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THE REFORM OF THE JUDICIARY IN CROATIA

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STANDARD BRIEFING

THE REFORM OF THE JUDICIARY IN CROATIA

Abstract

The basic legislative framework governing administration of justice in Croatia is almost complete. Outstanding reforms include adoption of Penal Code and Constitutional amendment, both scheduled for 2010. Professional education and appointment of judges and prosecutors are made subject to objective criteria under the auspices of an independent judicial academy. Gender balance needs improvement as women are underrepresented at higher levels of judicial hierarchy. Backlog of cases is reduced but final resolution is still facing structural problems. Education of legal professionals needs development of teaching curricula and learning outcomes. Independence of the judiciary has improved, but needs to be strengthened. Publication of judicial decisions needs further improvement in order to increase legal certainty. Measures for fight against corruption in the judiciary are being taken but public perception of corruption in the judiciary is still high. Judicial infrastructure for the fight against corruption and organized crime is in place and is showing first results. Further efforts are needed to achieve sustainability. Excessively long judicial proceedings often require additional judicial protection of the right to fair trial in reasonable time. Otherwise, protection of fundamental rights is satisfactory but courts of ordinary jurisdiction should be more engaged instead of deferring to the Constitutional Court.

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DISCLAIMER

EXECUTIVE SUMMARY

By the end of 2009 Croatia has opened 28 and provisionally closed 17 negotiating chapters in EU membership talks. Chapter 23 - Judiciary and Fundamental Rights - still remains unopened. According to the 2009 Progress Report, Croatia"…needs to ensure that all necessary steps are taken by the Croatian government to settle the issue of access for ICTY to important documents."

Main findings:

- The judicial branch has an independent constitutional status, co-equal to the legislature and the executive. However, in practice, judges inherited a self-understanding as public servants and not as members of an independent profession. Authority of the Minister of Justice still plays a role within the judicial system, notably in appointment of court presidents. Systematic education of judges should be introduced in order to improve professional skills and self-awareness of judges;
- The most recent legislative reform de-vested the State Judiciary Council (SJC) from much of its appointment power and appointment of judges became an objective and measurable process tested by the Judicial Academy. The SJC kept its competence to remove judges from office in cases of misconduct. It should be ensured that judicial appointments are based on merit and that discretion of appointing authority is kept narrow, transparent and reviewable;
- Legislative amendments envisage the merger of a number of municipal courts as of January 1, 2009, with a view to increasing the efficiency of administration of justice and specialisation. Similarly, as of January 1, 2010 the number of misdemeanour courts is envisaged to be decreased from 114 to 61. The process of reduction is facing local resistance, only six courts being merged to three, so far. Additional efforts are needed in order to rationalize the court network. The process should be accompanied by measures increasing efficiency and transparency of judicial work;
- By December 2008 civil and criminal cases older than 3 years were reduced by 31% and 52% to 102,430 and 4,408 respectively. In the broader historical perspective, the 8% decrease can be traced during preceding 2 years, figures for 2009 not being available. The problem of trial within reasonable time is still present. The Supreme Court records show a 7,9% increase of pending cases seeking to remedy the violation of that right before the Supreme Court. Introduction of new direct legal remedies for protection of fundamental rights should be considered. In any case the problem of backlog should be addressed at source by providing better judicial training, a more accessible system of legal remedies and better transparency of judicial work;
- Electronic case management system is in preparation but, as of May 2008, is functional only at two courts - Municipal court in Pula and Commercial Court in Split. The system is being tested at Municipal Criminal Court in Zagreb and at Municipal Civil Court in Zagreb (50 selected users). Efforts to introduce a functional ECM system should be doubled;
- Factors contributing to low efficiency of justice are deficient education of judges, low working morale, lack of technical resources and poor access to information and unsupportive social environment. Significant investment in court infrastructure, equipment and software is required. Working environment should be improved;
- Recruitment, selection and professional formation of judges is undergoing substantial legislative reforms. The existing Judicial Academy is emancipating from the Ministry of Justice and becoming an independent institution. Its new responsibilities include lifelong learning programs for the judicial profession and education for entry into the judicial profession. Appointment to the Constitutional Court remains highly politicized and non-transparent. Appointment to European

judicial offices still represents a concern. Continue process of strengthening of the judicial academy by hiring competent legal professionals and developing training curricula. Revise the process of appointment to Constitutional Court including a meaningful parliamentary hearing and professional screening. Introduce a transparent and de-politicized process of appointment to European judicial offices;

