Article shall be regulated in more detail by an enactment of the Government of the Republic of Serbia, i.e. enactments of the Assembly of AP Vojvodina and enactments of assemblies of local self-government units.

(7) The public authority, by carefully assessing all the criteria from this article, makes a decision on the selection of media outlet through which public advertising will be placed, provided that the person whose right or interest is endangered or violated by such decision has the right to claim damages in accordance with general regulations governing obligations and torts.

Other forms of public announcement and public advertising

Article X9

Public authorities, with the exception of the authorities referred to in Article X8, which are not contracting authorities in terms of the law regulating public procurement, shall apply the public procurement procedure in accordance with the provisions of this law and the law governing public procurement when conducting procurement for mandatory or optional public announcement or public advertising, which is related to the exercise of public authority or the use of public funds.

MISDEMEANOUR PROVISIONS:

A fine ranging from RSD ___to RSD__ shall be imposed on a responsible persons in a public authority for a misdemeanour if s/he:

1) fails to apply the rules on conducting public procurement with public announcement and/or public advertising services (Article X3);

2) fails to apply the rules concerning the manner of publishing mandatory public announcement and public advertising (Article X4);

3) does not establish objective and non-discriminatory criteria for qualitative selection of economic operator, criteria for contract awarding, as well as criteria for selection of media outlet and/or fails to apply other rules concerning selection of media outlet in which mandatory public announcement and public advertising will be performed (Article X5);

4) does not apply the rules concerning optional public announcement and public advertising (Article X6);

5) acts contrary to the restrictions and prohibitions related to optional public announcement and public advertising (Article X7);

6) fails to apply the rules concerning public advertising of public authorities established in

order to meet industrial and commercial needs in terms of the definitions of the law governing public procurements (Article X8);

7) fails to apply the public procurement procedure when conducting mandatory or optional public announcement or public advertising, which is related to the exercise of public authority or use of public funds in the case of public authorities other than public authorities referred to in Article X8 and which are not contracting authorities in the sense of the law governing public procurements.

4. DEFINING PROHIBITED FORMS OF PROMOTION

The document Public Procurements in the Media Sphere[61] from December 2018, among other things, deals with the issue of the unsuitability of certain "media services" to be the subject of public procurement, and it cites numerous reports that show this tendency. These reports "emphasize two basic problems in the application of the LPP to these specific services: 1) inadequacy of "media services" that promote the work of public authorities to be the subject of public procurements in general and 2) indirect influence on project co-financing, which is deliberately circumvented in order to finance through public procurement the media outlets that are perceived as eligible."[62]

The mentioned document elaborates in detail why the mentioned services cannot be the subject of public procurement, but the same arguments could be used in the context of banning certain promotional activities of public authorities, specifically in the context of applying the Law on Public Information and Media and the Law on Advertising.

The media services mentioned in the document are mainly related to „audio-visual media content promoting the work of public authorities in the form of editorially shaped content, which is actually a form of advertising (covert)".[63] The same document states that the existence of a promotional element in the procurement of these services actually qualifies these services as advertising services.

[61] The document was created within the project "Public Money for the Public Interest", jointly implemented by BIRN, the Slavko Ćuruvija Foundation and NUNS, which is available on the website kazitrazi.rs, via the following link: ,https://bit.ly/2TlOnW9, p.9-12, accessed on 22.10.2020.

[62] Ibid, page

[63] Ibid, page

As already mentioned, the definitions of the Law on Advertising on the one hand reduce advertising to commercial advertising of persons who have the status of a trader, but they also state that this law applies to public authorities.[64] This in fact means that promotional activities of public authorities are legally equated with (commercial) advertising, which leads to the application of the provisions of the law, even those governing covert advertising. Covert advertising is defined as "representation of goods, services, business names, trademarks or other marks, or activities of a natural person or legal entity engaged in the production of goods or provision of services, with the intention that such representation has the purpose of advertising and may mislead the public with regard to its actual nature, provided that the intention is deemed to exist in particular, if it is carried out with monetary or other compensation".[65] The criterion of editorial justification is also used as one of the criteria for determining whether an advertisement is covert.[66] Although this provision is formulated for commercial advertising due to (congruent) application of advertising rules to other types of promotional activities, including promotional activities of public authorities. In order for an advertisement not to be covert, there must be a so-called "identification mark", which actually classifies specific content as advertising.[67] If there is no identification mark, covert advertising is prohibited[68], and violation of this prohibition is the basis for misdemeanour liability.[69]

