



PROPOSALS FOR THE APPLICATION AND / OR AMENDMENT OF THE EXISTING REGULATORY FRAMEWORK RELATING TO MEDIA AND ELECTIONS

It is necessary for all participants in the electoral process to respect already existing laws and by-laws, as it would significantly improve the media image in Serbia during the election campaign. At the same time, there is a significant number of recommendations for amending or supplementing legal acts or adopting by-laws by the Regulatory Authority for Electronic Media (REM), which would improve the work of the media during the election campaign. This document covers both categories of proposals.

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NECESSARY AMENDMENTS AND SUPPLEMENTS TO THE EXISTING MEDIA AND ELECTION REGULATORY FRAMEWORK

I Measures ensuring the equal representation of participants in the elections in the informative and election-related programmes broadcast by media service providers

1. Define the principle of “representation without discrimination” by applying the strict equality of participants in the election and the principle of proportional equality in the informative programme;
2. Foresee that media service providers, public broadcasting services and commercial media cannot provide privileged treatment for government authorities within the election programme frame.
3. Prohibit the broadcasting of shows, in the scope of informative programmes, in which public officials use their office for party or election promotions and precisely determine which activities of public officials who are at the same time candidates to the elections or prominent representatives of the electoral lists may be broadcast within the information programme;
4. Prohibit overt favouritism in programmes or overt discrimination in programmes regarding political entities and their representatives;
5. Determine in more detail the manner of broadcasting of political rallies. It is necessary to disable live broadcasting of election rallies by imposing a measure to all MSP so that they are allowed to play only a two-minute feature in the election programme frame.

Reasoning: The principle of "representation without discrimination" stipulated by the Law on Electronic Media has not been set out in a precise manner. The Code of Good Practice on Elections, adopted by the Venice Commission in 2002, states "equal opportunity" as a fundamental principle that must be guaranteed for political parties and candidates. The state is urged to ensure neutral behaviour, especially in relation to:

1. Election campaigns;
2. Covering of elections in media, especially in public service media;
3. Public financing of parties and campaigns.

The Venice Commission perceives equality in two ways:

- i. *Strict*: when political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate.
- ii. *Proportional*: when political parties are treated according to the results achieved in the elections.

In order to implement the recommendation regarding the restriction of public officials' activities that may be broadcast in the informative programmes, **it is necessary to adopt the REM by-law** (a new Rulebook on obligations of media service providers during the election campaign) **to specify precisely what activities of public officials who are at the same time candidates or prominent representatives of the electoral lists may be broadcast within the information programme.** It is necessary to consider the possibility that their appearance in the news programme be reduced to statements given only in cases of urgent nature, while all their other activities (participation in various events, factory openings, etc.) would be considered a campaigning activity and broadcast exclusively in that segment of the programme, so that the rules on equal representation of candidates could be applied.

A large number of objections that citizens filed to the REM in the 2017 and 2018 election processes referred to the unequal representation of public officials in the informative programmes. For example, in a complaint filed by a citizen to the REM during the 2017 presidential campaign, it was stated that *in the central informative programme of a TV station having a national frequency, all presidential candidates were systematically discriminated in favour of Aleksandar Vučić (the then prime minister) during the entire campaign. In the election programme featuring presidential candidates' activities, all candidates were presented in a balanced manner, only Vučić's campaign was followed up in an extensive fashion...and features about his activities lasted for as much as 20 minutes in the News.* The department for oversight and analysis of the REM concluded in its report that ***"reporting about public officials' activities was a matter of the editor's judgment and was therefore not subjected to the ban in reporting during the election campaign."***

Although reporting on public officials' activities is not subjected to a ban, it is subjected to certain restrictions, especially during the election campaign. In that sense, the **Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, foresees that in election campaigns, media service providers should be particularly fair, balanced and impartial in their informative and news programmes, including discussion programmes such as interviews and debates. No privileged treatment should be given by broadcasters to public authorities during such programmes.**

