BASIC COURT OF PRISTINA

Case no.: PKR 84/14 (PPS 67/10)

Date: 29 May 2014

RULING

ON OBJECTIONS TO EVIDENCE

AND REQUESTS TO DISMISS THE INDICTMENT

EULEX Judge Anna Adamska - Gallant, acting as the Presiding Trial Judge, in the criminal case against the defendants:

1. **F.L.**,
2. **S.T.**,
3. **N.K.**,
4. **A.A.**,
5. **B.D.**,

charged with the following criminal offences:

1. **Organized Crime** in violation of Article 274 paragraph 3 of the (old) CCK as read by paragraph 1 of the CCK and read in conjunction with Article 23 (old) CCK (co-perpetration) as to F.L., N.K. and S.T.;
2. **Misappropriation in Office** in violation of Article 340 paragraphs 1 and 3 of the (old) CCK read in conjunction with Article 23 (old) CCK (co-perpetration) as to F.L. and N.K.; and further read in conjunction with Article 25 (old) CCK (assistance) as to S.T.;

3. **Entering into harmful Contracts**, in violation of Article 237 paragraphs 1 and 2 of the (old) CCK read in conjunction with Article 23 (old) CCK (co-perpetration) as to F.L. and N.K., and further read in conjunction with Article 25 (old) CCK (assistance) as to S.T.;

4. **Abusing Official Position or Authority** in violation of Article 422 paragraph 1 of the CCK read in conjunction with Article 23 of the (old) CCK (co-perpetration) as to F.L. and N.K.; and read in conjunction with Article 25 of the (old) CCK (assistance) as to S.T.; and additionally read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement and additionally read in conjunction with the offense of Accepting Bribes as specified in Count 5;

5. **Accepting Bribes** in violation of Article 343 paragraph 2 of the (old) CCK read in conjunction with Article 23 of the (old) CCK (co-perpetration) as to F.L. and S.T.; and read in conjunction with Article 25 of the (old) CCK (assistance) as to N.K.; and additionally read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement;

6. **Misuse of Economic Authorizations** in violation of Article 236 paragraph 1 subparagraphs 4 and 5, and paragraph 2 of the (old) CCK read in conjunction with Section 117.1.a. and d. of the Law on Public Procurement as well as the criminal offense of **Giving Bribes** in violation of Article 344 paragraph 1 of the (old) CCK**;** all read in conjunction with Article 25 of the (old) CCK (assistance) as to A.A. and B.D.;

having received the Indictment PPS no. 67/10 filed by the Special Prosecutor Johannes Pickert ("the Prosecutor" or "Special Prosecutor"), as representative of the Special Prosecution Office of Kosovo ("SPRK"), on 18 February 2014 against the above mentioned Defendants for the above mentioned charges;

having held the Initial Hearing on the Indictment on 26 March 2014 in the presence of the parties, pursuant to Article 245 of the Criminal Procedure Code of Kosovo (Criminal Law no. 04/L-123, hereinafter referred to as "CPC");

noting that the parties are entitled to file motions as per Article 245 (5), Article 249 and Article 250 of the CPC, and they did so accordingly;

noting that the Prosecutor has timely filed a response to the objections as per Article 251 of the CPC;

pursuant to Articles 249, 250, 253 and 254 of the CPC,

issues the following:

RULING

I. The Objections to Evidence filed by Defence Counsel Tahir Rrecaj on behalf of defendant F.L. on 24 April 2014, by Defence Counsel Bajram Tamava on behalf of defendant N.K. and by N.K. in person on 23 April 2014, by Defence Counsel Artan Querkini on behalf of defendant S.T. on 18 April 2014, and by Defence Counsel Qerim Metaj on behalf of defendant B.D. on 11 April 2014 are partially grounded and the following evidence is considered inadmissible and shall be excluded from the files and sealed:

- pre-trial statements of the following witnesses and defendants:
    i. statement of witness I.M., dated 12 January 2012;
    ii. statement of witness X.R., dated 6 December 2010;
    iii. statement of witness H.D., dated 18 March 2013**;**
    iv. statement of defendant A.A., dated 15 March 2013;
    v. statement of defendant B.D., dated 14 March 2013;
- expert opinion of the Directorate of Geodesy, Cadaster and Property;
- claim filed by claimant A.M. to the Municipal Court Malisheva for confirmation of ownership right to an immovable property, dated 4 July 2007;

II. The Presiding Trial Judge, acting *ex officio,* declares all evidence which was collected after 6 April 2008 in execution of the "Order for the Application of Covert Measures**",** issued by District Court of Pristina (PPN 697-7/07) on 6 February 2008, inadmissible. This evidence shall be excluded from the files and sealed.

III. The Requests to Dismiss the Indictment filed by Defence Counsel Tahir Rrecaj on behalf of defendant F.L. on 24 April 2014, by Defence Counsel Bajram Tmava on behalf of defendant N.K. and by N.K. in person on 23 April 2014, by Defence Counsel Artan Querkini on behalf of defendant S.T. on 18 April 2014, and by Defence Counsel Qerim Metaj on behalf of defendant B.D. on 11 April 2014 are partially granted. The following counts of the indictment are dismissed and the criminal proceedings for the respective charge is terminated :

- Misappropriation in Office against F.L., N.K. and S.T. (Count 2);
- Entering into Harmful Contracts against F.L., N.K. and S.T. (Count 3);

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

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

REASONING

I. Procedural Background

1. On 8 August 2012, the Prosecution issued a Ruling on Initiation of Investigation opening case PPS 79/12 against the defendants mentioned above as well as further individuals for the commission of the criminal offences of Organized Crime, Entering into Harmful Contracts, Abusing official Position or Authority, Misuse of Economic Authorization, and Accepting and Giving Bribes.

2. On 15 October 2012, the Prosecution expanded case PPS 79/12 against F.L. and N.K. for the criminal offense of Misappropriation in Office. On the same day, the Prosecution joined cases PPS 19/11 with PPS 79/12 and then combined case PPS 79/12 with case PPS 67/10, thereby combining all investigations under the heading of case PPS 67/10 being the leading case because it had been initiated first.

3. On 18 February 2014, Indictment PPS 67/10 was filed by the Prosecution with the Basic Court of Pristina against the above mentioned Defendants and for the above mentioned charges. The Special Prosecutor provided the original case-files to the Court together with electronic copies which were subsequently served by the Basic Court's administration to the respective Defendants and Defence Counsel.

4. The Initial Hearing was held the on the 26 March 2014 in the presence of the parties. The Indictment was read and the defendants pleaded not guilty to all counts of the Indictment.

5. Pursuant to Article 245 (5) of the CPC, the Presiding Trial Judge, during the Initial Hearing, requested the Defence to file written submissions within 30 days.

6. By 25 April 2014, Defence Counsel of F.L., S.T., N.K. and B.D., as well as N.K. himself, pursuant to Articles 245 (5), 249 and 250 of the CPC, filed objections to evidence and requested the dismissal of the Indictment. Defendant A.A., so far acting *pro se* during the criminal proceedings, did not file a motion.

7. The SPRK Prosecutor was served with the submissions of the Defence on 30 April 2014 and filed written responses on 7 May 2014, i.e. within the one week period prescribed by Article 251 (3) of the CPC.

II. Applicable Procedural Law

8. As during the course of the criminal proceedings against the defendants the substantive and procedural law was subject to fundamental changes, the Presiding Trial Judge deems it necessary to assess the applicable law as a preliminary matter before entering into the merits of the case.

9. With the CPC in force since 1 January 2013, the procedural law has fundamentally changed. Under the Provisional UNMIK Criminal Procedure Code 2004 ("PCPCK") the procedure was more continental law oriented, whereas the new code added adversarial aspects to the proceedings. For the case at hand the essential questions regarding applicable law are whether the proceedings before the Court (the indictment and plea stage, the main trial and the legal remedy stage) will be governed by the CPC or by the PCPCK. It is also crucial to determine which provisions should be applied by the Court to assess the admissibility of the evidence which was obtained during the investigation conducted under the previous Code.

10. The Presiding Trial Judge finds that the procedural situation of the instant case is covered by the transitional provision of Article 540 of the CPC which reads as follows:

> "*For any criminal proceeding initiated prior to the entry into force of the present Code, but without an indictment filed, the provisions of the present code shall be applied mutatis mutandis*".

The criminal proceedings in the case at hand were initiated with the Ruling on Initiation of Investigation on 8 August 2012, thus prior to the entry into force of the new Criminal Procedural Code. The Indictment PPS 67/10 was filed on 19 February 2014, which is more than one year after the CPC entered into force. Thus, the CPC is the applicable procedure code as per Article 540 of the CPC.

III. Objections to Evidence

1. General remarks

11. The purpose of the initial and second hearings provided by the CPC is to eliminate truly unmeritorious cases and to protect the defendants from unjustified and potentially long

exposure to the trial. Contrary to the PCPCK, under the legal framework of the CPC the court is no longer entitled to fully assess the Indictment and the admissibility of evidence acting *ex officio*. Objections against the evidence and/or requests to dismiss the Indictment have to be filed by the Defence pursuant to Articles 249 and 250 of the CPC. The Prosecutor has the opportunity to respond to these objections and/or requests as provided for by Article 251. The arguments raised by both parties are considered by the Presiding Trial Judge in order to make the respective assessment.

12. In accordance with Article 249 (1) of the CPC the defendant may file objections to the evidence listed in the Indictment, based upon the following grounds:

    - the evidence was not lawfully obtained by the police, state prosecutor, or other government entity;
    - the evidence violates the rules in Chapter XVI of the present Code;
    - there is an articulable ground for the court to find the evidence intrinsically unreliable.

13. Pursuant to Article 249 (5) of the CPC, the only remaining *ex officio* competence of the court under the CPC is to determine if the admission of evidence would violate rights guaranteed to the defendant under the Constitution of Kosovo (also Article 97 (4) of the CPC).

14. In accordance with the general rule enshrined in Article 257 (2) of the CPC, evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe. This rule is developed in paragraph 3 of this Article stating that the Court cannot base a decision on inadmissible evidence. Exactly the same provisions were included in Article 153 of the PCPCK.

15. In regard to the applicable procedural law for determining the admissibility of evidence, it is worth making reference to the Ruling of the Court of Appeals, PN 577/2013, dated 10 December 2013. The Court had introduced a two tier approach requiring the Presiding Trial Judge to assess as a first step whether the investigative action was conducted lawfully and, in a second step, to assess if the evidence obtained is admissible and can be used as evidence during main trial. The first part of the assessment will always have to be determined against the procedural rules in force at the time the investigative action was carried out whereas, as a general rule, the assessment of admissibility will be done on the

basis of admissibility clauses dictated by the CPC, as the Code applicable to the criminal proceeding as a whole. Only exceptionally could the PCPCK admissibility clauses remain applicable.

2. Manifestly Irrelevant Evidence (Submission of the Defence of F.L.)

Submission of the Parties

16. The Defence submits that the following evidence is manifestly irrelevant, thus inadmissible pursuant to Article 249 (1.2) read in conjunction with Article 259 (1) of the CPC:

- statement of witness I.M., dated 12 January 2012[1];
- statement of witness X.R., dated 6 December 2010[2];
- expert report of a geodesy expert[3];
- statement of Q.K., dated 7 July 2007;
- claim filed by claimant A.M., dated 4 July 2007[4];

17. The Prosecution submits that the objection should be rejected as the above evidence is of a strong probative value and refers to personal circumstances of defendant S.T.. Further, in order to maintain the completeness of the case-file and transparency of the procedure, all evidence collected during the investigative phase, pursued first separately and then joined into one case, was submitted to the Court.

***Applicable* Law**

18. Article 259 (1) of the CPC establishes that manifestly irrelevant evidence is any evidence that is unrelated to: the proving an element of the criminal offence (i); the damage caused by the criminal offence (ii); a defence to the prosecution (iii); or other relevant issue (iv). Within the

[1] Binder 6, pp. 58 et seq.
[2] Binder 6, pp. 100 et seq.
[3] Binder 1, pp. 126 et seq.
[4] Binder 1, pp. 112 et seq.

context of Article 259 (1) of the CPC, "issue" should be interpreted as an issue pertaining to the case. The substantial definition of "relevance" in terms of evidence has been discussed in the jurisprudence of international courts and tribunals.[5] For example, the International Criminal Court (ICC) has defined relevance as relating to the "matters that are properly to be considered by the Chamber in its investigation of the charges against the accused" and that "an item will be relevant only if it has the potential to influence the Chamber's determination on at least one fact that needs to be determined to resolve the case".[6] The Presiding Trial Judge finds this approach reasonable and it will be adopted for the legal assessment of the objection at hand.

Findings of the Presiding Trial Judge

19. The statement of Q.K. could not be found in the case file submitted to the Court and, therefore, the Court is unable to assess its contents and issue a decision on its admission into evidence.

20. As to the other pieces of evidence in question, they relate to disputed immovable property (parcel of land) and a claim filed by A.M. to the Municipal Court of Malisheve for confirmation of the ownership right to such parcel. In relation to the record of I.M.'s hearing before the KP, held on 12 January 2012, although the Prosecution argues that it is of a strong probative value in relation to the charges against S.T., the only information connected to the present case is the fact that the witness stated that S.T. was either the driver or the bodyguard of F.L.. The fact that S.T. is F.L.'s bodyguard is not disputed between the Parties. Accordingly, this item should be considered irrelevant to the case as it does not have the potential to determine any fact on the case and does not fulfil any of the conditions foreseen in Article 259 (1) of the CPC.

