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HOW TO ENSURE MORE ACCOUNTABLE AND MORE TRANSPARENT WORK OF PUBLICLY OWNED CORPORATIONS?

(Summary of the Analysis)

FONDACIJA ZA OTVORENO DRUŠTVO, SRBIJA
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*** All terms used in the masculine gender in the text refer to both masculine and feminine genders of the persons they refer to.

Contents:

1. Context and Reasons for the Analysis

The Ministry of State Administration and Local Self-Government (hereinafter referred to as: Ministry) on February 5, 2018 opened the public consultation procedure aimed at amending the Law on Free Access to Information of Public Importance (hereinafter referred to as: Law)[1] and proposed a Draft Law on Free Access to Information of Public Importance (hereinafter referred to as: Draft), which was followed by a public debate that ended on April 19, 2018.

One of the more significant changes brought about by the Draft refers to the exclusion of certain public authorities (which probably arouse the greatest public interest) from the implementation of the Law. Unlike the still applicable provision of the Law, under which a public authority is a state authority and a legal entity fully or predominantly founded or funded by a government body, Article 3 of the Draft defines „public authority bodies" and envisions that a body of authority within the meaning of this Law *shall not be a corporation that operates on the market in accordance with regulations on companies, regardless of who its member or shareholder is.*

The civil society sector, the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as: Commissioner) and part of the professional public have stated their position that the exclusion of "corporations" established or funded fully or mostly by a state authority (hereinafter referred to as: publicly owned corporations) from the group of entities subjected to the Law does not only represent regression from the achieved level of transparency in the work of authorities of the Republic of Serbia, but considerably compromises the very purpose of the Law, since this regulation should ensure the protection of the public interest in a free democratic order and open society. If adopted, this provision would practically invalidate all constitutional and statutory principles on the public right to be informed truthfully, completely and in a timely manner about the issues of public importance, i.e. to have the right to access information in the possession of state authorities and organizations entrusted with public competences and corporations financed from public funds.

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The purpose of this analysis is not to point out this inappropriate legal solution once again, but to offer specific solutions with the aim of helping the interested public, primarily journalists, activists, citizens, potential whistleblowers and all other stakeholders to be ready (as much as possible) for the beginning of implementation of the amended Law (if the modifications proposed in the Draft are upheld) and to try, as successfully as possible, to continue with the already challenging and frequently obstructed monitoring of the work of entities that are to be excluded from the scope of the new law.

Even if the proposed legal solution were not adopted, which would certainly be good primarily for the interested public, this research can certainly help the public to prepare better for the improved use of primary and alternative ways for collecting information about the work of publicly owned corporations, with the aim of achieving and protecting the interest of the public to know how public funds are being used! **Therefore, the aim of this analysis is to identify ways for getting information about the work of corporations through**

[1]Law on Free Access to Information of Public Importance (Official Gazette of the RS, No. 120/2004, 54/2007, 104/2009 and 36/2010)

official channels, but by addressing other institutions which might have certain information about the operation of corporations. This is particularly important for the research of the operation of the corporations that have so far frequently violated they statutory obligation to work in a transparent manner.

The complete analysis (on Serbian) was published on the Partners Serbia website (www.partners-serbia.org) and the summary of the analysis is provided below.

2. Entities which will not be subjected to the Law, according to the Draft Law on Free Access to Information of Public Importance

Practically all corporations will be excluded from the preview of the potential Law (if the Draft is adopted), and particularly those:

- That are organized as limited liability companies or joint stock companies, regardless of their activity or purpose of establishment,
- That operate on the market (regardless of whether they have monopoly or dominant position on the market),
- That are either completely private, or in which the Republic of Serbia, autonomous province or a local self-government unit has a share of between 1% and 100% of capital or funding.

This solution is particularly problematic because an activity of general interest may be carried out not only by a public enterprise (which even according to the Draft remains subjected to the law), but also by other legal formats, including corporations, which will not be subjected to the law, according to the Draft. This leads to an absurd situation in which the public will not have the right of access to information of public importance even if the relevant companies operate in the general interest, if they are organized as corporations, which would deal a particularly big blow to the public right to transparency regarding the financing of activities of general interest.

