

# Montenegro and negotiations in the Chapter 23

June, 2012

## Summary

Harmonization of national legislation with the European Union acquis, within the framework of Chapter 23 is followed by a numerous additional conditions, reflected in solving concrete cases in the field of fight against corruption, judicial reform and human rights violations.

Taking into account the dynamics of reforms in Montenegro, Croatian experience and European Commission evaluation on reform implementation progress, without a strong commitment to provide an independent judiciary and prosecute corruption cases at all levels, negotiation process will be condemned to stagnation. Persistent and serious violations of human rights and freedoms can lead to the obstruction of the entire negotiation process. Therefore, it is of particular importance to intensify actions on judiciary reforms; accelerate Constitutional changes that would eliminate political influence from the judiciary; encircle and enhance anti-corruption mechanisms and legal norms, as well as institutional framework for fight against corruption; clearly delineate responsibilities and improve coordination between bodies in charge of fighting corruption. It is necessary to ensure the openness of the process and high level of civil society participation, based on regular consultations and thematic forums, involvement in the process of strategic documents' development and their monitoring.

## INTRODUCTION

In accordance with the EU recommendation from the Spring report on progress achieved in implementing reforms<sup>1</sup>, the European Council should approve opening of negotiation talks between Montenegro and EU in late June. With this decision, the most challenging phase of accession process, which will be opened with most difficult chapters, should begin.

The goal of this analysis is to, based on Croatian experience in the negotiation process in the framework of Chapter 23 and evaluations of the European Commission in Montenegrin progress reports, as well as the dynamics of reforms conducted so far, point at possible obstacles during in negotiating this chapter, and to offer recommendations to overcome them.

## CHAPTER 23-DYNAMICS OF NEGOTIATIONS ON THE EXAMPLE OF CROATIA

Compared to the Central and Eastern Europe countries that became members of the EU in 'accession waves' in 2004. and 2007., Croatian negotiation process for membership in the EU was characterized by numerous novelties.

Negotiation process in Croatia was extremely closed. All information in the process were held strictly confidential by state government officials, so the public was not informed on the standards' content, or with negotiating positions. University and professional associations' representatives participated in work of individual working groups

<sup>1</sup> Report from the Commission to the European Parliament and the Council on Montenegro's Progress in the implementation of Reforms, Brussels, 22. 05. 2012, COM (2012) 222 final, p. 12.

for preparing negotiations, while academic community union representatives and employers' associations were involved in the work of parliamentary (National) Committee for Monitoring Accession Negotiations of Croatia to the European Union. However, as well as earlier in the negotiation processes, NGO representatives remained outside negotiating structure<sup>2</sup>. Previously mentioned National Committee for European integration in Croatian Sabor monitored the flow of negotiations, while the Committee for European Integration followed the compliance of national legislation with the *acquis*. National Committee for Monitoring Accession Negotiations had a significant role in achieving consensus among political parties on specific issues related to the negotiating process.

Curiosity in negotiations under chapter 23 was a restrictive clause, which determined that negotiations will be terminated in case of serious and permanent fundamental human rights and freedoms violations<sup>3</sup>. In the final stage of negotiations European Commission requested a detailed presentation of progress in solving concrete cases of corruption and human rights violation (so called track record).

## Content of the Chapter 23

Timeframe for negotiations on Chapter 23 - Croatia	
April 2005.	Negotiating structure
October 2006.	Screening
December 2007.	Screening results
December 2007.	Opening benchmarks
18. October 2010.	Negotiating positions
30. June 2010.	Closing benchmarks
30. June 2010.	Negotiations start
June 2011.	Negotiations end

National legislation harmonization with the EU *acquis* in the framework of the Chapter 23 aims at providing high level of rule of law, based on the effective judiciary and human rights protection mechanisms. Fields that make this chapter are: a) judiciary; b) fundamental human rights; c) anti-corruption policies and d) EU citizens' rights. Justice, human rights and anti-corruption policies are part of political criteria for EU membership.

Negotiating structure in Croatia was established in April, 2005<sup>4</sup>. Working group for the Chapter 23 had a total of 56 members, consisted of state institutions representatives and one representative of the University<sup>5</sup>, while most members came from the Ministry of Justice, Supreme Court, Ministry of Foreign Affairs and European Integrations and Ministry of Interior<sup>6</sup>.

