DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENSINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU

Judgment of 2 April 2015 – AC-I.-14-0169

Factual and Procedural Background: [1] On 11 April 2005, the Claimant JSC *S* filed a claim against the Respondent KTA. According to the claim, the company *S* is the sole owner of *F-S* LLC – the enterprise sold on 16 September 2004 by the KTA as a SOE. To prove this allegation, the Claimant introduced a decision issued on 28 October 1992 by the Interim Governing Body of the SOE "*F* – Wallpaper Factory", to join the *S*, a JSC, which had mainly maintained private capital. On 4 November 1992 the Commercial Court in N. S./Serbia] registered the company that survived the merging and thus all assets and liabilities of the Wallpaper Factory were transferred to *S*. However, the Governing Body of *S* decided to incorporate a new company in Kosovo - namely *F-S* LLC. On 2 December 1992, the New Co LLC was registered in the Commercial Court in P./P. as JSC *S* as solely established.

[2] This legal circumstance continued until the arrival of international forces in Kosovo. Then the newly established KTA, after studying the status of *F-S* LLC decided to disregard the company joined and to treat it as a SOE, which resulted in its privatization accruing the total amount of … euros.

[3] The Claimant is claiming payment of the amount of … euros including interest from 16 September 2004 until the final payment. In addition, the Claimant also claimed payment of … euros as a compensation for the lost profit as a result of illegal treatment by the KTA.

[4] On 26 October 2005, the KTA submitted its defence to the claim with the Special Chamber of the Supreme Court. The KTA requests from the Court to order the Claimant to submit more evidence in support of the claim. Amongst others, the KTA requests to prove whether the shareholders have approved the current claim, or are advised for the action undertaken by management; that the Claimant monitored the activities of its alleged affiliate *F* and that has paid its shareholders; that the Claimant had made any investment with its alleged affiliate *F* and requires proofs how the financial loss alleged by the Claimant was calculated.

[5] Further in the KTA's defence, it asserts that this merging was not based on the Federal Law on Enterprises (adopted in 1988 and promulgated in Official Gazette No 77/88, later amended in 1989 and twice in 1990), which may constitute an Applicable Law because the significant provisions of this law were not applied during the merging process.

[6] Otherwise, the Respondent claims that the grounds for this merging are with the Interim Measures for the Protection of the Rights of Self-Management and Social Protection of *F*, adopted by the Assembly of Serbia on 6 November 1990. Moreover, the Respondent asserts that this law does not mean the Applicable Law under UNMIK Reg 1999/24, primarily because it does not cover the legislative gap in virtue of Sec 1.2 of UNMIK Reg 1999/24. The KTA also claims that the Sec 1.2 of UNMIK Reg [1999/24] introduces a presumption that laws before 22 March 1989 normally are not applicable and the burden of proof rests with the Claimant that the law after 22 March 1989 was not discriminatory.

[7] At the hearing held on 20 June 2013, the trial panel summoned the Respondent - PAK as the *ex lege* successor of the former - KTA. At the same hearing, the Claimant explained that the claiming company (*S*) was merged with a company called *T* LLC from B. P.[/Serbia], and as a result the Claimant should have been considered as a *T* LLC from B. P.[/Serbia].

[8] Both parties in the case at hand (Claimant and Respondent) confirmed that they stand by the claim, respectively the Respondents stand by the defence to the claim filed by the KTA on 26 October 2005.

[9] At the hearing held on 22 January 2014, the main issue was the admissibility and connection of the requested evidence. After hearing, the Panel decided that the admissibility and connection of evidence in writing will be decided during the deliberation on the merits.

[10] The last hearing for this case was held on 13 March 2014. Both parties declared that [they] have no new suggestions for additional evidence, so the court decided to close the proceedings of the evidence over this case and gave the word to the parties for their closing statements.

[11] It is important to emphasize that both parties stood by their previous approaches.

[12] Given that both parties have claimed the costs, the Presiding Judge has given them 5 days to specify the amount of costs claimed.

[13] On 14 March 2014 (within deadline), the PAK complied with the court order and claimed the costs in the total amount of … euros (… euros).

[14] On 25 March 2014 (after the deadline), the Claimant's representative complied with the Court Order and claimed the costs in the total amount of … euros (… euros).

