THE BASIC COURT OF PRISHTINË/PRIŠTINA

[The judgments published may not be final and may be subject to an appeal according to the applicable law.]

Case No. P.8/13

24 November 2017

IN THE NAME OF THE PEOPLE

The Basic Court of Pristina in the Trial Panel composed of EULEX Judge Marie Tuma as Presiding Trial Judge, and EULEX Judge Jennifer Seel and Kosovo Judge Isuf Makolli as panel members, with court recorder Alexandra Popova,

In the criminal case against the accused:

1)

Name	F.
Surname	L.
Father's name	XXX
Date of Birth	XXX
Place of Birth	XXX
Gender	Male
Address	XXX
Nationality	Kosovo Albanian
Citizenship	Kosovar
Occupation	Former Minister of Transport and Telecommunications (2008-2010)
ID	XXX

2)

Name	E.
Surname	S.
Father's name	XXX
Date of Birth	XXX
Place of Birth	XXX
Gender	Male
Address	XXX
Nationality	Kosovo Albanian
Citizenship	Kosovar
Occupation	Former Chief of Cabinet and Political Advisor to F.L. (2008-2010)
ID	XXX

3)

Name	N.
Surname	K.
Father's name	XXX
Date of Birth	XXX
Place of Birth	XXX
Gender	Male
Address	XXX
Nationality	Kosovo Albanian
Citizenship	Kosovar
Occupation	Former Chief of Procurement, Ministry of Transport and Telecommunications
ID	XXX

4)

Name	F.
Surname	Z.
Father's name	XXX
Date of Birth	XXX
Place of Birth	XXX
Gender	Male
Address	XXX
Nationality	Kosovo Albanian
Citizenship	Kosovar
Occupation	Owner of [T-Company], Gjilan
ID	XXX

5)

Name	S.
Surname	T.
Father's name	XXX
Date of Birth	XXX
Place of Birth	XXX
Gender	Male
Address	XXX
Nationality	Kosovo Albanian
Citizenship	Kosovar
Occupation	Former Bodyguard of F.L.

Charged with the following criminal offences as per Indictment PPS No. 425/09 dated 5 December 2012 and PPS No. 67/10 dated 18 February 2014, as consolidated in Indictment PPS No. 425/09 dated 28 September 2015:

Count 1 against F.L., E.S., N.K. and S.T.: **Organized Crime** in violation of Article 274(3) of the Provisional Criminal Code of Kosovo ("PCCK") as read by Article 274(1) PCCK and punishable by a fine of up to 500.000 Euros and by imprisonment of seven to 20 years; read in conjunction with Article 23 PCCK (co-perpetration) as described in the Consolidated Indictment PPS No. 425/09 dated 28 September 2015;

Count 2 against F.L., E.S., N.K. and S.T.: **Abusing Official Position or Authority** in violation of Article 339(1) and (3) PCCK; punishable by imprisonment of one to eight years and read in conjunction with Article 23 PCCK (co-perpetration) as to F.L. and N.K. and read in conjunction with Article 25 PCCK (assistance) as to E.S. and S.T.; additionally read in conjunction with Section 117.1.a and d of the Law on Public Procurement and additionally as read in conjunction with the following crime of Accepting Bribes as specified in Count 3, as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015;

Count 3 against F.L., E.S. and N.K.: **Accepting Bribes** in violation of article 343(1) of the PCCK and punishable by imprisonment of six months to five years; read in conjunction with Article 23 PCCK (co-perpetration); and additionally read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement, as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015;

Count 4 against F.Z.: **Giving Bribes** in violation of Article 344(1) PCCK and punishable by imprisonment of three months to three years; read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement, as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015;

Count 5 against F.Z.: **Misuse of Economic Authorizations** in violation of Article 236(1)(5) and 236(2) PCCK, punishable by imprisonment of six months to five years as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015; and

Count 6 against F.L.: **Other Criminal Offences in the form of the Non-Declaration of Received Campaign Money in violation of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences,** as amended, Section 5.1 read in conjunction with Section 10.8 punishable by imprisonment of up to two years and a fine of up to 5.000 Euros or twice the amount of the currency accepted, whichever is greater; and Section 5.6 read in conjunction with Section 10.5, punishable by imprisonment of up to five years and a fine of up to 100.000 Euros; as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015.

After conclusion of the main trial, before the current trial panel in public trial sessions, equally in the presence of the Prosecutor, defendants and their defence counsels;

Having deliberated and voted pursuant to Article 357 of the Criminal Procedure Code on 23 November 2017;

Pursuant to Article 362, 363, 364, 366, 450, 454 and 463 of the CPC,

Issues the following unanimous:

JUDGMENT

I. PROCEDURAL HISTORY

A. MTPT I

1. On 16.11.2012 the Special Prosecutor with the Special Prosecution Office of Kosovo (hereafter “SPRK”) filed Indictment PPS no. 425/09 with the (then) District Court of Pristina in Case No. P 8/13, known as “MTPT I”, against F.L., Fl.L., D.L., E.S., N.K., F.Z. and G.Z. Pursuant to an order of the EULEX Confirmation Judge dated 3.12.2012 to supplement the Indictment, the Special Prosecutor filed an amended Indictment on 7.12.2012 (itself dated 5.12.2012).

2. The Initial Hearing was held on 8.04.2013 and 10.04.2013, and the Second Hearing on 17.05.2013 and 10.06.2013. On 1.07.2013 the Presiding Trial Judge issued the ‘Ruling on Objections to Evidence and Requests to Dismiss the Indictment’. The Presiding Trial Judge declared the following evidence inadmissible:

   2.1. The evidence obtained during the search of the house of F.L. in XXX conducted on the 28.04.2010;

   2.2. The statement of the defendant Fl.L. given to the Special Prosecutor on 4.09.2012;

   2.3. The statements of B.P. dated 8.11.2011, R.E. dated 9.11.2011, V.O. dated 3.04.2012 and A.I. dated 11.11.2011;

   2.4. The statements (and transcripts) of M.S. before the Kosovo Anti-Corruption Agency (“KACA”);

   2.5 The evidence obtained during the search conducted at the server room of the Kosovo Assembly building on 28.04.2010.

3. The objections to evidence filed by defence counsel for F.Z., N.K. and D.L. were rejected; and the objections filed by defence counsel of D.L. and F.Z. were dismissed as inadmissible. The Presiding Trial Judge further declared *ex officio* the evidence obtained by the Financial Intelligence Centre (reports dated 21.06.2011, 30.01.2012 and 29.03.2012) inadmissible.

4. The criminal proceedings against G.Z. for criminal offences *Obstruction of Evidence* and *Destroying or Concealing Archive Materials* (Counts 9 and 10 of the Indictment) were terminated. Finally, the criminal proceedings for the following criminal offences were also terminated:

   4.1. *Organized Crime* against Fl.L. and D.L. (Count 1);

   4.2. *Misappropriation in Office* against F.L. and N.K. (Count 2);

   4.3. *Entering into Harmful Contracts* against F.L., N.K., E.S. and F.Z. (Count 3);

   4.4. *Money Laundering* against F.L., Fl.L. and D.L. (Count 8);

4.5. *Unauthorized Ownership, Possession or Use of Weapons* against F.L. (Count 11).

5. The Defence of F.L., E.S., N.K. and F.Z. and the Special Prosecutor filed appeals against the Presiding Trial Judge's Ruling; and on 10.12.2013 the Court of Appeals rendered the Ruling (PN 577/2013) partially granting the SPRK appeal and declaring admissible (i) the evidence obtained during the search of the house of F.L. in XXX conducted on 28 April 2010; and (ii) the record of interrogation of the defendant Fl.L. before the Special Prosecutor on 4.09.2012. The rest of the SPRK appeal was rejected as unfounded. The appeals filed by defence counsel on behalf of F.L., E.S., N.K. and F.Z. and the appeal filed by N.K. himself were all rejected as unfounded.

6. The Ruling of the Presiding Judge was affirmed for the remaining parts. In particular, the Court of Appeals upheld the Presiding Trial Judge's rulings finding M.S.'s statement to EULEX police (dated 12.01.2010) and letter to KACA (received by KACA on 6.05.2009 and forwarded to SPRK on 20.10.2009) to be admissible evidence; as well as her ruling that M.S.'s statement to KACA was inadmissible. Finally, the Court of Appeals affirmed the Presiding Judge's ruling concerning statements given by B.P. (8.11.2011), R.E. (9.11.2011), V.O. (3.04.2012), A.I. (11.11.2011).

B. MTPT II

7. On 18.02.2014 the SPRK Prosecutor filed Indictment PPS no. 67/10 with the Basic Court of Pristina in Case no. PKR 84/14 – known as "MTPT II" – against defendants F.L., S.T., N.K., A.A. and B.D.

8. The Initial Hearing was held on 26.03.2014; the Indictment was read and the defendants pleaded not guilty to all counts. This was followed by written objections by the defence to the evidence and the indictment and, on 29.05.2014, the Presiding Trial Judge issued the 'Ruling on Objections to Evidence and Requests to Dismiss the Indictment' declaring the following evidence inadmissible:

   8.1. Pre-trial statement of witness I.M., dated 12.01.2012;

   8.2. Pre-trial statement of witness X.R., dated 6.12.2010;

   8.3. Pre-trial statement of witness H.D., dated 18.03.2013;

   8.4. Pre-trial statement of defendant A.A., dated 15.03.2013;

   8.5. Pre-trial statement of defendant B.D., dated 14.03.2013;

   8.6. Expert opinion of the Directorate of Geodesy, Cadaster and Property;

   8.7. Claim filed by claimant A.H.M. to the Municipal Court Malisheva for confirmation of ownership right to an immovable property, dated 4.07.2007;

8.8. All evidence collected after 6.04.2008 in execution of the "Order for the Application of Covert Measures", issued by District Court of Pristina (PPN 697-7/07) on 6.02.2008.

9. The following charges were dismissed:

9.1. *Misappropriation in Office* against F.L., N.K. and S.T. (Count 2);

9.2. *Entering into Harmful Contracts* against F.L., N.K. and S.T. (Count 3);

9.3. *Accepting Bribes* against F.L., N.K. and S.T. (Count 5);

9.4. *Misuse of Economic Authorization* and *Giving Bribes* against A.A. and B.D. (Count 6).

C. Joint proceedings

10. On 18.02.2014 – the same day as the filing of the MTPT II Indictment – the SPRK filed an application seeking joinder of the criminal proceedings in MTPT I with those in MTPT II. This was granted by the Presiding Trial Judge on 30.05.2014, and the two proceedings were joined under Case no. P 8/13 (i.e. the previous MTPT I).

11. On 23.12.2014 the Court of Appeals rendered the Ruling (PN 373/2014) partially granting the SPRK appeal against the Presiding Trial Judge's Ruling of 29.05.2014 (in MTPT II), to find that the interception evidence collected on the basis of the 'Order for extension of covert measures' dated 9.04.2008 in the period from 7.04.-5.06.2008 constitutes admissible evidence.

12. In the remaining part, the appeal of the Special Prosecutor and the appeals of the respective defence counsels of behalf of the defendants were rejected as unfounded, and the ruling of the Presiding Trial Judge affirmed. Finally – and noting that both MTPT I and MTPT II Indictments had been partially affirmed – the Court of Appeals found that the procedural requisites are met for the joint case to proceed to main trial for those counts of the two indictments that have been affirmed. Further, it ordered the SPRK to present to the court and to the defence in the joint proceedings a consolidated indictment for the counts that have been affirmed and which proceed to main trial.

13. On 28.09.2015, the SPRK Prosecutor filed a consolidated Indictment (given the same number as the MTPT I Indictment, PPS. No. 425/09) with the Basic Court of Pristina against F.L., E.S., N.K., F.Z. and S.T. The consolidated Indictment contains the following counts:

13.1. *Organized Crime* in violation of Article 274(3) Provisional Criminal Code of Kosovo (hereafter "PCCK") as read by Article 274(1) PCCK and punishable by a fine of up to 500.000 Euros and by imprisonment of seven to 20 years and read in conjunction with Article 23 PCCK (co-perpetration) as to F.L., E.S., N.K. and S.T. (Count 1);

13.2. *Abusing Official Position or Authority* in violation of Article 339(1) and (3) PCCK, punishable by imprisonment of one to eight years, and read in conjunction with Article 23 PCCK (co-perpetration) as to F.L. and N.K. and Article 25 PCCK (assistance) as to E.S. and S.T. (Count 2);

13.3. *Accepting Bribes* in violation of article 343(1) PCCK, punishable by imprisonment of six months to five years, and read in conjunction with Article 23 PCCK (co-perpetration) and additionally with Section 117.1.a. and d. of the Law on Public Procurement, as to F.L., N.K. and E.S. (Count 3);

13.4. *Giving Bribes* in violation of Article 344(1) PCCK, punishable by imprisonment of three months to three years, read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement, as to F.Z. (Count 4);

13.5. *Misuse of Economic Authorizations* in violation of Article 236(1)(5) and (2) PCCK, punishable by imprisonment of one to eight years; read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement as to F.Z. (Count 5);

13.6. *Other criminal Offences* in the form of the non-Declaration of Received Campaign Money in violation of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, as amended, Section 5.1 read in conjunction with Section 10.8 punishable by imprisonment of up to two years and a fine of up to 5.000 Euros or twice the amount of the currency accepted, whichever is greater; and Section 5.6 read in conjunction with Section 10.5, punishable by imprisonment of up to five years and a fine of up to 100.000 Euros, as to F.L. (Count 6).

14. The main trial commenced with an initial status conference in the now joint proceedings held on 30.10.2015; the consolidated Indictment was read and all defendants pleaded not guilty on 2.12.2015. By letter dated 3.10.2013, the injured party, the Ministry of Justice of Kosovo, informed the Court that its representatives would not attend hearings of the main trial.

15. Opening statements of the Prosecutor, defence counsels, and the defendants F.L., E.S. and N.K. themselves, were held on 4.12.2015, 9.12.2015, and 10.12.2015.

16. The Prosecution called 22 witnesses, who testified between 11.12.2015 and 7.11.2017. The defence for F.L. withdrew from its sole witness on 16.11.2017, and the remaining defendants and their counsels declined to call any witnesses. Closing statements of the SPRK Prosecutor, defence counsels and defendants were heard on 21.11.2017 and 22.11.2017.

17. With the Panel having satisfied itself that there were no further motions by the parties to supplement the evidentiary proceedings, and that further evidence was

unnecessary, the Presiding Trial Judge announced the conclusion of the evidentiary proceedings on 22.11.2017. Judicial deliberations and voting were held on 23.11.2017 and the judgment was announced on 24.11.2017.

II. APPLICABLE LAW

A. Substantive law

18. The Indictment charged the accused with a number of offences under the Provisional Criminal Code of Kosovo 2003 (UNMIK/REG/2003/25) ("PCCK"), including: Organized Crime (Article 274(3)); Abusing Official Position or Authority (Article 339(1) and (3)); Accepting Bribes (Article 343(1)); Giving Bribes (Article 344(1)); and Misuse of Economic Authorizations (Article 236(1)(5) and (2)). The PCCK was superseded, effective 1 January 2013, by the new Criminal Code of Kosovo (Code No. 04/L-082) ("CCK"). All of the charged offences are also criminalized under the CCK. These crimes are charged, variously, under the modes of responsibility of co-perpetration (as defined in Article 23 PCCK) and assistance (Article 25 PCCK).

19. Further, the Indictment charged the accused F.L. with non-Declaration of Received Campaign Money in violation of Sections 10.8 and 10.5, read in conjunction with Sections 5.1 and 5.6, of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences (as amended). The contemporaneous equivalent provisions are found in Law 03/L-196 on the Prevention of Money Laundering and Terrorist Financing of 3 September 2010.

20. Both the PCCK, in Article 2(2), and the new CCK, Article 3(2), give effect to the *lex mitior* principle, providing in identical terms:

    In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.

    The same imperative – to apply the law most favorable to the accused – is derived from application of Article 22 of the Constitution of the Republic of Kosovo, which makes the provisions of key international human rights instruments directly applicable in the Kosovo legal system, *viz.* Article 11(2) Universal Declaration of Human Rights; Article 7(1) European Convention on Human Rights; Article 15(1) International Covenant on Civil and Political Rights.

21. For this reason, the Panel considered it necessary to conduct a leniency assessment, comparing PCCK provisions with the corresponding newer CCK provisions for the crimes and modes of responsibility charged. It will, for the sake of clarity, thereafter set out the (material and mental) elements it applied in its assessment of the evidence, and the punishment applicable in case of conviction.

i. Crimes

'Organized crime'

22. Both the charged Article 274(3) PCCK and new Article 283(2) CCK provide for the criminal responsibility of *"[w]hoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group"*. Article 274(7)(1) PCCK additionally defines 'organized crime' as *"as a serious crime committed by a structured group in order to obtain, directly or indirectly a financial or other material benefit."*

23. The definitions of terms accompanying the provisions are in all material respects near-identical. For brevity's sake, those of the charged (old) provision will be set out. The notion of 'organized criminal group' is defined in Article 274(7)(2) PCCK as *"a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit"* (See corresponding Article 120(13) CCK). Although both codes refer to 'material benefit' only the CCK defines it, albeit very broadly. No genuine difference between the provisions can be ascertained, as both encompass obtaining *"financial and other material benefit, directly or indirectly"*, and are thus aimed at capturing a wide array of benefits. The CCK is merely more elaborate on this point. A 'structured group' is *"a group of three or more persons that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure"* (Article 274(7)(4) PCCK; See also Article 120(14) CCK, defining 'structured association').

24. Important in the present case is the interpretation of the phrase "serious crime". A 'serious crime' is an offence *"punishable by imprisonment of at least four years"* (Article 274(7)(3) PCCK; Article 283(1) CCK). A majority of the Panel considered that this constitutes a requirement that the underlying crime committed by the group – i.e. that around which the group is organized – has, *per* its statutory definition, a ***minimum*** term of imprisonment of four or more years. Put differently, a crime which is punishable by, for example, one to five years' imprisonment cannot serve as the underlying crime for a charge of 'organized crime' under either Article 274 PCCK or Article 283 CCK. This interpretation, although not uniformly accepted, is not novel in Kosovo jurisprudence.[1]

25. This conclusion was necessitated, first, by a strict textual interpretation. It stems from the word *"punishable"* – which points to the (upper and lower) limits of permissible punishment – and its combination with the words *"at least"*, which mean *"a minimum of"*. (That *"at least"* means *"a minimum of"* is confirmed by use of the phrase in other parts of the PCCK. Thus, the offence of actively participating in 'organized crime' in Article 274(2) (not charged in the present

[1] See, e.g. Judgment, Case No. 410/13, Basic Court of Prizren, 14 April 2016, pp 187-188.

case) is punished by *"imprisonment of at least five years"*, where 'at least' means 'a minimum of'.)

26. Conversely, that *"punishable by imprisonment of at least four years"* cannot be taken to mean *"where a punishment of four years may be imposed"* is also confirmed by the fact that the legislator draws a clear distinction between the two phrases. Thus, Article 20(2) PCCK and Article 28(2) CCK criminalize attempts of criminal offences *"for which a punishment of three or more years may be imposed."* That is not the phrase used here. Further, and in a similar vein, an interpretation that equated *"punishable by imprisonment of at least for years"* to *"punishable by imprisonment of four years"* would make the words *"at least"* superfluous. This would fall foul of the requirement that statutory interpretation give full effect to the words rather than make some redundant.

27. A majority of the Panel was of the view that this conclusion is confirmed, in the second place, by the drafting history and object of the provision. It has been said that the provision is based on – and intended by the legislator to emulate – definitions of 'organized crime' found in the EU Joint Action 'on making it a criminal offence to participate in a criminal organization' and the UN Convention against Transnational Organized Crime. Both of these provisions, however, explicitly provide that the *upper* range of punishment is determinative. Thus, Article 1 of the EU Joint Action speaks of *"offences which are punishable by deprivation of liberty of a detention order of a maximum of at least four years"* (emphasis added). Similarly, Article 2(b) of the UN Convention defines 'serious crime' as *"conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."* (emphasis added). Rather than copy either of these formulations verbatim, the legislator chose to remove the reference to 'maximum' term of imprisonment. The legislator's object must therefore be to restrict the provision to the most serious forms of organized crime, such as those connected to the trafficking in persons (punishable under Article 171 CCK by between five and 12 years' imprisonment) as well as terrorism (Article 136 CCK, five plus years).

28. Finally, the Panel majority held that, even if doubt could be raised as to what crimes are, properly speaking, capable of being punished with a minimum of four years imprisonment, this must be resolved in favor of the accused, by adopting the more stringent requirement. The principle of *in dubio pro reo,* as embodied in Article 1(3) PCCK and Article 2(2) CCK provides that *"[i]n case of ambiguity, the definition of a criminal offence shall be interpreted in favor of the person being…convicted."*

29. Turning next to the applicable punishment for the offence of 'organized crime', this differs as between the two provisions. In particular, the PCCK in Article 274 provides for punishment by a term of imprisonment of seven to 20 years, whereas the new CCK Article 283 provides for a term of imprisonment of at least 10 years without prescribing a maximum penalty. On these grounds, the PCCK provision is

clearly more favorable to the accused, in that it both sets a lower minimum term and imposes a ceiling on the maximum term.

30. Further, the crime definition must be read in conjunction with the general provision on intent (Article 5, PCCK; Article 6, CCK). This is identical as between the new and old provisions, with Articles 15 PCCK and 21 CCK both providing:

> *(1) A criminal offence may be committed with direct or eventual intent.*
>
> *(2) A person acts with direct intent when he or she is aware of his or her act and desires its commission.*
>
> *(3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.*

31. The Panel, by majority, therefore found that Article 274(3) PCCK is the more lenient of the two provisions, and that its material elements are:

    (a) the existence of an 'organized criminal group' (being i. a structured group, ii. existing for a period of time, and iii. acting in concert);

    (b) the acts of organizing, establishing, managing or directing of the group by the accused; and

    (c) the commission by the group of a crime punishable by a minimum term of imprisonment of at least four years.

32. Reading Article 274(3) PCCK together with Article 15 PCCK, the Panel considered the mental elements of the offence to be as follows:

    (d) awareness of or intent to organize, establish, manage or direct the group;

    (e) intent to commit a crime punishable by at least four years imprisonment; and

    (f) intent to obtain, directly or indirectly, a material benefit.

33. In keeping with the above discussion, the Panel found that the more lenient punishment of seven to 20 years imprisonment applies in case of conviction.

'Abusing official position or authority'

34. The definition of the crime of 'abusing official position or authority' is substantially identical as between the basic offence contained in Article 339(1) PCCK and Article 422 CCK. The latter requires:

> *An official person, who, by taking advantage of his office or official authority, exceeds the limits of his or her authorizations or does not execute his or her official duties with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violates*(sic) *the rights of another person…*

35. Article 422(2) CCK provides, in addition to the definition, a non-exhaustive list of conduct that may properly constitute abuse of official position. As with the definition of "material benefit" (Article 120(34) CCK, discussed above), this provision does not alter the scope of the provision, but merely illustrates that it could be satisfied by a broad range of conduct. Further, the term 'official person' is defined in the PCCK as including one who is *"appointed to a public entity"* (Article 107(1)(1)) or *"exercises specific official duties, based on authorization provided for by law"* (Article 107(1)(3)). Such persons equally fall within the scope of 'official person' in Article 120(2) CCK.

36. The accused, however, were charged with Article 339(1) PCCK in conjunction with Article 339(3) PCCK. Article 339(3) prescribes a harsher penalty where an additional *actus reus* element – being *"a material benefit exceeding 5,000 EUR"* – is established. Whereas the basic offence (339(1) PCCK) is punishable by imprisonment of up to one year, if a material benefit in excess of 5,000 EUR is established the offence is punishable by one to eight years' imprisonment (339(3) PCCK). Article 422 CCK contains no equivalent to this provision, but makes the offence is punishable by imprisonment of six months to five years.

37. The Panel noted, first, that the conduct with which the accused are charged (insofar as this is alleged to have resulted in material benefit in excess of 5,000 EUR) continues to be punishable under the CCK; there is thus no repeal of the criminal provision. Instead of criminalizing abuse of official position/authority with a resulting material benefit under an independent provision, Article 422 CCK gives the Panel discretion to take into account the amount of any material benefit in determining the appropriate sentence. (On this, it is further noted that a significant benefit could be taken into account as part of the CCK's sentencing calculus under Article 73(3)(3.3) which directs the court to take account of the *"intensity of...injury to the protected value"*.) The prescribed sentence, in turn, is more lenient under Article 422 CCK (six months to five years) than under Article 339(3) PCCK (one to eight years). For these reasons, the Panel applied the more lenient, newer provision in this case.

38. The Panel found that the material elements of the crime of 'abusing official position or authority' *per* Article 422 CCK require that the accused:

    (a) is an 'official person' (being i. a person elected or appointed to a State body; ii. an authorized person in a state body who by law exercises public authority; or iii. a person who exercises specific official duties, based on authorizations provided for by law); and

    (b) takes advantage of his office or authority, exceeds the limits of authorizations, or fails to execute his official duties.

39. The mental elements require a showing of the accused's

    (a) awareness of or intent to abuse his office or authority, exceed the limits of authorizations or fail to execute official duties;

(b) intent thereby to either: i. acquire a 'material benefit' for himself or another person; ii. cause damage to another person; or iii. seriously violate the rights of another person.

40. In case of conviction, the applicable punishment is a term of imprisonment of six months to five years.

'Accepting bribes'

41. Despite the *prima facie* divergent phrasing of the crime of 'accepting bribes' in the PCCK and CCK, the provisions are substantially identical in scope. Article 343(1) PCCK and 428(2) CCK are concerned with an official who accepts a bribe in order to act *in violation of* his official duties, whether by doing something which they should not or failing to do something which they should (or which is within their discretion to do). Articles 343(2) PCCK and 428(1) CCK, respectively, address the conduct of an official who accepts a bribe in order to act *in accordance with* his official duties (i.e. in a way that he was required to act by virtue of his official functions). As the Indictment charges the accused only under Article 343(1) PCCK (i.e. acting in violation of official duties),[2] Article 343(2) PCCK and its corresponding 428(1) CCK will not be considered further in this section.

42. The punishments entailed, however, differ between the old and new provisions. Whereas the PCCK punishes an official who agreed to act in violation of official duties (Article 343(1)) with imprisonment of six months to five years, the equivalent CCK provision (Article 428(2)) ascribes imprisonment of three to 12 years. On the other hand, however, Article 343(4) PCCK provides for confiscation of any received bribe. The CCK instead deals with confiscation generally in Article 96, which provides that material benefits acquired by the criminal offence *"shall be confiscated…according to the terms provided for by law."* Thus, a number of CCK articles provide expressly for confiscation, including some in the relevant Chapter XXXIV (see: Article 430(4) 'Giving bribes to foreign public official'; Article 431(3) 'Trading in influence'). The absence of a corresponding provision in Article 428 leads the Panel to conclude that confiscation of an accepted bribe is not provided for by law and is impermissible under Article 428 CCK.

43. The PCCK is thus harsher in the sense that it provides for confiscation of a received bribe whereas the CCK does not. The Panel was of the view that the PCCK provision is nevertheless more lenient toward the accused as a whole, by reason of the shorter minimum and maximum terms of imprisonment prescribed for the offence. For these reasons, Article 343(1) PCCK will be applied.

44. The Panel found that the material elements of the offence of accepting bribes *per* Article 343(1) PCCK require that the accused:

(a) is an 'official person' (as defined above)

[2] On this, see *infra* Section V.C (paras 239-241).

(b) solicits or accepts a gift, benefit or promise thereof for himself or another person;

(c) agrees, within the scope of his official authority, to: i. perform an official or other act he should not perform, or ii. fail to perform an official or other act which he should or could have performed.

45. The corresponding mental elements of 'accepting bribes' under Article 343(1) require a showing of the accused's intent or awareness of the material elements.

46. The applicable punishment for 'accepting bribes' to act in violation of official duties in six months to five years.

'Giving bribes'

47. Article 344(1) PCCK provides for the responsibility of a person who

> *confers or promises to confer a gift or other benefit on an official person so that such person perform within the scope of his or her official authority an official or other act which he or she should not have performed or fail to perform an official or other act which he or she should have performed, or whoever serves as an intermediary in bribing an official person…*

48. There is no material difference between the above and the equivalent Article 429(2) CCK. In this regard, PCCK explicitly proscribes acting as an intermediary in the bribing of an official, whereas the CCK does not. Nevertheless, serving as an intermediary is encompassed by the ordinary meaning of Article 429(2) CCK, insofar as that provision does not require that the person who performs the *actus reus* does so seeking personal benefit from the misuse of official authority. Conversely, the ordinary meaning of Article 344(1) PCCK does not preclude the responsibility of one who engages an intermediary to affect a bribe, whereas Article 429 CCK covers this explicitly by proscribing bribes given *"directly or indirectly"*.

49. Both prescribe identical basic terms of imprisonment for the giving of bribes, being imprisonment for between three months and three years. However, Article 429(3) CCK provides for punishment by fine and imprisonment of one to eight years in cases where the benefit exceeds 15,000 EUR, and in this respect imposes a harsher punishment than the PCCK. On the other hand, the PCCK provides that any bribe shall be confiscated and restored to the person who gave it. There is no equivalent in the CCK. The Panel found that the PCCK provision, read as a whole, is more lenient to the accused and this was therefore applied.

50. The Panel held that the material elements of the offence of 'giving bribes' *per* 344(1) PCCK are:

(a) the accused confers or promises to confer a gift or benefit;

(b) the recipient of the gift or benefit or promise thereof is an 'official person'.

51. The mental elements of the offence are:

(a) intent or awareness of the act of conferring or promising a gift or benefit;

(b) awareness of the 'official' status of the person;

(c) intent to cause the 'official person' to act in violation of his official duties.

52. The punishment applicable in case of conviction for 'giving bribes' is a term of imprisonment between three months and three years, as well as confiscation of any bribe paid.

'Misuse of economic authorizations'

53. The charged Article 236(1)(5) PCCK proscribes serious violations of the law or the rules of business activity which relate to the disposal, use or management of property, by a responsible person within a business organization or a legal person who engages in economic activity, undertaken with intent to obtain an unlawful material benefit for the business organization or legal person where he is employed, or for any other business organization or legal person. Article 107(2) PCCK defines the term 'responsible person', as

> *... an individual in a business organization or legal person who because of his or her function or special authorization is entrusted with duties that are related to the implementation of the law or other provisions issued on the basis of law or of general rules of business organizations or other legal persons in managing or administering property, or are related to the management of production or other economic process or supervision of such process...*

54. The equivalent Article 290 CCK contains a simplified text which is somewhat broader in scope. In particular, rather than requiring that the accused is *"a responsible person within a business organization or legal person which*[sic] *engages in economic activity",* Article 290(1) CCK applies to anyone *"engaging in an economic activity"*. Similarly, whereas Article 236(1) PCCK demands intent to unlawfully benefit *"the business organization or legal person where [the person] is employed or…any other business organization or legal person",* in the CCK the requisite intent is to benefit *"oneself or any other person."* Finally, whereas the PCCK requires a 'serious' violation of the law/rules of business activity, under Article 290(1)(1.5) CCK any violation suffices. The Panel thus considers that, being more restrictive, the PCCK provision is more favorable to the accused.