## Analytical review of Croatian legislation alignment with the *acquis* (screening) and benchmarking

In the report on Croatian legislation analytical review, the European Commission emphasizes the necessity of fulfilling four criteria, in order to start negotiations within the chapter of Judiciary and Fundamental Rights, which implied preparing the same number of action plans:

<sup>2</sup> Upor: <http://www.eu-pregovori.hr/default.asp?gl=200609040000003>

<sup>3</sup> In Croatia this was the case for negotiations were blocked in 2008 because of the border dispute with Slovenia, but also due to the lack of cooperation with International Criminal Tribunal for War Crimes in Former Yugoslavia, based in Hague, which lasted until the beginning of 2010.

<sup>4</sup> The decision of the Government of the Republic of Croatia on establishing a structure for accession negotiations, April 7th, 2005., Official Gazette, 49/05.

<sup>5</sup> Faculty of Law

<sup>6</sup> Upor: <http://www.eu-pregovori.hr/default.asp?gl=200609040000004>

AP for 1. Prevention of corruption; 2. Judiciary reform; 3. implementation of the Constitutional Law on National Minorities' rights; 4 Accelerated implementation of the Housing refugees program - former tenancy rights holders who wish to return to Croatia<sup>7</sup>. The achievement of commitments from these action plans should provide, inter alia, independence, impartiality and professionalism of judiciary; court network rationalization, establishment of an efficient institutional mechanism for implementation and monitoring of anti-corruption measures, etc.

In its negotiating position for Chapter 23, Croatia did not ask for permanent exemptions<sup>8</sup>, or transitional periods<sup>9</sup>, estimating that there will be no problems in harmonization with the *acquis*. Year 2010<sup>10</sup> was specified as a possible year for fulfilling all obligations from this chapter. Achievement of certain degree of progress in these areas in June 2010 represented the basis for obtaining closing benchmarks for negotiations in this Chapter.

Although closing benchmarks were defined in ten points<sup>11</sup>, these requirements were set up in a complicated way, and were followed with twenty two complex sub-benchmarks, so these conditions expanded up to eighty in the end<sup>12</sup>. Complexity of these benchmarks is best reflected in, eg., requirement to show substantial results in the fight against corruption, or else, to improve efficiency of the judiciary. Croatia showed real commitment towards meeting these conditions by forming specialized bodies for detection, monitoring and sanctioning of corruption, so called "Uskocke vertikale." Chapter 23 was closed in June 2011.

## *The role of the civil society in the monitoring of negotiations and reporting*

Participation of NGOs in Croatia in the negotiations was almost to the end of this process reduced to a single statements and reference on omissions made in the process. However, in early 2011, leading non-governmental organizations in Croatia joined forces with the aim of publishing monitoring report on the negotiations under Chapter 23. The main motive for their joint action was announcement on closure of this chapter, while in the opinion of these NGOs, 'permanent' progress in these areas was not made.

---

7 Comp: Analytical review report, Croatia, Chapter 23. – Judiciary and Fundamental Human Rights, MD 210/07, 27. jun 2007, page. 26

8 In special cases candidate states for the membership can be authorized permanent exemption from the application of EU *acquis*.

9 Transitional period is the additional period of time given to the state to get its legislation in line with the *acquis*. This time period can be obtained under the condition that it does not disrupt the internal EU market functioning.

10 Croatian negotiating position for the Intergovernmental Conference on the Croatian accession to the European Union for Chapter 23 "Judiciary and Fundamental Rights", Zagreb, 19 February 2010, pg2.

11 1. Correction and implementation of the Judicial Reform Strategy and Action Plan; 2. Strengthening independence, accountability, impartiality and professionalism of the judiciary; 3. Improving the efficiency of the judiciary; 4. Improving the treatment of domestic war crimes; 5. Evidences of substantial results in combatting corruption; 6. Evidences of strengthened prevention measures in the fight against corruption and conflict of interest; 7. Strengthening protection of minorities; 8. Resolving outstanding issues regarding refugees return; 9. Improving protection of human rights; 10. Cooperation with the ICTY

12 Extracts from the presentation of Kristijan Turkalj, member of Croatian Negotiating group for chapters 23 and 24, Podgorica, March 15. 2012.

