

**BASIC COURT OF PRISHTINË/PRIŠTINA**  
**P. Nr. 709/12**  
**18 June 2013**

## **JUDGMENT**

### **IN THE NAME OF THE PEOPLE**

The Basic Court of Prishtinë/Priština, in the trial panel composed of:

Cornelie Peeck, presiding judge  
Shemsi Hajdini, panel member  
Vladimir Mikula, panel member;

Assisted by the Court recorder Joseph Hollerhead;

In the criminal case against:

IT, AP, IH, HF, ZK, BF and BB;

Charged with the criminal offences of:

1. Abuse of official position contrary to article 339 paragraph 1 and 3 in conjunction with article 23 of the CCK (all defendants);
2. Attempted abuse of official position contrary to article 339 paragraph 1 and 3, in conjunction with article 20 and 23 of the CCK (AP and IT);
3. Mistreatment in the exercise of official duties contrary to article 164 paragraph 1, in conjunction with article 23 (IT and BF);
4. Accepting bribes contrary to article 343 paragraph 2 of the CCK (IH, IT and HF)
5. Tax evasion contrary to article 249 paragraph 2 of the CCK (IT),
6. Obstruction of evidence contrary to article 309 paragraph 1 and 2 of the CCK (IT);

After public trial sessions held on 10 January, 8, 13, 14, 15, 21, 22 and 28 February, 1, 7, 8, 13, 14, 15, 22, 27, 28 and 29 March, 11 and April, 15, 16, 17, 22, 23, 24, 29, 30 and 31 May and 6, 12 and 13 June 2013, in the presence of the SPRK Prosecutor Maria Bamieh and the accused mentioned above. The defense counsels Korab Rexhepi and Rezerta Metaj for IT, Naser Peci for AP, Fatmir Aliu for IH, Ramë Gashi for HF, Xhevdet Shala for ZK, Osman Mehmeti for BF and Besnik Berisha for BB and the injured parties JX (representative BD), SX (representative MA), YX (representative AR), PX (representative FL), FC and BM, Ministry of Health and their

representatives AK for JX, NK for the Ministry of Health, BMA for YX and SM for PX were either present or summoned to be present;

After the panel's deliberation on 14 June 2013, pursuant to Article 363, 364 and 365 announced on 18 June 2013 in public this judgment.

## ENACTING CLAUSE

1. IT, fathers name XX, born XX in XX, living in XX, XX, Kosovar Albanian;
2. AP fathers name XX, born on XX in XX, living in XX, XX, Kosovar Albanian;
3. IH, fathers name XX, born on XX in XX, living in XX, XX, Kosovar Albanian;
4. HF, fathers name XX, born on XX in XX, living in XX, XX, Kosovar Albanian;
5. ZK, fathers name XX, born on XX in XX, living in XX, XX, Kosovar Albanian;
6. BF, fathers name XX, born on XX in XX, living in XX, Kosovar Albanian;
7. BB, fathers name XX, born on XX in XX, living in XX, XX, Kosovar Albanian;

### **Count 1.1**

AP and IT are **ACQUITTED** of the act described in the indictment under count 1.1, that they acting together as supply officer respectively Permanent Secretary in the Ministry of Health on a date between 26 September 2007 and 1 October 2007, allowed a legally binding contract with JX, dated 26<sup>th</sup> September 2006, to lapse without compliance with its terms and conditions. This resulted in a loss of over 1.5 million Euros to the Kosovo Consolidated Budget in addition to the costs of running the new and unnecessary tender process.

### **Count 1.2**

IT is **ACQUITTED** of the act described under count 1.2 of the indictment that he as Permanent Secretary in December 2007 told the evaluation committees of the emergency tenders 71300007737126 and 7130007789126 which operator should be selected. He did so because he did not wish to honor the existing contracts of the Ministry of Health since he wanted to issue new contracts in his own interests and for the material benefit of those with whom he had connections, financial or otherwise.

### **Count 1.3**

IT and AP are **FOUND GUILTY** of the act **implicitly** described under count 1.3 of the indictment that they on 7 December 2007 acting together as Permanent Secretary respectively supply officer/member of the evaluation committee in the Ministry of Health asked RH, both themselves and through APO, to sign that she took part in the evaluation of tender 71300007737126 when she did not participate. RH signed the evaluation form. By acting this way they committed the criminal offence of incitement to falsify official documents in co-perpetration as described in article 348 of the CCK read with article 23 and 24 of the CCK.

IT and AP are **ACQUITTED** of the act described under count 1.3 of the indictment that they on 27 December 2007 acting together as Permanent Secretary respectively supply officer/member of the tender evaluation committee in the Ministry of Health, asked RH, both themselves and through APO, to sign that she took part in the evaluation of tender 7130007789126 when she did not participate. RH signed the evaluation form.

#### **Count 1.4**

IT, AP and IH are **ACQUITTED** of the act described under count 1.4 of the indictment that they on several dates in December 2007 as Permanent Secretary respectively supply officer and procurement officer in the Ministry of Health had improper contacts with economic operators LX, EX and KX by means of telephone calls and meetings.

#### **Count 1.5**

AP is **ACQUITTED** of the act described under count 1.5 of the indictment that she on 27 December 2007 as an official of the Ministry of Health did not recuse herself from the evaluation committee because of a conflict of interest she had being a friend of BS and working for his brother AS.

#### **Count 1.6**

IT and AP are **ACQUITTED** of the act described under count 1.6 of the indictment that they acting together as Permanent Secretary respectively supply officer in the Ministry of Health in and around November and December 2007 had meetings with suppliers on various dates between the 15 and 18 November where the suppliers who could not supply by the 21<sup>st</sup> December 2007 were asked to provide bank guarantees. The bank guarantees were received by AP who also told the acceptance commission to sign a false declaration of acceptance of medicines from suppliers who were unable to supply the Ministry of Health before 21 December 2007. IT and AP enabled the suppliers to receive a material benefit, namely, advance payment by deception. AP also deceived the Ministry of Finance by telling the acceptance committee to sign false acceptance certificates claiming that the merchandise had been received when in fact it had not been.

AP is **FOUND GUILTY** of the act described under count 1.6 of the indictment that she on various dates between 21 December 2007 and 31 December 2007 as supply officer in the Ministry of

Health told a member of the acceptance commission to sign a declaration of acceptance of medicines from suppliers who were unable to supply the Ministry of Health before 21 December 2007, when the goods physically had not been received. The member signed the declaration although the goods were not received. Acting like this she committed the criminal offence of incitement to falsify official documents as described in article 348 of the CCK read with Article 24 of the CCK.

### **Count 1.7**

IT, AP, ZK, HF, BF and BB are **ACQUITTED** of the act described in article 1.7 of the indictment that they acting together on several dates in the period from 1 June 2010 until 30 November 2010 as Permanent Secretary respectively Supply Officer, Head of Procurement Department, Head of Quality, Head of Pharmaceutical Department and Minister of Health, in the Ministry of Health ran a campaign to damage JX and YX. The campaign consisted of ensuring JX and YX did not win any contracts with the MOH, sending inspectors to “JX” and asking them to punish them, making an inordinate amount of criminal reports and civil claims against JX and YX and using their influence to ensure JX and YX did not get import and export licenses.

### **Count 1.8**

IT and BB are **ACQUITTED** of the act described under count 1.8 of the indictment that on a date in June 2010 IT as Personal Advisor to BB, who was the Minister of Health, influenced the latter to ensure that one plus one contracts awarded to JX and YX were not extended. During a meeting with economic operators IT told FC that ‘you do not take your friends to Court’. The Head of Procurement EM was instructed not to extend the contract even though the contract had been prepared. HK and EM had prepared the contracts but BB did not sign the contracts for YX or for JX.

### **Count 1.9**

IT, HF, BF and ZK are **ACQUITTED** of the act described under count 1.9 of the indictment that they acting together as Permanent Secretary respectively Head of Quality, Head of Pharmaceutical Department and Head of Procurement Department in the Ministry of Health between 1 March 2011 and 30 April 2011 awarded a contract to “LX” in respect of tender number 206/11/029/111, lot 20, where they failed to follow procurement procedures because there was a signed and final report awarding the contract to JX. ZK, as Head of Procurement, did not sign it and shortly thereafter asked the same panel to reevaluate the tender. All companies who put in bids that were cheaper than LX were eliminated.

### **Count 1.10**

IT, BF and ZK are **ACQUITTED** of the act described in the indictment under count 1.10 that they as Permanent Secretary, respectively Head of Pharmaceutical department and Head of Procurement department between 1 January 2009 and 31 December 2011 advertised and without

good reasons cancelled tenders for essential drugs Beta Interferon 1b and Fludarabine because the sole supplier of these medicines MA was not liked by the Ministry for previously going to the press. The Ministry continued to cancel and annul tenders for these drugs supplied by SX rather than use the exemption in the Procurement Laws. Thereby, IT, BF and ZK let patients in Kosovo, suffering from Leukemia and Multiple Sclerosis, go without medication at the same time as spending the budget on drugs for less life threatening conditions.