- Index of perception of corruption in the Croatian judiciary is 4.4. (1 being corruption free and 5 being extremely corrupt). This places Croatia at the same level as e.g. Bolivia. Remedial measures include judicial inspections, mandatory declaration of assets and strengthening of judicial ethics by education and developments of codes of conduct. Reduce number of courts and break local political bias by increasing transparency of judicial work. ECM system and publication of all judicial decisions is highly recommended;
- The new powers of State Attorneys in criminal proceedings are exercised and judicial panels specialized for high profile corruption cases are operational. In 2008 there were 113 sentencing judgments for organized crime, and until end of October 2009 there were 150. Number of persons sentenced for organized crime amounted to 73 in 2008 and 122 until end of October 2009. As of January 1, 2010 all financial transactions are monitored by use of personal identification numbers (OIB). Continue process of strengthening of Criminal Justice system;
- Judicial protection of fundamental rights is accessory and indirect. New legal remedies are necessary in order to satisfy the standards of the EU Charter of Fundamental Rights. Protection is more effective at higher levels of judicial hierarchy. New legal remedies allowing direct actions for infractions of fundamental rights should be introduced. Such legal remedies should make direct actions for violation of rights under the EU Charter of Rights admissible;
- Government has stepped-up efforts to ensure full cooperation with the International Criminal Tribunal for Former Yugoslavia (ICTY). In early December 2009, extensive searches were conducted in order to locate documents required by the ICTY, signalling more commitment to prosecution of ethnic Croatian indictees for war crimes. Such efforts should be continued in order to achieve and maintain full cooperation.

Main conclusions:

Successful continuance of the reforms in the sector of the judiciary is key for Croatia's accession to the European Union. Actions undertaken by the Croatian government indicate serious commitment to implement the necessary reforms. However, there are still a number of weaknesses that encumber Croatian judiciary:

- reform of judicial professional formation and appointment is in an early stage of implementation and results are not clearly visible yet;
- adequacy and relevance of education in the area of European Union law is questionable as well as the learning outcomes in the field;
- rationalization of the court network is still in an early stage;
- strategies for reduction of backlog of cases are showing some results but will have to be re-considered and supplemented with appropriate measures addressing independence, transparency and professionalism of judges;
- right to trial within reasonable time is still not ensured at all levels of judicial hierarchy and the present solution is only remedial and not structural;

- courts presidents are still appointed by the minister of justice;
- self-awareness of judges as being members of an independent branch of government is low and results in frequent deference to the legislature, or higher courts, thus contributing to case backlogs;
- participation of women decreases at higher levels of judicial hierarchy;

Main recommendations are as follows:

- Legal framework for appointment of judges should be fully implemented. Role of the Minister of Justice in appointment of court presidents should be minimized or excluded. Appointment to highest national and European judicial positions should be made more transparent;
- Implement legal reform, including constitutional amendment, that would enable direct effect of EU law in the national legal system;
- Education and training of judges should be implemented along the lines of the newly adopted legislation. Curricula should be relevant and should include law of the European Union. Education should develop self-awareness of judges as members of an independent profession and branch of government;
- Continue development of ethical standards of the judicial profession and strengthen institutional and peer mechanisms of supervision. Transfer of professional values should be one of the learning objectives of law school curricula; continue reform of legal education along the lines of Bologna Declaration
- Continue implementation of measures directed at reduction of old unsolved cases and reduction of trial time;
- Consider the creation of direct legal remedies for protection of fundamental rights by ordinary courts in order to satisfy requirements of the EU Charter of Fundamental Rights;
- Network of courts should be rationalized in order to increase efficiency, transparency and professionalism. Adequate funding should be allocated to support the rationalization;
- Measures should be taken in order to ensure appropriate participation of women at all levels of judicial hierarchy, not excluding measures of affirmative action for appointment to highest judicial positions.
- Step-up efforts to ensure full cooperation with the ICTY, particularly by tracking requested documentation.

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1 INTRODUCTION

By the end of 2009 Croatia has opened 28 and provisionally closed 17 negotiating chapters in EU membership talks. Chapter 23 – Judiciary and Fundamental Rights – still remains unopened. According to the 2009 Progress Report Croatia"…needs to ensure that all necessary steps are taken by the Croatian government to settle the issue of access for ICTY to important documents."

This briefing paper takes in account developments prior and subsequent to the publication of the Croatia 2009 Progress Report. It includes legislative developments until December 31, 2009. The report was produced on the basis of desk legal research, press review, and interviews with judges, attorneys and public servants, on condition of confidentiality.

2 THE BASIC LEGAL FRAMEWORK AND ITS IMPLEMENTATION

2.1 The Legal Framework

On December 21, 2009, the Parliament enacted the Courts (Amendment) Act, Probation Act, Juvenile Offences (sanctions) Act, Judicial Academy Act, State Judiciary Council Act and State Attorneys' Office Act. These reforms follow the earlier legislative amendments in the areas of civil procedure, mediation and organisation of justice. Notably, in late 2008 and early 2009, the Parliament enacted the new Criminal Procedure Act. The Act on Free Legal Aid was also enacted in 2008.