In February 2011, first joint CSO report on readiness of Croatia to close chapter 23 was published. The report contained a number of 'requirements', which fulfillment would, in authors' opinion, represent 'tangible improvement of Croatian citizens' everyday life'<sup>13</sup>. Requirements included the annulment of judges' election and certain laws; decriminalization of defamation...<sup>14</sup>

Taking into account that these organizations considered that there are certain issues and problems which can be classified within the framework of Chapter 23, on which the European Commission did not insist in its progress reports, one might say that they managed to "extend" this Chapter, by emphasizing wider range of issues and problems.

By joint engagement and distribution of the report to the European Commission, CSOs made significant influence in order to prevent that issues of great importance for improving the rule of law in Croatia, remain "in the background." In May 2011, associated civil society organizations published a second report, which focused on legal norms monitoring. Although these organizations have joined forces and commenced joint actions only at the very end of negotiations, their engagement can be measured by concrete results.<sup>15</sup>

After negotiation process was completed, these NGOs in extended structure<sup>16</sup>, created the Platform 112<sup>17</sup> in the direction of continuing with joint monitoring of progress in reforms. One of their key requirements related to the transformation of National Committee for monitoring the negotiation process in the body which would monitor progress in implementing reforms until Croatia's accession to the EU in 2013.

## MONTENEGRO AND CHAPTER 23

Negotiating structure in Montenegro was established in February 2012, while forming of working groups for Chapters 23 and 24 followed a month later.<sup>18</sup> Working group for Chapter 23 counts a total of 48 members.

Although the process is almost at the beginning, some of its specifics can already be distinguished. This is the first time that one state included representatives of the NGO sector in the composition of working groups. Also, besides of the Montenegrin state administration representatives, explanatory examination (screening) of Chapter 23, held in late March, was attended by representatives of candidate countries for membership<sup>19</sup>. After explanatory, bilateral examination of national legislation compliance with the *acquis* was held in May 30 and 31. When taking about the harmonization of legislation within the framework of Chapter 23, there are serious challenges ahead, related to the completion of judicial reform and strengthening anti-corruption standards, but also improvement and enforcement of legal framework in fields within this Chapter.

Taking into account current dynamics of the reform process in the country, as well as European Commission progress reports, there can be identified potential problems of negotiations in the framework of Chapter 23.

13 Joint opinion of Croatian civil society organizations on readiness of Croatia to close negotiations on Chapter 23 – Judiciary and fundamental rights, Zagreb, February 16th, 2011, pg. 1.

14 Ibid., pgs. 2-4.

15 For example, repeal of Law on golf terrains was one of them. NGOs considered this law to have high corruption potential. Comp: Law on golf terrains, Official Gazette, no 152/08. An 80/10

16 60 civil society organizations

17 It was named based on work appraisals of the newly elected Croatian government in the period of 112 days. This report consisted of total 112 recommendations for improving the work of the Government.

18 The decision on forming the Working group for preparing negotiations for accession of Montenegro to the EU for the field of EU *acquis* relating to negotiating chapter 23 – Judiciary and Fundamental Rights, March 8th 2012.

19 Republic of Serbia and Republic of Macedonia.

Current European Commission reports show that at this point EU sees potential problems in the need for court network rationalization, reducing judicial processes lasting more than a decade, functional immunity for judges and prosecutors<sup>20</sup>.

In the field of anti-corruption policies, the EC indicates the need for: systematic management of financial investigations as a common method for serious criminal offenses investigations, essential verification of reports on state officials' income and assets with the aim of determining possible illicit enrichment, appropriate sanctioning system, and limiting membership fees in the case of political parties financing; strengthening capacities of the State Election Commission (SEC) in order to adequately perform supervisory role over political parties' financing<sup>21</sup>. Finally, key challenge in fight against corruption so far was a low number of processed cases, especially in the field of high-level corruption. This problem continues to be a major obstacle<sup>22</sup>.

Despite improved legal framework for the fight against corruption, implementation of certain measures encounters difficulties, due to weak capacities for their implementation. Such is the case with the provision on extended confiscation of assets of the Criminal Procedure Act.

In the field of human rights, violence in police stations; shortcomings in the fight against abuse, inadequate prison conditions, attacks on the media, are often the case<sup>23</sup>.