21. The remainder of the evidence objected to by the Defence (i.e., statement of X.R., dated 6 December 2010, the expert report of geodesy expert, and claim filed A.M., dated 4 July 2007) cover aspects of the above mentioned disputed parcel of land. No information that

[5] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the First Decision on the Prosecution and Defence Requests for the Admission of Evidence, dated 15 December 2011, ICC-01/05-01/08-2012-Red, para. 14. See also ICTY, *Prosecutor v. Mucic et al.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, IT-96-21.
[6] Ibid.

could be relevant to the case under Article 259 (1) of the CPC was found in the items. As a result, none of the conditions set forth above are fulfilled and, therefore, the Presiding Trial Judges considers them irrelevant and does not admit them into evidence.

22. Thus, the Presiding Trial Judge finds the following pieces of evidence as inadmissible because they are manifestly irrelevant:

- testimonies of I.M.,
- statement of X.R., dated 6 December 2010,
- expertise of geodesy expert,
- claim filed by A.M., dated 4 July 2007

3. Evidence obtained by Order of the District Court of Pristina (PPN 697-7/07), dated 6 February 2008 (Defence of F.L., of S.T., and B.D.)

Submission of the Parties

23. Defence of F.L. opines that SMS messages obtained through the order of the District Court of Pristina (PPN 697-7/07), dated 6 February 2008 are inadmissible pursuant to Article 249 (1.1) of the CPC read in conjunction with Article 259 (1) of the PCPCK (Article 93 of the CCP). The court order refers to a different criminal proceeding ("the Clinton Bombing" case) and does not mention any of the defendants in the present case. Besides, use of this set of evidence would violate the right to a fair trial, guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"). The Defence did not elaborate further as to why these specific provisions should be applied to justify a finding on inadmissibility.

24. Similar objections were raised by Defence of B.D., arguing that he was neither a suspect nor subject to investigation and no legal order was issued by the pre-trial judge for the interception of the telephone calls, and (ii) between the defendant A.A. and Z.A., as the defendant B.D. was not aware of these conversations. Defence contends that admitting these items into evidence would violate the defendant's rights guaranteed by the Constitution of the Republic of Kosovo.

25. Also Defence of S.T. objected against the evidence obtained by the order mentioned above, pursuant to Article 249 (1.1) of the CPC read in conjunction with Article 259 (1) of the PCPCK (Article 93 of the CPC), because the order was not issued against the defendant who was not a suspect in the criminal proceedings PPN 697-7/07 ("Clinton Bombing"). It is argued that the situation is covered by Articles 259 (5) and 259 (6) subparagraph 2 of the PCPCK pursuant to which an order which only includes a general description of the telephones which might be intercepted "may not be used to intercept the telecommunications of a person who is not the suspect". Further, the Defence submits that the evidence was obtained in violation of the ECHR and the Constitution of the Republic of Kosovo.

26. The Prosecution contests the arguments raised by the Defence as wholly ungrounded in law and logic. It is submitted that no provision in the PCPCK, as the law in force at the time the covert measure was executed, allows for the exclusion of evidence that arises from a lawfully obtained and implemented interception order against a party heard on interception, even if it is not subject to the order. It is further argued that the evidence was based on conversations with the defendant A.A., who was a subject of the interception order. Constitutional rights cannot be used as a shield to protect criminal conduct.

***Applicable* Law**

27. The admissibility of evidence obtained through orders for covert and technical measures of surveillance and investigation is regulated in Article 97 of the CPC, which in relevant parts provides:

> *"1. Evidence obtained by a measure under the present Chapter shall be inadmissible if the order for the measure and its implementation are unlawful.*
>
> *2. Evidence which has been obtained by (…) interception of telecommunication (…) is only admissible in criminal proceedings in respect of a criminal offence which is specified in Article 88 paragraph 3 of the present Code.(…)*
>
> *4. At any time prior to the final judgment, the single trial judge or presiding trial judge may review the admissibility of materials collected under Article 88 of this Code ex officio for violations of the defendant's constitutional rights if there is an indication that the materials were collected unlawfully."*

28. The Presiding Trial Judge finds that the admissibility of the evidence obtained through a covert measure of interception, in principle, shall be assessed in the light of provisions referring to the protection of privacy. These are as follows:

Article 8 of the ECHR:

> *"1. Everyone has the right to respect for his private and family life, his home and correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law it is necessary in a democratic society in the interest of national security, public safety or the economic well – being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."*

Article 36 of the Constitution of the Republic of Kosovo:

> *"1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication. (...)*
>
> *3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law.(…)"*

Findings of the Presiding Trial Judge

29. The issue at stake concerns the admissibility of evidence discovered by "chance" or "accident", i.e. evidence unexpectedly obtained during the execution of a covert measure applied in a different criminal proceeding, for a different criminal offence and/or suspect.

30. The admissibility of evidence obtained through an order for covert and technical measures of surveillance and investigation is regulated in Article 97 of the CPC. The Presiding Trial Judge concurs with the Prosecutor that neither Article 97 of the CPC nor any other provision of the CPC justifies the exclusion of evidence discovered by chance during a lawfully obtained and implemented interception order against a party not being a subject to the

order. Where the evidence was lawfully collected in another case and could have been lawfully collected during the investigative period of the current case, it should be admissible.

31. The object and purpose of Article 97 (2) of the CPC is to ensure that the legal requirements necessary for the ordering of specific intrusive covert measures are not undermined in cases where the obtained evidence is intended to be introduced in a separate criminal proceeding. Hence, Article 97 (2) of the CPC does not, in general, prohibit the use of evidence in separate criminal proceedings but introduces an additional legal requirement. The argument that Article 97 (2) of the CPC by using the term "criminal proceedings" covers the situation of another criminal proceeding in addition to the one from which the evidence originally derives, is supported by the fact that the requirement of Article 88 (3) of the CPC is already covered by the situation mentioned in Article 97 (1) of the CPC. The present case concerns criminal offences listed in Article 90 of the CPC.

32. The Presiding Trial Judge notes that Article 97 (2) of the CPC restricts the possibility of using evidence obtained through covert measures only with regard to the object of the criminal proceedings, as it provides that it is merely admissible in criminal proceedings in respect of a criminal offence which is specified in Article 88 (3) of the Code. There is no limitation with regard to the person against whom this evidence may be used, as the Code does not determine that the evidence is admissible only against the person against whom the covert measure has been applied.

33. Further, the fact that the defendants B.D. and S.T. were unaware of conversations between A.A. and Z.A. is irrelevant to the admission of the items into evidence and/or their lawfulness. However, exception is made to the intercepted telecommunications from 5 April 2008 to 4 June 2008, which was unlawfully obtained and, therefore, should not be admitted into evidence, as explained in a further part of the reasoning.

34. In regard to the argument raised by the Defence of F.L. that the evidence in question should not be admitted because it would violate the right to a fair trial, the Presiding Trial Judge is fully aware that it is a fundamental aspect of this right that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Nevertheless, the Presiding Trial Judge opines

that the right to a fair trial of F.L. with regard to evidence obtained through interception was not violated, as the defence has access to it and will have the possibility to challenge its credibility and relevance or the case during the main trial.

35. In regard to the additional argument submitted, i.e the non-conformity of the provisions of the procedural code with ECHR, the Presiding Trial Judge makes reference to the Ruling of the Supreme Court of Kosovo where the Court held that the Kosovo legislation in relation to covert and technical measures of surveillance and investigation described in Chapter XXIX of the PCPCK is in full compliance with the requirements established by the ECHR.[7]

4. Review *ex-officio* of the Presiding Trial Judge with regard to the admissibility of the evidence obtained through interception

36. As has been already been mentioned above, under the CPC the Court is no longer entitled to fully assess the admissibility of evidence *ex-officio*. Objections against evidence have to be filed by Defence pursuant to Articles 249 of the CPC in order to enable the Court to make a respective assessment. The only remaining *ex-officio* competence is pursuant to Article 249 (5) "*to determine if the admission of evidence would violate rights guaranteed to the defendant under the Constitution of Kosovo*". Likewise, Article 97 (4) CPC provides - as a provision *lex specialis* – that:

> *"At any time prior to the final judgment, the Presiding Trial Judge may review the admissibility of material collected under Article 88 of this Code ex officio for violations of the defendant's constitutional rights if there is an indication that the materials were collected unlawfully."*

37. The Presiding Trial Judge notes that the covert measure of interception of the defendant A.A.'s telephone in the "Clinton Bombing" case took place in the year of 2008 and, as a result, the lawfulness of this measure must be assessed in accordance with the law applicable and in effect in 2008, that is, the PCPCK. The question of the lawfulness of such a measure under the PCPCK was governed by Articles 256, 257 (3), 258 and 259 of the PCPCK. Of particular pertinence is Article 259 (1.4) of the PCPCK, which prescribed that an order for interception of telecommunication should specify the period within which the order would

[7] See Supreme Court of Kosovo, Api-Kzi 1/2010, Judgment 26 November 2010, p. 13 et seq. (making reference to the ECHR Case of Bykov v. Russia, Application no. 4378/02, Judgment 10 March 2009).

have effect, which should not exceed sixty (60) days from the date of the issuance of the order.

38. It must be underlined that the power to intercept communication supports relevant state authorities in their function of investigating and detecting crimes and, as such, is necessary in a democratic society for the prevention of disorder or crime, within the meaning of Article 8 (2) of the ECHR which provides the right to privacy. The increase of crime and particularly the growth of organised crime, the increasing sophistication of criminals combined with the ease and the speed of communication lead to the conclusion that telephone interception is an indispensable tool in the combat of crime. However, every intrusive investigative measure has to be based on law and must be executed within limits imposed by it.

39. On 6 February 2008, in the "Clinton Bombing" case, the District Court of Pristina (PPN 697-7/07) issued an order for the covert measure of interception of telecommunications against a number of individuals, including defendant A.A. (mobile number 044-24-2255). The District Court expressly stated that the "Order should remain in effect from a period of sixty (60) days starting from the date of its issue". Therefore, it is clear that the measure would only be lawful from 6 February 2008 to 5 April 2008.

40. The Prosecution seeks admission into evidence of a number of intercepts from the defendant A.A.'s telephone. As reflected in the case file, the interception of A.A.'s telecommunication ranges from 9 February 2008 to 4 June 2008. The interception was supposed to be carried out under the auspices of the above mentioned Order issued by the District Court of Pristina on 6 February 2008. It is emphasised that the Order was due to expire on 5 April 2008 and should interception still be deemed appropriate, an extension should have been sought for the measure as per Article 261 of the PCPCK. There is no evidence in the case file that the Order was extended.

41. It is worth highlighting that officers from the Special Investigative Unit were aware of the validity of the Order and its expiry date of 5 April 2008. In a memorandum from SIU Investigator Sergio D'Orsi to the Prosecutor in charge of the case dated 21 March 2008, the Investigator points out that the date of termination of the Order was approaching and that an extension should be sought. In fact, on 8 April 2008, by means of another memorandum, SIU Investigator Sven Ischen informed the Judge from the District Court of Pristina who

issued the Order and the Prosecutor in the case that the validity of the Order was sixty (60) days and therefore the covert measures terminated on 5 April 2008.

42. Nevertheless, the defendant A.A.'s telephone was intercepted after the 5 April 2008 deadline. The interception of the telecommunications that took place from 6 April 2008 to 4 June 2008 was, therefore, unlawful as it was implemented without a lawful order authorising the measure and in violation of Articles 258 and 259 of the PCPCK.

43. Having considered the above, the Presiding Trial Judge declares *ex-officio* that the evidence of the intercepted telecommunications dating from 6 April 2008 to 1 June 2008 was collected in violation of the defendants' rights guaranteed by Article 36 of the Constitution of the Republic of Kosovo. Therefore, the Presiding Trial Judge denies their admission into evidence under Article 249 (5) read in conjunction with Article 97 (5) of the CPC.

5. Admissibility of interrogations and interviews of defendants and witnesses conducted by the SPRK Legal Officer (Submission of the Defence of F.L.)

Submission of the Parties

44. The defence asserts that the statements of the following defendants and witnesses which were taken by the SPRK Legal Officer Bernhard Kuschnik are inadmissible pursuant to Article 249 (1.1.) CPC read in conjunction with Article 51 (2) and 221 (4) of the PCPCK (Article 152 of the CPC):

    - Statement of defendant S.T., dated 19 March 2013 ;
    - Statement of defendant A.A., dated 15 March 2013 ;
    - Statement of defendant B.D., dated 14 March 2013 ;
    - Statement of witness H.D., dated 18 March 2013 ;
    - Statement of witness I.M., dated 12 January 2012

45. The Prosecutor submits that all interrogations and interviews were undertaken in full compliance with Kosovo law. To support his point of view that an International Legal Officer may be active in a pre – trial interrogation the SPRK Prosecutor referred to the previous

judgment of the Municipal Court of Prishtina in the case PPS 10/11, citing proper paragraphs of the reasoning.

Applicable Law

46. The issue of EULEX Legal Officers conducting interviews has been extensively discussed not only by the Presiding Trial Judge in her decision dated 1 July 2013 in the MTPT 1 case, but also by the Court of Appeals in its decision in the MTPT 1 case PN 577/2013. As such, the Presiding Trial Judge will briefly outline the applicable law on the issue and asks the Parties to refer to the above mentioned rulings.