In addition, Recommendation No. CM/REC (2007) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns stipulates that ***media service providers, public broadcasting service and commercial media cannot provide privileged treatment to government authorities in the election programmes.***

Furthermore, in the findings presented after monitoring of the 2017 election campaign, ***the ODIHR mission noted that "generally speaking, the majority of the media reported on the campaign in a biased manner. The contents were dominated by topics about the governing structure activities, particularly the prime minister¹" and that "viewers were unable to clearly distinguish which activities were a part of their official duties and which were a part of Mr. Vučić's candidacy promotion²".***

For this reason, one of the recommendations of the ODIHR Election Observation Mission to Improve Electoral Conditions in Serbia stipulates that ***the media, especially the public service broadcaster, should consider adopting measures to regulate their own work in order to ensure a fair and independent editorial policy in monitoring the election campaign, including emphasising the clear demarcation between candidates' official activities and their appearance as part of a campaign, to prevent other candidates from being unfairly marginalised by reporting on state officials.³***

The recommendation regarding the **restriction of the broadcasting of rallies** is a consequence of the fact that, prior to the adoption of the Rulebook on MSP Obligations during the 2015 election campaign, the rules concerning the presentation of rallies, gatherings, etc. made possible the broadcasting within the paid election programme. However, these rules also knew some limitations: one party was not allowed to have more than one thirty-minute broadcast on one television during the election campaign. After the adoption of the Rulebook, former "paid terms" were classed as 'advertising' and therefore could last no more than 12 minutes on commercial and 6 minutes on public services televisions. Nevertheless, rallies that had previously been

¹ Report of the OSCE/ODIHR mission on election assessment, 2017, page 13

² Ibid, 14

³ Ibid

broadcasted within the paid term, **after the adoption of the Rulebook, were broadcast unrestrictedly and without any limitations within the election programme, with a formal request for television to take account of the equal representation. The actual consequence of this situation is the unrestricted possibility of individual parties to broadcast their conventions, rallies at other gatherings during the campaign.** It is therefore necessary, by the REM by-law, to specify precisely the rules relating to the broadcasting of rallies and other similar formats.

II Measures ensuring the equal representation of political entities in the public service broadcasting programme

- 1. Obliging the REM to publish quarterly on its web site reports on fulfilment of obligations of public media services on the basis of a performed qualitative and quantitative analysis of public interest in the information programme of public media services, regarding:**
 - a) Truthful, timely, complete, impartial, and professional provision of information for the citizens (article 7, item 1, point 1 of the Law on Public Media Broadcasting);**
 - b) Respecting and encouraging pluralism of political ideas;**
 - c) Independence of the editorial policy in relation to political interests of individuals or political parties (article 7, item 1, point 4 of the Law on Public Media Broadcasting);**
 - d) impartial coverage of political issues, enabling equal encounters of different views; (article 7, item 1, point 7 of the Law on Public Media Broadcasting).**
- 2. It is necessary to broaden the public interest generated by public media services with minimal access to public media services regarding advertising during election campaigns.**
- 3. Oblige public media services to adopt the Code of Conduct during the election campaign.** Additionally, it is recommended that public media services adopt codices that would be in force outside of election campaign as well, and that would more precisely define their obligations in realising programme functions towards supporting political pluralism.

Reasoning: The exercise of public interest as defined in article 7, item 1, points 1, 4 and 7 of the Law on Public Media Broadcasting is not limited to the election campaign period, but obliges public media broadcasters to make their political programmes available to different political options at all times. The exercise of public interest by RTS and RTV in the field of fostering political pluralism is essential for enabling viewers to form free and informed views. For this reason, it is imperative that the fulfilment of this obligation by the MSP be systematically controlled.

The REM publishes, on an annual basis, reports on compliance with legal and programmatic obligations for all televisions with national coverage, including public service broadcasters. Nonetheless, in these reports, the REM expert service does not pay enough attention to the exercise of public interest in the RTS and RTV news programmes. These reports are important not only to the public but also to the MPS Programme Boards, which, on the basis of these reports, can make recommendations for improving the programme of their services.