The mentioned document emphasizes that media services "acquired" through public procurement:

- have a promotional element (for example, monitoring the work of local self-government authorities). Those "services" in particular aim to advertise the activities of public authorities, and in addition have monetary equivalent (value of specific public procurement);
- mislead the recipient, as editorially shaped and promotional contents are mixed;
- are contrary to the general principles of the Law on Public Information and Media[70], and starting from the fact that

[64] The Law actually mentions "public advertising performed by state authorities, or holders of public authorities", but substantially
that term corresponds to the term of public authority, and is used as such in this context (author's comment.)

[65] Law on advertising, Article 12 paragraph 2.

[66] Law on advertising, Article 12 paragraph 3.

[67] Law on advertising, Article 13

[68] Law on advertising, Article 12 paragraph 1.

[69] Law on advertising, Article 78 paragraph 1 items 3 & 4

[70] Primarily, in the context of Article 4 paragraph 3 of the LPIM which prescribes that "the free flow of information through the media outlets must not be endangered, nor the editorial autonomy of the media outlets ...", as well as Article 5 of the LPIM which prescribes that the media publish "information, ideas and opinions on phenomena, events and personalities the public has a legitimate interest to know about, regardless of the manner in which the information was obtained, in accordance with the provisions of this law ", and that "everyone has the right to be truthfully, fully and timely informed about

paid promotion of public authorities is affirmative in nature, not critical, thus it represents a form of influence on editorial autonomy, and is disputable from the objectivity point of view - taking into account that it is a paid performance.

In addition, promotional activities are generally not accompanied by an identification mark, so the document concludes that this subject of public procurement is in fact prohibited in such a situation.[71]

In this regard, the findings from the research[72] published in 2018 by the Business Alliance of the Association of Local and Independent Media "Local Press" are illustrative. The report analyses the data on media financing in40 local self-government units. In this research, various forms of business contracts of local self-governments with the media were observed in 25 of the 40 observed municipalities, which were not realized either as calls for co-financing nor as public procurement of services, including some local self-governments that did not announce tenders for co-financing media content.

Therefore, in practice, the existence of media coverage of the work of public authorities of an affirmative promotional character is evident. It is procured as a service for which a compensation is paid. However, it is also evident that these restrictions are not explicitly regulated by law, and that they need to be specified. Moreover, sometimes there is a legitimate need for public authorities to present certain activities, but not in such a way as to be the promotion of officials. If all these interests are balanced, and if we start from the provisions that previously regulated this area (Law on Advertising of 2015), a satisfactory formulation can be reached.

In addition, an exclusively affirmative presentation of the work of public authorities that is not fact-based leads to the possible application of provisions relating to misleading advertising.[73] Since these

issues of public importance and the media outlets are obliged to respect that right ".

[71] The document was created within the project "Public Money for the Public Interest", jointly implemented by BIRN, the Slavko Ćuruvija Foundation and NUNS, which is available on the website kazitrazi.rs, via the following link: ,https://bit.ly/2TlOnW9 pages 11and 12, accessed on 22 October 2020

[72] **The Research on the application of the Law on Public Information and Media** in the local communities with the special focus on the project co-financing, "Lokal pres" and Civil Rights Defenders, December 2018 The Report is available on the website of the PU Lokal Pres, via the following link: ,https://bit.ly/2TuqGLB accessed on 28 October 2020

[73] 40 local self-government units. In this research, various forms of business contracts of local self-governments with the media were observed in 25 of the 40 observed municipalities, which were not realized either as calls for co-financing nor as public procurement of services, including some local self-governments that did not announce tenders for co-financing media content.

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provisions are also more appropriate for commercial advertising, it makes sense to provide special rules for public advertising and public announcement of this type.