47. The role of the State Prosecutor is governed by Article 109 of the Constitution of the Republic of Kosovo, by the *Law on State Prosecutor* (Law No. 03/L-225 of 30 September 2010), the *Law on the Special Prosecution Office of the Republic of Kosovo*, (Law No. 2008/03-L052), the CPC and PCPCK.

48. Notably, in accordance with Article 51 (1) of the PCPCK the public prosecutor shall undertake all actions in criminal proceedings which he or she is authorized by law to undertake either by himself or herself or through persons authorized by the Law on the Public Prosecutor's Office to represent him or her in criminal proceedings. In accordance with paragraph 2 of this Article the public prosecutor shall undertake investigative actions him or herself or through the judicial police.

49. Within the existing legal framework, the role of a EULEX legal officer is not defined by law. The position of a legal assistant was foreseen in Article 43 of the Law 32/1976 on Public Prosecution Office, according to which "for performing duties in the Public Prosecutors office necessary number of legal assistants and trainees can be determined. A legal assistant in the Public Prosecutors office can be determined a graduated lawyer who has a judicial exam." Although the duties and responsibilities of the legal assistant are not detailed in the mentioned law, it cannot be intented that the legal assistant could act as a substitute or representative of the Prosecutor. The same is true in regard to other applicable laws and practices according to which position of legal assistants are advertised by the Office of the Chief State Prosecutor.

50. The competence to interrogate the defendant is determined in the Article 231 (1) of the PCPCK which states that:

> *"The examination of the defendant shall be conducted by the public prosecutor. He may entrust the examination to the judicial police or, in exceptional cases, to the regular police."*

51. With regards to the inadmissibility of statements by defendants, Article 156 of the PCPCK provides that a statement by the defendant given to the police or the public prosecutor may be admissible evidence in court only when taken in accordance with the provisions of Articles 229 through 236 of the present Code. Such statements can be used to challenge the testimony of the defendant in court (Article 372 paragraph 2 of the PCPCK).

52. Somehow conflicting with this, the wording of Article 235 of the PCPCK provides as follows:

> *"If the examination of the defendant was conducted in violation of the provisions of Article 155 paragraph 1, Article 231 paragraph 2 and 3 or Article 234 paragraph 2 of the present Code, the statements of the defendant shall be inadmissible."*

53. Thus, whereas Article 156 (1) of the PCPCK also covers the requirements prescribed in Article 231 (1) of the PCPCK, Article 235 does not. The Presiding Trial Judge finds that the only reasonable way of reading Article 235 of the PCPCK is as a provision serving the purpose of clarification of the four situations mentioned. As all these situations are also covered by Article 156 (1) of the PCPCK, Article 235 has no particular substantial meaning.

54. The inadmissibility of witness statements is governed by Article 161 of the PCPCK which does not contain a corresponding paragraph to Article 156 (1) of the PCPCK. Nevertheless, the competence rules contained in the laws regulating the position of prosecutors shall be applied. As was mentioned above, only a duly authorized prosecutor has the competence to conduct investigative actions. Furthermore, the Defence in accordance with Article 249 (1.1) of the CPC may raise an objection that the evidence was not lawfully obtained by the police, state prosecutor, or other government entity.

55. The Code does not specify the meaning of the notion "lawfully", nevertheless it is obvious that it shall be interpreted as "in accordance with the law" or "based on the law". More importantly, there is no provision in the Code which determines the consequences of a situation where the evidence was obtained "unlawfully". The Code clearly states that

evidence is inadmissible only if strictly provided for by law. Nevertheless, the Presiding Trial Judge is of the opinion that the lack of a precise provision does not prohibit declaring the evidence obtained unlawfully as inadmissible. First of all, from reading Article 249 of the CPC as a whole it can be presumed or implied that evidence found to be obtained "unlawfully" as per Article 249 (1.1) will be considered to be inadmissible. Articles 249 (3) and (4) – which flow from Article 249 (1) - provide that the Judge can "permit or exclude the evidence" and that "inadmissible evidence shall be excluded from the file and sealed" and will "not be examined or used in the criminal proceedings". Secondly, treating unlawfully obtained evidence as admissible would not only be illogical but more importantly would constitute a breach of constitutional principles of the right to a fair trial and would be contrary to the rule of law.

Findings of the Presiding Trial Judge

56. All provisions quoted above confirm that the position of the Prosecutor is an individual one and he is allowed to delegate his competences to other prosecutors, police, or judicial police only when it is strictly prescribed by law. The applicable law does not provide the possibility to entrust investigative actions to legal officers, whose professional role and position is not regulated by law but can generally be described as to support a judge or a prosecutor "comparable to an observer or adviser"[8]. None of the provisions in the mentioned laws provide any competences for legal officers in criminal proceedings.

57. The Presiding Trial Judge concurs with the opinion of the Municipal Court in case KA 44/12, that the participation of the legal officer in the examination of the defendant and witnesses does not in principle constitute a breach of Article 231 of PCPCK but only if it is conducted by the Prosecutor who is clearly responsible for the manner and the direction of the interview.

58. From the object and purpose of Article 231 (1) of the PCPCK, which is to avoid examination of a defendant by unauthorized persons, it is clear that the term "conduct" must be understood as meaning that the Prosecutor must have control in steering the examination. Thus, active participation of a legal officer or legal adviser in the examination of a defendant is of no concern as long as the interrogation is clearly led by the competent prosecutor. This not only requires the permanent presence of the prosecutor during the examination but

[8] Supreme Court, Ap.-Kz. No. 527/2012 ("Klecka"), Ruling, 11 December 2012, para. 28

also exercise of his overall authority in posing questions and directing the substantial aspects of the examination.

59. The Presiding Trial Judge in the MTPT 1 case, in her decision dated 1 July 2013, found that "[t]he practice that a legal officer, whose role is important but only supportive, conducts examination of witnesses without *de facto* control of the prosecutor is unacceptable and unlawful as contrary to the applicable law".[9] By the same token, the Court of Appeals held that "[t]o determine whether the witness statements are admissible or not, the Panel must determine whether the Legal Officer can be said to have *conducted* the interview (…) the person conducts the interview if he/she appears to be the authority leading the interview by controlling the questioning and the direction of the interview".[10] [emphasis on the original] The Court of Appeals went further and gave examples of a leading role, such as if the Legal Officer asked the majority of questions, if he followed up on answers and asked related questions, if he reacted to answers, if he mainly asked questions prepared in advance or if he adapted the line of questioning.

60. Based on this already existing jurisprudence, the Presiding Trial Judge thoroughly analyzed the minutes of the examination of witnesses and defendants in this case with regard to the objections raised by Defence.

(i) Pre-Trial Testimony of the Defendant S.T.

61. Both, the SPRK Prosecutor Johannes Pickert and the Legal Officer Bernhard Kuschnik were present at the interview and both asked questions to the Defendant. According to the record of the pre-trial testimony, the SPRK Prosecutor started the interview, explained the reasons for the interview, and informed the Defendant that he was a suspect in the case and of his rights. After a few initial questions, the SPRK Prosecutor stated that the Legal Officer would ask prepared questions. The Legal Officer proceeded with posing questions to the Defendant. Throughout the course of the interview, the Legal Officer asked the majority of the questions, which seem to have been prepared beforehand, but also a few follow up questions, whereas the SPRK Prosecutor asked some other follow up questions. In the middle of the interview, the Legal Officer also gave instructions to the Defence Counsel on

[9] Basic Court Pristina, Ruling on Objections to Evidence and Requests to Dismiss the Indictment, PKR 84/18 (MTPT 1), 1 July 2013, para. 83.
[10] Court of Appeals, PN 577/2013 (MTPT 1), Ruling on Appeals, 10 December 2013, paras. 52-53.

how to inform his client whether he wanted to consult with him before answering questions so as it would be officially registered into the minutes. Finally, it was the SPRK Prosecutor who concluded the interview by informing that there were no more questions from their side and allowing the Defendant to read the record of the interview.

62. Taking into consideration the particular circumstances of the interview and the characteristics of the manner in which the interview was conducted, in view of the above, the Legal Officer did not have overall control of the interview. Although the Legal Officer did conduct the interview at some stages, the SPRK Prosecutor had overall control and leadership of the interview. In addition, given the fact that most of the questions asked had been already prepared prior to the actual interview, the active role which the Legal Officer played during the interview does not seem to be decisive. Consequently, the involvement of the Legal Officer in this particular instance was lawful and the record of the Defendant S.T.'s pre-trial testimony should be admitted into evidence.

(ii) Pre-Trial Testimony of the Defendant A.A.

63. SPRK Prosecutors Johannes Pickert and Robert Kucharski, as well as the Legal Officer Bernhard Kuschnik were present at the interview. According to the record of the pre-trial testimony, the EULEX Prosecutor started the interview, asked the Defendant if he had a Defence Counsel, explained the reasons for the interview, and informed the Defendant that he was a suspect in the case and of his rights. After a few initial questions made by the SPRK Prosecutor, the Legal Officer started posing questions to the Defendant. The first question asked by the Legal Officer was not a prepared one, but a follow up regarding the Defendant's relatives. The majority of the questions in the interview were asked by the Legal Officer, in particular regarding meetings with the Defendants F.L. and S.T. during the Indictment period (2008). The Legal Officer was the one who confronted the Defendant with documentary evidence (telephone intercepts from 2008) and their content, as introduced by the SPRK Prosecutor.

64. The SPRK Prosecutors intervened occasionally and were the ones to ask directly if the Defendant A.A. ever arranged deals for B. Company, as well as a few questions arising from the telephone intercepts. The remainder of the interview, however, was conducted by the Legal Officer. He not only asked the vast majority of the questions, but such questions were

related, prepared and followed up, rather than only prepared in advance. The interview was concluded by the EULEX Prosecutor, who informed the Defendant that he had the right to read the record of the interview or have it read.

65. In view of the foregoing, and the role played by the Legal Officer throughout the interview, the Pre-Trial Testimony of the Defendant A.A. should not be admitted into evidence. The Legal Officer had a leading role throughout the interview and can be considered as the one conducting it. As explained above, the involvement of the Legal Officer in such a manner is unlawful and, therefore, the record of the Pre-Trial Testimony of A.A. should be declared inadmissible pursuant to Article 249(1.1) of the CPC.

(iii) Pre-Trial Testimony of the Defendant B.D.

66. At the interview of the Defendant B.D., EULEX Prosecutor Johannes Pickert and Legal Officers Bernhard Kuschnik and Manuel Eising were present. According to the record of the Pre-Trial Testimony, the EULEX Prosecutor started the interview, explained the reasons for it, and informed the Defendant that he was a suspect in the case and of his rights. The EULEX Prosecutor proceeded with the questioning. The Legal Officer Bernhard Kuschnik then intervened to confront the defendant with evidence about the incorporation of the Defendant's company and asked certain follow up questions based on the answer received. The majority of the questions pertaining to the tender process were asked by the EULEX Prosecutor; however, the Legal Officer asked the majority of both prepared and follow up questions regarding the price of the Defendant's offer and its calculation. In fact, the subject of the price of the offer and the discount given by the company B. in the tender process, an issue that is crucial to the Prosecution's case, was triggered by one of the Legal Officer's follow up questions, indicating the role the Legal Officer played during the interview. The Legal Officer proceeded to ask the majority of the questions regarding the price and the discount and it was him who confronted the defendant with documentary evidence. The Legal Officer was also the one to declare that there were no further questions to the defendant. The interview was concluded by the EULEX Prosecutor by thanking the defendant for attending the interview and advising him that he had the right to read the record or have it read.

67. Taking into consideration the importance of the questions asked by the Legal Officer Bernhard Kuschnik (e.g., price calculation and discount) and the way the interview unfolded, it transpires that the Legal Officer was in fact playing a leading role in the Defendant B.D.'s interview. The Legal Officer Bernhard Kuschnik changed the line of questioning when he followed up on the price calculation, reflecting his conduct throughout the interview. As a result, the record of the Pre-Trial Testimony of B.D. is inadmissible pursuant to Article 249 (1.1) of the CPC.

(iv) Pre-Trial Interview of witness H.D.

68. The EULEX Prosecutor Johannes Pickert and Legal Officer Bernhard Kuschnik were present at the interview. The EULEX Prosecutor warned the witness of the obligation to tell the truth and informed him of his rights, followed immediately by the Legal Officer's questioning of the witness. The EULEX Prosecutor intervened occasionally by asking follow up questions and asking the witness to provide further details on certain topics. As in B.D.'s interview, the Legal Officer asked questions regarding the price of B.'s offer and its calculation. Afterwards, the Legal Officer changed the course of the interview by introducing a new issue to be exploited. Subsequently, all questions were posed by the Legal Officer with no interventions from the EULEX Prosecutor, who then only intervened to say that there were no further questions.

69. Based on the foregoing, the Presiding Trial Judge concludes that the Legal Officer was in fact leading H.D.'s interview and, accordingly, the record of the Pre-Trial interview of H.D. should be considered inadmissible as per Article 249 (1.1) of the CPC.

(v) Pre-Trial Interview of witness I.M.