For example, some of the information at the disposal of publicly owned corporations is:

- Information on the concluded business or other contracts with other legal entities (particularly information on investment contracts), data on the amendments to the existing contracts;
- Accompanying documents to the business contracts, studies, analyses and evaluations of performance preceding the conclusion of agreements and contracts, reports on or analyses of the enforcement of investment contracts;
- Memoranda or agreements on cooperation with other institutions or legal entities;
- Information on the engagement of certain persons in performing some tasks, employment data, internal job classification acts;
- Data on received state assistance, subsidies, claims and write-offs of claims, real debt, given or received donations,
- Information on public procurement procedures and other procurement procedures which are not encompassed by the Law on Public Procurement (hereinafter referred to as: **LPP**) 2, investment data, other corporate procurement procedures;
- If a corporation does not implement public procurement procedures, data on the implementation of purchase procedures (for works, goods or services);
- Data on implemented internal audits.

[2] It seems that the procurement procedures on which the Law on Public Procurement does not apply (Official Gazette of the RS, No. 124/2012, 14/2015 and 68/2015) or procedures for which there is a special interest to remain outside the reach of the public will remain completely closed under Article 7 of the LPP.

We would like to stress that the existing legal solutions make it possible to restrict the public right to get certain information whenever this is required by an overweighing legitimate interest. In connection with this, the above mentioned rigid definition proposed in the Draft really results in an excessive restriction, nearly abolishment, of the public right to be informed, at request, about the work of corporations which are directly or indirectly owned by the public.

At this point, we should stress that the disputable provision in the Draft does not envision a prohibition to access particular information of public importance; instead, it only frees corporations from the obligation to act on the requests of the interested public. In practice, rather than prohibiting the access to a particular piece of information, the Draft leaves out the obligation of an entity to provide a particular piece of information (therefore, this is, in fact, a type of prohibition to access a particular piece of information on which the corporation has the discretion to decide, and judging by the practice so far, there are grounds for expecting that its decision will be negative).

So, although the information of public importance regarding such corporations is free, the Draft practically removes the main channel through which this information could be obtained. The corporations' information of public importance can be held by other corporations and public authorities or held at some other places from which they can be requested (under certain conditions).

Although this can appear to be consoling at first, since the information of public importance will remain available, i.e. will not be completely secret, the path to this information, in addition to being challenging, could, nevertheless, become either completely closed or significantly impeded after the adoption of the Draft.

Even if we assume that a large number of information of public importance concerning publicly owned corporations is held by another corporation, a body of public authority which is subjected to the Law or another state authority, in the absence of the obligation of publicly owned corporations to respond to the public request, a major challenge in the finding of this information will be the questions to which the public will have to know the answer in order to be able to count on the timely response from a particular person, as follows:

- Which person or state authority, as an entity subjected to the Law has a particular piece of information?
- Which exact piece of information does the entity subjected to the Law have and in which format and scope?
- When is this information really in the possession of a particular entity subjected to the Law?

In this context, if the Draft becomes law, the interested public will be able to access the following types of information of public importance:

- Less information of public interest about publicly owned corporations that the public can access through the mandatory or voluntary publication of certain data by corporations themselves,
- Limited information of public interest about publicly owned corporations, which may be accessible to the public if it knows who holds them, in which format and scope and when they can be found in order to access them freely, and
- Most information of public interest about publicly owned corporations will never be accessible to the interested public (either because this information has never been published or because the public does not know where, when and from whom this information can be requested).

3. Some alternative ways for obtaining information on the operation of publicly owned corporations

Although the alternative mechanisms presented in the analysis can be effective in certain cases, they are not and cannot be a replacement for the functional framework for requesting information of public importance from corporations which should be regulated by law. They, represent only the last, although utterly insufficient barrier to the possible elimination or considerable restriction of accountable and transparent work of publicly owned corporations!