[15] On 15 April 2014, the Specialized Panel rendered Judgment SCC-05-0113, whereby the claim for compensation for the alienation of property in the amount of … euros and profit loss in the amount of … euros was entirely rejected as ungrounded.

[16] The Claimant is required to pay the PAK the amount of … euros for the procedural costs. In the reasoning of the Judgment, the Specialized Panel states that the main part of this lawsuit lies in the Court's findings related to two key issues:
(1) What laws were applicable to the merging of 1992 and if they were duly enforced.
(2) Was it simply the fact that on behalf of the *F* the decision for merging was issued by the so-called Internal Body; sufficient to consider the transformation as discriminatory.

[17] According to the Claimant, the Law on Companies would be applied only in 1988 and the challenged merging was based on its article 187-a. In the view of the Respondent, the whole privatization laws, approved in the late 1980s - and the well-known "Laws of Marković" (according to last prime minister of the SFRY Ante Marković) should have been implemented. Therefore merging based on only one of them has no effect.

[18] Regarding the second issue, the Claimant presents the view that although the imposition by the Interim Body in the SOE *F* was based on discriminatory laws, it is not itself sufficient to consider the merging as discriminatory. What is important according to the Claimant is that how the transformation was made (in this case the merging). The Claimant alleges that because most of the employees of *F-S* LLC who were given free shares, were of Albanian ethnicity, proves that the process was conducted in a non-discriminatory way.

[19] According to assessments of the first instance, UNMIK Reg 2002/12 shall apply because the privatization of the property in stance was done in 2004. Under that Regulation, Sec 5.4, any merging that occurred after 22 March 1989 is valid only if based on applicable laws and to be [correct: if] executed in a non-discriminatory way. Merging in question occurred in 1992 and therefore satisfies both requirements. Merging was like "taking over" - SOE *F* was completely absorbed by JSC *S* and had lost its legal personality. The socially-owned capital of *F* became part of the capital mainly in the private ownership of the absorbing company. Therefore, the merging of 1992 was itself a classic example of privatization - a part of social capital was transferred to become part of the primarily private company. Consequently, privatization related laws would apply.

[20] The Court found that at the time of the merging, the Law on Turnover and Disposition of Socially-Owned Capital (LTDSOC) of 1990 set forth rules concerning privatization issues. In fact, this law - even in its first version of 1989 - was adopted after the deadline specified in UNMIK Reg 1999/24 (22 March 1989). However, the law that was [a] first regulation on privatization was not itself discriminatory and therefore should be applied in accordance with Sec 1.2 of UNMIK Reg 1999/24. According to Art 2(1) of LTSSC [correct: LTDSOC] an enterprise can be sold whole or in part, and the proceeds accrued shall be allocated to the Development Fund - a special body established in each of the constituent members of the SFRY. The contract for the sale / privatization of socially-owned entities and capital will be encompassed by the Development Fund as per Art 2-b [of the LTDSOC]. In accordance with Article 4 of the same law, an individual agency will provide estimates on the value of social capital for sale. The merging between the JSC *S* and the SOE *F* had the effect of sale of the entire SOE and privatization rules would apply. Otherwise, the JSC *S* practically acquired the

enterprise for free. The fact that the later the management of the Company granted free shares for the workers of *F* is insignificant as workers were not owners of the socially-owned capital. As long as the company that survived the initial union had legal deficiencies, subsequent incorporation of the LLC *F-S* and all changes in registration and status of the company *S* had no effect on the socially-owned capital in stance. For the whole period, from its foundation until privatization in 2004 "*F* – Wallpaper Factory" should be considered as SOE.

[21] Concerning the issue of discrimination during merging, the Court is of the opinion that for the case at hand it does not matter. Having decided on the merging without complying with the normal procedure of privatization, the Temporary Body assigned for the SOE *F* issued an unlawful decision and it is unimportant whether this decision was executed in a non-discriminatory way.

[22] Therefore, a claim for compensation for loss of property and loss of profits will be rejected as ungrounded.

[23] On 19 May 2014 the Appeal was filed against Judgment SCC-05-0113 dated 15 April 2014 of the Specialized Panel, by the JSC *T* from B. P./Serbia, due as it is said, breach of procedure, erroneous determination of the factual situation and wrongful law interpretation.