PROPOSED ARTICLES

Freedom of public advertising and public announcement

Article X10

(1) Public authorities have the right to public announcement and public advertising under the conditions and in the manner prescribed by the provisions of this Law and the law governing the area of advertising.

(2) The name, character, voice or personal capacity of an official of a public authority cannot not be used in public announcement and public advertising.

(3) If public announcement and public advertising are made via electronic media outlets, free of charge, the duration of that advertising is not included in the duration of TV advertising and TV sales in terms of the law governing advertising.

Prohibition of covert public advertising
Article X11

(1) Covert public advertising is prohibited.

(2) Covert public advertising means presentation of public authorities and officials of public authorities in the form of media content or presentation of public authorities and officials through the form of public announcement with the intention for this presentation to have the advertising purpose and can mislead the public in terms of its real nature, which has no editorial justification.

(3) It will be deemed that there is no editorial justification if it does not concern activities that the public has a legitimate interest in knowing in terms of the law governing public information, and especially if:

1) there are no public authorities' announcements of an urgent nature related to threats to life, health, safety or property;

2) the duration or length of media content related to the activities of public authorities are of such a scope that does not justify the exercise of citizens' right to information in terms of the law governing public information;

3) the presentation of activities is exclusively affirmative;

4) in other cases when the media coverage of the activities of public authorities and/or officials has no editorial justification.

(4) The media outlets and other means of public information to which this law applies

interests are balanced, and if we start from the provisions that previously regulated this area (Law on Advertising of 2015), a satisfactory formulation can be reached.

In addition, an exclusively affirmative presentation of the work of public authorities that is not fact-based leads to the possible application of provisions relating to misleading advertising. 73 Since these provisions are also

shall be obliged to respect the prohibition of covert public advertising.

(5) Prohibitions and restrictions from this article shall apply to all types of media content.

(6) If the public advertising is clearly marked with an identification mark, the application of the provisions on covert advertising in a specific situation shall be excluded, and such advertising shall be allowed if the conditions concerning public advertising and public announcements from this law, as well as the conditions from the law governing advertising are met.

Prohibition of misleading public advertising and public announcement

Article X12

(1) Misleading public advertising and misleading public announcement are prohibited.

(2) Misleading public advertising and public announcement mean any public advertising and public announcement that, in any way, including the manner of presentation, misleads or is likely to mislead the recipients of such advertising or announcement.

(3) A person whose right or interest is endangered or violated by misleading public advertising/public announcement, may file a lawsuit before the competent court requesting that the court orders the cessation of misleading advertising.

(4) The provisions on court relief for misleading and comparative advertising from the law governing advertising shall apply accordingly to the court relief procedure referred to in paragraph 3 of this Article.

MISDEMEANOUR PROVISION:

A fine ranging from RSD ___ to__ RSD shall be imposed on a legal entity for a misdemeanour if it acts contrary to the provisions of Article X10- X12.

A natural person or a responsible person in a legal entity shall be imposed a fine ranging from RSD 50,000.00 to RSD 150,000.00 for actions referred to in paragraph 1 of this Article.

An entrepreneur shall also be imposed a fine ranging from RSD 50,000.00 to RSD 500,000.00 for actions referred to in paragraph 1 of this Article.

5. CERTAIN OPEN ISSUES

Assembly session broadcasting

One of the common forms of procurement of media services in practice is arranging broadcasting of local assembly sessions. Taking on this obligation is not only a burden for the towns and municipalities that finance this activity, but also for the media outlets, which in order to fulfil the obligation have to significantly change their programme schedule, often for several days in a row. On the other hand, they can also be a suitable means of avoiding the application of regulations on project co-financing, but also a means of "buying influence in the media".

The regulatory body for electronic media is of the opinion[74] that there is no obstacle for media service providers to present such programme content, if they do so within the framework of their license for the provision of services. Thus, such programmes can be broadcast on the media outlets specialized in news programmes, as well as those that have received a license to provide general media services. However, this only addresses the question of whether certain media outlets can in principle have this type of programme as part of the provision of media services, but not the question of whether the funds allocated on this basis may have a direct or indirect undue impact on editorial independence. It is evident that there is a public interest for citizens to be informed about the work of their representative body, since in that way, at least on a theoretical and principled level, they have the opportunity to learn about the ideas, views and opinions of opposition political actors, not just the ruling ones. However, on the other hand, there is also a potential for corruption in this type of contributions, so the real question is whether this "service" should really be paid for, or whether it represents a regular activity of the media outlets.

