

# **SUPREME COURT**

**Case number:** **Plm. Kzz. 178/2016**  
**(PKR. No 1046/2013 Basic Court of Prishtinë/Priština)**  
**(PAKR 216/2015 Court of Appeals)**

**Date:** **19 December 2016**

## **IN THE NAME OF PEOPLE**

**The Supreme Court of Kosovo**, in a Panel composed of the Supreme Court Judge Avdi Dinaj (Presiding), EULEX Judge Anna Adamska-Gallant (Reporting), and the Supreme Court Judge Nebojsa Boricic, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against defendants:

**N.V.;**

**E.D.;**

**N.T.;**

charged under the Special Prosecution Office of the Republic of Kosovo's (hereinafter "SPRK") amended indictment PP 898-4/2012 dated 7 November 2013, and amended by Ruling of the Basic Court of Prishtinë/Priština PKR.Nr.1046/16 dated 3 February 2014 and Ruling of the Court of Appeals PN 97/14 dated 27 March 2014 with the following criminal offences:

**N.V.: Organised Crime** in violation of Article 274(1), (3) and (7) of the Provisional Criminal Code of Kosovo (hereinafter "PCCK"); **Money Laundering** in violation of Article 32 (2)(2.1), (2.4) and (2.5) of the Law on the Prevention of Money laundering and Terrorist Financing;

**Fraud** in violation of Article 261(1) and (2) of the PCCK; **Tax Evasion** in violation of Article 63(1), (2)(2.1), (3) and (4) of the Law on Tax Administration and Procedures; and **Breach of Trust** in violation of Article 269 of the PCCK;

**E.D. and N.T.: Organised Crime** in violation of Article 274(1), (3), (4) and (7) of the PCCK; **Money Laundering** in violation of Article 32 (2)(2.1), (2.3), (2.4) and (2.5) of the Law on the Prevention of Money laundering and Terrorist Financing; and **Tax Evasion** in violation of Article 63(1), (2)(2.1), (2.5), (3) and (4) of the Law on Tax Administration and Procedures;

*acting upon* the requests of protection of legality filed by defence counsel S.M. on behalf of defendant E.D. on 16 March 2016, defence counsel S.K. on behalf of defendant E.D. on 28 April 2016, defence counsel A.B. on behalf of defendant N.V. on 21 March 2016, and defence counsel A.A. on behalf of defendant N.T. on 22 April 2016;

*having considered* response of the Office of the State Prosecutor (hereinafter “Prosecution”) filed on 20 July 2016;

*having deliberated and voted* on 19 December 2016;

*pursuant to* Articles 432, 433, 435, and 438(2) of the Criminal Procedure Code of Kosovo (hereinafter “CPC”)

*renders the following*

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## **JUDGEMENT**

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- I. The requests of protection of legality filed by defence counsel S.M. on behalf of defendant E.D. on 16 March 2016, defence counsel S.K. on behalf of defendant E.D. on 28 April 2016, defence counsel A.B. on behalf of defendant N.V. on 21 March

2016, and defence counsel A.A. on behalf of defendant N.T. on 22 April 2016, are hereby rejected as unfounded.

- II. Judgement PAKR 216/15 of the Court of Appeals dated 9 December 2015, page 7, paragraph IV contains *de minimis* errors, therefore is modified to be read as follows: “Pursuant to Article 365 par 1.5 of the CPC, the time spent in detention on remand and in house arrest, respectively, is credited against the defendants; for N.V. from 12 November 2012, for F.B. from 12 November 2012, for B.B. from 12 November 2012, for E.D. from 18 December 2014, for I.F. from 18 December 2014 until 25 December 2014, and for N.T. from 18 December 2014 until 25 December 2014”.

## REASONING

### **I. Procedural background**

1. On 7 November 2013, the SPRK filed Indictment No. PP 898-4/2012 against N.V., N.T., E.D. and other defendants. The Indictment was subsequently amended on 3 February 2014 and 27 March 2014. The Indictment was further amended by Ruling of the Basic Court of Prishtinë/Priština PKR.Nr.1046/16 dated 3 February 2014 and Ruling of the Court of Appeals PN 97/14 dated 27 March 2014.
2. After conclusion of the main trial, on 18 December 2014 the Basic Court of Prishtinë/Priština rendered its Judgement, by which:
  - defendant N.V. was found guilty of the criminal offence of Organized Crime pursuant to Article 274 (3) of the PCCK in conjunction with the criminal offence of Money Laundering pursuant to Article 32 (2) (2.1), (2.4) and (2.5) of the Law *on the Prevention of Money Laundering and Terrorist Financing*, read in conjunction with Article 23 of the PCCK; and of the criminal offence of Fraud pursuant to Article 261 (1) and (2) of the PCCK. She was acquitted of the criminal offence of Breach of Trust under Article 269 of the PCCK, and of the criminal offence of Tax Evasion pursuant to Article 63 (1), (2) (2.1), (3) and (4) of the Law *on Tax Administration and*

*Procedures.* N.V. was sentenced to an aggregate sentence of 12 (twelve) years of imprisonment and a fine of 25 000 (twenty-five thousand) Euros which had to be paid within 6 (six) months after the judgement becomes final. Time spent by her in the detention on remand from 14 November 2012 was credited to the aggregate sentence of imprisonment;

- Defendants E.D. and N.T. were found guilty of the criminal offence of Organized Crime pursuant to Article 274 (1) of the PCCK in conjunction with the criminal offence of Money Laundering pursuant to Article 32 (2) (2.1) of the Law *on the Prevention of Money Laundering and Terrorist Financing*, read in conjunction with Article 23 of the PCCK. They were acquitted of the criminal offence of Tax Evasion pursuant to Article 63 (1), (2) (2.1), (3) and (4) of the Law *on Tax Administration and Procedures*;
  - Defendant E.D. was sentenced to 8 (eight) years of imprisonment and a fine of 20 000 (twenty thousand) Euros which had to be paid within 6 (six) months after the judgement becomes final;
  - Defendant N.T. was sentenced to 4 (four) years of imprisonment and a fine of 8 000 (eight thousand) Euros which had to be paid within 6 (six) months after the judgement becomes final;
  - N.V. and another accused were found jointly and severely liable to compensate the amount of 1 420 255,13 Euros to the injured party, the determination of which may be the subject of the civil proceedings;
  - E.D. with another defendant was found jointly and severely liable with N.V. and other defendant in the amount of 400 000 Euros, and N.T. in the amount of 69 000 Euros.
3. All defendants filed appeals against the Judgement of the Basic Court through their defence counsel.
  4. On 9 December 2015, the Court of Appeals rendered Judgement PAKR 216/15. The appeals of the defence counsel on behalf of N.V., E.D. and N.T. were partially granted. Judgement of

the Basic Court in reference to these defendants was modified as follows: in regards to the decision on the punishment as follows:

