BASIC COURT OF PRISTINA

Case number 144/13

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

(INTRODUCTION)

This judgment is dated 21 September 2015.

JUDGMENT IN THE NAME OF THE PEOPLE

Pursuant to the Articles 359 *et seq.* of the Criminal Procedure Code of Kosovo (hereinafter C.P.C.K) *ex vi* Article 541, paragraph (hereinafter, par.) 1, C.P.C.K. (the new C.P.C.K., entered into force on January the 1st 2013, shall apply to this case as the indictment, dated 05/11/2012, was filed on 13/11/2012, this as per art. 541, par. 1, C.P.C.K.).

The initial hearing took place on 28/03/2013 and on 18/06/2013, presided by Jonathan Welford-Carroll, EULEX Judge. While at the first session the defendants were identified and some administrative issues were dealt with, at the second the submitted written submissions about evidence, the chart clarifying each defendant's charges, references to the previous criminal code and to the new one and the amended indictment (filed on 28/03/2013) were discussed at length. Also procedural issues were discussed, as the need for an expertise on procurement, claimed by the defendant K. – to what the defendant Z. opposed.

On 18/06/2013 the pleas of the defendants were also taken and all have pleaded not guilty to every charge.

On 17/10/2013 a ruling on the said matters has been issued – whose contents is not necessary to repeat at this point.

The Basic Court of Pristina in this case has a trial panel comprised of EULEX Judges Jorge Martins Ribeiro (as Presiding Judge) and Arkadiusz Sedek, together with the Kosovar Judge Beqir Kalludra, with Driton Musliu assigned as legal adviser to the case. The international judge Arkadiusz Sedek replaced the other international judge who was a panel member, Petar Stoitsev, as of the session held on 04 November 2014. Pursuant to Article 311, par. 1, C.P.C.K., after hearing the parties, it was agreed by everyone to consider as read, administered or examined, the evidence that had already been produced along the previous sessions.

As ascertained before, this court is the competent to adjudicate the case, pursuant to articles 1, 2, par. 1.2, 9 par. 2.1, 15 par. 1.20 and 15, par. 2 of the Law on Courts (L. 03/L-199 in force at the time the proceedings began) and per articles 3, pars. 1 and 7 (this last one in relation to the majority of EULEX Judges) of Law on the Jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (L. 03/L-053 as it was in force at the time) *ex vi* art. 442 C.C.K.

This criminal case (initially PPS 30/10) is against the defendants N. K. (holder of the ID. card no. 1004339475), A. Z. (holder of the ID. card no. 2010233197), S. H. (holder of the ID. card no. 1003446243), S. F. (holder of the ID. card no. 2015061017) and H. B. (holder of the ID. card no. 1003930722), accused initially by an indictment dated 05/11/2012, filed with the court by the State Prosecutor of the Republic of Kosovo, S.P.R.K., Besim Kelmendi.

On 28/03/2013 the said indictment was amended in relation to the relevant provisions of the criminal code that had entered into force on 01/01/2013, as S.P.R.K. was of the opinion that the new provisions would be more favourable to the defendants, stating that *"(...) instead of the criminal offence of Abusing official position or authority in violation of Article 339, paragraph 3 related to Article 23 of the (former) Criminal Code of Kosovo (C.C.K.), it should be - Abusing official position or authority as per Article 422, paragraph 1 related to Article 31 of the Criminal Code of the Republic of Kosovo, whereas at all times where the criminal*

offence of Giving bribes as per Article 344, paragraph 1, of the (former) Criminal Code of Kosovo is mentioned, it should be - Giving bribes as per Article 429, paragraph 1, of the Criminal Code of the Republic of Kosovo".

The charges below already correspond to the S.P.R.K.'s clarification, dated 14/04/2014, in relation to the English version of the indictment, given that in the initial version of the indictment where it reads "misappropriation in office, in violation of Article 341, paragraphs 1 and 3, with Article 23 of the C.C.K.", it should be read – following the Albanian version – "fraud in office, from Article 341(…) C.C.K. " and also contain the changes made by the, at the time, Presiding Judge, on 17/10/2013, in relation to the more favourable provisions applicable to two of the criminal offences ("abusing official position or authority", now Article 422, par. 1, and Article 31 of the Criminal Code of Kosovo, not anymore Article 339, par. 3, and Article 23 of the Provisional Criminal Code of Kosovo, and "giving bribes", now Article 429 of the Criminal Code of Kosovo, not anymore Article 344, par. 1, of the Provisional Criminal Code of Kosovo), in abstract, after the initial hearing was held. The amendments, dated 29/10/2014, made to the English translation of the indictment will always be considered along this judgment.

In the session held on 17 April 2015, during the closing statements, the Prosecution dropped one of the charges (Fraud in Office, in violation of Article 341, paragraphs (hereinafter par.s) 1 and 3, in conjunction with Article 23 of the former Criminal Code of Kosovo, C.C.K.). In fact, and quoting the prosecutor, "*(...) the actions of the accused N. K., S. F., A. Z., S. H. there are the elements of the criminal offense Abuse of Official Position or Authority, from Article 422, paragraph 1 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo, while there do not stand the elements of criminal offense, Fraud in Office, in violation of Article 341 paragraph 1 and 3 in conjunction with Article 23 of the former Criminal Code of Kosovo (C.C.K.), since the actions of the accused of the offense Abuse of Official Position or Authority do consume also the actions of the criminal offence Fraud in Office (...)*".

Pursuant to Article 52 C.P.C.K, "*the state prosecutor may withdraw from prosecution up until the conclusion of the main trial before a basic court* (…)".

Accordingly, also the said withdrawal from prosecution will always be considered along this judgment.

Hence, each of the accused in now charged as follows:

1- N. K.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 C.C.K.);

-Accepting bribes (contrary to article 343.1 Provisional C.C.K.) and

-Entering into harmful contracts (contrary to article 237.1 and 2 Provisional C.C.K.).

2-A. Z.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 C.C.K.).

3- S. H.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343.1 Provisional C.C.K.).

4- S. F.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343.1 Provisional C.C.K.).

5- H. B.:

-Giving bribes (contrary to article 429 C.C.K.) and

-Misuse of economic authorisations (contrary to article 236 1.2 and 2 Provisional C.C.K.).

The main trial hearings, open to the public, were held on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and 18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31 August 2015 and 17 September 2015, in the presence of the state prosecutor, Mr. Besim Kelmendi and after 31 August 2015 Ms. Merita Bina Rugova, the said defendants and their defence counsels, Mr. B.T. (for N. K.), Mr. H. L. (for A. Z.), Mr. S.G. (for S. H.), Mr. D.R. (for S. F.) and Mr. A.A. (initially Gj. D., for H. B.) and the representative (when present) of the injured party Ministry of Trade and Industry; in some of the sessions there were replacements of defence counsels and the required authorisations were filed.

The sessions scheduled to 20 March 2015 and 11 May 2015 had to be cancelled; the first due to the strike of the national judges and the second due to the celebration of the Europe Day (9 May) on the first working day after it (Monday, 11 May 2015).

There was no representative of the Ministry of Trade and Industry of Kosovo attending the sessions, except the one on 31 August 2015.

The panel deliberated and voted on the 17 and 18 September 2015.

The deliberation and voting was made in accordance with the provisions set in article 365 and articles 470 to article 473 of the Criminal Procedure Code of Kosovo (C.P.C.K.).

The judgment was announced (is being) orally on the 21 September 2015, in accordance with the provisions set in article 366 C.P.C.K., in the presence, namely, of the S.P.R.K.'s prosecutor, the defendants and their defence counsels, pursuant to the afore mentioned provisions, read together with article 470 *et seq.* C.P.C.K.

(ENACTING CLAUSE)

On the 21 September 2015, the Basic Court of Pristina in the trial panel composed of EULEX Judge Jorge Martins Ribeiro, as presiding Judge, EULEX Judge Arkadiusz Sedek and Judge Beqir Kalludra, as panel members, in the criminal case P.No. 144/13 – PPS. No. 30/2010 prosecuted by the Special Prosecutors Mr. Besim Kelmendi and, after 31 August 2015, Ms. Merita Bina Rugova, from the Special Prosecution Office of Republic of Kosovo, pronounces in public the following:

IN THE NAME OF THE PEOPLE

The accused are:

1- N. K.

2- A. Z.

3- S. H.

4- S. F.

and

5- H. B.

All of them initially charged by an indictment dated 5 November 2012, filed with the Basic Court of Pristina on 13 November 2012, and by the amendment to the indictment dated 28 March 2013 and **now charged with the following criminal offences** (now as per the amended indictment and withdrawal from prosecution of one charge during the closing statements by the Prosecution)**:**

1- N. K.,

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.);

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.) and

-Entering into harmful contracts (contrary to article 237, par. 1, and 2 Provisional C.C.K.).

2-A. Z.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.).

3- S. H.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.).

4- S. F.:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.).

5- H. B.:

-Giving bribes (contrary to article 429 C.C.K.) and

-Misuse of economic authorisations (contrary to article 236, pars. 1.2 and 2, Provisional C.C.K.).

After having held the main trial hearings, open to the public, on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and 18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31

August 2015 and 17 September 2015, in the presence of the state prosecutor, Mr. Besim Kelmendi and, after 31 August 2015, Ms. Merita Bina Rugova, the said defendants and their defence counsels, Mr. B.T. (for N. K.), Mr. H. L. (for A. Z.), Mr. S.G. (for S. H.), Mr. D.R. (for S. F.) and Mr. A.A. (initially Mr. GJ.D., for H. B.) and the representative (when present) of the injured party Ministry of Trade and Industry, and after the trial panel's deliberation and voting held on 17 and on 18 September 2015 (the appointed recording officer to the deliberation and voting session was A.XH.).

And pursuant to articles 359 to 366 and 370 of the Criminal Procedure Code of Republic of Kosovo, on this 21 September 2015, in open court and in the presence of the defendants, defence counsels, the SPRK Prosecutor and the injured party, renders the following

VERDICT

Declare the absolute bar on criminal prosecution with regards to the criminal offence of giving bribes, contrary to art. 429 C.C.K., the defendant H. B. has been charged with (**count 2**). The absolute bar on criminal prosecution has already happened on two moments: on 15/09/2011 (in relation to the alleged bribe to the co-defendants N. K. and S. F. – meaning that it had already taken place when the indictment dated 05/11/2012 was filed, on 13/11/2012) and on 31/12/2013 (in relation to the alleged bribe to the co-defendant S. H.).

Accordingly, pursuant to articles 362, par. 1, and 363, par. 1.3, C.P.C.K., as the period of statutory limitation has long expired, the court rejects this charge in relation to the criminal offense of giving bribes.

And:

In relation to count 1, pursuant to articles 359, 361, 362, par. 1, 365, and 366, and 370, par. 3, C.P.C.K, the court finds the defendants N. K., A. Z., S. H. and S. F. **guilty** of abusing official position or authority, committed in co-perpetration

(contrary to articles 422, par.1, read with art. 31 C.C.K.), because [1] it has been proven that the said accused have committed acts [2] with which they have been charged, namely, it has been established beyond reasonable doubt that the defendants along the execution of the contract for the projection and construction of infrastructure in the industrial park in Drenas Nr. MTi/22/07/2005, to be carried by "Eltoni Company" owned by, H. B., on 25/07/2006 have allowed a payment of 135.278,20 Euros to "Eltoni" company that included 50.000 Euros that were not due, as this last amount had already been paid in advance on 07/06/2006 as part of the advanced payment in the amount of 140.689,62 Euros as per the document entitled "situacini I pare avansuas", dated 31/05/2006, advance payment that was allowed by the defendant N. K. on 07/06/2006 and at the time the acting permanent secretary was already the defendant A. Z., who did not stop it. Instead of paying 135.278,20 Euros on 25/07/2006, 50.000 Euros should have been deducted from it. In the execution of that contract there could not be any advance payment and therefore no advance payment could have been made before, because the contract, in the general conditions (in the payment section, paragraph 20) stated "advanced payment amount shall be 0%". The defendant N. K. as director of the procurement department approved the said payment of 135.278,20 Euros on the 25/07/2006, the defendant S. H. approved it as certifying officer also on 25/07/2006 and the defendant A. Z. as acting permanent secretary did not stop the payment, despite at the time there was also the pre-existing document situation number 33, dated also 21/07/2006, but signed by the supervising company "North" in which it was clearly stated that the 50.000 Euros had to be deducted. The defendant S. F. as Chief of Division for Enterprise Support and Regional Development, as per the contract he signed with the Ministry of Trade and Industry on 07/06/2004, also failed to oversee the process and works related to the Industrial Park in Drenas and as an official of the said Ministry involved in the Department of Private Sector Development to which the project belonged, and as foreseen in the contract (article 6, right of inspections and supervision of the works in the Industrial Park Drenas) did not carry on his managing duties on the project as per his contract with the Ministry, in relation to the documents pertaining the said payment, that he did not stop or reported about, hence allowing it, as he was also tasked with the supervision of the project.

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[1] The facts in the enacting clause are <u>only an overview</u> to allow the understanding of the decision.

[2] "Acts" comprises "actions" and "omissions".

By acting as said, they abused their official position and damaged the budget of the Ministry of Trade and Industry in excess of 2.500 Euros and the said payment results in a material benefit exceeding 5.000 Euros to “Eltoni” company. Following an internal audit in the Ministry of Trade and Industry conducted in 2007 by the now defendant A. Z., the economic operator “Eltoni”, owned by H. B., was requested to return the above mentioned amount of 50,000 Euros – out of which up to day only 5.000 Euros were returned by the defendant H. B., on 10/04/2007 .

The defendants at the time held official positions in the Ministry of Trade and Industry and through their joint acts, actions and omissions, they violated their duties and substantially contributed to the commission of the criminal offence. At the time the defendants behaved in the way described above, they were able to understand and control their acts, which they desired, knowing that their acts were forbidden and punishable by law.

Also in relation to count 1, and in accordance with the said legal provisions, but now read together with Articles 359, 360, par.2, 361 and 363, par. 3, C.P.C.K., the court finds that the defendant H. B. committed part of the acts he was charged with, because it has been established that the defendant as owner of the “Eltoni” company during the execution of the contract for projection and construction of infrastructure at industrial park in Drenas Nr. MTi/22/07/2005, in cooperation and coordination with at least other defendant official in the Ministry of Trade and Industry, the defendant N. K., as head of the procurement department and signer of the contract dated 07/10/2005, and not excluding other officials in that Ministry, the defendant B. presented to the Ministry of Trade and Industry, on behalf of his company “Eltoni”, documents with the logo and stamp of that company, and bearing his signature, documents that were stating facts that were not true in relation to the works performed and their cost, knowing that the contents of the documents presented were false for not corresponding to the reality and would be used in the Ministry of Trade and Industry to formally enable the advance payment and other payments, including those where the advanced

payment would be paid-back by deduction in installments, concerning the said contract of projection and construction of the Industrial Park in Drenas. Namely, the defendant B. has presented to the Ministry of Trade and Industry the following documents: **A)** - dated 31/05/2006, “Situacioni I Pare Avansuas”, stating in row 6 amount of conducted work according to this situation: 156.321,80 Euros, in row 7 deducted based on the agreement: 15.632,18 Euros, in row 9 for the payment according to this situation 140.689,62; **B)** “Situacioni I Pare 20/06”, without date, under items A, B, C work in the amount of 116.339,26 Euros plus 15% tax and total amount of 135.278,20 Euros; **C)** - dated 21/07/2006, “Situacioni I Dyte 3/2006”, “document 33”, stating in row 6 amount of conducted work according to this situation: 150.309,11 Euros, in row 7 deducted based on the agreement: 15.030,11 Euros, in row 8 for the payment it remains 135.278, 20 Euros, in row 9 advanced payment 140.689,60 Euros, in row 9A deducted from the present situation 50.000 Euros, in row 9B advance payment which remains to be deducted 90.689,60 Euros and on row 10 for the payment according to this situation 85.278,20 Euros and **D)** the invoice 39/06, dated 21/07/2006, produced on an “Eltoni” letterhead sheet, bearing two “Eltoni” stamps (one on the top and one at the bottom), stating works in the amount of 127.762,74 Euros, added by tax 15% in the amount of 22.546,11 Euros, in the total amount of 150.309,11 Euros, deducting from it 10% in the amount of 15.030,91 Euros, and claiming to be paid the total amount of 135.278,20 Euros.

The defendant behaved in the way described above although he was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law.

In the indictment the Prosecution charged the defendant B. for misuse of economic authorisations (contrary to article 236, paragraphs 1.2 and 2, Provisional C.C.K.) but there is one constituent element to the criminal offence that does not correspond to the established facts (“***and in this way misleads** the managing bodies within the business organization or legal person to err in decision-making*” – **emphasis added**) and therefore the said criminal offence is not the one that was perpetrated, given that the said falsified documents were not what led (or to say it better, what “**misled**”) to the payments; rather the documents were only the necessary means to give inside the Ministry of Trade and Industry (and later at the Ministry of Finance) an appearance that the payments were lawful, in line with the

applicable laws and specially in line with the contract – by which advance payments were not allowed as the percentage for it was 0%.

Therefore, for the lack of one of the elements of the constituent offence of "misuse of economic authorisations", the court requalifies (as per Article 360, par. 2, C.P.C.K., "*the court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act*") the acts committed by the defendant H. B. to the criminal offence of falsifying documents – pursuant to Article 332, par. 1, of the P.C.C.K., "*whoever draws up a false document, alters a genuine document with the intent to use such document as genuine or knowingly uses a false or altered document as genuine shall be punished by a fine or by imprisonment of up to one year*" (the new law is not more favourable, as the foreseen sanction is now a "fine or by imprisonment of up to three years", Article 398 C.C.K.).

Having come to this stage, and pursuant to Article 90, par. 1, subparagraph 6 of the P.C.C.K., we see that the term to the statutory limitation is 2 years and the absolute bar on prosecution of the criminal offence of falsifying documents is 4 years, as per Article 91, par. 6. P.C.C.K. and such term of 4 years has already elapsed (on 21/07/2010), as the last document of the above mentioned documents [3] is dated 21/07/2006; the said term had elapsed even before the date on which the prosecutor issued a ruling to initiate investigations, 10/12/2011.

Therefore, accordingly, pursuant to Article 363, par. 1.3, C.P.C.K., **the court rejects this charge**.