The major regulatory challenges remain the Constitutional amendment and the enactment of the Penal Code, scheduled for 2010. The Constitutional amendment is expected to adjust the legal basis for EU accession, including for enabling extradition of nationals for the purposes of the European Arrest Warrant. The Penal Code is expected to sanction a number of white collar criminal offenses related to organized crime.

2.2 Independence of the Judiciary

The judicial branch has an independent constitutional status, co-equal to the legislature and the executive. However, in practice, judges inherited a self-understanding as public servants and not as members of an independent profession. This can be changed only by proper education and by measures targeted at increasing the professionalism and expertise.

While there is no recent evidence of direct and visible political biases, judges, typically, do not understand law as an instrument of protection of the weaker side. In such circumstances litigants that have significant economic or political power and who appear before courts in multiple litigations (repeat players), are able to bring about favourable interpretation of law, possibly to the detriment of protection of fundamental rights of individuals. In that context, ordinary courts, unlike the Constitutional Court, are still unfamiliar with proportionality test and give preference to whatever is declared by law to be of public interest. Also, judges of ordinary courts are extremely reluctant to institute concrete constitutional review before the Constitutional Court and challenge constitutionally suspect legislation. Since 1991, there were only a few such preliminary references. Generally speaking, judges often defer their decisions to the legislative branch, as evidenced by excessive practice of the so-called authentic interpretation of the legislature. That practice has detrimental effect on the development of judicial doctrine and stabilization of judicial practice.

The Minister of Justice still plays an authoritative role within the judicial system, notably in appointing court presidents. Ministerial involvement can be welcomed in terms of supervision of legality of operation of courts. For example, in October 2009 the Minister of Justice removed a judge from a case in

which her husband was involved as a party. In early 2010, the SJC reversed the decision of the Minister. However, there are also examples where the role of the Minister is less desirable.

There is one particular instance where the indirect effect of authority of the Minister of Justice is particularly unwelcome. Courts of appellate jurisdiction, as a rule, have established offices for "monitoring and analysis" of judicial practice. Head of such an office is, as a matter of practice, appointed by the President of the respective court (so there is a clear "chain of command" Minister-President-Head of Office). According to the internal judicial procedures, every judicial decision has to be forwarded to such an office, prior to being delivered. The office has power to stay the delivery of the judgment and to address its concerns to the reporting judge, where it considers that the decision is in contradiction with earlier practice, or with the "substance of the case", or "illegal". While the record of judicial practice is indispensable for professional administration of justice, such an office should primarily serve the reporting judge and the judicial panel in making coherent decisions and not be superimposed to them. Practical consequences of such practice can not be researched due to the lack of transparency.

Generally speaking, transparency of judicial work has only slightly improved. Electronic file processing is still at an early stage, most of the judicial decisions published are those decided by the Supreme Court and the Constitutional Court. There is a cultural bias against publication of decisions of lower courts that are not final. Criticising work of the courts is still criminalized under Art. 309 of the Penal Code. While rarely applied in practice, this provision serves as an excuse to avoid public discussion of first instance judicial decisions. As far as conflict of interest is concerned, mandatory declaration of assets for all judges has improved the situation and reduced risks of blatant corruption. However, it is difficult to assess the situation at local level. Reduction of number of courts is expected also to break the political bias at local level, which still needs to happen. There is no hard evidence of political corruption of high profile judges.

Appointment of judges is not any more entrusted exclusively to the State Judiciary Council (SJC), a professional body appointed by the Parliament. So far the SJC has displayed a high degree of improper bias (not necessarily political), unpredictability and subjectivity leading to public controversies. For instance, in a scandalous move Mr. Arno Vičić, member of the SJC explained the appointment of former Minister's of Justice doughter at a judicial position with her "good genetics". More recently the SJC refused to recuse a judge from a case in which her husband was indirectly involved. The most recent legislative reform (Judicial Academy Act) made appointment of judges subject to objective and measurable criteria tested by the Judicial Academy. The SJC has retained the role to establish a ranking of candidates for appointment to judicial positions. The ranking itself is based on written and oral examination and a psychological test. The SJC has no discretion to give preference to certain candidates, but has to respect results of the examination. The SJC kept its competence to remove judges from office in cases of misconduct.

Further efforts should be invested in developing court management, including case management, and improving the professional education of judges. Separation of court management functions from the court president's office should also be considered.

In sum, there is some progress in respect of independence, transparency and impartiality of the judiciary. However, further efforts are needed in the area of publication of judicial decisions, decriminalization of comments as to judicial work, fight against bias at local level and improving the case management.