- The criminal offence of fraud committed by N.V. was classified under Article 335 of the Criminal code of the Republic of Kosovo;
  - N.V. was sentenced to an aggregate punishment of 8 (eight) years of imprisonment and a fine of 25 000 (twenty-five thousand) Euros;
  - E.D. was sentenced to 5 (five) years of imprisonment and a fine of 15 000 (fifteen thousand) Euros;
  - N.T. was sentenced to 1 (one) year and 6 (six) months of imprisonment and a fine of 5 000 (five thousand) Euros;
  - The decision on compensation for the injured party was modified in its entirety and the injured party was instructed that the property claim for compensation of any damages arising from the crimes attributed to the accused may be pursued in the civil litigation;
  - Time spent in detention on remand and in house arrest is credited against the defendants as follows: N.V. from 12 November 2014, E.D. from 18 December 2014, and N.T. from 18 December 2014 until 25 December 2014.
5. Requests for protection of legality against the judgments rendered in the first and the second instance were filed by defence counsel S.M. on behalf of defendant E.D. on 16 March 2016, defence counsel S.K. on behalf of defendant E.D. on 28 April 2016, defence counsel A.B. on behalf of defendant N.V. on 21 March 2016, and defence counsel A.A. on behalf of defendant N.T. on 22 April 2016.
  6. On 20 July 2016, the Prosecution filed its response to the requests. The Prosecution moves the Supreme Court to dismiss the two requests filed by defence counsel on behalf of E.D. as inadmissible or unfounded, and the requests filed by defence counsel on behalf of N.V. and N.T. as unfounded.

## **II. Submissions of the parties**

*Submissions of the defence counsel on behalf of N.V.*

7. The defence counsel in the request for protection of legality alleges that the judgement of the Basic Court and the judgement of the Court of Appeals were issued with essential violations of the criminal procedure and of the criminal law. The defence counsel therefore moves the Supreme Court to amend them and to acquit defendant N.V. from all charges, or to annul entirely the judgement of the Basic Court and partially the judgement of the Court of Appeals, and send the case for re-trial.
8. The defence counsel claims that the judgement of the Basic Court contains essential violation as defined in Article 384 (1.2) of the CPC in connection with Article 370 (7) of the CPC because the enacting clause is incomprehensible, in contradiction with its content and reasoning, and is based on selective and inserted evidence. There is no reasoning in relation to decisive facts; the reasoning presented is unclear, contradictory and bias. The defence counsel further claims that the defence's proposal for an independent financial and comprehensive expertise was rejected without any reasons what constitutes the violation of Article 384 (2) (2.2) of the CPC.
9. The defence further claims that the judgement of the Basic Court does not contain any reasoning regarding the confiscation of assets as indicated in Order PKR.Nr.1046/13 dated 18 December 2014. The Order given pursuant to Article 284 of the CPC does not diminish the obligation to give reasoning in the judgement as well.
10. The defence alleges that the judgement of the Basic Court contains violations listed in Article 385 of the CPC because the criminal offence of Fraud was not confirmed against N.V., and presents the analysis of the evidence to support this claim.
11. The judgement of the Court of Appeals did not present the facts fully and clearly. It is further not clear what was the reasoning in relation to the criminal offences of fraud and money laundering or in relation to the defence counsel's allegations concerning the responsibilities of the OeSD and the MIA for the implementation of the contract on passports. According to the defence counsel, these shortcomings constitute an essential violation of the provisions of the criminal procedure as it is established in Article 384 (1.12) of the CPC in conjunction with Article 370 of the CPC.

12. The defence counsel further alleges that the Judgement of the Court of Appeals contains violations established in Article 384 (1.12) of the CPC in conjunction with Articles 277 of the CPC and 385 (1.5) of the CPC because it was not considered that the confiscated apartment was obtained lawfully.
13. The defence counsel alleges that the Court of Appeals failed to establish the elements of the criminal offence of money laundering. The defence counsel submits that one of the elements of the criminal offence of money laundering is the unlawful origin of the money; however in this case both in the enacting clause and in the reasoning it is clearly indicated that the origin, intention and destination of the money is known.
14. The defence counsel further submits that the Court of Appeals violated the criminal law as it is provided in Article 385 (1.6) of the CPC while accrediting the time spent in the detention on remand towards the sentence. The Court of Appeals erroneously accredited time spent in detention on remand from 14 November 2014 while N.V. was in the detention on remand from 14 November 2012.

*Submissions of defence counsel S.M. on behalf of E.D.*

15. The defence counsel moves the Supreme Court to annul the judgement of the Basic Court and the judgement of the Court of Appeals, and to acquit E.D. of all charges.
16. The defence counsel submits that E.D. had never been part of any action related to money laundering. The defence counsel further analyses the evidence related to the company called P. and the legal basis of the loan that E.D. took from another defendant. The defence further adds that the purpose of the loan was proven by the legend which the prosecutor has deciphered in its entirety; however neither the Basic Court nor the Court of Appeals addressed it. There is enough evidence to show that the loan was spent to invest to the restaurant. The defence counsel further explains the nature of another company called "Q." and the purpose of the loan received from the bank account of "CE" Company of N.V.. The

legal actions of this company are proven by the written purchase agreement on immovable property and all back transfers.

*Submissions of defence counsel S.K. on behalf of E.D.*

17. The defence counsel claims that the judgement of the Basic Court and the judgement of the Court of Appeals contain violations of the criminal law and essential violations of the criminal procedure law in accordance with Article 432 (1.1) of the CPC. The defence counsel moves the Supreme Court to amend both judgements and to acquit E.D. of all charges, or to annul both judgements and send the case to the Basic Court for re-trial.
18. The defence counsel claims that the judgement of the Court of Appeals contains violations of the criminal law as described in Article 432 (1.1) of the CPC. The defence claims that the criminal offence of money laundering is of a similar nature as the one of organized crime. In this type of criminal offences it is necessary to prove the elements of an underlying criminal offence. In relation to money laundering an underlying criminal offence is an offence which has caused material benefit. The defence counsel further indicates that the subjective element of the criminal offence of money laundering was not established in this case. The defendant was not aware that the money that he borrowed from other defendants was a result of criminal activities. The defendant had no knowledge about these illegal activities nor intended to contribute to them (*dolus directus*), and he was not aware that because of his actions he could have created prohibited consequences (*dolus eventualis*).
19. The defence counsel avers that the judgement of the Basic Court contains essential violation of the criminal procedure law provided in Articles 432 (1.2), and 384 (1.12) in relation to Article 370 (7) of the CPC because reasoning of the judgement is incomplete and not clear. The defence alleges that the Basic Court simply mentions facts in the judgement without any evaluation or legal assessment. For example, in page 75 of the judgement, it is stated that company P. signed an agreement for investment in business premises, and in the following page it is stated that E.D. took the loan of 200 000 (two hundred thousand) Euros. Therefore, the defence alleges that the Basic Court did not provide legal analysis of these facts according to the law, especially that the loans were not illegal but simply concluded without a written agreement.