In relation to count 2, pursuant to Articles 359, 361, 362, par. 1, 364, par. 1.1.3, and 370, par. 3, C.P.C.K, the court finds the defendants N. K., S. H. and S. F. **not guilty** of the criminal offence of accepting bribes (contrary to article 343, par.1, Provisional CCK), because it has not been proven beyond reasonable doubt that the following accused have committed the acts with which they have been

[3] We mentioned only these documents as the court should not go beyond the indictment, Article 360, par. 1, C.P.C.K., "*the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial*".

charged, namely, it has not been established that [4] “from 14.09.2005 when the evaluation commission made the report on evaluation and recommendation of bids for awarding the contract concerning the tender for construction of infrastructure at the industrial part in Drenas Nr.MTI/22/07/2005 whereupon “ELTONI” - company owned by H. B. - was awarded the contract and until the conclusion of contracted works from this company on 31.12.2007, the defendants N. K. as an official person – Director of the Procurement Department – and S. F. as an official person – Head of Sector for Businesses and Regional Development – both at the Ministry of Trade and Industry, acting in coordination and cooperation one with another, received bribes from the defendant H. B. in order not to carry out the official duties they were obliged to, whereas defendant H. B. as owner of “Eltoni” company gave bribes to the defendants N. K. and S. F. in the following way: one day following the conclusion of the evaluation of bids and recommendation for awarding the contract for construction of infrastructure of industrial park in Drenas has invited the defendant H. B. at the restaurant “Tirana” in Pristina. Present were also the other defendant, S. F., as well as the witness H.Z. He informed him that his company “Eltoni” had won the tender in question. However, in order to proceed with the implementation of works, he told H. B. that the latter should give them 180,000 Euros an amount which H. B. agreed to either give to S. F. or witness H.Z. in the following way: within two days, the amount of 130,000 Euros, whereas the remaining amount during other payments. And, according to this agreement H. B. through his employee Y.C. on the same day had send N. the amount of 100,000 Euros in Pristina at a place called “Kurrizi”. The money was put inside a black plastic bag and Y.C. did not know what it contained. The other amount of 35,000 Euros H. B. gave personally to N. at “Ana Benz” located in the motor way Pristina-Peja at Sllatina and during the implementation of works the amount of 45,000 Euros at Hotel “Palas” in Mitrovica in the presence of the driver of “Eltoni” company, A.SH. The last amount was supposed to be picked up by S. F. but it was N. K. himself who came to take the money. H. B. gave to S. F. personally 50,000 Euros at restaurant “Qershiat e Llapashtics” located in the entrance to Podujeva near the house of S. F.. So, in total defendant H. B. gave the following amounts as bribes: to N. K. a total amount of 180,000 Euros; and to the defendant S. F. the amount of 50,000 Euros. Likewise, defendant S. H. while acting in the capacity of

[4] In this case the facts will be copied directly from their description in the indictment.

a financial officer received a bribe from H. B. in order not to carry out official tasks which he was obliged to fulfill in the following way: by the end of 2007, S. H. called on the phone H. B. and told him "do you want me to transfer all the money" and as the defendant H. B. said it was not possible S. H. replied "that it is possible but you have to give me 3,000 Euros". H. B. told him that was not a problem. S. H. went to H. B.'s office at the industrial park and received 3,000 Euros. S. H. then transferred all the money to H. B.".

In relation to count 3, pursuant to Articles 359, 361, 362, par. 1, 365, and 370, pars. 3 and 4, C.P.C.K, but now read together with Article 360, par.2, C.P.C.K., the court finds the defendant N. K. **guilty** after requalifying (as per Article 360, par. 2, C.P.C.K.) the established facts, as the established facts, in relation to any amount of damage, do not match all the elements that are constituent of the criminal offence of entering into harmful contracts (contrary to article 237.1 and 2 Provisional C.C.K., according to which "*the perpetrator shall be punished by imprisonment of one to ten years*"), but are constituent of the more lenient criminal offence of abusing official position or authority, contrary to articles 422, par.1 and par. 2.1, C.C.K., because it has been proven that the accused has committed part of the acts with which he has been charged, namely, it has been established that [5] following the announcement of the tender on 22/07/2005 for the "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" the bids "for design and construction of the infrastructure of the industrial park in Drenas" were evaluated, and "Eltoni" company was selected, on 07/10/2005 the contract for the project and construction of infrastructure of the industrial park in Drenas, between the Ministry of Trade and Industry and "Eltoni Company", represented by H. B., was signed, in the amount of 144.000 Euros / price per unit 69.825,25 Euros (without mentioning number of units). Without any other tender, the said contract was changed by the first annex contract dated 20/07/2006, between "Eltoni Company" and the Ministry of Trade and Industry, signed by the defendant N. K. on behalf of the Ministry, in which it is stated: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas, (…) Based on the works carried out by the contractor and

[5] The facts in the enacting clause are only an overview to allow the understanding of the decision.

its request in changing the conditions of payment and upon the approval by the MTI, whereby parties agree to mutually change the condition of payment (…) Have agreed as follows: (…) Article 1 (about changing clauses 17.3 to 17.5), Article 2 (about payments made pursuant "situations") (…) Article 4: The total value of the contract shall be 1.730.000 Euros (…)". After this change to the contract through the said annex contract dated 20/07/2006, another annex contract was made between the Ministry of Trade and Industry, signed again by the defendant N. K., and "Eltoni Company", represented by its owner, H. B., on 28/09/2006, stating: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas based on the works carried out which came after the approval of the request on negotiated procedure before the announcement of the contract with the PPA, hereby we enter this annex contract (…) Article 1: The original contract dated 07/10/2005 as mutual agreement between parties the total value of which is 1.730.000 Euros (…) Article 2 The total value of the annex contract shall be 14.580,00 Euros (…)". Despite the amount of the initial contract dated 07/10/2005 was changed only with the first annex contract (article 4 of such annex), dated 20/07/2006, one month early, on the 20/06/2006 the defendant N. K. had already submitted to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work stating: "approximate value of contract: 1.700.000 Euros, foreseen value: value of additional works: 14.580 Euros", when at that time (on 20/06/2006) the amount of the contract dated 07/10/2005 (the only contract existing) was 144.000 Euros / price per unit 69.825,25 Euros, not 1.700.000 Euros.

At the time the defendant behaved in the way described above he was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law. By acting as described, he abused his official position.

For the above the Court imposes the following

Sentencing:

Count 1 (defendants N. K., A. Z., S. H. and S. F.): Abuse of official position as per Article 422 C.C.K., read together with Articles 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45, 50, 51, 52 (if suspended) and 73 C.C.K.

The court imposes the following punishments of imprisonment:

N. K.: 12 months of imprisonment.

A. Z.: 10 months of imprisonment.

S. H.: 8 months of imprisonment.

S. F.: 7 months of imprisonment.

Count 3 (defendant N. K.):

N. K.: Abuse of official position as per Article 422 C.C.K., read together with Articles 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45, and 73 C.C.K.

The court imposes the following punishment of imprisonment: 1 year and 6 months (18 months) of imprisonment.

The aggregate punishment of imprisonment of the defendant N. K.

Pursuant Article 80, par. 2.2. C.C.K., between the minimum of 18 months of imprisonment and the maximum of 30 (12 + 18) months of imprisonment is hereby set in 26 months of imprisonment for the commission of two criminal offences of abuse of official position or authority, pursuant to Article 422 C.C.K.

Suspension of the imprisonment sanctions imposed to the defendants A. Z., S. H. and S. F.:

Pursuant to Article 52, par.2, C.C.K., the punishments shall not be executed if the convicted persons do not commit another criminal offence for the

verification time and the court sets the verification period in 2 years for the defendant A. Z., S. H. and S. F..

According to Articles 52, par. 3, and 59 C.C.K, the suspension also includes the obligation of refraining from changing residence without informing the probation service.

Accessory punishment(s)

In relation to an accessory punishment to the defendant N. K. (whose sentence is not suspended), the court decided not to impose the accessory punishment foreseen in Article 62, par. 2.1, read together with Article 65 C.C.K. "*prohibition on exercising public administration or public service functions*".

Confiscation of objects: There are no objects listed in the indictment subject to forfeiture.

Property claim: The property claimed, compensation for damages, filed with the Court by the Ministry of Trade and Industry on 22 May 2012 is rejected as on that date the Ministry of Trade and Industry was already informed of the decision taken in the case number 164/2008, by a judgment dated 04/05/2011, in which the Supreme Court of Kosovo has refused as ungrounded the appeal of the respondent and confirmed the ruling of the Commercial Court of the District of Pristina, case number 272/2007, dated, 18/06/2008, in which the claimant was also the Ministry of Trade and Industry, in Pristina, against the respondent NNP "Eltoni" and the court has adjudicated in favour of the claimant and as a consequence the respondent was convicted to return to the claimant the amount of 45.000,00 Euros with the annual interest of 2,5%, commencing on 19/04/2007, up to the final payment in the term of 8 days, from the day the judgment would become final (04/05/2011); if failed to do so, there would be a compulsory execution.

The amount is the same and it is now a matter of execution of the final civil judgment as it cannot be subject of another decision.

The costs of the proceedings: Pursuant to Article 450 C.P..K.) shall be paid by the defendants who were convicted. Pursuant to Article 450, par. 2.6, the scheduled amounts are 150 Euros to each of the defendants, in the total amount of 600 Euros.

The court, *ex officio*, sees no need of announcement of this judgment (enacting clause) in the press or radio or television, Article 365, par. 1.1.6, C.P.C.K, to protect the values of Justice and Public Interest.

Legal remedy: Pursuant to Articles 374, par. 1.1, and 380, par. 1, an appeal against this judgment may be filed within 15 days of the day its copy has been served to the parties. The appeal should be addressed to the Court of Appeals through the Basic Court of Pristina.

(STATEMENT OF GROUNDS)

REASONING

A) Trial Panel and competence:

No objection was raised by the parties regarding the composition of the trial panel. Upon the change of one panel member all parties have agreed to consider "as read and administered" all the evidence that had been produced so far. This court is the competent to adjudicate the case, pursuant to Articles 1, 2 subparagraph 1.2, 9 subpar. 2.1, 15 par. 1.20 and 15, par. 2, of the Law on Courts - L. 03/L-199 in force at the time the proceedings began [the Basic Court shall be the court of first instance in the Republic of Kosovo, in this case (par. 2) the Basic

Court of Pristina is the one with territorial jurisdiction and in accordance with Article 11, par. 1, of the same law, the Basic Court is competent to adjudicate in the first instance all cases, except otherwise foreseen by Law - and per articles 3, paragraphs 1 and 7 (this last one in relation to the majority of EULEX Judges) of the Law on the Jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (L. 03/L-053 as in force at the time), *ex vi* Article 442 C.C.K.

B) The procedural background:

B.1- This criminal case (initially PPS 30/10) is now against the defendants N. K., (holder of the ID. card no. 1004339475), A. Z. (holder of the ID. card no. 2010233197), S. H. (holder of the ID. card no. 1003446243), S. F. (holder of the ID. card no. 2015061017) and H. B. (holder of the ID. card no. 1003930722) and the investigation against the defendants began on 05/04/2008, when the Anti-Corruption Agency of Kosovo submitted to the S.P.R.K. an information concerning possible corruptive behaviour against suspects B.D. , B.Z. and N. K..

B.2 - On 15/11/2008 the Kosovo Police submitted to the Prosecution Office a criminal report, “2011-XI-248”, against the defendants N. K., A. Z., S. H., S. F. and H. B., for the grounded suspicion that they committed criminal offences.

B.3 - On 10/12/2011 [6] the Prosecutor Besim Kelmendi issued a ruling to initiate the investigations against the above mentioned defendants, N. K., A. Z., S. F., S. H. and H. B., for the criminal offences of abusing official position or authority, article 339, par. 3, read with article 23 of the C.C.K;, misappropriation in office, article 340, par. 3, read with article 23 of the C.C.K.; fraud in office, article 341, pars.1 and 3, read with article 23 of the C.C.K., whereas on 21/05/2012 issued a ruling to expand the investigations against the defendants N. K. and S. F. to include the criminal offence of accepting bribes, from article 343, par. 1, of the C.C.K., and against H. B. to include the criminal offence of giving bribes, from article 344, par. 1, of the C.C.K. On 20/07/2012 another ruling was issued to expand investigations against N. K., for entering into a harmful contract, from article 237, par. 2., read with par. 1. of the C.C.K., and against H. B. for misuse of

[6] Not 2012, as by mistake mentioned in the reasoning of the indictment.

economic authorization, from article 236, par. 1, subparagraph 2, and par. 2, of the C.C.K.

B.4 - The defendants were accused initially by an indictment dated 05/11/2012 filed in the court by the mentioned State Prosecutor of the Republic of Kosovo - S.P.R.K., on 13 November 2012, and on 28/03/2013 the said indictment was amended in relation to the relevant provisions of the criminal code that had entered into force in the meantime, on 01/01/2013, as S.P.R.K. was of the opinion that some of the new provisions would be more favourable to the defendants (as already explained in detail at the beginning).

B.5 - The initial hearing took place on 28/03/2013 and on 18/06/2013 – on which day the pleas of the defendants were taken and all pleaded not guilty to every charge. On 17/10/2013 a ruling was issued on the matters addressed on those previous dates – whose content is not necessary to repeat at this point (but already mentioned earlier).

B.6 - The main trial hearings, open to the public, were held on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and 18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31 August 2015 and 17 September 2015, in the presence of the state prosecutor, Mr. Besim Kelmendi, the said defendants and their defence counsels, Mr. B.T. (for N. K.), H. L. (for A. Z.), S.G. (for S. H.), D.R. (for S. F.) and Mr. A.A. (initially GJ.D. , for H. B.); in some of the sessions there were replacements of defence counsels but the due authorisations were filed.

B.7- There is no property claim and there was no representative of the Ministry of Trade and Industry of Kosovo attending the sessions.

B.8 - The panel deliberated and voted on the 17 and 18 September 2015.

C) Statement of grounds pursuant to Articles 364, 365 and 370 C.P.C.K.:

C 1) - Facts proven which are relevant for the decision:

Count 1

C.1.1 – On 21/07/2005 N.G. (as Head of Department for Private Sector Development) addressed N. K. (as Head of Procurement Department) to announce, pursuant to the law on procurement, an international tender to the projection and to the construction of the physical infrastructure of the industrial park in Drenas (document in the case file, evidence 40/1).

C.1.2 – On 21/07/2005 S. F. (Chief of Division for Enterprise Support and Regional Development, as per the contract he signed with the Ministry of Trade and Industry on 07/06/2004, involved in the Department of Private Sector Development) made a request to M. B. (as head of financial department in the Ministry of Trade and Industry) for commitment of funds for the construction of the said industrial park in Drenas, request in the amount of 400.000 [7] Euros (document in the case file, evidence 41/2).

C.1.3 – Following the said requests, the Ministry of Trade and Industry launched the project "Industrial Park in Drenas" project Nr. MTi/22/07/2005.

C.1.3.1. – The announcement in the newspapers, dated 22/07/2005, for the said tender says in the title (title of the contract, from the contracting authority – the Government): "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" (document in the case file, evidence 43/2).

C.1.4 – On 12/09/2005 N. K. sent to the permanent secretary, at the time Skender Ahmeti, a proposal as to whom should be the members of the commission to evaluate the bids in the mentioned project; such proposal was as follows: N.G. (chairman), B.Z. , RR.Q., H.Q. and S.A. (members) and, as observers, A.B. (also adviser of the Minister at the time), S.SH., Y.M. and R.H. (document in the case file, evidence 47/1).

C.1.5 – On 12/09/2005 N. K. also sent to the permanent secretary, at the time S.A., a proposal as to whom should be the members of the commission who should open the bids: S. F., H. K. and G.B. (document in the case file, evidence 45/3).

[7] Later made another, as we will see.

C.1.6 – On 12/09/2005 the company "Eltoni", owned by H. B., offered its bid in the said procurement procedure launched by the Ministry of Trade and Industry, related to the projection and construction of the industrial park in Drenas (documented by evidence 46/2).

C.1.7 – On 14/09/2005 the evaluation commission made its report on the bids (whose copies are in the case file, as a chart on which "Eltoni" appears in the last place, on page 2 of the chart) and made its recommendation on to whom the tender should be granted, which bid was the winner; the final evaluation report, appointing "Eltoni" as the winning company, the recommendation was signed by all the members and observers, except by RR.Q., and the document, at the bottom, was signed also by N. K. as head of the procurement department (documented by evidence 48/7).

C.1.8 – On 07/10/2005 the winner was formally announced, "Eltoni Company" (documented by evidence 42/1).

C.1.9 – Also on 07/10/2005 the contract for the project and construction of infrastructure of the industrial park in Drenas, between the Ministry of Trade and Industry and "Eltoni Company", represented by H. B., was signed (documented in the case file as "Base Agreement" or "Base Contract") in the amount of 144.000 Euros and 69.825,25 Euros price per unit, despite the contract has no reference to the number of units and in point 6 of section 4 it reads "this shall be a contract based on unit price and price offered for the project / lump sum contract (…)".

C.1.10 – During the implementation of the works in the construction of the project "Industrial Park in Drenas", the defendant S. F. was acting in the capacity Chief of Division for Enterprise Support and Regional Development, involved in the Department of Private Sector Development, the defendant N. K. was the director of the procurement department, the defendant A. Z. was the acting general secretary from 18 May 2006 until 27 November 2006 and S. H. was financial officer, with different competencies.

C.1.11 – "North" company, by a contract entered with the Ministry of Trade and Industry on 24/05/2006, would supervise the works by "Eltoni" in relation to the compliance of the works with the project and contract signed between "Eltoni"

and the Ministry of Trade and Industry, for the construction of the Industrial Park in Drenas.

C.1.12 – "North" company also entered a contract of supervising, directly with the Ministry of Trade and Industry.

C.1.13 – According to the (base) contract dated 7 October 2005, between "Eltoni" and the Ministry of Trade and Industry, and in relation to the payments, in the general conditions of contract, in the payment section, paragraph 20, it states: "advanced payment amount shall be 0%" and on paragraph 21 it states: "amount of cash withhold will be 10% for every payment to the contractor" this last as a guarantee.

C.1.14 – H. B. presented to the Ministry of Trade and Industry, on behalf of his company "Eltoni", documents, with the logo and stamp of that company, and bearing his signature, documents that were stating facts that were not true in relation to the works performed and their cost, knowing that the contents of the documents presented were false for not corresponding to the reality and that such documents would be used by the Ministry of Trade and Industry to formally enable the advance payment and its pay back in instalments, despite the contract prohibited any advance payment.

C.1.14.1 –The advance payment in the amount of 140.689,62 Euros, related to the document entitled "Situacioni I Pare Avansuas" (dated 31/05/2006), took place on 07/06/2006 [8] and was approved ("Nepunesi Aprovues") by the now defendant N. K. as director of the procurement department 07/06/2006 and this payment was not stopped by the acting permanent secretary at the time, the now defendant A. Z.. The certifying officer in such payment was the now witness B.S. [9].

C.1.14.2 – The pay back of the advance payment to "Eltoni", owned by H. B., would happen through the deduction of its amount in instalments and such instalments would be deducted in the following payments.