2.3 Rationalisation of the Courts' Network

Prior to Jan. 1, 2009, Croatia had 217 courts of first instance (out of which there were 108 municipal courts) 21 appellate courts, one high court of misdemeanour, one high commercial court, one administrative court and the Supreme court. Subject to legislative amendments effective as of Jan. 1, 2009, a number of municipal courts have been merged with a view to increase efficiency of administration of justice and specialisation. Similarly, newly adopted legislation envisages, as of Jan. 1, 2010, a decrease of the number of misdemeanour courts from 114 to 61.

In reality, the reform is slow and resulted in only six courts being actually merged into three. Projected budget for 2010 allocates approximately 3.865.000 € for the reform of the judiciary. Projection of spending for 2011 and 2012 is approximately 20% lower. This amount includes construction works and equipment procurement for municipal and county courts. However, there is still no sign of rationalisation of the network of county courts and commercial courts.

The main obstacle to rationalisation of municipal and county courts is political bias at local level. Namely, Croatia has 429 municipalities, 127 townships and 21 county. While local authorities are politically accountable to the local electorate, administration of justice is financed from the national budget. Therefore, keeping the administration of justice present on municipal level ranks high among political goals of local political elites and creates political bias at central level. Similar can be said about the network of 21 appellate (County) courts, some of which are located in immediate vicinity. For example, County court in Šibenik is only 72 km from its fellow court in Zadar, and only 97 km from the one in Split. County courts in Osijek and Vukovar are only 36 km away from one another.

According to the Ministry of Justice, rationalisation of the court network is in progress and court merger continues. Sometimes, at the early stage, smaller courts (e.g. in Omiš) are administratively merged with larger ones (e.g. in Split), the main benefit of such administrative mergers being a more efficient case management.

Further efforts should be invested in dismantling the local political bias and into further reduction of the number of courts, with a view to increasing their efficiency, transparency, professionalism and independence.

2.4 Case Backlog

The Commission 2009 Progress Report noted the reduction of backlog by 8.4% to 887,000 in December 2008. Old civil and criminal cases were reduced by 31% and 52% to 102,430 and 4,408 respectively. In the broader historical perspective, the 8% decrease can be traced during preceding 2 years, figures for 2009 not being available.

According to the Minister of Justice, Mr. Šimonović, the improvement is due to the reform of criminal and civil procedure and to an effective system of internal supervision which led to the removal of three court presidents owing to "their lack of managerial skills". Removing courts' presidents is a prerogative of the Minister of Justice and it is regulated by the disciplinary provisions of the Judiciary Act. While the engagement of the Minister of Justice in strengthening managerial discipline of the courts can be welcomed, concerns remain about his role in appointing the Court's presidents, even after the newly introduced obligation to have them interviewed prior to the appointment. In its 2009 Progress Report, the Commission calls for clearer separation of administrative and judicial functions.

For the time being such separation is not on the horizon. The role of the minister seems to be unquestioned. Indeed, before the appointment of a president, the minister has an obligation to consult the judicial college of a respective court, but the opinion of the judicial college is only consultative. A

reasonable alternative would be a public hearing of a candidate and an obligation of the minister to give a reasoned opinion in cases where the opinion is not honored.

Backlog of cases originates from the two main sources – the old cases that have accumulated over time and the new cases that are being tried during an excessive and unreasonably long time.

a) The Old Cases

According to the Croatian Ministry of Justice, in the period between the end of 2004 and the end of 2007, the number of unsolved old cases was reduced by 40%, i.e. from 1.640.365 to 969.100. Out of that number, 478.450 were pending before municipal courts and were mostly civil cases. Cases are considered to be "old" when the proceedings enter the third year of litigation. This reduction of pending cases is due to the efforts undertaken by the Ministry of Justice, notably stricter monitoring and a more even distribution of cases among different courts.

b) Trial Within Reasonable Time

Respect of the right to trial within reasonable time is another concern. On 15 March 2002, reacting to the increasing number of cases addressed to the European Court of Human Rights on grounds of violation of Art. 6 (1), the Parliament adopted the Constitutional Court Amendment Act. The amendment addressed the issue of the non existence of adequate legal remedies in cases of excessive length of legal proceedings, which was considered a violation of Arts. 13 and 6(1) of the Convention.

Accordingly, a new Art. 59a (now Art. 63) was adopted, providing a new legal remedy before the Constitutional Court. The Constitutional Court was also vested with power to specify for the lower courts the time within which a decision on the merits has to be delivered and with power to award "adequate compensation" to victims of unduly lengthy proceedings. The European Court of Human Rights (ECHR) accepted the new legal remedy as satisfactory.