20. The defence counsel further asserts that the judgement of the Basic Court contains essential violation of the criminal procedure law established in Articles 432 (1.2), and 384 (1.12) in relation to Article 370 8) of the CPC because the judgement does not contain proper justification of the criminal sanction. The defence argues that the defendant should have received a lenient sentence.

*Submissions of defence counsel on behalf of N.T.*

21. The defence counsel alleges that the judgement of the Basic Court and the judgement of the Court of Appeals contain violations of the criminal law, essential violation of the provisions referred to in Article 384 (1) of the CPC, and violation of criminal procedure. The defence counsel therefore moves the Supreme Court to annul the judgements of the Basic Court and of the Court of Appeals, and to send the case for re-trial. Additionally, the defence requests to stay the enforcement of the judicial decision based on Article 434 (4) of the CPC.

22. The defence alleges that there are number of violations of the criminal law in the judgements of both instances:

- The Basic Court erroneously applied provisions of the PCCK while the applicable law is the current Criminal Code of the Republic of Kosovo (hereinafter “CCK”). The Basic Court violated the provisions of Article 3 of the CCK defining the applicability of the most favourable provisions while concluding that the PCCK was more favourable as a basis for adjudication of the present case. Further, the Court of Appeals failed to observe such violation.
- The first and the second instance courts violated Article 2 (3) of the CCK which provides that in case of ambiguity a definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted. In the present case, there are no direct or circumstantial evidence to show that N.T. committed any alleged criminal offence.
- The courts violated Article 17 of the CCK because the key elements such as intent and negligence were not analysed. The first and the second instance judgements do not contain analysis of the defendant’s awareness that by his action of receiving a certain

amount of money as a loan or debt by another company, he could have done an illegal action. The mere transfer of the money does not show the knowledge of the illegal origin of the money.

- The defence further alleges that the courts violated the criminal law because they failed to provide grounds for the punishment.

23. Further, the judgements of the Basic Court and the Court of Appeals contain essential violation of the criminal procedure.

- The defence alleges that the judgements contain violation of Article 384 (1.8) of the CPC because it is based on the inadmissible evidence. The courts failed to establish beyond reasonable doubt that N.T. committed any criminal offence. They proved only the fact that N.T. received a small loan, and that the origin of the money is of suspicious origin.
- Further, the judgement of the Basic Court and the judgement of the Court of Appeals contain violation of provisions of Article 383(1.12) of the CPC which means that the judgements were drawn in accordance to the provisions of Article 370 of the CPC. The judgements contain contradictions between the reasoning and the enacting clause. The defence further adds that there is no need to elaborate the violations in the present requests as the Supreme Court is obliged to address these violations *ex officio*.

#### *Prosecutor's replies*

24. The Prosecution in its replies moves the Supreme Court to reject the requests filed by E.D. as inadmissible or unfounded and the requests filed by N.V. and N.T. as unfounded.

#### *Requests of protection of legality submitted by the defence counsels on behalf of E.D.*

25. The Prosecution claims that the requests for protection of legality filed by the two defence counsels on behalf of E.D. should be dismissed as inadmissible because the current provisions of the CPC does not foresee a possibility for the party to file multiple requests for protections of legality against the same judgement. In this regards, the Prosecution claims that Articles 432 and 433 (1) of the CPC clearly excludes the possibility to have two requests

filed by the defendant or his/her defence counsel or multiple counsels against the same final decision.

26. The Prosecutor submits that all allegations indicated by defence counsel S.M. are related to erroneous or incomplete factual determination and should be rejected in accordance to Article 432 (2) of the CPC.
27. In relation to the arguments raised by the defence counsel S.K. on behalf of E.D., the Prosecutor indicates that there is nothing in the law that would suggest that the criminal offence of money laundering needs an underlying criminal offence. According to Article 32 of Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing, the constituent elements of the criminal offence of money laundering are: 1. The act of money laundering itself; 2. A certain level of knowledge or suspicion relating the criminal source of the funds. The requirement of prior or concurrent conviction is expressly excluded under Article 32 (4) of Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing. In the present case, the Court of Appeals clarified in the enacting clause that E.D. received 400 000 (four hundred thousand) Euros coming from the criminal offence of Fraud committed by N.V. with the intention of concealing the nature, source and ownership of the stolen money. The judgement of the Court of Appeals further in detail describes the intent of this criminal offence. Thus, all constituent elements of this criminal offence were established.
28. The Prosecutor further indicate that the allegations of defence counsel S.K. that the courts did not sufficiently assessed the evidence and that the mitigating elements are related to the erroneous and incomplete determination of the factual situation and therefore should be dismissed.

*Request of protection of legality submitted by the defence counsel on behalf of N.T.*

29. In relation to the allegations of the defence counsel of N.T., the Prosecutor indicates that the first and the second instance courts correctly applied the most favourable law. In this regard, the defendant was convicted for the criminal offence of money laundering committed in co-perpetration contrary to Article 32(2)(2.1) of Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing. The law was already in force at the time the criminal

offence was committed and the law was not amended since then. Additionally, Article 31 of the PCCK and 31 of the CCK are worded identically.

30. Further, the Prosecutor indicates that the allegations that the first and the second instance court failed to provide the evidence establishing the criminal offence, the intent and the circumstances on which the punishment was decided, are based on the disagreement on the factual determination and should be dismissed.
31. The Prosecutor further states that the defence alleges that the conviction of N.T. are based on a single piece of evidence which is inadmissible; however it fails to identify which piece of evidence it is.
32. The Prosecutor indicates that under Kosovo law, the Supreme Court does not have *ex officio* obligation to determine the violations itself. On the contrary, the principle under Article 436 (1) of the CPC is that the Supreme Court must confine itself to examining the violations alleged in the request. Therefore, this argument should be rejected as ungrounded.