The adoption of the MPS Code of Conduct is in line with the best practices of European countries. BBC and HRT have these Codes which additionally affirm the standards of equal and impartial treatment for all participants to the elections. Areas that the codices should mandatorily regulate

include defining methods for upholding the principle of equal representation in MPS programmes, prohibiting programmatic favouritism or discrimination (negative campaign) of individual political actors, access to free broadcasts and regulating the minimum access to public media services related to advertising during the election campaign. The main purpose of the codex would be to further strengthen professionalism of public media services towards supporting political pluralism.

III Amendments to the regulatory framework regarding the transparency of the REM work during the election campaign

1. Introduce an obligation to the REM to periodically (for example, once a fortnight during the campaign), issue written reports about monitoring and analysis of the work of electronic media in the election period. The REM must be obliged to publish the final report on the work of electronic media during the electoral campaign one month after the final results announcement at the latest and submit it to the National Assembly for consideration. Additionally, the National Assembly should be obligated to review this report within 60 days from the announcement of final election results.
2. Precisely define compulsory elements in the reports on control of a MSP during the campaign. Reporting shall be performed on the basis of a qualitative and quantitative analysis of programme contents, whereas the reports must contain findings prepared by the expert service of the REM about the equal representation of candidates, i.e. electoral lists to media, media reporting about the candidates' activities, records of public appearances of stakeholders in their capacity of public officials and candidates, context in which a candidate is being mentioned, as well as other important aspects of the work of media that may have an impact on an objective and comprehensive informing of citizens about the candidates and the election programmes;
3. Prescribe that monitoring of the work of the MSP during the campaign comprise public media broadcasters, all MSP with the national coverage and a convenient sample of the MSP with the local and regional coverage;
4. Oblige the REM to publish findings collected through every-day monitoring on its web site in the open data format.
5. In order to ensure a higher level of publicity of the REM work in the election process, it is necessary to allow that, apart from media representatives, observers accredited for the election monitoring attend the Council sessions.
6. Introduce clear indicators for the assessment of the REM Council work by establishing objective criteria for the evaluation of the Council members' work.
7. Introduce an obligation to report on the fulfilment of the performance indicators of the REM Council.

IV Amendments to the regulatory framework concerning acting of the REM to complaints and the imposition of sanctions during the election campaign

1. Foresee the obligation that the REM initiate proceedings and pass a reasoned decision that can be subject of an administrative dispute following every complaint filed during the election campaign, including those that indicate the violation of public interest;
2. Introduce an obligation to include the report of the expert service for oversight and analysis in the reasoning of a decision brought following a complaint, in order to make the complainant aware of the facts and circumstances that were decisive for a specific decision.
3. Prescribe a 72-hour deadline for the REM to process complaints during the campaign, so that the control over the election campaign is timely and effective;

4. Prescribe rules that will allow the REM to impose fines on media service providers in fixed amounts.

Reasoning:

1. Complaints indicating violation of the obligations of media service providers which, in the Regulator's view, do not constitute a violation of the complainant's personal interest shall be treated by the REM as notifications to be taken into account when initiating proceedings ex officio. This means that if the REM Service for oversight and control of the broadcaster's programmes establishes that allegations indicating the **violation of the public interest** are unfounded, the REM Council will not initiate proceedings. This is particularly important from the standpoint of the form of the Regulator's decision. When proceedings are not initiated, the Council does not pass an administrative act that can be subjected to the administrative procedure. The possibility that the court controls decisions made by the Regulator upon complaints is one of the important standards of fair and democratic elections, comprised in the ODIHR⁴ documents, while the implementation of this recommendation would enable the court control over the REM Council decisions during the election campaign.
2. During the 2017 election campaign, a large number of complainants were informed by the competent REM body that "upon consideration of the report prepared by the Service for oversight and analysis, the Council passed on a decision that there were no grounds for initiation of proceedings against the media service provider." Although the Council, in its notifications to citizens, referred to the Service's report, the reasoning of the aforementioned notifications did not comprise the content of the findings, i.e., the complainants were not aware of how the competent service had established the facts before it was decided not to initiate the procedure. Some citizens approached the REM with a request for free access to information of public importance in order to inspect the contents of the report of the Service and in that way determine the inconsistencies in the internal cooperation and communication between the Council and the Service for oversight and analysis. Although in some cases the Service considered that there were indications of a violation of the principle of non-discrimination by broadcasters, at its session the Council decided that there was no room to initiate proceedings.
3. The need to prescribe short deadlines for acting upon complaints and to introduce new types of sanctions has been recognised by the ODIHR election observation mission that indicated, in its Report for 2017, the need to amend and supplement the Law on Electronic Media **in order to ensure more efficient sanctions, including the adoption of swift and timely decisions during the election campaign. The recommendation that the REM should have the possibility to impose proportionate fines has also been addressed by the European Commission.**