### **Count 1.11**

HF, ZK and IT are **ACQUITTED** of the act described in count 1.11 that they acting together as Head of Quality respectively Head of Procurement Department and Permanent Secretary in the Ministry of Health in or around November and December 2010 called FL to the Ministry of Health where HF asked him to pay 10% for the extension of his 1+1 contract signed on 9 December 2009. Mr FL did not pay the money and his contract was not extended. The Ministry re-advertised the contract for medications which included the infusions from Mr FL contract – even though the infusions were not specifically advertised in the tender. The termination of this contract and advertising of the tender for the supplies in the contract was authorized by the Permanent Secretary, IT. The Head of Procurement, ZK, signed all the relevant documents.

### **Count 1.12**

IT, HF and ZK are **ACQUITTED** of the act described under count 1.12 of the indictment that they acting together as Permanent Secretary respectively Head of Quality and Head of Procurement Department in 2011 awarded a contract to AX. They failed to check the documents to ensure that there were three responsible bidders and to check that there was no conflict of interest. This resulted in the economic operators, BA of AX, KX and KWX, being able to price fix.

### **Count 1.13**

ZK is **ACQUITTED** of the act described under count 1.13 of the indictment that he in the period from 31 July 2010 until 12 January 2012 as Head of Procurement department in the Ministry of Health failed to keep tender documents.

### **Count 2**

IT, IH and AP are **ACQUITTED** of the act described under count 2 of the Indictment that they acting as Permanent Secretary respectively procurement officer and supply officer in the Ministry of Health on 30 November 2007 in a meeting with JX owner BD offered to award his company an emergency tender and future tenders in exchange of the withdrawal of the lawsuit JX made against the Ministry of Health.

### **Count 3**

IT is **ACQUITTED** of the act described under count 3.1 of the indictment that he in the period between 1 June 2010 and 31 July 2010 while working as Personal Advisor to the Minister of Health, told FC that you do not take friends to Courts.

IT and BF are **ACQUITTED** of the act described under count 3.2 of the indictment that they acting as Permanent Secretary respectively Head of Pharmaceutical Department in the period between 1 December 2011 and 11 January 2012 threatened BM;

#### **Count 6**

The charge under count 6 against the defendant IT, that he together with another made abuse of official position is **REJECTED**;

#### **Count 8**

IT is **ACQUITTED** of the act described under count 8 of the indictment that he together with others acting as Permanent Secretary in the Ministry of Health on various dates in 2007, 2010 and 2011 asked for bribes;

IH is **ACQUITTED** of the act described under 8.1 in the indictment that he as procurement officer in the Ministry of Health on a date in 2007 told FC that he would have to pay a 10% cut if he wanted to win a contract with the Ministry;

HF is **FOUND GUILTY** of the acts described under 8.2 of the indictment that he as an official of the Ministry of Health on a date in 2011 told MA that he would need to give a 10% cut if he wanted to win a Ministry contract. By doing so he committed the criminal offence of accepting bribes as described in article 343 paragraph 2 of the CCK;

HF is **FOUND GUILTY** of the act described under 8.3 of the indictment that he as an official of the Ministry of Health in or around November 2010, asked for a 10% cut if he wanted his one plus one contract extended. By doing so he committed the criminal offence of accepting bribes as described in article 343 paragraph 2 of the CCK.

#### **Count 9**

IT is **FOUND GUILTY** of the act described under count 9 of the indictment that he did not declare his foreign income over the years 2006, 2007 and 2008 on time. By doing so he evaded the payment of income tax as described in article 313 of the CCRK;

#### **Count 10**

IT is **ACQUITTED** of the acts described in count 10 of the indictment that he on various dates between the 12 January 2012 and the 25 June 2012 contacted the Chief EULEX Prosecutor and the President of the Assembly of EULEX Judges to get the Prosecutor removed from the case and to

get the case against him dismissed and/or to get any decision on confirmation decided in his favour. He also wanted the experts in the case to be approached so that they would direct the expertise in his favour. He was in contact with officials within the Ministry of Health to delay requests for documents by the Prosecutor and to make copies of documents the Prosecutor was asking for or had written. Together with another he was planning to pay money for such assistance. Together with another he was planning and claimed to have neutralised various witnesses. Together with another person he contacted staff within EULEX to give them confidential documents.

### **Count 11**

BB is **ACQUITTED** of the act described under count 11 of the indictment that he acting as Minister of Health on or about September/October 2010 executed the Judgment of the Supreme Court dated 8 September 2010 in which the appeal made by IT was granted. By doing so he reinstated IT as Permanent Secretary in violation of the Law on Civil Service, because IT was arrested on 13 July 2010 and an application for his detention was made.

### **Count 12**

IT and HF are **ACQUITTED** of the act described under count 12 of the indictment that they acting on or about 24 December 2010 as Permanent Secretary respectively member of the evaluation commission for tender 71300/10/647/111 insisted that EM would sign the tender evaluation form for this tender, awarding the tender to FX, although this was in breach of the international patent of NX.

## **SENTENCES**

### **AP**

Pursuant to Article 34, 41, 42, 43, 44 and 348, paragraph 1 read with article 23 and 24 of the CCK the defendant is sentenced to a suspended sentence of 6 months of imprisonment (count 1.3);

Pursuant to Article 34, 41, 42, 43 44 348, paragraph 1 read with article 23 and 24 of the CCK the defendant is sentenced to a suspended sentence of 6 months of imprisonment (count 1.6);

Pursuant to article 71 read with article 52 with the CCRK the Court imposes an aggregate suspended punishment of 8 months which shall not be executed if the defendant does not commit another criminal offence for a period of two years from the moment this judgment becomes final;

Pursuant to article 54 read with article 56 of the CKC the defendant is prohibited to exercise public administration or public service functions for the duration of 2 year;

### IT

Pursuant to Article 34, 36, 38 and 348, paragraph 1 read with article 23 and 24 of the CCK the defendant is sentenced to 10 months of imprisonment (count 1.3);

Pursuant to article 249, paragraph 1 of the CCK the defendant is sentenced to 9 months of imprisonment (count 9);

Pursuant to Article 39 and 249, paragraph 1 of the CCK the defendant is sentenced to a fine of 1000 euros (count 9);

Pursuant to article 80 of the CCRK the Court imposes an aggregate punishment of 18 months imprisonment;

The fine has to be paid within 2 months from the date this judgment becomes final;

The time spent in detention and under house detention shall be credited in the punishment of imprisonment;

Pursuant to article 54 of the CCRK the defendant is prohibited to exercise public administration or public service functions for the duration of 3 years;

### HF

Pursuant to article 34, 36, 38 and 343, paragraph 2 of the CCK the defendant is sentenced to imprisonment of 6 months for each act described under count 8.2 and 8.3 (count 8)

Pursuant to article 80 read with article 52 with the CCRK the Court imposes an aggregate punishment of 8 months on the defendant;

Pursuant to article 54 of the CCRK the defendant is prohibited to exercise public administration or public service functions for the duration of 3 years;

The time spent under house detention shall be credited in the punishment of imprisonment.

### **COSTS**

The defendants IT, AP and HF are obliged to pay the costs of the criminal proceedings in the amount of 1000 EURO, pursuant to Article 453 paragraph 1 of the CPC.

The costs of the defendants IH, BB, ZK and BF will be paid from the Kosovo budget.

### **PROPERTY CLAIMS**



The injured parties are referred to a civil lawsuit to materialize their property claims.

**HOUSE DETENTION**

The house detention of the defendant IT will be terminated as from today and a separate ruling will be issued.

**BANKACCOUNTS**

The blocked bank accounts belonging to AP and IT will be de-blocked by a separate ruling.

## REASONING

### Preliminary issues

#### Applicable law

According to article 3 paragraph 1 and 2 of the Criminal Code of the Republic of Kosovo the applicable law is the law that was in effect at the time the criminal offence (*the Court reads: act*) was committed. In case there is a change in the law after this moment and prior to a final decision, the law most favorable to the perpetrator shall apply.

Regarding the most favorable law, a distinction has to be made between the description of the criminal offence and the punishment prescribed.

With regards to the criminal offence of Abuse of official position the Court considers the CCRK less favorable, because the element of **unlawfulness** has been deleted from the code. This means that the prosecution does not have to prove that the unlawfulness of the intended benefit. For this reason the CKC is the applicable law regarding the act.