*Request of protection of legality submitted by the defence counsel on behalf of N.V.*

33. The Prosecutor observes that most of the arguments in the request for protection of legality have already been put forward as grounds for appeals and were subsequently rejected by the Court of Appeals. Further, most of the arguments are based on erroneous and incomplete determination of the factual situation which cannot be a basis for the request for protection of legality and should be dismissed.
34. The Prosecutor further indicates that the claim that the reasoning in the judgements is unclear and contradictory should be rejected as unfounded. The court fully addressed all the issues and gave sufficient reasons for their decisions. The judgements and their enacting clauses contain all necessary data, facts and circumstances required under Articles 365, 370 and 384 (1) of the CPC.

### **III. Composition of the Panel**

35. The Panel established that this case was assigned to EULEX Judges before 15 April 2014, and is therefore considered as an “ongoing case” in accordance to Article 1A (1.4) and 3(1) of the Law *on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo* (Law No. 05/L-103) *inter alia* modifying Law No. 03/L-053 *on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo* (hereinafter “Omnibus Law”). Thus, EULEX judges have jurisdiction in this case. Pursuant to Article 3.3 of the Omnibus Law, the panel shall be composed of a majority of local judges and presided by a local judge.
36. The Panel notes that in the present case, the panel member Anna Adamska-Gallant was involved in the case against S.S. during the main trial stage. S.S. was one of the co-defendants in the present case and an owner of the company R.I.. He was charged with the criminal offences of Receiving Stolen Goods in violation of Article of 345 of the CCK, and Tax Evasion in violation of Article 63 (1), (2.1), (2.5) and (4) of the Law on Tax Administration and Procedures. On 22 May 2014, the trial panel issued a decision to sever the case against S.S. because the Prosecution and the defendant presented the court a guilty plea agreement. Subsequently, a new trial panel with Judge Anna Adamska-Gallant as a presiding judge was formed. On 4 June 2014, the trial panel concluded that the agreement does not meet the legal requirements stipulated in the CPC. Consequently, on 3 July 2014, the case of S.S. was re-joined. Currently, three defendants in the re-joined case filed their requests for protection of legality: N.V., E.D. and N.T.. Therefore, the Judge was involved into a related but not the same criminal proceedings.
37. According to Article 39 (2) of the CPC “a judge shall be excluded as a single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case”. The aim of this provision is to ensure the defendant’s access to fair and impartial trial. This article applies objective test which mostly concerns the functional nature of the judge’s involvement in the previous stages of the proceedings and might lead to an objective doubt as to the impartiality of the judge.

38. The European Court of Human Rights (hereinafter “ECHR”) concluded that it must be assessed in each individual case whether judge’s involvement into criminal proceedings is of such nature and degree as to indicate a lack of impartiality on the part of the tribunal. The current interpretation of Article 39 (2) of the CPC further confirms that the intention of the lawmaker was not to disqualify from a criminal process any judge who has previously participated in the same (or related) criminal case. Further, the lawmaker’s intention not to disqualify every judge who participated in the previous proceedings in the same case can be derived from Article 398 (2) of the CPC which stipulates: “the Court of Appeals may direct the Basic Court to assign, based on an objective and transparent case allocation system, a new single trial judge, presiding trial judge or trial panel”. This means that a judge or trial panel that adjudicated the matter once, may be working again on the same or related matter.
39. The Supreme Court in its Legal Opinion No. 164/2014 dated 10 April 2014 added that the restrictive interpretation of this article would make the functioning of the judicial system questionable, also considering the fact that currently there are no lay judges in the criminal matters anymore. Therefore, the mere fact that a judge in a criminal court has been involved in the criminal proceedings related to the case cannot be taken in itself as justifying fears as to lack of impartiality; any doubt of judge’s impartiality in light of Article 39 (2) of the CPC shall be addressed on case by case basis.
40. In relation to the present situation, the ECHR concluded in a number of cases that the mere fact that a judge has already tried co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on judge’s impartiality in a subsequent case.<sup>1</sup> In these situations it is necessary to assess whether the decision taken in relation to co-accused contains any findings that actually prejudice the question of guilt of the other accused in the subsequent proceedings.
41. Judge Anna Adamska-Gallant in the capacity of a presiding judge in the case against S.S. assessed whether the plea agreement meets the requirements set in the CPC. These

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<sup>1</sup> See ECHR, *Kriegisch v. Germany*, Decision as to the Admissibility of the Application, 23 November 2010; *Khodorkovskiy and Lebedev v. Russia*, Judgement, 25 July 2013; *Poppe v. the Netherlands*, Judgement, 24 March 2009; *Schwarzenberger v. Germany*, Judgement, 10 August 2006; *Ferrantelli and Santangelo v. Italy*, Judgement, 7 August 1996.

proceedings were separated from those in the case PKR 1046/13, and the trial panel did not assess the evidence related to defendants N.V., E.D. and N.T.. The reasonable doubt of having committed the criminal offences the three defendants were charged with was not addressed, determined or assessed by the trial judges. There is no specific qualification of the involvement of the three defendants or of acts committed by them, criminal or otherwise.

42. Further, the requests for protection of legality filed by defendants N.V., E.D. and N.T. challenge the findings of judgement PKR 1046/13 of the Basic Court of Pristina and Judgement PAKR 216/15 the Court of Appeals related to the three defendants. None of the requests mentions the evidence related to S.S. or his company R.I..

43. Having considered the above, the Panel concludes that in the given circumstances there are no indications showing that the Judge will not be able to give the fresh consideration to the requests for protection of legality. The assessment of the plea agreement of the co-defendant in the related case would not prejudice in any way the question of guilt or innocence of the other accused. Therefore, the Panel unanimously concludes that the circumstances related to the case of S.S. and the present proceedings do not cast objectively justified doubts on the Judge's impartiality.

#### **IV. Applicable Law**

44. In relation to the criminal procedure provisions applicable to the present proceedings, the Panel notes that according to Article 540 of the CPC, for any criminal proceedings initiated prior to entry into force of the CPC (1 January 2013), but without any indictment filed, the provisions of the CPC shall be applied *mutatis mutandis*. In the present case, the investigation was initiated on 9 November 2012, and expanded on 11 November 2012, 14 November 2012, and 4 June 2013. The indictment in the present case was filed on 7 November 2013. Therefore, the applicable criminal procedure in this case is the CPC in force from 1 January 2013.