[8] This document and situation, as well as its payment, will be addressed after with more detail.
[9] These facts will be mentioned in detail after.

C.1.14.3 –Namely, the defendant H. B. presented the following false documents:

A) - Dated 31/05/2006, "Situacioni i Pare Avansuas", stating in row 6 amount of conducted work according to this situation: 156.321,80 Euros, in row 7 deducted based on the agreement: 15.632,18 Euros, in row 9 for the payment according to this situation 140.689,62, knowing this was false as this amount corresponded to an advance payment and not to conducted work.

B) - "Situacioni I pare 20/06", without date, under items A, B, C work in the amount of 116.339,26 Euros, plus 15% tax, claiming a total amount of 135.278,20 Euros.

C) - Dated 21/07/2006, "situacioni I dyte 3/2006", "document 33", stating in row 6 amount of conducted work according to this situation: 150.309,11 Euros, in row 7 deducted based on the agreement: 15.030,11 Euros, in row 8 for the payment it remains 135.278, 20 Euros, in row 9 advanced payment 140.689,60 Euros, in row 9A deducted from the present situation 50.000 Euros, in row 9B advance payment which remains to be deducted 90.689,60 Euros and on row 10 for the payment according to this situation 85.278,20 Euros.

D) The invoice 39/06, dated 21/07/2006, produced on an "Eltoni" letterhead sheet, bearing two "Eltoni" stamps (one on the top and one at the bottom), stating works in the amount of 127.762,74 Euros, added by tax 15% in the amount of 22.546,11 Euros, in the total amount of 150.309,11 Euros, deducting from it 10% in the amount of 15.030,91 Euros, and claiming to be paid the total amount of 135.278,20 Euros.

C.1.15 – Pursuant to a payment order for obligation and payment with the reference 20406254, and the commitment number 33994, dated 25/07/2006, "Eltoni" company was paid the invoice no. 39 dated 21/07/2006, in the amount of 135.278,20 Euros.

C.1.15.1 – This said payment took place and was allowed by the Ministry of Trade and Industry in reference to the invoice 39 dated

21/07/2006, despite there was already another document with the same date, 21/07/2006, but number 33 (older than the other, which is 39) “situacioni I dyte” clearly stating that only 85.278,20 Euros had to be paid, not 135.278,20 Euros (document “**C**” described above in **C.1.14.3**), and despite that the document number 33 was the one with the stamp and signature by the supervising body “North Company”, not the number 39.

C.1.15.2 – The contents of the documents above described (in **C.1.14.3** “**A**”, “**B**” “**C**” and **D)** are false because, even among themselves, they are materially incompatible:

-“**A**” and “**C**” documents have the reference to the same amount of 140.689,60 Euros, but that amount in document “**A**” is described as performed work (rows 6 and 7), despite the reference on the top to “Situacioni I Pare Avansuas”, whereas in document “**C**” that amount corresponds to advanced payment (rows 9, 9A and 9B and the total of amounts to be discounted or deducted are listed in rows 9A and 9B, making the total in row 9).

-“**B**” and “**C**” documents have the reference to the same amount of 135.278,20 Euros but this amount in document “**B**” corresponds to work in the amount of 116.339,26 Euros plus 15% tax, whereas in document “**C**” the same value is obtaining by stating that the work done was in the amount of 150.309,11 Euros to which 10% is being deducted based on the agreement (and 10% is 15.030,11 Euros) and therefore the amount to be pay for the work performed becomes, again, the same amount, 135.278, 20 Euros.

- “**B**”, “**C**” and “**D**”, because in “**D**” the amount corresponding to (also different) works is different in relation to the one presented in “**B**” (and “**C**”) and despite the price of the works is different, and although now not only the 15% tax is added but also the 10 % of guarantee is deducted, everything is written in a way to obtain the same final amount to be paid, 135.278,20 Euros, as in the document(s) “**B**” (and “**C**”).

C.1.16 – “North” company was accepting, by stamping and signing, the situations presented by “Eltoni” company on which there were sentences such as”:

"advance payment", "deducted from the present situation" and "advance payment which remains to be deducted".

C.1.17 – During the period of time A. Z. was acting as permanent secretary, from 18 May 2006 until 27 November 2006, and apart the disputed payment in the amount of 135.278,20 Euros (in which the 50.000 Euros were not deducted), dated 25/07/2006, there were other payments of situations presented by "Eltoni" company that he did not stop or report, and therefore allowed, and the same applies, *mutatis mutandis*, to S. F. as Chief of Division for Enterprise Support and Regional Development, as he was involved in the Department of Private Sector Development to which the project belonged did not carry on his managing duties on the project as he was also tasked with the supervision of the project:

A) - Dated 31/05/2006, "Situacioni I Pare Avansuas", stating in row 6 amount of conducted work according to this situation: 156.321,80 Euros, in row 7 deducted based on the agreement: 15.632,18 Euros, in row 9 for the payment according to this situation 140.689,62.

B) - Dated 25/10/2006, "Situacioni I Katert Energjia, Ndriqimi dhe Telefonia", "document 51", stating in row 6 amount of conducted work according to this situation: 146.317,90 Euros, in row 7 deducted based on the agreement: 14.631,79 Euros, in row 8 for the payment it remains 131.686, 11 Euros, in row 9 A deducted from the present situation 35.000 Euros, in row 9B advance payment which remains to be deducted 35.689,60 Euros and in row 10 for the payment according to this situation 96.686,11 Euros.

C.1.17.1 – In evidence 5 of the indictment [10], page 3, at the end of the chart (bottom right side "Avansi I paguar"), after the 50.000 Euros there are 20.000 Euros (the 20.000 Euros that are missing on the first page of the same evidence, between the amounts of 50.000 Euros and 35.000 Euros) and then there are 35.000 Euros and after it: 15.000 Euros, 10.000 Euros and 10.689,60 Euros; these last 3 amounts make the total of 35.689,60

[10] Provided to S.P.R.K. by the witness Agron Pajazati, from the time he discharged his functions at "North Company".

Euros (the same amount as in row 9B of the situation mentioned earlier under **C.1.17 B**).

C.1.17.2 – On the same page 3 of the same evidence just mentioned, at the bottom left side, "10%" (the amounts of the 10% deductions in each payment, as per the contract), the amount deducted was 14.631,79 Euros, as in row 7 of the situation of 25/10/2014.

C.1.17.3 – The amounts on the page 3 of the same evidence, at the bottom right side (parcels of "Avansi I paguar") make the total of 140.689,60 Euros, which is the amount that corresponds to the payment of the situation dated 31/05/2006, also stamped and signed by "North" company and whose payment was allowed by the defendants (and others, in different moments and payments) in the Ministry of Trade and Industry.

C.1.17.4 – "North" company was aware about the advance payment referred to, 140.689,60 Euros, as per the document called "evidence 5" the total amount of advanced payment, and description of parcels to pay it back, is described and "North" company, as said, was stamping and signing the situations presented by "Eltoni" on which, in "rows 9", these facts were stated.

C.1.18 – The order for payment, bearing the needed signatures by the officials at the Ministry of Trade and Industry, was sent to the Treasury in the Ministry of Finance to order the bank to execute the transfer of money, the payment, to "Eltoni", pursuant to the mentioned payment order for obligation and payment with reference 20406254, and commitment number 33994, dated 25/07/2006, by which "Eltoni" company was paid the invoice no. 39 dated 21/07/2006 in the amount of 135.278.20 €, and not 85.278,20 Euros, as per the document with the same date, 21/07/2006, but number 33 "situacioni I dyte" clearly stating that only 85.278,20 Euros had to be paid, not 135.278,20 Euros (pursuant the document mentioned above in **C.1.14.3 "C"**, number 33, issued by "Eltoni" and stamped and signed by the supervising body "North" company – above in **C.1.15.1**).

C.1.19 – At the time of the said payment of 135.278,20 Euros the certifying officer Bahrije Simnica was on leave and the defendant S. H. was replacing her in

that capacity of “certifying officer” for this payment, this despite he had initially signed the same form (the form that along the project would be copied to be filled in the remaining parts and execute the payments) in the capacities of “admitting officer” and “committing officer” (as he was a finance official).

C.1.20 – Before the payment in the amount of 135.278,20 Euros mentioned earlier, others had been carried out, as explained above, namely the advance payment, submitted by “Eltoni” on which it is written in a box “SITUACIONI I PARE AVANSUAR NR. 02/2006” in the amount of 140.689,62 Euros (with Bahrije Simnica signing it as certifying officer), payment with the reference 20406254 and the commitment number 33994, dated 07/06/2006 because it reads, in relation to the amount of 156.321,80 that it is “the amount of work concluded according to this situation” and on the following row it reads “10% of the sum to withhold according to the agreement” equals to 15.632,18 (and therefore the payment of 140.689,62 Euros – as mentioned in the document referred to earlier in **C.1.14.3 “A”**).

C.1.20.1 – The forms of the Treasury (order for purchase, “Thesarit Urdherblerje”), of the Ministry of Finance, for the payment of 140.689,62 Euros and for the payment of 135.278,20 Euros are signed by (the now witness) H.Z. as receiving financial officer and by the defendant N. K. as approving officer “Nepunesi Aprovues”, and were signed respectively on 07/06/2006 on 25/07/2006.

C.1.20.2 – According to such document (**“A”**) the amount of 504.945,80 Euros was the “amount of work finished from the beginning of the construction” until that date, and in the end it reads “amount for paying according to this situation”: 140.689,62 Euros.

C.1.20.3 – Up to that moment (07/06/2006) on which the 140.689,62 Euros were also paid, the following payments had already taken place, on 19/10/2005 in the amount of 144.000 Euros and on 15/12/2005 (respectively “CPO”’s 24484, 29849, 22974 and 307713): 107.000 Euros, 68.984,94 Euros, 256.000 Euros, 72.960, 84 Euros, in the total amount of 504.945, 78 Euros [11].

[11] Not 504.945, 80, Euros as there is a difference of 2 cents, as it reads on the document submitted by “Eltoni” for the payment of 140.689,62 Euros.

C.1.20.4 – Considering the amount (not to mention the 144.000 Euros) of 504.945,78 Euros that had been paid before the 140.689,62 Euros, 10% of it would be 50.494, 58 Euros, not 50.000 Euros – then these 50.000 Euros are a parcel of pay back of the advance payment of 140.689,62 Euros [12], as described and explained above.

C.1.21 – Until 07/06/2006, until when at least those payments took place (144.000 Euros + 504.945,78 Euros + 140.689,62 Euros), in the total amount of 789.635,40 Euros, the initial contract was the only one in force and it was only in the amount of 144.000 Euros / price per unit 69.825,25 Euros (following the tender "for the projection and construction of the industrial park in Drenas", where no number of units is mentioned), whereas commitments of funds for the project of the industrial park in Drenas had been made in the amount of 400.000 Euros (on 26/07/2005, used to pay 144.000 Euros and the 256.000 Euros), in the amount of 107.000 Euros (on 29/07/2005), in the amount of 72.960,84 Euros (on 12/10/2005), in the amount of 69.867,16 (on 14/10/2005, out of which only 68.984,94 were paid on 15/12/2005 – see above fact **C.1.20.3**) and in the amount of 1.040.000 Euros, on the very same day mentioned above, 07/06/2006 – date on which the defendant A. Z. was already acting as permanent secretary [13]. The above mentioned requests for commitments in the amount of 400.000 Euros and the other in the amount of 1.040.000Euros, dated respectively 21/07/2005 and 31/05/2006, were signed by the defendant S. F., in the capacity of Chief of Division for Enterprise Support and Regional Development.

C.1.21.1 – On 07/06/2006 the contract in the amount of 144.000 Euros (/ price per unit 69.825,25 Euros) had not been "complemented" by another contract (following other tender) and the initial contract with no reference at all to the number of units (the same as in the contract notice in the open procedure, this assertion made due to the reference to the "price per unit" of 69.825,25 Euros in the winning bid made by "Eltoni") had not been "replaced", "substituted", "complemented" by another.

[12] This judgment will not go out of the scope of the indictment and therefore the reference of advanced payment is being made only to the 140.689,62 Euros out of which the 50.000 Euros were not deducted.

[13] The commitments of funds mentioned are only the ones that took place before 07/06/2006 and on 07/06/2006, as said (see the forms of commitment of funds existing in the case files; the chart produced by the now witness M.B. and presented to the Prosecution on 03/07/2014 in essence corroborates such forms of commitment of funds).

C.1.21.2 – The "substitution" of that initial contract only took place on 20/07/2006 in the "first annex contract", by which "*considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas, (...) based on the works carried out by the contractor and its request in changing the conditions of payment and upon the approval by the MTI (...) the total value of the contract shall be 1.730.000 Euros (...)*" and on 28/09/2006 a "second annex contract" was made, adding the amount of 14.580,00 Euros for additional works [14]; both "annex contracts" were between "Eltoni" company and the Ministry of Trade and Industry, having been signed by the defendant N. K. [15].

C.1.22 – The called invoice 39/06 bears the facsimile that A. Z. was using at the time the amount of 135.278,20 Euros was paid and the invoice was in "Eltoni"'s company letterhead and it bears 2 stamps of the company (one on the top with the date) and another at the bottom where the name of H. B. is; A. Z. at that time was using a facsimile of his signature (stamp) as he had his arm plastered due to an injury sustained in a car accident on 2 July 2006.

C.1.23 – A. Z. worked at the Ministry of Trade and Industry as internal auditor and then, between 18 May and 27 November 2006, he was appointed as acting permanent secretary and wanted to be appointed permanent secretary and for that he has applied to the position, but, after the selection process was over, the person appointed as permanent secretary was the Minister Bujar Dugolli's adviser, Bujar Zeneli - who took office. A. Z. became then director of the audit unit.

C.1.24 – In an internal audit, carried at the Ministry of Trade and Industry, by the now defendant A. Z., at the time director of the audit unit, dated 21/1/2008, it was "*noted that (...) b) The bid submitted by the economic operator upon the tender, has exceeded items billed to MTI for payment e) Under the contract conditions, there was no payment in a form of an advance payment where MTI has done the same f) MTI has overpaid the amount of 50,000.00 Euros to the economic operator to which the MTI has failed to reconcile the balance and to review the contract and has not formed a committee for admission of the project phase (...)*".

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[14] These works and the second annex contract will be mentioned with more detail (count 3).
[15] These facts will be addressed ahead with more detail (count 3).

C.1.25 – Following such internal audit in the Ministry of Trade and Industry, and after A. Z. informed the Minister as per the audit, the economic operator "Eltoni" was requested to return the amount of 50.000 Euros, out of which he returned 5.000 Euros to the Ministry of Trade and Industry.

C.1.26 – The remaining 45.000 Euros have not been returned up to day.

C.1.27 – Until the completion of works and payments in the project, any undue payment could be subject to compensation in a following payment, through deduction of any undue amount paid earlier (in excess) to a payment not executed yet.

C.1.28 – Any payment, in different ways and stages along the process, had to be authorised by the head of the procurement department, had to be certified and allowed by the certifying officer and by the permanent secretary, as any of these officials alone was not able to enable the payment and both the certifying officer and the permanent secretary had legal power to stop any payment against the contract or the law. The defendant K., as head of the procurement department, signed the order for purchase (see above **C.1.20.1**) dated 25/07/2005 related to the payment order for obligation and payment with the reference 20406254, and the commitment number 33994, dated also 25/07/2006, through which "Eltoni" company was paid the "invoice" no. 39 dated 21/07/2006, in the amount of 135,278.20 Euros. At the time, on 25/07/2006, the certifying officer was the defendant S. H. and certified the form in that capacity and the acting permanent secretary was the defendant A. Z. who did not stop such payment. The defendant S. F. did not stop or report, and therefore allowed, the said payment: as Chief of Division for Enterprise Support and Regional Development, as he was involved in the Department of Private Sector Development to which the project belonged, did not carry on his managing duties on the project as he was also tasked with the supervision of the project.

C.1.29 – In the case 272/2007, in which the claimant was Kosova - Government of Kosovo, Ministry of Trade and Industry, in Pristina, against the respondent NNP "Eltoni", from the village of Rreznik, Municipality of Vushtrri, the Commercial Court of the District of Pristina, on 18/06/2008, has adjudicated in favour of the claimant and as a consequence the respondent was convicted to return

to the claimant the amount of 45.000,00 Euros with the annual interest of 2,5%, commencing on 19/04/2007, up to the final payment in the term of 8 days, from the day the judgment would become final (04/05/2011); if failed to do so, there would be a compulsory execution; as said, the amount has not been paid (as in **C.1.25**).

C.1.30.1 – There is no need to repeat here the reasoning of the said judgment. The court copies here, however, the following excerpt: "(…) *the claimant (...)" has determined that the amount of 50,000.00 euros was overpaid erroneously. Following the detection of this error, on 13.04.2007, the claimant has sent a note to the respondent concerning the afore-mentioned error. On the date of 19/04/2007, the respondent, also by a note, notifies the claimant whereby he acknowledges its obligations towards the claimant and at the same time along with this letter for acceptance of obligations, has returned the amount of 5.000 Euros on 10/04/2007* [16], *by sustaining the obligation to repay the rest of the money in amount of 45,000.00 € at a shortest term possible*".

C.1.31 – In the case number 164/2008, by a judgment dated 04/05/2011, the Supreme Court of Kosovo has *"refused as ungrounded the appeal of the respondent and confirmed the mentioned ruling of the Commercial Court of the District of Pristina, case number 272/2007, dated, 18/06/2008*".

C.1.31.1 – The appeal was filed based on "(…) *the erroneous or incomplete determination of the factual situation, essential violation of the provisions of contested procedure and a wrong application of the material rights with the proposal to dismiss the appealed Judgment and (...)return for retrial at the First Instance Court*".

[16] There is no documentary evidence on the date and means, despite this fact has not been denied by anyone along the proceedings, that it was returned by the bank; nevertheless, the only reference to the date of payment stems from the statements of the defendant H. B. given before the expert R.B. who was the financial court expert assigned by the Commercial Court to conduct the expertise (page 3 of his report "Financial Expertise on the 50.000 Euros", where the expert states –last paragraph – "*according to the statement given by the defendant which is part of the case file the same person on 10/04/2007 has returned the amount of 5.000 Euros to the account of MTI through bank transfer, whereas the other amount of 45.000 has not been returned up to this moment of the expertise*").

C.1.31.2 – Along the civil proceedings "*returning the remaining 45.000 Euros through any of the defendants*" was not an argument used by the respondent "Eltoni", not even at the appeal stage.

C.1.32 – The first statement before the Prosecution, at the time in the capacity of a witness, given by the now defendant H. B. was on 02/09/2011, continued on 07/09/2011, after the first instance decision, dated 18/06/2008, and after the (final) judgment on the appeal had been issued, on 04/05/2011 – by which he had been convicted to return the amount of 45.000 Euros plus interest in the already said terms.