\*\*\*

Key challenges in the process of Croatian accession negotiations in the framework of Chapter 23, related to the implementation of reforms necessary for ensuring the independence of the judiciary, fight against corruption and cooperation with International Criminal Court<sup>24</sup>. Even though the third condition will not apply to Montenegro, judicial reforms and fight against corruption represent serious problems, and obtaining a date for opening negotiations is precisely conditioned by concrete results in these areas.

Experience of Croatia shows that presence of **political will** to implement reforms in these areas, in order to establish actual rule of law, is of utmost importance for the success of the negotiation process under Chapter 23. In this respect, competent authorities should show actual determination to prosecute cases of corruption at all levels, including the highest. Although many of laws relating to anti-corruption policy are adopted, some areas still remain without adequate normative solutions, which are either inapplicable in practice, or are not harmonized with relevant EU regulations. Such is the case with concessions and public-private partnerships.

Also, the existing strategic framework for certain areas does not give enough space to the fight against corruption. In this direction it is necessary to amend the existing Strategy and Action plan for developing the system of public procurement with more powerful anti-corruption measures<sup>25</sup>. Changes in the legal framework for the field of fight against corruption should be made available in one place within a single web portal.

Since Croatian case of progress reporting in fight against corruption demanded demonstration of situation development in each individual case (so called track record), such practice should already be developed in this stage, for what a systematic approach will be needed.

20 Montenegro Progress report for year 2011, followed by Commission's announcement to the Parliament and Council, Enlargement Strategy and main challenges 2011-2012, COM (2011) 666, Brussels, October 12., 2011.

21 Ibid, pg.14

22 Report from the Commission to the European Parliament and the Council on Montenegro's Progress in the implementation of Reforms, Brussels, 22. 05. 2012, COM (2012) 222 final, p. 7.

23 Ibid, pgs 56, 57.

24 Extracts from the presentation of Kristijan Turkalj, member of Negotiating group of Croatia for chapters 23 and 24, Podgorica, March 15. 2012.

25 See: Insittute Alternative's comment on the Strategy for development of public procurement system for the period 2011-2015 and Action Plan for its implementation, December 2011. Available at: <http://www.institut-alternativa.org/archives/2185>



Clear division of responsibilities and good coordination of activities between bodies dealing with fight against corruption, primarily the Police Directorate and Prosecution, is of particular importance, which is not the case at this moment<sup>26</sup>. Also, the institutional framework for fight against corruption in some fields requires improvement. For example, this is the case with institutional framework for the control over political parties' financing. The newly formed independent body for fighting against corruption could add to its mandate activities related to financial operations of political parties, preventing conflicts of interest, misuse of state resources and positions and lobbying<sup>27</sup>.

Joint action of civil society organizations in Croatia was important for several reasons. First, this approach showed that joint civil society activities provide more systematic, comprehensive and quality monitoring of negotiations in the framework of the Chapter 23. Example of Croatian organizations showed the existence of great field for influence, but it remained unused just because civil society capacities were mobilized on the very end of the process. Since Montenegro is at the beginning of negotiations, the CSO will be able to timely organize and focus their capacities in the direction of monitoring negotiations, not only chapter 23, but other chapters as well.

Given that the appointment of NGO representatives in working groups in Montenegro represents only one, smaller segment of their participation in negotiations, joint CSO "reporting" is also one of modalities for their active contribution to the process. "External" contributions that CSOs can provide in developing strategic plans, especially in the impartial evaluation of the implementation of these plans, the flow of negotiations and progress achieved, can be of great importance and should not be ignored by the Government and the Parliament.

The role of Parliament in the negotiation process, and particularly parliamentary body(ies), which will coordinate the monitoring of negotiations and discuss negotiating positions is also of particular importance. In Croatia, this was the role of National Committee for Monitoring the Negotiation Process, while in Montenegro Committee for European integrations will be in charge of monitoring negotiations on the accession to the European Union, including the discussion on negotiating positions. However, Rules of the Procedure do not specify the important role that the Committee for European Integration should have in gathering representatives of civil society, interest groups and interested parties through various forms of consultations, thematic debates and expert discussions. Also, taking into account that the Parliament already established a model according to which the compliance of draft laws with the *acquis* is considered by professional service of working body specialized for specific area, this practice should be applied for considering negotiating positions as well. Substantive negotiating positions discussion on joint sessions of parent committee and the Committee for European Integration, would improve the quality of the process.