55. Turning to the prescribed penalties, Article 236(1) PCCK provides for punishment by imprisonment of six months to five years. Article 290(1) CCK provides the same, with the addition of the possibility for a fine. Both Article 236(2) PCCK and Article 290(1) CCK are identical in providing for imprisonment of one to eight years where the criminal act results in material benefits exceeding 100,000 EUR.

The PCCK provision is therefore more lenient insofar as it does not provide for the possible imposition of a fine.

56. Thus, the Panel found that the material elements of the offence of 'misuse of economic authorizations' under the charged sub-paragraph 5 of Article 236(1) PCCK require that the accused:

    a. is a 'responsible person' within a business organization or a legal person who engages in economic activity;

    b. commits a serious violation of the law or the rules of business activity which relate to the disposal, use or management of property.

57. The corresponding mental elements are the accused's:

    c. intent or awareness as to violating the law or rules of business activity which relate to the disposal, use or management of property; and

    d. intent to obtain an unlawful material benefit for the business organization or legal person where he is employed, or for any other business organization or legal person.

58. The applicable punishment is imprisonment of six months to five years for the basic offence, and one to eight years where the criminal act results in material benefit exceeding 100,000 EUR.

Other criminal offences related to the receipt and non-declaration of received political contributions

59. Section 5.1 of the UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences (as amended) prohibits political parties and registered candidates from accepting *"any contribution in currency in excess of €1,000 from a single source in a single day.*" This proscription is repeated verbatim in Article 25(1) of the Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing.

60. Section 10.8 of the UNMIK Regulation provides that

    > *"[w]hoever wilfully accepts… currency in violation of section…5.1…commits a criminal offence punishable by imprisonment of up to two years and a fine of up to €5,000 or twice the amount of the currency accepted…whichever is greater."*

    This too is repeated in Article 33(5) of the Law, which prescribes identical punishment.

61. Article 33(11) of the Law further defines a "willful" act as *"an act which is performed not only intentionally, but also deliberately and is not performed unintentionally, carelessly or accidentally."* Notably, and perplexingly, this definition is not explicitly adopted in relation to Article 33(5) but only in relation

to other sub-sections of Article 33 and Article 32. The Panel considered this to be a typographical error, there being no discernable reason to suppose that the same word should bear different meanings in different provisions of the Law. Further, in the Panel's view, the same meaning attaches to the word "willfully" in the charged Section 10.8 of the UNMIK Regulation. For these reasons, the Panel found that no law more favorable to the accused has been enacted subsequently and applied the provisions charged.

62. Section 5.6 of the UNMIK regulation requires political candidates to certify that they have complied with their obligations (including under Section 5.1) in their candidate registration submitted to the Central Election Commission. An identical obligation to certify compliance is contained in Article 25(6) of the Law. Pursuant to both of the corresponding Section 10.5(a) of the UNMIK Regulation and Article 33 of the Law, it is an offence to *"knowingly…[make] any materially false statement or willfully [omit] to disclose material information"* in any report, certification or declaration made pursuant to Section 5.6. This offence is punishable by imprisonment of up to five years and a fine of up to 100,000 EUR under both provisions.

63. For this reason the Panel concluded that the material elements of the offence of accepting disbursements in excess of 1,000 EUR are that the accused:

   e. is a registered political candidate; and

   f. received a contribution in currency in excess of 1,000 EUR from a single source in a single day.

   The corresponding mental element is that the accused was:

   a. aware of the contribution, and

   b. accepted it willfully (that is, intentionally and deliberately and not unintentionally, carelessly or negligently).

   In case of conviction, this offence entails punishment of up to two years imprisonment and a fine of up to 5,000 EUR or twice of the amount accepted (whichever is greater).

64. The Panel held that the offence of making false statements requires that the following material elements be satisfied. The accused:

   g. is a political candidate; and

   h. either made a materially false statement, or did not disclose material information in a report, certification or declaration.

   The mental elements of making false statements require that the accused either knew the statement was false in material respects, or willfully omitted material information. The applicable punishment is imprisonment of up to five years, and a fine of up to 100,000 EUR.

ii. Modes of participation

65. Co-perpetration is identified in identical terms in Article 23 PCCK and Article 31 CCK. It is established:

> *When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way…*

66. Article 25(1) PCCK and Article 33(1) CCK define as an assistant one who *"intentionally assists another person in the commission of a criminal offence"*. Both provisions contain a substantially similar non-exhaustive list of examples of assistance to crime. *Per* Article 25(2) PCCK assistance includes:

> *…giving advice or instruction on how to commit a criminal offence, making available for the perpetrator the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, or promising in advance to conceal evidence of the commission of a criminal offence, the identity of the perpetrator, the means used for the commission of a criminal offence, or the profits which result from the commission of a criminal offence.*

The Panel thus considered that neither provision can be considered more favorable to the accused, and applied the PCCK provisions as charged.

B. Procedural law

67. The new Criminal Procedure Code of Kosovo, Code No. 04/L-123 (hereafter "CPC") entered into force on 1 January 2013 (see Article 547, CPC); it thereby superseded the (old) Provisional Criminal Procedure Code of Kosovo, UNMIK/REG/2003/26 ("PCPC"). In the present proceedings, the MTPT I Amended Indictment was filed on 05 December 2012 (under the PCPC) and the MTPT II Indictment on 19 February 2014 (under the CPC). It is clear that the procedural law applicable to the present proceedings is, since its entry into force on 1 January 2013, the new CPC.[3] The latter has, indeed, been applied throughout the conduct of the main trial. Importantly, however, investigative steps were undertaken pursuant to the then applicable PCPC provisions in both originating proceedings (MTPT I and II). The Panel therefore considered it necessary to set out what law it will apply as concerns the admissibility of evidence collected under the PCPC.

68. The law applicable to the admissibility of evidence was considered by the Court of Appeal (Ruling PN 577/2013). In reasoning with which the Panel concurred, the Court of Appeal emphasized, first, that *"the issue of assessing the admissibility of*

[3] See also Court of Appeal Ruling PN 577/2013, 10 December 2013, para. 24.

evidence is distinct from assessing the lawfulness of an investigative action through which the evidence was collected."[4] In particular:

> *"The assessment of whether the investigative action was conducted lawfully is but one step towards the decision on admissibility of the evidence. Based on the general principles* tempus regit actum, *the lawfulness of an investigative action will always have to be determined against the procedural rules in force at the time the investigative action was carried out. In the current case* [i.e. MTPT I]*, the lawfulness of investigative actions will therefore always be determined according to the* [PCPC] *as the procedural law in force when the investigative actions were conducted."*[5]

The same logic applies to investigative actions undertaken under the then MTPT II. The Panel noted, however, that some MTPT II investigative actions were undertaken *after* the entry into force of the new CPC, and their lawfulness should thus be assessed under the new provisions.

69. In the second place, the Court of Appeal continued:

> *"The decision on whether evidence lawfully obtained is also admissible and can be used as evidence during main trial will however, as a general rule, be taken on the basis of admissibility clauses dictated by the CPC as the Code applicable to the criminal proceedings as a whole. Only exceptionally could the* [PCPC] *admissibility clauses remain applicable. One such example would be <u>when the procedural action collecting the evidence and the admissibility clauses are so inter-connected they cannot be set apart</u>. In such circumstances, the* [PCPC] *would govern the matter."*[6]

70. Finally, the Court of Appeal summarized its overall positions as follows:

> *"…the lawfulness of the investigative action – the interrogation of the witness – must be assessed against the then applicable procedural law, the* [PCPC]. *The admissibility of the evidence however must be assessed in light of the criminal procedure code applicable to the proceedings as a whole, i.e. the CPC."*[7]

III. STATUTORY LIMITATIONS

A. Legal regime

71. Article 106(1) CCK sets out periods of statutory limitation, calculated with reference to the punishment applicable to the crime in question. Article 106(2) CCK clarifies that where the law provides for a sentencing range, the limitation period is determined on the basis of the *"the most serious punishment"*, understood

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[4] Court of Appeal Ruling PN 577/2013, 10 December 2013, para. 28.
[5] Court of Appeal Ruling PN 577/2013, 10 December 2013, para. 29.
[6] Court of Appeal Ruling PN 577/2013, 10 December 2013, para. 30.
[7] Court of Appeal Ruling PN 577/2013, 10 December 2013, para. 65.

by the Panel to be the upper end of the sentencing range. Thus, where an offence is punishable by a maximum term of imprisonment of more than one year, up to and including three years, the period after which criminal prosecution may no longer be initiated by the authorities is three years (Article 106(1)(1.5) and (1.4)). These provisions are identical in substance to the equivalent Articles 90(1) and 90(2) PCCK.

72. Article 107 CCK (and the corresponding Article 91 PCCK) deals with the commencement and stay (i.e. pauses) to the applicable statutory limitation periods. Its final paragraph, Article 107(8) CCK, however, provides that "*[c]riminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed.*" The same was found in Article 91(6) PCCK, which added the bracketed description: *"absolute bar on criminal prosecution"*. The Commentary to the CCK explains that Article 107(8) constitutes an absolute bar to prosecution, the purpose of which is to prevent the competent state authorities from abusing the legally permitted interruptions to delay the expiration of the statutory limitation period indefinitely.[8] The Court of Appeals similarly views the provision as *"an absolute bar for prosecution, meaning that regardless of the actions of the authorities, the prosecution is prohibited after that period of time."*[9] The old PCCK provision was interpreted in the same way.[10]

73. Finally, Article 363(1)(1.3) CPC provides that the court must (*"shall"*) render a judgment rejecting a charge, if the period of statutory limitation has expired.

74. The Panel thus considered that the absolute bar is calculated straightforwardly from the date of alleged commission of the offence to the date of expiration of double the applicable period of statutory limitation. Charges for which this period has elapsed must be rejected.

B. Rejection of Count 4

75. Count 4 of the Consolidated Indictment charged the accused F.Z. with 'giving bribes' in violation of Article 344(1) PCCK. As previously discussed, this provision is more lenient than the corresponding Article 429(2) CCK, and is

[8] The relevant portion of the Commentary provides: *"Paragraph 8 regulates the issue of absolute statutory limitation. Cessation and termination of statutory limitation may practically prevent the statutory limitation occur at all. Especially the termination may always obstruct the statutory limitation because the competent state authorities may undertake such actions which would make impossible the meaning and the purpose of statutory limitation. To avoid this possibility, the contemporary criminal law provides for the absolute statutory limitation."*

[9] Court of Appeals, PAKR 161/16, 15 September 2016, section 8.

[10] Court of Appeals, PAKR 359/13, 13 March 2014 ("…the Criminal Code prohibits prosecution *in every case* when twice the period of time set for statutory limitation in Article 90 Paragraph (1) CCK has elapsed. This is the so called absolute bar on criminal prosecution regulated in Article 91 Paragraph (6) CCK. This means that after a certain period of time, irrespective of reasons for delay, a defendant cannot be prosecuted for a criminal offence.")

punishable by a maximum term of imprisonment of three years.[11] By virtue of Article 106(1)(1.5) CCK, the statutory limitation period for this offence is three years. The absolute bar on criminal prosecution is therefore six years from the date of commission of the offence.

76. Further, the Panel recalled that the offence of 'giving bribes' can be committed by either actually conferring or only offering to confer a bribe.[12] The Prosecutor alleges that F.Z. promised to confer a bribe in the amount of EUR 250,000 in exchange for *T-Company* being awarded Tender 009-004-511 for the Summer and Winter Maintenance of the Regional Roads of Kosovo 2009-2010, Gjilan Region. Specifically, this bribe is said to have been negotiated between E.S. and F.Z. in meetings held between the end of January and end of March 2009; it is explicitly confirmed in SMSs between the two sent on 23 and 28 March 2009.[13] The Prosecutor did not allege, nor present any evidence in support of the allegation, that the promised bribe was actually paid at a later date. The Panel thus considered that the operative date from which the period of statutory limitation must be calculated is 28 March 2009.

77. For these reasons, the Panel found that the absolute bar on criminal prosecution expired six years after 28 March 2009 – in March 2015 – and rejected Count 4 as absolutely time barred.

C. Partial rejection of Count 6

78. Count 6 of the Consolidated Indictment charged the accused F.L. with two separate offences. The first was accepting a political contribution in excess of EUR 1,000 from a single source in a single day, criminalized by Section 5.1 read in conjunction with Section 10.8 of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. This is punishable by a maximum of two years' imprisonment; as discussed, the punishment is identical to that provided in the newer Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing and the charged provision is therefore applied.[14] By virtue of Article 106(1)(1.5) CCK, the statutory limitation period for this offence is three years. The absolute bar on criminal prosecution is therefore six years from the date of the commission of the offence.

79. The Prosecutor alleged that F.L. received EUR 5,000 from an I.M. as contribution for his election campaign to become mayor of Pristina in 2007. This sum is said to have been received on 18 October 2007.[15] The Panel thus considered that the absolute bar on criminal prosecution expired six years after 18 October 2007, in October 2013, and rejected this charge as absolutely time barred.

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[11] See *supra* Section II.A.i, paras 47-52.
[12] See *supra* Section II.A.i, paras 47-52.
[13] See Consolidated Indictment, pp 11-12; 46, paras 91-92; p. 48, para. 100; p. 49, para. 101.
[14] See *supra* Section II.A.i, paras 59-64.
[15] See Consolidated Indictment, p. 14; p. 79, paras 190-192.

80. The Panel noted that dismissal of this charge leaves intact the second charge contained in Count 6—that of non-declaration of the received campaign money in violation of Sections 5.6 and 10.5(a) of the abovementioned UNMIK Regulation. This is further considered below.[16]

IV. EVIDENTIARY CONSIDERATIONS

A. Burden and standard of proof

81. In criminal proceedings, the principle of presumption of innocence and the burden proof upon the Prosecution is articulated in a number of international instruments, including Article 6(2) European Convention on Human Rights and has been reiterated in the jurisprudence of the European Court of Human Rights.[17] In the laws of the Republic of Kosovo, the presumption of innocence to which a defendant is entitled is enshrined in Article 31(5) of the Constitution of the Republic of Kosovo, and Article 3(1) of both the CPC and PCCK. This presumption places on the Prosecution the burden of establishing the guilt of each defendant, a burden that remains on the Prosecution throughout the main trial.

82. Following this principle the trial Panel, pursuant to Article 7(1) CPC and PCCK, *"... must truthfully and completely establish the facts which are important to rendering a lawful decision"*, and, pursuant to Article 7(2) CPC and PCCK has *"...a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favour…"*. Thereafter, in rendering the lawful Judgment, *"the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this"* pursuant to Article 370(7) CPC and Article 396(7) PCCK.

83. Accordingly, the trial Panel must determine in respect of each of the Counts charged against each of the defendants whether it is satisfied on the basis of the whole of the evidence that every element of the crime has been established. It is for the Prosecutor, during the course of a trial, to adduce evidence sufficient to convict the defendants of the charges for which they are indicted. A defendant's guilt cannot be presumed until a charge has been proven beyond reasonable doubt.[18] At the conclusion of the case, any remaining doubt as to whether the criminal offence has been proved must be resolved in favour of the defendant pursuant to Article 3(2) CPC and PCCK.

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[16] See *infra* Section V.E, paras 265-273.

[17] For example Telfner v Austria, 2001, ECHR 228, para 15 and Barbera, Messagué and Jabardo v Spain, 1998, ECHR 25, para 77.

[18] A principle articulated in, for example, UN Human Rights Committee, CCPR General Comment 32, 2007, para 30 and in Sobhraj v Nepal, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.3.

B. Evidence originating with the late M.S.

84. The Panel considered it necessary, as a preliminary matter, to set out its final determination on the admissibility of various pieces of evidence originating with the late M.S. and the evidential weight that will be accorded to them in this Judgment.

i. Statement of M.S. to EULEX Police (12 January 2010)

85. The Presiding Trial Judge found the statement of M.S. given to EULEX Police to be admissible,[19] and this ruling was upheld by the Court of Appeals.[20] However, the Court of Appeals noted that its probative value remains to be determined by the Trial Panel,[21] and made the following specific observations:[22]

"in light of the change of the procedural law, the Trial Panel will have to determine what is the status of [M.S.]'s statement pursuant to the new CPC. Does the statement correspond to a pre-trial testimony or pre-trial interview? This is an assessment and determination to be made by the Trial Panel. If the latter concludes the statement should be treated as a pre-trial interview, limitations on its use from Article 123(2) CPC will apply. If the Trial Panel concludes the statement should be treated as a pre-trial testimony, limitations on its use from Article 123(3) CPC will apply."

86. As noted by the Court of Appeals, the CPC introduced a new distinction between three types of pre-trial evidence: pre-trial interviews; pre-trial testimony; and Special Investigative Opportunities (Article 123 CPC). Pre-trial interviews are largely an investigative instrument, used to substantiate pre-trial investigative orders, detention on remand and indictments. At the main trial however, a pre-trial interview may only be used in cross-examination to impeach a witness who has given contradictory accounts of events: in this way, its use is tied to the opportunity afforded to the defence to challenge the evidence. Special Investigative Opportunities (not central to the present discussion) are effectively a way of conducting a mini-trial at the pre-trial stage, and thereby collecting fully admissible evidence.

87. Pre-trial testimony is something of a half-way measure: it *"may be used as direct evidence during the main trial if the witness is unavailable due to death"* (Article 123(3) CPC). Of course, that the witness in question is deceased does not by necessity mean that his witness statement constitutes pre-trial testimony. Rather, the CPC provides several pre-conditions to the use of pre-trial testimony in this way, intended to serve as safeguards to the rights of accused persons:

[19] P 8/13, 1 July 2013.
[20] PN 577/2013, 10 December 2013, para. 64.
[21] PN 577/2013, 10 December 2013, para. 73.
[22] PN 577/2013, 10 December 2013, para. 74.

a. The evidence obtained must be *"audio-recorded, audio and video-recorded or transcribed verbatim"* (Article 123(3) CPC; Article 133(1) CPC);

b. The Prosecutor is required to give five days' written notice to the defendant of the date, time and location of the pre-trial testimony (Article 132(6) CPC), and be given an opportunity to examine the witness (Article 133(5) CPC);

c. Even if the evidence is used as direct evidence during the main trial, *"it may not be used as the sole or as a decisive inculpatory evidence for a conviction"* (Article 123(3) CPC).

88. Crucial to the present case is the fact that M.S.'s statement was taken without the presence of any defendant or defence counsel. As a result of the witness's untimely passing, the defence did not have the opportunity to test this evidence at a later time. It is therefore impossible to qualify M.S.'s statement to EULEX as equivalent to 'pre-trial testimony' under the new CPC and thus to rely upon it as direct (though not sole or decisive) evidence.

89. The Panel therefore, by method of exclusion, concluded that M.S.'s statement to EULEX must qualify as no more than the equivalent of a 'pre-trial interview' under the new CPC. However, since – due again to the witness' death – it cannot be used in his cross-examination, the practical effect is that it cannot be used as direct evidence. In the end, it seems that although the statement is (*per* the reasoning of the Court of Appeals) technically 'admissible', there is no way for it to be used as direct evidence in the main trial.

90. Another way to reason through this problem would be to demonstrate that, had the trial proceeded under the (old) PCPC, M.S.'s statement to EULEX could have been used as direct evidence in the main trial. If such were the case, it could be argued that *"the procedural action collecting the evidence and the admissibility clauses are so inter-connected they cannot be set apart"* and thus that the PCPC should apply.[23] This line of argument is not sustainable when it comes to witness statements. Article 156(2) PCPC provides that a witness statement *"may be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings."* Thus, M.S.'s statement could not have been relied upon at main trial even under the previously applicable procedural law.

91. For these reasons, the Panel concluded that it was unable to rely upon M.S.'s statement to EULEX as direct evidence during the main trial.

ii. KACA 'Information regarding alleged corruption' (undated, received by SPRK 20 October 2009)

92. On 6 May 2009, the Kosovo Anti-Corruption Agency ("KACA") received a letter of complaint signed by M.S., alleging corruption by the MTPT in the award of road

[23] PN 577/2013, 10 December 2013, para. 30.

construction and maintenance tenders. Two Prosecution witnesses testified to the actions thereafter taken by KACA, as follows:

a. **H.P.**, Director of KACA between 2006 and 2016,[24] described the procedure followed by the agency upon receipt of information (e.g. in the form of an individual complaint) of alleged corruption at the relevant time (2009): first, the information provided was analysed; second, officers were assigned to conduct a preliminary investigation; and, finally, the complete information was forwarded to the competent prosecuting authorities for further criminal investigation and prosecution.[25]

   H.P. testified that KACA received a letter of complaint from M.S. on 6 May 2009.[26] The witness opened a case and assigned two officers (E.D. and Bu.S.).[27] The two officers took two statements from M.S., both of which they audio-recorded due to the sensitivity of the case.[28] They did not speak with F.L., N.K. or any other official person, nor examine documentation related to the tenders in question, as this was an action outside of the agency's competence.[29] H.P. confirmed that everything contained in the KACA Information is based on what M.S. told the officers in his interviews.[30]

   KACA forwarded all the gathered information to EULEX in October 2009 and, following a long period of silence and a further request from EULEX, again in 2012.[31]

b. **E.D.**, Senior Officer for the Investigation and Detection of Cases at KACA since mid-2008,[32] confirmed that M.S.'s complaint to KACA was assigned to him.[33] The witness disputed H.P.'s assertion Bu.S. was also assigned to the case,[34] although Bu.S. was present during the second interview with M.S.[35] As he did in all cases where the complainant is known, E.D. invited M.S. to the agency for an in-depth discussion.[36] They met two or three times, and their meetings were recorded from the second half of their first conversation onwards.[37] M.S. also provided some tender documentation, which was reviewed by the witness.[38]

[24] Minutes, 27 May 2016, p. 5.
[25] Minutes, 27 May 2016, pp 5-7.
[26] Minutes, 27 May 2016, p. 7; 12 July 2016, p. 3.
[27] Minutes, 27 May 2016, pp 7-8; 12 July 2016, p. 3.
[28] Minutes, 12 July 2016, pp 4-6.
[29] Minutes, 12 July 2016, pp 4, 6-7, 14-15.
[30] Minutes, 12 July 2016, p. 14.
[31] Minutes, 12 July 2016, p. 6.
[32] Minutes, 6 October 2016, pp 3-4; 11 October 2016, p. 4.
[33] Minutes, 6 October 2016, p. 4.
[34] Minutes, 6 October 2016, pp 7, 9.
[35] Minutes, 6 October 2016, p. 9.
[36] Minutes, 6 October 2016, p. 6.
[37] Minutes, 6 October 2016, p. 6.
[38] Minutes, 6 October 2016, pp 7-8.

The witness confirmed that KACA did not conduct an investigation in this case, and that everything mentioned in the KACA Information is based on the unverified statements of M.S.[39] However, the witness also disputed H.P.'s claim that KACA did not conduct its own investigations at the relevant time—stating that investigations stopped because the case was requested by EULEX. Consequently, the information that was passed on to EULEX was only what had been collected up to that stage, and not a result of a complete investigation.[40] Later in his testimony, the witness confirmed that further investigation by another authority was necessary, as certain investigative steps could only be ordered by the prosecution.[41]

93. The information passed on to EULEX was in the form of an **"Information regarding alleged corruption"** (hereafter **"KACA Information"**), signed by H.P. (document is undated, but is stamped as received by the SPRK on 20 October 2009). This document is a letter or short report, which summarizes and quotes portions of the statements given by M.S. to KACA during his interviews and forwards these to SPRK for comprehensive investigation. Appended to the KACA Information were, *inter alia,* M.S.'s original letter of complaint and the audio-recorded statements taken by KACA.

94. Following defence objections to the evidence in MTPT I (described in Section I.1), the Presiding Trial Judge excluded the **audio-recorded statements** (and transcripts thereof) of M.S. as inadmissible.[42] This ruling was upheld by the Court of Appeals[43] who further noted that *"the statement of [M.S.] to KACA does not constitute evidence in this criminal proceeding... These materials can only be treated as information that led to the filing of the criminal report of KACA with the SPRK"*[44] Despite the Court of Appeals' unnecessary and confusing reference to the audio-recorded statements being "treated as information", <u>the Panel understood this to mean that these statements are inadmissible, and they were not further considered in its evaluation of the evidence.</u>

95. Further, the Presiding Trial Judge held that M.S.'s original **letter of complaint** represents admissible documentary evidence (although <u>not</u> a witness statement) in the case.[45] This ruling was upheld by the Court of Appeals.[46] The probative value of the letter of complaint, however, remained to be determined by the Trial Panel.[47] While neither the Presiding Trial Judge nor the Court of Appeals explicitly pronounced themselves on the admissibility of the **KACA Information** itself, the

[39] Minutes, 6 October 2016, pp 8, 10-15; 11 October 2016, pp 12, 15, 17.
[40] Minutes, 6 October 2016, pp 7, 9-10; 11 October 2016, p. 7-12.
[41] Minutes, 11 October 2016, p. 20.
[42] P 8/13, 1 July 2013.
[43] PN 577/2013, 10 December 2013, para. 77.
[44] PN 577/2013, 10 December 2013, para. 80.
[45] P 8/13, 1 July 2013.
[46] PN 577/2013, 10 December 2013, para. 83.
[47] As was also reaffirmed by the Court of Appeals PN 577/2013, 10 December 2013, para. 85.

Panel considered – on the same logic as the letter of complaint – that this was also admissible documentary evidence, with probative value to be determined.

96. The Panel therefore turned its attention to the probative value of the KACA Information and letter of complaint and found this to be limited in both instances. Relevant in this regard is Article 262(1) CPC which provides that *"[t]he court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings."* While neither document can in any sense be qualified as a witness statement, both documents contain allegations made by M.S. that the defence did not have the opportunity to challenge through questioning at any stage of these proceedings. It is particularly noteworthy that both H.P. and E.D. testified that the KACA Information is based entirely on the unverified statements of M.S. and that they did not conduct any meaningful investigation into M.S.'s claims before passing on the information to SPRK.

97. For these reasons, the Panel considered that the Prosecutor was entitled to rely on these documents to frame his allegations against the accused. The Panel was however barred from relying upon them 'solely or to a decisive extent' for a finding guilt against the accused, and thus held that they must be corroborated by other admissible evidence. Further, the Panel noted that allegations originating with M.S. – whatever evidential form they assumed in these proceedings – cannot be used to corroborate one another: the veracity of M.S.'s claims is not strengthened through their repetition.

C. Hardcopy printout of SMSs seized during a search of F.L.'s house in XXX

98. Article 259(2) CPC provides that intrinsically unreliable evidence is inadmissible. Article 19(1)(1.29) defines 'intrinsically unreliable' as follows: *"evidence or information is intrinsically unreliable if the origin of the evidence or information is unknown…"* By oral decision on 16 November 2017, the Panel found that the hardcopy printout of alleged SMSs seized during the search of F.L.'s house in XXX on 28 April 2010 was inadmissible by reason of being intrinsically unreliable *per* Article 259(2) in conjunction with Article 19(1)(1.29) CPC. The Panel considered it necessary to fully set out its reasons for this decision, and these follow.

99. The Panel recalled that the Court of Appeals found that the hardcopy printout of alleged SMSs were not inadmissible by reason of being intrinsically unreliable.[48] The Appeals Panel acknowledged that *"the SMS messages printouts do not constitute evidence obtained through a lawful order of interception and must not be treated as such. The evidence was not a result of covert and technical measures*

[48] PN 577/2013, 10 December 2013, p. 29, paras 101-106.

of surveillance and investigation, but was instead found as simple documentary evidence. The evidence must therefore be treated as such."[49]

100. Nevertheless, according to the Court of Appeals, the evidence was not intrinsically unreliable because *"its origin is known, it was found in [F.L.]'s house in [XXX]."*[50] The Court of Appeals thus went on (unpersuasively) to distinguish between the "origin" of the evidence and its "actual source", noting that *"the actual source of evidence and authenticity of the SMS messages will need to be carefully scrutinized and assessed during the main trial."*[51]

101. The defence challenged the admissibility of the hardcopy SMSs on a number of occasions subsequently, and the Panel reiterated the Court of Appeals ruling and its own intent, in following this, to assess the source and authenticity of the purported SMSs in light of all the evidence led by the Prosecutor.[52] To that end, throughout the main trial the Panel gave the Prosecutor great latitude to explore with witnesses his theory that the hardcopy SMSs are original printouts from Vala of SMS intercepts between E.S. and F.Z., which were in some manner deleted from the official Vala records. Thus, for instance, the Prosecutor was allowed to put the content of these alleged communications to witnesses who may have been in a position to confirm that they knew about them and thus, indirectly, that they were authentic.[53]

102. Very last among Prosecution witnesses was Detective Sergeant M.T.,[54] who served as investigator in the case.[55] An EULEX Police Report originating with M.T. and another investigator, dated 28 March 2012,[56] expressed the view that *"the SMS mentioned in the hardcopy…found in F.L.'s house are an original print out of metering between E.S. and F.Z. ([T-Company] Co.)"* and, conversely, *"the [electronic] version found on…a memory stick is a 'cleansed' version of the metering"*. Apart from the content of the messages (which bears a relationship to contemporaneous tender procedures), the chief basis for this view is that SMSs found in hardcopy do not appear also in the soft copy (*"there are a number of messages missing from it when compared to the hardcopy."*)[57] This leads the investigators to posit the theory that *"[F.L.] had messages missing from the electronic version deleted from the Vala system"*.

103. The report does not, however, stop there. The reporting investigators also propose further investigative steps aimed at *"[establishing] if the messages were deleted from the system and if they were when they were deleted and as to whom may have deleted them."* The point of these actions, according to M.T. and her colleague is to *"give a stronger evidential grounding to the hardcopy version."* M.T. and her colleague thus go on to recommend, *inter alia,* a search of the Vala system and interviews with "[Z.G.]" (author of the files contained in the memory stick) and

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[49] PN 577/2013, 10 December 2013, p. 29, para. 102.
[50] PN 577/2013, 10 December 2013, p. 29, para. 106.
[51] PN 577/2013, 10 December 2013, p. 29, para. 106.
[52] See, e.g., Minutes, 17 May 2016, p. 4; 19 May 2016, pp 6-9.
[53] See, e.g. testimony of A.G., Minutes, 15 March 2017, pp 8-11.
[54] Minutes, 2 November 2017, p. 4.
[55] Minutes, 2 November 2017, p. 5-6.
[56] 'EULEX Police Report: Organised Crime Investigation Unit OCIU/12/20120328/3590', Binder 12B, pp 47-48.
[57] See also Minutes, 2 November 2017, p. 14.

others with authorized access to the PTK/Vala system. In her live testimony, M.T. reiterated her view that further investigation was needed,[58] and repeatedly expressed frustration of the manner in which the Prosecutor conducted the investigation.[59]

104. The Panel concurred that further investigation was required to establish the origin of the alleged SMSs. Having heard all of the evidence on this point, it was unpersuaded that the Prosecutor proved beyond a reasonable doubt his theory that the hardcopy printout of alleged SMSs originated with Vala—and were not, alternatively, the product of creative writing. The Panel is of the view that the same conclusion could have been reached by the Court of Appeals at the pre-trial stage: since it was never the Prosecutor's theory that the origin of the hardcopy of SMSs was in some manner F.L.'s house (or that it could logically be argued that they were authentic by reason of being found there), but rather Vala, the relevant question was whether there was indication that the SMSs originated with Vala and not with the house.