The applicable procedure code is the CPC. Article 541 paragraph 2 of the CPC prescribes that criminal proceedings in which the indictment has been confirmed with a final decision before the entry into force of the CPC shall be concluded based on the provisions of the CPC. The Court understands the wording “concluded” that the main trial shall be proceeded according to the CPC. The indictment in this case was final before the entry into force of the CPC and therefore the main trial was conducted according to the CPC.

#### Indictment

The Court has noted that the indictment has been confirmed although essential elements are missing. Counts 1.2, 1.3, 1.4, 1.5, 1.7, 1.12, 1.13 and 6 do not contain the date on which the acts have been committed. In cases where dates are missing, the Court has concluded the relevant dates from the reasoning of the indictment.

The assessment of the Court is limited to acts which are subject of a charge contained in the indictment, as is foreseen in article 360 paragraph 1 of the CPC. This means that this judgment can only relate to acts described in the counts of the indictment. Acts described in the reasoning or “factual allegations” of the indictment cannot be assessed by the Court as charge meant in article 306 of the CPC and are not part of this judgment.

#### Admissibility of Evidence

The confirmation judge declared inadmissible all evidence, meaning telephone metering results and sms messages, obtained through the order 302-2/08 dated 29 April 2008 from the Public Prosecutor. Also the statements given by EM to the prosecutor on 16 June 2011 and 29 December 2011 are declared as inadmissible.

The Three judge panel declared inadmissible the statements given by HE to the prosecution on 6 May 2011 and 4 January 2012 inadmissible.

Trial Panel declared inadmissible the statements given by the witnesses APO, FA and BS when they were heard as suspects.

The trial panel rejected the request made by the prosecutor to collect as new evidence the text messages and metering results that were declared inadmissible by the confirmation judge. The Court cannot allow evidence to be taken that was previous declared inadmissible.

No other submissions to declare administered evidence inadmissible were made or were not repeated during closing arguments.

#### Not accepted evidence

The Court rejected the request of AK to take evidence during the questioning of the defendant. He wanted to administer as evidence footage from a television program. Since the evidence was in his possession during the phase of the administration of the evidence, the Court concluded that this was no new evidence and therefore rejected the taking of this evidence.

#### **Evidence presented**

During the main trial the evidence listed in Annex A was administered. This evidence is considered to be read with consent of the parties.

During the main trial the witnesses and experts listed in Annex B were heard.

The statement of IQ was read out with consent of the parties. The statement of NZ was read because the witness was unable to come to the Court and a rogatory letter would cause undue delay to the proceedings.

On 12 April 2013 an episode of Jeta ne Kosovë from 22 July 2010 about Paracetamol supplied by JX was shown in Court. On the same date footage of a government meeting was shown.

#### **Findings of the Court**

Regarding all charges the Courts considers proven that the defendant IT was working in an official position as Permanent Secretary from 9 August 2006<sup>1</sup> until 10 March 2007<sup>2</sup> and from 28 September 2010 until 11 January 2012, when he was arrested.<sup>3</sup>

AP worked with the Ministry of Health in an official position as supply officer in the Pharmaceutical department from April 2005 until May 2011.<sup>4</sup> IH worked in an official position for the Ministry of Health from March 2004 until 27 December 2007 as procurement official and from 27 December 2007 until end 2009 as (acting) head of the procurement department.<sup>5</sup> BF

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<sup>1</sup> Additional evidence Binder 1 page 9 and 10;

<sup>2</sup> Additional evidence Binder 1 page 32/33 and 34/35;

<sup>3</sup> Additional Evidence Binder 1, page 47/48 and 49 and 50;

<sup>4</sup> Statement of AP, Minutes of the Main Trial 16 May 2013, page 22;

<sup>5</sup> Statement IH, Minutes of the Main Trial 16 May 2013, page 4;

worked for the Ministry of Health in an official position from May 2010 until 11 January 2012 when he was arrested, as head of the pharmaceutical department.<sup>6</sup> ZK worked for the Ministry of Health in an official position as head of the procurement department from 28 December 2010 until 11 January 2012 when he was arrested.<sup>7</sup> HF worked for the Ministry of Health in an official position as Head of Quality from 10 November 2010 until 11 January 2012 when he was arrested.<sup>8</sup> BB worked as Minister of Health in an official position for the Ministry of Health from 6 April 2010 until 18 October 2010.<sup>9</sup>

### **Count 1.1**

#### *Facts proven*

AP worked in the relevant period as supply officer in the Ministry of Health. It was her responsibility to make requests for supply with medication to the procurement department based on needs of the health institutions.

A contract worth 3 Million Euro was signed between the Ministry of Health and JX on 26 September 2006.<sup>10</sup> The contract would have been fulfilled if 75-125% of the contract value was ordered. On 11 August/September 2007 JX requested a meeting with IT as the Permanent Secretary because the contract had not been fulfilled and the tender had been re-announced.<sup>11</sup> On 26 September 2007 the contract expired. The fulfillment of the contract at that date was 16%. JX filed a civil lawsuit against the Ministry of Health for non-fulfillment of the contract on 1 October 2007. On 14 March 2008<sup>12</sup> and 3 June 2008<sup>13</sup> JX requested the Ministry of Health to come to an amicable settlement. On 18 June 2008 the Economic Court ruled in favor of JX and ordered the Ministry of Health to pay 1.5 million euro compensation.

#### *Findings*

The Court remarks in the first place that none of the acts described in the indictment under count 1.1 falls in the time frame from 26 September 2007 and 1 October 2007.

No proof has been presented by the Prosecutor that AP was in a position to fulfill the contract signed between the Ministry of Health and JX on 26 September 2006. Although she was responsible to prepare requests for supplies, the Prosecution did not prove that the contract was not fulfilled because AP failed to do so. Therefore the defendant has to be acquitted of the act described in count 1.1 in accordance with article 364 under 1.1 of the CPC.

Although IT did not respond to the requests made by JX in August and September 2007 to come to a solution for the unfulfilled contract, it cannot be concluded that this led to the non-fulfillment of the contract. It cannot be suspected that IT in a period of six weeks (from the moment he took the office until 26 September 2007) would have been able to find a solution for the unfulfilled contract. The Court concludes that the accusation that the contract expired without

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<sup>6</sup> Statement BF, Minutes of the Main Trial 23 May 2013, page 2;

<sup>7</sup> Statement of ZK, Minutes of the Main Trial 24 May 2013, page 2;

<sup>8</sup> Statement HF, Minutes of the Main Trial, 22 May 2013, page 18;

<sup>9</sup> Statement BB, Minutes of the Main Trial 17 May 2013, page 15;

<sup>10</sup> Binder 16A page 38-40 (English), Binder 16C, pages 17-20 (Albanian)

<sup>11</sup> Binder 16A, page 43 (English), Binder 16C, page 23

<sup>12</sup> Binder 37, page 57-62 (ENG/ALB)

<sup>13</sup> Binder 38, page 260/260a (ALB/ENG)

being fulfilled as a result of any action of IT cannot be proven. Therefore the defendant has to be acquitted of the act described in count 1.1, in accordance with article 364 under 1.1 of the CPC.

### **Count 1.2**

The Court concludes from the reasoning of the indictment that the act was committed between 30 November 2007 and 27 December 2007.

#### *Facts proven*

On 6 December 2007 and on 27 December 2007 APO, AP and RH were appointed as members of the commission for evaluation of tender 71300 07 737 126<sup>14</sup> respectively 71300 07 789 126<sup>15</sup>. Based on the evaluation the first tender was awarded to KX and LX as cheapest responsible bidders and the second tender was awarded to EX as cheapest responsible bidder.

#### *Findings*

APO testified that IT told him and AP which companies should be awarded as winners, although there were cheaper bids. Based on the contracts that were signed these companies are LX, KX and EX.<sup>16</sup>

The statement given by APO is not supported by the statements of AP. From the evaluation forms it cannot be concluded that the tenders were awarded to companies that were not the cheapest responsible bidder. There is no evidence that supports the claim made by APO that the tender process was fixed in order to award the tenders to companies connected to IT.

The defendant has to be acquitted of the act described in count 1.2, in accordance with article 364 under 1.1 of the CPC.

### **Count 1.3**

The Court concludes from the reasoning of the indictment that the act was committed in the period from 6 December 2007 to 27 December 2007.

#### *Facts proven*

On 6 December 2007 and on 27 December 2007 AP, APO and RH were appointed as members of the commission for evaluation of tenders 7130007737126<sup>17</sup> and 7130007789126<sup>18</sup>.