---

<sup>26</sup> Ibid, pg. 8

<sup>27</sup> Recommendation of the Working group 1: Judiciary and fundamental rights in the framework of National Convention on European integration of Montenegro, Session 1: Political party financing, April 26th, 2012.

# RECOMMENDATIONS

## *Parliament*

- Negotiating positions for individual chapters should be discussed on joint sessions of „parent” committees and Committee for European Integration.
- Committee for European Integration should organize thematic meetings with representatives of civil society and other interested parties, in the period before discussing negotiating grounds.

## *Judiciary*

- Accelerate the adoption of amendments to the Constitution which will enable the independence of judiciary and prevent political influence, which has been possible so far based on appointment of state prosecutors, presidents of the Supreme Court, composition of Judicial Council etc.

## *Anti-corruption policies*

- Encircle and improve the existing anti-corruption legal and strategic framework. Taking into account that fields of public-private partnerships and concessions are a high risk fields for corruption, it is necessary to accelerate work on a new legal framework, or modification of the existing one. The same recommendation applies to the need to improve strategic framework for combating corruption in certain areas, such as public procurement.
- Strengthen capacities of competent authorities for implementing anti-corruption provisions.
- Improve institutional framework for fight against corruption. One of possible solutions of this issue is to form an Agency for fight against corruption.
- Strengthen activity coordination between Police Directorate and State Prosecution in fight against corruption.
- Create special web portal, through which citizens could follow changes in the legal framework related to the anti-corruption norms and rules.
- Improve awareness among citizens in order to be active participants in the process through intensive campaign of institutions coordinating the process of fight against corruption.

## LITERATURE

- *Analytical review report, Croatia, Chapter 23. – Judiciary and Fundamental Human Rights, MD 210/07, June 27. 2007.*
- *Montenegro Progress report for year 2011, followed by Commission's announcement to the Parliament and Council, Enlargement Strategy and main challenges 2011-2012, COM (2011) 666, Brussels, October 12., 2011., sec (2011) 1204*
- *Extracts from the presentation of Kristijan Turkalj, member of Croatian Negotiating group for chapters 23 and 24; Seminar on negotiating chapters 23 and 24, Podgorica, March 15. 2012.*
- *Joint Opinion of Croatian Civil Society Organizations on the Progress regarding the Readiness of the Republic of Croatia to Close Negotiations in Chapter 23 - Judiciary and Fundamental Rights, Zagreb, May 10, 2011*
- *Janjević Milutin (organizer), Consolidated Treaty on European Union, from Rome to Lisbon, Official Gazette, Belgrade, 2009.*
- *Institute Alternative's comment on the Strategy for public procurement system development for the period 2011-2015 and Action Plan for its implementation, December 2011. Available at: <http://www.institut-alternativa.org/archives/2185>*
- *The decision on forming the Working group for preparing negotiations for Montenegro accession to the EU for the field of EU acquis relating to negotiating chapter 23 – Judiciary and Fundamental Rights, March 8th 2012, Official Gazette of Montenegro no. 20/12, 12.04.2012*
- *The decision on negotiating structure, Government of Montenegro, february 2012.*
- *The decision of the Government of the Republic of Croatia on establishing a structure for accession negotiations, April 7<sup>th</sup>, 2005. (Official Gazette, 49/05).*
- *The decision on Amendments on the Rules of Procedure of Parliament of Montenegro, May 7<sup>th</sup>, 2012.*
- *Croatian negotiating position for the Intergovernmental Conference on the Croatian accession to the European Union for Chapter 23 "Judiciary and Fundamental Rights", Zagreb, 19 February 2010.*
- *Recommendation of the Working group 1: Judiciary and fundamental rights in the framework of National Convention on European integration of Montenegro, Session 1: Political party financing, April 26<sup>th</sup>, 2012.*
- *Contribution to the European Commission Spring report on the fulfillment of the seven key priorities for the period from September 1<sup>st</sup> 2011 - March 1<sup>st</sup> 2012, Podgorica, March 8. 2012.*
- *Proposal for amending the Constitution of Montenegro, Podgorica, May 2011., Ministry of Justice*
- *Report from the Commission to the European Parliament and the Council on Montenegro's Progress in the implementation of Reforms, Brussels, 22. 05. 2012, COM (2012) 222 final*
- *Sixth Report on the implementation of obligations under the Stabilisation and Association Agreement, January-March 2012, Ministry of Foreign Affairs and European Integration, Podgorica, May 2012.*
- *Constitution of Montenegro, Official Gazette no. 01/07 od 25. 10. 2007.*
- *Joint opinion of Croatian civil society organizations on readiness of Croatia to close negotiations on Chapter 23 – Judiciary and fundamental rights, Zagreb, February 16th, 2011, pg. 1.*
- *Law on Golf Terrains, Official Gazette, no. 152/08., 80/10.*