Count 2

C.1.33 – During the execution of the contract of projection and construction of the industrial park in Drenas, one day whilst the defendant K. was together with (now witness) H.Z. having coffee at Hotel Palace in Mitrovica, upon idea of the latter, the defendant B. went there after having phoned and asking K. where they were, sat with them and talked about trivial things.

Count 3

C.1.34 – The announcement in the newspapers, dated 22/07/2005, for the said tender says in the title (title of the contract, from the contracting authority – the Government): "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" (as stated earlier in **C.1.3.1**, document in the case file, evidence 43/2).

C.1.35 – On 07/10/2005 the contract for the project and construction of infrastructure of the industrial park in Drenas, between the Ministry of Trade and Industry and "Eltoni Company", represented by H. B., was signed (as stated earlier in **C.1.9**, documented in the case file as "Base Agreement" or "Base Contract"), in the amount of 144.000 Euros and 69.825,25 Euros price per unit, without any mention to the number of units and the reference in the contract, point 6 of section 4, "this shall be a contract based on unit price and price offered for the project / lump sum (…)".

C.1.36 – Despite the general conditions of the contract signed with "Eltoni", under the section of payments (section 17) in par. 1 reads "First Payment (144.000

Euros for the design) must be made (…)"; the tender was for "Project and Construction", not only "design" but also for the works (project and construction).

C.1.37 – The minutes of the opening of the bids, in relation to bid 10, by "Eltoni" company state at the top: "Title attributed to the contract (…) Designing and construction of the infrastructure of the industrial park in Drenas" (the signature of the defendant N. K. follows, at the end of the document).

> **C.1.37.1** – The tender was for "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" (as stated earlier in **C.1.34**, document in the case file, evidence 43/2), not only for "*design – in the amount of 144.000 Euros*", as the said contract was only changed by the first annex contract, without other tender, between "Eltoni Company" and the Ministry of Trade and Industry, signed by the defendant N. K., contract dated 20/07/2006, in which it is stated: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas, (…) Based on the works carried out by the contractor and its request in changing the conditions of payment and upon the approval by the MTI, whereby parties agree to mutually change the condition of payment (…) Have agreed as follows: (…) Article 1 (about changing clauses 17.3 to 17.5), Article 2 (about payments made pursuant "situations") (…) <u>Article 4: The total value of the contract shall be 1.730.000 Euros</u> (…)".
>
> **C.1.37.2** – After this change to the contract through the annex contract dated 20/07/2006, another annex contract was made between the Ministry of Trade and Industry, signed by the defendant N. K., and "Eltoni" company, on 28/09/2006, stating: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas based on the works carried out which came after the approval of the request on negotiated procedure before the announcement of the contract with the PPA, hereby we enter this annex contract (…) Article 1: The original contract dated 07/10/2005 as mutual agreement between parties the total value of which is 1.730.000 Euros (…) Article 2: The total value of the annex contract shall be 14.580,00 Euros (…) Article 3: The contractor shall commence this work immediately upon signing of this contract and shall finish them in 7 days (…)".

C.1.37.3 – The base contract makes no reference to the laws on procurement and the "annex contracts" make no reference at all to their legal framework or on what provisions they are based.

C.1.37.4 – Despite the amount of the initial contract dated 07/10/2005 was changed only with the first annex contract (article 4 of such annex), dated 20/07/2006, <u>one month early, on the 20/06/2006 the defendant N. K. had already submitted</u> to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work <u>stating that the "approximate value of contract: 1.700.000 Euros</u>, foreseen value: value of additional works: 14.580 Euros" (see copy of the request, document in the case files).

> **C.1.37.4.1** – In the reasoning of such Request it is written: "in order to avoid eventual problems that would appear after completion of the project and in inability to remove the villagers themselves these pipes, from the side of the supervisory board for supervision of this park it was taken the decision to be paid by MTI the placement of these pipes out of the working spaces of this park, therefore we are making a request to PPA to allow procedures for publication of notification for a contract for additional works (works will be done by the company ELTONI which has the contract up to November 2006)".
>
> **C.1.37.4.2 –** The additional works in the amount of 14.580 Euros, mentioned in the request dated 20/06/2006, were included not in the first annex contract, dated 20/07/2006 (in which the amount of the base contract dated 07/10/2005 was set, changed to 1.730.000 Euros – in its article 4), but only in the second annex contract, dated 28/09/2006 (in its article 2).

Other facts

C.1.28 – At the time the defendants behaved in the way described above they were able to understand and control their acts (actions and omissions), which they desired, knowing that their acts were forbidden and punishable by law.

C.1.39 – The defendant N. K. was born on 15/06/1968, is widower, father of two children (ages: 11 and 15 years old), graduated in mechanic engineering, currently employed as director of the procurement department at the Infrastructure Ministry (suspended for a while, following an appeal returned to the position by the Independent Commission) and declared average financial status.

C.1.40 – The defendant A. Z. was born on 10/03/1957, is married, father of three children (ages: 28, 32, 34 years old), graduated in economics, currently economist, auditor and university teacher and declared good financial status.

C.1.41 – The defendant S. H. was born on 15/12/1974, is married, father of two children (ages: 1 year and 5 months and 3 years old), graduated in economics, currently economist at PTK internal inspections and declared good financial status.

C.1.42 – The defendant S. F. was born on 10/03/1973, is married, father of two children (ages: 8 and 10 years old), graduated in economics, currently free-lance consultant and declared average financial status.

C.1.43 – The defendant H. B. was born on 12/10/1967, is married, father of three children (ages: 20, 24 and 26 years old), having completed the secondary school, owner of the corporation "Eltoni" in Vushtrri and declared poor financial status.

C.1.44 – The defendant H. B. has the following criminal record:

- Criminal case P.No. 60/12 in the Basic Court of Vushtri for the criminal offence of Article 316, par.1, "unjustified giving of gifts", for which he was found guilty and sentenced to 3 months of imprisonment, suspended as long as he doesn't commit an offence for the period of one year.

- Criminal proceedings P.551/06 in the Basic Court of Mitrovica for the criminal offence of Article 334, par. 1, "legalization of false content", for which he was found guilty and sentenced to 3 months of imprisonment, suspended for the period of one year.

- Criminal proceedings P.562/09 in the Basic Court of Gjakova for the criminal offence of Article 332, par. 3-1, “falsifying documents”, for which he was found guilty and sentenced to 3 months of imprisonment for the criminal offence of Article 334, par. 1 (old code), “legalization of false content”, suspended for the period of one year.

C.1.45 – In regards to the other defendants there are no records from any of the basic courts in Kosovo certifying previous convictions.

Reasoning of the established facts:

The reasoning is not intended to be a repetition of the evidentiary material, its function is to enable the understanding of the decision concerning the establishment, or not, of the facts.

On the scope of the reasoning, we quote here the Article on the Right to a Fair Trial by the European Court of Human Rights (Art. 6 E.C.H.R.) [17] “ ‘Reasoning of judicial decisions’ – According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (*Papon v. France* (dec.). Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case (*Ruiz Torija v. Spain*, § 29). **While courts are not obliged to give a detailed answer to every argument raised** (*Van de Hurk v. the Netherlands*, § 61)**, it must be clear from the decision that the essential issues of the case have been addressed** (see *Boldea v. Romania*, § 30). National courts should indicate with **sufficient clarity the grounds on which they base their decision** so as to allow a litigant usefully to exercise any available right of appeal (*Hadjianastassiou v. Greece*; and *Boldea v. Romania*) [**emphasis added**].”.

[17] Available on http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf, p.21.

The "truth", whatever may it be, may not be coincident with the "juridical truth", "in other words, the judicial truth is founded on a correct establishment of the relevant facts, and the accurate establishment lies on *evidence* and *proofs*; in order to have a good judicial decision, any court has to have a good way of using the evidence to the aim of finding and proving the real facts"[18]. All established facts must be proved beyond the reasonable doubt[19], if not, the *non liquet* in terms of evidence and proof will benefit the defendant, *in dubio pro reo*, because a defendant is presumed innocent.

In relation to previous statements given by the (now) defendants, an obvious distinction must be made between the statements that in the pre-trial stage were given in the capacity of a witness and the statements that were given in the capacity of a defendant. There are four statements given by individuals that are now defendants but, at the time, they were examined they were no more than witnesses and, therefore, examined as such: S. F. gave a statement in the capacity of witness on 22/09/2011, A. Z. on 12/10/2011, S. H. on 31/10/2011 and H. B. on 2 and 7/09/2011 (whereas the defendant N. K. has always been questioned in the capacity of defendant).

Regardless in what capacity the statements have been given, it must be checked whether at the time each statement was given the applicable procedural provisions were applied, whether the statements are in accordance with the requirements set in the law. It is paramount to check, in any case, if the statement given, regardless in what capacity, has been given in accordance with the requirements set in the law (which is connected to the lawfulness of an investigative action) and if it hasn't, then it is irrelevant to discuss the issue further; in cases in which all the formalities have been observed, then it is crucial to assess why, if it can, or cannot, be considered as a piece of evidence – in our case we start by saying that in either case, at the time, the respective formalities have been

[18] Article from the European Judicial Training Network, in http://www.ejtn.eu/Documents/Themis/Written%20paper%20Italie/Themis%20written%20paper%20Romania%202.pdf p.1.

[19] "When analysing evidence in the substantial side of Article 2 and 3, the Strasbourg Court is guided by the principle of proof "beyond any reasonable doubt". Nevertheless, a conclusion of guilt may arise from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact, both in Article 2, and in Article 3, namely the result of indirect evidence". *Ibidem*, pp. 16 and 17.

observed, so it is left to discuss only whether they can, or cannot, be considered as piece of evidence.

The formalities to be observed are the ones in force at the time the person is being examined, as set in the law in force at the time (this as a consequence of the principle *tempus regit actum* – as stated by the CoA in the ruling dated 10/12/2013 in the case PN 577/2013, p. 14, “the lawfulness of an investigative action will always have to be determined against the procedural rules in force at the time the investigative action was carried out”).

At the time, and with regards to the statements as a witness, Articles 162 and 164 of the old Procedure Code have been observed by reading the rights of a witness in all four occasions. In relation to statements given in the capacity of a defendant, the legal provisions applicable to a defendant, Article 231, par. 2, section 2, were observed, namely “before any examination the defendant, whether detained or at liberty, should be informed of (…) the right to remain silent and not to answer any question, except to give information about his or her identity”; furthermore, par. 4 read that (the defendant has) “the right to receive assistance of a defence counsel and to consult with him or her prior as well as during the examination”.

In the present case, where all the formalities have been observed, it should be assessed whether the testimony is admissible against themselves as defendant now and also for co-defendants as well, and this must be made in accordance with the rules of evidence contained in the (new) Criminal Procedure Code of Kosovo, pursuant to Art. 541, par. 1, C.P.C.K..

One thing to take into consideration in the decision-making process is the set of evidence that has been admitted, administered, and not rejected *ab initio* or excluded by any ruling, but it is another thing to consider, to discuss, to what extent the court will assess each piece of evidence; to what extent will the court assess its probative value, to what extent will the court consider it as an admissible form of evidence to establish, or not, a given fact. Reading Article 361, par. 1, of the C.P.C.K. we see that “the court shall base its judgment solely on the fact and evidence considered at the main trial”, meaning on one hand the evidence that was produced at the main trial and, on the other hand, the evidence that has not been

rejected or excluded. The second paragraph of the same Article not only clarifies the meaning of paragraph 1 but also confirms what we have been saying, by stating that "the court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established".

In relation to the statements given in the capacity of a witness by someone who later became a defendant, they cannot be considered admissible evidence as "previous statements by a witness", because that person in not any longer a witness, and cannot be considered "previous statement by the defendant" – as at the time the person was not being examined in such capacity and, therefore, the rights provided by the law, and respected, were different. This is not contradicted by the provision contained in Art. 123, par.5, C.P.C.K.: "Statements provided by a defendant in any context, if given voluntarily and without coercion, are admissible during the main trial against that defendant, but not co-defendants. Such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction" [20]. In this provision it is logical to understand that the first time the word "defendant" is being used it is related not to the individual itself, rather to the capacity in which the individual stated. This last provision, where it reads "but not co-defendants" is consistent with the reasoning behind the norm set in Article 126, par. 1.1.3, C.P.C.K., "(…) may not be examined as witnesses (…) a co-defendant while joint proceedings are being conducted" – a fortiori, we would say, if the proceedings are the same.

As a matter of fact we see that in the quoted Article 123, par. 5, of the C.P.C.K., the legislator has chosen the words "statements by a defendant" (without stating since when…*ab initio*, from the commencement of the investigations or only at a later stage) and also has pointed out that these statements might have been provided in "any context". In relation to the second period of the paragraph, we can also say that one of the basic principles of juridical interpretation is that the legislator knew how to express; in fact, the legislator said *"(...) are admissible during the main trial against that defendant,* ***but not*** *co-defendant*", **has not said** "*(...) are admissible during the main trial against that* ***defendant and co-***

[20] There is, however, jurisprudence of the Court of Appeals defending that could be used even in relation to co-defendants.

defendant" [**emphasis added**]. The last sentence can be read as a criterion, a guidance to be followed by the court in assessing the evidence (considering even the principle of protection against self-incrimination) in relation to that specific defendant, "*such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction*".

In relation to statements of persons who have been examined as a witness, and remained as such during the main trial, then the law provides the cases in which the previous statements by a witness can be considered, and this because, as a rule, all pieces of evidence must be produced during the main trial, as a consequence of Article 361 of the C.P.C.K., par. 1, and Art. 123, par. 2, C.P.C.K. The law clarifies the exceptions to these rules, for instance, Art. 123, par. 3, *in fine*, and par. 4 *in fine*.

In relation to the previous statements given by a defendant in the capacity of defendant, then we must consider the different situations that may happen.

However, before this, it is also important to make the distinction between evidence that was admitted, administered (not excluded – and this issue has been addressed along the trial) and how it is evaluated as evidence, its probative value, as a consequence of Article 260, pars. 2 and 3, C.P.C.K..

The previous statements by a defendant, as the trial panel understands it, will dependent ultimately on whether the defendant, during the main trial, where all evidence is produced, as already said, decides do state his case or not, meaning, whether decides not to remain silent or not [21].

In any case, and in relation to co-defendants, the probative value of such statements has already been mentioned, the answer was that it cannot be considered.

[21] "As for the right to silence it can be understood in a broad or narrow way. The broad meaning refers to the right of the accused not to be disadvantaged on the basis of his silence In this conception, the right contains several legal corollaries among which is the right not to self-incriminate. According to the narrow conception the right of silence refers to the right of a person not to have his silence adversely taken into account by a court of law in the assessment of the charges against him or in the determination of his sentence". Article from the European Judicial Training Network, in http://www.ejtn.eu/Documents/Themis/Written%20paper%20Italie/Themis%20written%20paper%20Romania%202.pdf p.9.

It is now time to address the defendant itself and, of course, assuming that the statements were obtained in accordance with the law (as per Article 261, par. 1, C.P.C.K.).

According to this last norm, Article 261, par. 1, C.P.C.K., "*A statement by the defendant given to the police or the state prosecutor may be admissible evidence in court only when taken in accordance with the provisions of articles (...). Such statements can be used* ***to challenge the testimony of the defendant in court or as direct evidence in accordance with Article 262, paragraph 2 of the present code***" [**emphasis added**]. On the other hand, Article 262, par. 2, C.P.C.K., reads "*The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or state prosecutor*". Finally, Article 346, par. 1, C.P.C.K, states "*The accused has the right to not declare. If he or she chooses to declare (...)*".

This brings us to the cornerstone, the probative value (for the reasoning of the established facts) of previous statements by a defendant will depend on whether the accused declares or not at the main trial - where all evidence is produced, Art. 361. par. 1, C.P.C.K.

If the defendant at the main trials chooses to declare, to testify, his previous statements can be used to challenge the testimony given during the main trial. If chooses not to testify, not to state, then the previous statements cannot be used or, at least, cannot be used to the detriment of the defendant.

The panel notes that Article 261, par. 1, C.P.C.K., says "*to challenge the testimony of the defendant in court* ***or as direct evidence in accordance with Article 262, paragraph 2***" (The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or state prosecutor) but this leads us to the core of the problem.

Although the legislator has emphasised that as a "direct evidence" (which is in line with Art. 123, par. 5, C.P.C.K.) it cannot be used to find the accused guilty, solely or to a decisive extent, the legislator has not explicitly said that it does not apply to the cases where the defendant decides not to testify during the main trial.

This panel is of the opinion that if the defendant does not testify in the main trial the previous statements by him or her cannot be used at all much less, for sure, cannot be used to his or her detriment.

It is important to note the following:

- Even previous statements by witnesses may not be used as direct evidence; they can be used only to challenge (Art. 123, par. 2), to cross-examine (par. 3). This is the rule. The exceptions are if the witness died, is ill or asserts the privilege of lack of presence within Kosovo (par. 3, *in fine*) or if it is a special investigative opportunity (par. 4).

Therefore, it would not be reasonable to understand that the legislator wanted to give a higher probative value (and by "higher" it is meant "with less requirements to be lawfully used") to the previous statements of a (by definition, presumed innocent) defendant, than to the ones given by a witness.

With all due respect for different opinion, a different interpretation or conclusion in this regards might empty the value of deciding only at the main trial to remain silent; it is for no reason that all evidence must be produced at the main trial and during the main trial the defendants are the last ones - when it comes to produce evidence, namely to testify or not (and "not" is by remaining silent).

- One of the main principles in the criminal law is that in case of ambiguity the interpretation should be in favour of the defendant; although now we are not discussing the substantive criminal law, it is important to consider one of the dimensions of the principle of legality (Article 2, par. 3, of the C.C.K. reads "the definition of a criminal offence should be strictly construed and interpretation by analogy shall not be permitted. **In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of a person against whom the criminal proceedings are ongoing**") [**emphasis added**]; we see no reason to take a different stance or approach when we are discussing procedural law, a procedural norm. All the mentioned ambiguity of the legislator, not addressing explicitly the case when the defendant decides not to testify at the main trial (as it happens in

other countries, for instance, Portugal [22] – where previous statements may be considered only if the defendant was previously warned that if he or she states during the investigative stage, it may be used against him or her including the case of using the right to remain silent during the main trial) and having put it in a provision that starts by "Such statements can be used to challenge the testimony of the defendant in court" led the panel to clarify its interpretation of the law, in the said way: previous statements by a defendant are not admissible in the case the defendant uses the right to remain silent during the main trial - and a defendant is presumed innocent until a conviction by a court of law becomes final [23].