The second amendment followed in late 2005 when jurisdiction of ordinary courts was extended to cases of infringement of Art. 6(1). According to the new Arts. 27 and 28 of the Law on Courts, parties considering that the competent court did not decide their case within reasonable time can now address a claim for protection of the right to a trial within reasonable time to the next higher court. All such cases are ultimately subject to appeal before the Supreme Court and can be followed by a constitutional complaint to the Constitutional Court. In this way the Law on Courts provided for an effective legal remedy for infringements of the trial within reasonable time guarantee of Art. 6(1).

In July 2008 amendments to the Civil Procedure Act were adopted and came into force on 1 October 2008. The amendments strived to increase the efficiency of the judicial process by speeding-up the delivery of documents, by amendments to the system of judicial remedies and by strengthening the deadlines for introduction of evidence.

Electronic case management system is in preparation but, as of May 2008, is functional only at two courts – Municipal court in Pula and Commercial Court in Split. The system is being tested at Municipal Criminal Court in Zagreb (all users) and at Municipal Civil Court in Zagreb (50 selected users).

Amendments to the Mediation Act were introduced in July 2009, and the implementing regulations in November 2009. These amendments are expected to facilitate extra-judicial settlements but it is too early to estimate their effects. Institutional infrastructure for mediation is in place before 8 municipal courts, the Commercial Court in Zagreb and the High Commercial Courts. Education was implemented by the Ministry of Justice and the Judicial Academy.

Despite of the efforts invested in order to ensure the right to trial within reasonable time and to reduce the backlog of cases, results are disappointing. While the general number of old cases was reduced and keeps decreasing, according to the statistical data of the Supreme Court there is a permanent increase in the number of unsolved cases before that court. The general increase in unsolved cases amounts to 28% in the third quarter of 2009, while the increase in cases dealing with right to trial within reasonable time increased by 7,9 % in the same period. This is an indication of incapacity to address the problem adequately.

c) Underlying Reasons and Possible Solutions

Croatia has invested a significant effort in order to solve the backlog problem. However, the problem is due not only to insufficient legislative framework, but also to the long ago established practices and routines, especially the low working morale of judges and often lacking professional standards. This problem is particularly present in smaller courts where supervision is scarce and it is expected that the ongoing decrease of the number of courts will remedy the situation.

It can also be noticed that lack of proper professional education and lack of key resources, such as internet access, or access to literature, have made the judicial profession, especially at lower levels of the judicial hierarchy, less efficient. In the absence of expertise, judges were inclined to sweep hard cases "under the rug" in a vain hope that the problem would disappear by itself. The newly introduced system of supervision and responsibility for workload management is expected to improve the situation.

Another reason is the deficient system of case reporting. Although the Supreme Court had developed a basic system of publication of cases which are available on the web at www.vsrh.hr the search engine does not allow for a systematic search and identification of relevant legal authority.

Legal and social environment also contribute to delays. Lack of discipline among participants to the legal proceedings aggravate the problem. Attorneys seek to maximize attorneys fees by prolonging litigation. A substantial overhaul of billing methodology will be required in order to discourage attorneys to recourse to unfair procrastinatory practices. Strengthening of ethical code and stricter enforcement could improve the situation. Also, a number of state actors contribute to the length of proceedings. State Attorneys, often acting on orders of their superiors, are reluctant to settle a case even in undisputedly lose-situations. For example, in 2006 Mr. Maškarin lost his leg in a state hospital while being treated for appendicitis, due to alleged medical malpractice. State refused to settle. More precise litigation guidelines for State Attorneys would be welcomed. Police cooperation in apprehending indicted persons or summoning witnesses could also be improved. There is a widespread impression that police is investing only a minimum effort to perform their tasks.

2.5 Recruitment, Selection and Professional Formation of Judges

According to the 2009 Progress Report, "… the selection procedure for judges and prosecutors remains deficient, lacking transparency and the application of uniform, objective criteria." In response to that criticism, recruitment, selection and professional formation of judges is undergoing substantial legislative reforms.

The existing Judicial Academy is emancipating from the Ministry of Justice and becoming an independent institution. The Academy has responsibility for (a) lifelong learning programs for the judicial profession and (b) education for entry into the judicial profession (Judicial School for future judges and state attorneys). Having 70 out of 100 points at the bar exam is a condition for enrolment into the Judicial School. Once admitted, candidates have to take 2 years of training after which they can take the final exam. Candidates who do not qualify may not be appointed to a judicial function. Budget allocated to the Judicial Academy for 2010 amounts to 2.435.000 €.