This analysis describes in detail the types of information on the operation of corporations that can be obtained on the basis of other regulations, or can be obtained from other authorities using the mechanism of access to information of public importance. The analysis has focused primarily on the Law on Public Enterprises and the Law on Public Procurement. Analyzing the competence of other public authorities, we have identified the type of information or documentation that can be found at the:

- Ministry of Finance and its organizational units (Tax Administration, Public Debt Administration, Free Economic Zones Administration, Administration for Prevention of Money Laundering, and the Treasury and Customs Administrations),
- Other ministries and their organizational units, depending on the scope of work of publicly owned corporations (e.g. ministries in charge of economic affairs, energy, traffic, etc.).
- Public agencies, independent republic authorities and independent bodies and their organizational units, special organizations within the state administration system and their organizational units (e.g. the Business Registers Agency, RATEL, Statistical Office of the Republic, Public Investment Management Office, Energy Agency, State Audit Institution, Commission for Protection of Competition and Commission for State Aid Control, etc.),
- Judicial authorities, public enforcement officers, state attorney’s office and notaries.

All these alternative mechanisms are presented in detail in the analysis, the full text of which is available in the Serbian language, at www.partners-serbia.org.

4. Conclusions

Therefore, the implementation of a new law, if the Draft is adopted, will doubtless be much more efficient, but the title that would better suit its real nature, primarily in view of its limited implementation could actually be *Law on the **Limited** Access to Information of Public Importance."*

An additional risk for the restriction of the public right to know is also the fact that the Law on Public Enterprises says itself that an activity of general interest may be performed not only by a public enterprise (which remains an entity subjected to the law even according to the Draft) but also by companies with other legal formats, including corporations. This, justly, causes apprehension that, instead of continuing to obstruct the currently applicable Law like many times before, public enterprises or their founders could now, under the new Law, avoid their obligations altogether, since, unfortunately, an established practice already exists in this respect.

An additional challenge for the realization of the public right to know lies in the uncertain status of the publicly owned corporations which are still subjected to the Law. In practice, their founders (i.e. the Republic of Serbia, autonomous province and local self-governments) present this status in different ways and treat them like public enterprises, although their real responsibility and attitude towards obligations largely differ from those of public enterprises.

The behavior of publicly owned corporations as entities subjected to the Law can be described as problematic, because it sometimes seems that these corporations invest much more effort in trying to fulfill certain international corporate operation standards than in the fulfillment of domestic provisions on publicity and transparency. In addition to this, the accountability standard has not been established yet, and the absence of proceedings and impunity of responsible persons at those enterprises that do not fulfill these obligations completely is especially striking.

In fact, we can observe the absence of accountability, internal review and procedures, and, consequently, the impunity of responsible persons at enterprises. There are also similar examples in external controls, no control data are available, and the responsible persons at corporations and public enterprises are very rarely punished.

The absence of full transparency of operation is reflected in the fact that the public is deprived of the most important information about the operation of corporations that work in the general interest. Most frequently, there is no insight in the provided state aid and subsidies, losses, risk assessments, loans and credits, Serbian ministry and government conclusions, contracts on the use of funds, investment contracts and engagement contracts with other natural persons and legal entities (publication of data, submitting data to other authorities or acting on requests for free access to information).

Another problem lies in the fact that other public authorities refuse to submit key documents (Government of the Republic of Serbia, which most frequently has founder's rights, and this practice was topical at the time of finalization of this research).

There is a large number of documents that should contain data on the work of corporations and public enterprises at the level of the republic, which are required to be submitted to other public authorities and, during the research, we identified more than 20 different public authorities which either have or may have data on the work of corporations and which have the obligation to implement the Law.

Out of them, the Government of the Republic of Serbia and local self-governments as the founders, and the Ministry of Economy, as the controller in the public enterprise sector, already has a large number of data of interest for publication, and the public could also use the mechanisms at its disposal.

However, although they have this type of information, the Government of the Republic of Serbia and the Secretariat-General fail to respond to more than 90% of requests for access to information, which marks the continuation of the existing practice within which the access to data of public interest becomes more and more restricted and which sends a very bad message to other bodies of public authority which are slowly but surely accepting this type of behavior (i.e. inaction).

5. Recommendations

Recommendations for decision-makers for the amendment of regulations:

The Ministry of State Administration and Local Self-Government should withdraw the announced amendments to the Law on Free Access to Information of Public Importance, in the part that refers to the exclusion of publicly owned corporations from the group of entities subjected to the Law.