After explaining the guidelines in assessing evidence, the trial panel will not give probative value to the statements of the defendants who remained silent in the main trial (N. K., S. F. and H. B.). The previous statements given in the capacity of defendants (not as witnesses) by the defendants A. Z. and S.H., will not be valued against the co-defendants and will be given probative value to assess the statements of the defendants in court or as direct evidence, although the court shall not establish facts leading to find the accused guilty based solely, or to a decisive extent, upon such statements, given by the defendants during the investigative stage.

In relation to the previous witnesses' statements, the probative value was already mentioned above, "even previous statements by witnesses may not be used as direct evidence, they can be used only to challenge (Art. 123, par. 2), to cross-examine (par. 3). This is the rule. The exceptions are if the witness died, is ill or asserts the privilege of lack of presence within Kosovo (par. 3, in fine) or if it is a special investigative opportunity (par. 4)". An ambiguous situation might happen if

[22] For example the provision set in Article 141, par.4, section b, of the Criminal Procedure Code, according to which the defendant is informed that in the case he or she states the statements can be used in the main trial even if he or she decides to remain silent at that time.

[23] "As to the presumption of innocence, as stated in Article 6 § 2 of the Convention, it is a *sacred* principle of every judicial system founded on the principle of Rule of the Law and it translates the idea that a person accused of having committed a criminal nature deed, is considered to be innocent until a verdict of guilt is delivered in court. That presumption requires, *inter alia*, that when carrying out its duties, the court should not start with the preconceived idea that the accused has committed the offence charged. **In that manner, the burden of proof is on the prosecution, and any doubt should benefit the accused** [**emphasis added**]. Article from the European Judicial Training Network, in http://www.ejtn.eu/Documents/Themis/Written%20paper%20Italie/Themis%20written%20paper%20Romania%202.pdf p.10.

during the trial the witness claims that stands by the contents of previous statements that has given… Even in such case, that should be avoided, the court still has to follow the legal criteria just mentioned and must use the main trial to ask the witness what may be relevant and any discrepancies will be freely evaluated by the trial panel.

Documents:

All documents relevant to the decision process were considered, the court will not address one by one as it is not needed, rather particular references to a particular document or set of documents has already been made when establishing the facts and other references will be made when deemed necessary, only to that extent.

Apart from that, to make it easier, some of the relevant documents were pointed out after the respective fact, as said.

Also, some of the established facts are self-explanatory and some explain others.

The contract between the Ministry of Trade and Industry and the supervising body "North Company" was asked from the Ministry on the 17 September 2015; the documentary evidence of the payment of 5.000 Euros by H. B. to the Ministry on 10/04/2007 is not in the case files. The owner of the company, witness S.A. (session on 14/05/2014) stated that did not remember who was representing the Ministry when he was negotiating this contract, but recalled to have signed it on behalf of his company.

As far as the return of the 5.000 Euros by the defendant B. to the Ministry of Trade and Industry is concerned, in terms of documentary evidence the final civil judgment can be considered; despite this fact has not been denied by anyone along the proceedings, that it was returned by the bank; the only reference to the date of payment stems from the contents of the expertise by R.B., who was the financial court expert assigned by the Commercial Court to conduct the expertise (page 3 of his report "Financial Expertise on the 50.000 Euros", where the expert states – in the last paragraph – "according to the statement given by the defendant which is part of the case file the same person on 10/04/2007 has returned the amount of

5.000 Euros to the account of MTI through bank transfer, whereas the other amount of 45.000 has not been returned up to this moment of the expertise”.

With a particular emphasis, the court evaluated the base agreement or contract and the two annex contracts, as well as the other document: namely the mentioned orders for purchase within the treasury, in the Ministry of Finance, and the mentioned orders for payments and those issued by “Eltoni” and signed by the defendant B. (those described above as “A”, “B” “C” and “D”, respectively dated 31/05/2006, “Situacioni I Pare Avansuas”, 20/06/2006, “Situacioni I Pare 20/06” and dated 21/07/2006, “Situacioni I Dyte 3/2006”, “document 33”, and invoice 39/06). Other documents were mentioned when the respective facts were being established. When it comes to the documents related to the requests for commitment of funds, at least 2 of them were signed by the defendant S. F., one in the amount of 400.000 Euros and another in the amount of 1.040.000Euros, dated respectively 21/07/2005 and 31/05/2006.

The case in count 1 was based on the fact that the amount of 50.000 Euros was not deducted in the payment of 135.278,20 Euros, what is not clear is why the case was not built about the sheer fact of the payment, the advance payment before the payment of 135.278,20 Euros; more important than discussing why it was not deducted (as the deduction is only a means to diminish the damage, does not exclude the criminal offence itself) it should have been to clarify how come that an amount had to be deducted, had been there any mistake in a previous payment (paying more than it should have been) or had been there any payment that could not have taken place? – This to say that if an amount has to be deducted it is because the amount should not have been paid in the first place... but the court believes the established facts shed light on this.

The court’s request for the defendants’ criminal records has been answered: Basic Court (B.C.) Ferizaj on 05/04/2015, B.C. Peja on 30/04/2015, B.C. Pristina on 09/03/2015, B.C. Prizren on 09/03/2015, B.C. Gjakova on 12/03/2015, B.C. Gjilan on 20/03/2015 and from B.C. Mitrovica on 13/03/2015.

Witnesses:

In relation to the statements given by the witnesses, again it is worth to point out that some reasons have already been stated along this judgment and that this

part of the reasoning does not aim at repeating the evidence, or even being a summary of it. Nevertheless, some excerpts, or references, will be made.

In relation to the evaluation commission, the witness N.G. (session on 28/05/201) testified and clarified his position as a chairman of the evaluation commission for the tender, stated that was appointed as the chair of the commission by the former permanent secretary and since it was his first time in such kind of commission, insisted that apart from the 5 individuals from the commission, there should be also three international experts to assist the commission. The witness A.B. (session on 16/07/2014) also testified as being part of such commission, in the capacity of observer of tender awarding. He only stated that he was part of the evaluation committee as an observer and that the evaluation process happened in a big room. He did not provide any relevant information in this regards.

As far as the role of the supervising body "North" company is concerned, the key witnesses are A.P., S.A., N.G. and H. K..

The witness A.P. (session on 14/05/2014) made reference to "North" company, he was an outside associate of "North" company and was assigned to supervise the works conducted by the economic operator "Eltoni" in the Industrial Park of Drenas. He stated that there were other five persons assigned to supervise the work in the park and some of them were from "North" and some outsiders. The duty of the supervising body was to make sure the work was performed, evaluate it and file a signed report to the procurement office, in order to proceed with payment(s). This witness even confirmed the advance payments, "so the ministry would pay advanced payments and in situations when we made the comparisons we would then make the deduction from the advanced payment by the ministry".

This explains how the witness could be in the possession of the documents that later would "become" evidence number 5, where we see a column of the "agreed deductions of advance payment" (including the 50.000 Euros) and it is worth pointing that after this 50.000 Euros there is an omission (in that chart) of 20.000 Euros, as on the last page of the same evidence we have a list of parcels starting from the 50.000 Euros where the 20.000 Euros mentioned are included and

all those parcels make the total of 140.689,60 Euros, the same amount already addressed.

Again, it is worth noting that in this case, in the document number 33 by "Eltoni", dated 21/07/2006, "Situacioni I Dyte 3/2006", the one that bears the stamp and signature of the supervisory body "North" under row 9A Eltoni states there are 50.000 Euros to be deducted from that payment and, in row 10, it states that for payment according to that situation it was only 85.278,20 Euros.

Also in the session held on 14/05/2014 the witness S.A., who was the owner of the "North" company, stated not remembering with whom (from the Ministry of Trade and Industry) had negotiated and signed the contract of supervising the work, that he started supervising this project park a bit later, in May 2006, not from the beginning, and he didn't know who supervised the works before him and did not give many clarifying details along his testimony.

The engagement of the defendant S. F. in the project of the Industrial Park in Drenas, was mentioned by the witness B.S. as she said that the invoices would go to him as "manager of the project" before going to the procurement department. Although the director of S. F. was not even indicted, N.G., he also said (despite, for obvious reasons, many of his answers were very vague and avoiding all the time) about S. F. that there were occasions on which he would go to the site when problems were raised, in order to rectify or eliminate such problems, also by contacting the citizens involved. B.D. also said that going to the site and inspect the works was S. F.'s duty; said that the department for the "development of small and medium businesses / enterprises" (name of the division after the end of 2006) was in charge of this project, said that "N.G. and S. F. were there, the Procurement Director, of course, because he was in-charge of the contracts and from the administration department, of course, these were the people who had to answer to me about what had happened". In relation to the contract entered by the Ministry of Trade and Industry and the supervising company "North", the court deems it does not subsume the responsibilities of those who worked in the Ministry itself - as owner of the project (contrary to what the witness N.G. said).

N.G. further explained that the supervising body made a report and assessment on the performed work and then, after, the procurement department

would "review these specific performance and then it was processed for the payment and this was after the signature of the permanent secretary" and it was also responsibility of the procurement department to decide whether a given invoice/ payment should be made or not based on the report made by the supervising body and then after the certification of a situation the procurement office would only "compare the amounts whether it is the same or exceeded the amount which is provided by the situation" and said that both the procurement department and financial office and permanent secretary would approve an order for payment. In relation to the payment at stake (50.000 Euros) stated that there has been a chain of "mistakes" but the "the certification official is the last person" (to check). At the end of his testimony claimed not to see any problem if a ministry relies on the sole role of a company to supervise works that it is going to pay.

On 5 of June 2014 the witness H. K. gave testimony and he clarified that as supervisor, before "North" company, there was an MTI official who was an engineer and his name was H.B. and after him came the "North" company as supervising body. Mr. H.B. supervised in the beginning of year 2005 until the beginning of 2006, and then after in April or May 2006 Company North was awarded to supervise the works.

As an abstract:

In relation to the payment procedure, the already mentioned witness N.G. stated that S. F. also went to site construction to observe the works, while the procurement department was in charge of doing the balance of payments and according to him the last person who should notice the amount of 50.000 Euros being paid was the certifying officer within the financial department. He stated as well that the "procurement department kept the books in regard to the economic operator Eltoni". When asked about which division was responsible for the balance between the payments and the invoices, he explained that the procedure was: after the supervising company received or accepted a specific performance, then the procurement office reviewed these specific performance and then it was processed for the payment and this was after the signature of the permanent secretary. He stated that the responsibility for the comparison between the payment and the invoices was within the procurement department. As said, the witness testified that the competency to check the payments (whether it was paid more or paid less) was

within the procurement office; nonetheless, according to this witness the last person to asses and notice the mistake should have been the certifying officer.

The witness B.D. at the time was the Minister of Trade and Industry and he confirmed that he was informed by the now defendant A. Z. with regards to the 50.000 Euros paid to the economic operator Eltoni. Once he was informed he made inquiries whether the payment was due to an error or it was intentionally. After inquiries made by the staff of the ministry he declared that he was presented with a letter signed by the economic operator "Eltoni", who declared in writing that would return the money to the bank account of the Ministry and this letter was brought to him by N. K., from the procurement department. He stated that he told A. Z., "do you know that this is a criminal offence and you can go to prison for this", and he answered him that he had been deceived by those persons and if he had to go to prison he would go, but N. had to go as well and I noticed that they had issues between them.

B.S., the certifying officer, testified on 4 June 2014. She also declared that she used to work in the Ministry from 2003-2008 and initially she was a finance officer and later a certifying officer. She declared that while she was on leave in the period of 2005-2006 she was replaced by S. H. In regards to the payment of 135.275,28 Euros, where the alleged deduction of 50.000 Euros should have been made, she stated that if an invoice was brought with that sum, meaning already approved by the supervising body, then the payment should be done in that exact amount. In relation to what a certifying officer checks in a payment, she said that "the completed case file is forwarded to the certifying officer, with allocated funds, invoice, and all the necessary documents the case file should contain are within the case file. They include the signatures of all competent authorities or bodies" This verification includes the inspection of invoices and all necessary documents, contract, attachments, the allocated funds etc. Last, but not the least, she stated that every time a payment was done it was a practice to go to the contract and check the terms and that was the duty of the procurement office.

M.B. (heard on 5 June 2014) as head of the financial department and, while explaining the procedure of commitment of funds, she stated that at the time, when the project is planned, the funds are allocated based on the request made by the respective department. Based on this, the funds are committed and after that the

procurement procedures would commence. She clarified that, based on the practice, the contract on the project doesn't have to be in the same amount of the commitment of funds, the contract can be of a different sum of the amount committed for a particular project. She said not to have a clue how come there are two invoices (20/06 and 39/06) with the same amount of money, while the description of works in the invoices is different and on how, on the other hand, there is a situation which correctly describes the amount which had to be paid (document number 33). She stated that the excess payment was noticed only after it had already been paid and that S. H. signed replacing the certifying officer, since B.S. was on leave at the time. She declared that the contract was entered by the procurement office and the receipts were brought to that office. As the person who provided to the Prosecution the report on the payments to the economic operator "Eltoni", she clarified also that the first advance situation was an advance payment, meaning the amount of 140,689.62 was given before the work commenced but she did not clarify what happened with regards the 50.000 Euros that should have been deducted during the payment made to "Eltoni" company.

About contradicting versions, even coming from the very same person, we can see that, for instance (and it is only an example…), the defendant A. Z. claimed that there had been an advance payment and later on it was not an advance payment but rather payment for works… (see as an example the audit report, page 4 point 2 e) and p. 12 of the session held on 12 September 2014) *vs.* penultimate paragraph of page 2 of the minutes of the session held on 30 September 2014, "yes, I had been acting permanent secretary, but there is no advance payment but only payment for carrying out the works, so there is no advance payment allowed as mentioned"). This (last) version of no advance payment was repeated in the session held on 30 September and 4 November 2014. Also the defendant S. H. had different opinions on whether the contract allowed or not an advance payment to be made, as in the session held on 5 January 2015, on page 6 of the minutes, he says the contract was not clear about no advance payments, on page 7 was sure there were no advance payments, but then also says that certified the payment because everything was fine and then on page 17 the contractions become clear as now everything would depend on the invoice.

When it comes to the sequence concerning signing documents pertaining the payment process, then again hardly there is the same version…According to

witnesses B.S., M.B. , S. R. , and defendants S. H. and A. Z. there would be different practices, different versions of the same reality.

According to the witness B. S. the sequence of the signatures in order to allow a payment (pre-trial interview that she stood by in the trial) would be: after the invoice is compiled the invoice is supervised by the manager of the project which was S. F. then it should be sent to the procurement department or permanent secretary, and after it is signed by them then the invoice would go to the finance office and would be signed by the certifying officer and likewise it should have been be signed previously by the approving officer.

The witness M.B. explained that B.S. was the certifying officer, S. H. the officer for commitment of funds and on the prosecutor's question about the procedure for payment after the work is completed, she replied that initially the contracted works are completed, so the completed work is accepted and we receive the invoice that would be delivered to the procurement office (whose head at the time was N. K.) to be signed and then it would be signed by the permanent secretary; afterwards the invoice would be admitted by the finance office. In this specific case, the form was prepared by S. H., was then forwarded for signatures and signed by N. K.. There was also a form about receiving goods. Since the amount was above 5.000 euros, it had also to be signed by the Permanent Secretary, A. Z.. Upon obtaining the signatures, it was signed by the certifying officer S. H. and then it would go to the Treasury. She also said that then we would make copies of the case: one copy remained within the ministry and the original copy of the invoice would go to the treasury, and basically this was the sequence of signatures to be provided when an invoice was received.

The witness H. K., who used to be a procurement officer within the ministry, and, as already said (session on 5 June 2014), in relation to the procedural sequence leading to a payment, said that it would start with the procurement officer of the supervising company bringing the documents and then the company who conducted the works submits the invoices. The invoice would come to the procurement office that on its turn would send the invoice to the permanent secretary for signature and then it was further processed. On page 35 of the minutes of the said session, this witness presented also his version, both in relation to the allocation of means and to payments, "I have described from the allocation

of means until the payment order. The form for allocation of means signed by the secretary and budget official then by the certifier, whereas the document for admission of goods by procurement officer and official charged with admitting works and the last person to sign is the certifying officer".

The witness S.R. during his testimony did not provide the testimony in regards to the sequence of the signatures which was to be followed when an invoice was to be approved; however, he stated that knowing the procedure to be followed, the payment in excess of the amount of 50.000 Euros should not have happened.

The witness H.Z. (gave testimony in the session held on 17 July 2014) previously worked at Ministry of Trade and Industry between 2003 and 2010 as admitting officer. He stated that an advanced payment should always be foreseen in the contract and the contract should stipulate if any advanced payment would take place or not. He was not familiar with the specific terms of the contract at the time; however, he knew (later on along his statement) that an advanced payment was done in relation to "Eltoni", because in the invoices every time they had to withhold an amount of the payment. He stated that as admission officer there was a column where he was supposed to write so he would sign in that column where it stated the "admission of goods". In this particular case they had this oversight body ("North" company) which would, externally from the ministry, conduct the oversight of works of the constructions. Apart from his signature he declared that those additional signatures would include the names of Secretary which at the time was A. Z. and the others in the line were B.S., S. H., N. K. and himself. He was asked about the sequence of signatures mentioned above, "who should be the in your view, who was primarily the responsible person for doing that balance" not making the deduction from the invoice, and he stated that the Secretary was in charge of the whole staff, not the political staff, but the whole staff and the permanent secretary was A. Z. and therefore he could have done the final reconciliation between invoices and payments if something was not matching or equalised, before the end of the process. He also (pages 21 and 22, amongst others) mentioned his version (and changed it…) on the sequence of signatures leading to a payment.

According to S.R. (session on 17 July 2014) it was the duty of the commission (meaning the supervising body, the “North” company) and that of the Permanent Secretary, together with the technical commission, to make the equalisation (of works executed and payments) and in that sense there should not be 50.000 Euros more paid. While answering the prosecutor about the person who should have compared the advanced payment with the invoices for the completed works, stated that after the admitting official, it would go to the procurement office or if the company has such a service it goes through the service of management of contracts, an office within the department dealing specifically with that kind of matters. He also testified about the issue of payment while questioned by the defendant A. Z., since defendant Z. declared that he did not sign or allowed any upfront payment and the witness stated that the upfront payment can only be allowed with the prior signature of the Permanent Secretary or by a person specifically authorized by the permanent secretary.