If implemented, the professional formation reform could bring about significant improvement in transparency and quality of education. However, it is estimated that it will extend professional education of judges to 9 years in the best case (Five years leading to the Master of Laws degree, two years before the bar exam and two years at the Judicial School after the bar exam). Bearing in mind that the average actual length of studying for the law degree is approximately 8 years, it will take a minimum of 12 years of education to become a judge and qualify candidates for the profession at the age of 30, and in any case not less than 27.

It is not clear what effects will the prolonged qualification period have on the gender structure of judges. In 2007 there were 69.9% of female judges at the municipal court level. However, only 50% of presidents of municipal courts were women. At the same time, 51.7 % of County Court judges were women while only 14.3 % of women made it to the position of a County Court president. Only 45 % of judges sitting at the Supreme Court are women.

Another concern is the quality of professional education. The role of legal scholarship is limited and opportunities for cross-fertilization of legal practitioners and academia are not clearly defined. There is a danger of perpetuation of "old" knowledge. The Bar exam, as defined today requires only rudimentary knowledge of EU institutional structure, not of the EU law. Indeed, the fact that the examination unit dealing with the EU is titled "Constitutional Order, Organisation of Justice and the European Union" fundamentally underestimates the role of EU law, does not guarantee possession of key analytical skills necessary for domestic application of EU law and will need to be substantially changed.

The appointment procedure to the Constitutional Court remains highly politicized and non-transparent. Criteria for the office are not clearly defined and left to the discretion of the Parliament in the absence of a thorough interview with candidates for the office. Lack of transparent criteria resulted in a constitutional challenge for appointing a constitutional judge before the Administrative Court and the Constitutional Court finally upheld the appointment.

Appointment to European judicial offices still represents a concern. In December 2009 an ad hoc committee for appointing the Croatian judge to the ECHR was established, comprising 5 members. None of the members represents civil society and candidates are not subject to parliamentary or any other public scrutiny. Procedures and criteria for appointment of judges to the ECJ and other tribunals of the EU are not in place.

3 FIGHT AGAINST CORRUPTION AND ORGANISED CRIME

There are two aspects of the fight against corruption and organised crime. One addresses corruption within the judicial profession and the other addresses the capacity of the justice system to fight these vice.

3.1 Suppressing Corruption Within the Judiciary

Spread of corruption among judges remains under-investigated. According to the Global Corruption Barometer for 2009, the index of perception of corruption in the Croatian judiciary is 4.4. (1 being corruption free and 5 being extremely corrupt). This places Croatia at the same level as e.g. Bolivia, Samoa or Tunisia and only one decimal point better than Bulgaria.

The key issue in fight against corruption is professional formation and appointment of judges. Once implemented, the reformed system of judicial education and merit based appointment should significantly improve the situation.

There are, however, outstanding issues. The new system of the Bar exam faced problems in implementation and after an initial attempt in September 2009, its full application was postponed. Namely, all persons who have commenced their employment in the legal profession before end of 2008 are exempted from the obligation to attend courses at the judicial academy and can take the bar exam nevertheless. In effect, it will take at least four years before the first judicial school graduates are eligible for judicial appointment. Being so, at the present time appointment of judges is performed according to a transitional system. According to the transitional system, the appointing authority – the SJC – has to respect the results of the new bar exam, or alternatively, has to conduct a written examination. A condition for appointment is 70% of points earned at the bar exam and an additional structured interview. Such situation will persist until the first graduates of the Judical Academy complete the program.

The transitional system significantly reduces the discretion of the SJC and introduces objective criteria. However, it still lacks the element of professional education. In that context the issue of professional ethics is particularly important. An additional emphasis should be put on strengthening of judicial ethics and professional standards. For the time being there is no ethical component in legal education. Law schools should not only "transfer knowledge" but also values of the profession. In that respect education within the Judicial Academy is invaluable.

In 2007 and 2008 legislative amendments made judges and state attorneys liable to declare their assets. As of 2008, the Ministry of Justice kept information about assets of 1,937 judges and 576 state attorneys. Respective ethical codes for judges and state attorneys were adopted too.

3.2 Fight Against Organized Crime and Corruption

The judiciary has only limited capacity to fight organized crime and corruption, but the situation is gradually improving. According to the Minister of Justice, Mr. Šimonović, the structure of USKOK institutions (Office for Fight Against Corruption and Organized Crime) is becoming functional. The new powers of State Attorneys in criminal proceedings are exercised and judicial panels specialized for high profile corruption cases are operational. In 2008 there were 113 sentencing judgments for organized crime, and until Oct. 31, 2009 there were 150. The number of persons sentenced for organized crime amounted to 73 in 2008 and 122 until the end of October 2009.