D. Expert reports of L.M., K.G. and J.H.

105. On 19 March 2012, pursuant to Articles 236 and 237 PCPC, the SPRK issued an Order of the Public Prosecutor for Expert Witness appointing J.H., L.M. and K.G.. Subsequently, three expert reports were submitted as follows:

a. The report by L.M. and K.G. dated 1 June 2012;

b. The report by L.M. and K.G. dated 30 May 2013;

c. The report by J.H. dated 11 October 2012.

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[58] Minutes, 2 November 2017, pp 18-19; p. 23 (*"…six people…had authorization to PTK admin system…I wanted them to be interviewed at that point but the Prosecutor said it is not needed because they will not tell anything."*); 3 November 2017, pp 6-7 (*"we sent all our findings to the prosecutor with suggestions that we the investigation team would like to do. Just simply to interview those people that had the right to the PTK administrative system which I think everyone in the investigation team found very important and based on that one we sent all the reports to Mr. Pickert and we argued with Mr. Pickert because he thought we do not need to interview those people in PTK and he stated that they will not tell you anything anyhow and I answered him and after that I gave the report to him and after that he is the one who is making the next step. I am more basic investigator, to go and ask the people"*); pp 11, 13-14.

[59] Minutes, 2 November 2017, p. 5 (*"from my point of view to be a lead investigator in EULEX where the Prosecutor is in charge of the investigations it differs a lot from my job description back home because back home when the police is in charge of the investigations it means that I am the one who is justifying and I am the one who is making the decisions but here I couldn't do it. It was the Prosecutor and it was not always easy."*); p. 20 (*"I argued a lot with the Prosecutor. We had different, like I said in the beginning in Finland the police is in charge of the investigations and in Germany the prosecutors are. That is enough sometimes… we have different ways of thinking tactically and what should be done and Finns can be stubborn."*); 3 November 2017, p. 4 (*"…the prosecutor is in charge and in this case was Johannes Picker and his legal officer Bernard Kushnick, the information between the investigation team and the prosecutor was not always on the level the investigation team wanted. I do not want to blame anyone for that but we found it extremely challenging from time to time."*)

106. These reports were challenged by the defence, particularly in the closing statements made on 22 November 2017. The challenges were made on a number of issues, and are summarized as follows.

107. Defence counsel Karim A. Khan submitted that K.G., a German citizen, had been hand-picked by the Prosecutor at the time, Johannes Pickert, as an expert on procurement law apparently for no reason other than that they were 'mates' and fellow Germans. Mr. Khan argued that K.G. usurped the responsibility of the Panel by offering an interpretation of the Kosovo procurement law, both in his portion of the experts' reports and in his live testimony on 1 November 2017. Mr. Khan also submitted that K.G. is not a registered lawyer in Germany, nor a Court expert in Germany, and that he therefore does not possess a specialist qualification in procurement sufficient to qualify him as an expert in that field.

108. A number of defence counsel additionally noted that the Prosecutor had not supplied K.G. with important original tender documents and technical specifications. Despite K.G.'s request for additional documentation, the Prosecutor had provided him only with the tender dossier. A professional committee had compiled Minutes of the technical assessment, also not provided to the expert for his review. Defence counsel also submitted that K.G. did not know the specific tasks he was assigned by the Prosecution because this had not been provided to him. Further, Mr. Khan submitted that K.G.'s report is based on information given by the Prosecution which has been shown to be deficient. It was also noted that K.G. had never been to Kosovo before coming to give evidence. Finally, he had not used an authorized translator but had used Google to assist in the translation of documents. Mr. Latifaj supported the comments of Mr. Khan regarding the expertise of K.G. and L.M., and also submitted that K.G. had stated in his testimony that he is not a Court expert.

109. In relation to L.M., defence counsel submitted that it had not been demonstrated by the Prosecution that L.M. was an expert in the relevant issues of the case. Further, it is stated that the assessments in the reports are based on German and European standards as they did not know the standards of Kosovo for road construction. Blerim Prestreshi, defence counsel for F.Z., additionally raised the issue that it is not certain where the relevant samples were collected, as no one from the Ministry of Infrastructure or the Municipality where the road is located was present when they were collected.

110. <u>The Panel accepted the expert reports, for the following reasons</u>. Even if the Prosecutor, Johannes Pickert, was acquainted with K.G., the Panel found no indication that this, or the fact that they are both German, was the Prosecutor's motivation in his selection of K.G. for appointment as an expert in this case.

111. The Panel noted that the Prosecutor outlined the skills and experience of all three experts in the Order of 19 March 2012 at section B entitled 'Tasks and Suitability of Experts', and it accepted this makes them suitably qualified for the task. Further, the expert experience and credentials of both K.G. and J.H. was addressed

specifically in their respective testimonies of 1 and 7 November 2017. In particular, K.G. stated that in Germany all lawyers are educated in all fields of law, but since 1999 he had specialized in European procurement law. He further stated that he had been working for a number of years with the European Commission in twinning projects involving procurement law with the Czech Republic, Croatia, Bosnia and Hercegovina, Macedonia and Moldavia. The Panel accepted that both were amply qualified for the tasks they undertook.

112. Regarding K.G.'s comments concerning the Kosovo procurement law, the Panel did not consider these to be an attempt on K.G.'s part to usurp its role. Rather, these simply provide background and explanatory information of the procurement process and compare this with European standards as a way to highlight potentially problematic areas which have been identified and addressed at a European level. The Panel has carefully considered all the applicable relevant laws for itself.

113. Regarding the information which was made available to the experts by the Prosecution, the Panel has noted and taken into account all instances where the information provided by the Prosecutor limited the analysis that the expert could undertake. Specifically, the Panel considered that K.G. was unable to conduct his own independent assessment of the points awarded to individual bidders by bid evaluation committees undertaking a 'most economically favourable' assessment, and this has in some instances limited the usefulness of his commentary on these points. The Panel also considered that J.H. was unable to undertake a technical assessment as against relevant Kosovo standards, which were not provided to him.

114. Further, K.G. was given sufficiently specific questions to answer. The Prosecutor's Order of 19 March 2012 is clear as to the purpose of the appointment. The Panel considered the remainder of the issues raised by the defence counsel, such as the partial reliance on Google for the translation of some words, to be trivial and that such minor matters do not diminish the material content of the expert reports.

115. The Panel did, however, note that the expert reports lack some of the formalities foreseen by the CPC. Article 138 CPC, entitled 'Report of the Expert', contains the requirements of an expert report and provides that the report shall be inadmissible if it does not comply with these requirements. In particular, Article 138(1.3) states that an expert's report shall contain the expert's specialized training or experience and how current it is and why it is relevant, and these details are lacking from the expert reports.

116. However, the Panel noted that the Order of the Public Prosecutor for Expert Witness was made pursuant to Articles 236 and 237 of the PCPC, which was the Code in force at the time of the making of the Order. The PCPC is less specific than its successor regarding the formal requirements of an expert's report. Article 237 states that the provisions of Chapters XX 'Witnesses', XXI 'Protection of Injured Parties and Witnesses' and XXII 'Expert Witnesses' concerning expert witnesses shall apply *mutatis mutandis*. Article 183 simply states that the record of the expert analysis or the written result of the findings and opinion shall indicate

the name of the person who performed the expert analysis, his or her occupation, professional training and specialty. The Panel is satisfied that the Prosecutor's Order contains sufficient details of the experts' credentials, and that otherwise the expert reports meets the formal requirements as to content as were in force at the time they were commissioned.

V. CRIMES CHARGED

A. Organized Crime (Count 1)

117. Count 1 of the Indictment charges the accused **F.L.**, **E.S.**, **N.K.** and **S.T.** as co-perpetrators of the criminal offence of Organized Crime in violation of Article 274(3) PCCK, as read by paragraph 1. Article 274(1) PCCK criminalizes the commission of *"a serious crime as part of an organized criminal group."* Article 274(7)(3) states that "*[t]he term 'serious crime' means an offence punishable by imprisonment of at least four years"*. As elaborated in Section II.A.i (paras 24-28), a majority of the Panel adopted a strict interpretation of "serious crime" to mean a crime punishable by a ***minimum*** of four years of imprisonment. The majority of the Panel rejected the broader interpretation, which would understand the words *"at least four years"* to mean that imprisonment of four years is within the sentencing range for the particular criminal offence.

118. Having held that the requirement for the underlying criminal offence perpetrated as an Organized Crime – the "serious crime" – of Article 274(7)(3) must be an offence punishable with a minimum of four years of imprisonment, the Panel applied its interpretation to Counts 2 to 6 of the Indictment, as follows. Count 2, Abusing Official Position or Authority in violation of the applicable (more lenient) Article 422 CCK is punishable by six months to five years imprisonment. Count 3, Accepting Bribes in violation of Article 343(1) PCCK is punishable by imprisonment of six months to five years. Count 4, Giving Bribes in violation of Article 344(1) PCCK is punishable by imprisonment of six months to five years. Count 5, Misuse of Economic Authorizations in violation of Article 236(1)(5) and (2) PCCK is punishable by imprisonment of one to eight years. Count 6, non-Declaration of Received Campaign Money in violation of UNMIK Regulation No. 2004/2 is punishable by imprisonment of up to five years and a fine or by imprisonment of two years and a fine.

119. Thus, none of the underlying criminal offences in Counts 2 to 6 of the Indictment meet the requirement of a "serious crime" as none are punishable by a minimum of four years imprisonment. Accordingly, the acts with which the accused have been charged do not constitute the criminal offence of Organized Crime within the meaning of Article 274(7)(3) PCCK. For these reasons, the Panel acquitted the accused F.L., E.S., N.K. and S.T. of Count 1 in the Indictment pursuant to Article 364(1)(1.1) CPC.

120. The Panel further noted that it would have arrived at the same conclusion had it adopted the broader interpretation of "serious crime". As will be seen in the reasoning which follows, the Panel found that the Prosecutor did not prove beyond a reasonable doubt that the accused committed the acts with which they were charged under Counts 2, 3, 5 and 6 (for: non-Declaration of Received Campaign Money). Counts 4 and 6 (for: accepting political contributions in excess of EUR 1,000 from a single source in a single day) were dismissed as absolutely time barred. Therefore, even had the Panel accepted that the offences charged could in principle constitute the underlying serious crimes of Organized Crime, this would not have been established in this case.

B. Abuse of Official Position or Authority (Count 2)

i. Tender 08-049-511 – Construction of the Road Ponesh-Zhegovc, Gjilan, won by T-Company

121. The Prosecutor made three distinct allegations of abuse of official position or authority in relation to the tender procedure 'Construction of the Road Ponesh-Zhegovc' in Gjilan (08-049-511). These are: (a) that **F.L.** promised the tender to M.S., advised M.S. on what to do to win the tender, and was otherwise improperly involved in the award of the tender; (b) **N.K.** signed the contract with the eventual winner, *T-Company*, despite knowing both that i. F.Z. entered into a secret price-fixing agreement with his brother N.Z. of *ZC-Company* and ii. there were several violations in the procurement process; and (c) while the road was being constructed and after being informed by F.Z. that there were defects in its construction, **E.S.** instructed F.Z. to continue.

122. The Prosecutor did not allege the involvement of **S.T.** in this tender procedure and his criminal responsibility is therefore not further considered in this section. The allegation that **F.Z.** entered into and tolerated a price-fixing agreement with his brother N.Z. of *ZC-Company* in the bidding for this tender also forms the basis of allegations against him for misuse of economic authorizations charged under **Count 5**. These are considered separately in Section V.D.i.

Did F.L. promise M.S. Ponesh-Zhegovc?

123. Turning to the Prosecutor's allegations as regards F.L., the Prosecutor alleges that F.L. personally promised the tender for construction of the road Ponesh-Zhegovc to M.S. F.L. later broke this promise (the road was awarded to *T-Company*, owned by co-accused F.Z.), telling M.S. that he did not win the tender because he lacked proper work references.[60] SMS contact between M.S. and F.L. between 6 and 16 May 2008, according to the Prosecutor, *"corroborates [F.L.]'s involvement in the*

[60] Consolidated Indictment, p. 8; p. 34, paras 54-55, 61-62.

awarding of this tender."[61] More specifically, M.S. and F.L. met in person on 12 May 2008 and in this meeting *"[F.L.] gave instructions to [M.S.] about what to do to win this tender."*[62]

124. Turning to the evidence led in support of these allegations, the Panel recalled, first, that the audio-recorded statement given by M.S. to KACA was declared inadmissible evidence by the Presiding Trial Judge, in a ruling affirmed by the Court of Appeals. Second, the Panel found it was unable to rely upon M.S.'s statement to EULEX Police and that the KACA Information (and M.S.'s letter of complaint appended to it) was of limited probative value as its content could not be tested by the defence.[63] The Panel examined the case file for evidence relevant to abuse of official position/authority of F.L. by way of a promise to M.S. that he would be awarded the tender for construction of the road Ponesh-Zhegovc (08-049-511) and highlighted the following:

a. The **KACA Information** compiled and sent by H.P., Director of KACA, to SPRK (undated, but received by SPRK on 20 October 2009)[64] reports statements given by M.S. to KACA, forwarded to SPRK for more comprehensive investigation. The KACA Information sets out the background leading up to F.L.'s alleged promise of tender 08-049-511 by reporting that M.S. described perceived:[65]

"injustice done to him when some of the work references, which had from before the war and regarding which he possesses relevant contracts as evidence, were not accepted when he made a bid for some of the tenders announced by the…ministry."

The KACA Information quotes M.S. as saying:[66]

"we, as a company did not fulfill(sic) *the criteria as per [MTPT's] request, so, we started cooperating with another firm called 'Planning'*(sic)*, represented by [Z.S.]* (sic)*, since the latter had not so relevant references and since these criteria, in contradiction with the Law on Public Procurement, were put as criteria to win the public contract, this way making it impossible for my ([M.S].) company (literal translation-translator's note) to win the public contract."*

It continues with M.S.'s general allegation that *IE-Company/PI-Company* were not awarded contracts because they refused to pay the requested bribes:[67]

"M.S. explains that, although he cooperated with the company '[PI-Company]', owned by [Z.S.], they could not win none(sic) *of the tenders and*

[61] Consolidated Indictment, p. 34, para. 56.
[62] Consolidated Indictment, p. 35, para. 58.
[63] See *supra* Section IV.B.
[64] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, pp. 1-27.
[65] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 3.
[66] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 3.
[67] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 3.

this was because, as emphasised by [M.S.], he did not give them the requested percentage in tenders for which he had placed a bid."

The report then provides, relevantly for this specific tender, verbatim:[68]

"Unsatisfied with what was happening to him, [M.S.] states that he had a meeting with [Z.P.], current Minister of Internal Affairs, when they had a talk about these tenders and the fact that company '[IE-Company]' was not able to win any of them. It was suggested by [Z.P.] that [M.S.] should meet with the minister, [F.L.], since they knew each other well, and then later on, [Z.P.] had arranged a meeting for them with the minister, [F.L.].

'I was on the road, travelling, at the moment when invited to the meeting arranged by [Z.P.] for us with [F.L.]', states [M.S.], 'but, I phoned my son [B.S.] and told him that he needs to go and meet minister [F.L.], since my son also knew minister [F.L.] well. When [B.S.] went to the ministry he met minister [F.L.] and after the conversation they had,' continues in his statement [M.S.], 'I was called on the phone by my son [B.S.] who told me: - Now you will talk to minister [F.L.]. [B.S.] was in a meeting with him during this time. This meeting took place in 2007 and [F.L.] told us: - The Ponesh – Zhegovc road is yours. [B.S.] was also present since we talked through [B.S.]'s phone. One month passed by and the tender was not announced.', [M.S.] continued. 'A month later, [F.L.] phoned me and told me: - On Wednesday I'm coming to Gjilan at the Municipality. I waited for [F.L.] and we had a meeting there with the Major of Gjilan, [X.M.], and afterwards he had an interview with journalists; in this occasion I can not(sic) *talk about what we agreed to talk about, and [F.L.], after finished his interview with journalists told me to go one day to the ministry and have a coffee with him.*

I decided to go and meet minister [F.L.] before the announcement of the tender for Ponesh – Zhegovc road, but, before I went to this meeting with [F.L.], Mr. [F.Z.]…had met with [F.L.] and asked for this road to be given to him, but, he was told by [F.L.] that they could not give him this road since it was promised to me (meaning to [M.S.]-translator's note).'

…'Mr. [F.Z.]…phoned me and asked me where I was and I told him that I was on my way to Pristina, precisely at the Veternik neighbourhood, to meet minister [F.L.], since the latter had invited me for a coffee. Mr. [F.Z.] told me to wait for him and I did. After we met he invited me to his office… We went there and we met Mr. [I.S.], owner of the company '[E-Company]'. After we greeted each other, Mr.[I.S.] told me these words: - They phoned from the ministry last night, about 1 (one) in the morning, and told me that the company '[IE-Company]' is not going through even though you were in consortium with the company '[PI-Company]'. Once the meeting with them ended and after I was told these words by Mr. [I.S.], I decided to go to the

[68] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, pp 3-4.

ministry and meet [F.L.] in order to get more detailed information about this tender since Mr. [I.S.] was also a bidder with his company '[E-Company]' and to verify as to why Mr. [I.S.] told me those words.'

In his statement [M.S.] says that he went to the [MTPT] and asked for a meeting with minister [F.L.], where he waited for an hour and a half and then [met] the minister. In this meeting present were Mr. [A.G.], deputy minister of the [MTPT], Mr. [N.K.], Procurement Manager at the [MTPT] and an advisor to the minister whose name he did not remember, and this staff was introduced to him by [F.L.] who said: - This is my staff that I work with. 'After I was introduced to the staff by [F.L.] he told me that I do not meet the conditions to win this tender, we are talking about Ponesh – Zhegovc road tender, but, they are giving it to the company '[T-Company]' and that I will then get it from him. More than one month passed by and the winner was not announced or made public in newspapers.'...

To the KACA Information is appended M.S.'s original **letter of complaint** (also undated, received by KACA on 6 May 2009). The relevant portions of this letter lists projects for which *IE-Company* and *PI-Company* bid and provides: *"4. Asphalt lay on the road of Ponesh – Zhegovc, this road was promised to me by [F.L.] and he did not keep the promise."* [69]

b. **H.P.**, whose testimony was summarised in Section IV.B.ii, confirmed that the 'Information regarding alleged corruption', signed by him, is the document that KACA sent to EULEX.[70]

c. **E.D.**'s testimony was previously summarised in Section IV.B.ii.

d. **Contemporaneous intercepted SMSs**, including:

   i. Intercepted SMSs between M.S. and F.L. on 6 May 2008 read:[71]

   M.S.: *"Good morning Minister. It is [M.S.] from Gjilan, let me know when you have time to accept me and have coffee with me."* (8:20)

   F.L.: *"I will be at your territory."* (9:22)

   ii. Intercepted SMSs between M.S. and F.L. on 10 May 2008 read:[72]

   M.S.: *"Good morning Mr Minister, it is [M.S.] and today I am in Pristina; can we meet somewhere and have coffee together and tell me at what time if you can?"* (7:39)

   F.L.: *"Come at Ariu"* (11:46)

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[69] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 10.
[70] Minutes, 12 July 2016, pp 8-9.
[71] Transcript of SMS between M.S. and F.L. dated 6 May 2008: Interception Data Summary Nos 48a and 48b, Post Indictment Binder IV-A.
[72] Transcript of SMS between M.S. and F.L. dated 10 May 2008: Interception Data Summary Nos 49a and 49b, Post Indictment Binder IV-A.

iii. Intercepted SMSs from M.S. to F.L. sent on 12 May 2008 read:[73]

"Good morning, Mr. Minister, today I will come by you; the other day I had a problem and I couldn't stay longer in Pristina. I believe that I will be at your place at about 10" (8:25)

"It is [M.S.] from [IE-Company]. In relation to what we talked today, the references are not being accepted for the future, thus I cannot work on behalf of other companies, but I hope that you will give it directly to our name so we will have the references for the future works. Greetings from Gjilan." (22:29)

e. **Z.Q.**, a civil engineer technician and owner of *PI-Company*,[74] testified that he knew M.S. since about 1973 as they were both from Gjilan and that M.S.'s company, *IE-Company, "mostly dealt with sale of wood and was in possession of trucks."*[75] The witness and M.S. agreed to bid in consortium for the Ponesh-Zhegovc tender because *PI-Company* was in possession of the requisite work references, whereas *IE-Company* had equipment (trucks) that *PI-Company* needed.[76] According to the witness, while M.S. was the driving force behind bidding for this tender, it was *PI-Company* who would carry out the work,[77] and Z.Q. carried out the necessary analysis, calculated the prices and compiled the bid documentation.[78] Z.Q. denied that M.S. was an expert qualified in road construction; the witness described M.S. as a driver and expressed *"doubts that he had completed secondary education."*[79]

The witness confirmed that he discussed the prospect of their bid being successful, and explained that M.S. *"always said he had people he knew at the government."*[80] The Prosecutor did not ask, and the witness did not volunteer, who M.S. said he knew in the government. Z.Q. denied that M.S. ever spoke to him about the latter's communications with F.L. on 10 and 12 May 2008.[81] The witness stated that, to his knowledge, B.S. was not involved in this bid.[82]

Z.Q. denied having discussions with M.S. about other companies who bid for the project.[83] He added: *"[u]p to the point when they opened the bids we did not know who submitted tender bids for the contract."*[84] However, the witness

[73] Transcript of SMS between M.S. and F.L. dated 12 May 2008: Interception Data Summary Nos 50a and 50b, Post Indictment Binder IV-A.
[74] Minutes, 19 July 2016, pp 5-6.
[75] Minutes, 19 July 2016, p. 14.
[76] Minutes, 19 July 2016, pp 13-16.
[77] Minutes, 19 July 2016, pp 14-15, 17; M.S. picked up the tender dossier and submitted the bid: Minutes 20 July 2016, pp 6-7.
[78] Minutes, 20 July 2016, p. 7.
[79] Minutes, 19 July 2016, pp 16-17.
[80] Minutes, 20 July 2016, pp 7, 14.
[81] Minutes, 20 July 2016, pp 12-13.
[82] Minutes, 20 July 2016, p. 13.
[83] Minutes, 20 July 2016, pp 7, 10.
[84] Minutes, 20 July 2016, p. 10.

accepted his earlier statement to EULEX, where he stated that after the submission of the bid:[85]

"I know that [M.S.] told me that there are three companies giving lower prices than us but as he told me they are not looking for cheapest price but for the most economic favourable price, he hope to get the work."

He explained that *"in the year 2012 the memory was much fresher because now lots of things might have been forgotten."*[86]

f. **B.S.**, M.S.'s son and owner of *IE-Company* since the latter's passing, testified that he worked at the company since 1993 managing a gas station and two wedding halls, and dealing in wood in winter.[87] The witness confirmed that *IE-Company* bid for government tenders, including for the supply of wood for schools and road construction, but stated that he did not participate in preparing these bids,[88] including the bid for Ponesh-Zhegovc.[89] B.S. found out about his father's complaint to KACA from a TV broadcast following M.S.'s death.[90]

The witness testified that he did not know F.L. personally, and did not know whether his father knew F.L..[91] He denied his father's allegation, as presented in the KACA Information, that *'I* [M.S.] *was on the road, travelling, at the moment when invited to the meeting arranged by Mr. [Z.P.] for us with [F.L.]…but, I phoned my son [B.S.] and told him that he needs to go and meet minister [F.L.], since my son also knew minister [F.L.] well."*[92]

The witness could not recall taking a tender file down to the MTPT for his father.[93] However, he accepted as truthful his statement to EULEX, wherein he stated:[94]

"believe me I never opened it but I have some personal things to do in Pristina as I was there to XXX XXX XXX, and my father asked me if I can go and take the tender file for the road Ponesh-Zhegovc, I don't remember very well but I spoke on the phone with my father."

Under cross-examination, the witness confirmed that he meant that he was there to pick up the tender dossier for Ponesh-Zhegovc (i.e. not to submit the

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[85] Minutes, 20 July 2016, p. 11, referring to the witness's statement of 17 July 2012, Binder 19B, p. 452.
[86] Minutes, 20 July 2016, p. 11.
[87] Minutes, 25 October 2016, pp 10-11; 26 October 2016, pp 5-6.
[88] Minutes, 25 October 2016, pp 11-13.
[89] Minutes, 25 October 2016, p. 19.
[90] Minutes, 25 October 2016, pp 13.
[91] Minutes, 25 October 2016, pp 13-14, 16.
[92] Minutes, 25 October 2016, pp 14, 16.
[93] Minutes, 25 October 2016, p. 17.
[94] Minutes, 25 October 2016, pp 18-19, referring to Binder 19A, tab 2, p. 28 onwards; 26 October 2016, p. 5.

bid).[95] B.S. recalled that while he was at the MTPT, he met F.L. in the hallway and gave F.L. his phone so that might speak to his father.[96] This meeting was by chance, as he had had no previous contact with F.L.[97] His father never told him what the conversation was about.[98]

The witness could not remember sending an SMS to his father saying that he had spoken to the minister and would go and see what the minister had to say.[99] The Prosecutor put to the witness the intercepted SMS of 19 May 2008 from himself to his father (*"I spoke with the Minister; he called me so I will go and see what he is going to say."*). B.S. stated: *"I don't know anything. I didn't speak anything related to the minister. I don't remember anything."*[100] Later, the witness testified that he sought the assistance of the Ministry of XXX for XXX and he once met the Minister of XXX at that ministry.[101] He could not recall the specific SMS, but assumed it was about XXX and not F.L.[102]

g. **Q.M.** was Mayor of Gjilan and Deputy President of Democratic Party of Kosovo ("PDK") (Gjilan branch) from the start of 2008 to the end of 2013[103] and knew M.S. since about 1990.[104] Q.M. stated that M.S. never told him, or he could not recall M.S. telling him, that F.L. promised him Ponesh-Zhegovc but later gave it to *T-Company* instead with the explanation that *IE-Company* did not meet the requirements.[105]

h. **A.G.** who, in addition to holding a number of PDK posts was MTPT Deputy Minister in 2008-2009,[106] testified that he had no role in the award of road construction tenders,[107] and does not know and has never met M.S.[108]

125. The Panel considered that the Prosecutor did not prove beyond a reasonable doubt that F.L. promised the tender for the construction of Ponesh-Zhegovc to M.S., for the following reasons. M.S.'s account of F.L.'s promise to award him the tender—allegedly made over the following a meeting between F.L. and B.S. at MTPT—was not corroborated by his son, B.S. The younger B.S., the only person in a position to provide first-hand confirmation of these allegations, first disputed his father's assertion that he knew F.L. well, saying that he had never met him in

[95] Minutes, 26 October 2016, pp 3-4.
[96] Minutes, 25 October 2016, p. 19.
[97] Minutes, 26 October 2016, pp 4-5.
[98] Minutes, 25 October 2016, p. 19.
[99] Minutes, 25 October 2016, pp 16-17.
[100] Minutes, 25 October 2016, p. 17.
[101] Minutes, 26 October 2016, p. 6.
[102] Minutes, 26 October 2016, p. 7.
[103] Minutes, 22 March 2016, p. 10; 19 April 2016, p. 5.
[104] Minutes, 22 March 2016, p. 22; 19 April 2016, p. 8; 20 April 2016, p. 10.
[105] Minutes, 20 April 2016, pp 11-12.
[106] Minutes, 14 March 2017, pp 13, 15, 18-19, 32.
[107] Minutes, 14 March 2017, p. 24.
[108] Minutes, 15 March 2017, pp 13-15, 17.

person. Indeed, the Panel considered B.S.'s account to be plausible: it is unclear why the assistance of Mr. Z.P. to set up a meeting between M.S. and F.L. would have been necessary if both B.S. and M.S. indeed knew F.L. as well as was claimed by M.S.

126. Second, the two differed on what happened on the day in question. B.S. denied that his father sent him to meet F.L. because M.S. himself was traveling at the time the call to meet came. Instead, according to B.S., his father sent him to pick up the tender dossier for Ponesh-Zhegovc because he was in town anyway on other business, and he ran into F.L. in the corridor by accident. On both accounts, M.S. then spoke to F.L. over B.S.'s phone. M.S. told KACA that, following on from a conversation between his son and F.L. preceding the phone call, F.L. promised him (M.S.) the tender. B.S., however, did not speak to any such pre-negotiation and said that he did not hear what was said between the other two over the phone.

127. Third, the timing of this alleged promise made by F.L. to M.S. remains vague. M.S. described to KACA three separate meetings with F.L. The first one, during which the promise is said to have been made, occurred either in 2007 or a month before the tender was announced. The second, according to M.S., took place in Gjilan in the presence of Q.M. (whose testimony did not provide support for the existence of such a meeting). The third meeting is said to have taken place at the MTPT, in the presence of A.G., N.K. and another adviser more than one month before the winner was publicly announced.

128. On the above, the Panel considered that F.L.'s promise of the tender was alleged to have been made at the latest a month before the contract notice for Ponesh-Zhegovc was issued on 23 March 2008. B.S. testfied that he was sent by his father to MTPT to pick up the tender dossier. While the timing of the two accounts is therefore in the ballpark of within four-five weeks of each other, B.S.'s claim is discounted by the 'Record of received tender dossier MTPT/08/049/511' which indicates that it was most likely M.S. himself, and not B.S., who picked up the tender dossier, on 27 March 2008.[109]

129. Further, the intercepted SMS from B.S. to M.S. that the Minister "*called me so I will go and see what he is going to say*" (put to the witness in support of this allegation) was sent on 19 May 2008. This is a month after the companies' bids were opened, a week before *T-Company* was declared the winner and, indeed, weeks after M.S.'s alleged third meeting with F.L. (in which B.S. was not claimed to have played any part). B.S.'s testimony therefore provided no corroboration of either the circumstances surrounding, the content or the timing of the meeting in question.

130. Fourth, the Panel did not consider that Z.Q.'s testimony that M.S. had expressed confidence in winning the tender because *"he had people he knew at the government"* clearly indicated that M.S. told him that F.L. had promised him the

[109] Binder 48B, p. 139.

tender for Ponesh-Zhegovc. Similarly, Q.M. denied M.S. telling him that F.L. had promised him Ponesh-Zhegovc. The Panel noted that even if both had recounted M.S. telling them of such a promise, the allegation itself would remain untested by questioning of its original source (M.S.) and could not provide a basis for a finding F.L. guilty, *per* Article 262(1) CPC.[110]

131. M.S. told KACA of a third meeting between himself and F.L., which took place at the MTPT in the presence of N.K., A.G. and an adviser. The Prosecutor alleged that at this meeting *"F.L. gave instructions to M.S. about what to do to win this tender."* Further, according to the Prosecutor, this meeting and the SMSs leading up to it *"[corroborate] [F.L.]'s involvement in the awarding of this tender."* Both of these allegations were considered by the Panel.

132. As the companies submitted their bids on 17 April and *T-Company* was declared the winner of the tender on 26 May, M.S.'s time-line placed this meeting in the second half of April or beginning of May. Intercepted SMSs indicate that M.S. made unsuccessful attempts to meet F.L. on 6 May and 10 May. An SMS from M.S. on 12 May (22:29), however, indeed refers to a meeting between the two on that day. On the Panel's reading of this SMS, M.S. is unhappy with an alleged proposal or suggestion by F.L. for *IE-Company* to work (or try to work) for other companies because under such an arrangement *IE-Company* would not obtain references as would enable it to be awarded work directly in the future. He therefore hopes to be awarded the tender.