Judging by the stated position of the REM, there is no obstacle to continue such practice, if the provision of such services would be contracted through public procurement, which allows competition and selection of bidders who can ensure the achievement of the desired goal. In such procurements and their monitoring, the rules described in the model of the proposed law for optional public announcement and public advertising should be followed in all respects. Among other things, this means rethinking the

[74] Regulatory Body for Electronic Media letter number 07.1955/20-1 of 28 October 2020

effectiveness of this type of communication with the public, having in mind technological progress, as well as the possibility to ensure the transparency of the work of local assemblies in other ways (for example through a special specialized TV channel, to monitor the activities of all representative bodies at all levels of government with different "streamings", depending on the local community the program is dedicated to).

From the legal point of view, the situation would be much clearer if there were unique legal solutions (e.g. in the Law on Local Self-Government) and practice at the level of Serbia, and not to leave these issues to be decided on the level of each local self-government. In the current situation, the very fact that some municipalities *do not allocate* funds for broadcasting the Assembly sessions calls into question the justification of such budget costs even in those municipalities that broadcast. Namely, different practice shows that this is not a necessary budget expenditure.

(Im)possibility of public-private partnership

The Law on Public-Private Partnerships and Concessions[75] regulates, among other things, the conditions and manner of drafting, proposing and approving public-private partnership projects, entities that are competent or authorized to propose and implement public-private partnership projects, rights and obligations of public and private partners, the form and content of the public contract, as well as legal protection in public contract award procedures. Amendments to that Law have been planned for a long time, primarily for the purpose of harmonization with the valid EU directives. Public-private partnerships are contracted in the public procurement procedure or in a special procedure for concessions.

Article 7 of the Law defines the public-private partnership as a "long-term cooperation between public and private partner for the purpose of providing financing, construction, reconstruction, management or maintenance of infrastructural and other facilities of public importance and provision of services of public importance, which may be either contractual or institutional." The subject of a PPP may not be the exclusive commercial use of goods in general use or other goods or the exclusive delivery of goods.

The basic forms are institutional PPP, contractual PPP and concession. The obligation of a private partner may, inter alia, be contained in the provision of services of public importance, with one or more obligations such as: financing, management and maintenance, in order to provide services

[75] Official Gazette of the RS, no. 88/11, 15/16 and 104/16).

of public importance to end users within the competence of the public partner, or in order to provide the necessary preconditions for the public partner to provide services of public importance within its competence, or provide services of public importance within the competence of public partners to end users.

There is a possibility for the public partner to transfer certain real rights to the private partner for the assumed obligations or to grant it a concession or to pay it in cash for the assumed obligations or to allow it to collect compensation from end users for the provided services, if so provided by the PPP project proposal/ concession enactment. There is also a possibility for the public partner to allow the private partner to perform commercial activities or build other facilities within the implementation of the PPP project, but only if it is not possible to provide the required level of profitability of the public-private partnership project and return on investment.

What can be the subject of public-private partnership is not itemized in this law , so there is no explicit prohibition for public partners to conclude contracts with media service providers in this way. However, some prohibitions arise either from the explicit norms of other regulations, or from the nature of the contract that would be concluded in this way.

In this sense, it could not be legal to contract an institutional public-private partnership between a public and a private partner, as it would involve the establishment of a joint venture. On the other hand, by the explicit provision of Article 32 paragraph 4. of the Law on Public Information and Media, it is prohibited to have as a media publisher a legal entity established directly or indirectly by the Republic, Autonomous Province, a local self-government unit, as well as an institution, enterprise and other legal entity that is wholly or partly state-owned, i.e. which is financed in whole or in part from public revenues.