V Necessary amendments to the existing regulatory framework in the field of advertising

1. Regulate the maximum number of seconds of the pre-election ad space that MSPs could offer to one political actor within one hour;
2. Regulate the total allowed advertising time for one political actor in the programme of one MSP within the entire election campaign;

⁴ OSCE/ODIHR Handbook On Media Monitoring for Election Observation Missions, str. 27 *The implementing body should act in response to complaints from candidates and parties or whenever it identifies a breach of the regulations, regardless of whether a complaint has been filed. Procedures should be established to receive, investigate, hear and resolve complaints from candidates, political parties or others about unfair or unlawful media coverage. These procedures should be timely, clear and accessible, in order to provide complainants with prompt remedy.* <https://www.osce.org/odihr/92057?download=true>

3. The financing of all segments of election campaigns must be transparent, and includes the following:
 - a. To oblige MSPs which decide to broadcast election advertisement messages to publicly announce price lists of their marketing services during the election campaign before they start contracting political advertising services during the campaign.;
 - b. To introduce the obligation of the REM to include in the reports on advertising during election campaigns the number of leased seconds of each political entity and the schedule of broadcasting the advertisement message.
4. Broaden the definition of a misleading (article 11 of the Law on Advertising) and parallel advertising (article 14) and of specificities related to election campaigns.

Reasoning:

1. **The huge differences in the financial power of political entities in Serbia are the reason for proposing the limitations on the number of seconds that TV stations can offer to political entities.**

As a matter of fact, if one looks at the money spent on television advertising by individual political entities during the 2017 presidential election campaign, out of 701,524,522.95 dinars paid to TV stations for advertising, the Serbian Progressive Party paid 501,369,674.36 (71%), Vuk Jeremić 123,893,761.78 (18%), whereby the remaining nine candidates spent the remaining 11%.

2. The Venice Commission Code of Good Practice in Electoral Matters from 2001 is one of the key standards for fair and democratic elections and foresees that financing of election campaigns must be transparent. Costs incurred by political entities for advertising in the media are presented in reports submitted to the Anti-Corruption Agency, **but it cannot be seen from these reports whether the media service providers have offered advertising to all participants under the same technical and financial conditions.**
3. Although the existing Law on Advertising also applies consequently to election campaigns, the provisions of the Law are so much oriented to commercial advertising that it is practically impossible to discern their sense in the context of political advertising. This problem was also noticeable during the 2017 and 2018 campaigns when the REM repeatedly spoke out on the contents of presidential candidates' video clips and interpreted the provisions of the Law on Advertising. However, the way in which the REM interpreted the existence of misleading and parallel advertising during these two election cycles was inconsistent. Clear guidelines that would be formulated in the by-law of the REM would add up to certitude in this area.