133. This SMS is consistent with M.S.'s statement to KACA that F.L. told him that he did not meet the conditions to win this tender, but that he could sub-contract from *T-Company.* On the other hand, A.G., who is said to have been present for this meeting, denied having ever met M.S. and thus that it ever took place.

134. However, the Panel did not consider that, even if accepted, this meeting corroborated the existence of a previous promise by F.L. (alleged meeting one), as the 12 May 2008 (22:29) SMS makes no reference to a previous promise but only the author's "hope" that it might be awarded to him. The Panel therefore rejects as unfounded the Prosecutor's submission that *"[M.S.] was also promised the tender by [F.L.], since [M.S.] texted to [F.L.] of*(sic) *his hope 'that you [F.L.] give it [the tender] directly in our name."*[111]

135. The Panel was also not persuaded that the SMS demonstrated F.L.'s involvement in the award of the tender. While contact between F.L. and M.S. at this time was improper, the SMS does not suggest that F.L. did anything more than explain the legal requirements that would be applied. Further, the Panel did not accept that F.L. *"gave instructions to [M.S.] about what to do to win the tender."* To the contrary, the SMS appears to show that F.L. told M.S. that he would <u>not</u> win the tender as his bid did not qualify as he lacked appropriate references. Finally, it is not clear on

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[110] On this point, see previous discussion in Section IV.B.
[111] Consolidated Indictment, p. 38, para. 61.

the face of the SMS that F.L. told M.S. that *T-Company* would sub-contract execution of the work to *IE-Company.* The SMS itself does not say that, and such an assertion is undermined by both the fact that *T-Company* did not do so and by Z.Q.'s testimony that *IE-Company* would not have had the capacity to execute the project.

136. The Panel therefore held that the Prosecutor failed to prove beyond a reasonable doubt that F.L. promised the tender for the construction of the road Ponesh-Zhegovc (08-049-511) to M.S.; that he told M.S. what to do to win the tender; or that he was involved in its award. The material element of the offence of abuse of official position was therefore not established.

137. Moreover, the Panel recalled that the Prosecutor was required, under the applicable Article 422 CCK, to show that F.L. intended to either acquire a 'material benefit' for himself or another person; cause damage to another person; or seriously violate the rights of another person. The Panel found that the Prosecutor did not allege – nor lead sufficient evidence in support of – facts that might have established this mental element in relation to tender 08-049-511. This element of the offence is not dispensable and its absence was alone fatal to the charge.

138. For these reasons, the Panel concluded that the Prosecutor did not prove beyond a reasonable doubt that F.L. abused his official position or authority as MTPT Minister in the award of tender 08-049-511 for the construction of the road Ponesh-Zhegovc.

<u>*Was N.K. signing the contract with T-Company unjustified?*</u>

139. The Prosecutor submitted that there were several violations in the procurement process for tender 08-049-511. First, the project was a local road which under relevant legislation should have been financed and run under the auspices of the Municipality of Gjilan, rather than the MTPT. Instead, a co-financing agreement between MTPT and the Municipal Assembly of Gjilan shifted this responsibility to the MTPT.[112] The Prosecutor stopped short of making any clear allegation on this point, merely noting that *"[t]he reason and alleged necessity why the MTPT underwent a co-financing agreement…remains without proper explanation, when assessing the tender files."*[113]

140. Second, the legal deadline for submission of the bids was shortened from 40 to 23 calendar days in a way that is *"illegal and [indicates] an interest to restrict the competition to 'well-prepared' economic operators only."*[114] Third, the Prosecutor identifies shortcomings and opaqueness with the assessments of the individual bids as might suggest that *"the demands of the dossier and/or the weighing of the*

[112] Consolidated Indictment, p. 29, para. 43; p. 33, para. 53.
[113] Consolidated Indictment, p. 29, para. 43.
[114] Consolidated Indictment, p. 31, para. 51.

criteria intentionally lead to [T-Company] as favoured result."[115] Finally, there was a price-fixing agreement between bidding companies *T-Company* (owned by F.Z.) and *ZC-Company* (owned by his brother N.Z.).[116]

141. According to the Prosecutor, N.K., being the MTPT Head of Procurement and signatory of the contract with *T-Company,* abused his official position/authority by signing the contract with *T-Company* when the violations of public procurement law set out above made this unjustified,[117] and thereby intentionally favoured *T-Company.*[118] Responsibility for the illegal awarding of the contract is attributed by the Prosecutor also of F.L..[119] The Prosecutor alleges that F.L. *"bears criminal responsibility for a lack of proper oversight in the project."*[120]

142. The Panel considered that the alleged conduct of F.L. (failing to exercise proper oversight over this project) cannot constitute the material element of the charged crime of abuse of official position/authority. The Panel accepted that F.L. could abuse his influential political position as MTPT Minister were he to unduly interfere in the procurement process. Other impugned tender procedures were examined in this light. However, the Panel did not accept that F.L. had any formal role in the procurement process and thus that he had any duty of oversight in relation to specific procurement procedures.[121] For this reason, the Panel held that the Prosecutor did not prove beyond a reasonable doubt that F.L. abused his official position/authority in relation to tender 08-049-511, Construction of the Road Ponesh-Zhegovc in Gjilan.

143. As for the responsibility of N.K., the Panel made the following preliminary observations. The Panel did not consider it necessary for the Prosecutor to prove beyond a reasonable doubt the alleged underlying violations of or irregularities in the procurement process (although it found that the Prosecutor failed to prove beyond a reasonable doubt that there was a price-fixing agreement between *T-Company* and *ZC-Company* in relation to charges against F.Z.[122]). Rather, it was incumbent on the Prosecutor to show either i. improper conduct on the part of N.K. (i.e. that any violation was attributable to him), or ii. that N.K. was aware of possible violations such as would have triggered his responsibility to stop the process and elicit further investigation prior to signing any contract with the winning company.

[115] Consolidated Indictment, pp 32-33, para 51.
[116] Consolidated Indictment, pp 31-32, para. 49, 51.
[117] Consolidated Indictment, p.8; p. 31, para. 51.
[118] Consolidated Indictment, p. 33, paras 53-54.
[119] Consolidated Indictment, p. 33, para. 53.
[120] Consolidated Indictment, p. 33, para. 54.
[121] See 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16 and evidence of B.R., V.K., A.G.
[122] This is examined in detail in Count 5, Section V.D.i.

144. The Panel examined the case file for evidence relevant to abuse of official position/authority by N.K. by way of signing the contract with *T-Company* on behalf of MTPT and highlighted from amongst it the following:

   a. **B.R.**, a Procurement Officer at the MTPT at the relevant time,[123] who reported to N.K.[124] and served on evaluation committees for road construction tenders,[125] provided a general overview of the tender process. Of relevance to the question at hand, he stated that bids for road construction tenders were evaluated by a commission[126] composed of two members and a chair[127] and appointed by a decision of the MTPT Permanent Secretary on the recommendation of the Director of Procurement.[128] The task of the commission was to assess the bids with reference to pre-determined criteria and recommend a winner. Its report would be reviewed and recommendations approved by the Director of Procurement, whereupon a contract award notice declaring the winner would be published, and – usually following the expiration of a period for complaints and appeals – the Director of Procurement would sign the contract with the winning bidder.[129]

      B.R. testified that evaluation commission members signed an oath of independence in the performance of their duties before commencing with the evaluation.[130] If, during its work, the commission noticed any irregularity in the tender bids, this would be included in its evaluation report.[131] Any criminal violation would be reported to the Ministry of Internal Affairs via the MTPT General Secretary.[132]

   b. **V.K.**was, at the relevant time, a Senior Legal Procurement Officer at the MTPT, who reported to N.K. and served on evaluation committees for road construction tenders.[133] V.K. testified that the Director of Procurement would recommend who should be appointed to evaluation committees and this would be affected by decision of the General Secretary.[134] The committee would evaluate the tender bids on the basis of criteria set by the MTPT,[135] and issue a report containing its recommendations.[136] In the witness' experience, the evaluation was carried out independently and the Director of Procurement

[123] Minutes, 11 December 2015, p. 8; 6 January 2016, p. 10.
[124] Minutes, 11 December 2015, pp 10, 15.
[125] Minutes, 11 December 2015, pp 9-10; 6 January 2016, p. 10.
[126] Minutes, 11 December 2015, p. 14.
[127] Minutes, 6 January 2016, p. 15.
[128] Minutes, 11 January 2016, pp 24-25; 13 January 2016, p. 10.
[129] Minutes, 11 December 2015, pp 16, 17, 20-22; 6 January 2016, p. 15, 17; 11 January 2016, p. 25; 13 January 2016, pp 6-7, 11.
[130] Minutes, 6 January 2016, p. 15.
[131] Minutes, 13 January 2016, pp 8-9.
[132] Minutes, 13 January 2016, pp 8-11.
[133] Minutes, 8 March 2016, pp 4-7, 22-23.
[134] Minutes, 8 March 2016, p. 5-6.
[135] Minutes, 8 March 2016, p. 7.
[136] Minutes, 8 March 2016, p. 25.

never interfered to influence to committee in favour of any economic operator.[137]

The witness denied ever consulting with N.K. in evaluation of the bids, and stated that the oath signed by committee members prevented them from consulting with any person not a member of the committee.[138] The Panel noted that this directly contradicted her earlier statement given to the SPRK Prosecutor, wherein she asserted that the committee would consult with N.K. if they were unsure about any document:

"because he wanted to be informed about everything. He was the supervisor. So we were the recommending committee but we were not the decision-making committee. He had the authority for contracts, or the contractual authority. So he was responsible about everything, that is why our obligation was to consult with him."[139]

Under cross-examination, the V.K. explained that *"The committee does its work independently and by the law on procurement we are obliged to report to the manager of the procurement because he is the contracting authority for our work."*[140]

Further, although V.K. denied that N.K. ever requested any documents, suggesting he had no need to do so since they were kept in their joint office,[141] she also claimed she could not recall whether N.K. had access to the whole case file.[142] This again contradicted her earlier witness statement wherein she confirmed that *"of course"* N.K. had access to the whole case file *"if he wanted to have access",* adding *"he would ask you, 'can you give me the case file for this road construction tender' and you would give it to him."*.[143] Under cross-examination, the witness claimed that N.K. did not request such access as regards the tender procedures that are the subject of this indictment.[144]

c. The **report of the bid evaluation commission**[145] first lists the value of the bids submitted by seven bidding companies.[146] This is followed by a 'preliminary examination' in the form of a table in which the evaluation commission indicates (with a 'yes'/'no') whether the bidding companies meet

[137] Minutes, 8 March 2016, pp 25, 29.
[138] Minutes, 8 March 2016, pp 10, 12.
[139] Record of witness hearing – V.K., 24 August 2011, Binder 19B, pp 41-42.
[140] Minutes, 8 March 2016, p. 24.
[141] Minutes, 8 March 2016, p. 13.
[142] Minutes, 8 March 2016, p. 14.
[143] Record of witness hearing – V.K., 24 August 2011, Binder 19B, p. 42.
[144] Minutes, 8 March 2016, pp 23-24.
[145] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, pp 163-177.
[146] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, p. 165.

various requirements to be considered responsive.[147] On the basis of this assessment, the evaluation commission then goes on, with brief reasons, to exclude bids which were determined to be irresponsive,[148] as well as provide a summary of the remaining bids and their offers.[149] Finally, the report, again in table form, presents the commission's 'most economically favourable assessment' where points are awarded to each bid on various 'soft' criteria.[150] No written explanation is provided for the points awarded. It concludes by providing a final score out of 100, with *T-Company* listed as the winner with a score of 88.6.[151]

d. In the **'Provision of expert's report regarding the contract awarding procedure'**,[152] international procurement expert K.G. made the following observations relevant to the MTPT-Gjilan co-financing agreement:

"As the road Ponesh-Zhegovc is a local one the competence for maintenance and contracts thereof is with the municipalities… It is not clear, why, if not for the reason of superorder, the Ministry (MTPT) has taken over."[153] Therefore, according to K.G.: *"it has to be explained why there was reason for the change of competences to the MTPT in the above Co-financing agreement, given that the subject was a Local Road…"*[154]

As for the shortening of the time-limit for receipt of tender bids, K.G. noted: *"If there was no previous Indicative Notice pursuant to Section 43 of the PP Law that allows a shortening of the time limit to 24 calendar days the setting would be illegal and indicate an interest to restrict the competition to 'well prepared' economic operators only."*[155]

K.G. made the general observation that: *"When differences of tenders are expected to be short a contracting authority may influence the competition*

[147] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, pp 166-172.
[148] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, pp 173-174.
[149] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, p. 175.
[150] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, pp 176-177.
[151] Tender Evaluation Report and Recommendation to Award Contract: 'Reconstruction of the local road Ponesh-Zhegovc' (MTPT 08/049/511, May 2008, Binder 48B, p. 177.
[152] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16.
[153] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 343.
[154] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 344.
[155] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 344.

either by tailoring the conditions of the tender dossier to a known enterprise or weight(sic) *the points to the favored result or both of it*(sic).*"*[156]

Moreover, K.G. went on to posit a link between the co-financing agreement, the tailoring of conditions and the shortening of the time-lines, as follows:

"One can assume that the MTPT intended to run the procurement procedure, otherwise presumably there wouldn't have been the Co-financing agreement with MA. If so, one may be also right in thinking that the MTPT was familiar with the competing enterprises and their abilities in advance. As far as the experience of the bidders was related to 'value ½ of the bid' one has to have in mind that the MTPT presumably knew the enterprises and their economic standing including the formerly awarded contracts and their values. If so, the MTPT could tailor the demands of the tender dossier and by this exclude some of the competitors. As mentioned above, the shortness of time limits – in an open procedure – indicates the will to restrict competition as well. → ***It suggests itself that the demands of the tender dossier and/or weighing of the criteria intentionally lead to [T-Company] as a favored result****."*[157]

e. **Q.M.**, whose testimony was previously summarized above in para. 124), testified that the municipality had two main sources of revenue for road construction projects: government grants (the majority) and municipal revenues.[158] Although some projects were co-financed between the Municipality and MTPT, the share contributed by the municipality tended to be symbolic (5%, 7%, 10% or even 0%).[159] The majority of municipal-level projects which were co-financed by the Municipality and MTPT were completely and independently proceeded by the municipality; however, projects which required large funds and which belonged to the national and regional level were proceeded by the MTPT.[160]

f. **K.G.** testified as follows with respect to this tender:

"*there were open questions regarding competence on this procedure. Normally the competence for this proceeding would lay with the municipality but the proceedings have actually been performed by the ministry and we asked the question what was the reason for that. And then there were also questions regarding the procedure as such, namely regarding the time frames... I know from other countries, and also from Germany, that this is kind of method is to tailor this to the needs of companies who are prepared to tender on short notice and are more prompt to do this. You need to understand*

[156] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 346.
[157] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, pp 347-348.
[158] Minutes, 22 March 2016, p. 14.
[159] Minutes, 22 March 2016, p. 15.
[160] Minutes, 22 March 2016, p. 16.

that already the 40 day deadline is quite a short one for engineers to prepare and perform their planning and if this deadline is shorted down to 24, then this is a great stress for the company."[161]

"...By cutting down the deadline from 40 to 24 days you need to know, you need to understand that many of the companies for simply technical reasons are not able to submit a tender within this deadline. This creates at least suspicion of irregularity which is not already proven as such but it is an indication that you need to have a closer look. You might even hold the entire proceedings based on this to be unlawful, but as we say in Germany and maybe you do just as well here in Kosovo 'When there is no claimant there is no judge'."[162]

"...We noted that there was a quite liberal handling of the criteria regarding technical and economical components which have to be looked at in detail... The matrix which the tender administration has to come up with regarding the economic and the technical criteria, we call it so-called the soft points which bid is awarded 5, 6 or 10 points, the awarding administration can kind of play with. In any case it needs to be documented why which company received those points, but such documentary we could not find. So you could conclude that there is at least a suspicion for irregularities and here was the result as such that normally another company should have been awarded the tender "Bejta" Commerce with the lowest price, but based on playing with these points all of a sudden "[T-Company]" has received the tender."[163]

"...So, concluding you can say that tender administration can at two instances play with the material of the tender. I can either exclude the qualification or award points for qualification to come to the result that a company is excluded. In the same direction goes the shortening of deadlines, and the second option is to treat the bid in a way that a specific tender bidder has to receive the contract."[164]

"...you can play with awarding points here and why one company is awarded the full number of points and another company is not. This has to be documented and such documentation we could not find."[165]

145. At the outset, the Panel noted that the Prosecutor did not argue that any of the alleged underlying irregularities in the tender procedure (i.e. the co-financing agreement; the shortening of the bidding deadline; directed assessment of the individual bids) was attributable to conduct of N.K. himself. The Prosecutor's allegations (as quoted above) are framed in the passive voice. This is a natural reflection of the source of these allegations, the expert analysis of K.G., which also

[161] Minutes, 1 November 2017, p. 6.
[162] Minutes, 1 November 2017, p. 7.
[163] Minutes, 1 November 2017, p. 7.
[164] Minutes, 1 November 2017, p. 8.
[165] Minutes, 1 November 2017, p. 9.

speaks passively (e.g. *"an interest to restrict the competition"; "a quite liberal handling of the criteria"*) or of conduct of "the contracting authority" or "the MTPT" generally. Notably, K.G.'s phrasing is entirely logical: in examining the tender documentation, he identified suspected irregularities which required further corroboration by additional evidence. The Prosecutor did not, however, lead sufficient additional evidence as might have proved possible irregularities conclusively or indeed linked these to N.K.

146. The Panel therefore next considered whether there was sufficient evidence to establish that N.K. was aware of the possible violations such as would have triggered his responsibility to stop the process and elicit further investigation prior to signing any contract with the winning company. In particular, on the evidence of B.R. and V.K., the Panel accepted that N.K. was obliged to review the report of the bid evaluation commission prior to signing the contract with the winning company, and thus that he was aware of it contents. The report, however, does not highlight any irregularity in the procedure nor provide sufficient reasoning as might expose an assessment geared toward *T-Company* as the favoured result.

147. As regards the Prosecutor's allegations of price-fixing between *T-Company* and *ZC-Company,* the Panel considered that, if N.K. was aware of the striking similarity of the respective bids, this would have triggered his duty to intervene to stop the tender procedure. The bid evaluation commission's report, however, is not informative in this respect: it lists only the final offers of the two companies, being EUR 576,345.50 and EUR 579,499.26 respectively. This closeness was not in itself sufficient to alert N.K. of wrongdoing; indeed the calculation (before discount) of *IE-Company* (EUR 575,855.64) was closer in value to *T-Company* than that of *ZC-Company.*

148. Finally, the Panel accepted that it was reasonable for N.K. to rely upon the advice of the evaluation committee and, conversely, rejected the notion that he was either required to, or in fact did, personally examine each individual tender offer. On this point, the Panel doubted the veracity of V.K.'s live testimony, noting that she was hesitant to answer the Prosecutor's questions and repeatedly contradicted her earlier statements to the SPRK Prosecutor. However, even were it to accept the witness' (earlier) assertions that N.K. had access to the whole case file and *"wanted to be informed about everything"*, these lack the specificity required to find beyond a reasonable doubt that N.K. had actual knowledge of either irregularities or the individual tender offers made by *T-Company* and *ZC-Company.* This conclusion was bolstered by the fact that V.K.was unable to comment on N.K.'s involvement with this particular tender, for which she did not serve on the evaluation committee.

149. For these reasons, the Panel found that the Prosecutor failed to prove beyond a reasonable doubt that N.K. either directed manipulation of the tender procedure for the reconstruction of the road Ponesh-Zhegovc (08-049-511) or was aware of such manipulation as would have triggered his duty to intervene to stop the process.

150. Finally, Panel recalled that the Prosecutor was required, under the applicable Article 422 CCK, to show that N.K. by acting or omitting to act intended to either acquire a 'material benefit' for himself or another person; cause damage to another person; or seriously violate the rights of another person.[166] The Prosecutor asserted that irregularities *"intentionally lead to [T-Company] as favoured result"*, specifying neither whose intent was in question or what they stood to gain. The absence of this crucial ingredient of the offence was, according to the Panel, alone fatal to this charge.

151. For all of these reasons, the Panel concluded that the Prosecutor did not prove beyond a reasonable doubt that N.K. abused his official position or authority as MTPT Director of Procurement when he signed the contract for tender 08-049-551 for the reconstruction of the road Ponesh-Zhegovc in Gjilian with *T-Company.*

Did E.S. assist the abuse of official position or authority?

152. Finally, the Prosecutor alleged that *"[E.S.] is suspected to be involved in the tender procedure and the execution of the construction of the road as well"*[167] and *"was likely involved in the procurement procedure involving [T-Company] and served as the contact point for the MTPT to cover up the defective work of the company for the road."*[168] Specifically, the Prosecutor points to a series of intercepted SMSs between F.Z. and E.S. on 18 July and 22 August 2009. In both conversations F.Z. informs E.S. of defects in the construction of the road and conveys his concern that he will be fined or the commission won't accept the road. E.S. reassures F.Z., advises him to continue and suggests justifications for the defects should these be needed.[169]

153. The Panel recalled that Count 2 charged E.S. as an assistant pursuant to Article 25 PCCK.[170] The criminal responsibility of an assistant hinges upon his conscious contribution to a principal's crime. Thus, it was incumbent on the Prosecutor to prove that E.S. i. assisted an official person in abusing his office or authority, exceeding the limits of his authorizations or failing to execute his official duties and ii. was aware of the principal's intent thereby to acquire a material benefit for himself or another person or to cause material damage to another person or to seriously violate the rights of another person.

154. The Prosecutor's allegations did not direct themselves, nor did the evidence presented establish, these necessary elements of the offence charged. For these reasons, the Panel held that the Prosecutor failed to prove beyond a reasonable

[166] See *supra* Section II.A.i.
[167] Consolidated Indictment, p. 35, para. 59.
[168] Consolidated Indictment, p. 39, para. 62.
[169] Consolidated Indictment, p. 36, para. 60, referring to Transcript of SMS between F.Z. and E.S. dated 18 July and 22 August 2008: Interception Data Summary Nos. 52a-52g, Post Indictment Binder IV-A.
[170] Consolidated Indictment, pp 3, 6; See also Section II.A.ii.

doubt that E.S. assisted an abuse of official position or authority by reassuring and encouraging F.Z. in defective construction for tender 08-049-511 for the reconstruction of the road Ponesh-Zhegovc.

ii. Tender 08-006-511 – Summer Maintenance for the Regional Roads of Kosovo, Gjilan Region (2008), won by Magjistrala

155. The Prosecutor contended that F.Z. of *T-Company* entered into a price-fixing arrangement with *E-Company,* which he tried to conceal by including minor variations between the two tender bids.[171] As a result, both companies should have been disqualified from the tender – disqualification necessitating that the entire process be cancelled and re-run.[172] This allegation also forms the basis for **Count 5**, alleging abuse of economic authorizations against **F.Z.** and is further considered in Section V.D.ii.[173]

156. The Prosecutor alleged that **N.K.** abused his official position or authority because he knew about the abovementioned price-fixing and nevertheless allowed the tender procedure to continue (i.e. failed to intervene to stop it), failed to report the price-fixing to the requisite authorities, and eventually signed the contract with the winning company (*M-Company*).[174] Further, according to the Prosecutor, N.K. intentionally favoured *M-Company.*[175]

157. The Prosecutor does not allege any involvement on the part of **F.L.**, **E.S.** or **S.T.** in Tender 08-006-511 and their liability is thus not furthered considered in this section. The Panel therefore examined whether the allegations against N.K. were proven beyond a reasonable doubt, as follows.

158. The Panel was satisfied that N.K. did not intervene to stop the procedure for Tender 08-006-511 or report any irregularity to the authorities. This is clear as the

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[171] Consolidated Indictment, p. 8 (*"…F.Z. of [T-Company] entered into a price fixing arrangement with [E-Company]… F.Z. concealed the price arrangement and manipulated prices with [E-Company] secretly."*); p. 13 (*"F.Z.…conducting, and tolerating a price fixing agreement with [E-Company]…"*); p. 40 (*"The slight difference in the price results from minor variations which were included to conceal the price fixing arrangement.")*

[172] Consolidated Indictment, p. 8 (*"…both companies should have been disqualified from the tender. Such a disqualification would have necessitated a re-running of the entire process."*)

[173] Consolidated Indictment, pp 13, 40 (para. 68).

[174] Consolidated Indictment, p. 8 (*"…N.K. signed the tender for [M-Company] despite knowing"* of the price-fixing and that the process should be re-run); p. 9 (*"N.K., despite knowing about the price fixing agreement, nevertheless accepted the continuation of the tendering process. He also did not report to the requisite authorities on the price fixing arrangement between both companies and signed the contract with the winning company [M-Company] even though he knew about the illegality involved in continuing with this process."*); p. 40 para. 67 (*"N.K., being the MTPT Head of Procurement and on 24 April 2008 signatory to the contract…with [T-Company] bears legal responsibility…"*)

[175] Consolidated Indictment, p. 40 para. 67 (*"N.K.…bears legal responsibility for the intentional favouring of [M-Company]. The breaches of law were done with the intention to favour [M-Company]."*).

public procurement process advanced unimpeded through all the relevant stages to its conclusion,[176] at which time N.K. indeed signed on behalf of the MTPT the contract with *M-Company*.[177] While the Prosecutor failed to prove beyond a reasonable doubt that there was a price-fixing agreement between *T-Company* and *E-Company*,[178] the Panel did not consider this to be essential to establishing N.K.'s criminal responsibility under this Count. Rather, the striking similarity of the tender bids, which were identical in 54 of 56 items—should N.K. have been aware of it—would have triggered his duty to stop the process and elicit further investigation prior to signing the contract.

159. It was thus necessary to consider whether the Prosecutor proved beyond a reasonable doubt that N.K. was aware of the similarity of the bids, such that allowing the tender procedure to continue without investigation into the bids, and signing the contract with the winning company, would constitute an abuse of his authority as MTPT Head of Procurement. The Panel considered the entirety of the case file and highlighted the following relevant evidence:

a. **B.R.** and **V.K.**'s testimonies, summarised in Section V.B.i (para. 144) above.

b. The **report of the bid evaluation commission**[179] lists the overall (total) bids submitted for the regions forming a part of this tender, including those of *E-Company* and *T-Company* for Gjilan Region.[180] This is followed by a table in which the evaluation commission indicates – with a 'yes'/'no' – whether the bidding companies meet administrative/formal and security requirements;[181] legal suitability requirements;[182] professional suitability requirements;[183] economic and financial standing requirements;[184] and technical and professional capabilities requirements.[185] On the basis of this assessment, the report then goes on, with brief reasons, to exclude bids which were not responsive,[186] as well as provide a summary of the remaining, responsive bids and their overall offer amounts.[187] The same information is presented again in a different table.[188] Finally, in relation to each region which forms part of this

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[176] This is outlined in Consolidated Indictment, paras 63-67.
[177] Contract – Summer Maintenance of National and Regional Roads 2008, Gjilan Region between MTPT and M-Company dated 24 April 2008: Binder 47U, p. 3; Binder 47X, p. 2.
[178] This is examined in detail in Count 5, Section V.D.ii.
[179] Report on Bid Evaluation and Recommendation for Contract Award: Summer Maintenance of National and Regional Roads for 2008 (MTPT 08/006/511), April 2008, Binder 47D, pp 48-107.
[180] Binder 47D, pp 51-52.
[181] Binder 47D, pp 57-62.
[182] Binder 47D, pp 63-68.
[183] Binder 47D, pp 69-76.
[184] Binder 47D, pp 77-82.
[185] Binder 47D, pp 83-88.
[186] Binder 47D, pp 89-92.
[187] Binder 47D, pp 93-94.
[188] Binder 47D, pp 95-98.

tender procedure, the report ranks the responsive bids by offered price, with the lowest offered price being recommended for award of the tender.[189]

160. The Panel recalls that it previously accepted that: i. N.K. was obliged to review the report of the bid evaluation committee prior to signing the contracts with the winning bidders, and thus that he was aware of the report's contents; ii. it was reasonable for N.K. to rely upon the advice of the evaluation committee; and iii. N.K. was not required to examine each individual tender offer, and there is insufficient evidence to establish that he did so.

161. The committee's report nowhere indicates that it suspected price-fixing between *T-Company* and *E-Company* or that the companies' bids coincided in 54 of 56 items. Rather, it includes only their final offers, being 799,488.63 and 801,386.15 euros respectively. The Panel did not consider that this closeness in the final offers was, by itself, sufficient to alert N.K. of potential wrongdoing. In this regard, the Panel noted that a number of companies made bids that were exceptionally close in value, in relation to which no wrongdoing has been alleged by the Prosecutor,[190] among them the offer of *I-Company* of 804,146.13 for Gjilan region.[191] For these reasons, the Panel found that the Prosecutor failed to prove beyond a reasonable doubt that N.K. was aware that the bids of *T-Company* and *E-Company* were so similar as to require further investigation.

162. Finally, Panel recalled that the Prosecutor was required, under the applicable Article 422 CCK, to show that N.K., by failing to stop the procedure or eliciting further investigation or by signing the contract with *M-Company,* intended to either acquire a 'material benefit' for himself or another person; cause damage to another person; or seriously violate the rights of another person.[192] The Prosecutor asserted that N.K. acted with the intent to favour the winning company, *M-Company*. He neither substantiated this assertion nor led sufficient evidence in support of it (such as, for example, evidence of any meetings between N.K. and any representative of either *M-Company, T-Company* or *E-Company*; or the offer or payment of any bribe in exchange for award of this tender). The absence of this crucial ingredient of the offence was, according to the Panel, alone fatal to this charge.

163. For all of these reasons, the Panel concluded that the Prosecutor did not prove beyond a reasonable doubt that N.K. abused his official position or authority as MTPT Director of Procurement when he signed the contract for tender 08-006-551 for Gjilian region with *M-Company.*

[189] Binder 47D, pp 99-107.
[190] See, for example, the bids of *I-Company* (983,468.50) and *E-Company* (987,321.00) for Pristina region (Binder 47D, p.99); *T-Company* (631,097.00) and *E-Company* (631,528.25) for Mitrovica I region (p.105).
[191] Binder 47D, p. 101.
[192] See Section II.A.i, paras 34-40.

iii. Tender 009-004-511 – Summer and Winter Maintenance for the Regional Roads of Kosovo, Gjilan Region (2009-2010), won by T-Company

164. The Prosecutor alleged two distinct instances of abuse of official position or authority in relation to this tender. First, he contended that **F.L.** and **N.K.** promised M.S. of *IE-Company* that they would 'fix' his tender bid documents so that he would be awarded the tender, in exchange for his silence about not being awarded previous tenders, and if he paid 20% of the total value of the tender as a bribe.[193] M.S. refused these terms, and the accused turned to F.Z..

165. Thus, the Prosecutor's second allegation was that **E.S.**, acting on behalf of **F.L.**, agreed with F.Z. to 'fix' *T-Company*'s bid documentations in such a way as to make sure that company won the tender. In exchange, F.Z. would pay a bribe of EUR 250,000 (again representing 20% of the total value of the tender). This agreement was executed in the course of March 2009, and *T-Company* was awarded the contract for Tender 009-004-511 (Gjilan).