AP and APO evaluated the bids for these tenders without the presence of RH on the mentioned dates.<sup>19 20</sup> On 7 December 2007 APO asked RH to come to his office to sign the evaluation form for tender 7130007737126. She went to his office where IT, at that time Permanent Secretary, AP, as commission member and APO were present. IT and AP told RH that she could sign the evaluation forms. After this RH signed these forms, together with APO and AP.<sup>21</sup>

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<sup>14</sup> Binder 16C page 133 (ALB), Binder 16A page 153-154 (ENG)

<sup>15</sup> Binder 16B page 176 (ENG) Binder 16B page 180 (ALB)

<sup>16</sup> Statement APO Minutes of the Main Trial 14 March 2013 page 9;

<sup>17</sup> Binder 16C page 133 (ALB), Binder 16A page 153-154 (ENG)

<sup>18</sup> Binder 16B page 176 (ENG) Binder 16B page 180 (ALB)

<sup>19</sup> Statement APO Minutes of the Main trial 14 March 2013, page 10

<sup>20</sup> Statement RH Minutes of the Main Trial 21 March 2013, page 3

<sup>21</sup> Statement APO Minutes of the main Trial 14 March 2013 page 9 and 10; Statement RH, minutes of the Main trial 21 March 2013, page 3; Statement IH, minutes of the Main Trial 16 May 2013, page 13

*Findings*

There is no proof that IT and AP asked RH to sign the documents in order to obtain an unlawful benefit for themselves or any other (legal) person. With regards to the second evaluation on 26/27 December 2007, there is no evidence supporting the testimony of APO, because RH stated that he came with the documents to her office on that occasion and no other evidence was presented. The defendants are therefore acquitted from the charge of abuse of official position in accordance with article 364 under 1.1 of the CPC.

From the facts the Court concludes that RH on 7 December 2007 signed the evaluation forms after AP and IT convinced her that there was no problem signing the documents although she did not participate in the evaluation. RH only recently started to work with the Ministry of Health and had no experience with procurement procedures. The defendants knew this. Using her lack of experience they convinced her to sign the evaluation form although she did not participate.

By signing the evaluation form RH falsified an official document. Since she did so after she was told by IT and AP that there was no harm in this action, they incited her to falsify an official document.

The Court in accordance with article 360 paragraph 2 of the CPC qualifies the act of the defendants as incitement to falsify official documents in co-perpetration contrary to article 348, paragraph 1 read with article 23 and 24 of the CCK.

**Count 1.4**

The Court concludes from the reasoning of the indictment that the acts were committed in the period from 1 December 2007 to 27 December 2007.

*Facts proven*

AP, IT and BS, owner of EX, met once in a restaurant on a date in December 2007.<sup>22</sup> IH had contacts with economical operators in his capacity of procurement official in the Ministry of Health during the month December 2007.<sup>23</sup>

*Findings*

Contacts between officials of the Ministry of Health and economical operators can be improper because of the nature of the contact or because the contact in itself is prohibited.

IH as procurement official had daily contacts with economical operator with regards to the execution of their contracts and tender procedures, for which he was a contact person. These contacts in itself were allowed. The prosecution did not present any evidence regarding the content of these contacts. There is no proof that the contacts IH had were improper because of the nature of the contacts. Since no improper contacts between IH and the mentioned economical

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<sup>22</sup> Statement AP, Minutes of the Main Trial 16 May 2013, page 43; Statement IT, Minutes of the Main Trial 24 May 2013, page 43;

<sup>23</sup> Statement IH, Minutes of the Main Trial 16 May 2013, page 4

operators can be proven, the defendant has to be acquitted in accordance with article 364 under 1.1 of the CPC.

It is unclear when the meeting between IT, BS and AP took place. Contacts with economical operators are not prohibited for the permanent secretary of a ministry or the supply officer. For a member of a tender evaluation commission such a contact can be prohibited during the tender evaluation process when there is no official need for this contact.

Since the nature of the contact the defendants had with BS is not known, and it cannot be established that the contact took place at a time when AP was appointed as a member of the evaluation commission of tender 71300/07/789/126, there is no proof the defendants had improper contacts with BS. The defendants have to be acquitted from the charge of abuse of official position in accordance with article 364 under 1.1 of the CPC.

### **Count 1.5**

From the reasoning of the indictment the Court concludes that the act was committed on or around 26 December 2007.

#### *Facts proven*

AS, brother of BS, used the pharmacy license of AP from 1 January 2006 until 27 February 2007 for his company VX.<sup>24</sup> AP was acquainted to BS and arranged a meeting for him with IT.<sup>25</sup> On 26 December 2007 AP was appointed as member of the commission for the evaluation of tender 71300/07/789/126. BS made a bid in that same tender.

#### *Findings*

According to section 5 of the Code of Ethics compiled by the Public Procurement Regulatory Commission, there is a conflict of interest when the official or any of his family or associates has a present or potential interest, financial or otherwise which impairs or might appear to impair the official's independence of judgment in the discharge of responsibilities to the Organization. Associates means, among others, any enterprise in or with which the official or any member of his or her family has any material association with.

It was not proven that BS is a family member of AP. There is no proof that she or (any member of her family) had any interest, financial or otherwise, in the company owned by BS. The connection she had with the brother of BS until February 2007 does not constitute a conflict of interest. The defendant has to be acquitted from the charge of abuse of official position the CPC, because it has not been proven there was a conflict of interest.

### **Count 1.6**

#### *Facts proven*

On dates in November/December meetings were held within the Ministry of Health about modalities to deliver goods after the closing of the fiscal year between officials and economic operators. During this meetings it was discussed how the budget for goods that could not be delivered before the end of the fiscal year on 21 December 2007 could be used. One or more of

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<sup>24</sup> Binder 62, page 8-17; Statement AP Minutes of the Main trial 16 May 2013, page 40;

<sup>25</sup> Statement BS, minutes of the Main Trial 27 March 2013, page 16;

these meetings were attended by IT, AP, EM, HE, Head of Pharmacy and economical operators.  
<sup>26</sup> Economic operators delivered bank guarantees to the Ministry of Health, in order to be paid in advance for goods that good not be delivered before 21 December 2007.<sup>27</sup>

Upon recommendation of AP acceptance forms for the receiving of goods in the Central Warehouse at Mazgit were signed, although the goods were not delivered.<sup>28</sup>

### *Findings*

None of the witnesses presented by the prosecutor testified in front of the Court that AP played a role in the decision to use bank guarantees. Even if she was the one who suggested the bank guarantee scheme, she was not in the position to do so. As pharmaceutical officer it was not within her competence to decide on this matter. That she was aware of the use of bank guarantees and as member of an acceptance commission signed for the receiving of goods that were not delivered does not change this opinion. The defendant is acquitted from the charge of abuse of official position because there is no evidence to proof the charge.

By telling a member of the acceptance commission that she should sign the acceptance forms although the goods were not delivered, AP incited her to commit the criminal offence of falsifying official documents, because the information contained in the documents, that the goods were received was not true.

The act described in charge 1.6 of the indictment cannot be requalified as fraud in the office, because according to the charge AP told the acceptance commission to sign and did not sign the acceptance form herself.

Although IT as Permanent Secretary was ultimately responsible for the decision to use bank guarantees, he is not charged for the fact that he approved or took such a decision. He attended one or more meetings regarding this issue, but that in itself does not constitute the criminal offence of abuse of official position. The defendant therefore is acquitted.

Furthermore there is no proof that the decision to use bank guarantees was taken with the intent to obtain an unlawful benefit. All persons involved in the meetings regarding the bank guarantees stated that the purpose was to use as much of the yearly budget as possible. That as a result of the use of bank guarantees certain economic operators received a benefit -payment for goods they did not deliver- does not proof that this was the purpose of the use of bank guarantees. That the Ministry of Health was damaged because some of the goods that in the end were delivered were of other origin than described in the tender offer is not a consequence of the use of bank guarantees, but of negligence of the commission that accepted these goods on actual delivery.

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<sup>27</sup> EM, Minutes of the Main trial 13 March 2013, page 9, Minutes of the Main Trial 14 March, page 2; Statement APO, Minutes of the Main trial 14 March, page 11; StatementLM, Minutes of the Main trial 28 February 2013, page 14, Minutes of the Main Trial 22 February 2013, page 11; Statement LIM, Minutes of the Main Trial 22 March 2013, page 2;

<sup>27</sup> LIM, Minutes of the Main Trial 22 March, page 3; BS, Minutes of the Main Trial 27 March 2013, page 18;

<sup>28</sup> APO, Minutes of the Main Trial 14 March 2013, page 12; NZ, Police Interview, Binder 16B page 78-79; Signed Packing list Binder 16b, page 232; Receiving and inspection reports, Binder 58, page 97-100;



### Count 1.7

From the reasoning of the indictment the Court concludes that the events described under count 1.6 took place between 1 June 2010 and 30 November 2010.