70. The hearing of I.M. was held on 12 January 2012 before the KP Investigative Officer Zijadin Isaku, who posed all questions to the witness. The Legal Officer was not present at the hearing. As a result, the Defence submission that this evidence is inadmissible because the investigative action was conducted by the legal officer, is rejected as unfounded, notwithstanding the above assessment of the relevance of this item to the case at hand.

71. Having considered the law and the facts presented above, the Presiding Trial Judge concludes that the following pieces of evidence are inadmissible as they were obtained unlawfully (Article 249 (1.1) of the CPC) because they were led by a person not authorized under the law to conduct investigative actions:

- statement of witness I.M., dated 12 January 2012 ;
- statement of witness X.R., dated 6 December 2010 ;
- statement of witness H.D., dated 18 March 2013
- statement of defendant A.A., dated 15 March 2013 ;
- statement of defendant B.D., dated 14 March 2013 ;

6. Admissibility of the documents obtained during the search and seizure conducted in F.L.'s house in Caglavica and in the Assembly on the 28th April 2010.

Submission of the Parties

72. The Defence of F.L. submits that the search at F.L.'s house in Caglavica on the 28th April 2010 was conducted in violation of Article 245 (6) in conjunction with Article 245 (3) of the CPC and Article 36.2 of the Constitution of the Republic of Kosovo, and therefore, that the evidence obtained by the search is inadmissible.

73. The Defence asserts that the search cannot be based solely on a verbal court order without written judicial approval afterwards. It is submitted that Article 246 (1) of the PCPCK clearly provides that a search executed without an order from a Pre-Trial Judge is in breach of the Code and Article 245 (6) of the PCPCK as it requires that a search conducted without a written order is to be reported to the Pre-Trial Judge within 12 hours.

74. The Prosecution submits that the objection raised by the Defence is without merit. In the opinion of the Prosecution it is the PCPCK and not the CPC which is applicable for determining whether a violation of the law occurred when collecting evidence on the basis that the assessment should be grounded upon the law as it existed when the investigative action was conducted. It is argued by the Prosecution that the search of the house of F.L.

was conducted in accordance with Article 245 (3) of the PCPCK, based on a verbal search order issued by EULEX Pre-Trial Judge Ferdinando Buatier de Mongeot.

Findings of the Presiding Trial Judge

75. In the ruling dated 01 July 2013 in the MTPT 1 case, the Presiding Trial Judge found that the evidence obtained by the search of the house of F.L. in Caglavica on 28 April 2010 was inadmissible because it was executed in breach of the provisions of Article 246 (4) of the PCPCK, as the prerequisites for conducting this investigative action without a court order did not occur. The Defence in the case MTPT 1 raised the same objections against the evidence obtained during the search as in the present criminal proceedings.

76. The Court of Appeals, with a Ruling dated 10 December 2013, did not share the opinion of the Presiding Trial Judge and held that the search conducted in F.L.'s house in Caglavica was lawful and the evidence obtained admissible[11]. The documentary evidence objected to by the defence is part of the items found during that search. There are no new circumstances which would justify a different legal assessment of the admissibility of the evidence to the one of the Court of Appeals.

77. Bearing in mind, that the Defence did not raise any new arguments against the evidence obtained by the search conducted in F.L.'s house in Caglavica, the Presiding Trial Judge finds that the objection is ungrounded.

7. Objection against the proposal of the Prosecution to hear several police officers as witnesses during main trial (Defence of F.L.)

[11] Court of Appeals, PN 577/2013 (MTPT 1), Ruling on Appeals, 10 December 2013, para. 86 - 99

Submission of the Parties

78. The Defence puts in question the right of the Prosecution to propose to hear as witnesses several police officers. It is submitted that these officials are directed and overseen by the prosecution and, therefore, they should be disqualified from testifying in court.

79. The SPRK Prosecutor in his written response submits that the objection should be rejected as ungrounded because there is no legal provision which would prohibit examining police officers as witnesses. To support his stance, reference is made to Article 124 (1), which allows summoning a person as a witness if there is a likelihood that he or she may give information about the criminal offence, and to Articles 126 and 127 of the CPC which specify the catalogue of privileged witnesses and witnesses exempted from duty to testify.

Findings of the Presiding Trial Judge

80. The objection raised by Defence is inadmissible because the matter is not within the possible grounds listed in Article 249 (1) of the CPC. The Defence can file a motion objecting to the Prosecution's proposal for witnesses at any time during the main trial. The Presiding Trial Judge will ensure that evidence is taken in accordance with Chapter XVI of the CPC when ruling on such motion pursuant to Article 299 (5) of the CPC.

8. Admissibility of evidence collected after the 23 April 2012 (Defence of N.K.)

Submission of the Parties

81. The Defence for N.K. submits that the evidence collected after 23 April 2012 is inadmissible due to the time-limits to conclude the investigation in the case pursuant to Article 225(2) of the PCPCK and Article 159 of the CPC.

82. The Special Prosecutor in his response argues that the time-limits prescribed by law were strictly adhered to. He submits that the investigation in the present case was initiated on 8 August 2012 against defendant N.K., thus the prescribed investigation period would expire on 8 August 2014 if no indictment would have been filed. Further, the issue has been

already addressed by the Basic Court in relation to the Indictment PPS 425/09 (MTPT 1) where the arguments of the defence were rightfully rejected.

Applicable Law

83. In accordance with the transitional provision stipulated in Article 540 of the CPC for any criminal proceedings initiated prior the entry into force of the present Code, but without an indictment being filed, the provisions of the present code shall be applied *mutatits mutandis.* The Supreme Court has clarified that the CPC applies to all on-going criminal proceedings initiated prior to its entry into force, except for cases where the main trial has already commenced or where a case was sent for retrial. [12]

84. In accordance with Article 159 (1) of the CPC the investigation shall be completed within two years and during this time the indictment shall be filed. Pursuant to Paragraph 2, the pre – trial judge may authorize a six month extension of an investigation where a criminal investigation is complex, including but not limited to, if there are four or more defendants, multiple injured parties have been identified, a request for international assistance has been made, or other extraordinary circumstances exist.

Findings of the Presiding Trial Judge

85. The investigation concerning the defendants in the instant case was initiated on 8 August 2012, i.e. prior to the entry into force of the CPC. Although investigation PPS 79/12 was later joined to PPS 67/10, the fact remains that the investigation against N.K. and the other defendants in the present case started on that date. On 28 January 2013, the Court of Appeals, in the ambit of case PPS 67/10, deciding on an appeal filed by the Prosecution against the Pre-Trial Judge of the Basic Court of Prizren rejecting the Prosecution's application for extension of investigation, stated that: "[a]ny investigation that started prior to the entry into force of the CPC and was at the time on-going or a decision on extension was timely filed and pending is *ex lege* authorized to last up to 2 years".[13]

[12] Supreme Court, Legal Opinion 56/2013, 23 January 2013.
[13] Binder 1, p. 4; Court of Appeals, PN/KR 93/2013, Ruling on Appeal, 28 January 2013, para. 13.

86. Taking this jurisprudence into account, and according to the applicable law, the investigation period in the instant case was expanded *ex lege* with the entering into force of the new CPC in regard to the defendants and criminal offences subject to the present Indictment. As the calculation of time limits for extension and expansion of investigation periods are to be calculated independently and separately for each defendant and criminal offence, the investigation initiated on 8 August 2012 against F.L., S.T., N.K., A.A. and B.D. for the criminal offences of Organized Crime, Entering Into Harmful Contracts, Abusing Official Position or Authority, Misuse of Economic Authorization, Accepting and Giving Bribes would expire on 8 August 2014 if the SPRK had not filed Indictment PPS 67/10. The investigation initiated on 1 November 2012 against F.L. and N.K. via Ruling on Expansion of Investigation would expire on 1 November 2014 if the SPRK had not filed Indictment PPS 67/10.

87. Thus, the defence submission is without merit because on 18 February 2014, the time when the indictment was filed, the investigation periods were still running.

9. Evidence presented by the Prosecutor is not reliable (Defence of N.K.)

Submission of the parties

88. Defendant N.K. in his submission argues that there is no reliable evidence to support the indictment.

89. The Prosecutor did not respond to this objection.

Findings of the Presiding Trial Judge

90. The Presiding Trial Judge finds that the objection of N.K. should be dismissed as unfounded. The defendant did not advance any argument in support of his submission, nor make reference to any specific item(s) of evidence that should be declared intrinsically unreliable under Articles 19 (1.29) and 259 of the CPC.

91. The credibility of evidence presented by the Prosecutor may be duly assessed only in the course of the main trial when the parties shall present evidence to support their stance. They will also be given the opportunity to challenge the evidence presented by each party.

10. *Summary*

92. The following evidence is inadmissible and shall be excluded from the files and sealed:

- statement of witness I.M., dated 12 January 2012[14];
- statement of witness X.R., dated 6 December 2010[15];
- statement of witness H.D., dated 18 March 2013[16]
- statement of defendant A.A., dated 15 March 2013[17];
- statement of defendant B.D., dated 14 March 2013[18];
- expert report by the Directorate of Geodesy, Cadaster and Property[19];
- claim filed by claimant A.M. to the Municipal Court Malisheva for confirmation of ownership right to an immovable property, dated 4 July 2007[20];
- all evidence which was collected after 6 April 2008 in execution of the "Order for the Application of Covert Measures"[21], issued by District Court of Pristina (PPN 697-7/07) on 6 February 2008.

IV. Requests to dismiss the indictment

1. *Applicable standard of review*

93. The motion to dismiss the indictment is provided by Article 250 of the CPC which allows the defendant to request it if there is not sufficient evidence to support a well-grounded suspicion that he committed the criminal offence which he is charged with.

94. As to the requests to dismiss the Indictment, the CPC provides unambiguous criteria that have to be considered. As results from Articles 250 (1) and Article 253 (1) of the CPC, prior to

[14] Binder 6, pp. 58 et seq.
[15] Binder 6, pp. 100 et seq.
[16] Binder 6, pp. 1 et seq.
[17] Binder 5, pp. 131 et seq.
[18] Binder 5, pp. 375 et seq.
[19] Binder 1, pp. 126 et seq.
[20] Binder 1, pp. 112 et seq.
[21] Binder 4, pp. 85 et seq.

the second hearing, the defendant may file a request to dismiss the indictment, based upon the following grounds:

- the act charged is not a criminal offence;
- circumstances exist which exclude criminal liability;
- the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution; or
- there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment."

95. A well-grounded suspicion is defined in Article 19 (1.12) of the CPC and it means "possession of admissible evidence that would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence". The "objective observer" standard requires evidence which would convince most people that a crime was committed by the defendant.

96. Article 241 of the CPC requires that the Indictment must determine the alleged criminal offense with precision by stating the time and place of the commission of criminal offence, the object upon which and the instrument by which the criminal offence was committed and other necessary circumstances. Under Article 1 (3) of the CPC definitions of crime must be strictly construed, interpretation by analogy is not permitted, and if there is an ambiguity, the definition of the crime shall be interpreted in favor of the person being prosecuted.

2. Submissions of the Parties - general remarks

97. The Defence Counsels of all Defendants have filed requests to dismiss the Indictment on the ground prescribed in Article 250 (1.4) of the CPC, because of lack of sufficient evidence to support a well-grounded suspicion that the defendants committed the criminal offences they are indicted with.

98. The Prosecutor in His responses did not agree with the Defence, and maintained that every charge against the defendants is supported by sufficient evidence of well - grounded suspicions that they committed the criminal offences which they are charged with.

3. The Indictment is formally deficient

Submissions of the Parties

99. The Defence of F.L. submits that the Indictment is formally deficient because it does not comply with the requirements specified in Article 241 (1.4) of the CPC read in conjunction with Article 2 (3) of the CPC. It is argued that "the Prosecutor did not determine precisely the definition of the criminal offences" which, in the opinion of Defence, constitutes a violation not only of Article 241 (1.4) of the CPC, but also the principle of legality (Article 3 (2) of the CPC). In particular, the precise location, time and intention of awarding the tenders to specific companies are not determined in the Indictment.[22] Further, the Defence submits that contrary to the requirement stipulated in Article 241 (1.7) of the CPC, the Indictment lacks clear references to evidence in relation to facts.

100. The SPRK did not file a response in regard to this issue.

Applicable law

101. Article 241 of the CPC provides that in regard to the criminal offence, with which the defendant is charged, the indictment shall contain:

- the time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstance necessary to determine the criminal offence with precision;
- a recommendation as to evidence that should be presented at the main trial along with the names of witnesses and expert witnesses, documents to be read and objects to be produced as evidence.

[22] See defence submission paras. 18 and 27.

102. Article 242 of the CPC determines the actions to be taken by the court after filing the indictment, and these are as follows:

- assigning a single trial judge or presiding judge and panel based on an objective and transparent case allocation system, as appropriate (paragraph 2);
- determining *ex officio* whether there is jurisdiction over the matter within the indictment (paragraph 3);
- scheduling immediately an initial hearing to be held within 30 days from the indictment being filed (paragraph 4), but if the defendant is being held in detention – not later than 15 days from the day the indictment being filed (paragraph 5).

103. Article 442 of the CPC regulates the method of filing submissions. As results from its paragraph 3, a submission must be comprehensible and must contain everything necessary for it to be acted upon. Paragraph 4 provides that when a filed submission does not meet these requirements, the person making submissions shall be summoned to correct or supplement the submission, unless otherwise provided for in the present Code.