166. Deal-making with both Mehmed Shkodra and F.Z. also formed the basis of **Count 3** against **F.L.**, **N.K.** and **E.S.** for accepting bribes. This is considered in Section V.C. Further, the alleged involvement of **F.Z.** in negotiating with and promising a bribe to E.S. was also charged as abuse of economic authorizations in **Count 5**, considered in Section V.D.ii. Finally, as the Prosecutor did not allege the involvement of **S.T.** in either instance, the Panel did not consider his responsibility further in this section.

167. The Panel examined each allegation in turn, as set out further below.

Deal-making with M.S.

168. The particulars of the Prosecutor's allegations as concerns M.S. were as follows. According to the Prosecutor, in October or November 2008 I.Z., President of the PDK Branch in Gjilan, arranged a meeting between M.S. and MTPT Deputy Minister A.G., which took place in the latter's office.[194] F.L. showed up to this meeting and told M.S. *"Do not speak, and the summer maintenance tender of the roads for 2009 is yours"*[195] and promised that he would 'fix' his tender documentation.[196]

169. The following March 2009, after failing to persuade Mayor of Gjilan Q.M. to join him, M.S. unsuccessfully attempted to meet with F.L. alone.[197] The Prosecutor claimed that F.L. did not 'fix' M.S.'s documents as promised, but instead directed

[193] Consolidated Indictment, p. 9; p. 41, paras 69-71; pp 44-46, paras 85-90; pp 49-50, paras 104-107; pp 51-52, paras 109-111; pp 53-55, paras 114-117.
[194] Consolidated Indictment, p. 41, para. 69.
[195] Consolidated Indictment, p. 9; p. 41, para. 70.
[196] Consolidated Indictment, p. 41, para. 71.
[197] Consolidated Indictment, p. 44, para. 85 (*"Since Q.M. didn't have time, M.S. probably went to the meeting with F.L. without him."*); p. 45, para. 86 (*"F.L. postponed this meeting…").*

him to contact N.K..[198] According to the Prosecutor, M.S. went as directed to N.K. and told him *"Listen to me I know that you want to get 10% but I do not have any money",* to which N.K. is said to have replied: *"We will deposit to you 20% of the total sum in advance and you will then give these*(sic) *money to us."*[199] M.S. refused these terms and N.K. sent him back to F.L., who suggested to M.S. that he complete the document with a company with which he had made previous unsuccessful tender bids.[200]

170. On 23 March 2009, M.S., *"in order to be sure whether the effort to prepare the documents himself was worth it…attempted to receive reassurances from [A.G.]…"*[201] Between 28 March and 1 April M.S. attempted to secure the tender by repeatedly reaching out to F.L., N.K., and Q.M..[202] The Prosecutor contended that F.L. responded to one SMS sent to him.[203]

171. Having heard that *T-Company* had been awarded the tender, M.S. initially sought to confirm this with F.L.,[204] then became angry, accusing him of being *"bought"* and not keeping *"the given word"*.[205] In May of 2009, M.S. had a conversation with Q.M. wherein the former again accused F.L. of breaking his promises and threatened to *"publish everything"* if the tender was not cancelled.[206] Following a final attempt to secure a different tender,[207] M.S. wrote a complaint letter to KACA, triggered investigations that culminated in the present criminal proceeding.

172. Turning to the evidence presented in support of these allegations, the Panel recalled, first, that the audio-recorded statement given by M.S. to KACA was declared inadmissible evidence by the Presiding Trial Judge, in a ruling affirmed by the Court of Appeals. Second, the Panel found that M.S.'s statement to EULEX Police could not be used as direct evidence in this trial and that the KACA Information and M.S.'s letter of complaint appended thereto were of limited probative value.[208] The Panel examined the case file for evidence relevant to abuse of official position/authority of F.L. and N.K. by way of promises and deal-making with M.S. and highlighted the following:

a. **Contemporaneous intercepted SMSs**, including:

i. An intercepted SMS sent from <u>M.S. to Q.M.</u> on 19 March 2009 read: *"Mayor, tomorrow, Friday, Fatmir said to go to his place. Shall we go*

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[198] Consolidated Indictment, p. 9; p. 45, para. 86.
[199] Consolidated Indictment, p. 9; p. 45, paras 86-87.
[200] Consolidated Indictment, p. 9; p. 45, paras 88-89.
[201] Consolidated Indictment, p. 45, para. 89.
[202] Consolidated Indictment, pp 49-50, paras 104-107; p. 51, paras 109-110.
[203] Consolidated Indictment, p. 50, para. 106 (*"F.L.'s response has never been recovered by the investigators. Logically speaking there was in fact a response from F.L. because shortly after M.S. had requested a meeting, M.S. at 11:29 replied to F.L. stating the [following]: 'Here in Pristina'."*)
[204] Consolidated Indictment, p. 51, paras 110-111.
[205] Consolidated Indictment, p. 51, para. 111.
[206] Consolidated Indictment, p. 53, para. 114.
[207] Consolidated Indictment, pp 54-55, paras 115-116.
[208] See Section IV.B above.

together. Confirm. Greetings." Q.M. replied to M.S.: *"I don't have time for tomorrow. Next week."*[209]

ii. Two intercepted SMSs sent from M.S. to F.L. on 20 March 2009 read: *"It is [M.S.], I am on the way, at what time I should pass by your place?"* (7:30) and *"I am waiting."* (10:15).[210] There is no recorded response from F.L. to M.S. to either SMS.

iii. Three SMSs from M.S. to F.L. intercepted on 23 March 2009 read: *"Good morning, it is [M.S.]; I am waiting here in the Ministry"* (9:01); *"I am at your office"* (13:54); *"I am going to wait, but it can be too late!"* (14:24).[211] There is no recorded response from F.L. to M.S.

iv. An intercepted SMS sent from M.S. to A.G. on 23 March 2009 at 17:15 reads: *"Mr. Deputy are we in the same line as you said to me last November about the summer maintenance? M.S. GJILAN."*[212] There is no recorded response from A.G. to M.S.

v. Two intercepted SMSs sent by M.S. to F.L. on 28 March 2009 read *"Please don't leave me aside"* (14:47) and *"Do not forget the terms we had in October last year"* (15:12).[213] There is no recorded response from F.L. to M.S.

vi. An intercepted SMS from M.S. to I.Z. on 29 March 2009 (18:30) reads: *"[I.Z.] if you don't mind send one SMS to [A.G.] before it didn't become too late if they fail also this time I will open my cards, [M.S.]."*[214]

vii. Two intercepted SMSs sent by M.S. to F.L. on 30 March 2009 read *"Minister, can we meet today?"* (11:27) and *"Here in Pristina"* (11:29).[215] There is no recorded response from F.L. to M.S.

viii. On 30 March 2009, the following exchange of SMSs between M.S. and Q.M. was intercepted:[216]

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[209] Transcript of SMS between M.S. and Q.M. dated 19 March 2009 at 17:46 and 19:52: Interception Data Summary Nos 79a and 79b, Post Indictment Binder IV-A.
[210] Transcript of SMS between M.S. and F.L. dated 20 March 2009 at 7:30 and 10:15: Interception Data Summary Nos 79c and 79d, Post Indictment Binder IV-A.
[211] Transcript of SMS between M.S. and F.L. dated 23 March 2009 at 9:01, 13:54, 14:24: Interception Data Summary Nos 82a-82c, Post Indictment Binder IV-A.
[212] Transcript of SMS between M.S. and A.G. dated 23 March 2009 at 17:15: Interception Data Summary No. 83, Post Indictment Binder IV-A.
[213] Transcript of SMS between M.S. and F.L. dated 28 March 2009 at 14:47 and 15:12: Interception Data Summary Nos 99a and 99b, Post Indictment Binder IV-A.
[214] Transcript of SMS between M.S. and I.Z. dated 29 March 2009 at 18:30: Interception Data Summary No. 197, Post Indictment Binder IV-B.
[215] Transcript of SMS between M.S. and F.L. dated 30 March 2009 at 11:27 and 11:29: Interception Data Summary Nos 100a and 100b, Post Indictment Binder IV-A.
[216] Transcript of SMS between M.S. and Q.M. dated 30 March 2009 at 18:54, 19:07, 19:09, 19:25, 19:26, Interception Data Summary Nos. 100c-100h, Post Indictment Binder IV-A.

M.S.: *"President, did you speak with [F.L.]? [M.S.]"* (18:54)

Q.M.: *"With [F.L.]"* (19:07)

M.S.: *"Yes, with [F.L.]"* (19:09)

Q.M.: *"Day after tomorrow my friend. I will be busy until day after tomorrow."* (19:25)

M.S.: *"maybe it will be too late for us"* (19:25)

Q.M.: *"Friend, I don't know anything. The deal cannot be made over the phone."* (19:26).

The Panel notes that the court interpreter disagreed with the Prosecution translation of this SMS, translating it instead as *"Believe me friend, I don't know, we cannot do anything by phone."* The Panel has indicated that it will accept as authoritative the interpretation of the court-appointed interpreter.[217]

ix. An SMS intercept from M.S. to N.K. on 31 March 2009 reads: *"Good evening [N.K.], is there anything new from you? [M.S.] Gjilan."*[218]

x. An SMS from M.S. to A.G. on 31 March 2009 reads: *"Good evening Mr. [A.G.] is there any hope for that job to be completed? [M.S.], Gjilan."*

xi. An intercepted SMS from M.S. to F.L. from 1 April 2009 says: *"Minister, is there any chance or not?"*[219]

xii. A 16 April 2009 SMS from M.S. to F.L. reads: *"Minister, a week ago in the conversation with [I.H.], [T-Company] announced himself as the winner of the tender for summer maintenance, is this true? [IE-Company] Gjilan"* (21:06).[220]

xiii. Two SMS intercepts of 29 April 2009 from M.S. to F.L. state:[221]

"Sir, all the Gjilan rumours seem to be true. They have bought you; they have even pushed you back to the wall; so you must play how taki[222] *whistles you."* (18:37)

"You forgot the 150 votes that you got from these 30 workers who were waiting 10 years for some work and you didn't respect them. You

[217] Minutes, 22 March 2016, pp 28-29.
[218] Transcript of SMS between M.S. and N.K. dated 31 March 2009 at 19:32: Interception Data Summary No. 102, Post Indictment Binder IV-B.
[219] Transcript of SMS between M.S. and F.L. dated 1 April 2009 at 11:58, Interception Data Summary No. 103a, Post Indictment Binder IV-B.
[220] Transcript of SMS between M.S. and F.L. dated 16 April 2009 at 21:06, Interception Data Summary No. 103b, Post Indictment Binder IV-B.
[221] Transcript of SMS between M.S. and F.L. dated 29 April 2009 at 18:37 and 18:51, Interception Data Summary Nos 104a and 104b, Post Indictment Binder IV-B.
[222] "Taki" is assumed to be a misspelling by M.S. of "T-Company".

don't keep the given word; you are a betrayer; it is true whatever was said about you. I don't want to see you again." (18:51)

xiv. The following SMS conversation between M.S. and Q.M. of 20 May 2009 was intercepted:[223]

M.S.: *"Greetings, if the summer maintenance doesn't get cancelled, I will publish everything on Monday."*

Q.M.: *"You will harm yourself more than [F.L.]. Buddy, don't exaggerate it, it will be better. The only thing that you can do further is to ruin your job and PDK. I am aware that you made some investment, I have also invested hundred thousand in cash and I lost it. Have a nice day friend."*

M.S.: *"You know that this issue is torn apart because of me. [F.L.] knew about this job and he broke the promises that he gave. This man doesn't care for the party and for anyone. Only for his personal benefit he broke the respect, votes and everything that we did for him. Everyone is working nowadays and we stay."*

Q.M.: *"Only with patience, and we in the municipality will manage to go ahead alone."*

M.S.: *"[F.L.], [N.K.] and [I.Z.] knew about this job so now they can't complain."*

"I hope in the next life everything will get better; it is over in the present one."

Q.M.: *"Which [I.Z.]? What is [I.Z.] doing in this job? Don't even ask…"*

"No, [M.S.] do not give up, the life is long."

M.S.: *"Ask [I.Z.], he will let you know better."*

Q.M.: *"But what is [I.Z.] doing in that job? Did he hear that he has asked for a bribe?"*[224]

M.S.: *"Why are you joking? You are also aware about this job, but you will find out everything starting from Monday."*

Q.M.: *"I don't know, friend, why you have talked with [I.Z.] about this job?"*

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[223] Transcript of SMS between M.S. and Q.M. dated 20 May 2009 at 11:58-21:23, Interception Data Summary Nos 107a-107p, Post Indictment Binder IV-B.
[224] For translation correction see Minutes, 22 March 2016, p.34; See also Minutes, 23 March 2016, pp 3, 6 (*"What is Izmia seeking in this job, did he hear that he asked for a bribe, didn't he."*)

M.S.: *"Man, this job was given to [T-Company] in January this year and everything what [F.L.] was saying when we were together were lies."*[225]

Q.M.: *"Take it easy. Are you coming for condolences at [F.L.]'s on Saturday?"*

M.S.: *"May XXX rest in peace, it is too bad but I cannot come."*

Q.M.: *"Ok. See you buddy."*

xv. Three SMS between M.S. and Q.M. dated 26 May 2009 read as follows:[226]

Q.M.: *"Buddy, try with those at the procurement, try with [N.K.] he might do something."*

M.S.: *"He won't make a solution for me, only if someone has ordered him"*[227]

Q.M.: *"Friend, I cannot communicate with them."*

xvi. An SMS sent from M.S. to E.K. on 10 June 2009 reads *"Greetings, have you contacted with the president. What did he say for what I have asked Ponesh-Gadime [M.S.] Gjilan."*

xvii. An SMS sent from M.S. to E.K. on 13 June 2009 reads *"Mr. [E.K.], insist for me to get the road Bresalc Gadime, since I should not be left without any work. [Q.M.] is saying that he cannot meet with them."*[228]

xviii. A further SMS sent from M.S. to E.K. on 7 August 2009 states *"Mr. [E.K.], that tender that we discussed they gave it to someone else. This business has ended and I will not be silent anymore and no one has the right to tell me to be silent when he or she did not finish the job for me."*[229]

b. The **"Information regarding alleged corruption"** sent by H.P., Director of KACA, to SPRK (undated, but received by SPRK on 20 October 2009) (hereafter "KACA Information").[230] This document reports statements given

[225] A slight correction of the Prosecution translation was effected by the court interpreter, Minutes, 22 March 2016, pp 30-31.
[226] Transcript of SMS between M.S. and Q.M. dated 26 May 2009 at 10:55, 10:58, 14:25, Interception Data Summary Nos 108a-108c, Post Indictment Binder IV-B.
[227] Prosecution translation was corrected in Minutes, 23 March 2016, pp 16-17.
[228] Transcript of SMS between M.S. and E.K. dated 13 June 2009 at 7:34, Interception Data Summary No. 108d, Post Indictment Binder IV-B.
[229] Transcript of SMS between M.S. and E.K. dated 7 August 2009 at 10:21, Interception Data Summary No. 108e, Post Indictment Binder IV-B; Prosecution translation amended in Minutes, 26 January 2017, p. 16.
[230] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, pp. 1-27.

by M.S. to KACA, forwarded to SPRK for more comprehensive investigation. The KACA Information provides, relevantly for this tender, verbatim:[231]

"'Afterwards', continued [M.S.], 'I was called by Mr. [I.Z.], President of the Democratic Party branch in Gjilan, and arranged a meeting for me with the deputy minister [A.G.], and during the conversation with [A.G.], [F.L.] arrived, and I think that this meeting took place in October 2008, and we again started the conversation with [F.L.] and he told me: - You do not need to talk any further because Mirëmbajtja Verore (the Summer Maintenance-as in original-translator's note) for year 2009 will be yours and do not bid together with the ['Si-Company']. I told him that I can't complete the documentation needed for bidding on my own to which [F.L.] replied by saying that they will complete the documentation. Then [A.G.] intervened in the conversation by saying to [F.L.]: - How can we complete his documentation. [F.L.] replied: - We'll do it through [R-Company]."

"Once Mirëmbajtja Verore (the Summer Maintenance) for year 2009 tender was announced, I took the documents and met [F.L.] again and told him: - I did not bid with anybody else since you promised to me that you will complete the documentation."

"Seeing that they could not complete my documentation [F.L.] told me: - We can not complete your documentation, but, complete it again with the ['Si-Company']."

"Afterwards I went to the MTT procurement manager, Mr. [N.K.], and I engaged in a conversation with him, during this conversation he asked from me 20% of the total amount of this tender and I told him: - I don't have money to give you. He told me: - We will put a 20% of the tender value as an advanced payment and you will give this to us (so these are the words of the manager, Mr. [N.K.], states [M.S.]). When I told him that I had no money and I did not accept what he told me, he then told me: - Go to [F.L.], he promised you and he will do it for you."

"[M.S.] further states, 'I went again to meet [F.L.] and he told me to complete the documentation again with the ['Si-Company'] because there was no possibility to complete the documentation."

To the KACA Information is appended M.S.'s original **letter of complaint** (also undated, received by KACA on 6 May 2009). Relevant portions of this letter provide:

"Road maintenance during the summer season in Gjilan area 2009, we expected that one of these working project would belong to us, even [F.L.] promised, it didn't happen, we remained without job."[232]

[231] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, pp 4-5.
[232] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 9.

"...Since we have completed all documents with accuracy they appointed a meeting for me with [A.G.] and Mr. [F.L.]. I mention what I was told: don't say anything and for sure during the summer you will take care of the road maintenance in Gjilan region. I thought you will tell me again that my documents are not completed [F.L.], immediately [A.G.] acted, you say nothing, [F.L.] said we will manage with documents with one company called [R-Company], and about [Si-Company] he said: He is worst than Serbian and he can't get a job here. Summer season 2009 arrived and again road maintenance was given to [T-Company], as usual..."[233]

"I have 30 employees and we gave you 150 votes and you treat us worst than Serb, you give to Zubin Potok Serb many works every year but never to us"[234]

c. **B.S.**'s testimony was previously summarised in para. 124 above. In relation to this tender, the witness could not recall his father ever telling him that: F.L., in the presence of A.G., told M.S. that if he kept quiet the 2009 summer maintenance would be his;[235] N.K. requested a bribe of 20% of the value of the tender;[236] M.S. met with E.K.[237]

d. **Q.M.,** whose testimony was previously discussed in paras 124 and 144, was unable to recall specific SMSs sent between himself and M.S., but confirmed that he recalled the content and spirit of their communications and accepted the messages put to him as accurate.[238]

In relation to SMS intercepts of 19 March 2009, the witness confirmed that M.S. asked him to attend meetings with F.L. *"constantly"*[239] and sent similar messages *"3-4 times a day"*.[240] M.S. asked Q.M. to speak with F.L. and he agreed.[241] He could not recall whether M.S. asked him to speak with F.L. specifically in relation to Tender 009-004-511, but assumed that he had.[242] The witness indeed asked F.L. to meet with M.S. several times because the latter *"was a party militant of my party, he was good activist, he was a hard working person, he was a family oriented person."*[243] However, the witness was unable to attend any meeting with M.S. and F.L.[244] He clarified that he

[233] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 11.
[234] 'Information regarding alleged corruption', H.P., Director of KACA, Binder 19A, Tab 1, p. 12.
[235] Minutes, 25 October 2016, p. 20.
[236] Minutes, 25 October 2016, pp 20-21.
[237] Minutes, 25 October 2016, pp 21-22.
[238] Minutes, 22 March 2016, pp 24, 32-35; 23 March 2016, pp 5, 7; 19 April 2016, p. 17.
[239] Minutes, 22 March 2016, p. 23.
[240] Minutes, 22 March 2016, p. 24.
[241] Minutes, 22 March 2016, pp 24-25; 19 April 2016, pp 15-16.
[242] Minutes, 22 March 2016, p. 25.
[243] Minutes, 22 March 2016, pp 24, 26; 19 April 2016, p. 8.
[244] Minutes, 22 March 2016, p. 24; 19 April 2016, p. 16.

did not speak on behalf of M.S., but intended only to give him the opportunity to meet with F.L. as well as, essentially, to get M.S. off his back.[245]

Q.M. recalled or accepted several SMSs between himself and M.S. sent on 30 March[246] and 20 May 2009.[247] He twice confirmed that M.S.'s complaints on the latter date were about Tender 009-004-511,[248] before later disclaiming he knew what they were about.[249] The witness was questioned extensively in relation to his SMS of 20 May 2009: *"But what is [I.Z] doing in that job? Did he hear that he has asked for a bribe?"* He recalled asking M.S. about I.Z.'s involvement which, according the witness, required explanation as the latter was president of the Gjilan PDK branch rather than a member of the municipality or MTPT and should thus have had no involvement with tenders.[250] Q.M. asserted that he asked M.S. about a bribe because his political position made him sensitive about corruption and, prompted by M.S.'s threat to *"publish everything"*, Q.M. was interested to find out whether anyone had solicited or accepted a bribe, i.e. what M.S. would publish.[251] According to the witness, the translation should have read: *"Did he hear that somebody is asking for a bribe?"*[252] Conversely, the witness denied that he knew anyone had asked for a bribe or that he was referring to F.L.[253]

Finally, Q.M. could not recall whether M.S. ever told him that F.L. promised him the Gjilan region summer maintenance in 2009 but did not award it to him;[254] whether M.S. had told him that either F.L. or N.K. wanted a bribe of 20% of the total tender to be awarded the summer and winter maintenance for Gjilan region for 2009 and 2010;[255] or that the maintenance was eventually given to *T-Company.*[256]

In relation to their SMS exchange of 26 May 2009, in which Q.M. suggested that M.S. speak to N.K. to see if *"he might do something"*, the witness testified that he did not know N.K. personally at that time but only his position as MTPT Director of Procurement.[257] The witness again explained his intervention as being motivated by the fact that M.S. *"was a good PDK activist, and of course I wanted to have him close to myself as the party*

[245] Minutes, 22 March 2016, p. 25; 19 April 2016, p. 16.
[246] Minutes, 22 March 2016, pp 27-29.
[247] Minutes, 22 March 2016, pp 30, 32-35.
[248] Minutes, 22 March 2016, pp 31-32, 35.
[249] Minutes, 23 March 2016, p. 13.
[250] Minutes, 22 March 2016, pp 34-35, 37; See also 23 March 2016, p. 7.
[251] Minutes, 22 March 2016, pp 35-36; 23 March 2016, pp 3, 11-13.
[252] Minutes, 23 March 2016, p. 11.
[253] Minutes, 23 March 2016, p. 8, 14.
[254] Minutes, 20 April 2016, p. 10.
[255] Minutes, 23 March 2016, pp 26-27; 20 April 2016, p. 14.
[256] Minutes, 20 April 2016, p. 10.
[257] Minutes, 23 March 2016, pp 15-16; 19 April 2016, pp 18, 22.

activist, and that was the reason I constantly communicated with him."[258] He directed M.S. to N.K., while asserting that he himself *"cannot communicate with them",* because he wanted him give up on road tenders without souring their communications,[259] and assumed that N.K. would explain to M.S. the legal and technical criteria he would need to fulfil to be awarded any road construction tender.[260]

Q.M. described M.S. as *"frustrated"*[261] and opined that this frustration was the source of his threats.[262] He testified that M.S.'s company, *IE-Company*, did not deal with road construction but rather with wood, fuel and catering.[263] As a result, he was unqualified, lacking the technical and professional expertise to be awarded road construction tenders.[264] Q.M. stated that M.S.:

"always expressed dissatisfaction with me, with others, because he constantly was asking for big projects and big works, regardless of the fact that he did not have even the minimum of capacities, neither professional nor technological to perform the duties… he participated in many tenders and he expressed his dissatisfaction there. He was always thinking that someone was being unjust to him but in fact he was not prepared either technologically or professionally… he was a very hard working person but his niche was something else; it was for cutting firewood and also hotel business used for weddings but not infrastructure"[265]

Finally, Q.M. reiterated that the accusations contained in M.S.'s SMSs represented only M.S.'s own *"opinion"*,[266] with which Q.M. could not concur as he was not in possession of facts to support it.[267] Q.M. denied having any knowledge of F.L., N.K. or E.S. asking for a bribe while employed at the MTPT.[268]

e. **I.Z.**, head of PDK Gjilan branch between 2008 and 2012,[269] testified that in this role he had contacts with many PDK members, including Q.M., F.L. and A.G.[270] Although very reluctant to confirm that he had discussed road construction projects in Gjilan with other PDK officials, he conceded that such discussions were only in the context of discussing the PDK's development

[258] Minutes, 23 March 2016, p. 15.
[259] Minutes, 23 March 2016, pp 17-18; 19 April 2016, pp 19, 21.
[260] Minutes, 23 March 2016, pp 15-16; 19 April 2016, p. 21.
[261] Minutes, 22 March 2016, p. 24.
[262] Minutes, 22 March 2016, p. 27.
[263] Minutes, 23 March 2016, pp 14-15; 19 April 2016, p. 9; 20 April 2016, p. 10.
[264] Minutes, 23 March 2016, pp 15, 17; 19 April 2016, pp 8-9, 19; 20 April 2016, pp 8-10.
[265] Minutes, 22 March 2016, p. 25.
[266] Minutes, 22 March 2016, p. 32-33; 23 March 2016, p. 17.
[267] Minutes, 22 March 2016, pp 36.
[268] Minutes, 23 March 2016, pp 9-10; 19 April 2016, pp 16-17, 21; 20 April 2016, p. 14.
[269] Minutes, 28 April 2016, pp 5-6.
[270] Minutes, 28 April 2016, pp 6-7.

program for that municipality.[271] The witness vehemently denied ever discussing *specific* tender procedures with Q.M. or discussing tender procedures with Q.M. *alone*, but refused to provide the names of other persons present at meetings in question.[272] I.Z. denied ever discussing either the issue of bribery in the award of road construction tenders, or the complaints of M.S., with Q.M.[273] He stated that he did not speak to F.L. in relation to road construction projects in Gjilan.[274]

I.Z. claimed to have never heard about anyone in the MTPT awarding road construction tenders in exchange for bribes,[275] but that if he had received such information he would have reported it to the proper authorities.[276] He testified that, being from Gjilan, he knew '[F.]' who owned *T-Company* (although was not asked to identify him in the courtroom)[277] as well as M.S. of *IE-Company*,[278] and accepted the veracity of his earlier statement to EULEX that M.S.:

"always insisted to meet at the Ministry and to talk. His impression was that he was discriminated… for the tenders, and he wanted to talked to them why this happened to him. After the war Mehmet didn't really deal with asphalting roads, he had other businesses. But, before the war he did and he had better equipment than others. After the war he dealt with catering and hotel business and he had a petrol station."[279]

I.Z. confirmed that M.S. had asked him to set up meetings with MTPT officials, including F.L., A.G. and others, and that he indeed asked A.G. to meet M.S.[280] He added:

"M.S. was not pleased with the PDK in Gjilan and for all the projects which he applied for and was not awarded he was displeased with that although he never met the requirements because the requirements are strictly laid out in the Procurement Law. His intention was by all means to meet anyone from the Government, starting from Prime Minister and downwards and myself as the party leader I felt like an obligation to arrange that meeting if he wanted to meet party senior members or somebody at lower levels as he was a party member and here everything ended with me."

I.Z. said that M.S. never complained to him personally about not receiving road construction tenders.[281] However, M.S. had an *"aggressive personality"*

[271] Minutes, 28 April 2016, pp 7-8, 11-13; 16 May 2016, pp 22-23.
[272] Minutes, 28 April 2016, pp 12-14; 16 May 2016, p. 23.
[273] Minutes, 16 May 2016, pp 23-24.
[274] Minutes, 28 April 2016, p. 10.
[275] Minutes, 28 April 2016, pp 14.
[276] Minutes, 28 April 2016, pp 14-15; 16 May 2016, p. 16.
[277] Minutes, 28 April 2016, p. 8.
[278] Minutes, 28 April 2016, pp 8-9; 16 May 2016, p. 3.
[279] Minutes, 28 April 2016, pp 9-10.
[280] Minutes, 16 May 2016, pp 18-19.

and commonly complained that *"he was not being treated properly"* in the award of tenders by the MTPT and others.[282]

I.Z. received a copy of, and read, M.S.'s letter of complaint but could not recall the allegations it contained.[283] He explained that he did not take its contents seriously or report it the authorities, as any citizen was entitled to complain (it was *"just a piece of paper"*, unsupported by evidence) and it had already been sent to all relevant institutions by M.S. himself.[284] Further, the witness claimed that M.S. never told him any of the following: that F.L. promised him the tender for the construction of the road Phonesh-Zhegovc in the presence of N.K., A.G. and others;[285] that F.L. told M.S. that the summer maintenance (Gjilan 2009) would be his if he remained silent;[286] that he was being solicited for a bribe;[287] that F.L. told him that he could 'fix' his tender documents through 'RMS' company;[288] that F.L. later avoided meeting M.S., before directing him to speak to N.K.;[289] that N.K. told M.S. that they were waiting for him to pay 10% of the value of the tender;[290] that when M.S. told N.K. that he had no money, N.K. advised him that *"we will deposit to you 20% of the total sum in advance and then you will give this money to us"*.[291] When the Prosecutor put to the witness the SMS sent by M.S. to him on 29 March 2009 (*"[I.Z.], if you don't mind send one SMS to [A.G.] before it didn't become too late. If they fail also this time I will open my cards. [M.S.]."*), I.Z. claimed he had *"no idea"* what M.S. was thinking of and did not take his messages seriously because M.S. was *"revolted at everything"* and *"was interested in meeting every member of Kosovo government."*[292]

f. **A.G.**, whose testimony was previously addressed in para. 124, testified that he never discussed any specific road construction project with N.K.,[293] and had no authority to give directions to N.K..[294]

A.G. confirmed that he knows I.Z., would communicate with him via telephone and SMS, and – based on his relationship with the Z. family –

[281] Minutes, 16 May 2016, p. 9.
[282] Minutes, 16 May 2016, pp 9-10.
[283] Minutes, 16 May 2016, pp 10-16, 26.
[284] Minutes, 16 May 2016, pp 10-17.
[285] Minutes, 16 May 2016, pp 17-18.
[286] Minutes, 16 May 2016, p. 19.
[287] Minutes, 16 May 2016, pp 19-20.
[288] Minutes, 16 May 2016, p. 20.
[289] Minutes, 16 May 2016, p. 21.
[290] Minutes, 16 May 2016, p. 21.
[291] Minutes, 16 May 2016, p. 21.
[292] Minutes, 20 May 2016, pp 15, 17-18.
[293] Minutes, 14 March 2017, pp 25-26.
[294] Minutes, 14 March 2017, p. 26.

would be inclined to read and respond to his SMSs.[295] The Prosecutor put to the witness two SMSs sent from I.Z. to him, which read:[296]

"Mr Deputy Minister, at what time can you receive [M.S.], he is in Pristina, health (regards) [I.Z.]." (11 March 2009)

and

"Deputy Minister take into account [M.S.]. Thank you for understanding. [I.Z.]" (24 March 2009)

In addition, the Prosecution presented to A.G. SMSs sent from M.S. to the witness:[297]

"Mr. Deputy Minister, are we on the same words as you have told me in November for the summer maintenance? [M.S.], Gjilan." (23 March 2009)

and

"Good evening Mr. [A.G.], is there any hope for that job to be completed? [M.S.], Gjilan" (31 March 2009)

The witness testified that he does not remember receiving these SMSs,[298] or that I.Z. ever asked him to meet with M.S.[299] He does not know and has never met M.S.,[300] and explained that the SMSs from M.S. to himself as *"lame provocation"*.[301]

g. **E.K.** was a member of the PDK presidency as of its establishment in 1999,[302] who served as Deputy Minister in the Ministry of Environment and Spatial Planning from January 2008 to June 2010, and MTPT Deputy Minister from June 2010 to 2013.[303] The witness testified that he knew M.S. as they were from the same municipality and had a familial relationship.[304] E.K. believed M.S.'s business was in sand and transportation, but was unsure.[305]

M.S. called or texted the witness frequently, *"but he had so many requests* [that] *even if we were USA we could not fulfil his requests"* and the witness was often too busy to answer or reply to him.[306] This was confirmed with reference to two SMSs sent by E.K. to M.S., which read *"Mr. [M.S.] we are in a conference. We will call you later greetings EK"* (12 June 2009, 17:44) and

[295] Minutes, 15 March 2017, p. 12.
[296] Minutes, 15 March 2017, pp 12-13.
[297] Minutes, 15 March 2017, pp 14-15.
[298] Minutes, 15 March 2017, pp 13, 16.
[299] Minutes, 15 March 2017, p. 14.
[300] Minutes, 15 March 2017, pp 13-15, 17.
[301] Minutes, 15 March 2017, p. 15.
[302] Minutes, 26 January 2017, pp 6-7.
[303] Minutes, 26 January 2017, pp 7, 18.
[304] Minutes, 26 January 2017, p. 10.
[305] Minutes, 26 January 2017, p. 12.
[306] Minutes, 26 January 2017, pp 10-13.