The Ministry of State Administration and Local Self-Government should reopen a public debate on amendments to the Law on Free Access to Information of Public Importance, in which attention would be dedicated to the biggest problems in the implementation of the Law.

The process of amending the Law on Public Enterprises needs to be initiated, with the aim of:

- increasing the mandatory number of documents which public enterprises must make public,
- expanding the scope of mandatory data in the annual business report,
- introducing the obligation of submitting narrative reports, data on concluded investment contracts, analyses and studies to founders who represent public authorities,
- introducing the obligation to send to the State Attorney's Office draft legal transactions concluded by entities it represents, if the subject matter of these legal transactions are property rights and obligations of the Republic of Serbia, or rights of these entities, whose value exceeds e.g. 500 thousand euros, for the purpose of providing a legal opinion.

The process of amending the Law on State Attorney's Office (Article 14 and Article 17) should be initiated, by making it an obligation of the state attorney's office (which is a public authority) to provide legal opinions to the drafts of legal transactions concluded by entities it represents, if the subject matter of these legal transactions are property rights and obligations of the Republic of Serbia, or rights of these entities whose value exceeds e.g. 500 thousand euros;

Recommendations to public institutions for improving the implementation of regulations:

The founders of publicly owned corporations should:

- More regularly inspect and oversee of the work of corporations, publish reports on supervision and undertaken measures and activities with the aim of removing any observed irregularities;
- More regularly check and analyze the implemented internal controls of corporations, publish reports on implemented checks and analyses, and undertaken measures and activities with the aim of removing any observed irregularities;

The State Audit Institution should increase the number of audits of the largest and most important publicly owned corporations.

Recommendations for the interested public

To the interested public, which most frequently includes applicants requesting information of public importance (civil society organizations, political parties, civic activists, journalists, etc.), we recommend the implementation of the following activities for the purpose of contributing to further strengthening of the public right to know and control of work of publicly owned corporations:

- They should continue to urge the reopening of a public debate on the Law on Free Access to Information of Public Importance, by pointing to the provisions of the draft law which restrict the achieved level of the public right to know, and particularly the provision under which, within the meaning of the Law, a body of authority shall not be a corporation that operates on the market in accordance with regulations on companies, regardless of its member or shareholder;
- They should more frequently conduct the research of business operation of publicly owned corporations, in such a way as to (in case that the proposed draft becomes the new law) use the findings of this research on the collection of data from alternative sources (founders, ministries and inspection services, agencies, etc.);
- Within this type of research, we suggest that they send requests for access to information of public importance to public authorities which have not been the primary sources of information before, particularly to those which have publicly owned corporations and public enterprises within their competence or under control, in view of the fact that these authorities represent a major source of information and data, but that they have been secondary sources so far and very frequently had just a small number of received requests for the access to information of public importance. This type of research also needs to be implemented in order to improve the implementation of the Law on Companies, Law on Public Enterprises and related regulations, especially in the part which refers to the principles of publicity and transparency of work of these companies;
- They should use the findings of this research to recognize new, additional alternative sources of data on the work of publicly owned corporations and public enterprises of public interest;
- In the case of inaction of authorities on the received requests for access to information of public importance, the applicants should use all available legal remedies or recourses (complaints to the Commissioner, lawsuits to the Administrative Court, referrals to the Administrative Inspectorate, etc.) with the aim of reaching the standard of lawful operation of these authorities;
- The work of the applicants should be harmonized through the establishment of a single database with all collected data on the work of publicly owned corporations, and the public should be regularly informed about the most important findings of the conducted research;
- They should address relevant international organizations in which publicly owned corporations are members, as well as international financial institutions that have corporations as their beneficiaries and whose corporate rules should be applied, and point to the lack of transparency, inaction and concealment of information in operation;
- They should send suggestions to the State Audit Institution regarding the programs of planned audits and request from the SAI to particularly focus on and conduct audits of some publicly owned corporations and public enterprises;
- They should ask the founders of publicly owned corporations to make and publish reports containing information on the fulfilment of obligations by publicly owned corporations.