Findings of the Presiding Trial Judge

104. The Presiding Trial Judge finds that, under the new Criminal Procedure Code, the assessment of whether the indictment meets the requirements provided by the law can be done only at the stage of the initial and second hearing. The Code precisely determines all steps to be taken and decisions to be issued. The Presiding Trial Judge avers that, contrary to the PCPCK, the CPC allows the issue of comprehensibility of the indictment to be addressed only in the course of initial hearing. This was also the intention of the legislator, as the new Code does not contain a similar provision to the one contained in Article 306 (2) of the PCPCK which provided that: "*Immediately upon receiving the indictment, a judge who will conduct the proceedings to confirm the indictment shall check whether the indictment is drawn up in accordance with Article 305 of the present Code.*"

105. The Presiding Trial Judge notes that it is a matter of fairness that the Defence and the court are in possession of a comprehensive indictment outlining the allegations with necessary precision. It is a fundamental right included in Article 30 (1) of the Constitution of

the Republic of Kosovo and Article 6 (3) a) of the ECHR that "*everyone charged with a criminal offence has the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him*". Only a detailed and comprehensive document containing the charges will enable the defendant to prepare for an effective defence.[23] It is for these reasons that Defence's request shall be treated admissible.

106. The requirement for a written notice of the factual and legal basis of the charges safeguards the fundamental right of the defendant to be fully informed about them and the matter and scope upon which the court has to decide on. The duty to inform the defendant about the charges rests entirely with the Prosecution. It encompasses the need to inform about the cause of the accusation, i.e. the acts the defendant is alleged to have committed and on which the accusation is based, as well as the nature of the accusation, i.e. the legal characterization given to those acts.[24]

107. In terms of the required description of the criminal offence, as provided by Article 241 (1.4) of the CPC, the Court of Appeals clarified that the Indictment "must encompass all the elements that establish the criminal offence in question and sufficient information to separate it from other acts". Further, the Court noted that for the assessment whether the indictment is comprehensible "[it] must be considered as a whole, meaning that both the charging part and the reasoning part are to be read together".[25]

108. In light of these interpretations, the Defence's submission that Indictment PPS 67/10 does not provide a sufficient description of the criminal offences, is ungrounded. The Defence particularly takes issue with the fact that in regards to count 1, the charging part of the Indictment only mentions "in Kosovo in 2008" which, in the opinion of the defence, is not a sufficient description of the time and place of the commission of the criminal offence. Although it is correct that the first part of the indictment ("description and legal names of the criminal offences") does not provide any detailed information in count 1, the

[23] See European Court of Human Rights, *Pélissier and Sassi v. France* [GC], para. 54; *Dallos v. Hungary*, para. 47; See further ICTY, *Prosecutor v. Zoran Kupreski, Mirjan Kipreski, Vlatko Kupreski, Drago Kupreski and Vladimir Šantic,* Case No. IT-95-16-A, Judgment of 23 October 2001, para. 88: "Whether an indictment is pleaded with sufficient particularity depends on whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that the accused may prepare his defense".

[24] See European Court of Human Rights, *Mattoccia v. Italy*, para. 59; *Penev v. Bulgaria*, paras. 33 and 42; See further ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, 17 September 2003, paras. 131 et seq.

[25] Court of Appeals, Ruling on Appeal, PN 577/13 ("MTPT 1"), 10 December 2013, para. 218.

explanations provided in the other counts, especially in count 3 and 6, are detailed. It is also not necessary that the exact place or date are mentioned in the Indictment as long as the act is clearly identifiable and distinguishable, i.e. there is no risk that the act charged might be confused with other acts. When reading the Indictment as a whole, it provides sufficient and detailed information which allows the defendants to adequately and effectively prepare their defence.

109. Furthermore, the Defence's submission that the Indictment does not comply with the requirement stipulated in Article 241 (1.7) of the CPC is ill-founded. The CPC clearly makes it mandatory for the prosecution to ensure that the indictment contains an explanation of the evidence in relation to key facts of the prosecution case. This requirement was already at length discussed at length by the Basic Court Pristina and the Court of Appeals in regard to Indictment PPS 425/09 (MTPT 1). However, the present case differs from the previous one in that Indictment PPS 67/10 provides an acceptable and sufficient number of cross-references to evidence the basis of the charges.

110. Having considered the above, the Presiding Trial Judge finds that the request to dismiss the indictment because it does not meet the requirements specified in Article 241 of the CPC is ungrounded.

4. The indictment shall be partially dismissed because it charges the defendant for the same criminal act with several criminal offences (Defence of F.L.)

Submission of the Parties

111. The Defence for F.L. request that the indictment be partially dismissed because it charges the defendant for the same criminal act with several criminal offences (Abuse of Official Position or Authority and Accepting Bribes). Based on the theory of concurrences, particularly the principle of speciality (*lex specialis*), the defendant might only be held criminally liable for the criminal offence of receiving/giving bribes. To support this stance,

the Defence makes reference to the Ruling of the Court of Appeals in the case against *Uka et al.* dated 17 April 2013.[26]

112. The SPRK did not file a response in regard to this particular issue.

Findings of the Presiding Trial Judge

113. Firstly, the admissibility of the request needs to be addressed because dismissal of the indictment is limited to the grounds listed in Article 250 (1) and reaffirmed in Article 253 (1) of the CPC. The Code does not explicitly foresee the applicability of the principle of *lex specialis*, consumption or concurrence as circumstances whose existence would justify the dismissal of the indictment. However, in the opinion of the Presiding Trial Judge, the matter of concurrences of criminal offences can be seen as part of the broader assessment of whether a well-grounded suspicion in relation to the alleged criminal offences exists (Article 250 (1.4) of the CPC). If, for example, one of the criminal offences is clearly consumed by the other or the principle of speciality applies, a well-grounded suspicion seems to be difficult to confirm for this criminal offence. This finding is further supported by Article 253 (2) of the CPC and, therefore, the request is considered admissible.

114. The issue at stake is whether cumulative charging is permissible under the legal framework of the CPC. After having reviewed the existing jurisprudence, some of the basic courts seem to sift the indictment by applying the principles governing concurrences of criminal offences at the indictment and plea stage[27], whereas other basic courts have confirmed the indictment without addressing the matter at all. The Court of Appeals, as the defence in its submission rightly points out, has applied the principle of *lex specialis* at the indictment and plea stage and dismissed one of the charges of the indictment in the case against *Uka et al.* The Court held in this case, that the prosecutor effectively charged the defendants for the same criminal activity with two criminal offences and found that such "cumulative legal qualification for the same alleged action amounts to an error in law".[28] However, the Court of Appeals also noted that the legal qualifications set out by the Special

[26] See defence submission paras. 22 et seq. and para. 119; Court of Appeals, Ruling on Appeal, PN 230/130 ("Land case"), 17 April 2013.
[27] See e.g. Basic Court Pristina, PKR. Nr. 1046/13 ("Passport"), Ruling on Applications to Dismiss the Indictment and Objections to Evidence, 3 February 2014.
[28] Court of Appeals, PN 240/2013, Ruling on Appeal, 17 April 2013, paras. 55 et seq.

Prosecutor and by the appeals panel are not binding on the trial panel, which will set the legal qualification for the respective criminal act only after a full assessment and determination of the factual situation.[29] More recently, the Court of Appeals left the matter of cumulative charging open. It held that:

> *"[t]he Presiding Trial Judge has in his ruling taken the approach to dismiss charges where the act is already covered by another charge in the indictment. The Court of Appeals finds no reason to object to this approach, but finds it unnecessary. Pursuant to Article 253 paragraph 2 the Presiding Trial Judge shall not be bound by the legal designation of the criminal offence as set forth by the state prosecutor in the indictment and further pursuant to Article 360 paragraph 2 when rendering a judgment the court shall not be bound by the motions of the state prosecutor regarding the legal classification. The Prosecutor has chosen to in his indictment describe the acts that the defendants allegedly have committed and charged them with every criminal offence that could cover the committed acts, even though it is clear that the accused cannot be convicted of several different criminal offences for the same act, unless it is permitted according to the rules on concurrence. Regardless of how the Prosecutor has formulated the indictment it will be up to the Trial Panel to decide which acts have been proven beyond reasonable doubt, how the committed acts should be qualified and which criminal offences the accused should be convicted of. The Court of Appeals will therefore not further elaborate on the rules on concurrence between the charge of Fraud and the charge of Breach of Trust."*[30]

115. Thus, the Court of Appeals does not seem to have a firm stance on the issue of cumulative charging; it is simply left to the discretion of the Presiding Trial Judge whether she wants to deal with the matter during the indictment and plea stage or not. It is noted that the practice of cumulative charging has been widely accepted by international criminal bodies on the grounds that, prior to trial, it may not be possible to determine exactly which charges will be proven beyond a reasonable doubt.[31]

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[29] Ibid, para. 66.
[30] Court of Appeals, PN 97/14 ("Passport"), Ruling on Appeals, 27 March 2014, paras. 14 and 15.
[31] ICTY, *Prosecutor v. Delalić, et al.*, Appeals Chamber Judgement, Case No. IT-96-21-A, 20 February 2001, para. 400; SCSL, *The Prosecutor v. Sesay et al.,* Appeals Chamber Judgment, Case No. SCSCL-04-15-A, 26 October 2009, para. 1192.

116. However, a different emerging practice tends towards stressing the obstacles which cumulative-charging might cause to the Defence and the right to a fair trial. The International Criminal Court recently ruled that "the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence, since it places an undue burden on the Defence".[32] Further, "as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges". The court stressed that there is a possibility for judges "to re-characterize a crime to give it the most appropriate legal characterization" when finding that there is no need for a cumulative charging approach in order for the prosecution to ensure that at least one of the charges will be retained by the court.

117. The Presiding Trial Judge notes that in the parallel criminal proceedings in case P 8/13 (MTPT 1), the indictment was confirmed in regard to both criminal offences, Abuse of Official Position or Authority and Accepting Bribes. Although in that case no request for dismissal of indictment was based on the argument of concurrence, in order to provide coherence in the case at hand – particularly in the light of a possible joinder at a later stage – the Presiding Trial Judge concludes that the request of the Defence to dismiss the indictment on this ground should be rejected as ungrounded.

5. Filing of the indictment in violation of the principle ne bis in idem (double jeopardy)

Submission of the parties

118. The Defence of F.L. requests to dismiss the indictment because the defendant was already indicted by Indictment PPS 425/09. It is submitted that the principle of *ne bis in idem* covers not only the situation of acquittal or conviction by a final decision, but also the situation when the accused is charged with more criminal offences for the same criminal acts (Article 250 (1.3) of the CPC).

119. The Prosecution did not respond to this particular issue.

[32] ICC, *Prosecutor v. Jean-Pierre Bemba*, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 200 et seq; Similar approach was adopted by the Appeals Chamber of the Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law, Case No. STL-11-01/I/AC/R176bis, 16 February 2011, para. 298.

Applicable law

120. Both constitutional guarantees as well as directly applicable international and European human rights law prevent a defendant from being tried more than once for the same criminal offence or act.

121. Article 4 (1) of the CPC provides as follows:

> *"No one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, of criminal proceedings against him or her were terminated by a final decision of a court or if the indictment against him or her was dismissed by a final decision."*

122. The wording of Article 4 (1) of the CPC ("criminal offence") might suggest that it is rather the legal classification of the charges which are decisive for assessing the applicable scope of *ne bis in idem*. However, a systematic reading of the CPC and considering the applicable constitutional and European human rights frameworks, lead to the conclusion that the term "same criminal offence" must be understood as related to the same facts or conduct and not its classification in law. The CPC itself provides in Article 363 (1.2) that the court shall render a judgment rejecting the charge, if "the accused was previously convicted or acquitted of the same act under a final judgment or proceedings against him or her were terminated in final form by a ruling".

123. In addition, Article 34 of the Constitution of the Republic of Kosovo provides that "[*n]o one shall be tried more than once for the same criminal act*". The European Court of Human Rights (ECtHR) has interpreted Article 4 of Protocol No. 7 to the ECHR as "prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same".[33] Further, the ECtHR has clarified that "the Court's inquiry should focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings".[34] Accordingly, the Court took the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as

[33] *Zolotukhi v. Russia*, Judgement [GC](no. 14939/03), 10 February 2009 para. 82.
[34] Ibid., para. 84

it arises from identical facts or facts which are substantially the same. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.

Findings of the Presiding Trial Judge

124. The request made by Defence is admissible as it is within the scope of Article 250 (1.3) of the CPC. The term "circumstances which bar prosecution" encompasses the principle of *ne bis in idem* as stipulated in Article 4 of the CPC.

125. The Presiding Trial Judge finds the reasoning of the ECtHR in *Sergey Zolotukhin v. Russia* convincing and it should be followed in the instant case. In order to assess whether the "same criminal offence" is concerned, one has to consider if the criminal act arises from the identical facts or facts which are substantially the same; the legal classification of such acts by the Prosecution is irrelevant.

126. The factual and legal situation in the present case does not fall within the scope of Article 4 of the CPC. Defendants F.L. and N.K., both subject to the criminal proceedings in P 8/13 (MTPT 1) and PKR 84/18 (MTPT 2), have not been acquitted or convicted for the acts charged in Indictment PPS 67/10. The criminal proceedings against F.L. in the so-called *Klecka* case (P 766/12) were based on different factual and legal allegations. Also the fact that charges on Indictment PPS 425/09 (P 8/13) have been partially dismissed by the Ruling of the Presiding Trial Judge, a decision upheld by the Court of Appeals, does not trigger the principle of *ne bis in idem*. The Presiding Trial Judge does not have to decide on the guilt of the accused at this stage of the proceedings, and the defendant continues to be presumed innocent until his guilt will be proven with a final decision having *res judicata*. The finding of a well-grounded suspicion for the criminal acts charged is not a finding of guilt.