According to the defendant A. Z., in the session on 26 September 2014 (pages 6 to 10), initially the oversight body brings the request for payments and submits it to the procurement department, namely to N. K., then after the department of procurement notifies the department implementing the project, in the former department for small business development (at the time the director was N.G.), after the paperwork would go to the department of admission of assets and projects, to the “assets officer”, who was H.Z., then when he receives the asset then the procurement officer should sign the request and without being approved by this officer it would not go for payment (N. K. as signing party of the contract); finally, the whole file would go to the financial department and there they should check the invoices and services, check the contract whether there are any excess, and if things are fine they can proceed with the payment and the key financial person to sign the invoice was S. H.. Finally, in the Treasure, S. G. allowed the payment and was the last filter and in a position to stop the payment. Also said that the permanent secretary didn’t have to sign the invoice (his signature was forged to blackmail him) and also said that “after this round is closed, the complete file goes to the financial department because the payment procedure has been completed. When it goes there they should check the invoices and services, check the contract whether there are any exceeding, and if they see that the state of things are fine

they can proceed with payment (…) The key financial person was S. H.” (see p. 9, session on 26 September 2014).

The defendant S. H. explained his version on the sequence of signatures to be provided in order for the payment to happen in the session of 12 December 2014 (p. 6 about hierarchy, p.10 about commitment of funds, p. 11 about sequence of signatures – after which should check the contract…) as following: before the invoice goes to the Permanent Secretary there is someone who receives that at the ministry as admitting officer (at that time it was H.Z.) and after it would go to the permanent secretary (A. Z.) and then after to procurement department to be signed by N. K.; after it would go the certifying officer (B.S.), but since she was on leave he signed on her behalf as he was authorised to do so and clarified that it is the certifying officer who checks if everything has been signed. After all signatures the whole case file goes to the Treasury for execution and the officer at that time was S.G. , who signed for that payment.

About the stamp, the defendant A. Z. in the session held on 12 September, p. 6, claimed someone had used his stamp, whereas on the session held on 26 September, pp. 14/15, claimed that maybe another stamp (forged) with his facsimile had been made – maybe because his defence witness, his secretary (witness H.), did not say or confirm that his facsimile could be taken, used by someone else…as it was in his office and no-one could enter it.

H. K. who used to be a procurement officer within the ministry and, as already said, testified on 5 June 2014, in relation to the annex he declared that the annex contract, referring to additional works, cannot go beyond 10%. The maximum it can go is 10 %. He then explained the sequence of signatures while asked by the prosecution.

The court has established the facts beyond reasonable doubt. All the evidence produced during the sessions was recorded *verbatim*, being therefore available for reassessment, be it the case.

C 2) –Facts that were not established

The facts not established are only “not established” and “not established” means only that it was not possible to establish them, as from a juridical point of view such does not mean they did not occur.

All the facts mentioned in the indictment and not considered established are not established, and need not be repeated here. Still, the court highlights the following facts that were not established:

Count 1

C.2.1 – The exact circumstances in which A. Z.’s facsimile ended born on the top (right hand side) of the document called “invoice” 39/06.

C.2.2 – That based on the request of the defendant N. K. and consent of the defendant H. B., the amount of 50.000 Euros, better saying, 45.000 Euros was personally given to the defendant K. who had told B. that he would hand over this amount himself to the budget of the MTI.

Count 2

C.2.3 – From 14/09/2005 when the evaluation commission made the report on evaluation and recommendation of bids for awarding the contract concerning the tender for construction of infrastructure at the industrial part in Drenas Nr.MTI/22/07/2005, whereupon “ELTONI” - company owned by H. B. - was awarded the contract and until the conclusion of contracted works from this company on 31/12/2007, the defendants N. K. as official person – director of the procurement department – and S. F. as official person – Chief of Division for Enterprise Support and Regional Development and involved in the Department of Private Sector Development – both at the Ministry of Trade and Industry, acting in coordination and cooperation one with another, received bribes from the defendant H. B..

C.2.4 – The defendant H. B. gave the following amounts of bribes: to the defendant N. K. a total amount of 180.000 Euros and to the defendant S. F. the amount of 50.000 Euros.

C.2.5 – The defendant S. H. while acting in the capacity of a financial officer, by the end of 2007 called on the phone H. B. and told him “do you want

me to transfer all the money" and as defendant H. B. said it was not possible the defendant S. H. replied "that is possible but you have to give me 3.000 Euros". H. B. told him that that was not a problem. S. H. went to H. B.'s office at the industrial park and received 3.000 Euros. S. H. then transferred all the money to H. B.".

Count 3

C.2.6 – Notwithstanding the first annex contract signed on 20/07/2006 between the defendant N. K. and the representative of "Eltoni" company (the defendant H. B.), annex contract changing the amount of the initial contract of 144.000 Euros to the amount of 1.730.000 Euros, exceeding the amount of 10% of the initial contract, he has caused material damage to the budget of the Ministry of Trade and Industry in an amount exceeding 100.000 Euros.

Reasoning (without any prejudice to the previous reasoning of the established facts):

Apart from what has already been said above, which *mutatis mutandis* applies here, in this "negative reasoning" there are some aspects worth being pointed out, although and again, as said earlier, this has got not to be a repetition of the evidence produced and it must be understood in conjunction, coordination, with the reasoning of the established facts.

Count 1

All documents existing in the case file have been checked and, when relevant, mentioned along this judgment.

Count 2

In relation to the facts that would be relevant for the criminal offence of accepting bribes, apart from the defendant B.'s statements (the evaluation of defendant's and witnesses' statements at main trial was already addressed above), the key witnesses' statements in relation to this matter will be examined

thoroughly, despite it has already been said that the reasoning does not have to be a repetition of every piece of evidence – nevertheless, the key aspects will be mentioned, given the importance of this count, and to enable the understanding of this panel's decision about these facts.

Considering what was said about the defendants' statements, eventual contradictions or discrepancies they contain will not be mentioned. It should be noted, however, that from the overview of the evidence listed in indictment there are many things that don't make sense at all to an objective observer, be it constant changes in amounts (and totals not matching the subtotals, etc.; the amounts allegedly given as bribe are not consistent one with each other as, and this as only one of the possible examples, from 180.000 Euros, pursuant to the indictment itself, in total it amounts to more than 233.000 Euros: 180.000 Euros to the defendant K., 50.000 Euros to the defendant F. and 3.000 Euros to the defendant H., not to mention other amounts of 1.000 Euros or 2.000 Euros that allegedly were being given repeatedly), be it in sequence of facts and other data.

It is also somehow unclear how, according to the indictment itself, what the criterion has been to indict some individuals and leave others as witnesses, or how some statements can be given credit if coming from someone who conducts business on a regular basis such as a constructor (as the defendant B. was the constructor in this case) in relation to the procedures of being payed and returning (paying back) amounts of money without document it – according to him.

The first event of "giving bribe" would be the meeting on the day following the evaluation commission has finished evaluating, meaning, on 15/9/2005, and this would have happened at Restaurant Tirana and defendants K., F. and B. (allegedly) met in the presence of H. Z., where the amount of 180.000 Euros was asked by K. (for himself and F.) from B. as condition required for this last one to start the works.

The witness H.Z. (session on 17/7/2014) mentioned meetings with B. at the offices, in the ministry, and also mentioned an occasional meeting at hotel "Palace" (not Tirana) and that he (no-one else) had had the idea of stopping there to see friends, not knowing whether B. and K. had any other contact there, apart from B. having joined them (Z., K. and others, some friends) at the same table for a

cup of coffee and this after B. phoned K. to ask where they were. According to this witness, nothing was given to K. and the conversation was trivial (about "casual", "occasional things").

The second event, would have taken place on the following 2 days, approximately on 16 or 17/9/2005, at (near) "Kurrizi", where B. sent his employee Y.C. to handover a bag to N. K. containing 100.000 Euros.

The witness Y. C. (session on 13/5/2014) would be the core witness, together with Z.M.

Both witnesses stated in a way that some facts related to giving bribes could be established. However, the statements lack consistency to the extent that they do not suffice to establish the facts beyond a reasonable doubt - still reasonable, according to this panel's assessment.

The witness Y.C. has not stated the same version two times (and this can be taken into consideration, given the way the statement at the main trial was produced): at the police (on 20/09/2011) basically he stated that at the first time he was present when H. B. went to give something to MTI officials, at evening, in hotel Illyria; the second time he was given a (black colour, this following one of the questions…) plastic bag to give to K. and he (the witness) met K. and S. near "Kurriz" and gave the bag to K. but a few questions later said that didn't know to whom had given the bag. At the Prosecution (on 16/01/2012) the witness stated that at the first time, around evening, in hotel Illyria, H. B. gave a black plastic bag to these 2 persons who joined them when they were sitting there at the table and, at the second time, H. B. insisted that he (the witness) would go with him (H.) to meet K. in the evening at a restaurant near "Kurriz" and then H. B. gave to K. a black plastic bag and as it was dark and as he was standing he could not see if someone else was together with K., also stating to know that H. B. went to meet K. with the bag and came back without the bag, but a few questions later the witness says that he saw H. B. and K. with other people who were with him, that he could see people sitting at the table.

In both interviews, occasions, he mentioned that H. B.at told him that to be awarded the work he had to give something to MTI officials and that he (the witness) never knew what was inside the bag(s).

At the main trial the witness claimed to have said the truth at both interviews mentioned above (despite the inconsistencies and changes in the description of the facts from one to another) and during the examination by the trial panel claimed not remembering that H. B. had told him that to be awarded the project would have to give something, confirmed that one time he went together with H. B.to meet K. and S. in hotel Illyria and that H. B. then gave them a black bag and that on another occasion, when it was already dark, he went with H. B.to a place near "Kurriz" and H. B. handed over a bag to K. who was there with another person.

In relation to some discrepancies the witness stated not to remember to have said such things to the police. Stated not to know what was in the bag.

The statement of the witness changes over time and if some things could be considered as "a matter of detail", others cannot: for instance, not remembering anymore what was the reason H. B. told him for the encounters with the officials, who (he or B.) handed over the bag the second time, who was (or was not) present at the second time apart from K. and B..

It could be said that the witness is telling the truth, although with discrepancies, but it can also be said that the witness lies, as the versions are incompatible and in every occasion he had been instructed about his duty of telling the truth and that lying is a criminal offence; one thing is sure, the witness lied at least in one of the versions presented. The mentioned core facts could not be mixed, "covered by shadow", to this extent if the witness was stating the truth.

The question now is, if apart from that, this kind of "statement" can still be used to reason a decision beyond the reasonable doubt? – In this panel's assessment no. The court has no sufficient data to establish the facts the witness stated about and therefore they are not established, and not established means only that, this to say that the court is not saying that the facts did not take place; what the court says is that the witness' statement(s) were given in a way that does not allow to establish them.

It is not a case only of contradiction between a person and another person (or even confrontation), it is a case of contradiction in the statements of the same person and to an extent that allows one to say the witness lies, at least partially, and this takes away the credibility to reason a decision based on such statements. This

is valid also in relation to the confrontation that was held between this witness and the defendant B., in the sense that, again, the versions did not match. The statement of the witness was not confirmed by any other statement, namely by the witness A.B., who has always presented the same version (session on 16/07/2014 and pre-trial statements on 20/11/2011 and on 19/01/2012).

Also about the credibility of the witness Y.C., the court notes that in this case the contradictions were not from the pre-trial stage to the main trial stage, because years have elapsed; they happened also within approximately 3 and a half months – between the statement at the police and at the prosecution.

This leads us to another witness that might help in assessing the facts, considering the contents of the statements and of the questions that were asked to the witness Y.C.: in the confrontation that took place on 14/05/2012, on which date, according to the version presented to the witness (based on the version of B.), he had gone to deliver to K. 100.000 Euros together with the witness Z.M. The witness Y.C. makes no references to going with Z.M. in any occasion and the witness Z.M. in no occasion makes reference to Y. or to going with him to deliver a bag to K. in (or near) "Kurriz"; rather, he talks about other place, restaurant "Ana Benz" on the highway Pristina – Peja. This witness' statement will be analysed after.

The third event mentioned in count 2 was a meeting between the defendants B. and K., "the next day" (17 or 18 /9/2005), at the restaurant "Ana Benz", where K. allegedly received 35.000 Euros from B..

For this set of facts it is important the statement of the witness Z.M. (session on 13/05/2014), who considers himself as B.'s family and in the trial stated that when he (Z.M.) had been interviewed before he had stated the truth. The witness stated to be B.'s driver and to go often with him to the restaurant "Ana Benz".

In essence, during the main trial, this witness confirmed what he had said before in the two mentioned interviews, to the police on 10/10/2011 and to the prosecution on 16/01/2012 and those 2 statements were consistent one with another: basically he stated what the defendant B. had told him in the car while he was driving, that (B.) was going to meet officials of MTI to give them money, does not know names, B. went out with a bag (the witness did not know what was

inside) and he stayed in the car in the parking lot waiting for B., B. returned after a while carrying the same bag, he did not see anyone giving anything to anyone and at the parking lot he saw a MTI vehicle.

At the trial, after "having accepted" his previous statements, this witness sustained that he knew (only) what B. had told him, that it was not a "bag" but a "case" that B. was carrying with him, did not know who exactly B. would meet there, not remembering anymore whether had seen or not a MTI vehicle in the parking lot and not recalling anymore that before that day he had heard a conversation between B. and Y.C. about giving money to MTI officials.

In relation to this statement it is worth pointing out that: on one hand he knows no names, did not see anything being given to anyone and, on the other hand, he claims that what he says is in essence what B. has told him. Regardless what was said before about considering the defendant's previous statements, still article 123, par. 5, C.P.C.K. would have to be kept in mind, in the sense that the defendant's statements (B.'s) would be at least (not to say "sole") decisive inculpatory evidence for a conviction (for the co-defendants).

The fourth event is not dated, it has allegedly taken place during the execution of the contract, at "Hotel Pallas" ("Hotel Palace" according to the photo in the case file) in Mitrovica, where allegedly K. took 45.000 Euros from B. in the presence of A.SH.

The witness A.SH. said different things, even during the same session; for instance, in relation to having seen B. giving something to a person, first he said that did not see it, after he said he saw giving something under the table but without knowing what it was. Other illogical things were mentioned, such as the witness being able to remember two bags (one of them made of plastic), how they were looking before and after the meeting (not empty) but not being able to tell a colour, not even if it was a light or a dark colour of the bags he had **seen** [emphasis added, "seen" in the same way had seen the material they were made of and their volume…]. Also earlier in his statement(s) had given the impression that B. had picked him up near the train station in Mitrovica so he would go with him to the bank, and later on he said he was driving and, finally, he said that B. went to meet him near the station but he (the witness) drove from there onwards …

Furthermore, and as far the value of this statement is concerned, the witness does not even know when this episode he mentions may have taken place: whereas in the interview in front of the prosecution he was able to mention the year 2005, in the trial did not and did not know day, month or other detail. Before the trial had said that B. was going to meet people (and that the amount collected from the bank was 700.000 Euros that would be for his work, activity), but during the trial said that he had told him that he (B.) was going to meet people to give them money. Always stated not knowing who the persons B. met with were. In the main trial also declared to have seen the defendants for the first time in the court session.

In spite of the contents of the statement making it irrelevant for the case, the witness had also stated that B. went to Procredit in Mitrovica to get that amount of money. The bank documents / bank statements in the case file (by a reply of Reiffeisen Bank, dated 12 September 2012, to a court order issued by the pre-trial judge on 24 August 2012 – order for disclosure of financial data concerning all defendants in all financial bank institutions in Kosovo), related to B., state that H. B. was an authorised person for NNP Eltoni, where he had incoming transfers from (DANCON) KFOR in the amount of 58.703,45 Euro from 29/09/2008 until 6/04/2012; the other reply to the court order was from SHPK, where Eltoni had one bank account and from 30/03/2001 until 25/08/2011 the only deposit was in the amount of 20,00 Euro... These were the spotted bank transactions.

The fifth event of bribery mentioned in the indictment is not dated, allegedly took place during the execution of the contract and happened at restaurant "Qershiat e Llapashtica", where allegedly F. took 50.000 Euros from B..

During the trial there was no reference to this event.

The sixth event is in the end of 2007, and the defendant H. allegedly went to B.'s office to collect 3.000 Euros so he would execute a payment to B..

Although along the investigation the month "December" 2007 was discussed, we have in the indictment "end of 2007".

It is important, therefore, to check in the first place if he (S. H.) was in position within the Ministry, in the end of 2007, that might make sense he asked the alleged question to B. in return of money (bribe).

In this regards, the court notes that the defendant S. H., when identified in court (session on 14/4/2014) said: "Was former official at the Ministry of Finance and Economy from 17th May 2004 until 2010. I was initially suspended and by court order was returned at my workplace"; during the session held on 12 December 2014 he clarified that he was suspended between 16 January 2007 and 23 February 2009 and upon request from the court clarified the answer and said "from 16 February 2007 until 23 February 2009".

Apart from this, at the end of 2007 he was not even in functions anymore at the Ministry because he had already been suspended, it is also worth to point out that no contrary evidence to that was produced and at that time no payments to Eltoni were being executed any longer – evidence number 5 presented by the prosecution is important (the documents provided by the witness A.P.) as it also points out to the fact that at the end of 2007 there were not any more payments to Eltoni.

Count 3

No-one mentioned any particular amount of damage, not even the co-defendant A. Z. and there was no evidence that the works covered by the said annex contract were not performed.

D -The facts and the criminal liability of the accused (Articles 361 and 370, par. 7, C.P.C.K.):

The applicable law (statutory limitation and the established facts and criminal liability in relation to the remaining criminal offences)

The statutory limitation

Analysis of the statutory limitation in relation to each criminal offense:

In relation to the statutory limitation on 17/10/2013 the, at the time, Presiding Judge wrote: "*Issue re statutory limitation: the relevant statutory limitation period pursuant to CPC Article 106(1.4) is 5 years. The defence argue*

that the statutory limitation period has expired in this case because the final act of the alleged offending according to the indictment occurred in December 2005 and the ruling on initiation of investigation is dated 10 December 2011, outside the 5 year limitation. The Prosecutor argues that the first step taken towards a criminal prosecution occurred by a written information from the Anti-Corruption Agency dated 15 April 2008, which is clearly within the limitation period. CPC Article 107(5) states that 'the period of statutory limitation is interrupted by every act undertaken for a purpose of a criminal investigation'. This is clear language and needs no interpretation. 'Every act" means precisely that. The article does not state every act from the date of a ruling on initiation of criminal investigation'. The Anti-Corruption Agency letter dated 15 April 2008 was clearly an act and it was clearly undertaken for the purposes of a criminal investigation. To that extent, it fully complies with Article 107 and interrupts the Statutory Limitation period. The Presiding Judge is satisfied that the statutory limitation period in this case has not expired".

Let us now check each of the criminal offences in relation to this procedural requirement, that the statutory limitation has not lapsed.

1) Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 CCK): this is under the new Criminal Code of Kosovo (C.C.K.) and therefore the statutory limitations are provided by Article 106 C.C.K.

The criminal offense was, in accordance with the indictment, committed on 25/07/2006, when the order to pay dated that date was issued, this although the way the indictment is written might create the doubt ("from 14/09/2005 (…) until the conclusion of works by this company on 31/12/2007") whether we are not dealing with a criminal offense in continuation, which would increase the deadline for the statutory limitation.