#### *Facts proven*

In 2009 JX and YX signed so called 1+1 contracts with the Ministry of Health. These were a one year contracts with the possibility of extension for another period of maximum 1 year. In June 2010 meetings were arranged for economic operators at the Ministry of Health with BB, IT and Ministry officials.<sup>29</sup> During this meeting with representatives of JX, FC and YX, AG, was discussed that they had filed lawsuits against the Ministry of Health and that this could prevent their contracts from being extended.<sup>30</sup> The extended contracts of YX and JX were prepared and signed by EM. His signature is dated 30 June 2010.<sup>31</sup> These contracts are not signed by HK and BB. All extended contracts are signed by HK as Permanent Secretary and BB.<sup>32</sup> The contracts of YX and JX were not extended.

In 2009 after information received from one of the health institutions the Health Inspectorate took samples of paracetamol syrup supplied by JX for further analysis.<sup>33</sup> Because the paracetamol was not according to the standards JX withdrew the amount of paracetamol from the warehouse of the Ministry of Health. In May 2010 BF requested JX to replace the amount of paracetamol. On 30 June 2010 IT sent an email to HE asking him to undertake action against JX in conformity with his competencies regarding the paracetamol.<sup>34</sup> On 10 June 2010 JX requested an import license for the import of paracetamol. This request was not approved because it was unclear whether ECX, the manufacturer of the paracetamol was entitled to produce this medicine.<sup>35</sup> On 17 June 2010 BB made a criminal report for irregularities within the Ministry of Health related to civil claims made by JX and YX.<sup>36</sup> On 19 November 2010 IT filed an almost identical submission.<sup>37</sup>

#### *Findings*

HF was not working at the ministry of Health during the time in question. The charge against him can therefore not be proven.

Neither the charge nor the reasoning specifies any action or involvement of AP, ZK or BF. No acts can be proven against these defendants in relation with this charge. These defendants are therefore acquitted.

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<sup>29</sup> FC Minutes Main trial 14 February 2013, page 46; AG Minutes of the Main Trial 15 February 2013, page 17; HK minutes of the main trial 8 March 2013 page 14; EM, minutes of the Main Trial 13 March 2013 page 13;

<sup>30</sup> FC, Minutes of the Main Trial 14 February 2013, page 47; AG, Minutes of the Main Trial 15 February 2013;

<sup>31</sup> Contract JX Additional evidence binder 1 page 150-172; Contract YX Additional Evidence Binder 1 page 178-186

<sup>32</sup> Additional Evidence Binder 1, page 187 -274

<sup>33</sup> Binder Evidence presented by IT, tab 15 Routing slip dated 13 October 2009

<sup>34</sup> Binder 32, page 235;

<sup>35</sup> Binder 33, page 144

<sup>36</sup> Criminal Report dated 17 June 2010, Binder 35, page 13; Binder 32, page 110; Binder 38, page 15; Binder 43, page 50; Binder 47, page 107;

<sup>37</sup> Submission 19 November 2010, Binder 47, page 107; Binder 35, page 3;

The Court remarks that according to the terms of the contracts closed between Ministry of Health and, JX and YX, there was no contractual obligation to extend the contracts.

From the statements given by the witnesses and the defendants it remains unclear why the contracts of YX and JX were not extended in June 2010. BB stated that he signed all contracts that were brought to him by HK.<sup>38</sup> HK stated that he brought all the contracts to BB's after he signed them. After the contracts were brought back to him he noticed two were unsigned, but he did not ask BB for explanation.<sup>39</sup> The statement given by HK contradicts with the signatures on the mentioned contracts. They are only signed by EM. The signature of EM is dated 30 June 2010. Only one of the unsigned contracts is stamped.

IT was as personal advisor to the Minister of Health from April 2010 till July 2010 not in the position to decide on the extension of contracts. Although witnesses have stated that he had a lot of influence on BB, these allegations have not been substantiated. It is unclear on what these allegation is based. No conclusions can be drawn from these statements.

Although both FC and AG testified that the claims made by their companies were discussed during the meetings with economic operators, this is not enough to conclude that their contracts were not extended because of these claims.

The presented evidence is not conclusive on who decided that the contracts of JX and YX were not to be extended. The circumstances indicate that there is a relation between the claims made by these companies and the fact that their contracts were not extended, but this is not enough to proof beyond reasonable doubt that BB and IT are responsible for the non-extension. From the evidence it is clear that JX was visited by the Health Inspectorate before IT and BB worked at the Ministry from April 2010. Apart from the email dated 30 June 2010, where IT on behalf of the Minister makes inquiries about JX and asks to undertake action if necessary there is no proof that IT and/or BB requested or ordered the Inspectorate to take measures against JX.

No evidence was presented from which it can be proven that apart from the import license for paracetamol that was not approved because there was unclarity about the authorization of the manufactures, other import or export licenses were rejected or delayed because the defendants influence the decision-making regarding these licenses. Because of the absence of a head of the Kosovo Medicine Agency there was a backlog in the issuance of licenses. Not only YX and JX but also other companies suffered from the lack of competent officials.

The events involving YX and JX cannot be considered to be the result of a campaign against these companies. The Court could not establish the involvement of IT and BB in these events to an extend that exceeded the usual execution of their duties and competencies. Therefore the defendants are acquitted from the acts described under count 1.7.

## **Count 1.8**

### *Facts proven*

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<sup>38</sup> BB, minutes of the Main trial 17 May 2013, page 27;

<sup>39</sup> HK, Minutes of the Main Trial, 8 March, page 19;

The Court refers to the events proven under count 1.7 regarding the extension of the contract of JX and YX

### *Findings*

With reference to the facts proven and reasoning under count 1.7, regarding the extension of the contracts of JX and YX, the defendants have to be acquitted because it cannot be proven that the contracts of JX and YX were not extended due to decisions made by BB influenced by IT.

### **Count 1.9**

#### *Facts proven*

On 2 March 2011 a tender with number 206/11/029/111 was opened. Lot 20 of this tender was for surgical sutures. Positions 5 and 6 were for Polyglactine 910 sutures.<sup>40</sup> Bids for this tender were made by JX, LX and other companies. On 28 March 2011 the tender evaluation form for lot 20 was signed by the evaluation commission. According to this evaluation JX was the cheapest responsible bidder. This evaluation form was not signed by the head of the procurement department, ZK.<sup>41</sup> On 14 April 2011 lot 20 was re-evaluated. According to this evaluation the cheapest responsible bidder for this lot was LX after several bidders were eliminated because not all requested sutures were in their catalogues.<sup>42</sup>

#### *Findings*

The tender evaluation form dated 30 March 2011 was given to the prosecution by BM. During his interview to the Prosecutor he initially stated that he found this document during an absence of ZK in his office. Later on he acknowledged that this document was never filed by him and that he had kept it in his office.<sup>43</sup> He also added a memorandum, addressed to ZK to the tender file in which he stated that he relied on the expertise of the other panel members with regards to the evaluation of the catalogues.<sup>44</sup> This memorandum was never sent to ZK.<sup>45</sup>

BM testified that the reason for the re-evaluation of the tender was the fact that JX was evaluated as the cheapest responsible bidder. Since this company was not liked by IT, he was told by ZK, HF and BF that the evaluation had to be repeated.

BF was member of the evaluation commission. He stated that during the first evaluation performed by the commission the catalogues were not checked. For this reason there had to be a re-evaluation.<sup>46</sup>

HF as member of the evaluation commission stated that the bids were re-evaluated because.<sup>47</sup>

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<sup>40</sup> Contract notice Binder 42 page 79-98;

<sup>41</sup> Tender evaluation form Binder 42 page 26;

<sup>42</sup> Tender evaluation form Binder 42 page 39;

<sup>43</sup> BM, Minutes of the Main Trial 21 February, page 30

<sup>44</sup> Binder 41, Tab 28

<sup>45</sup> BM, Minutes of the Main Trial 21 February, page 7

<sup>46</sup> BF, Minutes of the Main Trial, page 15-16

<sup>47</sup> Statement HF Minutes of the Main Trial 22 May, page 19;

ZK denied he was ever given the first evaluation form for signature. He only knows the second evaluation form, which he signed.<sup>48</sup>

The Court ordered an expertise to evaluate the catalogues presented by JX and LX.<sup>49</sup> According to the report of these expertise the sutures under position 5 and 6 in lot 20, could be found in the catalogue of LX but not in the catalogue of JX. During the examination of the experts it was clarified that these sutures could also not be found in the LX catalogue, but that the sutures presented in the LX catalogue were almost identical. According to the experts the difference between Polyglactin 910 and Polyglycolic acid are not significant and they are interchangeable.

The Court did not find evidence for the allegation that IT instructed the evaluation commission not to award the tender to JX. Although there is a suspicion from the presented evidence that JX was not liked by IT because they won a law suit worth 1.5 million euros, this is not enough to proof beyond reasonable doubt that he used his position to prevent JX from winning this and other tenders. There is no evidence that proofs that IT in anyway interfered with the evaluation of the tender. The fact that he informed BB in May, after the contract award notice was send out, does not proof his involvement before this stage.