[24] Initially, the Appellant objects the assessments of the Specialized Panel that the union-merging of *F* and *S* which occurred in 1992 constituted a classical example of privatization, given that the socially-owned capital was transferred, namely it becomes primarily a private company, therefore laws on privatisations were applied, basically the LTDSOC. The Panel established that the LTDSOC although adopted after 22 March 1989 was not discriminatory and shall be applied in accordance with Sec 1.2 of UNMIK Reg 1999/24. The Panel established that the upheld decision for merging without obeying respective procedures of privatization, which the temporary body imposed on SOE *F*, was an unlawful decision and the procedure to render this decision is unimportant.

[25] According to the Appellant the Law on Enterprises (official gazette of SFRY No 77/88, 40/89) applied for the subject matter transaction. The Law is valid along with Sec 1.1 of UNMIK Reg 1999/24 taking into consideration that [it] has entered into force on 1 January 1989, namely before 22 March 1989. Art 187(1) of the Law on Enterprises sets forth that decisions on change of the enterprise status (separation or merging) shall be rendered by the administrative body of the enterprise. Under Art 187a(3) [of the Law on Enterprises] it is defined that the mutual relations of enterprises arising from the status changes will be set forth by the contract. For this purposes the *F* enterprise management – interim body rendered a decision for joining – merging respectively integration of enterprise *F* with enterprise *S* on 28 October 1992. In accordance herewith may be noticed that the procedure was followed as it was set forth by Art 187a(1) of the Law on Enterprises. In addition, enterprise *F* and *S*, on 28 October 1992 signed the protocol whereby [they] established mutual relations in accordance with Art 187a(3) of the Law on Enterprises. Art 27 of the Law on Enterprises defines that enterprises stated in

paragraphs (1) to (4) of this Article (socially-owned enterprises, enterprises of corporations, mixed ownership enterprises and privately-owned enterprises), have the same status but also rights and obligations in the market. In consideration of this provision, it is obvious that SOEs have also had the rights and obligations in the merging procedure with privately-owned enterprises in accordance with Art 187a of the Law on Enterprises. The Appellant alleges that no provisions exist to prohibit such merging. According to him the reasoning in the judgment of the first instance Panel is erroneous taking into consideration that the social capital of *F* became part of private ownership enterprise. For the existing transaction the LTDSOC shall apply. At the time the LTDSOC and the Law on Enterprises were valid and no provisions were in force to oblige *F* and *S* to apply the LTDSOC instead of the Law on Enterprises. *F* and *S* have chosen to apply the Law on Enterprises because it was in the common interest of the enterprises taking into consideration that this was a more efficient manner to commence with business cooperation. Moreover, the legality of the transactions are also confirmed by the fact that the transaction (merging and separation) were registered with the competent body of the state namely with the Economic Court in P./P. and in the Economic Court in N. S.[/Serbia].

[26] In addition, attention shall be paid to the UNMIK Reg 2002/12 which sets forth that the unification-merging may be done when the SOEs, in a way as it is defined by Sec 5.4 of this Regulation:

> *A re-registration or merger of a Publicly-owned or Socially-owned Enterprise after 22 March 1989 shall affect its status as a Publicly-owned or Socially-owned Enterprise only if such re-registration or merger was: Based on Applicable Law; and Implemented in a non-discriminatory manner".*

[27] In spite to what is stated hereupon, the subject matter transaction would be allowed pursuant to applicable law even if it was based on any grounds of the Law on Enterprises or the LTDSOC.

[28] Merging and separation of SOEs was allowed pursuant to the Law on Enterprises (which is valid in accordance with UNMIK Reg 1999/12, taking into consideration that was adopted on 22 March 1989). Furthermore, transformation of the social capital into private capital was allowed in accordance with the LTDSOC (which is valid as it is not discriminatory, in accordance with Sec 1.2 of UNMIK Regulation 1999/12. Basis for the respective transaction is the one valid for application of Sec 5.4 of UNMIK Reg 2002/12, not the steps which should have been undertaken during the process of implementation of this transaction. Taking into consideration the above, [the] mentioned merging or separation of *F* was based on a valid law. Therefore, the first condition pursuant to Sec 5.4 of UNMIK Reg 2002/12 was fulfilled. The second condition that the transaction was not implemented in a discriminatory manner was also fulfilled as it is clarified by the following paragraph.