VI Measures to protect media at election time

1. **Obligate representatives of public authorities not to interfere with the activities of journalists and other media professionals with the aim of influencing the elections.**
2. **Journalists should be protected from assaults, threats and other unlawful pressure on the media at election time.**
3. **The law should ensure the independence of media editorial policy for media coverage of elections.**

Reasoning: The interference of the governing structure in the editorial policy of the media during the election of the President of the Republic of Serbia in 2017 was identified by the ODIHR observation mission as one of the key problems in the media environment in Serbia. Based on the findings of the 2017 Presidential Election Observation, the ODIHR Observation Mission recommended that ***state bodies should not interfere with media and journalist activities, as they should be allowed to act freely without intimidation or pressure, administrative sanctions or other forms of unfair influences.***

The existing legal framework contained in the Law on Public Information and Media needs to be strengthened and recommendations set forth by the Council of Europe should be implemented in the national legislation in order to prevent the state or its authorities from interfering in the activities of journalists and other media personnel with a view to influencing the elections. Namely, the **Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns**, foresees special measures for media protection at election time which include a recommendation *that public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections.*

EXISTING REGULATORY FRAMEWORK THAT CAN BE IMMEDIATELY APPLIED

1. A Media Service Provider (MSP), in relation to programme content in accordance with their programme concept, **is held to respect the ban on political advertising outside of political campaigns and during such campaign enable** registered political parties, coalitions and candidates **representation without discrimination** (article 47, item 1, point 5).

2. The Regulatory Authority for Electronic Media (REM) shall exercise control over the MSP and ensure consistent application of provision of the Law on Electronic Media, including the obligation that media service providers shall enable registered political parties, coalitions and candidates representation without discrimination, as well as sanctions for those MSP that violate the Law (article 47, item 1, point 5 of the Law on Electronic Media).

After the control over the work of media service providers, the REM can impose on the media service provider the following measures in case of violation of obligations relating to discrimination:

1. Remonstrance;
2. Warning;
3. Temporary ban on publication of the programme content, and
4. Revoking of the license (article 28, item 2 of the Law on Electronic Media).

The Regulator shall impose the aforesaid measures ex officio or upon filed objections, “independently of the use of other means of legal protection available to the injured or another party, in accordance with the provisions of special laws” (article 28, item 2 of the Law on Electronic Media).

Apart from these four measures, the REM is entitled to additionally sanction a MSP that did not respect the obligation of enabling registered political parties, coalitions and candidates representation without discrimination during the campaign, in the following ways:

1. The Regulator can reject the application for issuing of a license for the provision of media services submitted by a MSP;
2. The Regulator can reject the application for renewal of the license submitted by a MSP. (article 83, item 3 of the Law on Electronic Media).

3. The REM is already entitled to bring by-laws which establish detailed rules for carrying out the obligations set forth in Articles from 47 to 59 of the Law on Electronic Media (article 60 of the Law on Electronic Media). It is therefore necessary to start the process of adopting the new Rulebook on Obligations of Media Service Providers during the election campaign as soon as possible and to conduct a public hearing about its adoption in accordance with article 40 of the Law on Electronic Media.

The by-law shall imperatively contain the following:

1. A definition of a notion of an equal representation.
2. A definition of a covert or indirect recommendation of electoral lists or candidates. In particular, it is necessary to specify precisely what activities of public officials who are at the same time candidates or prominent representatives of the electoral lists may be broadcast within the information programme. It is necessary to consider the possibility that their appearance in the news programme be reduced to statements given only in cases of urgent nature, while all their other activities (participation in various events, factory openings, etc.) would be considered a campaigning activity and broadcast exclusively in that segment of the program, so that the rules on equal representation of candidates could be applied;
3. A closer definition of the manner of broadcasting of rallies. It is necessary to disable live broadcasting of election rallies by imposing a measure to all MSP so that they are allowed to play only a two-minute feature in the election programme frame with two audio fragments of speeches held at the rally at the most.

4. The application of the existing provisions on the right of reply and the right of correction are realised in accordance with provisions of articles 83 – 100 of the Law on Public Information and Media. While assessing a MSP, the Regulator shall pay special attention to whether a media service provider ensured a representation without discrimination to registered parties, coalitions and candidates in accordance with article 47, item 1, point 5 of the Law on Electronic Media, and consequently apply article 83, item 3 thereof.