45. In relation to the applicable criminal law, the Panel is mindful of the principle of legality and its core which is the applicability of the most favourable law as described in Article 2 (2) of the CCK and 3 (2) of the PCCK. Article 11 of the Universal Declaration of Human Rights (1948) gives a very well structured definition of the principle "*No one shall be held guilty of*

*any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed*'. The same concept with nearly identical wording is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (1966), the European Convention for the Protection of Human Rights. Originated from the principle of legality, the concept of the most favourable criminal law is a tool that guarantees individual rights, thereby ensuring by its effectiveness, the accessibility and predictability of the criminal law. Where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are the most favourable to the defendant.<sup>2</sup>

46. In the present case, the Basic Court took into consideration that the criminal offences were committed prior to the entry into force of the CCK. The Basic Court compared the criminal offences of the Organized crime (Article 283 of the CCK and Article 274 of the PCCK), Fraud (Article 335 of the CCK and Article 261 of the PCCK), Breach of Trust (Article 342 of the CCK and Article 269 of the PCCK), and Receiving of Stolen Goods (Article 345 of the CCK and Article 272 of the PCCK). After comparing the elements of each criminal offence and taking into consideration the punishments provided by law, the Basic Court concluded that the substantial changes to the criminal law are not favourable to the defendants. Therefore, the Panel finds that the Basic Court of Prishtinë/Priština correctly applied the most favourable criminal law principle.
47. The Panel further notes that the Court of Appeals applied Article 335 of the CCK to the criminal offence of Fraud and not Article 261 of the PCCK. However, the Court of Appeals did not give any explanation why the applicability of the most favourable law as determined by the Basic Court was changed. The Panel notes that the elements of the criminal offence of Fraud are identical in Article 335 of the CCK and Article 261 of the PCCK; therefore, the legal qualification of the criminal offence would be identical under both codes, as well as the

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<sup>2</sup> ECHR, *Scoppola v. Italy* (no. 2) [GC], paragraphs 103-109.

punishment imposed. Thus, the Panel finds no violation to the defendant or his right to fair trial.

48. The Panel further notes that Law No. 03/L-196 *on the Prevention of Money Laundering and Terrorist Financing* and Law No. 03/L-222 *on Tax Administration and Procedures* were adopted before the criminal offences were committed and since then the relevant provisions of these laws were not amended. Therefore, in relation to these laws there is no need to apply the most favourable law principle. For these reasons, the allegation of the defence counsel of N.T. that the Basic Court erroneously applied the provisions of the PCCK while the applicable law is the CCK is rejected as unfounded.

## V. Findings of the Supreme Court

### Admissibility of the requests of protections of legality

49. The requests of protection of legality filed by defence counsel S.M. on behalf of defendant E.D. on 16 March 2016, defence counsel S.K. on behalf of defendant E.D. on 28 April 2016, defence counsel A.B. on behalf of defendant N.V. on 21 March 2016, and defence counsel A.A. on behalf of defendant N.T. on 22 April 2016 are admissible. The requests were filed by an authorised persons (Article 433 (1) of the CPC), within the prescribed deadline (Article 433 (2) of the CPC), and to the competent court (Article 434 (1) of the CPC).
50. The Prosecution claims that the requests for protection of legality filed by the two defence counsel on behalf of E.D. should be dismissed as inadmissible because the current provisions of the CPC does not foresee a possibility for the party to file multiple requests for protections of legality against the same judgement. In this regard, the Panel notes that according to Article 55 (2) of the CPC, the defendants may have up to three defence counsel, and it shall be considered that the right to defence is satisfied if one of the defence counsel participates in the proceedings. Further, Article 19 (28) of the CPC indicates that when a party is represented by more than one defence counsel, only one of them shall represent the party before the criminal proceedings. While it can be argued that only one procedural document can be filed by the several defence counsel, the practice accepted in Kosovo and by the Supreme Court shows that the courts tend to accept several procedural documents filed by more than one defence counsel on behalf of the same defendant (*see* Supreme Court,

Judgement Pml. Kzz 145/2014 of 8 October 2014, page 7). The Panel considers that such procedure, especially when the defendant did not appoint the lead counsel, reinforces the protection of the rights of the defendant to have proper legal assistance during the criminal proceedings. Having accepted that, the Panel considers that the requests filed by the two defence counsel on behalf of E.D. are admissible.

*Scope of the request for the protection of legality*

51. The defence counsel of N.T. indicates that the judgement of the Basic Court and the judgement of the Court of Appeals contain violation of provisions of Article 383 (1.12) of the CPC which means that the judgements were not drawn in accordance to the provisions of Article 370 of the CPC. The judgements contain contradictions between the reasoning and the enacting clause. The defence further adds that there is no need to elaborate the violations in the present requests as the Supreme Court is obliged to address these violations *ex officio*.
52. The request for protection of legality is an extraordinary legal remedy designed for the Supreme Court to ensure that the cases are handled without any legal mistakes and to take care for the development and uniformity of the legal order. The parties have a right to request for protection of legality to ensure the protection of their rights, fair trial and of judicial review guaranteed by the Constitution of Kosovo. Article 432 of the CPC foresees the grounds that have to be identified to consider the request for protection of legality allowed. Additionally, Article 376 sets general requirements for requests for legal remedies including the obligation of the party to clearly describe relevant facts contained in the record, and the legal basis for the objection or request. The law on this matter is precise and consistent. It clearly shows that the lawmaker intended to set the rules obliging the parties to identify the grounds for filling a request for protection of legality. The issues that are not identified by the parties are generally not addressed by the Supreme Court unless it is specifically provided by the law.
53. In this regard, the law sets clear limits for the Supreme Court's examination of the case as the Court shall confine itself to examining these violations of law which the requesting party alleges in his or her request (Article 436 (1) of the CPC). The only issue that can be addressed *ex officio* by the Supreme Court is specified in Article 436 (2) of the CPC indicating that in case the Supreme Court finds that reasons for deciding in favour of the

defendant also exist in respect of another co-accused for whom a request for protection of legality has not been filed, the Court shall proceed *ex officio* as if such request has also been filed by another person.

54. Further, when the law sets the rules defining the role of the Supreme Court in the adjudication of the extraordinary remedies, it does not set any rule allowing the parties to delegate their obligation to identify possible violations of law to the Supreme Court. This is a responsibility exclusively vested to the parties. This ensures the independence of the Court and the equality of arms which are inherent features of a fair trial.
55. Therefore, the request of the defence counsel of N.T. for the Supreme Court to identify the specific violations of provisions of Article 383 (1.12) of the CPC is rejected as ungrounded.

#### Merits of the case

##### *Allegations of erroneous or incomplete determination of the factual situation*

56. At the outset, the Panel notes that a big part of the requests for protection of legality challenges the evaluation of evidence by the Basic Court and the Court of Appeals.
57. Particularly, the defence counsel of N.V. claims that N.V. benefitted from the authorization from the OeSD and did not defraud OeSD by receiving the sum of 1 420 255,15 Euros. The defendant received the payment lawfully and subsequently lawfully invested. Further, the defence counsel on behalf of N.V. states that the defendant had authorization to transfer the funds related to the contract for biometric passports concluded between the OeSD and the MIA to her bank accounts. She was an authorised representative of the OeSD to handle the implementation of the contract.
58. In relation to defendant E.D., the defence counsel claims that there is enough evidence to show that he took the loan from another defendant and used it for the investment to the restaurant called P. and the company called "Q.". The defence claims that there is enough of evidence to prove that these actions were legal. The fact that there is no written agreement to give a loan does not make it illegal. In relation to N.T., the defence counsel claims that there are no direct or circumstantial evidence to show that the defendant committed the alleged

criminal offence. The defendant simply received a small loan and made bank transfers without any malicious intent.