With regard to the concession, Article 10 of the Law stipulates that a commercial contract regulates the commercial use of a natural resource, a good in general use that is in public ownership, or a resource owned by a public body, or conducting of an activity of general interest, that a public partner assigns to a private partner, for a definite period of time, under specially stipulated conditions, against payment of a concession fee by the private, i.e. public partner, whereas the private partner assumes the risk related to the commercial use of the subject matter of concession. Concession for public services, in terms of this law, is a contractual relationship identical to a contract for public procurement of services in accordance with the law governing public procurements, if the compensation for services provided consists either of the right to commercial use or provision of services or that right along with payment.

It would be very difficult to envisage a situation in which a public partner could even consider the possibility of transferring the performance of activities of general interest to

a media publisher. Definitely such a consideration could not be supported by the Law on Public Information and Media. Namely, Article 16 of that Law prescribes that the Republic of Serbia realizes the public interest in the field of public information exclusively by establishing public media services, i.e. institutions on the territory of Kosovo and Metohija, enabling national councils of national minorities to establish institutions, companies and foundations with the prescribed goal, as well as by co-financing projects in the field of public information in order to achieve the public interest. Therefore, there is no room to entrust the performance of activities of general interest, for which a state body or another body would otherwise be competent, through a concession to a private partner.

When it comes to the third form of the PPP, contractual public-private partnership, it is important to consider in particular the provisions of Article 18 of the Law on PPP. It stipulates that the term for which a public contract is concluded is determined "in such a manner as not to restrict the market competition beyond what is necessary to secure usage of the private partner's investment and a reasonable return on the invested capital, while at the same time taking into account the risk related to the commercial exploitation of the subject matter of such contract." That term cannot be shorter than 5 or longer than 50 years.

One could imagine a situation in which an authority would wish to satisfy a need in the long run by entering into a long-term arrangement with the publisher of a particular media outlet. However, it is not possible to imagine that a public partner could do this without seriously distorting market competition, even if the shortest legal term (five years) were applied. Even if the legal terms in PPP are shorter, the big question is whether there could be a situation in which this type of cooperation would be justified, and therefore allowed.

Thus, a government body that wants to reach the public with certain content has the opportunity to do so through public announcement and public advertising, by applying the public procurement procedure for each specific situation. Even before it enters the public procurement procedure, the contracting authority should try to reach the recipients in another way - by publishing information on its website and the like. The need for some kind of public-private partnership could be considered only if there are no media outlets at all that can reach the recipients of advertising and if there is no commercial interest for such media outlets to appear.[76] It is hard to imagine that such a

[76] For PPPs in principle, there would be no justified reason even if the media outlets are not currently interested in transmitting government announcements and advertisements, as this could be an indication that the contracting authority has misstated the value of the procurement, i.e. that it has planned insufficient funds for it.

situation could be realistic given the growing opportunities for information through various types of media, including cable and on-line media outlets, which are visible outside their headquarters.

Some specialized services that are justifiably needed by the public authorities may not be fully provided by the media outlets, either due to restrictions under media laws or insufficient commercial interest, so this may be an area where public-private partnerships are considered. An example is the need for local governments to ensure the visibility of their assemblies. In a number of towns and municipalities this need is met by paying TV and radio stations to broadcast these sessions, which seriously disrupt their programme schedules. It is obvious that the need to inform the citizens can in this regards be primarily provided by enabling streaming live sessions and posting recordings of sessions on the internet presentations of government bodies, with insignificant investments. If this type of information would not be accessible to a significant number of interested citizens, which will happen less and less often, having in mind technological progress, it would be worth thinking about alternative solutions.

In any case, even if some reasons could be found that would serve as a justification for concluding a contractual public-private partnership, such a type of contracting would undoubtedly be contrary to the proclaimed strategic commitment to "the withdrawal of the state from the media outlets", primarily having in mind the long-term nature of such arrangements. In addition, it should always be borne in mind that on the basis of regulations and planning enactments in the field of media policy, it is envisaged that the missing content is primarily provided through project co-financing. The specific public interest in the field of public information is determined in a certain community (Republic, Province, local self-government) at least once a year (before announcing the call). On the other hand, as already mentioned, PPPs cannot be concluded at all for a period shorter than five years.