5. Political advertising is regulated by the Law on Advertising which stipulates in article 3, item 2 that “the provisions of this Law are also applied to activities that do not have an advertising character”, such as “election campaigns and other promotional activities of political organisations conducted in accordance with regulations regulating elections, as well as regulations regulating electronic media“. Consequently, it is possible to apply article 12 of the Law on Advertising in the following election campaign in Serbia, which says that **undercover advertising** is forbidden (article 12, item 1). The analogy can be applied to **deceiving** (article 11) and **parallel advertising** (article 14).

6. Public interest realised by the public media service is composed, inter alia, out of the following:

1. Respecting and advocating pluralism of political, religious and other ideas, and enabling the public to get acquainted with these ideas, without serving the interests of particular political parties or religious communities, or any other individual political, economic, religious or other attitudes and interests (article 7, item 1, point 4)
2. Impartial coverage of political, historical, economic, social, medical, cultural, educational, scientific, environmental, and other issues, enabling equal encounters of different views (article 7, item 1, point 7)

3. Free and equal representation of political parties, coalitions, and candidates that have verified electoral registers for the republic, provincial, or local elections during campaigning (article 7, item 1, point 8)

7. The position of public and political figures: The elected, appointed, i.e., assigned holder of public office shall be obliged to be subjected to the expression of critical opinions that pertain to the results of their performance, i.e., the policy they implement, in relation to performing their function – regardless of whether they feel personally affected by the expression of these opinions. (article 8 of the Law on Public Information and Media). This provision requires a special application during the election campaign (Joint statement on media and elections, UN special rapporteur on freedom of opinion and expression, OSCE Representative on Freedom of the Media, OAS special rapporteur on freedom of expression and ACHPR special rapporteur on freedom of expression and access to information).

8. Respect chapter VII relating to introducing the submitters of the electoral lists and the candidates on the electoral lists referred to in the Law on the Election of Members of the Parliament, in particular the following:

1. The submitters of the electoral lists shall have the right to inform the citizens of their programs and activities, as well as the nominated candidates, by the mass media, in accordance with the provisions of this law. (article 48).
2. Organisations which broadcast radio and television program, and are founded by the Republic of Serbia shall, from the day of calling of the elections, in their political-informative programs which can be seen or heard throughout the territory of the Republic, ensure the presentation of the submitters of the electoral lists and of the candidates from the electoral lists, as well as the exposition and explanation of the electoral programs of the submitters of said lists, in accordance with this law. (article 49, item 1).
3. Organisations which broadcast radio and television program, and are founded by the Republic of Serbia shall not be allowed to, under any circumstances, enable the presentation of candidates and the exposition and explanation of programs of submitters of electoral lists in the commercial, entertainment or other program. (article 49, item 2)
4. Editors and anchor-men of political-informative and specialised broadcasts of organisations referred to in article 49 of this law shall independently and impartially present all the candidates during the election campaign, and anchor-men of broadcasts shall have impartial attitude towards all presented political, social and ethical-cultural programs of the political parties whose candidates are presented. (article 50, item 1). This is why the broadcasts shall be organised in order to ensure the public confrontation of the electoral programs of submitters of electoral lists and candidates from those lists (article 50, item 2).
5. Two representatives of each public organisation, broadcasting radio and television program, founded by the Republic of Serbia, the Government of the Republic of Serbia as well as political parties that have their representatives in the National Assembly of the Republic of Serbia, shall mutually agree on the number and duration of the broadcasts for presentation of political parties, political organisations, or groups of citizens that intend to take part in the elections. (article 51, item 1). The agreement shall be reached not later than five days after the day of making the decision on calling of elections and shall be made public without delay. (article 51, item 2). Media service providers, together with the representatives of both the founders and submitters of the electoral lists, shall determine further regulations for the presentation of the submitters of the electoral lists, electoral programs and candidates from the electoral lists. (article 51, item 3).