59. In this regard, pursuant to Article 432 (1) of the CPC, the request for protection of legality can be filed only on the grounds of a violation of the criminal law, a substantial violation of the provisions of criminal procedure, or another violation of the provisions of criminal procedure if such violations affected the lawfulness of a judicial decision. Article 432 (2) of the CPC strictly and clearly indicates that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. A mere disagreement with the factual evaluation made by the first and the second instance courts does not amount to the requirements for the request for protection of legality as it is set in Article 432 (1) of the CPC. Furthermore, all of these allegations were raised in the defendants' appeals and addressed extensively in the Court of Appeals in its Judgement PAKR 216/15 (*see* paragraphs 75 to 85 of Judgement PAKR 216/15). Therefore, the Panel finds that this allegation is ungrounded.
60. The defence further alleges that the judgements of the Basic Court and the Court of Appeals are based on inadmissible evidence. The Panel notes that these allegations are related to the determination of factual situation in the case. The defence did not indicate which evidence they consider inadmissible or legal basis for such claim. Therefore, the Panel finds that all allegations related to the ground of erroneous or incomplete determination of the factual situation shall not be addressed in the present judgement.

*Incomprehensible and contradictory enacting clause and contradictions between the enacting clause and the reasoning*

61. The defence of N.V. and N.T. allege that the enacting clauses of the Judgement of the Basic Court and the Court of Appeals are incomprehensible and contrary to the content of reasoning, and are based on selective and inserted evidence and therefore in violation with the provisions of Article 370 of the CPC. The defence of N.V. alleges that the judgement of the Basic Court does not specify which evidence it considered confirmed; reasoning is completely unclear, contradictory and bias. Furthermore, the enacting clause of the first instance judgement is contradictory to the reasoning because the enacting clause states "N.V.

*defrauded the MIA and OeSD through a false presentation to transfer in the bank account number <...>*”, while the reasoning states “*the question is whether the MIA was guilty because it made the payment or OeSD for giving the authorisation to defendant N.V.*”. The defence of N.T. alleges that there are various collisions and ambiguities regarding the enacting clause and reasoning in the first and the second instance judgements; however the defence moves the Supreme Court to identify the particular issues *ex officio* (the issue was addressed earlier in this judgement, paragraphs 51-55).

62. The Panel notes that the allegation that the enacting clause of the Basic Court judgement is contradictory with the reasoning has already been raised in the appeal of the defence counsel filed on behalf of N.V.. The specific contradiction was analysed in great detail by the Court of Appeals in its Judgement PAKR 216/15 (*see* paragraphs 59 to 66 of Judgement PAKR 216/15). The Panel fully subscribes to the conclusion of the Court of Appeals that apart from the qualification of the criminal acts, no substantial contradictions and/or relevant discrepancies could be found in the enacting clause of the judgement of the first instance, or between the enacting clause and the reasoning.
63. The Panel considers that the enacting clauses of the judgements of the Basic Court and of the Court of Appeals are drawn in accordance to the requirements set in Article 370 (3) and (4) in conjunction with Article 365 of the CPC. The enacting clause contains full description of the acts of which the defendants were found guilty or acquitted together with the description of the facts and circumstances indicating their criminal nature and the application of pertinent provisions of the criminal law. The Basic Court clearly and sufficiently described the facts it considered proven or not proven and indicated the evidence relied upon by the court when rendering the judgement. The Panel further notes that the judgement has to be read in its entirety including the enacting clause and the reasoning. The enacting clause and the reasoning are inseparable parts of the judgement and certain part and/or sentences of the judgement cannot be read in isolation.
64. Therefore, the Panel considers that two sentences pulled out of the context do not show substantial contradiction between the enacting clause and the reasoning of the judgement. The defence’s disagreement with the factual situation described in the enacting clause does not amount to the violation of Article 384 (1.2) in conjunction with Article 370 (7) of the

CPC. Therefore, the allegations raised by the defence counsel of N.V. in relation to the contradictions in reasoning, and between the enacting clause and the reasoning are rejected as unfounded. The Panel further notes that the defence of N.T. did not identify any specific violations and inconsistencies between the enacting clause and the reasoning of the first and the second instance judgement, and are therefore rejected as unfounded.

*Rejection of the motion to call an independent financial and comprehensive expertise*

65. The defence counsel of N.V. claims that the defence's motion to call an independent financial and comprehensive expertise was rejected without any reasons which constitutes the violation of Article 384 (2) (2.2) of the CPC.
66. The Panel notes that the defence of N.V. made the same allegation in their appeal against the Basic Court judgement and it was addressed by the Court of Appeals. The Supreme Court fully subscribes to the analysis of the Court of Appeals that the transfers were made through the bank transfers and were proven by the invoices, and the Basic Court therefore was able to establish all transactions. The Panel further notes that the Basic Court addressed the defence's request to appoint an independent expert and concluded that the a separate analysis of the financial records would not assist the court in reaching the decisions (*see* Minutes of the Main Trial, 3 July 2014, page 5, and 9 September 2014, page 35).
67. The Panel further notes that according to Article 384 (2) (2.2) of the CPC, the substantial violations of the criminal procedure shall be considered if during the course of the criminal proceedings, including pre-trial proceedings, the court, the state prosecutor or the police violated the right of the defence, and this influenced or might have influenced the rendering of a lawful and fair judgement. The Panel notes that this article has to be read together with Article 384 (1) of the CPC which enlists possible substantial violations of the criminal procedure. This means that the party in its request has to show two elements of possible substantial violation of the criminal procedure: firstly, what the alleged substantial violation is; and secondly, that it violated the rights of the defence and possibly lead to rendering of unlawful and unfair judgement.

68. In the present case, the defence merely stated that the fact that the defence's request to call financial expert to present its expert opinion was rejected constitutes the violation of defence's rights without specifying the substantial violation of the criminal procedure. The Panel reiterates the obligation of the parties to identify all possible grounds to file the request for protection of legality enlisted in Article 432 of the CPC. It is of utmost importance that the parties present sufficiently reasoned submissions of possible violations of the criminal law, substantial violations of the criminal procedure or any other violation of the criminal procedure if such violation affected the lawfulness of a judicial decision. It is not enough to submit the disagreement with the first and the second instance judgement or to repeat the submissions of the previous appeals. Therefore, the Panel considers that the defence counsel of N.V. failed to show any substantial violation of criminal procedure and finds the allegations without merit.