## About Institute Alternative

**Institute Alternative** is a non-governmental organization, established in September 2007 by a group of young, educated citizens, with experience in the civil society, public administration and business sectors.

**The mission of Institute Alternative** is to strengthen the democratic processes in Montenegro by identifying and analyzing public policy options.

**The strategic aims of Institute Alternative are to:** increase the quality of development of public policy, contribute to the development of democracy and the rule of law, and to contribute to the protection of human rights in Montenegro.

**The values we follow** in our work are dedication to our mission, independence, constant learning, networking, cooperation and teamwork.

*Institute Alternative* acts as a think tank and a research centre, and its activities focus on the domains of good governance, transparency and accountability. Topics covered by the Institute's research activities, in which it exercises influence by providing its own recommendations are: parliamentary oversight of security and defense services, oversight role of the Parliament and its impact on the process of European integration, reform of public administration, public procurement, public-private partnerships, state audit and control of the budget of local authorities.

To date, Institute Alternative published the following reports / studies:

- *Parliament of Montenegro and the process of European integration - Just watching or taking part?*
- *Parliamentary Inquiry in Montenegro - Oversight Tool Lacking Political Support*
- *Montenegro under the watchful eyes of Đukanović and the EU*
- *The Montenegrin parliament in the process of EU integration*
- *Regulatory impact assessment (RIA) in Montenegro – Towards “Better” Regulations*
- *Control of the local self-governments' budget*
- *The State Audit Institution in Montenegro - strengthening its influence*
- *Report on democratic oversight of security services*
- *Think Tank - The role of Independent Research centers in Public Policy Development*
- *Public-Private Partnerships in Montenegro - Accountability, Transparency and Efficiency*
- *Public Procurement in Montenegro - Transparency and Liability*
- *The Assessment of Legal Framework and Practice in the Implementation of Certain Control Mechanisms of the Parliament of Montenegro: Consultative Hearing, Control Hearing and Parliamentary*
- *Parliamentary oversight of the defence and security sector: What next?*
- *The Lipci Case: How not to repeat it*
- *The Case of the First Bank - Lessons for the supervisor and other decision makers*
- *Public Administration in Montenegro: Salary schemes, reward system and opportunities for professional advancement*

All publications and materials are available on the Institute Alternative website: [www.institute-alternativa.org](http://www.institute-alternativa.org)

*Activities of Institute Alternative* have been supported by the Foundation Institute for an Open Society - Representative Office Montenegro (FOSI ROM) and Think Tank Fund, Friedrich Ebert Foundation, Commission for the distribution of funds for NGO projects of the Parliament of Montenegro, Canada Fund, European Fund for the Balkans and the European Commission. Institute Alternative has an ongoing cooperation with the Berlin-based European Stability Initiative (ESI), which conducted a capacity-building program for IA's associates.

IA also cooperates with a great number of organisations in Montenegro, as well as with numerous institutions and administrative bodies, such as the State Audit Institution, Directorate for Public Procurement, Parliament of Montenegro (especially its work committees, Committee for Economy, Finance and Budget and Committee for Security and Defence), Ministry of Finance, Commission for Concessions etc.

Institute Alternative is a member of the self-regulatory body of NGOs, and has disclosed full details on its financial affairs in line with the Activity Code for NGOs, to which Institute Alternative is a party.





*More information on Institute Alternative is available at:*  
**[www.institut-alternativa.org](http://www.institut-alternativa.org)**