The statement BM gave for the reevaluation is not corroborated by other evidence. The fact that he first said he found the first evaluation in ZK's office and later admitted that he took it from the file makes his statement less credible. The same goes for the memorandum addressed to ZK, but never send to him. The re-evaluation of the due to the catalogues being not properly checked, gives him even a motive for his actions, because he was responsible for a proper adjudication of the procurement rules.

Although the statements of HF and BF differ regarding the reasons for the re-evaluation, it remains unclear what happened after the first evaluation and who was responsible for this. Since it cannot be proven that HF and BF convinced BM to re-evaluate the bids, they have to be acquitted.

There is no proof that the first evaluation was presented to ZK, other than the statement of BM. Since ZK's denies that he deliberately did not sign the statement because it was awarded to JX, it cannot be proven that he abused is official position and therefore he has to be acquitted.

### **Count 1.10**

#### *Facts proven*

On 26 July 2010 a tender number 71300 10 533 111 was announced in which Fludarabine tablets (lot 26) were contained.<sup>50</sup> The tender for this lot (26) was cancelled on 27 October 2010, because there was only one responsive bidder.<sup>51</sup> On 29 October 2010 this medicine was retendered under the same tender number, lot number 26.<sup>52</sup> On 26 November 2010 the tender for this lot was

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<sup>48</sup> Statement ZK Minutes of the Main Trial 24 May page 6;

<sup>49</sup> Expert report dated 13 May 2013

<sup>50</sup> Contract notice Binder 44, page 72;

<sup>51</sup> Cancellation notice Binder 44, page 80;

<sup>52</sup> Contract notice Binder 44, page 91;

cancelled because there were less than 3 responsive bidders.<sup>53</sup> Under tender number 71300 10 647 111 this medicine was tendered on 30 November 2010, lot number 29.<sup>54</sup> The tender for the lot was cancelled on 2 March 2011, due to the lack of three responsive bidders.<sup>55</sup> The medicine was tendered on the same date as lot 11 in tender number 206 11 029 111.<sup>56</sup> On 22 July 2011 the medicine was tendered in tender 206 11 098 111, lot 4.<sup>57</sup> The same was cancelled due to a lack of responsive bidders on 8 December 2011.<sup>58</sup>

A tender for beta interferon was announced on 12 November 2010 under procurement number 71300 10 601 111. This tender was annulled on 30 November 2010. On 5 February 2011 a tender for beta interferon 1b was announced under tender number 106 10 017 111. The contract for this tender was awarded to SX as cheapest responsive bidder.

On 31 December 2010 the Ministry of Health filed a request to the Public Procurement Agency for revocation of article 30A.4 of the Law on Public Procurement. This request was rejected on 2 February 2011. On 4 February 2011 ZK filed a requested the Procurement Review Body to review this decision.<sup>59</sup> This appeal was rejected as ungrounded by the Procurement Review Body on 28 February 2011.<sup>60</sup>

### *Findings*

BF as head of pharmaceutical department had no formal authority to announce and/or Annul tenders. This is done by the procurement department. The prosecution did not present any proof that BF in any way influenced any decision to announce or annul tenders, other than present the needs of the health institutions to the procurement department in order to organize tenders for needed products, if there was no contract for these products. Since it has not been proven that BF used his position to influence tender proceedings, he is acquitted from the act described under count 1.10 of the indictment, because the act cannot be proven.

ZK, as head of the procurement department was responsible for announcing and annulling tenders. IT as his line manager had to approve the announcement of tenders; there is no evidence that he was involved in the cancellation of tenders.

The reason for cancellation of the tenders for Fludarabine was that there were not enough responsive bidders, as is visible from the cancellation notes. No evidence was presented that proves that this reason was invalid, because there were in fact enough responsive bidders but the officials involved didn't want to award the contract to the company of MA. Therefore the allegation that tenders were cancelled for ungrounded reasons is not supported by evidence. In the same tender exercises also numerous other tenders were cancelled for a lack of enough responsive bidders.

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<sup>53</sup> Cancellation notice Binder 44, page 97;

<sup>54</sup> Contract notice Binder 44, page 100;

<sup>55</sup> Cancellation notice Binder 44, page 111;

<sup>56</sup> Contract notice Binder 44, page 124

<sup>57</sup> Contract notice, Binder 44, page 153

<sup>58</sup> Cancellation notice, Binder 44, page 161

<sup>59</sup> Appeal against the decision of the PPA, Binder 33, page 28

<sup>60</sup> Decision PPA, Binder 33, page 60

The allegation that no request was made for revocation of Article 30A.4 of the Law on Public Procurement (20/L-99) is ungrounded. It is clear from the established facts that such a request was made by ZK, but rejected by both the PPA and PRB.

The statement given by EM that the tender for Interferon Beta was cancelled before the bids were opened is not supported by any material evidence. The statement given by MA that the tender for Interferon Beta was cancelled because IT decided so because he did not want any of the companies that received the tender dossier to win the tender, is not considered to be corroborative, because he claims to have heard this from EM.

The case file produced by the prosecutor does not contain any document related to the tender procedures for the Interferon beta tenders. Therefore it cannot be proven that this tender was announced and annulled without a grounded reason.

The prosecution did not present any evidence with regards to the intended material benefit for the defendants or others or the intended damage to a third person. The fact that patients may have suffered from the lack of medicines, does not proof that the defendants would acted with this intent.

The acts under count 1.10 cannot be proven regarding ZK and IT and therefore they are acquitted from the charges under this count.

### **Count 1.11**

#### *Facts proven*

On 9 December 2009 FL signed a so called 1+1 contract with the Ministry of Health for the supply of intravenous drops. On 22 November 2010 IT approved the extension of this contract.<sup>61</sup> The contract was prepared and signed by the head of procurement, permanent secretary and the minister of health on 22 November 2010.<sup>62</sup> On 9 December 2010 the intravenous drops were tendered in tender number 71300/10/647/111. After evaluation of the bids for this tender, EX was awarded a contract for these products. Comparison of the prices that were in the contract FL had and the prices EX offered, shows that the prices from EX were higher. Shortly before the extension of the contract of FL was due, HF asked him for a bribe for the continuation of the contract.<sup>63</sup>

#### *Findings*

ZK was appointed as Head of Procurement on 27 December 2010. The decision to extend 1+1 contracts signed in 2009 was taken in November 2010. During that time ZK was not working in the Ministry of Health and therefore cannot be guilty of the offence described under count 1.11.

The Court accepts the statement given by FL that he was asked for a percentage in order to get an extension of his contract. HF, acknowledged that he met with FL. The statement given by the

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<sup>61</sup> Binder Additional evidence 2, page 3

<sup>62</sup> Binder Additional evidence 2, page 117

<sup>63</sup> FL, Minutes of the Main Trial 21 February, page 20;

witness is considered to be credible, because it is supported by the statements of BEB<sup>64</sup> and CG<sup>65</sup>, to whom he told, shortly after he visited HF, what was discussed during this meeting. BEB and CG gave their statements independent of each other.

The fact that FL was asked for a percentage which he refused to pay, does not implicate that his contract was not extended because of this. Relevant for this conclusion is the fact that the date of the conversation is unknown and it is not clear whether IT approved the extension of the contract and signed it before or after this date. Also is not proven that HF was acting on behalf of IT.

Since HF was not in a position to award or refuse contracts, it cannot be excluded that he knew the contract was going to be extended and asked for a bribe for his own benefit. Through the evidence it has not been made clear whether FL actually was called to the Ministry to sign the contract or not.

The allegation that IT authorized the termination (the Court: non extension) of the contract FL had with the Ministry of Health is not supported by any evidence. On the contrary, the proposal made by BF and EM as to which contracts should be extended is approved by IT.

Given that the charges cannot be proven the defendants are acquitted.

## **Count 1.12**

### *Facts proven*

On 27 January 2011 bids from AX, KWX and KX in tender 206/11/009/136 were opened by a commission comprised of BEB, AA and ES.<sup>66</sup> The tender was evaluated by AT, BM and FM as members of the evaluation commission.<sup>67</sup> After evaluation of their bids this tender was awarded to AX as the cheapest responsible bidder.<sup>68</sup> HF had been working for AX until he started to work for the ministry of Health on 10 November 2010. His authorization to act for AX was never removed from the Chamber of Commerce records.<sup>69</sup>

### *Findings*

The prosecution did not present any evidence to proof the allegation that the three bidders AX, KX and KWX fixed their prices.

No act performed by IT is contained in the indictment. He was not involved in the tender process and did not counter sign the contract with AX. The fact that the defendant after the tender was awarded to AX was informed of a conflict of interest in relation to this tender because HF was involved in this company before he joined the Ministry of Health does not proof that he was aware of this before the tender was announced. The defendant has to be acquitted since there is no proof that he abused his official position.