*Elements of the criminal offence of Money Laundering*

69. The defence counsel of E.D. claims that the judgement of the Court of Appeals contains violations of the criminal law as described in Article 432 (1.1) of the CPC. The defence claims that underlying criminal offence of money laundering was not established. The defence counsel of N.V. alleges that the Court of Appeals failed to prove the elements of the criminal offence of money laundering. The defence counsel submits that one of the elements of the criminal offence of money laundering is the unlawful origin of the money; however in this case both in the enacting clause and in the reasoning it is clearly indicated that the origin, intention and destination of the money is known.

70. The Panel notes that the term "money laundering" describes a range of practices used to disguise the source of illicit profits and integrate them into the legitimate economy. The material element (*actus reus*) of money laundering includes three elements: (1) the conversion or transfer of property knowing that such property is the proceeds of crime for the purpose of concealing or disguising the illicit origin of the property, or helping any person who is involved in the commission of a predicate offence to evade the legal consequences of his or her action; or (2) the concealing or disguising of the true nature, source, location, disposition, movement or ownership of or rights with respect to property knowing that such property is the proceeds of crime; or (3) the acquisition, possession or use of property,

knowing at the time of receipt that such property is the proceeds of crime.<sup>3</sup> The Law *on the Prevention of Money Laundering and Terrorist Financing* also criminalizes ancillary offences which include association with or conspiracy to commit, attempt, aiding and abetting, facilitating, and counselling the commission of a money laundering offence. The property in this context includes assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments, evidencing title to or interest in such assets.

71. In the present case, the defence counsel alleges that the Basic Court and the Court of Appeals failed to prove that the property (in this case the money) is the criminal property. In other words, the defence alleges that the money was not obtained as a result of the criminal conduct. While it is not necessary to prove beyond reasonable doubt the underlying criminal offence as one of the elements of the criminal offence of money laundering, the court has to be satisfied that there is at least circumstantial evidence proving that the proceeds are the benefit of the criminal conduct. Unlike in case of the criminal offence of organized crime, it is not required to prove that the property in question is the benefit of a particular or a specific act of criminal conduct, as such an interpretation would restrict the scope of the legislation. The court needs to establish sufficient circumstantial evidence or other evidence from which inferences can be drawn to the required criminal standard that the property in question has a criminal origin. In this regard it is necessary to show the existence of a predicate offence, and establish a link between the property being laundered and a criminal conduct.
72. In the present case, the Panel is satisfied that the existence of the predicate offence was proven beyond reasonable doubt. The Basic Court established that following the tender contract signed on 17 June 2011, the MIA transferred into the C.E.U. account 3 361 283,25 Euro. The sum of 1 941 028,12 Euro was subsequently transferred from the account of C.E.U. to the OeSD leaving the balance of 1 420 255,13 Euros. The latter sum has never been transferred to the OeSD; therefore, the Basic Court concluded that it was unlawfully appropriated. The Court presented detailed analysis in relation to the role of defendant N.V. as the representative of the OeSD, the tender agreement and subsequent transfers of various sums from the MIA and by N.V. (*see* pages 106 to 153 of Judgement PKR.Nr.1046/13).

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<sup>3</sup> See Article 32(2)(2.1), (2.4) and (2.5) of Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing; Article 23 of the United Nations Convention against Corruption (2003).

Further, the Panel considers that the Basic Court found the link between transfer of the unlawfully appropriated money and defendants E.D. and N.T.. Defendant E.D. as the authorised person to manage company P.S. received the sum of 200 000 Euros, and as the owner of company Q.L.K. SHPR received the sum of 200 000 Euros. Defendant N.T. as a representative of C.B. received a sum of 69 000 Euros. The Basic Court extensively analysed the relationship between N.V. who made the transfers to the abovementioned companies and defendants E.D. and N.T. (*see* pages 124 to 132, and 135 to 139 of Judgement PKR.Nr.1046/13).

73. Further, the issue of the established elements of the criminal offence of money laundering was also addressed by the Court of Appeals which concluded that the first instance correctly established the legal elements of the criminal offence of money laundering pursuant to Article 32 (2) (2.1) of the Law the Prevention of Money Laundering and Terrorist Financing (*see* paragraph 100 of Judgement PAKR 216/15).
74. The defence counsel E.D. further indicates that the subjective element of the criminal offence of money laundering is not established. The defendant was not aware that the money that he borrowed from other defendants is proceeds of the criminal activities. The defendant had no knowledge about these illegal activities nor intended to contribute to them (*dolus directus*) and he was not aware that because of his actions he can create prohibited consequences (*dolus eventualis*). The defence of N.T. adds that the mere transfer of money does not show the defendant's knowledge of illegal origin of the money.
75. In addition to establishing the material elements of money laundering, the court has to establish the state of mind of the money launderer (i.e. criminal intent). In determining the mental element for the money laundering offence, the court must rely on objective factual circumstances to infer from them the mental element.
76. In the present case, the Basic Court analysed in great detail the relationship between N.V. as the person who made transfers of certain sums from C.E.U. to P. SHPK, Q. LB, K. SHPR and C.B. (*see* pages 124 to 132, and 135 to 139 of Judgement PKR.Nr.1046/13). In particular, the Basic Court concluded that the telephone records prove that N.V. and F.B. had telephone links with E.D.. It has been further found that there was no written agreement between C.E.U. and E.D. to give the "loan" or discussion to repay the "loan". Further, the

money was never reported in P. SHPK accounts or declared for tax purposes. In relation to N.T., the Basic Court concluded that F.B. and N.T. were friends and business associates. Information obtained from lawful interceptions demonstrated that F.B. even turned to N.T. on the day of his arrest. The Panel therefore finds that this clearly shows the defendants' knowledge about the illegal origin of the money and their intent to conceal the nature, source and ownership of it. The subjective elements of the criminal offence of money laundering were fully established by the Basic Court.

77. The Panel is mindful that the judgement of the Basic Court does not address each element of the criminal offence of money laundering separately; however the judgements have to be read in its entirety, including the enacting clause and all parts of the reasoning. In the present case, it is apparent from the judgement of the Basic Court that each element of the criminal offence of money laundering is fully established, and further confirmed by the Court of Appeals. Therefore, the Panel considers that the defendants' disagreement with the established factual situation does not amount to the violation of the criminal law as described in Article 432 (1.1) of the CPC. As such, the allegations that the elements of the criminal offence of money laundering were not established are rejected as unfounded.