Fight against corruption and organized crime is given the highest national priority. To that effect the Parliamentary Committee for Fight against Corruption has stepped up its activities and the Prime Minister, Ms. Jadranka Kosor, has personally taken the chair of the Committee for Monitoring of Implementation of the Action Plan for Fight Against Corruption and Organized Crime.

One of the fertile areas for organized crime is public procurement. In the last quarter of 2009 a number of police investigations were instituted and a relatively large number of highly ranking public servants were arrested on accusations of organized crime. Most of those investigations are still in the pre-trial stage and it is too early to draw any conclusions regarding capacity of the judiciary to deal with those cases in an independent, professional and efficient way. Due to the change of political climate which is turning against corruptive practices, it can be expected that, in absence of political bias, administration of justice will act professionally. In the regulatory field, it is expected that the central public procurement system will become effective in the first half of 2010. As of January 1, 2010 all financial transactions are monitored by use of personal identification numbers (OIB). This is expected to contribute to improving the transparency of financial transactions.

Another outstanding problem is the lack of extradition treaties with neighbouring countries, notably Serbia and Bosnia Herzegovina. A number of indicted or convicted persons have managed to take

refuge across the border. Efforts directed at remedying the situation by concluding extradition treaties are underway, including the constitutional amendment which should do away with the prohibition of extradition of nationals.

3.3 Fight Against Organized Crime and Human Rights Including Rights of Minorities

Measures undertaken against organized crime have beneficial collateral effects on protection of human rights and rights of minorities. Return of refugees continues under economic distress and effective legal protection of property rights remains essential. Reduction of the number of courts is expected to be beneficial due to increased efficiency and accountability of judges.

Government has stepped-up efforts to ensure full cooperation with the International Criminal Tribunal for Former Yugoslavia (ICTY). In early December 2009, extensive searches were conducted in order to locate documents required by the ICTY, signalling more commitment to prosecution of ethnic Croatian indictees for war crimes.

Recourse to County Courts on grounds of violation of right to trial within reasonable time is also expected to improve the situation. However, ordinary courts, especially courts of first instance (Municipal Courts) are still not in practice of applying fundamental rights standards directly. There are only a few cases where municipal courts instituted concrete constitutional review, and the courts generally do not disapply regulations on grounds of being contrary to fundamental rights. This means that protection of fundamental rights has to be pegged to another existing legal remedy.

While the situation is satisfactory for purposes of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the issue of legal remedies for protection of the fundamental rights will re-emerge in relation to the application of the EU Charter of Rights. Further adjustment will be needed in order to ensure effective legal remedies within the scope of application of the Charter.

4 CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

Successful continuance of the reforms in the sector of the judiciary is key for Croatia's accession to the European Union. The relevant Chapter 23 is still not opened as of January 1, 2010. Actions undertaken by the Croatian government indicate serious commitment to implement the necessary reforms. That commitment is evidenced, *inter alia*, by the following:

- introduction of the new, objective, procedures for appointment of judges;
- reform of the Judicial Academy and introduction of mandatory education and examination for candidates for judicial office;
- adoption of ethical codes for members of the judicial profession;
- initial steps taken in direction of rationalisation of the court network;
- efforts undertaken in order to increase the efficiency of justice showing some progress in decrease of the number of unsolved cases;
- legislative efforts directed at ensuring the right to trial within reasonable time;
- intensive introduction of new and amendment of existing laws governing organization and operation of the judiciary, including procedural laws, alternative dispute resolution laws and rules governing organization of the judiciary;

- changing political climate facilitating the fight against corruption and organized crime including implementation of measures directed at strengthening impartiality and transparency of the judiciary;
- Government's efforts directed at improvement of situation in he judiciary also reflect positively in area of protection of fundamental rights and rights of minorities, especially in terms of access to justice;
- commitment to complete the reforms in the judiciary in 2010 by adopting necessary legislation, including the Constitutional amendment and the new Penal Code.

However, there are still a number of weaknesses that encumber Croatian judiciary:

- reform of judicial professional formation and appointment is in an early stage of implementation and results are not clearly visible yet;
- adequacy and relevance of education in the area of European Union law is questionable as well as the learning outcomes in the field;
- rationalization of the court network is still in an early stage and faces local resistance;
- strategies for reduction of backlog of cases are showing some results but will have to be re-considered and supplemented with appropriate measures addressing independence, transparency and professionalism of judges;
- publication of judicial decisions needs to be improved by a meaningful classification system and a proper search engine;
- right to trial within reasonable time is still not ensured at all levels of judicial hierarchy and the present solution is only remedial and not structural;
- courts presidents are still appointed by the minister of justice;
- there is an outstanding issue of the position and the role of judicial offices for evidence of judicial practice and how do they affect independence of judicial proceedings;
- self-awareness of judges as being members of an independent branch of government is low and results in frequent deference to the legislature, or higher courts, thus contributing to case backlogs;
- participation of women decreases at higher levels of judicial hierarchy.