The criminal offense is punishable by imprisonment up to 5 years, which leads to the application of the statutory limitation period of 5 years (Article 106, par. 1.1.4, C.C.K.) in relation to the commencement of investigations and 10 years to absolute bar of criminal prosecution (including the possibility of the court convicting for the charge), in accordance with Article 107, par. 8, C.C.K.

Considering that the deadline starts on the day the criminal offence is (allegedly) perpetrated (as per Article 107, par. 1, C.C.K.), that it "*is interrupted by every act undertaken for the purpose of criminal prosecution of the criminal offence*" (Article 107, par. 5, C.C.K.) and that "*the first step taken towards the criminal prosecution occurred by a written information from the Anti-Corruption Agency dated 15 April 2008*" (as already stated in the ruling dated 17/10/2013), then we have the following results: the investigation started on 15/04/2008, and therefore within the deadline allowed by the law. The absolute bar on criminal prosecution will happen on 25/07/2016.

2) Entering into harmful contracts (contrary to article 237.1 and 2 Provisional CCK).

Considering the legal provisions, *criteria* just quoted (in the analysis of the previous criminal offence) from the old and the new criminal code and that Article 237, par. 2, of the Provisional C.C.K. read that "*when the perpetrator of the offence provided for in paragraph 1 of the present article accepts a bribe or causes damage exceeding 100.000 EUR, the perpetrator shall be punished by imprisonment of one to ten years*", we have the following results: the facts (count 3) took place on the 20/07/2006, the investigation started on 15/04/2008, and therefore within the deadline allowed by the law (10 years, Articles 90, par.3, and 91, pars. 1 and 3, P.C.C.K.). The absolute bar on criminal prosecution will happen on 20/07/2027 (20 years, Article 91, par. 6, P.C.C.K.).

If the offense is committed as provided for in Art. 237, par.1, the applicable sanction is "imprisonment of three months to three years" and then according to Art. 90, par. 5, P.C.C.K., the statutory limitation is "three years from the commission of a criminal offence punishable by imprisonment of more than one year" (as Art. 90, par. 4, P.C.C.K, does not apply because the criminal offense in not punishable with more than 3 years of imprisonment). Following the logics explained above, the absolute bar on prosecution happened on 20/07/2013.

The new Criminal Code of Kosovo does not change the result, following the reasoning explained before (Articles 291, par. 2, and, respectively, 10 years, Article 106, par. 1.1., of the new Criminal Code of Kosovo, and 20 years, Article 107, par. 8, of the same code).

3) Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.); according to this provision, the perpetrator shall be punished by imprisonment of six months to five years. Following the same logics as for the other criminal offenses already mentioned, the result is that as the investigation started on 15/04/2008, the deadline allowed by the law to the commencement of the investigations has not been violated (5 years, Articles 90, par.4, and 91, pars. 1 and 3, P.C.C.K.), considering that the indictment refers to a period of time ending in 31/12/2007 and the absolute bar on criminal prosecution will happen on 31/12/2017.

4) Giving bribes (contrary to article 429, par. 1, C.C.K., as per the ruling dated 17/10/2013, considering more favourable the current provision than the previous, Article 344, par. 1, Provisional C.C.K., as the perpetrator "*shall be punished by imprisonment of three months to three years*"); the perpetrator shall be punished by a fine or imprisonment of up to 3 years (while on the provisional code there was no option of convicting only to a fine and the lowest possible time of imprisonment was higher, as it was set in 3 months…). Following the same logics as before, the result is that as the investigation started on 15/04/2008, and considering the dates mentioned in the previous criminal offence, the result is that the deadline allowed by the law to the commencement of the investigations has not been violated (Article 106, par. 1.1.5, C.C.K.), as it started within 3 years after 15/09/2005 and 31/12/2007, but the absolute bar on criminal prosecution has already taken place on 15/09/2011 (in relation to the defendants N. K. and S. F. – meaning that it had already taken place when the indictment, dated 05/11/2012, was filed, on 13/11/2012) and on 31/12/2013 (in relation to the defendant S. H.).

As the absolute bar on criminal prosecution has already lapsed it is not worthy to address the issue that the facts would be subsumed to 3 criminal offenses of giving bribe, not only to 1, as in the indictment.

Therefore, accordingly, in relation to this charge, the criminal offense of giving bribes, the court had no option but to reject it, pursuant to Articles 362, par. 1, and 363, par. 1.3, C.P.C.K., as the period of statutory limitation has expired.

5) Misuse of economic authorisations (contrary to article 236, pars. 1.2 and 2, Provisional C.C.K.). The perpetrator of such criminal offence shall be punished

by imprisonment of six months to five years. Following the same logics, rationale, as for the other criminal offenses already mentioned, the result is that as the investigation started on 15/04/2008, the deadline allowed by the law to the commencement of the investigations has not been violated (5 years, Articles 90, par.4, and 91, pars. 1 and 3, P.C.C.K.) and the absolute bar on criminal prosecution will happen on 25/07/2016 (10 years, as per Article 91, par. 6, Provisional Criminal Code of Kosovo). The new law is not more favourable, Article 290 of C.C.K., as it also provides a fine, together with the same imprisonment as before.

Since we have analysed each of the criminal offences, and regardless that the prosecution has already withdrawn from prosecuting the criminal offence of "fraud in office", for systematic reasons we will make some references to it as well. Therefore, and accordingly:

6) Fraud in office, that had been alleged as having been committed in co-perpetration (contrary to articles 341.1 and 3 together with art. 23 Provisional C.C.K.), this pursuant to the Provisional Criminal Code of Kosovo, and applying the same *criteria* as above (but with the provisions on statutory limitation of the Provisional C.C.K.), pursuant to Article 341, pars. 1 and 3, "*when the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to ten years*", then we have the following results:

- The investigation started on 15/04/2008, and therefore within the deadline allowed by the law (10 years, Articles 90, par.3, and 91, pars. 1 and 3, P.C.C.K.).

- the absolute bar on criminal prosecution would happen on 25/07/2026 (20 years, Article 91, par. 6, P.C.C.K.).

It is paramount to see, pursuant to the principle that the most favourable law would apply, Article 2, par. 2, P.C.C.K., if with the new Criminal Code of Kosovo the result would be different.

According to Article 426, par. 2, C.C.K, the punishment of imprisonment (together with a fine, not foreseen in the previous code) for the criminal offence would be from 1 up to 8 years, and hence the result would be the same, respectively: 10 years, Article 106, par. 1.1., of the new Criminal Code of Kosovo,

and 20 years, Article 107, par. 8, of the same code. The absolute bar on criminal prosecution would take place on 25/07/2026.

The established facts and criminal liability in relation to the remaining criminal offences

Considering the amended indictment and drawing from prosecution (dated 17 April 2015) in relation to the criminal offence of "fraud in office" from article 341, pars. 1 and 1, C.C.K, as well as the above declared rejection of the charge "giving bribes", contrary to art. 429 C.C.K, due to the statutory limitation (pursuant to articles 362, par. 1, and 363, par. 1.3, C.P.C.K) the remaining criminal offences under analysis are:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 CCK) – defendants N. K., A. Z., S. H. and S. F.;

-Accepting bribes (contrary to article 343.1 Provisional CCK) – defendants N. K., S. H. and S. F.;

-Entering into harmful contracts (contrary to article 237.1 and 2 Provisional CCK) – defendant N. K. – and

-Misuse of economic authorisations (contrary to article 236, pars. 1.2 and 2, Provisional C.C.K.) – defendant H. B..

Now, in this part, an analysis, a description of each of these remaining criminal offenses the defendants are charged with, will follow pursuant the order they were just mentioned.

Along this judgment we have addressed the legal classifications made by the Prosecution. No need to say that the court is not bound by them, Article 360, par. 2, C.P.C.K., as only the facts are binding for the court, Article 361, par. 1, C.P.C.K.

-**Abusing official position or authority, committed in co-perpetration (contrary to articles 422.1 read with art. 31 CCK)** – defendants N. K., A. Z., S. H. and S. F. **(count 1)**

The criminal offence provided for in art. 422.1 C.C..K reads as follows: "**1**.*An official person, who, by taking advantage of his office or official authority, exceeds the limits of his or her authorizations or does not execute his or her official duties with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violate the rights of another person, shall be punished by imprisonment of six (6) months to five (5) years.* **2**. *For purposes of this Article, the abuse of official position includes, but is not limited to:* 2.1. *intentionally or knowingly violating a law relating to the official's office, duties or employment;* 2.2. *intentionally failing to perform any mandatory duty as required by law;* 2.3. *accepting any gift, fee or advantage of any kind as a result of the performance of an official duty unless the acceptance of the gift, fee or advantage is permitted by law;* 2.4. *misusing government property, services, personnel, or any other thing of value belonging to the government that has come into the official's custody or possession by virtue of the official's office or employment;* 2.5. *intentionally subjecting another person to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or* 2.6. *intentionally denying or impeding another in the exercise or enjoyment of any legal right, privilege, power, or immunity*".

Starting by analyzing the elements that are constituent of the criminal offence as it was at the time of the facts, we have to look at the previous version, Art. 339 of the Provisional Criminal Code of Kosovo (P.C.C.K.), that read as follows: "*(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties shall be punished by imprisonment of up to one year. (2) When the offence provided for in paragraph 1 of the present article results in a damage exceeding 2.500 EUR or a grave violation of the rights of another person, the perpetrator shall be punished by imprisonment of up to three years. (3) When the offence provided for in paragraph 1 of the present article results in a material*

benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years".

In both versions, as to the perpetrator, it is a criminal offence that is not common but specific, meaning that not anyone can commit this criminal offence, the perpetrator must be someone with a specific characteristic, must be an official.

The *mens rea* (subjective element in the continental doctrine) is the intent. In both versions the criminal offense must be committed with direct intent, and negligence is not an admissible way of committing it (as "a person is criminally liable for the negligent commission of a criminal offence only when this has been explicitly provided for by law" – art. 11, par. 3, P.C.C.K., and art. 17, par. 2, C.C.K.), and this is due to the fact that on the contrary of most of the criminal offenses committable with intent, to what a generic intent suffices, in this criminal offence that is not enough because a specific direct intent (*dolus specialis*) is required by the legislator, and this intent must then be aimed at acquiring a benefit for himself, herself or another person or to cause damage to another person (including a legal person). In this regards, there are slight changes in the wording but the core of the specific intent has remained the same.

With regards to the manner of commission, this criminal offence, in both versions, can be committed by an act or by an omission (art. 31, par. 1, P.C.C.K., and art. 8, par. 1, C.C.K.).

The criminal offense of abusing official position protects the juridical value of fulfilling the public interest in discharging official duties. As the Commentary on the (new) Criminal Code of Kosovo reads, "the criminal offense of abusing official position has the character of a general offense against official duty, based on the fact that most of the other offenses constitute a special form of these criminal offenses; therefore this offense has, in relation to other offenses, a subsidiary character, which means that this provision shall apply only if the actions of the offender would not be characterized by any of those offenses" [24].

[24] "Kodi Penal I Republikës Së Kosovës", Komentar, Botimi I", by Deutsche Gesellshaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn and Eschborn, Germany (hereinafter "Commentary"). In point 1, English translation, to the commentary of the said Article. "The issue here is about abuses in office, namely related to one's duty; the perpetrator of this criminal offense, through legal actions within the scope of his or her official duties uses his authorizations unlawfully, that is, the perpetrator of this criminal offense unlawfully uses the real

The main differences between the old and the new versions of the criminal offence are in the previous aggravating circumstances contained in paragraphs 2 and 3, depending on which the sanction would also be aggravated. The application of such circumstances depends obviously on the established facts.

Considering the facts established in relation to this criminal offence it is possible to say that it has been committed by the defendants N. K., A. Z., S. H. and S. F.. As stated in the facts **(see C.1.28**, among others**)** "*any payment, in different ways and stages along the process, had to be authorised by the head of the procurement department, had to be certified and allowed by the certifying officer and by the permanent secretary, as any of these officials alone was not able to enable the payment and both the certifying officer and the permanent secretary had legal power to stop any payment against the contract or the law. The defendant K., as head of the procurement department, signed the order for purchase (...) dated 25/07/2005 related to the payment order for obligation and payment with the reference 20406254, and the commitment number 33994, dated also 25/07/2006, through which "Eltoni" company was paid the "invoice" no. 39 dated 21/07/2006, in the amount of 135,278.20 Euros. At the time, on 25/07/2006, the certifying officer was the defendant S. H. and certified the form in that capacity and the acting permanent secretary was the defendant A. Z. who did not stop such payment. The defendant S. F. did not stop or report, and therefore allowed, the said payment: as Chief of Division for Enterprise Support and Regional Development, as he was involved in the Department of Private Sector Development to which the project belonged, did not carry on his managing duties on the project as he was also tasked with the supervision of the project*".

From the facts it is possible to conclude for the direct specific intent, the defendants acted with *intent to obtain an unlawful material benefit for (...) a business organization* ("Eltoni" company) and *abused* their *official position,* also by not executing *official duties* as per the law. In the panel's view, a different interpretation might lead to a situation where people with different tasks within different organizations (or in this case, officials at the "paying entities") might

and legal opportunities linked with his or her official position, by performing acts that, by their nature, are not official, but ordinary criminal acts. The act of the commission has been defined in an alternative manner and the criminal offense appears in three forms, namely: misusing official position (abuse) or authority, exceeding the official authorizations and failing to perform official duties (failure to perform official obligations)" – points 3 and 4.

even feel not responsible for performing their duties properly, namely, checking the contents of the documents presented - to primarily assess whether they can be considered accurate or not; it might lead to complete absence of responsibility in performing official duties.

This is connected actually to the main line of defence as somehow the fact that someone had already failed in discharging duties would justify that the next responsible person along the chain might fail as well… that is why so much emphasis along the trial was put on the sequence to allow a payment but in fact every person is responsible for his or her own acts regardless others have failed – in spite of, to some extent, the fact could be considered as mitigating but not to the extent envisaged by the defence. In this regards the court notes (and some of the names have been mentioned already along this judgment) that other persons might as well have been indicted, as already said, and it is worth noting how the version would change from individual to individual (sequence of signatures, etc.) and even the same person has stated different things along the case, including, for instance, whether it was or not an advance payment…

As said before, the defendants N. K., S. H., A. Z. and S. F. violated the law [25]. They violated the contract with the economic operator, violated their own employment contracts and the law.

The duties of the director of public procurement (N. K.), supervised by the Permanent Secretary (A. Z., acting), include: "(…) plans, processes, supervises and effectively and efficiently implements the goods and services supply as requested by respective departments and agencies; (…) strictly respects procurement procedures; follows up the delivery of goods and services based on contracts and agreements; (…) monitors and executes the contracts; controls the invoices in comparison to the records on goods and services received, in compliance with contracts and agreements (…)" [26], and in accordance with the law on procurement notably section 1, 2, 21, and 22 Law 2003/17 [27] and Law 2003/2002 (UNMIK Regulation 2003/17) [28].

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[25] For systematic reasons the defendant A. Z. will now be mentioned in the third place.

[26] As per his contract and "Job title: Director of Procurement Department".

[27] These provisions will be addressed again about count 3. The provisions read as follows: section 1: "*Purpose. 1.1 The purpose of the present law is to ensure the most efficient, cost-effective, transparent and fair use*

According to Sections 21, par. 1, and 22, pars. 1 and 2, of the L. 2003/17, "*Every procurement activity of a contracting authority shall be conducted by its Procurement Officer, except in those cases where the Government has assigned the procurement activity to the PPA in accordance with the present law (...).Every procurement activity of a contracting authority shall be conducted by its Procurement Officer, except in those cases where the Government has assigned the procurement activity to the PPA in accordance with the present law. (...) The Procurement Officer of a contracting authority shall be responsible for ensuring*

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of public funds, public resources and any other funds and resources of contracting authorities in Kosovo by establishing the requirements and rules that shall be observed, the procedures that shall be followed, the rights that shall be respected, and the obligations that shall be performed, by persons, economic operators, undertakings, contracting authorities, works concessionaires, and public bodies conducting, or involved, participating or interested in, a procurement activity involving or relating to the use of such funds and/or resources. 1.2 The present law also aims to ensure the integrity and accountability of public officials, civil servants and other persons conducting or involved in a procurement activity by requiring that the decisions of such individuals, and the legal and factual bases for such decisions, are free of any personal interest, are characterized by nondiscrimination and a high degree of transparency, and are in compliance with the procedural and substantive requirements of the present law. 1.3 Finally, the present law is intended to promote the establishment of an institutional culture of unbiased, ethical and materially disinterested professionalism among all public officials, civil servants and other persons conducting or involved in a procurement activity by requiring such individuals to conduct themselves in a manner that is informed solely by the objective of achieving the most efficient, cost-effective, transparent and fair use of public funds and public resources while strictly complying with the procedural and substantive requirements of the present law"; section 2 reads "*Scope. 2.1 The present law shall apply to the procurement activities of contracting authorities and works concessionaires, as those terms are defined herein. Such authorities and concessionaires are required, in the conduct of their procurement activities, to observe and comply with the applicable procedural and substantive requirements of the present law. 2.2 The present law also applies to all persons, economic operators, undertakings, as those terms are defined herein, involved, participating or interested, directly or indirectly, in a procurement activity covered by the present law; such persons, operators, undertakings are also required to observe and comply with the applicable procedural and substantive requirements of the present law*" and section 22: "*Procurement Officers to Conduct Procurement Activities 22.1 Every procurement activity of a contracting authority shall be conducted by its Procurement Officer, except in those cases where the Government has assigned the procurement activity to the PPA in accordance with the present law. 22.2 The Procurement Officer of a contracting authority shall be responsible for ensuring that all procurement activities of such contracting authority are conducted by the Procurement Department and in strict compliance with the present law. 22.3 The Procurement Officer of a contracting authority shall be responsible for immediately reporting to the PPRC any procurement activities of such contracting authority that are inconsistent with the present law. 22.4 If a Procurement Officer becomes ineligible to hold that position for a reason specified in Section 21.3, the contracting authority shall immediately remove such person from that position and shall notify KIPA and the PPRC of such action. If a Procurement Officer is a civil servant and such person becomes ineligible to hold a civil service position under the law and rules governing the civil service, the concerned contracting authority shall notify KIPA and the PPRC of such person's ineligibility. In either case, the body that issued such person's "procurement professional certificate", whether KIPA or the PPRC, shall immediately revoke and cancel such certificate*".

[28] Repealed later by Law 03/L-048, dated 13 March 2008.

that all procurement activities of such contracting authority are conducted by the Procurement Department and in strict compliance with the present law" [29].