#### *Calculation of the time spent in detention*

78. The defence counsel of N.V. submits that the Court of Appeals violated the criminal law as it is established in Article 385 (1.6) of the CPC while accrediting the time spent in the detention on remand towards the sentence. The Court of Appeals erroneously accredited time spent in detention on remand from 14 November 2014 while N.V. was in the detention on remand from 14 November 2012.

79. The Panel considers that this is *de minimum* error, an obvious writing and computing mistake as it is described in Article 371 of the CPC. The Panel further notes that the same *de minimum* error was done in relation to defendants F.B. and B.B.. Such error does not constitute a violation of laws in respect of crediting the period of detention on remand as described as described in Article 385 (1) (1.6) of the CPC. Therefore, the defence's allegation is rejected as ungrounded.

80. However, pursuant to Article 438 (1) (1.1) of the CPC and following the principle *beneficium cohaesioneis* set in Articles 397 and 436(2) of the CPC, the Panel modified the Court of Appeals Judgement PAKR 216/15, page 7, paragraph IV to read as follows: “Pursuant to Article 365 par 1.5 of the CPC, the time spent in detention on remand and in house arrest, respectively, is credited against the defendants; for N.V. from 12 November 2012, for F.B. from 12 November 2012, for B.B. from 12 November 2012, for E.D. from 18 December 2014, for I.F. from 18 December 2014 until 25 December 2014, and for N.T. from 18 December 2014 until 25 December 2014”.

*Violations in determining the sentencing*

81. The defence counsel of E.D. asserts that the judgement of the Basic Court contains essential violation of the criminal procedure law as provided in Articles 432 (1.2), and 384 (1.12) in relation to Article 370 (8) of the CPC because the judgement does not contain proper justification of the criminal sanction. The defence argues that the defendant should have received a lenient sentence.

82. The Panel notes that the aggravating and mitigating circumstances in determining the proper sentencing are addressed in great detail by the Basic Court in its judgement (*see* pages 168 to 169 of Judgement PKR.Nr.1046/13). The judgement referred to personal circumstances related to the defendant, in particular his family situation. The Basic Court took further into consideration the circumstances related to the case, the manner in which the criminal offence was committed and the far reaching consequences of the criminal offence. The Court of Appeals reviewed the assessment of the Basic Court and concluded that the imposed punishment is fair and lawful. However, the Court of Appeals noted that each defendant's involvement in the criminal offence was of a different level, and pursuant to the principle of proportionality and in the interest of proper administration of justice, reduced E.D. sentence from the punishment of 8 (eight) years of imprisonment and a fine of 20 000 (twenty thousand) Euros which has to be paid within 6 (six) months after the judgement becomes final to 5 (five) years of imprisonment and a fine of 15 000 (fifteen thousand) Euros.

83. The Panel agrees with the reasoning of the Court of Appeals and concludes that the individual participation in the criminal offence was fully evaluated and the sentencing was adjusted accordingly. The punishment reflects the purpose of the punishment prescribed by

the law, the far reaching consequences to the society, and the level of participation of each defendant. Therefore, the defence's allegation that the punishment imposed on E.D. should be more lenient is rejected as ungrounded.

84. The defence of N.T. alleges that the courts violated the criminal law because they failed to provide grounds for the punishment.

85. The Panel notes that the defence's allegation in relation to the grounds of punishments is entirely related to the factual determination of the case. The Panel reiterates that according to Article 432 (2) of the CPC a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation (the matter is detailed in paragraphs 56 to 60 of the present judgement). Therefore, the Panel considers that the defence failed to show any ground indicated in Article 432 (1) of the CPC, and rejects the claim that the first and the second instance courts failed to provide grounds for the punishment as unfounded.

#### *The Confiscation Order*

86. The defence of N.V. claims that the judgement of the Basic Court does not contain any reasoning regarding the confiscation of assets as indicated in Order PKR.Nr.1046/13 dated 18 December 2014. The Order given pursuant to Article 284 of the CPC does not diminish the obligation to give reasoning in the judgement as well. The defence further alleges that the confiscation order is ungrounded and against the law which constitutes the violation of the criminal law under Article 385 (1) (1.5) of the CPC. Defendant N.V. bought the apartment with lawfully earned money, notably from the payment she got for her services for the OeSD.

87. The Panel notes that according to Article 284 (1) of the CPC, the single trial judge or trial panel, concurrent with the judgement of the trial, shall issue an order supported by reasoning that determines whether property listed in indictment shall be forfeited or released. Article 275 (1) of the CPC indicates that the court can order a final order of criminal forfeiture only after it has been proven that the building, immovable property, movable property or asset was a material benefit of the criminal offence. It is specified in Article 276 (3) of the CPC, that the property purchased by funds that were directly obtained due to the acts constituting the criminal offence is a material benefit acquired by that criminal offence.

88. The Panel notes that the law clearly indicates that the order for criminal forfeiture shall be issued separately from the judgement and has to be concurrent with the findings of the judgement. It was the intention of the lawmaker to separate the issue of the criminal forfeiture from the main judgement. Therefore, the Panel finds that the Basic Court followed the requirement set in Articles 274 – 284 of the CPC in relation to the procedure of the criminal forfeiture.
89. In the present case, the Basic Court issued the Confiscation Order which was concurrent with the judgement in the same case. It is clearly determined in the judgement of the Basic Court that the apartment detailed in point Ia of the Confiscation Order was purchased using funds that were directly obtained due to acts constituting the criminal offence. The Basic Court found that the money for the purchase of the apartment was transferred from the account of C.E.U., and not from N.V. personal funds as it is claimed by the defence. Therefore, the Panel is satisfied that the Basic Court correctly established that the apartment was purchased by the defendant with the money illegally obtained from the MIA.
90. The defence counsel's allegations that the Confiscation Order is not sufficiently reasoned, and is ungrounded and against the law which constitutes the violation of the criminal law under Article 385 (1) (1.5) of the CPC is rejected as unfounded.

## **VI. CONCLUSION**

91. Having considered the above, the Supreme Court of Kosovo decided as in the enacting clause of this Judgment.

**THE SUPREME COURT OF KOSOVO**

**PRISHTINË/PRIŠTINA**

**PML-178/16**

**Presiding Judge:**

**Recording Officer:**

Avdi Dinaj  
**Supreme Court Judge**

Sandra Gudaityte  
**EULEX Legal Officer**

**Panel members:**

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Anna Adamska-Gallant  
**EULEX Judge**

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Nebojsa Boricic  
**Supreme Court Judge**