It is not reasonable to expect that the existing weaknesses will be solved overnight. However, a continued process of reform should ultimately bring about the desired results. At this point, the main efforts are focused on structural reform of the judiciary. Such reforms, when completed, will provide for a basis for inclusion into the legal system and system of judicial cooperation of the EU. For the time being the level of knowledge of EU law among judges and public prosecutors is low, sometimes naïve indeed. The depth of functional integration of EU and national legal systems is generally underestimated. This, however, is not an exception. It took 5 years until a Slovenian court submitted the first Slovenian preliminary reference to the ECJ. The dominant perception in the legal profession is that once EU law is implemented in national law, it is implementing national law only that counts. Such perception will not be easily changed and full compliance with EU law will require substantial monitoring and cooperation of the Supreme Court and the Constitutional Court. For that reason it is a priority to create relevant expertise at the top of the judicial hierarchy. Traditionally, Croatian judges, when properly informed, have a good record of compliance with decisions of the Supreme Court.

Therefore, the Supreme Court should be prepared to exercise its didactic role. However, acceptance of new European legal standards is hindered by a systemic problem. Namely, examinors at he bar exam need to have 15 years of working experience after having qualified for the bar. There are very few, if any, legal professionals who would satisfy that criterion while having formal education or being proficient in EU law. For that reason there is a danger that the role of EU law at the bar exam, and later on, in judicial practice, will be marginalized. For that reason the condition of seniority should be complemented by the condition of qualifications.

4.2 Recommendations

1. Legal framework for appointment of judges should be fully implemented. Role of the Minister of Justice in appointment of court presidents should be minimized or excluded. Appointment to highest national and European judicial positions should be made more transparent;
2. Implement legal reform, including constitutional amendment, that would enable direct effect of EU law in the national legal system;
3. Ensure that judicial panels maximize the utility of offices for evidence of judicial practice while deciding cases and not once the case has been already decided;
4. Education and training of judges should be implemented along the lines of the newly adopted legislation. Curricula should be relevant and should include law of the European Union. Education should develop self-awareness of judges as members of an independent profession and branch of government;
5. Supplement the Bar exam requirements with appropriate EU law contents, including analysis of EU law and solving legal problems involving application of EU law;
6. Requirements for appointment of bar examinors should not be based only on seniority but on qualifications, especially in field of EU law;
7. Continue development of ethical standards of the judicial profession and strengthen institutional and peer mechanisms of supervision. Transfer of professional values should be one of the learning objectives of law school curricula;
8. Continue reform of legal education along the lines of Bologna Declaration, including adjustment of learning outcomes to the needs of the profession and achievement of appropriate teacher/student ratio;
9. Continue implementation of measures directed at reduction of old unsolved cases and reduction of trial time;
10. Improve the system of case reporting including improvement of a classification system and application of an appropriate search engine;
11. Reform the system of attorneys fees and billing, in general in order to discourage procrastinatory litigation tactics;
12. Consider creation of direct legal remedies for protection of fundamental rights by ordinary courts in order to satisfy requirements of the EU Charter of Fundamental Rights;
13. Network of courts should be rationalized in order to increase efficiency, transparency and professionalism. Adequate funding should be allocated to support the rationalization;
14. Measures should be taken in order to ensure appropriate participation of women at all levels of judicial hierarchy, not excluding measures of affirmative action for appointment to highest

judicial positions. Also, proportion of men should be increased at some municipal courts in order to achieve better gender balance;

15. Step-up efforts to ensure full cooperation with the ICTY, particularly by tracking requested documentation.

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BIBLIOGRAPHY

ACTION PLAN OF THE JUDICIAL REFORM STRATEGY, Ministry of Justice of the Republic of Croatia, June 25, 2008

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2009-2010, {COM(2009) 533} Brussels, 14.10.2009 SEC(2009) 1333/2

CROATIA 2009 PROGRESS REPORT *accompanying the* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2009-2010, {COM(2009) 533} Brussels, 14.10.2009 SEC(2009) 1333/2 at p. 13 and p. 20

Rodin, S., *Functions of Judicial Opinions and the New Member States*, in The Legitimacy of Highest Courts'

Rulings / Nick Hulls and Jacco Bomhoff (eds.), den Haag : Asser Press, 2009

Rodin, S. *Croatian Parliament in Transition: From Authoritarian Past to European Future*, in Ph. Kiiver (ed.), NATIONAL AND REGIONAL PARLIAMENTS IN THE EUROPEAN CONSTITUTIONAL ORDER, Groningen: Europa Law Publishing, 2006, pp. 97-114.

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