Contracts on business and technical cooperation

As already mentioned, business and technical cooperation contracts are used in practice as a form of funding of the media outlets by the public authorities. This type of contract is common in the private sector. When it comes to such contracts that would be concluded by a public sector entity, there seems to be a legal gap, because this type of contract is not regulated in more detail by any regulation. In the absence of explicit regulations, the essence of each contractual relationship must be considered, in order to determine whether the subject of the contract and the manner in which mutual rights and obligations are determined are allowed to the public authority.

There are numerous situations where, through this type of contracting, the public authorities have avoided the application of other regulations. An excellent illustration in this regard can be the finding of the State Audit Institution regarding the agreement on business and technical cooperation that the Municipality of Lučani concluded with the marketing agency and media service provider regarding the media presentation and organization of the trumpet festival in Guča.[77]

The model law envisages solutions that would indicate in an even more clear fashion that it would not be allowed to avoid the mandatory application of public procurements through this type of contracting. Such a ban would also exist in the event that several types of services are contracted through business and technical cooperation, of which only some represent public announcement or public advertising. In such situations, the contracting authority should conduct a selection process for media outlet (or other entity) with which they will cooperate for each type of services individually (e.g. for advertising, for organizing a public event, for the production of promotional material).

Donations and sponsorships

The Law on Donations and Humanitarian Aid[78], which was planned to be amended in earlier anti-corruption documents for other reasons (reducing the risk of conflicts of interest when donations are received by state authorities and public services), has not been amended in the last fifteen years. However, this Law does not contain rules for situations where state authorities or public enterprises act as donors. Therefore, it is currently not relevant for the reform envisaged by the Media Strategy, but it will become so if the Ministry of Finance decides to significantly change the scope of this regulation instead of intervening in other laws.

General regulations governing the disposal of publicly owned funds apply to the giving of donations and sponsorships (to the media or anyone else). The Law on Public Property[79] leaves the possibility to sell publicly-owned real estate without compensation (Article 31) "if there is an interest in such management, such as elimination of the consequences of natural disasters or establishment of good relations with other states, i.e. international organizations, and in other cases provided by a special law". The proposal must be reasoned.

[77] Notes to the Consolidated Financial Statements of the Final Account of the Budget and Compliance Audit Report of the Municipality of Lučani for 2016, pages 49-54, available on the website of the State Audit Institution, via the following link: ,https://bit.ly/31R7QTp accessed on 28 October 2020

[78] Law on Donations and Humanitarian Aid: 53/2001-14, 61/2001-4 (Corrigendum), 36/2002-14, RS 101/2005-28 (other Law)

[79] Law on Public Property: 72/2011-114, 88/2013-3, 105/2014-3, 104/2016-6 (other Law), 108/2016-10, 113/2017-228,
95/2018-236, 153/2020-42

In the case of movables (Article 33, paragraph 4), alienation may be carried out without compensation "if there is an interest in such disposal, such as the elimination of the consequences of natural disasters and in other cases determined by an enactment of the Government." The proposal of the enactment, i.e. the enactment on alienation of movables from public property must contain an explanation wherefrom the existence of the stated reasons can be determined.

Although the cases and conditions under which the alienation of immovables can be carried out without compensation should be regulated in more detail by a Government Decree, even this enactment does not contain much more rules when it comes to immovables.[80] Here, in Article 5, the possible grounds for the gift of real estate referred to in the Law on Public Property are repeated (natural disasters, relations with other states, other cases determined by a special law). Article 23 envisages similar rules when it comes to the gift of other ownership rights (patent right, license right, model, sample and trademark, copyright and related rights, the right to use technical documentation and other ownership rights established by the Law on Public Property). In other words, in order for a media publisher to be given real estate or an ownership right, it would have to be regulated by a special law (which is not currently the case for the media outlets), or be related to the elimination of natural disasters or relations between the Republic of Serbia and other states (e.g. donating premises to a newspaper publisher after a flood; donating municipal space to a correspondent of a state news agency from abroad).