"Honourable Mr. [M.S.], I am in the conference for decentralisation. Greetings." (17 June 2009, 15:15). The witness could not recall precisely what M.S. had been calling him about in either instance, but suggested he might have wanted work.[307]

E.K. recalled that M.S. asked for his assistance in getting road construction contracts with the MTPT.[308] The witness testified that he advised M.S. to bid/compete and that the outcome would be determined on the basis of the applicable law.[309] He did not know whether M.S. ever did bid on such contracts or what happened subsequently.[310]

The Prosecutor put to the witness the SMS sent by M.S. to the witness on 10 June 2009 (*"Greetings, have you contacted with the president. What did he say for what I have asked Ponesh-Gadime M.S. Gjilan"*). E.K. confirmed that there is a road segment Ponesh-Gadime; that M.S. probably asked for it; and that by 'president' he might have meant the President of the PDK, Hashim Thaci.[311] He further explained again that M.S. *"asked for my assistance and I told him you can compete and there are rules and regulations you have to fulfil"* and that he did not speak to Hashim Thaci on M.S.'s behalf.[312]

The Prosecutor put to E.K. an SMS sent to him by M.S. 13 June 2009, which reads *"Mr. [E.K.] insist on giving me the road Bresalc Gadime because I cannot be left without work again. [Q.M.] is saying I am not able to meet with them. Why didn't he/she come with the president?"*[313] The witness confirmed that 'Q.' was Q.M.; that 'them' probably meant the PDK presidency; and that M.S. probably sought his assistance because of their familial relationship.[314]

E.K. could not recall whether M.S. ever discussed with him his efforts to win the tender of the summer and winter maintenance of the regional roads of Gjilan 2009-2010, adding *"even if he discussed that it was of no importance to me."*[315] He could not recall whether M.S. ever threatened to go public as a result of not getting a tender, but described M.S. as temperamental.[316] The Prosecutor put to E.K. the SMS sent to him by M.S. on 7 August 2009 (*"Mr. [E.K.], that tender that we discussed they gave it to someone else. This business has ended and I will not be silent anymore and no one has the right to tell me to be silent when he or she did not finish the job for me."*). The

[307] Minutes, 26 January 2017, pp 12-13.
[308] Minutes, 26 January 2017, pp 13-14.
[309] Minutes, 26 January 2017, pp 13-14.
[310] Minutes, 26 January 2017, pp 13-14.
[311] Minutes, 26 January 2017, p. 14.
[312] Minutes, 26 January 2017, p. 14.
[313] Minutes, 26 January 2017, pp 14-15.
[314] Minutes, 26 January 2017, p. 15.
[315] Minutes, 26 January 2017, pp 15-17.
[316] Minutes, 26 January 2017, p. 16.

witness testified that he did not know: which tender M.S. was referring to; who would have told M.S. to be silent; or that M.S. complained to KACA.[317]

Did F.L. promise M.S. the 2009 maintenance?

173. The Panel next considered whether the Prosecutor discharged the burden of proof in relation to the allegation that, in October or November 2008, F.L. promised M.S. the 2009 summer maintenance in the presence of A.G.

174. In his testimony before the court, I.Z. confirmed that he asked A.G. to meet with M.S., but did not know what happened subsequently. The Panel noted that the SMSs sent by I.Z. to A.G. containing this request (as put by the Prosecutor to A.G.) are dated 11 and 24 March 2009, that is, some six months after the meeting is alleged to have taken place—a fact incompatible with the Prosecutor's narrative of events. However, even accepting that I.Z. made an earlier, undocumented, request of A.G., there was insufficient evidence to establish that such a meeting in fact took place, let alone who attended or what was said.

175. In particular, A.G., who was alleged by the Prosecutor to have been present at the meeting, stated that he does not remember receiving these SMSs *or* that I.Z. asked him to meet with M.S. at another time. He also denied having ever met M.S. The truthfulness of A.G.'s assertion that he never read I.Z.'s SMSs related to M.S. could be doubted, on the basis of his earlier testimony that he held I.Z. and his family in high regard and would therefore read and respond to his SMSs. Were the Panel to accept that A.G. read the SMSs, however, this would say nothing about whether he acted upon the request and met with M.S. or what took place at any such meeting.

176. Thus, the evidence that F.L. promised M.S. the award of the 2009 summer maintenance, and to 'fix' his tender documentation to that end, originates with M.S. himself. It is chiefly in the form of SMSs sent by M.S. to various individuals that allude to being promised this tender by F.L. in October/November 2008 (See in particular: SMS to A.G. of 23 March 2009; SMS to I.Z. on 29 March 2009; two SMSs to F.L. on 30 March 2009; SMS sent to F.L. on 29 April 2009 at 18:51; SMS conversation with Q.M. of 20 May 2009). These allegations are elaborated upon in Q.M.'s complaint letter and the KACA Information.

177. The Panel underlined that, *per* the clear terms of Article 262(1) CPC, it is unable to find the accused guilty *"solely, or to a decisive extent, on… evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings"*. In the present instance, all inculpatory evidence originates with the late M.S., whose account of events the defence has never had an opportunity to test. That M.S.'s allegations appear in various forms (SMSs, letter of complaint, KACA Information), or that the late M.S. was

[317] Minutes, 26 January 2017, pp 16-17.

consistent in his allegations, does not overcome this prohibition. Put differently, the various pieces of evidence originating with M.S. cannot be used to corroborate one another.

178. The Panel noted that Prosecution witnesses–Q.M., I.Z., A.G., E.K.–consistently sought to downplay the seriousness and veracity of M.S.'s allegations and repeated, almost verbatim, key themes of the defence case theory (that M.S. did not have the necessary qualifications to be awarded the tenders in question; that his business was a petrol station, catering and wood; that he complained relentlessly and widely; that he was aggressive, etc.) In addition, some – including the late M.S.'s son, B.S. – denied that he ever shared with them his allegations of corruption within the MTPT. The Panel found these denials to be highly implausible and self-serving.

179. In this regard, I.Z. asserted that M.S. never told him that F.L. had promised him the tender and to 'fix' his documents or that N.K. had asked for a bribe in the amount of 20% of the value of the tender, despite (a) I.Z.'s acknowledgement that he received and read M.S.'s letter of complaint which contains these allegations; (b) M.S.'s SMS to I.Z. of 29 March 2009 threatening to *"open his hands"*, which clearly presupposed I.Z.'s knowledge of what M.S. intended to open his hands about; and (c) the general assertion that M.S. *"complained about everything"*, quite incompatible with M.S. failing to complain about this.

180. Similarly, E.K. denied that M.S. ever shared his complaints with him despite an SMS from M.S. to him making clear reference to such discussion between them (i.e. *"...I will not be silent anymore and no one has the right to tell me to be silent when he or she did not finish the job for me."*)

181. Q.M. flip-flopped on the question of whether M.S. spoke to him about this specific tender procedure (009-004-511). The Panel was unpersuaded by Q.M.'s explanation of his SMS conversation with M.S. of 20 May 2009, in particular that he asked M.S. about a bribe because his political position made him sensitive to allegations of corruption and he thus wanted to know whether anyone had solicited/offered a bribe. To the contrary, it is clear that M.S. had previously shared his allegations of MTPT corruption with Q.M. In this SMS exchange, it is Q.M. himself who brings up F.L.'s name, unprompted by M.S. Further, the context of the conversation—wherein F.L. and N.K.'s names are mentioned several SMSs earlier—makes clear that M.S. had told Q.M. that either F.L. or N.K. had asked for a bribe.

182. B.S., who was employed at *IE-Company* at the relevant time and would have been in a position to have first-hand knowledge of his father's clearly widely proclaimed grievances, took the doubtful position: *"I don't know anything. I didn't speak anything related to the minister. I don't remember anything."*[318]

[318] Minutes, 25 October 2016, p. 17. See also Minutes 25 October 2016, p. 20 (*"I don't know anything."*); 26 October 2016, p. 7 (*"I don't know anything or anything like that."*).

183. Nevertheless, even were the Panel to reject these accounts and accept the contrary, namely that M.S. had shared his allegations of MTPT corruption with Q.M., I.Z. and his son B.S., this would not alter its above conclusion. The veracity of a claim cannot be strengthened by its repetition and these accounts cannot be used to corroborate the substance of M.S.'s allegations; at best, they can show that M.S. was consistent in making them. The single, untested source of the corruption allegations remains M.S. himself.

184. For these reasons, the Panel found that the Prosecutor did not established beyond a reasonable doubt that F.L. promised M.S. the Summer and Winter Maintenance for the Regional Roads of Kosovo for Gjilan Region 2009-2010 (Tender 009-004-511) in October or November 2008, and did not thereby abuse his official position as MTPT Minister.

Did N.K. ask M.S. for a bribe of 20% of the total value of the tender?

185. The Panel turned next to the Prosecutor's second main allegation of deal-making with M.S., namely that: in March 2009, M.S. attempted to meet F.L., who directed him to contact N.K.; N.K. asked for a bribe in the amount of 20% of the value of the tender, which would be prepaid to *IE-Company* by the MTPT; when M.S. refused these terms, N.K. sent him back to F.L. who suggested that M.S. complete the bid documentation with a company with which *IE-Company* had made previous unsuccessful bids (thus effectively reneging on his earlier promise to 'fix' *IE-Company*'s documentation so it would be awarded the tender).

186. The Panel was satisfied that in March 2009, M.S. asked Q.M. to accompany him to a meeting with F.L. and Q.M. refused. This is shown by SMSs between M.S. and Q.M. of 19 March 2009 and confirmed in latter's testimony before the court. Text messages sent by M.S. to Q.M. on 19 March (*"[F.L.] said go to his place"*) and to F.L. on 20 March (*"It is [M.S.], I am on the way"*) also suggest (although are not conclusive) that F.L. had agreed to such a meeting.

187. However, the evidence did not establish beyond a reasonable doubt that F.L. either met with M.S. or in some other way directed him to speak to N.K. Rather, intercepted SMSs sent by M.S. to F.L. on 20 and 23 March—to which there is no recorded response from F.L.—show that M.S.'s repeated attempts in this vein were unsuccessful.

188. Indeed, the assertion that F.L., in any manner, directed M.S. to speak to N.K. finds no basis in any admissible evidence. In particular, M.S.'s allegations as reported by KACA are that F.L. advised him to complete documentation with Si-Company and M.S. went to N.K. on his own accord (*"…[F.L.] told me: - We can not complete your documentation, but, complete it again with the '[Si-Company]'. Afterwards I went to the MTT procurement manager, Mr. [N.K.], and I engaged in a conversation with him…"*) This particular alleged direction of F.L. is not mentioned in M.S.'s letter of complaint.

189. Turning to the third limb of the Prosecutor's allegation as concerns N.K., the key evidence marshalled in support of the assertion that N.K. asked M.S. for a bribe is found in the KACA information, as follows:

"Afterwards I went to the [MTPT] procurement manager, Mr. [N.K.], and I engaged in a conversation with him, during this conversation he asked from me 20% of the total amount of this tender and I told him: - I don't have money to give you. He told me: - We will put a 20% of the tender value as an advanced payment and you will give this to us (so these are the words of the manager, Mr. [N.K.], states [M.S.]). When I told him that I had no money and I did not accept what he told me, he then told me: - Go to [F.L.], he promised you and he will do it for you."

190. Finally, a number of SMSs sent by M.S. after the above is alleged to have taken place tend to suggest the contrary, that M.S. was not successful in making contact with F.L. or N.K. in March 2009. The Panel underlines that in SMSs to A.G. (23 March) and F.L. (28 March), M.S. continues to make reference to promises of the previous October/November and not, as one might reasonably expect, to very recent events. This is followed, on 30 March, by a continuation of attempts to meet with F.L.

191. For these reasons, the Panel found that the Prosecutor failed to prove beyond a reasonable doubt that in March 2009, M.S. attempted to meet F.L., who directed him to contact N.K.; N.K. asked for a bribe in the amount of 20% of the value of the tender, which would be prepaid to *IE-Company* by the MTPT; when M.S. refused these terms, N.K. sent him back to F.L. who suggested that M.S. complete the bid documentation with *Si-Company*. As for M.S.'s allegation (reported by KACA) that N.K. asked for a bribe of 20% of the value of the tender, the Panel underlined again Article 262(1) CPC and that M.S.'s allegations are untested.

192. For these reasons, the Panel found that the Prosecutor did not prove beyond a reasonable doubt his allegation that N.K. abused his official authority as MTPT Head of Procurement by asking Mehmet Shkdora for a bribe of 20% of the value of Tender 009-004-511 for the Summer and Winter Maintenance for the Regional Roads of Kosovo for Gjilan Region 2009-2010.

Deal-making with F.Z.

193. As concerns deal-making with F.Z., the Prosecutor alleged that *"[a]s [M.S.] did not agree to pay the requested bribe, [F.L.] instructed [E.S.] to negotiate a deal (bribe) with [F.Z.] of [T-Company] for his own personal benefit."*[319] Further, he claimed that F.Z. donated EUR 5,000 to the PDK in January 2009.[320] On 1 February 2009, F.Z. felt betrayed because, despite his 'investment', he was not invited to a PDK meeting at which tenders were being discussed, and complained

[319] Consolidated Indictment, p. 9.
[320] Consolidated Indictment, p. 41, para. 72; p. 42, para. 76.

to E.S.[321] According to the Prosecutor, E.S. invited F.Z. to the meeting as it was happening,[322] and then—on behalf of F.L.—reassured him *"that there were chances for [F.Z.] and [T-Company] to win MTPT contracts."*[323] The two agreed to have lunch, and *"[i]n due course in February 2009, [F.Z.] asked [E.S.] to have lunch with him."*[324] E.S. and F.Z. met on 10 March and discussed *"the issue that [T-Company] could be left out… despite the investment which [F.Z.] had made previously to the political party."*[325]

194. The disagreements between E.S. and F.L. on the one hand and F.Z. on the other were resolved in the course of March 2009.[326] It was agreed that, prior to the close of blind bidding and the opening of the bids, E.S. (on behalf of F.L.) would 'fix' or manipulate *T-Company*'s bid documentation in such a way as to make sure that company wins the tender; in return, F.Z. would pay a bribe in the amount of EUR 250,000 (*"25 with four zero"*).[327] E.S. completed his part of the arrangement on 24 March.[328] On 25 March, F.Z. submitted *T-Company*'s bid at 9:45 and, at 10:30, the bids were opened.[329] The two allegedly stayed in SMS communication between 25 and 29 March, requesting updates and reassuring each other all was on track.[330]

195. *T-Company* won the tender with its offer of EUR 1,192,844.94. The Prosecutor noted that EUR 250,000 represents 20% of the overall value of the tender—which coincides with the percentage allegedly asked by N.K. of M.S. (discussed above).[331] This money *"would be passed on directly to the [F.L.] family."*[332] The contract between F.Z. on behalf of *T-Company* and N.K. on behalf of MTPT was signed on 7 May.[333]

196. The Prosecutor further alleged that the procurement procedure contained *"critical legal violations"*.[334] Specifically: the bidding company *I-Company* should have been eliminated from this tender procedure for irresponsiveness.[335] Such elimination would have left fewer than three responsive bids and, *per* applicable provisions of the Law on Public Procurement, would have necessitated that the entire procedure be cancelled and re-run.[336] The Prosecutor's submissions were unclear as to the relevance of these alleged irregularities to the abuse of official

[321] Consolidated Indictment, p. 41, para. 72; p. 42, paras 73-75.
[322] Consolidated Indictment, p. 41, para. 74 (*"In response E.S. invited F.Z. for a talk…"*).
[323] Consolidated Indictment, p. 43, para. 77.
[324] Consolidated Indictment, p. 43, para. 78.
[325] Consolidated Indictment, p. 43, para. 81.
[326] Consolidated Indictment, p. 44, paras 82-84.
[327] Consolidated Indictment, p.9; p. 46, paras 91-92.
[328] Consolidated Indictment, p.9; pp 46-47, para. 93.
[329] Consolidated Indictment, p. 47, para. 94
[330] Consolidated Indictment, pp 47-49, paras 95-103.
[331] Consolidated Indictment, p.9; p. 47, para. 94.
[332] Consolidated Indictment, p. 9.
[333] Consolidated Indictment, p. 52, para. 112.
[334] Consolidated Indictment, pp 52-53, paras 112-113.
[335] Consolidated Indictment, pp 52-53, para. 113.
[336] Consolidated Indictment, pp 52-53, para. 113.

position alleged as against F.L. and E.S. The Panel accepted, however, that the decision to consider *I-Company* as responsive—if it could be attributed to F.L.—would provide circumstantial support for deal-making with *T-Company.* This is because (hypothetically) F.L. would receive his bribe by ensuring the procedure continued to its end with *T-Company* being awarded the tender.

197. The Panel recalled its finding, discussed in detail in Section IV.C, that the hardcopy printout of SMSs seized during the search of F.L.'s house in XXX are inadmissible in the present proceedings. Bearing that in mind, the Panel reviewed the remainder of the evidence presented by the Prosecutor in support of these allegations, and highlighted the following relevant evidence:

a. **Contemporaneous intercepted SMSs**, including:

i. Five intercepted SMSs sent from F.Z. to E.S. on 1 February 2009 read:[337]

"Are you with those from the Party? Nobody invited me, but when they need me they will immediately call me. Ask them if [T-Company] helps them at all." (14:09)

"If you do not get offended, I would not come because I am so angry with them for not inviting me." (14:14)

"Sorry guys, but I am very mad with them, last week I gave them 5000 Euro and they did not invite me at all. I will fuck their mothers." (14:17)

"Did you ask the Chief? It's OK, as you like! I wanted to buy you a lunch but we will meet some time in Pristina." (15:10)

"Ok, brother, see you in Pristina. Say hi to the Chief." (15:15)

ii. An SMS sent from F.Z. to E.S. at 16:03 on 10 March 2009 reads: *"Shall we leave it for 6?"*[338]

iii. An SMS sent from E.S. to F.L. at 20:58 on 10 March 2009 says: *"[T-Company] is saying you betrayed me".*[339]

b. An **'Audit Report of Campaign Financial Disclosure Reports of the Political Parties: Local Elections 2009'** by legal audit company *Univerzum Audit* dated November 2010, specifies that F.Z. made a donation of EUR

[337] Transcript of SMS between F.Z. and E.S. dated 01 February 2009 at 14:09, 14:14, 14:17, 15:10, 15:15: Interception Data Summary Nos 66, 67, 68, 70 and 71, Post Indictment Binder IV-A.
[338] Transcript of SMS between F.Z. and E.S. dated 10 March 2009 at 16:03: Interception Data Summary No. 75a, Post Indictment Binder IV-A.
[339] Transcript of SMS between E.S. and F.L. dated 10 March 2009 at 20:58: Interception Data Summary No. 75b, Post Indictment Binder IV-A

8,000 to PDK Branch 'Gjilan 2'.[340] The report does not specify the date on which the donation was made.

c. In the **'Provision of expert's report regarding the contract awarding procedure'**,[341] the international procurement expert Mr. K.G. concluded that award of the contract to *T-Company* was unjustified because (i) the large number (five) of bids who lacked a proper cleaning plan might lead one to suspect that *"these tenders were not meant serious"* and (ii) *"there was a heavy breach of law when the tender of the operator ['I-Company'] should have been eliminated from the contest for reasons of irresponsiveness. This would have given reason to cancel the procurement activity due to Section 30A.4 of the PP Law as less than three responsive offers were left then. A new procurement activity should have been initiated."*[342]

   K.G.'s report on this tender procedure specified that he was given *"the local expert's report from August 2011 on the above tender"* and *"this expertise is taken as a basis and will be referred to"*.[343] He further notes that his remarks *"intend to show both legal and feigned legal ways to award a public contract to a certain economic operator by…special handling of the procedure. It is not the intention of this expertize to claim the truth, though, as it is still possible that the award to a certain tender*(sic) *is the result of just undue but not necessarily criminal behaviour. This has been or will be checked by the means of prosecution."*[344]

d. **K.G.** testified as follows about this tender:[345]

   "There were 11 bidders here; 8 out of these tender bids have been excluded as unqualified for a variety of reasons. Why this happened, we couldn't really track down but the result is interesting, meaning that there were only three bidders left. Law provides that when there are fewer than 3 valid bids, usually public the procurement procedure will have to be terminated. <u>And here we found that the tender bid of the company "[I-Company]" would have needed to be excluded as well, but it was not. So normally, the proceedings would have needed to be terminated and a completely new procedure would have needed to be initiated.</u> Procurement administration would have had the

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[340] Audit Report on the reports of financial declaration of the political subject campaigns Local Elections 2009 (N.SH. Univerzum Audit) dated November 2010: Binder 36, p. 129.

[341] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, pp 293-319.

[342] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, pp 314-315.

[343] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 314, referring to 'Expertise PPS. No. 425/09, Procurement Process 'Summer and Winter maintenance of national and regional roads of Kosovo 2009/2010', MTPT 09/004/511, Binder 16, pp 20-30.

[344] 'Provision of expert's report regarding the contract awarding procedure', L.M. and K.G., Binder 16, p. 314.

[345] Minutes, 1 November 2017, p. 10.

opportunity to address national procurement Agency in order to set aside the legal question here but this has not been done as a procedure. And to conclude, this proceeding was irregular. Notwithstanding, the bidder "[T-Company]" has been awarded the contract."

The witness stated that, for the purpose of conducting his expert analysis, he was provided with voluminous, translated procurement files, including the tender dossier.[346] He confirmed that he was provided with the previous expertise and *"invited to make an expertise and complement it."*[347] K.G. could not recall the basis for his conclusion that *I-Company* should also have been excluded as irresponsive.[348]

Did F.Z. donate EUR 5,000 to PDK in January 2009?

198. The Panel examined whether each of the Prosecutor's allegations were proved beyond a reasonable doubt. The Prosecutor alleged that F.Z. complained on 1 February 2009 that he had not been invited to a PDK meeting despite a donation he made *"last week"*.[349] He sought to prove the existence of the donation itself with reference to an Audit Report on political campaign contributions made – during 2009 – for the 2009 local elections.[350] Thus, by deduction, the Prosecutor's theory was that F.Z. donated EUR 5,000 between 1 and 31 January 2009.

199. The Panel noted that the existence of a donation by F.Z. shortly preceding the alleged PDK meeting (discussed below) does not form any element of the charged offence of abuse of official position/authority by F.L. with the assistance of E.S. Nevertheless, this served to provide useful context for these allegations.

200. The Panel found that there was no indication in the Audit Report of the date any donation by F.Z. was made, nor that it was made in two or more instalments, and one of these was EUR 5,000 (as was speculated by the Prosecutor). Furthermore, the Audit Report considers donations made for the 2009 local elections. These were held in mid-November of 2009 and the remainder of the report suggests that no donations were received by any political party for these elections before August 2009, with the majority received in October 2009. The Panel therefore found that the Audit Report did not support the allegation that F.Z. donated EUR 5,000 to the PDK in the course of January 2009.

201. It is of course possible that the PDK either did not report a EUR 5,000 donation from F.Z. or that it is reported elsewhere—in particular because the Audit Report appears to only deal with political contributions made for the elections. Nevertheless, such evidence was not led by the Prosecutor. The Panel accepted, in

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[346] Minutes, 1 November 2017, pp 14-15, 38.
[347] Minutes, 1 November 2017, pp 13, 27-28.
[348] Minutes, 1 November 2017, p. 41.
[349] Consolidated Indictment, p. 42, para. 75.
[350] Consolidated Indictment, p. 42, para. 76.

any case, that F.Z. claimed to have given those from the Party EUR 5,000, as is stated in his SMS.

Did F.L. instruct E.S. to negotiate a deal with F.Z.?

202. The Prosecutor made the general allegation that *"[a]s [M.S.] did not agree to pay the requested bribe, [F.L.] instructed [E.S.] to negotiate a deal (bribe) with [F.Z.] of [T-Company] for his own personal benefit."*[351] No evidence was presented in support of this instruction. In fact, its existence seemed to the Panel to contradict the Prosecutor's theory that discussions were rather prompted by F.Z.'s complaints than by M.S.'s refusal (bearing in mind also M.S.'s countless SMSs which suggested F.L.'s refusal to negotiate with him). The Panel therefore did not consider that this was proven beyond a reasonable doubt.

Did E.S., on behalf of F.L., reassure F.Z. that T-Company would be awarded road construction tenders on 1 February 2009?

203. The Prosecutor pointed to several occasions where F.L., through E.S., was said to have negotiated with or promised F.Z. that *T-Company* would be awarded road construction tenders, and specifically Tender 009-004-511 for Gjilan region; each was considered in turn.

204. The first of these was via SMS from a PDK meeting held on 1 February 2009. The Panel considered that SMSs sent from F.Z. to E.S. on 1 February 2009 make clear that there was some sort of gathering ongoing to which he was not invited, and that this was attended by PDK members. The latter is shown by the fact that E.S. himself was in attendance; and by F.Z.'s reference to *"those from the Party"* and to a—apparently also present—*"Chief"*. Although there are no recorded SMSs from E.S. to F.Z., the SMSs from F.Z. indicate that E.S. did in fact respond.

205. There was, however, no evidence that any road construction tenders—let alone the specific tender that was the subject of this charge—were discussed at this PDK-member-attended gathering. One might suppose that F.Z. (being the owner of a company which bid for road construction tenders) might have been interested in attending such a meeting and would in turn have been upset if he was not invited. This says nothing of what was actually discussed between those at the meeting, and in any case falls very far below the threshold of proof beyond a reasonable doubt.

206. Further, there is insufficient evidence that, as was claimed by the Prosecutor, on 1 February 2009 E.S. passed on a message from F.L. reassuring F.Z. *"that there were chances for [F.Z.] and [T-Company] to win MTPT contracts."*[352] It is clear that the mood of F.Z.'s messages changes in the course of the afternoon, from *"so angry"* (14:14), *"very mad"* and threatening to *"fuck their mothers"* (14:17) to,

[351] Consolidated Indictment, p. 9.
[352] Consolidated Indictment, p. 43, para. 77.

later on, *"It's OK, as you like!"* (15:10) and *"OK brother… Say hi to the Chief"* (15:15). It can be presumed that this change was occasioned by the content of E.S.'s (undocumented) replies. However, lacking any concrete and direct evidence, the Panel did not consider that the Prosecutor proved beyond a reasonable doubt that that content was a promise of F.L., via E.S., to award *T-Company* road construction contracts, let alone this specific tender.

Did E.S. discuss road construction tenders with F.Z. over lunch on 10 March 2009?

207. The Panel accepted that E.S. met with F.Z. on 10 March 2009, on the basis of the two SMSs sent on that day. E.S. passed on to F.L. that F.Z. felt betrayed. While, again here one might speculate that F.Z.'s was concerned with road construction tenders, this is in no way explicit on the evidence and the Panel did not accept that it was the only reasonable explanation.

Did E.S. and F.Z. hash out a deal in the second half of March 2009?

208. Finally, the Prosecutor alleged that in the second half of March 2009, E.S. and F.Z. hashed out a deal in which E.S. promised to 'fix' *T-Company*'s bid documentation in a manner that would ensure it won this tender, in exchange for a bribe of EUR 250,000. The Panel noted that these allegations were based in very large part on the hardcopy of alleged SMSs seized during a search of F.L.'s house, which were found to be inadmissible.

209. The key remaining evidence put forth to sustain this claim is the expert report and live testimony of the international procurement expert K.G. This, it is alleged, proved there were violations in the procurement process for this tender: specifically, that *I-Company* should have been eliminated as irresponsive, thus resulting in fewer than three responsive bidders and necessitating that the entire process be cancelled and re-run. The (roundabout) argument being made is that the decision to consider *I-Company* as responsive when it in fact was not, if it could be attributed to F.L., would tend to suggest his personal interest in seeing the procurement process through to its end and thus the existence of a deal with *T-Company*. This evidence failed to meet the burden of proof for the following reasons.

210. First, the Panel was unpersuaded that the Prosecutor established beyond a reasonable doubt that *I-Company* should have been eliminated for irresponsiveness. K.G.'s portion of the expert report concluded that *"there was a heavy breach of law when the tender of the operator '[I-Company]' should have been eliminated for reasons of irresponsiveness."* This was echoed in K.G.'s live

testimony that *"we found that the tender bid of the company ['I-Company'] would have needed to be excluded as well, but it was not."*

211. However, the Panel was not satisfied that this conclusion is the fruit of K.G.'s personal judgment, based on the application of his professional expertise. Rather, it appears that K.G. relied on an earlier SPRK analysis for this conclusion.[353] While K.G. stated that he was provided with a lot of primary material, he also acknowledged that he was given the earlier analysis and asked to *"complement it"*. In his testimony before the court, K.G. could not recall how he arrived at the conclusion that *I-Company* should have been eliminated, whereas his report explicitly states that *"the local expert's report from August 2011…it taken as a basis."* The Panel did not hear any evidence surrounding the compilation of the earlier expertise such as it might have properly relied upon it.

212. Second, there is no evidence that F.L. (or E.S. or N.K. on his behalf) played any part in the decision to consider *I-Company* as responsive (thus paving the way for *T-Company* to be awarded the tender and the bribe to be paid). The decision to consider *I-Company* as responsive – if it should, in fact, have been eliminated – is equally explained by an oversight or incompetence of the bid evaluation committee. The Panel recalled its earlier finding that N.K. was not obliged to personally review every tender bid for every tender procedure, but was entitled to rely on the assessment and recommendation of the bid evaluation committee in signing the contract with the eventual winner (see para. 146).