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<sup>64</sup> BEB, Minutes of the Main Trial 7 March 2013, page 11;

<sup>65</sup> CG, Minutes of the Main Trial 8 March 2013, page 4;

<sup>66</sup> Minutes of tender opening Binder 45 page 309;

<sup>67</sup> Tender evaluation report Binder 45 page106-110

<sup>68</sup> Tender evaluation report Binder 45 page106-110

<sup>69</sup> Business records Binder 25 page 62- 95

Also no act performed by HF is described in the indictment. Since he was not involved in the procurement procedure he could not have checked any documents to establish if there was a conflict of interest. There is no proof that he in any way influenced the evaluation commission. The defendant has to be acquitted because it has not been proven that he used his position to have a tender awarded to AX.

ZK as Head of the Procurement department was entitled to follow the recommendation given by the evaluation commission. He was under no obligation to check in detail the evaluation that was done. It has not been proven that he was aware or should have been aware of any connection between HF and AX.

### **Count 1.13**

From the indictment the Court concludes that the act has been committed between 13 July 2011 and 12 January 2012.

#### *Facts proven*

During the search of the Ministry of Health one binder with tender file 20611095111 was taken by the police.

#### *Findings*

The mentioned binder as such was not submitted to the Court, although the case file contains documents related to this tender. The Court cannot establish that documents are missing from the Tender file. The Court however notes that a complaint was made to the Procurement Review Body by economic operator SX in relation to lot's 72 and 73 in this tender. The Procurement Review Body in its decision does not make any remark regarding missing documents. There is no sufficient evidence that the defendant ZK did not keep tender documents.

The prosecutor furthermore did not present any evidence to proof the intent with which the defendant was acting. For the aforementioned reasons the criminal act cannot be proven. The defendant has to be acquitted.

### **Count 2**

#### *Facts proven*

On 30 November 2007 there was a meeting in the Ministry of Health between AP, EM and LM as officials from the Ministry of Health and BD as representative of JX. The meeting was called on the request of AP. During this meeting BD was asked by AP to withdraw his claim against the Ministry of Health for breach of contract. BD was offered a tender worth 70.000 Euro in exchange for the withdrawal of the claim. He also was promised help in future tenders. When BD refused to withdraw his claim, AP left the meeting and returned with IT. After being told that BD was requested to withdraw his claim he said that they were not requesting anything. He told



BD that it was more likely for Kosovo to be under Serbian control than that he would win his claim. He also told him that JX would not win any tenders as long as he was in the office.<sup>70</sup>

### *Findings*

There is no proof IT authorized the offer made to BD to withdraw his claim. Although it is unlikely that he was not informed about this meeting and the purpose of the meeting, this is not enough to prove that he as a co-perpetrator was involved in this act. The statement he made towards BD can be considered unprofessional behavior, but does not amount to abuse of official position. Therefore the defendant IT has to be acquitted from the act described under count 2

Although according to the some witness statements it was AP who offered BD a tender if he would withdraw his claim, she was not in a position to do so. She was as supply officer not involved in tenders unless she was appointed as panel member. As such she could not award a tender to an economic operator on her own account. According to the statement of LM the meeting was called by EM at the suggestion of the Court to reach an out Court settlement for the case. There is no proof that AP was involved in the Court proceedings regarding JXs claim. The Court finds it unlikely that she would take the lead in a meeting with two directors. No proof was presented that she in some way was authorized to do so.

The proof present by the prosecution is insufficient to conclude that AP promised BD tenders in exchange for the withdrawal of his claim and therefore she is acquitted of the act under count 2.

### **Count 3**

#### *Facts proven*

In June 2010 meetings were held in the Ministry of Health with economic operators supplying the Ministry. IT was present during these meetings as advisor to BB.

During one of these meetings FC was told that you don't take your friends to Court.<sup>71</sup>

On 30 December 2011 a meeting took place in the office of IT regarding in incident that happened between BM and BF.<sup>72</sup>

### *Findings*

According to FC, he does not know whether he was addressed by IT or BB. The statements given by EM and HK support the statement given by FC that this was discussed. These witnesses did not recollect who addressed FC during this meeting. As a result it cannot be proven that IT addressed FC and he therefore has to be acquitted of the charge in count 3 under 1.

During his interview with the prosecutor on 5 January 2012, BM stated several times, after being specifically asked by the prosecutor that he was not threatened by anyone in the Ministry of Health. The words used by BF and IT according to count 3.2 of the indictment, were not

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<sup>70</sup> Statement BD minutes of the Main trial 13 February 2013, page 7; Statement LM, Minutes of the Main Trial 22 February 2013, page 12-13; Statement EM, Minutes of the Main Trial 13 March, page 7 and 8;

<sup>71</sup> Statement FC, minutes of the Main Trial 14 February 2013, page 48;

<sup>72</sup> Statement BM, Minutes of the Main Trial 21 February page 6;

confirmed by BM during his testimony in Court. This, taken with his statement to the prosecutor that he was not threatened leads to the conclusion that the threats made to BM cannot be proven.

Therefore BF and IT are acquitted of the charge under count 3 of the indictment.

### **Count 6**

The prosecutor has withdrawn from the charges against IT regarding count 6, abuse of official position in co perpetration with NS. For this reason the charge against the defendant is rejected.

### **Count 8**

#### *Proven facts*

On or around November 2010 HF had a meeting with FL in which he asked him for a 10% cut if he wanted his contract extended.<sup>73</sup>

In early 2011 HF met with MA, whom he asked for a 10 % cut to win a contract with the Ministry of Health.<sup>74</sup>

In 2007 IH told FC that he should not discuss matters of money with IT directly, implicating that there were going to be requests for bribes.<sup>75</sup>

#### *Findings*

There is no evidence to proof that IT requested bribes personally. Also no evidence was presented that IT through IH and/or HF asked percentages in exchange of contracts. The fact that MA understood that with the chief IT was meant, does not proof that he HF pointed at IT when he said this. Even if he did this does not proof that IT actually requested from HF to ask for bribes.

The conversation between IH and FC was according to the letter not a request for a bribe, but more informative. As if IH explained him the way things would be.

The evidence against HF consists of the statements of MA and FL. Although they are not referring to the same event, the Court considers them to be corroborative.

### **Count 9**

#### *Tax law*

During the period coverd by the indictment the applicable law is UNMIK Regulation 2004/52. According to article 26.1 of this regulation, all taxpayers are required to prepare an annual tax declaration on or before 1 April of the year following the tax period. The declaration shall include, among other things, gross income from all sources, allowable deductions, and taxable income. Article 3.1 of the Regulation states that the object of taxation for a resident taxpayer

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<sup>73</sup> FL, Minutes of the Main Trial 21 February, page 20; BB, Minutes of the Main Trial 7 March 2013, page 11; CG, Minutes of the Main Trial 8 March 2013, page 4;

<sup>74</sup> Statement MA, Minutes of the Main Trial, 1 March 2013, page 5;

<sup>75</sup> Statement FC, Minutes of the Main Trial 14 February 2013, page 42;

shall be taxable income from Kosovo source income and foreign source income. Taxable income for a tax period, according to article 4.1 means the difference between gross incomes received or accrued during the tax period and the deductions allowable under the present Regulation with respect to such gross income.

*Proven facts*

During the years 2006, 2007 and 2008 IT received payments from the Switzerland on his bank account ending on 126.<sup>76</sup> He never declared this income to the tax authorities, until he was prosecuted for tax evasion. On 24 August 2010 IT informed the tax office of this foreign income. According to a financial report dated 12 August 2011 the Kosovo Tax Administration charged IT with tax base value of € 20,245.90 for the years 2005 – 2009.<sup>77</sup> From the Payment Reminder Letters for the years 2006<sup>78</sup>, 2007<sup>79</sup> and 2008<sup>80</sup> under item 40 it is clear that the unpaid taxes for these years were respectively € 5835,80, € 5869,06 and € 1984,99. The total amount of unpaid taxes is € 13,689.85. Since this is less than € 15.000, article 249, paragraph 2 of the CCK does not apply. The amount mentioned in the Financial Report is the total obligation, including interest and penalties.

*Findings*

IT, by not declaring the income he received from Switzerland, before or on 1 April of the year following the one in which the income was received breached article 26.1 of UNMIK Regulation 2004/52. By doing this he evaded the taxes he had to pay over this income. His explanation that he was not aware of the fact that he had to pay taxes, because he assumed that taxes were paid by the Swiss Pension Fund is not accepted by the Court, because this assertion is in contradiction with the educational background of IT. The Court considers that IT as highly educated person with experience in the management of Ministry was very well aware with fact that every income is under taxation and also was sufficiently informed about the character of the income from Switzerland. The defendant should have ensured himself that taxes were withdrawn from the payment. By not doing so he deliberately accepted the change that he received a gross payment and acted with eventual intent.