A special Government Decree regulates the alienation of movables.[81] One possibility is to sell or donate things by direct agreement, if the sale failed after public advertising or collection of written bids. Even when there is no attempt at sale through public advertising or collecting written bids, publicly-owned movables can be given to a certain circle of users - "for the needs of humanitarian organizations, citizens' associations in the areas of health care, culture, science, education, sports, social and child protection, environmental protection, fire protection, as well as religious communities." (Article 2, paragraph 2). The decision on the alienation of movables owned by the Republic of Serbia by a direct agreement, below the market price, i.e. without compensation, is made by the Government (Article 4). It can be seen from the above that media publishers, as such, according to the existing regulations, in

[80] Decree on conditions for acquisition and alienation of real estate by direct agreement and leasing of public property, i.e. acquisition and assignment of use of other property rights, as well as procedures for public tendering and collection of written bids ("Official Gazette of RS", No. 16/2018)

[81] Decree on determining equipment of higher value and determining cases and conditions under which movables from public property can be alienated by direct agreement, below the market price, i.e. without compensation "Official Gazette of RS", No. 156 of 25 December 2020.

principle, are not qualified recipients of donations. However, if the media publisher is a humanitarian organization, religious community or association that operates in these areas, there would be the possibility of indirect funding of the media through donations in the form of movables.

These rules also indirectly apply to public companies and certain other state-owned companies. Pursuant to the Law on Public Enterprises[82] (Article 10), a public enterprise and association of capital whose sole owner is the Republic of Serbia, an autonomous province, local self-government or some other public enterprise, disposes of its property "in accordance with the law and the founding act". The property of the enterprise consists of "the right of ownership over movables and real estate, cash and securities and other property rights, which have been transferred to the ownership of the public enterprise in accordance with the law, including the right to use the property in public ownership." Based on the investment in capital, the founder acquires a share in a public enterprise or shares and stocks in an association of capital, as well as rights based on acquired shares, i.e. stocks.

Pursuant to the Law on Public Property (Article 14), the Republic of Serbia, Autonomous Province and local self-government unit may invest publicly owned funds in the capital of a public enterprise and an association of capital. Based on that investment, they acquire shares or stocks and rights based on that ownership. The users of property in public ownership are (Article 19), among others, public companies, associations of capital founded by the Republic of Serbia, Autonomous province and local self-government unit, as well as their subsidiaries.

Pursuant to Article 42, the Republic of Serbia, Autonomous Province and local self-government units may invest in the capital of public enterprises and associations of capital performing activities of general interest, namely money and securities, the right of ownership of publicly owned goods, except natural resources, goods in general use, network that can be exclusively in public ownership and other real estate that can be exclusively in public ownership and other property rights that can be invested in capital according to general regulations. On the basis of investments, holders of public property acquire stocks, i.e. shares, and the invested deposits are the property of a public company or association of capital .

Pursuant to Article 45, a public enterprise and association of capital whose founder, i.e. member is the Republic of Serbia, Autonomous Province or local self-government unit, which on the day this law enters into force has the right to use state-owned real estate, i.e. unlimited right to use other property rights, which form part or the

[82] Law on Public Enterprises ("Official Gazette of the RS", no. 15/2016 and 88/2019)

total capital of these legal entities, acquires the right of ownership over these real estates, i.e. becomes the sole exclusive holder of these other property rights. These provisions apply accordingly to real estate with the right to use by a dependent association of capital.

From the above, it can be concluded that public enterprises and other companies owned by the state, province or municipality have their own property (regardless of the fact that it comes from public property). This means that the aforementioned rules and restrictions on the disposal of immovable and movable property without compensation to third parties do not apply to the disposal of that property. However, public enterprises have certain limitations in the disposal of assets. Thus, Article 69 the Law on Public Enterprises stipulates that the founder (Government, local assembly) gives consent to the acquisition and alienation of publicly owned funds that have been transferred to the ownership of a public enterprise, which are of great value and which are in the direct function of performing activities of general interest, established by the founding act.

Pursuant to Article 70, paragraph 2, "a public enterprise that has no competition on the market in an activity of general interest may not be advertised without the consent of the founder."

When it comes to donations and sponsorships, the restrictions are set in the regulation (containing the Guidelines for the preparation of annual and three-year business programmes)[83], and the content of that act has not changed in this regard for years.