213. Finally, even if the decision to consider *I-Company* responsive when it was in fact not, was one attributable to F.L. (a proposition the Panel did not accept), the absence of any other evidence meant that this would be insufficient to prove beyond a reasonable that the tender was awarded to *T-Company* in exchange for the payment of a bribe. The Panel noted, in particular, that neither L.M.'s nor K.G.'s expertise supported the proposition that *T-Company*'s bid documentation was 'fixed'. Further, although the Prosecutor posited that the EUR 250,000 bribe *"would be passed on directly to the [F.L.] family",*[354] there was no evidence of such a sum being paid to either F.L. or any member of his family.

214. For these reasons, the Panel held that the Prosecutor did not establish beyond a reasonable doubt any of the following allegations: following the collapse of negotiations with M.S., F.L. instructed E.S. to negotiate a deal (bribe) with F.Z. for the award of Tender 009-004-511 for Gjilan region; on 1 February 2009 E.S., on behalf of F.L., reassured F.Z. that there were chances for F.Z. and *T-Company* to win MTPT contracts; on 10 March 2009, E.S. and F.Z. met and discussed the issue that *T-Company* could be left out despite the latter's investment by way of donation of EUR 5,000 to PDK; in the second half of March 2009, E.S. and F.Z. hashed out a deal whereby E.S. would 'fix' *T-Company*'s bid documentation for Tender 009-

[353] 'Expertise PPS. No. 425/09: Procurement Process 'Summer and Winter maintenance of national and regional roads of Kosovo 2009/2010' MTPT 09/004/511, Gjilian Region, Binder 16, pp 20-30.
[354] Consolidated Indictment, p. 9.

004-511 for Gjilan region and F.Z. would pay a bribe of EUR 250,000 after being awarded the tender and this bribe would go to F.L. or his family.

iv. Tender 08-073-521 – Asphalting of the Road Duraj-Gabrice, Gjilan, won by B-Company

215. The Prosecutor made three distinct allegations of abuse of official position or authority in relation to the tender procedure 'Asphalting of the road Duraj-Gabrice' (08-073-521), as follows: (a) **F.L.** guided *B-Company* company associates (*"most likely [A.A.]"*) through a 'letter' written in *Mani* restaurant what amount *B-Company* was required to offer in its bid in order to be successful; (b) **S.T.** assisted F.L. *"by establishing a private communication with [A.A.] when the tender procedure commenced"*; and (c) **N.K.**, despite knowing of F.L.'s private deal-making, accepted the continuation of the tender procedure, failed to report misconduct to the authorities, and eventually signed the contract with the winning company, *B-Company*.[355]

216. The Prosecutor did not allege the involvement of **E.S.** in this tender procedure and his criminal responsibility is therefore not further considered in this section.

<u>*Did F.L. inform an associate of B-Company what offer was needed to win the tender?*</u>

217. The Prosecutor alleged, first, that F.L. himself guided an associate of *B-Company*, *"most likely A.A.",* of the amount *B-Company* needed to offer to be successful by writing it on a receipt in *Mani* restaurant.[356] Later on, the Prosecutor alleged that F.L. was *"well aware about the price-fixing for the tender procedure involving the Duraj-Gabrice Road"*[357] and had personally taken part in meetings at *Mani* restaurant where MTPT officials and company owners would discuss illegal price-fixing arrangements.[358]

218. Turning to the Prosecutor's second allegation first: the Panel noted that the Prosecutor's submissions in this regard were geared to the elements of Count 1 (Organized Crime), for which F.L. was acquitted above.[359] Further, the Panel considered that these allegations, even if proved beyond a reasonable doubt (and they were not), would be insufficient to establish the offence of abuse of official position/authority. This requires the Prosecutor to show conduct on behalf of the

[355] Consolidated Indictment, p. 10.
[356] Consolidated Indictment, p. 10.
[357] Consolidated Indictment, p. 74, para. 180.
[358] Consolidated Indictment, p. 75, para. 180 (*"…The Mani restaurant, which is located in close vicinity to the premises of both, Es-Company and B-Company, served as a general meeting point between MTPT officials and the respective company owners, where the parties would have coffee and discuss their arrangements."*); para. 181 (*"The existence of a Mani receipt in the possession of F.L. demonstrates that F.L. has personally taken part in such meetings…"*)
[359] See *supra* Section V.A.

accused that can be characterized as abuse of official position undertaken with the intent to acquire a 'material benefit' for himself or another person, cause damage to another person, or seriously violate the rights of another person.[360]

219. The Prosecutor's allegation (i.e. F.L. *"has personally taken part in such meetings"*) did not point to a specific meeting where tender 08-073-521 was discussed, F.L.'s role (or conduct) in that meeting, or his corresponding intent to acquire a benefit or cause damage. On the latter, F.L.'s knowledge of price-fixing, while necessary, would in itself be insufficient to constitute the mental element of the offence.

220. The Panel thus turned to the Prosecutor's first and more concrete allegation, that F.L. guided a *B-Company* associate, *"most likely [A.A.]",* of the amount *B-Company* needed to offer in order to be successful in this bid. The Panel considered the testimony of A.A. and B.D.; the intercepts of telephone conversations and SMSs between April and June 2008; and the experts' report of L.M. and K.G., combined with the live testimony of the latter. In the Panel's assessment, while there are some indications that *B-Company* may have received information about the projected value of the tender, the evidence did not clearly tie F.L. (or, as will be seen further below, S.T. on his behalf) as the source of such information.

221. Thus the chief remaining piece of evidence put forth in support of this allegation is an undated receipt from *Mani* restaurant found in a search of F.L.'s residence in XXX.[361] The back of this receipt several projects and their price estimates, among them 'Duraj-Gabrice – 239,000'. This is very close to the projected value of the project, set at EUR 238,802.00,[362] as well as the offers made by *S-Company* (EUR 238,758.00) and *B-Company* (254,987.83 with a 7.3% discount, bringing the offer down to EUR 236,373.71), thus suggesting according to the Prosecutor that *S-Company* and *B-Company* were aware of what they needed to bid.[363]

222. The Panel was unable to accept the Prosecutor's submissions that this demonstrated that F.L. guided an associate of *B-Company* on how much to bid to win the tender. The Prosecutor did not lead evidence going to the circumstances in which the projected values of projects were written on a *Mani* receipt, as might have corroborated what is otherwise pure speculation. It is not known to the Panel when the receipt might have been annotated (and how this corresponded to the time-line of the procurement process); whether any company associate was present when the project's value was written on the receipt (as is evident also by the Prosecutor's guess that this was *"most likely [A.A.]"*); or indeed whether it was written by F.L. or even at *Mani* restaurant. If F.L. did indeed write it, providing guidance to company associates is not the only reasonable explanation for him

[360] See *supra* Section II.A.i.
[361] See Consolidated Indictment, p. 75, paras 180-181.
[362] Procurement File, Binder 34, pp 233-234.
[363] Consolidated Indictment, p. 75, para. 181.

doing so; he might, for instance, have been considering the MTPT's infrastructure spending for that period.

223. In addition, the Panel considered that the actual bid of *B-Company* does not corroborate the assertion that it was made aware in advance, via A.A. or anyone else, of the project's forecast value. In particular, the Prosecutor also submitted that *B-Company*'s bid *"was manipulated <u>during</u> the procurement procedure."*[364] That is, according to the Prosecutor, the 7.3% discount to *B-Company*'s offer was introduced after that company submitted its bid to the MTPT (thus: by a MTPT official) and for the purpose of undercutting *S-Company's* offer precisely to the extent necessary to obtain the tender.[365] This theory of the Prosecutor would tend to suggest the opposite, i.e. that *B-Company* was <u>not</u> informed in advance of the projected value of the project—otherwise its original (pre-discount) offer would have corresponded to that value. Further, as the bids were assessed by way of an 'economically most favourable' rather than 'lowest price' criterion, this undercutting of price was not strictly necessary.

224. Finally, the Panel noted that—as in tender procedures examined previously—here again the Prosecutor did not clearly allege facts as would establish the mental element of the crime of abuse of official position/authority under Article 422 CCK.[366] This, it was recalled, required that through his conduct, the accused intended to acquire a material benefit for himself or another person, cause damage to another person, or seriously violate the rights of another person. The Prosecutor did not in any satisfactory manner explain how this element was satisfied in relation to the procedure for tender 08-073-521.

225. <u>For these reasons, the Panel held that the Prosecutor did not prove beyond a reasonable doubt that F.L. abused his official position/authority as MTPT Minister in the award of tender 08-073-521 for Asphalting of the road Duraj-Gabrice.</u>

<u>Did S.T. assist F.L. by establishing a private communication with A.A. when the tender procedure commenced?</u>

226. The Prosecutor alleged that S.T. assisted F.L. in the abuse of his official position/authority *"by establishing a private communication with [A.A.] when the tender procedure commenced"*.[367] The key evidence led by the Prosecutor in

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[364] Consolidated Indictment, p. 72, para. 172.

[365] Consolidated Indictment, p. 72, para. 173 (*"...the 7,3% figure was subsequently introduced to undercut [S-Company]'s offer precisely to the extent necessary to obtain the tender."*); p. 73, para. 175 (*"...splitting the 7.3% discount from the calculated offer was effected for manipulation purposes."*); pp 73-74, para. 176 (*"It is submitted that the discount was added at a later stage of the procurement procedure in order to manipulate the numbers to ensure that [B-Company] would be the cheapest bidder... on the offer declaration form, the original price appears to be written in a way avoiding overlap with the [B-Company] stamp. This raises the suspicion that the offer paper was initially 'blank stamped' and that the figures were inserted subsequently."*)

[366] See *supra* Section II.A.i.

[367] Consolidated Indictment, p. 10.

support of this allegation is two SMSs sent from A.A. to S.T. in the relevant time-frame. The first was sent 23 April 2008 (the day before publication of the contract notice) and reads: *"[S.T.] can we have a coffee I am in Prishtina"*.[368] The second was sent on 1 June 2008 (a week after the winner of the tender had been announced) and asks whether S.T. is in Shterpce and for a reply.[369]

227. The Panel recalled that Count 2 charged S.T. as an assistant under Article 25 PCCK.[370] The criminal responsibility of an assistant is based upon his conscious contribution to a principal's crime. Thus, it was incumbent on the Prosecutor to prove that S.T. knowingly engaged in conduct that assisted F.L. in abusing his official position and was aware of F.L.'s intent to acquire a material benefit for himself or another person or to cause material damage to another person or to seriously violate the rights of another person.

228. The Panel found that the evidence does not support the Prosecutor's allegation that S.T. established a communication with A.A. when this tender procedure commenced. There is no indication that S.T. responded to the SMS he received on 23 April or that there was any communication between S.T. and A.A. or between A.A. and F.L. thereafter (let alone that such communication concerned Tender 08-073-521 or how it might have facilitated F.L. in abusing his position as MTPT Minister).

229. In this regard, the Panel considered that the remainder of the evidence led by the Prosecutor (chiefly communications between A.A. and Z.A.[371] and A.A. and B.D.[372]) also did not provide clear indication that S.T. facilitated communication with F.L.. Finally, the Panel found the SMS received by S.T. on 1 June to be irrelevant, being sent after the winner of the tender had been announced.

230. <u>For these reasons, the Panel held that the Prosecutor did not prove beyond a reasonable doubt that S.T. assisted F.L. in abusing his official position as MTPT Minister by establishing a private communication with A.A. when the procedure for Tender 08-073-521 commenced.</u>

<u>Was N.K.'s signing the contract with B-Company unjustified?</u>

231. Finally, the Prosecutor alleged that N.K. abused the official authority vested in him as MTPT Director of Procurement by allowing the continuation of the procurement procedure (i.e. not intervening to stop it), failing to report misconduct to the authorities and eventually signing the contract with *B-Company* on behalf of the

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[368] Binder 11, p. 50; Consolidated Indictment, p. 68, para. 157.
[369] Binder 7D, pp 402-403 (*"Buddy, are you in the territory of Shtrpce please return if possible"* or *"Buddy, are you Sterpce territory reply to me if you can"*).
Consolidated Indictment, p. 71, para. 169.
[370] Consolidated Indictment, pp 6-7, 10.
[371] Consolidated Indictment, p. 68, para. 159; p. 69, paras 162-163; p. 70, paras 165-166; p. 71, paras 167-169.
[372] Consolidated Indictment, p. 69, para. 160.

MTPT. According to the Prosecutor, there were several violations of the procurement procedure for tender 08-073-521.[373] Most significant among these is manipulation of *B-Company*'s bid that is evidenced by its unexplained and unusual offer of a 7.3% discount which *"undercut [S-Company]'s offer precisely to the extent necessary to obtain the tender"*.[374] In addition, the Prosecutor points to irregularities in the record of operators having received the tender dossier;[375] the record documenting the submission of the bids;[376] and the minutes of the opening of the bids.[377] He also notes that, being a local road, it should have been in the competence of the municipality rather than MTPT.[378]

232. The Panel recalled its previous findings that it did not consider it necessary for the Prosecutor to prove beyond a reasonable doubt the underlying irregularities in the procurement procedure. Rather, it was incumbent on him to show that N.K. was aware of suspected violations such as would have triggered his responsibility to stop the process and elicit further investigation prior to signing any contract with the winning company. The testimony of **A.A.** and **B.D.** was therefore considered immaterial on this point as it went to the existence of underlying violations rather than N.K.'s knowledge thereof.

233. The Panel examined the entirety of the case file for evidence relevant to this allegation and highlighted the following:

a. The testimony of **B.R.** and **V.K.** summarized above in para. 144.

b. A MTPT "**Routing Slip**" dated 23 April 2008, addressed to and signed by N.K., projects the value of the tender at EUR 238,802.00.[379]

c. The **'Record of Economic Operator that have Received the Tender Dossier'**[380] lists four companies as having picked up the tender dossier. *S-Company* is listed as having picked it up third at 15:45 on 9 May 2008, whereas *B-Company* is listed as having picked it up fourth albeit earlier, at 15:30, on the same day. The document lacks the signature of a reception officer in the cell corresponding to reception of each company. It is signed by N.K.

d. The **'Tender Submission Record'[381]** lists three companies as having submitted their bids on 13 May 2008. These are listed chronologically and all bear an appropriate 'Tender Deliverer's Signature'. However, the submission of *B-Company* lacks the signature of a reception officer. It is signed by N.K.

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[373] Consolidated Indictment, pp 71-74, paras 170-179.
[374] Consolidated Indictment, pp 72-74, paras 172-176.
[375] Consolidated Indictment, pp 71-72, para. 171.
[376] Consolidated Indictment, p. 74, para. 177.
[377] Consolidated Indictment, p. 74, para. 178.
[378] Consolidated Indictment, p. 74, para. 179.
[379] Binder 34, pp 233-234.
[380] Binder 34, p. 220.
[381] Binder 34, p. 219.

e. The **Report of the Bid Evaluation Committee**[382] lists the offers of the three bidding companies, including that *B-Company* offered a discount of 7.3% (without specifying a reason for this).[383] All three bids are considered responsive in a preliminary assessment,[384] and the three responsive bids are listed again (and again the 7.3% discount of *B-Company* is indicated).[385] The reporting commission conducts a 'most economically favourable' assessment, in which *B-Company* is awarded 100 points, followed by *Es-Company* (96.63) and *S-Company* (87.60).[386] *B-Company* is recommended as the winner by the bid evaluation commission, and this recommendation is approved with N.K.[387]

f. The relevant **experts' report**[388] provides that L.M. examined the offers for this tender, including that of *B-Company*, and concluded that there was *"no evidence of manipulation"* or price-fixing agreements.[389] L.M. added:

"It is however noticeable that the bidder [B-Company] allowed a price reduction of 7.3%, which in the end was sufficient in order to be the bidder with the best price. On the basis of the documents, it cannot be judged to what extent the bidder [B-Company] was provided with possible early information."[390]

K.G., in his portion of the report, noted that *"[t]he correctness of the procedure can be doubted to at least some extent"*.[391] These doubts, according to K.G., stemmed from the issue of 'competences' and the need to explain why there was a change of competence to the MTPT and why the deadline for submission of bids was shortened.[392] With respect to the discount offered by *B-Company*, K.G. noted:[393]

"There might be suspicion that someone of the MTPT informed that enterprise previously. Moreover, the bid of [S-Company] also is quite near to the 'estimated value'… and opens space for suspicions…

"There is no clear evidence for manipulations with respect to the financial criteria except for one suspicion: [B-Company] was previously informed about the estimated value and discounted the bid with such knowledge. But as this enterprise would have won the race even without discount, manipulations

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[382] Binder 34, pp 201-212.
[383] Binder 34, p. 203.
[384] Binder 34, p. 205.
[385] Binder 34, p. 206.
[386] Binder 34, pp 210-211.
[387] Binder 34, p. 212.
[388] 'Providing reports on the contract awarding procedures (Ref: PROC/PEX/12')', dated 30.05.2013, stamped as received by SPRK on 10.06.2013, Binder 9, pp 1-23.
[389] Binder 9, pp 3, 10.
[390] Binder 9, p. 10.
[391] Binder 9, p. 16.
[392] Binder 9, pp 16-17.
[393] Binder 9, pp 18-19.

would have additionally to be sought in the deduction of technical points for [S-Company]. This cannot be easily extracted from the material…"

g. In relation to this procurement procedure, **K.G.** testified as follows:[394]

"…this is about a little road in a municipal or local area with a length of approximately 2 kilometres, and again in here we have not been provided with an explanation why the ministry would have been competent here and not the municipality. There is also a time issue here. For this category of small roads, as we mentioned before, there was the 40 day deadline or 24 day deadline, and in this case the deadline of 24 days applied. Law provides a number of opportunities to cut the deadline shorter for reasons of urgency or priority. So this actually means that for small roads the deadline can be shortened to a minimum of 10 days and the ministry relied on this option of cutting the deadlines without providing any reason. The result was actually that we were left with only 3 tender bids. First of all, we don't know why the value of this contract has not been described, so whether this was actually a higher value tender or not, but in case when there were only three bidders frequently it is the case that only companies that are well prepared and know of such an invitation to issue a tender will be published will know about this. In here there is a very interesting detail regarding the tender offer as such. There were offers by companies "[Es-Company]", "[B-Company]" and "[S-Company]". "[Es-Company]" placed a bid in the value of 258.000 Euro, "[B-Company]" roughly 255.000 Euro and "[S-Company]" round about 239.000 Euro. So normally "[S-Company]" would have been looked at as having submitted the lowest bid and here it is interesting that [B-Company] has offered a discount in the value of 7.3% and eventually was with round with about 236.000 Euro as the lowest bidder. If we cast a second look on the awarding of points of different bidders, and here again "[B-Company]" has received the highest awards with 100 points. Concluding, we found <u>indications but no proof for manipulations</u>, we as being procurement specialists, <u>except one suspicion that "[B-Company]" had known beforehand about what values it should offer and which discount it should offer</u>.

Concluding, there remained two hard points from our perspective: firstly, the competence of the ministry for this small road; and secondly the question of the explanation of why this short deadline of 10 days has been used as an option. This way of offering a discount of 7.3 %, <u>we as procurement experts we know when things are done under the table, that means when there are illicit context between the parties in question, but of course I cannot state this</u>.

As I already have stated, from our point of view there is no clear proof according to the files, but it is of course striking that the offer of "[B-Company]" after the discount is just a little bit lower than the bid of "[S-

[394] Minutes, 1 November 2017, pp 10-11.

Company]" which makes the difference less than 2000 Euro. That may be taken as an indication that there was an illegal contact between the bidder and the ministry."

234. The Panel considered N.K.'s knowledge of each of the irregularities in the procurement procedure alleged by the Prosecutor. While it noted that N.K.'s signature appears on both the record for received tender dossiers and the tender submission records, and thus that he was aware of the contents of both documents, the Panel was unpersuaded that these were of a nature or seriousness as to clearly indicate the need for further investigation.

235. Similarly, N.K. was made aware of the 7.3% discount offered by *B-Company,* and that this resulted in *B-Company* offering the lowest price, by the report of the bid evaluation committee. However, as noted by K.G., *B-Company* would have won on the tender regardless of the discount on the basis of the points awarded by the bid evaluation committee for other criteria in the conduct of its 'most economically favourable' assessment. In this regard, the Panel recalled its previous finding that N.K. was entitled to rely on this assessment and was not, conversely, required to look 'through' it and himself examine the individual bids and re-evaluate the points awarded by the committee.

236. Further, the Prosecutor has not alleged facts that would establish that N.K. allowed the procedure to continue, failed to elicit further investigation, or signed the contract with *B-Company* with the requisite intent to obtain a material benefit, cause damage to another person, or seriously violate the rights of another person (Article 422 CCK). This is a necessary element of the offence.

237. For these reasons, the Panel held that the Prosecutor did not prove beyond a reasonable doubt that N.K. abused his official authority as MTPT Director of Procurement by signing on behalf of the MTPT the contract for tender 08-073-521 for 'Asphalting of the road Duraj-Gabrice' with *B-Company.*

C. Accepting Bribes (Count 3)

238. The Prosecutor charged **F.L.**, **N.K.** and **E.S.** with the offence of accepting bribes (Count 3) and, inversely, F.Z. with giving (the same) bribes (Count 4). The Prosecutor did not allege the involvement of **S.T.** in accepting bribes, and his responsibility is not further considered. The Panel recalled that **Count 4** against F.Z. was rejected as absolutely time barred (See Section III.B).

239. Before turning to the substance of the Prosecutor's allegations, the Panel saw fit to remark on the Prosecutor's charging in Count 3. The Consolidated Indictment charged the accused with the offence of Accepting Bribes in violation of Article 343(2) PCCK, punishable by imprisonment of six months to five years.[395] This is erroneous. The criminal offence of Accepting Bribes in violation of Article 343(2)

[395] Consolidated Indictment, p. 10.

PCCK is punishable by imprisonment of three months to three years (not five years). The criminal offence of Accepting Bribes in violation of Article 343(1) PCCK is punishable by imprisonment of six months to five years. The Consolidated Indictment therefore mismatches the articles and their associated punishments.

240. The mismatch necessitated the Panel determining which criminal offence is charged by Count 3 of the Consolidated Indictment. The Panel first noted the periods of statutory limitation which apply to both criminal offences. As previously discussed, the absolute bar on criminal prosecution is calculated from the date of the commission of the offence to the date of expiration of double the relevant period of statutory limitation.[396] Were the Panel to accept that the Prosecutor charged the accused under Article 343(2), it would follow that the absolute bar is six years from the commission of the offence. As the offence is alleged to have been committed in March 2009, its absolute bar would have expired in March 2015, and Article 363(1)(1.3) CPC would have demanded that this count be rejected as absolutely time barred.

241. The Panel, however, accepted that the Prosecutor meant to charge the accused with the offence of accepting bribes under Article 343(1) PCCK (which is punishable by a maximum five years' imprisonment) for the following reasons. It recalled that Article 343(1) criminalizes accepting bribes in order to act in violation of official duties, whereas Article 343(2) concerns an official who accepts a bribe for acting in accordance with official duties.[397] The substance of the allegations levelled against the accused under this count is that they accepted promises of bribes in exchange for awarding a road construction tender to *T-Company.* It is therefore obvious that the Prosecutor's allegation is that they acted in violation of their official duties within MTPT. The substance of the allegation therefore reflects Accepting Bribes in the form foreseen in Article 343(1) PCCK. The Panel was therefore satisfied that the reference to Article 343(2) rather than Article 343(1) was a typographical error, and that Article 343(1) is in fact charged.

242. Finally, all of the conduct charged under this counts concerns deal-making with respect to the award of **Tender 009-004-511, Summer and Winter Maintenance for the Regional Roads of Kosovo 2009-2010, Gjilan Region**. The factual allegations underpinning these charges were discussed in detail by the Panel in relation to Count 2 (Section IV.A.iii) and these findings are referenced again here.

Deal-making with M.S.

243. The Prosecutor alleged that F.L. showed up to a meeting between M.S. and MTPT Deputy Minister A.G. and told M.S. *"Do not speak, and the summer maintenance*

[396] This is discussed in detail in Section III.A.
[397] See *supra* Section II.A.i.

tender for the roads for 2009 is yours", and promised to 'fix' his tender documentation.[398]

244. The Panel was satisfied that this allegation, if proven, would fall within the scope of Article 343(1) PCCK, as it would amount to F.L. (a) soliciting the promise of a benefit for himself or another person (being M.S.'s silence about previous MTPT corruption), (b) in exchange for the performance of an act he should not perform (i.e. interference in the award of MTPT contracts).

245. However, the Panel recalled that, following an extensive review of the evidence, it found that the Prosecutor had not proved beyond a reasonable doubt that F.L. made the alleged promises (See Section IV.A.iii, 'Deal-making with M.S.').

Deal-making with F.Z.

246. The Prosecutor alleged that in the second half of March 2009 E.S., acting on behalf of (i.e. assisting) F.L., negotiated a deal with F.Z. Specifically, the two agreed that prior to the close of blind bidding and the opening of the bids, E.S. would 'fix' or manipulate *T-Company*'s bid documentation in such a way as to make sure that company wins the tender; in return, F.Z. would pay a bribe in the amount of EUR 250,000 (*"25 with four zero"*).[399] The bribe money *"would be passed on directly to the Limaj family."*[400] E.S. completed his part of the arrangement on 24 March.[401]

247. The Panel accepted that the Prosecutor's allegations, if proven, would establish the offence of "accepting bribes" *per* Article 343(1) PCCK. In particular, the Panel agreed with the Prosecutor[402] that it was unnecessary to show either that a bribe was actually paid, or that F.L. in fact performed an act he should not perform. Rather, the promise/agreement would suffice.

248. However, following in-depth review of the admissible evidence, the Panel found that none of the Prosecutor's allegations of deal-making with F.Z. in the course of February and March 2009 were proven beyond a reasonable doubt. This was discussed in Section IV.A.iii, specifically under the heading 'Deal-making with F.Z.'.

249. For these reasons, the Panel found that the Prosecutor failed to prove beyond a reasonable doubt that F.L., N.K. or E.S. committed the offence of 'accepting bribes' in the award of Tender 009-004-511, Summer and Winter Maintenance for the Regional Roads of Kosovo 2009-2010, Gjilan Region as charged in Count 3 of the Consolidated Indictment.

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[398] Consolidated Indictment, p. 11; p. 41, para. 71.
[399] Consolidated Indictment, pp 11-12; p. 46, paras 91-92.
[400] Consolidated Indictment, p. 9.
[401] Consolidated Indictment, pp 9, 11; pp 46-47, para. 93.
[402] See Consolidated Indictment, p. 10 (*"...accepted promises of bribes in exchange for..."*)

D. Misuse of Economic Authorizations (Count 5)

i. Tender 08-049-511 – Construction of the road Ponesh-Zhegovc, Gjilan, won by T-Company

250. The Prosecutor alleged that between 21 March and 17 April 2008 F.Z., as owner of *T-Company,* entered into and tolerated a price-fixing agreement with his brother N.Z. (owner of *ZC-Company*). In particular, he submits that the similarity of the companies' respective agreements with *KA-Company,* and the fact that *T-Company*'s agreement is signed whereas that of *ZC-Company* is not, demonstrate that F.Z. arranged the agreements for both companies.[403] Further, according to the Prosecutor, the offers of *T-Company* and *ZC-Company* have identical prices in all positions, with the slight different in final offers being the result of *"minor variations which were included to conceal a price-fixing arrangement."*[404] As F.Z. did not openly declare that *T-Company* and *ZC-Company* were interlinked (i.e. either that they were bidding in consortium or that one would sub-contract execution of the contract to the other if awarded), this, the Prosecutor contended, constituted a breach of Section 66.2 of the Law on Public Procurement, and consequently a misuse of the economic authorizations F.Z. held for *T-Company*.[405]

251. The Panel was satisfied that F.Z., as owner of *T-Company*, was a 'responsible person' in the sense of Article 107(2) PCCK at the relevant time. In addition, the Panel agreed that a secret price-fixing agreement (should this be established on the evidence) would constitute a violation of the Law on Public Procurement and, consequently, also the material element of the crime of 'misuse of economic authorizations' under the charged Article 263(1)(5) PCCK. This would, however, be more appropriately considered a breach of Article 117.1(c) of the Law of Public Procurement, rather than Article 66.2 of that Law as submitted by the Prosecutor. Article 117.1(c) explicitly prohibited entering into any agreement which *"has the purpose or effect of preventing restricting or distorting competition for any public contract."* Article 117.2, in turn, exempted agreements within the scope of Article 66.2 from the application of Article 117.1(c).

252. The Panel reviewed the entirety of the case file for relevant evidence and emphasized the following:

    a. The **agreements on the furnishing of asphalt** entered into by *T-Company*[406] and *ZC-Company*,[407] bear the same date (15.04.2008), as well as the same layout (being the letterhead of *KA-Company*) and wording (*"It is hereby obliged NTSH [KA-Company] to supply all types of asphalt and necessary machinery required under the agreement between NTSH [KA-Company] and* [company]. *This agreement has to do with your request for agreement with the*

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[403] Consolidated Indictment, p. 30, paras 45-46.
[404] Consolidated Indictment, p. 31, para. 49.
[405] Consolidated Indictment, pp 12-13; p. 31, para. 49.
[406] 'Agreement', Binder 48B, p. 387.
[407] 'Agreement', Binder 48T, p. 191.

asphalt producer and shall apply throughout the territory of Kosovo and during the ongoing year 2008.”).[408] The agreement between *T-Company* and *KA-Company* is signed by F.Z. and stamped with a *T-Company* stamp. The agreement between *ZC-Company* and *KA-Company* is stamped with the *ZC-Company* stamp but is not signed.

b. The **offers of *T-Company*[409] and *ZC-Company*[410]** have identical prices in all positions, with the final disparity in prices (EUR 576,345.00 and EUR 579,499.26) seemingly the result of arithmetical errors in calculating item quantities.

c. The international procurement expert **Mr. L.M.**, in his portion of the ‘Provision of expert’s report regarding the contract awarding procedure’, states:

   “It was…established in this tender that the two tenderers have identical prices in all positions. It concerns the tenderer [T-Company] Sh.p.k. and competitor Company [ZC-Company] L.L.C. It is particularly conspicuous that the family names of the trading persons are identical.”[411]

   Having compared their respective offers by way of a table, L.M. notes: *“suspicion of price agreement”*.[412]

d. **K.G.**, international procurement expert and co-author of the abovementioned (b) report,[413] testified that it was L.M. who looked into the issue of price-fixing.[414] K.G. was therefore not in a position to comment on this analysis in substance.[415]

253. The Panel was not satisfied that the Prosecutor proved beyond a reasonable doubt his underlying allegation that there was a secret price-fixing agreement between *T-Company* and *ZC-Company,* for the following reasons. First, the Panel accepted the Prosecutor’s submission that F.Z. concluded the agreements of both *T-Company* and *ZC-Company* with *KA-Company,* but was unpersuaded that this logically entailed that he also compiled the tender bids of both companies. The Panel noted in this regard that both agreements (similarly to the agreement between *PI-Company* and *KA-Company*) are a formality, indicating a willingness to provide asphalt in 2008, and do not specify the terms on which this would actually be

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[408] While the Panel noted that the two English translations of this term differed slightly, it accepted that the originals were the same.
[409] Bill of Quantities, Binder 48N, pp. 278-279.
[410] Bill of Quantities, Binder 48T, pp 273-275.
[411] Provision of expert’s report regarding the contract awarding procedure dated 1 June 2012, Binder 16, p. 297.
[412] Provision of expert’s report regarding the contract awarding procedure dated 1 June 2012, Binder 16, p. 298.
[413] Minutes, 1 November 2017, p. 4.
[414] Minutes, 1 November 2017, pp 4, 30; See also, pp 6, 9-10, 12, 33.
[415] Minutes, 1 November 2017, pp 33-34.

provided. They thus do not speak to the calculations of relevant items of the companies' offers.