The Court considers the failure to declare the income a continuing criminal offence that was fulfilled the moment the income was declared on 24 August 2010. The calculation of the period of statutory limitation starts from this date. For criminal offences punishable since the indictment was filed on 7 July 2012, the period of statutory limitation has been interrupted.

**Count 10**

*Proven facts*

IT discussed in the months May and June 2012 ways to get the charges against him withdrawn, by contacting officials in the Kosovo government and within EULEX.<sup>81</sup> On his behalf letters

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<sup>76</sup> Bank statements Binder 23, page 174-226;

<sup>77</sup> Police report OCIU/12/201110812/2471, Binder 61, page 27

<sup>78</sup> Binder 46, page 241

<sup>79</sup> Binder 46, page 238

<sup>80</sup> Binder 46, page 248

<sup>81</sup> Binder Intercepts May-June

were send to these institutions. He also was in contact with an employee from the Ministry of Health who informed him about a request that was made for documents. Furthermore he discussed names of parties involved in the case and spoke about neutralizing witnesses.

### *Findings*

Obstruction of evidence as meant in article 309 paragraph 1 and 2 of the CCK consists of inducing a witness or an expert by use of force, threat to use force or other means of compulsion or by a promise or a gift or any other form of benefit to give a false statement in Court proceedings or concealing, destroying, damaging or rendering unserviceable documents that may be used as evidence with the intent to prevent or hamper the collection of evidence in Court proceedings.

The acts described in the indictment and considered proven by the presented evidence are not acts that can be categorized under the acts described in article 309 paragraph 1 and 2 of the CCK. Since there is no proof that experts or witnesses were actually approached by the defendant or on his behalf, the Court concludes there was no attempt made to obstruct the evidence. The Court remarks that the way the defendant tried to interfere with the proceedings is not acceptable, but does not constitute the criminal offence of obstructing evidence.

Preparation of a criminal offence was not punishable under the applicable CCK. Even if the actions undertaken by the defendant IT would fulfill the criteria for this form of criminal liability, which they do not, there would be no ground for a conviction.

Therefore the defendant IT is to be acquitted since the proven acts do not constitute a criminal offence.

### **Count 11**

#### *Facts proven*

On 13 July 2010 IT was arrested for tax evasion. He was released on bail on 11 July 2010. On 8 September 2010 the Supreme Court of Kosovo granted the appeal made by IT against the decision of the Senior Public Appointments Committee to remove him from his position of Permanent Secretary in the Ministry of Health.<sup>82</sup> On 24 September 2010 BB asked for a legal opinion from the legal department within the Ministry of Health regarding this issue.<sup>83</sup> In response the legal department informed BB that the decision from the SC was executable, but that the commission for the appointment of high officials did no longer exist. On 28 September 2010 BB re-instated IT as Permanent Secretary in the Ministry of Health.

### *Findings*

Article 69 of the Law on Civil Service of the Republic of Kosovo prescribes that Civil Servants shall be immediately suspended from duties by when criminal proceedings are initiated against the Civil Servant for an alleged criminal violation committed in connection with the exercise of his/her functions. According to the prosecution BB deliberately did not apply this article when he re-instated IT. The defendant BB claims that he did not know IT was under investigation for

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<sup>82</sup> Additional evidence binder 1, page 88-89

<sup>83</sup> Additional evidence binder 1, page 96

other offences than tax evasion. Although the prosecutor claims he should have known that because “this was widely published” she did not present evidence to proof this.

Since tax evasion was not connected with the exercise of his function, there was no ground to suspend IT from the civil service based on article 69 of the Law on Civil Service.

Re-instating IT does not constitute a criminal act and for this reason the defendant BB has to be acquitted from the charge under count 11.

## **Count 12**

### *Facts proven*

On 24 December 2010 a meeting took place in the office of IT, where were present EM, IT, HF and BF.<sup>84</sup> During this meeting the evaluation of the imatinib lot of tender 71300 10 647 111 was discussed. On 28 December 2010 EM was removed from his position.

### *Findings*

EM stated that he was pressurized by IT and HF to sign the evaluation form for the Imatinib lot in tender 71300 10 647 111 and to award tenders to bidders, although there were not enough responsive bidders.<sup>85</sup>

IT confirmed that a meeting was held in his office on 24 December 2010 about the lot for imatinib in tender 71300 10 647 111. He denies that pressure was put on EM to sign the evaluation for this lot, awarding FX the contract for this tender. EM only wanted to sign the evaluation if it was co-signed by IT.<sup>86</sup>

HF and BF stated in conformity with the statement of IT.<sup>87</sup>

The testimony given by EM is not supported by other evidence. His complaint to the PRB cannot be considered as such, since the source of this evidence is the same: EM. The evaluation forms awarding a contract to the lowest bidder for lots where there were less than 3 responsive bidders were not presented as evidence. Also contracts signed for these lots are not presented as evidence.

The Court concludes that it cannot be proven that IT and HF pressurized EM to sign evaluation forms for lots although this was in breach of the Public Procurement Law or international patent rules.

## **Sentences**

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<sup>84</sup> Statement EM, minutes of the Main Trial 13 March 2013, page 18; Statement HF, minutes of the Main Trial 22 May 2013, page 36; Statement IT, minutes of the Main Trial 29 May 2013, page 16

<sup>85</sup> Statement EM, minutes of the main trial 13 March 2013, page 18;

<sup>86</sup> Statement IT, Minutes of the Main Trial 29 May, page 16;

<sup>87</sup> Statement HF, Minutes of the Main Trial, 22 May 2013, page 36; Statement BF, Minutes of the Main Trial 23 May, page 33

With regards to the sentences, the Court has taken the following into consideration: The acts committed and the acts, for which the defendants have been found guilty, were performed in official positions, apart from tax evasion. People should have trust in their government and the government must earn this trust. By committing these offences in official positions, population loses trust in the government.

The Court noticed during the trial a general lack of taking responsibility for ones acts. Witnesses and defendants testified that although they were involved in some activities, they were not responsible. A society can only function if officials take their responsibility and the people demand from them that they take that responsibility. The offences committed are serious offences that undermine the credibility and the sustainability of the government.

For this reason the Court finds that serious punishments should be imposed. On the other hand the Court has taken into consideration that the investigation done by the Prosecution, was clearly to investigate these defendants and nothing else. From one of the defendant's statements, it can be read that when he wants to talk about things that happened to him in the Ministry of Health in 2008 and 2009, the State Prosecutor asked if this was during the time IT was in office, when this was not the case she was not interested to hear. There has not been an open investigation to discover what happened in the Ministry of Health but a search for evidence to get certain defendants convicted. With regards to the offences committed in 2007, the Court notes that these have been investigated since 2008, being it now 2013 the case has not been tried without undue delay. For this delay the Court has mitigated the offences.

Also has been taken into consideration that the defendants have not been convicted before.

The accessory punishments of prohibition on exercising public service functions are justified by the fact that the offences were committed in official positions.

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**Cornelie Peeck**

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**Joseph Hollerhead**

**Legal remedy:**

**Authorized persons may file an appeal in written form against this verdict through the Basic Court of Prishtinë/Priština to the Court of Appeals within fifteen days from the date the copy of the judgment has been served, pursuant to Article 380 paragraph 1 of the CPC.**

Annex B

Witnesses

AB on 8 March 2013  
ALL on 21 March 2013  
APO on 14 March 2013  
AT on 28 March 2013  
AG on 15 February 2013  
AL on 28 March 2013  
BG on 21 March 2013  
BD on 13 and 14 February 2013  
BM on 21 February 2013  
BEB on 7 March 2013  
BMU on 7 March 2013  
BS on 27 March 2013  
CG on 8 March 2013  
DK on 22 March 2013  
EM on 13 and 14 March and 31 May 2013  
FL on 21 and 22 February 2013  
FA on 22 March 2013  
FC on 14 and 15 February 2013  
HM on 15 March 2013  
HE on 15 March 2013  
HZ on 22 March 2013  
HK on 8 March 2013  
IHA on 21 March 2013  
JS on 27 March 2013  
LM on 22 March 2013  
LMU on 22 and 28 February 2013  
MM on 27 March 2013  
MK on 28 March 2013  
MA on 28 February and 1 March 2013  
MR on 28 March 2013  
PB on 29 March 2013  
RH on 21 March 2013  
XM on 28 March 2013  
Expert witnesses  
AS on 11 April 2013  
Sutures experts commission on 17 May 2013

Defendants

IH on 16 May 2013  
AP on 16 May 2013  
BB on 17 and 22 May 2013  
HF on 22 May 2013  
BF on 23 May 2013  
ZK on 24 May 2013  
IT on 24, 29 and 30 May 2013