The guidelines do not apply to all state-owned enterprises, but only to the ones to which the Law on Public Enterprises applies. The rules require these enterprises to plan funds for donations and sponsorships, humanitarian activities, sports activities, representation, advertising and propaganda in their annual and three-year plans, up to the level of spending for those purposes in the previous year. They are also required to explain these needs in detail. If the enterprises performed negatively in the previous year or if they receive funds from the budget to finance current operations, then they must not plan allocations for sponsorships and donations at all. However, this prohibition on donations and sponsorships does not apply to enterprises that receive indirect support from the budget (for example, through state guarantees for their loans). Restrictions are not set regarding the nature of donations and sponsorships (who can be the recipient, for what purposes) - there is only an obligation to justify these costs, and it is up to the Government to decide whether to approve such a business programme or not. Finally,

[83] Decree on determining the elements of the annual business programme for 2021, or three-year business programme for the period 2021-2023 of public enterprises and other forms of organization performing activities of general interest "Official Gazette of RS", No. 124 of 16 October 2020.

although the Law itself stipulates that monopolistic enterprises may not be advertised without the consent of their founders, there are no restrictions on such companies in terms of giving donations and sponsorships.

6. METHODS OF ARRANGEMENTS AND OVERSIGHT

As it has already been said, in previous years, a kind of "transfer" of competencies for formulating the bill that should regulate this disputed area has been noticed. Media laws did not regulate the field of public advertising and announcement, while the new Law on Advertising is "cleaned" from all the provisions that do not apply to commercial advertising. This is also evident from the attitude of the Ministry of Trade, Tourism and Telecommunications during the public debate on the Draft Law on Advertising in January 2015.[84] Nevertheless, the new Law on Advertising has opened the space for the adoption of a new law[85], and the new Media Strategy, with its wording on “creating a regulatory framework” in the field of public advertising, implies the need to enact a new law. The proposed solutions, on the other hand, can be implemented through existing laws, i.e. specifically through the Law on Public Information and Media and through the Law on Advertising. So it doesn't matter which form of regulation is chosen.

The more important question seems to be who will oversee the implementation of these provisions. Bearing in mind the complexity of the matter, which summarizes the issues relevant to prevention of inappropriate influence on editorial independence, but also issues in which experience in the application of the Law on Advertising is valuable (such as covert advertising and misleading advertising), a logical conclusion can be drawn that supervision must be carried out by both ministries, but also by the Regulatory Body for Electronic Media (when it comes to media service providers) and additionally the inspection of the Ministry of Trade, Tourism and Telecommunications. Given the introduction of the obligation to apply the principles and specific provisions of the Law on Public Procurement, it is obvious that it would be necessary to significantly engage the institutions responsible for monitoring the implementation of this Law, especially the Public Procurement Office (responsible for "monitoring"), as well as the Ministry of

[84] See the Report on the conducted public hearing that is available on the website of the Ministry of Trade, Tourism and Telecommunications, via the following link: ,https://bit.ly/3meNQlA acceded on 22 October 2020

[85] Through defining promotional activities that do not have the property of advertising referred to under Article 3 of the Law on Advertising.

Finance (responsible for monitoring the execution of the contract).

Such a division of responsibilities would mean that more state authorities would have to be involved in the process of drafting legal solutions, irrelevant of the chosen form (special law or supplement to existing ones). If we add here that the prescribing of these provisions is closely related to the prevention of corrupt influence on the media outlets, as well as the influence on the provisions of many other regulations, the need to involve an even wider range of stakeholders is asserted. Among the independent state bodies are the Republic Commission for Protection of Rights in Public Procurement Procedures, State Audit Institution, Commission for Protection of Competition, Agency for Prevention of Corruption, Commissioner for Information of Public Importance and Personal Data Protection and the Regulatory Body for Electronic Media. In addition to those already listed, the Ministry of Economy would need to be involved in particular due to the large share of public enterprises in public advertising, as well as the rules that would refer to the advertising of those state-owned enterprises operating in the market. The involvement of the Ministry of Public Administration and Local Self-Government is also important, due to the regulation of these issues by towns and municipalities and their practice. Finally, some issues require the engagement of government services and special organizations, including the Republic Secretariat for Legislation and the Office for Information Technology and Electronic Administration.

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