[29] At the hearing held on 22 January 2014 the Respondent confirmed that a single contestable issue among parties remains whether the interim measures were discriminatory or not. The Respondent does not mention the non-discriminatory manner of merging as contentious. This is sufficient for the Court to establish that the second

condition under Sec 5.4 of UNMIK Reg 2002/12 was fulfilled. According to the Appellant this is confirmed by the fact that during the process no employees of Albanian ethnicity were expelled from their working positions. In this aspect it shall be specified that the Respondent has provided proofs related to employees' employment termination which occurred prior to merging of *F*. However, dismissal of Mr. *Sa Sa* occurred in December 1990, whereas Mr. *R Z* was expelled in October 1991. Merging of *F* took place in October 1992 and the said dismissal and expelling could not have been obstacles for merging and do not confirm the Respondent's allegations over the discriminatory manner of the *F* merging. The Respondent provided no proofs on termination of employments after merging (as no employments of employees were terminated).

[30] Concerning the Status Determination Report (SDR) whereby the Respondent intended to indicate that the merging of *F* was followed by discriminatory actions. The Claimant established that the SDR contains errors. For instance, under point b 2.4 of the SDR, it is erroneously stated that the Head of Legal Service was expelled because of political reasons in 1993. Moreover Mrs. *So Gj*, Head of the Legal Unit, continued to work in *F* until 1999. Under point B [correct: b] 8.2 [of the SDR] it is stated that the registration of a company as *F-S*, a ground which Serbia considers as a social company whereas the extract attached by the court registry indicates that the company is in private ownership. It is apparent[ly] the SDR intention not to show the manner the *F* merging was carried out, but to provide the Respondent with a ground to set aside the merging, and to sell *F* afterwards, alleging that merging never took place.

[31] The Appellant replicates [correct: replies] and cites Sec 5.4 of UNMIK Reg 2002/12 which sets forth:

> *A re-registration or merger of a Publicly-owned or Socially-owned Enterprise after 22 March 1989 shall affect its status as a Publicly-owned or Socially-owned Enterprise only if such re-registration or merger was: Based on Applicable Law; and Implemented in a non-discriminatory manner.*

The fact that the interim body administered the *F* at the moment of merging with *S* shall not be considered discrimination because of the following: (i) most of the employees were of Albanian ethnicity; (ii) no employees of Albanian ethnicity were expelled; (iii) employees of Albanian ethnicity enjoyed the same status before merging, acquired free shares in *S* which is not contestable among parties.

[32] In view of all these facts and grounds, the Appellant suggests the Appellate Panel to entirely amend [correct: quash] the appealed Judgment SCC-05-0113, dated 16 April 2014; to grant the Claimant's request and to oblige the Respondent to pay the Claimant the amount of … euros, including interest accrued from 16 September 2004 until the final payment; to pay the Claimant the amount of … euros including the interest, and to compensate the Claimant with the amount of … euros for the proceeding costs; or to set aside in full the appealed judgment.

[33] On 29 May 2014 the PAK filed a response to this Appeal whereby amongst others it is said that the PAK entirely objects the Appeal considering it to be legally ungrounded. The Appellant's Representative[s] have only repeated their ungrounded statements

provided earlier in the proceedings, and did not prove to have any alleged breach. For this reason, the PAK upholds the challenged judgment and considers it to be correct and legal.

[34] The PAK suggests to reject the Claimant's appeal and to uphold the challenged judgment.

Legal Reasoning: [35] The Appeal is ungrounded.

[36] Pursuant to Art 64.1 of the Annex, the Appellate Panel decided to dispense with the oral proceedings.

[37] The Appellate Panel upon careful examination of all appealing allegations, the appealed Judgment and all [pieces of] evidence submitted in the case file came to a conclusion that the Appeal is ungrounded.

Appealing allegations and findings of the Appellate Panel

[38] Initially, the Appellant objected the Judgment of the Specialized Panel in all points of its reasoning.

[39] The Appellant quotes Art 27 of the Law on Enterprises which defines that enterprises stated in paragraphs (1) to (4) of this Article (socially-owned enterprises, enterprises of corporations, mixed ownership enterprises and privately-owned enterprises), have same status but also rights and obligations in the market. According to the Appellant, taking into consideration this provision, it is obvious that SOEs have also had rights and obligations in the merging procedure with privately-owned enterprise in accordance with Art 18 a, of the Law on Enterprises and the Appellant alleges that no provisions exist to prohibit such merging.