6. Well-grounded suspicion for the criminal offence of Organized Crime (Count 1) against F.L., N.K. and S.T.

127. F.L., N.K. and S.T. are charged with the criminal offence of Organized Crime in violation of Article 274 paragraph 3 as read by paragraph 1 of the old CCK and punishable by a fine of up to 500.000 euros and by imprisonment of seven to twenty years, read in conjunction with Article 23 of the old CCK.

128. As it is alleged by the Prosecutor, from 2008 to 2012 in Kosovo, the defendants acted as members of an organized criminal group which committed serious crimes as specified in the indictment (Misappropriation in Office; Entering into Harmful Contracts; Abusing Official Position or Authority; Accepting Bribes). According to the indictment, the target of the group was to award lucrative road construction, respectively road maintenance tenders to road construction companies on the basis of political considerations and due to payments of cash incentives. The criminal group was allegedly structured and its members acted in concert for a significant period of time. The members were linked by family or friendship relations with F.L. who served as head of the group.

Submissions of the Parties

129. In general, the Defence of all defendants charged with this criminal offence requested to dismiss this charge because there is no evidence that a structured organized criminal group existed. Further, the Defence submits that the Prosecution failed to establish other necessary elements of the criminal offence of organized crime, identified in Defence's submission as follows:

- each member of the criminal organization had its duty assigned beforehand and his role in the commission of the criminal offence,
- activity of the criminal organization had been planned for a long or indefinite period of time,
- activity of the criminal organization is based on the application of some rules of internal control and discipline of the members,
- activity of the criminal organization is planned to be carried out internationally,
- for the commission of the criminal offence violence, intimidation or the readiness for its exertion has to be shown,
- for the commission of criminal activities, political, economic or other structures are used,

- the organization or part of it has influence in the legislative, media, judiciary or executive powers, etc.

130. The Defence of F.L. raised the argument that he did not have decision-making authority over members of the alleged organized criminal group. In particular it has not been established that F.L. held any kind of responsibility regarding the tender procedures and awarding of contracts to economic operators. Further, Defence submits that procurement procedures are regulated with the Law on Public Procurement (LPP), whereas the management of public finances is regulated with the Law on the Management of Public Finance and Responsibilities. Pursuant to these regulations, the ministers of any ministry, and thus defendant F.L., did not have any powers or responsibilities in relation to procurement procedures or management of public finance. The fact that F.L. was MTPT Minister does not imply that he should hold any responsibility for any eventual irregularities that could have occurred in relation to procurement procedures. The Prosecution has wrongly assessed and weighed evidence against the defendants, especially the expert report prepared by the international experts Lothar Mewes and Klaus Groth and the statements given by witnesses B.R. and V.K..

131. The Defence of S.T. also objected the charge of Organized Crime and requested its dismissal based on the argument that there is not sufficient evidence to support a well-grounded suspicion (Article 250 (1.4) of the CPC). Particularly, as the Defence argues, there is no evidence that the following requirements of the criminal offence were met: “three or more members of a group; intention of a group to commit criminal offences; decision-making organizational structure; division of roles”. Further, Defence submits that there is no evidence to support allegations that defendant S.T. arranged private negotiations between F.L. and companies interested in winning tenders for road construction.

132. The Prosecution argued, *inter alia*, that: (i) sufficient evidence has been gathered to secure convictions; (ii) the argument about F.L.’s influence is not based on his position as a minister but rather on his authority and influence he wielded in MTPT to areas not under his direct supervision; and (iii) the evidence should be analyzed as a whole and not in an isolated manner. The Prosecution repeats most of the factual allegations presented in the Indictment.

133. The Defence of N.K. and the defendant himself requested dismissal of this charge of the indictment on the following grounds: (i) there is not sufficient evidence that would support the commission of the criminal offences by him, contrary to Article 241 of the CPC; (ii) the Prosecution could not establish co-perpetration amongst the defendants; and (iii) the Indictment cannot be upheld on suppositions and the Presiding Judge should decide *in dubio pro reo*.

134. The Prosecution opposed the stance of the Defence of N.K., arguing that the submission amounts to unexplained assertions and conclusions and, thus, it is impossible for the Prosecution to make further comments or reply to such unjustified assertions.

Applicable Law

135. Article 274 paragraphs 1 and 3 of the old CCK (applied by the Prosecutor in the Indictment) stipulates:

> "(*1) Whoever commits a serious crime as part of an organized criminal group shall be punished by a fine of up to 250.000 EUR and by imprisonment of at least seven years.*
>
> *(3) Whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years."*

The necessary legal definitions are contained in the paragraph 7 of this Article that reads:

> *"For the purposes of the present article,*
>
> *1) The term "organized crime" means a serious crime committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit.*
>
> *2) The term "organized criminal group" means 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.*
>
> *3) The term "serious crime" means an offence punishable by imprisonment of at least four years.*
>
> *4) The term "structured group" means 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."

136. Organized Crime requires the commission of an 'underlying' criminal offence. The formulation used throughout Article 274 of the old CCK clearly stipulates that the commission of a basic offence is a constitutive element to this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of organized crime and of the underlying offence.[35]

137. As to the material elements of the offence of organised crime, the perpetrator must organise, establish, supervise, manage or direct the activities of the structured group (i.e., three or more persons) existing for a period of time and acting in concert. The subjective element of the offence is the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit. Paragraph 7(4) of Article 274 makes it clear that within the "structured group" the persons do not need to have formally defined roles, there is no requirement of continuity of membership or a developed structure.

Findings of the Presiding Trial Judge

138. The Defence arguments are rejected as ungrounded. Contrary to Defence's assertions, under the old CCK there is no requirement for a clear hierarchy between the group members, strict discipline, obedience and loyalty, expediency and resourcefulness in the commission of the criminal offence. For a structured group, it suffices that there are three or more members in the group that is not randomly formed.

139. During the main trial the Trial Panel will have the opportunity to scrutinize the evidence and determine whether F.L., N.K. and S.T. formed a structured group and which role, if any, each defendant played (e.g., organisation, supervision, managing, etc.). For now, the evidence presented by the Prosecution is sufficient to establish a well-grounded suspicion that F.L., N.K. and S.T. formed a group (three persons) that existed for a period of time (Indictment period), were not randomly acting in concert, and aimed at committing a serious crime. As the Prosecution submits, the evidence should be assessed as a whole and

[35] Supreme Court of Kosovo, Ap-Kz no. 61/2012, Judgment, 2 October 2012.

for now the evidence such as S.T.'s pre-trial testimony, intercept telecommunications, documents pertaining to the procurement procedure, and other documentary evidence, support a conclusion of a well-grounded suspicion against the defendants. Also during the main trial the Panel will establish if the underlying criminal offences necessary for the criminal offence of Organized Crime, were committed.

140. In relation to the expert report prepared by the international experts Lothar Mewes and Klaus Groth and the statements given by witnesses B.R. and V.K., the Presiding Trial Judge acknowledges that these items of evidence are of an indisputable probative value, as they are relevant for the case, but the weight to be afforded to them is yet to be considered during the main trial. The Panel's assessment of their appropriate weight can only be done once the evidence is tested and presented over trial.

7. Well-grounded suspicion for the criminal offence of Misappropriation in Office against F.L., N.K. ans S.T. (Count 2)

141. Defendants F.L., N.K. and S.T. are charged with the offence of Misappropriation in Office in violation of Article 340 paragraph 1 and 3 of the old CCK and punishable by imprisonment of one to ten years, read in conjunction with Article 23 of the old CCK (co-perpetration) as to F.L. and N.K.; further read in conjunction with Article 25 CCK (assistance) as to S.T..

142. The Prosecutor alleges that during the years 2008 to 2010 in Kosovo, F.L. and N.K. in their official positions as the MTPT Minister and the MTPT Chief of Procurement administered the usage of the MTPT budget. Whereas F.L. bore ultimate budget responsibility, N.K. made use of the assigned budget by signing legally binding contracts with the companies *E.* and *B.* for the tenders upon instruction of F.L.. The defendant S.T. is suspected of having assisted F.L. and N.K. in the private deal making negotiations, in the delivery of tender papers and in passing on of communications coming from and intended for F.L. before and while the tender procedure was underway. The contracts created legally binding civil claims against the MTPT budget and lead to the execution of the claims and payouts by the Ministry of Finance.

143. The Prosecutor further claims that the defendants misappropriated the MTPT financial budget while performing their duties as they dishonestly applied the budget to their own cause by awarding the tenders to *E.* and *B.* in a preselected and manipulated process in

exchange of bribe money. The financial benefit received by these companies exceeded well the 5.000 Euro limit as foreseen by Article 340 paragraph 3 old CCK.

Submissions of the Parties

144. The Defence of F.L., N.K. and S.T. request to dismiss this charge of the indictment, referring to the final decision of the Presiding Trial Judge in the MTPT 1 case.

145. The Prosecutor did not address the arguments presented by the Defence and sustained the charge of Misappropriation in Office.

Applicable Law

146. The provisions of Article 340 of the old CCK applied in the Indictment by the Prosecutor read as follows:

(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person, appropriates money, securities or other movable property entrusted to him or her because of his or her duty or position within a public entity or a legal person shall be punished by imprisonment of six months to five years.

(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, that perpetrator shall be punished by imprisonment of one to ten years.

147. "To appropriate" means to take possession of or make use of exclusively for oneself, often without permission. The property is entrusted to somebody if it is given over to for care, protection, or performance.

148. To assess properly the grounds of the charge it is necessary to refer to the scope of duties and competences of the defendants respectively as the Minister of Transport and Telecommunication (F.L.) and the Chief of Procurement (N.K.) in reference to budget.

149. The position of ministers is determined, in general, by *the Constitution of the Republic of Kosovo*, the *Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo* (in force until October 2010) and the *Law No.03/L –189 on the State Administration of the Republic of Kosovo (*in force since October 2010).

150. Under section 1.3 of *the Regulation on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo* each Minister shall, in accordance with policies set by the Government:

(a) lead and represent his or her Ministry;

(b) be accountable to the Assembly for matters concerning his or her Ministry;

(c) set the political direction for the work of the Ministry;

(d) issue decisions and administrative instructions in order to regulate the activities of the Ministry in general or its particular fields of activity;

(e) carry out other tasks within the framework of the Ministry's responsibilities as determined by legislation; and

(f) report to the Assembly on a periodic basis, as well as at the request of the Assembly, on the activities of the Ministry, including the use of all funds received.

151. As is provided by Section 1.7 b of the Regulation, in carrying out their responsibilities and functions, Ministers shall ensure that their respective Ministries comply with the most appropriate, cost-effective, transparent and accountable allocation of funds received from the Budget for the Provisional Institutions of Self-Government and other sources.

152. The position of Minister of Transport and Telecommunication was further regulated in the Annex VIII of the Regulation, and its provision (ix) provides that he shall:

"in the specific sector of road infrastructure, develop public road maintenance and construction programs, secure funding and organize the award of concessions, as appropriate; oversee the provision and management of the road infrastructure, including the performance of technical, organizational and developmental tasks related to the construction, maintenance and protection of public roads, control of the state of the roads, and maintenance of documentation on public roads and road traffic."

153. The most significant law in Kosovo affecting public internal financial control is the *Law on Public Financial Management and Accountability* (Law No. 03/L-048). This law covers the arrangements for the development of the budget and the processes for its approval, including parliamentary processes, as well as the arrangements for transfers and for reporting on budget outcomes. The law also defines "public money", the organization of the

Ministry of Finance and Economy and appointment of key officials, capital and operating expenditure, financial management, accounting, budget accountability, and financial reporting systems for public authorities and public undertakings in Kosovo; it prescribes the powers and duties of the Minister of Finance and Economy and other public authorities concerned with these matters.

154. The law in Article 1.1 defines "budget organization" as any public authority or public undertaking that directly receives under an Appropriations Law an appropriation that is not a component of a larger aggregate appropriation provided to another public authority or public undertaking. It also prescribes the administrative structure that budget organizations of all types are to establish to ensure appropriate financial management arrangements. This structure includes a chief administrative officer (who is the chief official), an internal auditor, a chief financial officer, a procurement officer, and a certifying officer. The law also specifies the arrangements for the receipt and expenditure of public money for accounts within the Kosovo Consolidated Fund. Part VIII of the law sets out the requirements for reporting, accounting, auditing and financial control, including a requirement for the Ministry of Finance and Economy to prepare a budget classification system and chart of accounts using applicable standards prepared by the International Federation of Accountants (IFAC).

155. The position of a chief administrative officer is regulated in Article 10 which stipulates:

10.1

A Chief Administrative Officer shall have principal legal responsibility for ensuring that his/her budget organization, (…), and its personnel, thoroughly and adequately comply with, observe and implement all applicable provisions of the present law and the FMC Rules.