254. Second, L.M.'s report indicates a *"suspicion"* of price-fixing. The Panel was unable to hear his live testimony and could not clarify his level of certainty on this point. As the evidence stands, the Panel does not consider that a suspicion on its face reaches the threshold of proof beyond a reasonable doubt.

255. Finally, and most importantly, the Panel heard no evidence going to the circumstances of the compilation of *T-Company*'s bid or the conduct or mental state of F.Z. therein. Even if the Panel were to accept (and it did not) that the similarity of the bids was conclusive of collaboration between the two companies, there is insufficient evidence that this can be attributed to the conduct of F.Z. or that he was aware of it—factors essential for any attribution of criminal responsibility. Indeed, an alternative explanation is that the information was passed between employees of the companies without F.Z.'s knowledge.

256. For these reasons, the Panel found that the Prosecutor did not prove beyond a reasonable doubt that F.Z. abused the economic authorizations he held for *T-Company* by conducting or tolerating a price-fixing agreement with *ZC-Company* in bidding for tender 08-049-511 for the Construction of the road Ponesh-Zhegovc in Gjilan.

ii. Tender 08-006-511 – Summer Maintenance for the Regional Roads of Kosovo 2008, Gjilan Region, won by Magjistrala

257. In respect of this tender procedure, the Prosecutor alleged that between 11 February and 24 April 2008 **F.Z.**, as owner of *T-Company*, entered into, and tolerated, a price-fixing arrangement with a representative of *E-Company,* and tried to conceal this by including minor variations between the two tender bids.[416] The Prosecutor identified first I.S.,[417] and later Y.S.,[418] as the owner of *E-Company*; he did not, however, specify with whom F.Z. is to have conspired to share prices. As F.Z. did not openly declare that *T-Company* and *E-Company* were interlinked (i.e. either that they were bidding in consortium or that one would sub-contract execution of the contract to the other), this, the Prosecutor contended, constituted a breach of Section 66.2 of the Law on Public Procurement, and consequently a misuse of the economic authorizations F.Z. held for *T-Company.*[419]

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[416] Consolidated Indictment, p. 8 (*"...F.Z. of [T-Company] entered into a price fixing arrangement with [E-Company]... F.Z. concealed the price arrangement and manipulated prices with [E-Company] secretly."*); p. 13 (*"F.Z.…violated the rules of business activity by conducting, and tolerating a price fixing agreement with [E-Company]…"*); p. 40 (*"The slight difference in the price results from minor variations which were included to conceal the price fixing arrangement.")*
[417] Consolidated Indictment, p. 13.
[418] Consolidated Indictment, p. 39.
[419] Consolidated Indictment, pp 8, 13, 39-40.

258. The Panel was not satisfied that the Prosecutor proved beyond a reasonable doubt his underlying claim that there existed a price-fixing arrangement between *T-Company* and *E-Company*. The Panel emphasized following evidence led in support of this allegation:

a. The **offers of *T-Company* and *E-Company*** have identical prices in 54 of 56 positions;[420] they are consequently very close in value, with *T-Company* making an offer of EUR 799,488.63 for the tender, and *E-Company* EUR 801,386.15;[421]

b. Having examined the offers for this tender, the international procurement expert, **L.M.**, stated in his portion of the expert report:

> *"The tenderer [T-Company] and the tenderer [E-Company] have identical prices in all positions. It is to be assumed from this that a price agreement was made between the abovementioned tenderers."*[422]

He further notes: *"Identical prices for [T-Company] Sh.p.k and [E-Company]; suspicion of price agreement."*[423]

c. **K.G.**, international procurement expert and co-author of the abovementioned (b) report,[424] testified that it was L.M. who looked into the issue of price-fixing.[425] K.G. was therefore not in a position to comment on this analysis in substance.[426]

d. **Y.S.**, director and owner of *E-Company,*[427] accepted that the Bill of Quantities submitted by *E-Company* as part of its tender documentation[428] was identical to that of *T-Company* in relation to 54 of a total of 56 items.[429] He was *"surprised",*[430] describing this as *"a bit unusual"*.[431] Y.S. explained the process of pricing for a road maintenance tender as follows: technical staff (engineers, economists) employed by *E-Company* determined the prices of the various items with reference to the market value of the requisite materials

[420] Consolidated Indictment, para. 66; (*T-Company*) Bill of quantities, 2008: Binder 47V, pp 307-328 (ALB), Binder 47H, pp 309-330 (ENG); (*E-Company*) Bill of quantities, 2008: Binder 47M, pp 101-125 (ALB).
[421] Consolidated Indictment, para. 65; Minutes of tender opening dated 29 February 2008: Binder 47D, pp 297-310 (ENG), Binder 47B, pp 302-315 (ALB).
[422] Provision of expert's report regarding the contract awarding procedure dated 1 June 2012, Binder 16, p. 323 (ENG).
[423] Provision of expert's report regarding the contract awarding procedure dated 1 June 2012, Binder 16, p. 324 (ENG).
[424] Minutes, 1 November 2017, p. 4.
[425] Minutes, 1 November 2017, pp 4, 30; See also, pp 6, 9-10, 12, 33.
[426] Minutes, 1 November 2017, pp 33-34.
[427] Minutes, 26 September 2017, p. 3.
[428] Minutes, 26 September 2017, p. 8.
[429] Minutes, 26 September 2017, pp 11-14.
[430] Minutes, 26 September 2017, p. 16.
[431] Minutes, 26 September 2017, p. 15.

(fuel, asphalt, etc.), while he specified a desired percentage of profit for the company which was subsequently added to those calculations.[432]

Y.S. denied that he had any communication with *T-Company* about the prices. He testified that his company at one time cooperated with *T-Company* on a road construction project. That cooperation had, however, ended with financial disagreements which precluded any discussion or cooperation between himself and F.Z. as at the time of the 2008 bidding for Tender 08-006-511.[433] He stated that he had not seen F.Z. for the 10 years preceding his testimony.[434] He did not know whether anyone else from *E-Company* communicated with *T-Company* about the prices.[435] Finally, the witness proposed that the two companies might have arrived at identical prices by applying the same formulas and profit margin.[436]

e. **S.P.**, who was a menial worker for *M-Company* in 2008,[437] including on road construction projects,[438] testified that he was not familiar with the work of Se.P. (his paternal uncle and owner of *M-Company*) in that company, nor whether the company ever bid for road construction tenders, and did not remember whether he worked on road construction in Gjilan.[439]

259. The Panel was unpersuaded that the evidence, taken as a whole, reached the threshold of proof beyond a reasonable doubt. While L.M. initially *"assumed"* the existence of a price-fixing agreement, he also described this as a *"suspicion"*. As the Panel was unable to hear his live testimony,[440] it could not clarify his level of certainty on this point, i.e. as to the likelihood, based on his professional experience, that two companies might arrive at nearly identical bids by coincidence. While Y.S.'s supposition that the companies might have applied the same formulas and margin of profit to arrive at identical offers is also doubted by the Panel, nor does his testimony go to proving the opposite—namely, that the similarity was *not* coincidental.

260. More importantly, the Prosecutor presented no evidence going to the circumstances of the compilation of *T-Company*'s bid or the conduct or mental state of F.Z. (who

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[432] Minutes, 26 September 2017, pp 9-10.
[433] Minutes, 26 September 2017, pp 5-6, 15-16.
[434] Minutes, 26 September 2017, p. 15.
[435] Minutes, 26 September 2017, pp 14-15.
[436] Minutes, 26 September 2017, pp 14-16 (*"...we had used the same formula, the same percentage and the price comes up the same. The fuel has the same price, the asphalt has the same price, so the things that we use in order to come to that product, the prices are the same and the same price will come up. If you do this mathematically you will come up with the same price, but if you use a different method, like most of companies*[sic] *apply, then you will come up with a ridiculous price."*
[437] Minutes, 29 September 2017, pp 3-4.
[438] Minutes, 29 September 2017, p. 5.
[439] Minutes, 29 September 2017, pp 4-5.
[440] The Panel recalled that, out of concern for L.M.' advanced age and inability to travel, the parties consented to have his expert report regarded as read: see Minutes, 7 November 2017, pp 19-20; 4 October 2017, pp 10-11.

stands accused of a crime) therein. Even if the Panel accepted (which it did not) that the bids are conclusive of collaboration between the two companies, there is no evidence that this can be attributed to conduct of F.Z. and not to any of his employees tasked with compiling *T-Company*'s bid. In this regard, Y.S.'s testimony suggested that technical staff, rather than the owner, may have compiled the bids. Indeed, an alternative plausible explanation is that a *E-Company* employee leaked the prices to *T-Company* without F.Z.'s involvement or knowledge.

261. For these reasons, the Panel found that the Prosecutor did not prove beyond a reasonable doubt that the accused F.Z. misused the economic authorizations he held for *T-Company* by entering into a secret price-fixing agreement in compiling the bid for tender 08-006-511 for Gjilan region.

iii. Tender 009-004-511 – Summer and Winter Maintenance for the Regional Roads of Kosovo 2009-2010, Gjilan Region, won by T-Company

262. The Prosecutor alleged that in March 2009 F.Z., as owner of *T-Company*, violated the rules of business activity by (a) promising a bribe in the amount of EUR 250,000 to E.S. in order to win Tender 009-004-511 for Gjilan Region; (b) negotiating with E.S. the manipulation of *T-Company*'s bid documentation for the same tender; and (c) privately communicating with E.S., a MTPT official, in the period between the placing of *T-Company*'s bid on 25 March 2009 and the awarding of the contract, notified to *T-Company* on 31 March 2009.[441] All of these violations constituted, according to the Prosecutor, misuse of the economic authorizations that F.Z. held for *T-Company*.

263. The Panel recalled its previous findings, discussed in detail in Section V.A.iv (under the headings *'Deal-making with F.Z.'* and *'Did E.S. and F.Z. hash out a deal in the second half of March 2009?'*). In particular, the Prosecutor did not prove beyond a reasonable doubt that F.Z. promised a bribe in the amount of EUR 250,000 for award of Tender 009-004-511 for Gjilan Region; negotiated with E.S. the 'fixing' of *T-Company*'s bid documentation for said tender; or, indeed, that there was any communication between the two during the relevant time period (which was also based entirely on the inadmissible hardcopy of alleged SMSs seized during a search of F.L.'s house in XXX).

264. For these reasons, the Panel was not satisfied that F.Z. misused economic authorizations he held for *T-Company* in March 2009 in the course of the tender procedure for 009-004-511, Summer and Winter Maintenance for the Regional Roads of Kosovo 2009-2010 for Gjilan Region.

E. Non-Declaration of Received Campaign Contributions (Count 6)

[441] Consolidated Indictment, p. 13; p.43, para 81; pp 46-49, paras 91-103; p. 50, para. 108.

265. In Count 6 of the Consolidated Indictment, the Prosecutor charged the accused **F.L.** with two separate offences in violation of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. The first was that of accepting a political contribution in excess of EUR 1,000 from a single source in a single day in violation of Section 5.1 in conjunction with Section 10.8 of the UNMIK Regulation. The Panel found that this offence had not been repealed nor a more lenient offence introduced by the subsequent Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing.[442] However, it concluded that the absolute bar on prosecution for this offence expired in 2013 and therefore rejected this charge.[443]

266. Count 6, however, also charged F.L. with another offence under the UNMIK Regulation: that of making false statements or omitting to disclose information in a political candidate's registration with the Central Election Commission, in violation of Section 5.6 in conjunction with Section 10.5(a) of the UNMIK Regulation.[444] The Panel earlier found that this offence was neither repealed nor a more lenient provision subsequently enacted.[445] Further, it considered that this charge remained intact as the absolute bar on prosecution had not yet expired at the time of delivery of the judgment in this case.[446] Put simply: while F.L. could no longer be prosecuted for accepting a political contribution, he could still be liable for failing to declare this to the Central Election Commission.

267. The Prosecutor alleged that on 18 October 2007 an I.M. transferred EUR 5,000 to F.L.'s private bank account in Kosovo as contribution for his election campaign to become mayor of Pristina in 2007.[447] In omitting to disclose this EUR 5,000 as a political contribution to the Central Election Commission in his political candidate's registration, F.L. fell foul of Sections 5.6 and 10.5(a) of the UNMIK Regulation.[448]

268. The Panel examined the case file for evidence relevant to this allegation and highlighted the following:

   a. A **statement of a Pro-Credit bank account** belonging to F.L. shows the receipt of EUR 5,000 from a German company, *Bibo GmbH,* on 22 October 2007. The reason for the transfer is specified as *"for campaigns"*.[449]

   b. A **printout of the website of *Bibo GmbH*** lists I.M. as the company's Managing Director.[450]

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[442] See *supra* Section II.A.i (paras 59-61, 63).
[443] See *supra* Section III.A and C (paras 71-74 and 78-80).
[444] Consolidated Indictment, p. 14.
[445] See *supra* Section II.A.i (paras 62, 64).
[446] See *supra* Section III.A and C.
[447] Consolidated Indictment, p. 14; p. 79, paras 190-192.
[448] Consolidated Indictment, p. 14; p. 79, paras 190-192.
[449] Binder 6, pp 118-119.
[450] Binder 6, p. 117.

c. F.L.'s **'Form on Declaration of Property Status of Senior Public Officials'** completed for KACA as MTPT Minister and dated 31 March 2008,[451] outlines the accused's family composition; moveable and immovable property; shares; cash held at financial institutions (this is left blank); financial liabilities; annual income, etc.[452] The form itself notes that *"Senior Public Officials are obliged to declare their existing property to the Agency, until 31 March of each year"* pursuant to Article 3 of the Law on Declaration, Origin and Control of Property and Gifts.[453]

269. In his submissions, the Prosecutor also relied on a **witness statement of I.M.**.[454] The Panel found it was unable to rely on this witness statement as direct evidence in the main trial. I.M. was interviewed without the presence of any defendants or defence counsel and, as he was not called by the Prosecutor to provide *viva voce* testimony, the defence has not been afforded any later opportunity to test his evidence. In keeping with the Panel's earlier discussion on this point,[455] it is therefore impossible to qualify I.M.'s statement as the equivalent of 'pre-trial testimony' under the new CPC provisions; it must instead be considered a 'pre-trial interview' the use of which is limited to cross-examination of the witness.

270. The Panel accepted that I.M., through his company *Bibo GmbH,* donated EUR 5,000 to F.L. for his political campaign in October 2007. This is evident on the Pro-Credit bank account statement evidencing receipt of this money, as well as the printout of that company's website, which indicates I.M. as its Managing Director.

271. However, the Prosecutor did not prove beyond a reasonable doubt that F.L. failed to disclose this political contribution in his candidate registration filed with the Central Election Commission. F.L.'s candidate registration filed with the Central Election Commission did not form part of the case file. F.L.'s KACA form, relied upon by the Prosecutor to establishing this failure to declare, did not require him to declare political campaign contributions as obliged by the UNMIK Regulation. Rather, it required him to declare his assets and liabilities pursuant to the Law on Declaration, Origin and Control of Property and Gifts. The Panel did not accept that a political campaign contribution would have appeared as such on the KACA form, and therefore that the material element of this offence was proven.

272. Further, the Panel recalled that the mental element of this offence requires that the omission was made 'wilfully'. A wilful act was understood by the Panel to be an act performed not only intentionally but also deliberately, and which is not performed unintentionally, carelessly or accidentally.[456] The Prosecutor brought no evidence going to F.L.'s state of mind in making the declaration as might establish

[451] Binder 21B, p. 245.
[452] Binder 21B, pp 247-255.
[453] Binder 21B, p. 247.
[454] Consolidated Indictment, p. 79, para. 190, citing I.M.'s witness statement dated 29 May 2012. Binder 14B, pp 174-179.
[455] See *supra* Section IV.B.i in relation to the statement of M.S. to EULEX Police.
[456] See Section III.A.i (paras 59-64).

such wilfulness, and there was no other evidence as might have enable the Panel to infer this.

273. For these reasons, the Panel held that the Prosecutor failed to prove beyond a reasonable doubt that F.L. committed the offence of omitting to disclose a material information in his candidate registration filed with the Central Election Commission in violation of Section 5.6 in conjunction with Section 10.5(a) of the UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, by not disclosing a campaign contribution in the amount of EUR 5,000 received from an I.M. in 2007.

VI. REJECTED MOTIONS OF THE PARTIES

274. The Panel rejected the motion of defence counsels that the Consolidated Indictment is belated as it is a new, rather than an amended, indictment. The Panel decided that the consolidated indictment is not a new indictment as there are no new charges or new Counts and, further, the Prosecutor was obligated to present a Consolidated Indictment to the Court and to the defence by the Court of Appeals Ruling of 23 December 2014. Therefore the consolidated indictment dated 28 September 2015 is the operative indictment in this case.[457]

275. A number of defence motions were filed concerning disclosure of material by the Prosecution. F.L. and his counsel Tahir Rrecaj, in a motion dated 3 November 2015, requested that the Prosecution provide transcripts of intercepted telephone conversations. Two items were requested in a motion dated 5 November 2015 filed by E.S. and his defence counsel Arianit Koci: the alleged SMS communications seized during the search of F.L.'s house on 28 April 2008 and a letter sent to the Kosovo Police and to the EULEX Police. Bajram Tmava, on behalf of N.K., filed a motion dated 5 November 2015 which made no request for the disclosure of specific material but reserved his rights in accordance with Article 348 CPC regarding supplementing the evidentiary proceedings. The Panel decided that the Prosecution had disclosed all of the documents in its possession to defence counsels for each defendant.[458]

276. In response to a motion filed by defence counsel, the Panel decided that there is no obligation imposed by Articles 244 and 213 CPC, or by practice, on the Prosecution to disclose material in physical form. Articles 244 and 213 only stipulate a copy of material, and not that it must be in hard copy (on paper). Therefore, in rejecting the motion, the Panel concluded that the Prosecution had sufficiently discharged its disclosure obligation by providing the material on CD.[459]

[457] Minutes, 30 October 2015, p. 19.
[458] Minutes, 3 December 2015, p. 5.
[459] Minutes, 16 December 2015, p. 9.

277. Further, in response to the motion filed by Bajram Tmava, the Panel found that the request was vague such that it could not be discerned exactly what evidence he was planning to submit and the witnesses he wished to call to give evidence. The Trial Panel rejected the motion and advised that it should be re-submitted with more detail.[460]

278. The Panel also refused a motion filed by defence counsel Karim A. Khan regarding the admissibility of the statement of M.S. The Panel stated that it will follow the decision rendered by the Court of Appeals on 10 December 2013 that M.S.'s statement is inadmissible.[461] The issue arose again on 15 February 2017 when the Panel reiterated that certain evidence has been declared inadmissible by the decisions of the Court of Appeals, and the Consolidated Indictment is in accordance with the Court of Appeals decisions regarding Section E. Therefore, the Panel barred the Prosecution from presenting or referring to any of that inadmissible evidence. In response to a motion of E.S., the Panel held that the Prosecutor does not need to change anything in the Consolidated Indictment as it is for the Panel to assess if the facts are proven or not. The indictment is a Prosecution document, the whole of which is an allegation for the Prosecution to prove; it is clear to all parties what evidence is admitted and what evidence is not admitted; therefore there is no need for the Prosecutor to change the wording in the indictment regarding the 'communications'.[462]

279. A motion was filed by the defence regarding the Orders of 6 February 2008 and 9 April 2008 authorizing covert measures. This was denied as the Court of Appeals has already decided the issue in its Ruling of 23 December 2014.[463]

280. The Panel rejected the motion filed by defence counsel Blerim Prestreshi on behalf of F.Z., which submitted that the statutory limitation had been reached for Count 4 of the indictment. The Panel decided that this will form part of the Judgment, and it has been fully addressed in Section III.A and B of this Judgment. The motion also raised issues of the admissibility of the evidence and the charges; the Panel decided that the indictment should be read and the defendants' pleas taken without delay.[464]

281. Tahir Rrecaj queried the legal basis for the panel's composition in majority of EULEX Judges rather than majority local Judges. The Panel confirmed that EULEX Judges were assigned to the case before 15 April 2014, and therefore that it was an 'ongoing case' within the meaning of Article 1A of the Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo, which entered into force

[460] Minutes, 16 December 2015, p. 12.
[461] Minutes, 13 September 2016, p. 13.
[462] Minutes, 15 February 2017, pp 22-23.
[463] Minutes, 18 July 2017, pp 2-5.
[464] Minutes, 3 December 2015, p. 11.

on the 30 May 2014. The Panel was therefore properly constituted in accordance with law.[465]

282. On 13 September 2016, the Prosecutor motioned that Florent Latifaj be excused as defence counsel for N.K. due to a conflict of interest. The Prosecutor submitted that it had been evident from the beginning of the case that the Prosecution intended to call A.G. as a witness. A.G. is represented by Mr. Latifaj in other matters, and Mr. Latifaj cannot represent both a defendant and a prosecution witness without a conflict of interest. The Prosecutor noted that while the CPC does not cover this specific situation, Article 5(2) and 19(1)(1.15) CPC are relevant. The Presiding Judge noted that it had come to the Panel's attention that Mr. Latifaj is a legal adviser to the Ministry of Justice, the injured party in the case, and it should therefore consider disqualification; under Article 56(1) CPC defence counsel may not also be an injured party. Mr. Latifaj opposed the Prosecutor's motion, submitting that Article 56 clearly and definitely sets out the available causes for dismissal of a defence counsel, and it does not include these circumstances. He further argued that the MTPT is the injured party and not the Ministry of Justice. However, Mr. Latifaj undertook to resign from this engagement and, at the Panel's request, he subsequently provided written proof of the same to the Court,[466] and a letter from the Ministry of Justice in acknowledgement.[467] Regarding the Prosecutor's motion, the Panel found there was no reason to disqualify Mr. Latifaj as defence counsel. The Panel considered F.L.'s situation is not included in those foreseen by Article 56 CPC, itself exhaustive. The Panel was unable to find an analogous situation in the jurisprudence of the ECHR and relevant General Comments of the UN Human Rights Committee, under the ICCPR. The Prosecutor's motion was therefore refused.[468]

283. On 16 September 2016, defence counsel Karim A. Khan motioned the Panel pursuant to Article 39(3) and 41(2) CPC. He argued that as Judge Marie Tuma was a member of the Prosecution team in the ICTY, and acted as Prosecutor in some cases concerning the KLA, this amounted to facts and circumstances that rendered doubtful the Panel's impartiality or created the appearance of impropriety.[469] Mr. Khan subsequently submitted the same in writing and on 22 September 2016 the matter was referred to the President of the Basic Court pursuant to Article 42(1)(1.1) CPC. The President of the Basic Court rendered a Ruling in response, requesting that the Panel deliberate on its disqualification. The Panel deliberated on the matter on 5 October 2016, and decided by majority to dismiss the motion in its entirety, pursuant to Article 42(4) CPC. The motion was filed after the

[465] Minutes, 26 November 2015, p. 7.
[466] Minutes, 14 September 2016, p. 2.
[467] Minutes, 15 September 2016, p. 11.
[468] Minutes, 5 October 2016, p. 6.
[469] Minutes, 16 September 2016, p. 5.

commencement of the main trial on 30 October 2015 and therefore Article 41(2) CPC applied.[470]

284. Defence counsel Karim A. Khan motioned the Panel to strike the Prosecution witnesses M.K. and E.K. from the list, submitting that the Prosecution is not entitled to use the trial to try to find evidence when there has been no attempt by an investigator to take their statements and further, without knowing the content of their testimonies, to ambush the defence. In response the Prosecutor stated that as far as he knew there is nothing in his records regarding these two witnesses, but stated that he would go through the case files again and give a firm answer to the defence prior to them being called, and that any material discovered regarding them will be disclosed to the Panel and to the defence. The Panel decided that the witnesses would be permitted to give testimony. M.K. is in the list of witnesses in the indictment. E.K. is not in the list. However, the panel granted the questioning of that witness in accordance with Articles 329 and 348 CPC, and further stated that if the defence needed more time after the direct examination for their cross examination then that would be granted.[471]

285. Defence counsel for F.L. filed a written motion dated 13 April 2017. The motion referred to the Letter of Entrustment of July 2012 and the expert report which should have been produced as a result, and that the proceedings should be stayed until that expert report is submitted to the defence, in addition to the disclosure of all other evidence and information in the possession of the Prosecution. Defence counsel also motioned for an independent inquiry. The Prosecution responded that the report had been located and has two annexes, and that the document was submitted to the defence as soon as possible. The Panel was satisfied with the explanation given by the Prosecutor and found no reason to reprimand him or to stay the proceedings. Further, in applying Article 176 and 183 PCPC, the document cannot be seen as an expert report as it does not meet the formal requirements. The motion was therefore refused.[472]

286. On 26 September 2017, the Prosecutor motioned the Court to summon L.M., D.H. and A.Z. to give evidence. The Prosecutor stated that his motion was based on the evidence given by Y.S., as he had testified that his technical staff were directly responsible for the pricing of all the line items for the Gjilan region in the compilation of his tender bid. All defence counsel opposed the motion. The Panel rejected the motion, stating that the main trial is not an investigation. The information concerning these individuals must have been available to the Office of the Prosecution before the beginning of the main trial, who should have proceeded accordingly.[473]

[470] Minutes, 5 October 2016, p. 3.
[471] Minutes, 26 October 2016, p. 12.
[472] Minutes, 11 May 2017, p. 11.
[473] Minutes, 26 September 2017, p. 23.

287. On 9 November 2017, the Panel rejected a number of motions for additional witnesses. The Panel rejected the motion filed by the Prosecutor to hear Hakan Ekisen as a witness, as his evidence was not obtainable in the foreseeable future and its relevance was unclear, pursuant to Article 258(2.1), (2.2) and (2.4) CPC. The Panel also rejected the motion on behalf of the defendants E.S. and F.Z. filed on 7 November 2017 to hear evidence from an IT forensics expert from Portugal by reference to the same Article. The motion by defence counsel Florent Latifaj on behalf of N.K. to hear evidence from a local expert regarding the interpretation of the Law on Procurement was rejected by reference to the same Article and also Article 329 CPC. The Panel stated that it is the Court that knows and interprets the law. The motions of Blerim Prestreshi and Hekuran Haxhimusa for expert evidence in the field of civil engineering regarding asphalt quality and other aspects of roads maintenance was also rejected pursuant to Articles 258 and 329, particularly as supplementary evidence was considered unnecessary.[474]

288. Defence counsel on behalf of E.S. filed a forensic expert report authored by Francisko Manuel Dos Ramos Nunes with the Court which purports to analyze the hard copy printout of alleged SMSs found during the search of F.L.'s house on 28 April 2010. The defence counsels of E.S. and F.Z. motioned for this report to be admitted as evidence, which was opposed by the Prosecution on a number of grounds, and particularly the lateness of the filing. The Panel rejected the motion. The Panel excluded the hardcopy printout of SMSs seized in a search of F.L.'s house in XXX as inadmissible on the basis that these were intrinsically unreliable (See *supra* Section IV.C). Consequently, the Panel also found that the expert report filed by E.S. and F.Z. was also inadmissible. Article 258(2.2) CPC provides that the Court may prevent evidence being taken if the fact to be proven is irrelevant to the decision or has already been proven. The expert report provides an analysis of the hard copy printouts of SMSs. As the Panel decided that this is inadmissible, the expert report was no longer relevant to proving any aspect of this case.[475]

289. F.L. motioned that Malcolm Simmons be summonsed as a witness as a result of his comments published in *Le Monde* newspaper. The Prosecutor deferred to the decision of the Panel on this motion, which was rejected pursuant to Article 258(2.2).[476]

VII. ENACTING CLAUSE

290. For the grounds set out in Sections I to VI above, the Panel unanimously decided as follows:

1. The accused F.L., E.S., N.K. and S.T. are **ACQUITTED** of Count 1 (Organized Crime in violation of Article 274(3) PCCK as read by Article 274(1) of the PCCK and

[474] Minutes, 9 November 2017, pp 2-4.
[475] Minutes, 16 November 2017, p. 6.
[476] Minutes, 16 November 2017, p. 9.

punishable by a fine of up to 500.000 Euros and by imprisonment of seven to 20 years; read in conjunction with Article 23 PCCK (co-perpetration) as described in the Consolidated Indictment PPS No. 425/09 dated 28 September 2015) pursuant to Article 364(1)(1.1) CPC because the acts with which they are charged do not constitute the criminal offence of Organised Crime;

2. The accused F.L., E.S., N.K. and S.T. are **ACQUITTED** of Count 2 (Abusing Official Position or Authority in violation of Article 339(1) and (3) PCCK; punishable by imprisonment of one to eight years and read in conjunction with Article 23 PCCK (co-perpetration) as to F.L. and N.K. and read in conjunction with Article 25 PCCK (assistance) as to E.S. and S.T. as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) pursuant to article 364(1)(1.3) of the CPC because it has not been proven that they have committed the acts with which they have been charged;

3. The accused F.L., E.S. and N.K. are **ACQUITTED** of Count 3 (Accepting Bribes in violation of article 343(1) PCCK and punishable by imprisonment of six months to five years; read in conjunction with Article 23 of the PCCK (co-perpetration) as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) pursuant to article 364(1)(1.3) CPC because it has not been proven that they have committed the acts with which they have been charged;

4. Count 4 against the accused F.Z. (for Giving Bribes in violation of Article 344(1) PCCK and punishable by imprisonment of three months to three years, as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) is **REJECTED** pursuant to Article 363(1)(1.3) of the CPC because the period of statutory limitation expired;

5. The accused F.Z. is **ACQUITTED** of Count 5 (Misuse of Economic Authorizations in violation of Article 236(1)(5) and 236(2) PCCK, punishable by imprisonment of six months to five years as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) pursuant to article 364(1)(1.3) CPC because it has not been proven that the accused has committed the act with which he has been charged;

6. The accused F.L. is **ACQUITTED** of Count 6 (wilfully omitting to disclose material information in a declaration in violation of Sections 5.6 and 10.5 of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, as amended, as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) pursuant to article 364(1)(1.3) CPC because it has not been proven that he committed the act with which he has been charged; and

Count 6 (against F.L. for accepting a political contribution in excess of EUR 1,000 from a single source in a single day in violation of Sections 5.1 and 10.8 of the UNMIK Regulation as described in the Consolidated Indictment PPS No.425/09 dated 28 September 2015) is **REJECTED** pursuant to article 363(1)(1.3) CPC because the period of statutory limitation has expired.

7. The injured parties are instructed that they may pursue their property claim in civil litigation pursuant to Article 463 CPC;

8. The costs of proceedings shall be paid from budgetary resources pursuant to Articles 450 and 454 CPC;

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Presiding Trial Judge
Marie Tuma

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Court Recorder
Alexandra Popova

Legal Remedy: Pursuant to Article 380 CPC, an appeal against this judgment may be filed within 15 days from the day the copy of the Judgment has been served to the parties. The appeal should be addressed to the Court of Appeals through the Basic Court of Pristina.