[40] Based on the Appellant's allegations, the Appellate Panel has found that paragraphs (1) to (4) of Art 27 of Law on Enterprises which is referred[-to] by the Appellant sets forth decisively that the decision on merging one of another enterprise by the enterprise that joins [correct: merging one company with another] necessarily requires consent of the employees' council of the enterprise. In virtue of the facts introduced in the case files the decision was rendered through a protocol signed by the members of the interim body of *F* installed by Serbia and a representative of the JSC *S* with no members of Albanian ethnicity, whereby the merging of the SOE *F* with the JSC *S* from B. P./Serbia was approved. By doing so, an illegal action was undertaken as it was rendered by the interim body without approval of the employees' council which represents the interest and willingness [correct: will] of [the SOE's] employees.

[41] The Appellate Panel has also found that in conformity with Art 14 of the Law on Enterprises (Official Gazette No 77, dated 31 December 1988)

> *[e]mployees shall decide to organize the joint associated labour organization, in accordance with the Statute of the Enterprise.*

Meanwhile, this matter is set forth by the Art 13 of the Statute of this SOE which reads that:

> *the employees may change the organization of the enterprise so as it can join, merge into another enterprise or to be divided in two or more enterprises. The employees will decide concerning the changes and organization of the enterprise by the majority votes of the total number of employees, through referendum.*

[42] As it is stated hereupon, for the case at hand it is obvious that changes in the Enterprise were undertaken in full contradiction with Art 13 of the Law on Enterprises and contrary to Article 13 of the Statute of the Enterprise.

[43] According to the Appellant Art 187(1) of the Law on Enterprises sets forth that decisions on change of the enterprise status (separation or merging) shall be rendered by the Management Body of the enterprise. The Appellant also mentions Art 187a(3) [of the Law on Enterprises], which defines that the mutual relations of enterprises arising from the status changes will be set forth by contract.

[44] The Appellate Panel found that Art 187 of the Law on Enterprises of 29 December 1988 which is referred by the Appellant, with Supplements and Amendments of this Law of 8 August 1990, Art 187 was deleted and Art 187a was inserted, which was related to statutory changes. This amendment of the basic law pursuant to which the decision was rendered, took place in a period defined by Sec 1.1 and 2 of UNMIK Reg 1999/24 on discriminatory laws, because the law was amended on 8 August 1990. For this reason the appealed allegations are ungrounded.

[45] The Appellate Panel finds that initially, the decision was rendered by interim bodies at the time when the interim measures were installed in all enterprises of Kosovo, facts which are well-known, and decisions of the body were arbitrarily and contrary to legal provisions. Thus, the decision was rendered by an incompetent body, therefore such decision was unlawful from the beginning.

[46] On the other hand, related to other legal requirement of Art 187a(3) [of the Law on Enterprises] which set forth that:

> *mutual relations of enterprises arising from the status changes will be set forth by the contract*.

In the case at hand, we have no such mutual relations because the social capital of *F* was given for free to a private company. This is contrary to the LTDSOC, Art 2 of which reads on sale of the capital and for the body which may render such decision for sale, to be the employees council. To the contrary, in the case at hand the social capital of the SOE *F* was given away for free or merged in a JSC in Serbia, which constitutes a typical example of arbitrary and illegal decisions.

[47] The Appellate Panel has found that truly as asserted by the Appellant a large number of employees of Albanian ethnicity retained their work and even shares were distributed to them. However, the problem lays in the fact if any of managers of Albanian ethnicity remained to work with the SOE. If we have a look over the report dated 28 October 1992, where the merging procedures and reasons for transformation of

F were discussed, no Albanian was amongst the six members of the Interim Body of the Enterprise.

[48] This proves another crucial moment that all transformation procedures were undertaken by violent or interim bodies installed by the Government of [correct: in] Belgrade, having no until then Albanian manager and without approval of the employees council. Although a certain number of the employees retained, [all Albanian] managers of the SOE were dismissed from their duties and substituted by an interim management. Whereas the labor force continued to work as they were needed to maintain production.

[49] For the above reasons, the Appellate Panel establishes that the Claimant's appealing allegations are grounded. Therefore, the Appeal is rejected as ungrounded, and consequently the appealed Judgment of the Specialized Panel is hereby upheld to be correct and legally grounded.

[50] Therefore, because of the reasons stated above and pursuant to Art 10.10 of the LSC, it is decided as in the enacting clause of this decision.