10.2

A Chief Administrative Officer shall, inter alia, be specifically responsible for

a) establishing internal financial controls within the budget organization, autonomous executive agency or public undertaking in accordance with the FMC Rules,

b) delegating functions associated with the collection and expenditure of public money in accordance with the FMC Rules,

c) *establishing an accountability framework for assessing and managing the performance of any personnel who are delegated such functions,*

d) *establishing and applying internal disciplinary measures to remedy situations where personnel with such delegated functions are not performing such functions adequately or properly, and*

e) *notifying the Auditor General of any circumstances giving rise to a reasonable belief that there has been a violation – by any person or undertaking - of the present law, the FMC Rules or any other law.*

156. As is provided in Article 12 (1) of the Law, each budget organization shall have a Chief Financial Officer. His duties and competences are further developed in paragraphs 4 and 5 (relevant for the case) which read as follows:

(4) Every CFO shall be responsible for the proper and lawful financial operations of the concerned budget organization, autonomous executive agency or public undertaking.

(5) In the case of the CFO of a budget organization or a autonomous executive agency, such CFO shall have the authority and responsibility for:

(i) *developing the proposed budget and appropriations request of the budget organization or autonomous executive agency;*

(ii) *ensuring that all transactions are accurately recorded in the Treasury Accounting Record;*

(iii) *ensuring that all legitimate invoices received are promptly submitted for payment through the Treasury system;*

(iv) *overseeing and supervising all aspects of budget reporting; and*

(v) *any function delegated to the CFO in accordance with the FMC Rules. All work of the CFO must strictly comply with the FMC Rules.*

157. In accordance with Article 13.1 each budget organization, autonomous executive agency and public undertaking shall have a Procurement Officer, who shall be responsible for conducting the budget organization's procurement activities in accordance with the Law on Public Procurement.

158. As results from Article 34.1 the Chief Financial Officer of a budget organization shall inform the General Director of Treasury of

(i) any contract entered into by the budget organization and any modification to a contract previously entered into by the budget organization if the contract obligates the budget organization to make payments from public money in the current fiscal year or in future fiscal years, and

(ii) any non-contractual payment obligation of the budget organization as described in paragraph 3 of this Article.

159. Rules of payment are prescribed in Article 38 and 39 of the Law:

"38.1 No money shall be released from the Kosovo Consolidated Fund for the purpose of making a payment in the absence of a currently effective allocated funds notice authorizing the use of such money to make such payment.

38.2 The process to be complied with for the making of payments authorized by an allocated funds notice shall be established by the FMC Rules.

39.1 The CFO of a budget organization shall be responsible for ensuring that every valid invoice and demand for payment for goods, services and/or works supplied to the budget organization is paid within thirty (30) calendar days after the budget organization receives such an invoice or demand for payment.

39.2 Where any person has issued such an invoice or demand for payment to a budget organization, and the concerned amount is more than sixty (60) days overdue, the person may submit a copy of the concerned invoice or demand for payment to the Treasury. Upon receipt of a copy of such an invoice or demand for payment, the General Director of the Treasury shall, within the next thirty (30) days, make an inquiry to the budget organization to ensure (i) that the invoice or the demand for payment is valid and that the concerned goods, services and/or works have been supplied, and (ii) that the concerned amount has not been paid and is more than sixty (60) days overdue. If the result of such inquiry is positive, the Treasury shall pay the concerned amount and shall not be required to obtain the prior approval of the concerned budget organization. In such event, the Treasury shall have the authority to execute a delegated expenditure notice without the prior approval of the concerned budget organization."

Findings of the Court

160. The analysis of the circumstances of the case leads to the conclusion that F.L. and N.K. did not appropriate money from the budget of the Ministry of Transport and Telecommunication as they did not take possession of it and did not make use of it exclusively for themselves. F.L. as the Minister was indeed responsible for proper use and due spending of funds which were appropriated to the budget organization he was head of, however there is no evidence that he used the money for himself. The Prosecutor does not claim that the spending described in the Indictment was not performed in accordance with the *Law on Public Financial Management and Accountability* and within the organizational framework provided by it. On the contrary, the spending was based on legally binding contracts concluded between the Ministry of Transport and Telecommunication and companies who won tenders for specific road constructions as a result of procurement procedure.

161. The Prosecutor seems not to notice that the money spent from the budget of the Ministry of Transport and Telecommunication was appropriated for road construction and this work was performed by contracting companies. There is not a single piece of evidence that these funds were abused by the defendants.

162. With regard to N.K., it must be also underlined that he was the Head of Procurement Department in the Ministry of Transport and as such he was responsible for proper conduct of procurement proceedings. He was not entrusted with any funds of the MTPT, therefore he also could not have appropriated them.

163. Therefore the Presiding Trial Judge decides to dismiss the charge of Misappropriation in office against F.L. and N.K.. As a consequence, the charge is also dismissed against defendant S.T. who is charged with assisting these defendants in committing the crime.

164. The same charge against F.L. and N.K. (but in connection with other contracts for road construction) was included in the indictment in the MTPT 1 case. For the same legal and factual reasons as presented above, the charge was dismissed. It is worth underlining that the Prosecutor did not appeal against this decision of the Presiding Trial Judge.

8. Well-grounded suspicion for the criminal offence of Entering into Harmful Contracts against F.L., N.K. and S.T. (Count 3)

165. Defendants F.L., N.K. and S.T. are charged with the criminal offence of Entering into Harmful Contracts in violation of Article 237 paragraphs 1 and 2 of the old CCK, punishable by imprisonment of one to ten years, where the perpetrators of the offence cause damages exceeding 100.000 euros, read in conjunction with Article 23 of the old CCK (co-perpetration) as to F.L. and N.K. and Article 25 of the old CCK (assistance) as to S.T..

166. The Prosecutor alleges that N.K. concluded the contracts for the public tenders (tender no. 08-006-511 and tender no. 08-073-521) with the companies *E.* and *B.* with the intention of receiving a personal benefit, under pressure exercised by F.L.. S.T. was to assist them in the private deal through negotiations, delivery of tender documents and passing on communication between company associates and F.L. before and while the tender procedure was going on. The concluded contracts were harmful because there were companies placing cheaper bids, which fulfilled the formal criteria in the respective tender bidding processes and which were able to properly execute the work.

167. In the opinion of the Prosecutor, the damage caused by these manipulations amounts to at least the difference in the placed offers; if not the overall value of the tenders in the amount of EUR 885.069,00 as the constructed roads required built-back efforts as well as the renewed proper construction of the roads.

Submissions of the Parties

168. The Defence of F.L., N.K. and S.T. requested to dismiss this charge. Reference was made by the Defence to the legal reasoning of the final decision of the Presiding Trial Judge in the MTPT 1 case, dated 01 July 2013.

169. The Prosecutor did not address the arguments presented by Defence and sustained the charge of Entering into Harmful Contracts.

Applicable Law

170. As during the course of the criminal proceedings against the defendants the substantive law was changed, in order to assess the charges the Presiding Trial Judge is obliged to verify which law is more favorable for the perpetrator. The comparison of the elements of a criminal offence of entering into harmful contracts in both Criminal Codes (the provisional and new ones) leads to conclusion that the more favorable law for the defendants is the new one.

171. In accordance with Article 291 of the new CCK, a criminal offence of entering into harmful contracts may be committed only by a responsible person who engages in an economic activity and through his/her activities causes damage to the business organization.

172. Article 120 (7) of the new CCK defines business organization as any natural or legal person or group of such persons who are engaged in economic activity and defined and regulated by the Law on Business Organizations (LAW No. 02/L-123). In accordance with its Article 2 (2.1) *"Kosovo business organization"* is a general term which means and includes any of the business organization types established in Kosovo under the present Law: a personal business enterprise, a general partnership, a limited partnership, a limited liability company and a joint stock company.

173. The old CCK in Article 237 paragraph 1 provides a different definition of the criminal offence of entering into harmful contracts as this offence could be committed not only by a representative or an authorized person of a business organization but also by a representative or an authorized person of a legal person. Therefore, the range of subjects who could commit this criminal offence was definitely wider than is provided for in the present Criminal Code. Furthermore, the previous Code provided that the damage as a result of acts taken by these persons should be damage which could be caused not only to a business organization, but also to a legal person.

174. Having considered the above, the Presiding Trial Judge opines that the definition of the offence of entering into harmful contracts as it is provided in the new CCK is more favorable for the defendants as the range of subjects able to commit the offence and potential injured parties is definitely narrower.

Findings of the Presiding Trial Judge

175. F.L. and N.K. were serving in the Ministry of Transport and Telecommunication as official persons. They were not engaged in economic activities, as defined in Article 291 of the new CCK, and through their acts did not cause any damage to a business organization. Therefore they could not have committed a criminal offence of entering into harmful contracts as provided in Article 291 paragraph 1 of the new CCK.

176. Having considered the above, the Presiding Trial Judge dismissed the charge of Entering into Harmful Contracts against F.L. and N.K.. As defendant S.T. is charged with assisting these defendants, consequently the charge is also dismissed in regard to him.

177. In the MTPT 1 case F.L. and N.K. were charged with an act classified by the Prosecutor as the criminal offence of Entering into Harmful Contracts. For the same legal reasons as presented above, the charge was dismissed. It is also worth underlining that in relation to this charge, the Prosecutor did not appeal against the decision of the Presiding Trial Judge.

9. *Well-grounded suspicion for the Criminal Offence of Abusing Official Position or Authority against F.L., N.K. and S.T. (Count 4)*

178. F.L., N.K. and S.T. are charged with the criminal offence of Abusing Official Position or Authority in violation of Article 339 paragraphs 1 and 3 of the old CCK, punishable by imprisonment of one to eight years, in conjunction Article 23 of the old CCK (co-perpetration) for F.L. and N.K. and with Article 25 of the old CCK (assistance) for 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 5.

179. The Prosecutor alleges that F.L., N.K. and S.T. abused their official position by negotiating, promising and respectively awarding the construction company *B.* with road construction tenders in exchange for bribes. The tender was awarded by circumventing and manipulating the legal procurement rules under violation of Section 6.2. of *the Law on Public Procurement,* which forbids favoring of one company over the other at any stage of the procurement procedure.

Submissions of the Parties

180. The Defence of F.L. and N.K. submits that the charge of Abuse of Official Position should be dismissed because there is no sufficient evidence to support a well-grounded suspicion that it has been committed. It is argued that even if there have been procedural errors in the tender proceedings, the defendant did not intent to violate the law.

181. The Defence of S.T. submits that the charge should be dismissed because the defendant is not an official person, thus he cannot commit the crime as a co-perpetrator. In addition, no evidence exist which would prove that any MTPT official has asked for or accepted bribes in regard to the tender procedure subject to the Indictment. The Defence further takes issue with the Prosecutor's finding that the alleged bribes were paid in exchange for awarding tender 08-006-511 to *B.* company as this tender was finally awarded to *E.* company.

182. The Prosecutor did not specifically address this argument in his response to the request filed by the Defence. He sustained his stance that there is sufficient evidence to support a well-grounded suspicion that the criminal offence has been committed by the defendants.

Applicable Law

183. Article 339 of the old CCK as applied by the Prosecutor in the Indictment reads, in pertinent parts, as follows:

> *"(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties shall be punished by imprisonment of up to one year.*
>
> *(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding* 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years."

184. The definition of an "official person" is defined in Article 107 (1) of the old CCK, in accordance to which the following shall be treated as official persons:

- a person elected or appointed to a public entity;

- an authorized person in a business organization or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority and who within this authority exercises specific duties,
- a person who exercises specific official duties, based on authorisation provided for by law;
- a person who is a member of personnel of liaison offices in Kosovo,
- a person in a public international or supranational organization who is recognized as an official or other contracted employee within the meaning of the staff regulation of such organizations,
- a judge, prosecutor or other official in an international tribunal which exercises jurisdiction over Kosovo.

Findings of the Presiding Trial Judge

185. The Presiding Trial Judge finds it necessary to ascertain during the main trial the Prosecutor's allegation whether F.L., N.K. and S.T. have committed the offence of the Abusing Official Position or Authority. The evidence presented by the Prosecutor indicates that the defendant F.L. used his positions within the Ministry to influence the tender procedures. Furthermore, the defendant S.T., in his capacity of F.L.'s bodyguard, used his position to liaise with companies and his relationship with F.L. to influence the tender procedures. The Presiding Trial Judge avers that there is sufficient evidence to support a well – grounded suspicion that the criminal offence has been committed. This is supported by numerous pieces of evidence presented by the Prosecutor, such as intercepted telecommunications, the tender procedures files, expert reports on the manner in which the tender procedures were carried out, and witness statements regarding the deliberations and assessment of the committee within the MTPT that would award the tender to the winning company. The very fact that F.L. as a Minister was not authorized by the law to participate directly in a procurement procedure, does not exclude *per se* his potential interference into it. In the course of the main trial it must be ascertained whether he used his political and personal position to influence on results of tender proceedings conducted by the Ministry which he headed.

186. The Presiding Trial Judge agrees with Defence of S.T. arguing that the defendant was not an official person within the meaning of Article 107 of the old CCK and, thus, he cannot be held criminal responsible as a co-perpetrator for a criminal offence in violation of Article 339 of the old CCK. The principle that all co-perpetrators needs to share the same the quality as the offender as prescribed by the criminal law, is essential.[36] The criminal offence of Abusing Official Position or Authority clearly requires the perpetrator to be an "official person". There is no ground to presume that the defendant S.T., in his capacity of F.L.'s bodyguard/driver, was an official person.

187. The Presiding Trial Judge is of the opinion that with regard to the defendant S.T. the mode of liability of assistance shall be considered instead of co-perpetration, as it may better reflect the factual circumstances presented in the Indictment. The finding that a defendant has committed a criminal offence through assisting a perpetrator who is an official person does not require that the abettor, i.e. the person who assists, shares the same quality as the principal. Such reasoning is supported by the provision of Article 36 (3) of the new CCK which, in pertinent parts, reads as follows:

> *"(…) However, if the personal circumstances which relate to the offender have an impact on a more severe or more lenient punishment, and these circumstances constitute an element of the criminal offence, the co – perpetrator, inciter or assistant is liable for the punishment for the criminal offense when he or she knew about this circumstance, even if it did not relate to him or her."*

188. Although the old CCK does not contain a similar provision, the Presiding Trial Judge opines that the same principle as to the scope of liability of an assistant can be interpreted from Article 1 of the old CCK combined with a definition of assistance, provided in Article 25 *("whoever intentionally assists another person in committing a criminal offence (…)").*

189. Thus, the Presiding Trial Judge finds that, depending of the results of the evidentiary proceedings during the main trial, it may be possible to re-classify the mode of liability from co-perpetration to assistance in regard to defendant S.T.. The competence to re-classify results from Article 253 (2) of the CPC, which foresees that the "*presiding trial judge shall*

[36] See L. Laszarevic, Commentary on the Criminal Code of FRY, 5th edition 1995, Article 22, para. 1: "[Complicity] exists when several people who meet all the requirements pertaining to the main actor of a particular deed and jointly agree to act as accomplices" [emphasizes added].

not be bound by the legal designation of the criminal offence as set forth by the state prosecutor in the indictment".

10. Well-grounded suspicion against F.L., N.K. and S.T. for the criminal offence of Accepting Bribes (Count 5); and against A.A. and B.D. for the criminal offence of Giving Bribes (Count 6).

190. The Presiding Trial Judge finds it reasonable to assess jointly the charges of Accepting Bribes (against F.L., N.K. and S.T.) and Giving Bribes (against B.D. and A.A.).

191. The Prosecutor alleges that in 2008 in Kosovo, F.L. in his official position as MTPT Minister, N.K. in his official position as MTPT Chief of Procurement; and assisted by S.T., requested payment of financial funds in exchange for awarding a road construction tender to *B.* company.

Submissions of the Parties

192. With regard to the charges of Accepting and Giving Bribes, the Defence requests to dismiss them because of lack of evidence to support a well-grounded suspicion that the criminal offences have been committed.

193. The Defence of S.T. additionally submits that the defendant could not have committed the offence of Accepting Bribes as he is not an official person within the meaning of the Criminal Code.

194. The Prosecutor in his response to the Defence's submissions takes the stance that sufficient evidence to support a well – grounded suspicion against the defendants for the criminal offences exists.

Applicable Law

195. Article 343 of the old CCK determines the necessary elements of the criminal offence of accepting bribes. In accordance with this article, this criminal offence is committed by an official person who solicits or accepts a gift or some other benefit for himself, herself or another person or who accepts a promise of a gift or some other benefit to perform within the scope of his or her authority an official or other act

- which he or she should not perform or to fail to perform an official or other act which he or she should or could have performed (paragraph 1);
- which he or she should have carried out or to fail to perform an official act which he or she may not perform (paragraph 2).

As results from paragraph 3 this criminal offence may be also committed by an official person who, following the performance or omission of an act provided for in paragraph 1 or 2, solicits or accepts a gift or some other benefit for himself, herself or another person in relation to such performance or omission.

196. The criminal offence of giving bribes is defined in Article 344 of the old CCK, which provides that it is committed by a person who confers or promises to confer a gift or other benefit on an official person for acts or omissions as mentioned above.

Findings of the Presiding Trial Judge

197. The Prosecution's allegations that bribes were paid is based mainly on intercepted telecommunications from the defendant A.A.'s telephone. In particular, the Prosecution relies on an intercepted telecommunication between A.A. and S.T. on 22 February 2008, in which the following statements were made:

"S.T.: Yes, one more thing, they will… something, normally, they will take something.

A.A.: Aha, aha.

S.T.: One is 900 and something.

A.A.: And it it's Bajrush?

S.T.: No, no, not him anymore, he was a mayor to sign things."[37]

On 4 March 2008, S.T. told A.A. that "we won't let it without taking something".[38]

198. Additionally, the Prosecution relies on intercepted telecommunications that were collected after 5 April 2008. As explained above, these intercepted telecommunications were collected unlawfully as no court order was issued authorizing the covert measure of interception to be extended after 5 April 2008. As a consequence, such evidence is

[37] Binder 11, pp. 86-88.
[38] Binder 11, p. 198.

inadmissible and cannot be taken into consideration when assessing whether there is a well-grounded suspicion that alleged bribes were being offered and accepted by the defendants. The Prosecution also bases its allegation on the defendant A.A.'s pre-trial testimony which the Presiding Trial Judge has found inadmissible due to the leading role and overall control that the Legal Officer from the SPRK had during the interview.

199. Although the argument that the evidence should be considered as a whole is valid, even construing all of the evidence before the Court, the Prosecution did not present any lawful evidence that the defendant A.A. met or had direct contact with the defendant F.L.. Likewise, no lawful evidence was put forward to support the allegations that bribes were being offered, paid, or negotiated. The single contention that "normally, they will take something" or that "we won't let it without taking something", in the opinion of the Presiding Trial Judge, does not meet the well-grounded suspicion threshold required under Article 253 (1.4) of the CPC to confirm the criminal offence of Accepting Bribes.

200. Therefore, the Presiding Trial Judge decides to dismiss the charges of Accepting Bribes (against F.L., N.K. and S.T.) and Giving Bribes against A.A. and B.D..

11. Well-grounded suspicion for the criminal offence of Misuse of Economic Authorization against A.A. and B.D. (Count 6)

201. The Prosecution submits that from 8 February 2008 to 25 April 2008, in relation to the tender process 08-006-511, Ferizaj region, and from 23 April 2008 to 3 June 2008, for the tender MTPT 08/073/521, B.D., in the capacity of owner of *B.* company, substantially violated the rules of business activity by knowingly and intentionally making use of co-defendant A.A. as a "fixer" to manipulate the tender processes, by having him contact S.T. and pass on relevant tender related messages to F.L.. The Prosecution's allegations are based on documentary evidence, such as the bid evaluation report and recommendation for award of contract, bids submitted by companies *B.* and *E.*, expert reports on the contracting award procedures, the tender dossier, and intercepted telecommunications from the "Clinton Bombing" case for the period of 6 February 2008 to 5 April 2008. Their behaviour has been classified by the Prosecutor as Misuse of Economic Authorization.

Submissions of the Parties

202. The Defence requests this count to be dismissed, arguing, *inter alia*, that: (i) the description of facts in the Indictment related to Count 6 refer to the company *E.*, rather than *B.*; (ii) A.A. is not the representative of the company *B.*; (iii) the enacting clause of the Indictment does not contain any elements of criminal offences; (iv) there is no evidence to support the Prosecution's argument that the 7.3% discount seems suspicious;.

203. The Prosecution opposes the Defence submission, noting that the Defence's arguments are unexplained assertions and conclusions and that the Defence failed to specify the basis of its arguments, making it impossible for the Prosecution to reply to the submission.

Applicable Law

204. Article 236 of the old CCK provides the following definition of the criminal offence of Misuse of Economic Authorization:

> *"A responsible person within a business organization or legal person which engages in an economic activity shall be punished by imprisonment of six months to five years if he or she commits one of the following acts with the intent to obtain an unlawful material benefit for the business organization or legal person where he or she is employed or for another business organization or legal person:*
>
> *1) creates or holds illicit funds in Kosovo or in any other jurisdiction;*
>
> *2) through the compilation of documents with a false content, false balance sheets, false evaluations, inventories or any other false representations or through the concealment of evidence falsely represents the flow of assets or the results of the economic activity and in this way misleads the managing bodies within the business organization or legal person to err in decision-making on management activities;*
>
> *3) fails to meet tax obligations or other fiscal obligations as determined by law in Kosovo;*
>
> *4) uses means at his or her disposal contrary to their foreseen purpose; or*
>
> *5) in any other way seriously violates the law or the rules of business activity which relate to the disposal, use or management of property."*

205. The Court of Appeals has clarified that the wording of "the law or the rules of business activity which relate to the disposal, use or management of property" is to be understood as "violation of any law, provided all other elements are met, will result in this criminal offence, whereas only violations of rules of business activity relating to disposal, use or management of property will trigger criminal responsibility".[39]

206. The Court of Appeals has further outlined that, in accordance with the wording of the provision, "not all but only serious violations will trigger criminal responsibility. It must therefore be clarified whether alleged violation is of such serious nature. In other words, the Court must clarify the meaning of the term "serious violation" as used in this provision".[40]

Findings of the Presiding Trial Judge

207. From the analysis of the charge and material provided by the Prosecution it results that the defendants A.A. and B.D. were cooperating with each other in the process of preparing tenders for road construction contract with the MTPT. The intercepted materials indicate that A.A. was lobbying for the *B.* company owned by B.D., in order to help him win the tender procedure. He allegedly had contact with defendant S.T., who purportedly was a contact person between the company and people in the MTPT who had influence on procurement proceedings.

208. The Presiding Trial Judge avers that the description of the factual circumstances which justifies the charge of Misuse of Economic Authorizations against B.D. and A.A. does not contain all necessary elements of the criminal offence as stipulated in Article 236 paragraphs 1, subparagraphs 4 and 5 of the old CCK.

209. What must be emphasized with regard to A.A. is that there is no description in the Indictment of the personal circumstances which constitute an element of the crime, i.e. of him being "*a responsible person within a business organization or legal person".* From the Indictment and the evidence presented by the Prosecutor, it results that defendant A.A. has only cooperated with *B.* company on an *ad-hoc* basis*;* he was not an employee of the company, neither did he have any contract for management or similar.

[39] Court of Appeals, PN 577/2013 (MTPT 1), Ruling, 10 December 2013, para. 192.
[40] Ibid, para. 193

210. The description of the charge presented by the Prosecutor indicates that the other way that A.A. committed "*serious violation of the law or the rules of business activity"* was that he had contacts with S.T. on behalf of *B.* company and purportedly passed on relevant tender related messages to F.L.. The Presiding Trial Judge does not concur with the assessment of the Prosecutor that this kind of activity constitutes a criminal offence. This kind of behavior is quite typical in business relations, and may be treated as lobbying, which is an activity of trying to persuade someone in authority, to support a business organization in obtaining an advantage, e.g. through winning a contract in public procurement procedure. As far as this activity does not exceed the limits established by the law or rules of business activity, it cannot be a basis for the criminal offence of Misuse of Economic Authorizations.

211. Even if the Presiding Trial Judge agreed with the Prosecutor that A.A. and B.D. seriously violated the law or the rules of business activity, it would not be sufficient to find that the criminal offence of abuse of economic authority as specified in Article 236 (1.5) of the old CCK had been allegedly committed by them. The existence of a relationship between such a violation and the disposal, use or management of property is a necessary element of the offence. In fact the Prosecutor in the charge does not mention this element of the criminal offence at all. The Presiding Trial Judge does not find any connection between the alleged violations of the law or rules of business and property.

212. The Prosecutor classified the charge of the abuse of economic authority against B.D. and A.A. also as a breach of Article 236 (1.4) of the old CCK. Nevertheless, the factual allegations to justify this charge presented in the indictment do not contain the necessary elements of the criminal offence as it is prescribed by the law. The Prosecutor did not explain what means at the disposal of the defendant were used contrary to their foreseen purpose; he did not elaborate this issue at all.

213. Having considered the above, the Presiding Trial Judge finds there is no sufficient evidence to support a well - grounded suspicion that the criminal offence of Misuse of Economic Authorization has been committed by the defendants A.A. and B.D.. Therefore, the charge is dismissed.

12. Summary

214. As there is no sufficient evidence to support a well-grounded suspicion that criminal offences were committed, the following charges of the indictment are dismissed:

- Misappropriation in Office against F.L., N.K. and S.T. (Count 2);
- Entering into Harmful Contracts against F.L., N.K. and S.T. (Count 3),
- Accepting Bribes against F.L., N.K. and S.T. (Count 5),
- Misuse of Economic Authorization and Giving Bribes against A.A. and B.D. (Count 6).

215. The following charges of the Indictment are not dismissed:

- against F.L., N.K. and S.T.: Organized Crime in violation of Article 274 paragraph 3 of the old CCK as read by paragraph 1 of the old CCK and punishable by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years, read in conjunction with Article 23 of the old CCK (co-perpetration) (Count 1);
- against F.L. and N.K.: Abusing Official Position or Authority in violation of Article 442 of the new CCK, punishable by imprisonment of one to eight years; read in conjunction with Article 23 old CCK (co-perpetration); and additionally read in conjunction with Section 117.1 a and d of the Law on Public Procurement (Count 4).

Pristina, 29 May 2014.

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Anna Adamska-Gallant,

Presiding Trial Judge

LEGAL REMEDY: An Appeal against this Ruling might be filed to the Court of Appeals through the Basic Court of Pristina. The Appeal must be filed within five (5) days of the receipt of the written decision (Articles 249 (6), 250 (4) of the CPC).