Following these provisions and those of Sections 1 and 2 of the same law (quoted in previous footnote) it is clear the head of procurement, the defendant N. K., had to enforce and comply with the law on procurement, tasks which he did not fulfill (on the contrary…), as the contract explicitly forbids any advance payment, as already explained and authorised a payment exceeding even the situation that held the stamp by "North" company, according to which there were 50.000 Euros to be deducted (as per the document with the date 21/07/2006, number 33 "situacioni I dyte" clearly stating that only 85.278,20 Euros had to be paid, not 135.278,20 Euros).

In its turn, in relation to the duties of the (acting) certifying officer (S. H.) it is important to take into consideration that according to the Law 2003/02, section 11, par. 2, "*the budget's organization Permanent Secretary (...) shall provide the Ministry of Finance and Economy with a written notice specifying the name of the individuals appointed to serve as the budget's organization (...) Certifying Officer (...)*" and, par. 4, "*the (...) Certifying Officer of a budget organization shall be accountable to the budget organization's Permanent Secretary (...)*" and according to Article 8 ("Internal Controls – Role of Key Delegates) point 8.6 of the Treasury Financial Rule – Number 01 – Public Internal Financial Control, in force as of April 2006, the tasks of a certifying officer are: "*8.6 Certifying Officer (appointment by CAO in accordance with Law on Public Financial Management and Accountability and financial rules) 8.6.1 A Certifying Officer is appointed by the CEO in accordance with the Law on Public Financial Management and Accountability. The Certifying officer shall report to the budget organization's CEO (Permanent Secretary). (...) 8.6.2 In relation to the expenditure of public money, prior to the submission of document to Treasury for the payment of such expenditure, the* ***Certifying Officer shall be responsible for reviewing the documentation associated with the expenditure*** *to identify any evidence of non-compliance with the following: (a) that a procurement has been conducted in*

[29] Subsequently, Article 13 of Law no. 03/L-048 on Public Financial Management and Accountability (par. 1, "*each budget organization, autonomous executive agency and public undertaking shall have a Procurement Officer, who shall be responsible for conducting the budget organization's procurement activities in accordance with the Law on Public Procurement*").

accordance with the Law on Public Procurement, (b) ***that the contractual terms have been fulfilled before payment is made****, (c) the payment request is coded to the correct expenditure sub-item in the expenditure classification; (d)* ***a properly rendered invoice was received****; (...)*" [30] [**emphasis added**].

Not to mention that the defendant S. H., in relation to this case had intervened in other capacities (admitting officer, committing officer – which to some extent increases his awareness duties), he failed to review the documentation concerning the payment and the contract and certified the procedure and signed the form that would be used to execute the payment.

Following Section 4 (definitions) of Law 2003/17 [31], as far as the defendant A. Z. is concerned, "*Chief Administrative Officer or CAO means, with respect to a budget organization, (i) its Permanent Secretary (...) In the case of a public undertaking, these terms mean the chief executive officer, managing director or other person having principal day-to-day administrative authority over its operations and personnel*".

Also, according to the UNMIK Regulation 2001/19, section 5 par. 1 "*The Permanent Secretaries of the Ministries and chief executive officers of the Executives Agencies shall be appointed by the Senior Public Appointments Committee. Such officials shall have the necessary competence, experience and high personal integrity* ***to manage the resources for which they are responsible***" and, par. 4, *"(...) the Permanent Secretaries of the Ministries and the chief executive officers of Executive Agencies shall be responsible respectively for: (a) The* ***overall administration and management*** *of the Ministry or Executive Agency and* ***ensuring that the functions entrusted to it are implemented****; (...) d) The*

[30] Later Article 14, pars. 1, 4 and 5 Law 03/L-048 would also state that on Public Financial Management and Accountability " *(...)* ***The Certifying Officer shall (…) report to the Chief Administrative Officer. The Certifying Officer shall be responsible for a) ensuring that the applicable terms of a public contract have been fulfilled before any payment under such contract is made or authorized****; and b) ensuring that the expenditure of public money under any public contract is done in accordance with the FMC Rules. The Certifying Officer shall also perform any other task required of a Certifying Officer under the FMC Rules. 14.5 The Certifying Officer shall identify and promptly report in writing all events of non-compliance to the Chief Administrative Officer, the CFO and any other senior official of the budget organization, autonomous executive agency or public undertaking. Instances of non-compliance with the Law on Public Procurement shall also be reported to the Auditor General (…)*" [**emphasis added**].

[31] Later repealed by Article 1 Law no. 03/L-048 on Public Financial Management and Accountability, dated 13 March 2008.

effective and efficient management of resources provided to the Ministry *(...)*" [**emphasis added**] [32].

Apart from the provisions already mentioned, according to point 4.2.1 of the Treasury Financial Rule – Number 01 – Public Internal Financial Control, in force as of April 2006, "*Under the Law on Public Financial Management and Accountability, the Chief Administrative Officer is the Permanent Secretary of the concerned budget organization or, if the budget organization has no Permanent Secretary, the budget organization's Chief Executive Officer*" and pursuant to point 4.2.3 a) and d) "*According to the Regulation 2001/19, the Permanent Secretary of a Ministries shall be directly accountable to the relevant Minister or, in the case of an Executive Agency, the Minister or other authority (as may be set out in the legislation establishing the Executive Agency).* ***The Permanent Secretaries (CEO) are, under the Law, responsible for*** *establishing internal controls. As an example, section 5.4 of the Law states the Permanent Secretary (CEO) is responsible for: (a)* ***The overall administration and management of the Ministry or Executive Agency and ensuring that the functions entrusted to it are implemented****; (...) (d)* ***The effective and efficient management of resources*** *provided to the Ministry or Executive Agency*" [**emphasis added**]. Also, according to the points 7.2.1 and 7.2.2., a) and c), "*While each employee has a responsibility for good financial management, of all civil servants,* ***the Chief Administrative Officer is ultimately accountable for the outcomes and performance of the budget organization****. Sound internal controls and a properly functioning accountability framework is (a) necessary for efficient and effective operation and (b) the only mechanism by which the Chief Administrative Officer can accept the risks associated with delegating controls whilst remaining accountable for outcomes (...).7.2.2 Under*

[32] Later, Article 10 of Law 03/L-048 would read: "***A Chief Administrative Officer shall have principal legal responsibility for ensuring that his/her budget organization, autonomous executive agency or public undertaking, and its personnel, thoroughly and adequately comply with, observe and implement all applicable provisions of the present law and the FMC Rules****. 10.2 A Chief Administrative Officer shall, inter alia, be specifically responsible for a)* ***establishing internal financial controls within the budget organization****, autonomous executive agency or public undertaking in accordance with the FMC Rules, b) delegating functions associated with the collection and expenditure of public money in accordance with the FMC Rules, c)* ***establishing an accountability framework for assessing and managing the performance of any personnel who are delegated such functions****, d) establishing and applying internal disciplinary measures to remedy situations*" [**emphasis added**].

the authority of this financial rule, ***the Chief Administrative Officer is responsible for****: (a) Implementing an internal financial control structure in the Budget Organization which provides* ***efficient and effective operations, protecting resources against loss due to waste, abuse, mismanagement, errors, fraud and other irregularities and is consistent with the with the Law on Public Financial management and the current financial rules****, including specific elements outlined in section 2.3 above. (...)(c) Developing a functioning accountability framework, by (1) implementing internal performance and financial reporting, (2) devolving authority to managers, and (3) by implementing systems, bodies and processes for assessing the performance of the CFO and other managers* ***to ensure*** *that the objectives of the Budget Organisation are being met;* ***proper use and handling of public money, compliance with relevant laws and financial rules, compliance with instructions for budget planning and execution****, and that the actual use of public money reflects that budget plans approved by the Assembly and SRSG (and Municipal Assembly) (...)*".

The defendant Z., who was acting permanent secretary, was above in the hierarchy and did not stop the authorised payment and therefore violated the law and his duties, and therefore allowed it. With less intensity in the criminal liability (which will be considered in due time), but holding it, it is the defendant S. F., as he also did nothing to stop or to report, and therefore allowed, the said payment: as Chief of Division for Enterprise Support and Regional Development, as he was involved in the Department of Private Sector Development to which the project belonged, did not carry on his managing duties on the project as he was also tasked with the supervision of the project and like the others violated the law on procurement by not making sure the expenditure of public funds was being made in accordance with the applicable rules, because as far as the expenditure of public money is concerned, "*Public money shall only be used for approved public purposes. No public authority, budget organization, person or undertaking may divert, misapply, improperly dispose of or improperly use public money (...). An expenditure or other use of public money shall only occur from appropriated and allocated funds and only in conformity with the process that, in accordance with Section 35.2, has been established by the Financial Rules*" (Article 15 of the same Law) and the contract did not allow any percentage for advance payment which leads to the conclusion that public money was spent against the law.

Again the court notes that in this case many things failed, the supervising entity "North" (that also had to assess the execution of the works in the light of the contract, but was also contracted directly by the same entity involved in the tender… the Ministry of Trade and Industry), the overall execution and supervision of the contract; the prosecution indicted only for some facts and only some of the persons involved.

The criminal liability is concurrent with civil liability; it is not an argument to say that there is no criminal liability because the case, from a civil point of view, has been decided and has become final and "Eltoni" company has been convicted to reimburse the Ministry of Trade and Industry. The civil liability does not prevent, itself, the existence of criminal liability as the juridical value underlying the criminal offence goes beyond the material damage itself. The criminal system is always the *ultima ratio* of a Rule of Law System and it goes beyond the civil liability when core values of the society are endangered or violated.

Article 31 of the C.C.K., on co-perpetration, states that "*when two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense*".

Co-perpetration is a very complex concept, subject to different doctrinal approaches; the one encompassed in Article 31 C.C.K. is very broad [33]. In the most obvious, clear form of co-perpetration, there must be a previous and true agreement, whereas on the other forms this "agreement" can be only **implied** [34] but, in both cases, the "participating" or "substantially contributing" still has to

[33] In the same way, see point 1 of the Commentary to Article 31 C.C.K. About "objective and subjective connection", points 6 and 7 ["6.*Objective connection is that each collaborator should undertake an action in which contributes to commission of criminal offense. All actions that are taken by the collaborators regardless whether they undertake at the same time and in the same place, should be related among them and directed in order to be achieved the same result, in order to be caused the specified consequence. With other words, the consequence of criminal offense should be the joint result of actions of all collaborators. 7 Subjective connection is that all collaborators should be aware that in commission of specified criminal offense will take part, will act together in different ways* (…)].

[34] See point 18A, in fine, of the Commentary to Article 31 C.C.K, "*based on this it results that the co-perpetration can be expressed even in cases when there was no previous agreement but at the meantime during the commission has been expressed. Regarding the existence of co-perpetration either the lawmaker does not foresees the agreement as necessary condition*".

lead to an objectively joint contribution to the commission of the same criminal offence [35]; it is required therefore that in the light of the facts it is possible to come to the conclusion that the individuals wanted to execute **the same** criminal offence, that a **given result** might be achieved as a consequence of their act / omission.

Consequently, there is no need for an express agreement, as a **conscious collaboration** in the activity of others [36] in order to fulfill, or complete, the criminal offence will suffice to the co-perpetration. There is co-perpetration, despite the fact there was no express agreement, when the circumstances in which the individual acted or omitted to act indicates that there was an implied agreement. **This implied agreement is based on the existence of a conscious willingness to collaborate, assessed in the light of common experience [emphasis added].**

This is a case of "successive co-perpetration", cases where another person joins a person who is committing the criminal offense, and, by his or her acts, participates in committing that criminal offense [37], but acts can also be omissions, "Co-perpetration at criminal offenses by omission of action is shown in cases when two or more persons together are obliged to undertake an action but they do not undertake it" [38]. It is also a case where acts are comprised by actions and omissions, the acts of approving by signing (K. and H.) and omissions of fulfilling the duties as officials, namely the duties of ensuring that every payment is being in accordance with the law and the contract (Z. and F.).

There is no need of repeating at this point what was already said about the way they violated their duties and legal provisions.

Finally, this kind of procedure, to pay in advance when the contract is not allowing it, is unacceptable as it undermines the sense of responsibility, of fulfilling the public interest and the law on procurement; it can also be said that it

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[35] See points 15 and 16 of the Commentary to Article 31 C.C.K., "(…) together commit their joint offense, in which each of them gives an important contribution without which the criminal offense would not be achieved or would not be completed (…).Everybody's contribution is an important part of achievement of criminal plan. One's contribution is fulfilled with the other's contribution and all of them are liable for the whole committed criminal offense".

[36] See point 19 of the Commentary to Article 31 C.C.K. about the concept of "necessary co-perpetration".

[37] See point 22 a) of the Commentary to Article 31 C.C.K.

[38] See point 22 c) of the Commentary to Article 31 C.C.K.

makes redundant to have in the contract a requirement related to the contract performance, the guarantee of 10% of the contract value (each payment).

-**Misuse of economic authorisations (contrary to article 236, pars. 1.2 and 2, Provisional C.C.K.)** – defendant H. B. **(count 1)**

Article 236, par.1.2 and 2 C.P.C.K. read as follows: "*(1) A responsible person within a business organization or legal person which engages in an economic activity shall be punished by imprisonment of six months to five years if he or she commits one of the following acts with the intent to obtain an unlawful material benefit for the business organization or legal person where he or she is employed or for another business organization or legal person:.2 Through the compilation of documents with a false content, false balance sheets, false evaluations, inventories or any other false representations or through the concealment of evidence falsely represents the flow of assets or the results of the economic activity* ***and in this way misleads*** **[emphasis added]** *the managing bodies within the business organization or legal person to err in decision-making on management activities; (2) When the offence provided for in paragraph 1 of the present article results in material benefits exceeding 100.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years*"

This criminal offence is now foreseen in article 290 C.C.K.; par. 2 remained unchanged and, apart from minor differences in the wording, the elements that are constituent of the criminal offense are the same. The punishment, however, is now graver, as a fine is provided for together with the imprisonment – whose limits remain the same.

Hence, and as the new Code might never be considered more favourable, all references will be made to the previous version of the criminal offence, in force at the time.

The juridical value protected by this criminal offense is certainty in conducting business, which includes accuracy and honesty. As far as the perpetrator is concerned, this criminal offence can be perpetrated only by a person who is responsible within a business organization or legal person. The *mens rea* is

the direct intent aiming at obtaining an unlawful material benefit; the criminal offence does not cover sheer negligent acts, mistakes, as intent is required.

In this case, and concerning the objective elements of the criminal offence, the charge refers to the second and, considering the indictment, the reference is to the modality "*through the compilation of documents with a false content, false balance sheets, false evaluations* (…)".

Two things are worth emphasizing, not only a specific and direct intent is required to commit this criminal offence, but also the material acts must be adequate and suitable to the result envisaged by the (attempting) perpetrator, as the criminal offence reads "***and in this way misleads the managing bodies***" **[emphasis added]**, meaning that not only the means used must be adequate and suitable to lead to the result as they in principle suffice to mislead, to err in the decision making process that will end in an (unlawful) material damage to the entity or organization to which the documents were presented.

As per the established facts (hereinafter summarized an in the enacting clause, despite the above entire description of them), "*during the execution of the contract for the projection and construction of infrastructure in the industrial park in Drenas Nr. MTi/22/07/2005, in cooperation and coordination with at least other defendant official in the Ministry of Trade and Industry, the defendant N. K., as head of the procurement department and signer of the contract dated 07/10/2005, and not excluding other officials in that Ministry, the defendant B. presented to the Ministry of Trade and Industry, on behalf of his company "Eltoni", documents with the logo and stamp of that company, and bearing his signature, documents that were stating facts that were not true in relation to the works performed and their cost, knowing that the contents of the documents presented were false for not corresponding to the reality and would be used to formally enable the advance payment and other payments, including those where the advanced payment would be paid-back by deduction in instalments, by the Ministry of Trade and Industry concerning the said contract of projection and construction of the Industrial Park in Drenas. Namely, the defendant B. has presented to the Ministry of Trade and Industry the following documents:* ***A)*** *- dated 31/05/2006, "Situacioni I Pare Avansuas", stating in row 6 amount of conducted work according to this situation: 156.321,80 Euros, in row 7 deducted based on the agreement: 15.632,18 Euros, in*

row 9 for the payment according to this situation 140.689,62; ***B)*** *- "Situacioni I Pare 20/06",without date, under items A, B, C work in the amount of 116.339,26 Euros plus 15% tax and total amount of 135.278,20 Euros;* ***C)*** *- dated 21/07/2006, "Situacioni I Dyte 3/2006", "document 33", stating in row 6 amount of conducted work according to this situation: 150.309,11 Euros, in row 7 deducted based on the agreement: 15.030,11 Euros, in row 8 for the payment it remains 135.278, 20 Euros, in row 9 advanced payment 140.689,60 Euros, in row 9A deducted from the present situation 50.000 Euros, in row 9B advance payment which remains to be deducted 90.689,60 Euros and on row 10 for the payment according to this situation 85.278,20 Euros and* ***D)*** *The invoice 39/06, dated 21/07/2006, produced on an "Eltoni" letterhead sheet, bearing two "Eltoni" stamps (one on the top and one at the bottom), stating works in the amount of 127.762,74 Euros, added by tax 15% in the amount of 22.546,11 Euros, in the total amount of 150.309,11 Euros, deducting from it 10% in the amount of 15.030,91 Euros, and claiming to be paid the total amount of 135.278,20 Euros. The defendant behaved in the way described above although he was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law*".

As mentioned earlier, in the indictment the Prosecution charged the defendant B. for misuse of economic authorisations (contrary to article 236, paragraphs 1.2 and 2, of the Provisional C.C.K.), but there is one constituent element to the criminal offence that does not correspond to the established facts ("***and in this way misleads*** *the managing bodies within the business organization or legal person to err in decision-making*" – **emphasis added**) and therefore the said criminal offence is not the one that was perpetrated, given that the said falsified documents were not what led (or to say it better, what "**misled**") to the payments; rather the documents were only the necessary means to give inside the Ministry of Trade and Industry (and later at the Ministry of Finance) an appearance that the payments were lawful, in line with the applicable laws and specially in line with the contract – by which advance payments were not allowed as the percentage for it was 0% and 10% was to be deducted as a guarantee.

Therefore, for the lack of one of the elements of the constituent offence of "misuse of economic authorisations", the court requalifies the facts (as per Article 360, par. 2, C.P.C.K., "*the court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act*"), the acts committed by the

defendant H. B. to the criminal offence of falsifying documents – pursuant to Article 332, par. 1, of the P.C.C.K., "*whoever draws up a false document, alters a genuine document with the intent to use such document as genuine or knowingly uses a false or altered document as genuine shall be punished by a fine or by imprisonment of up to one year*". The new law is not more favourable, as the foreseen sanction is now a "fine or by imprisonment of up to three years", Article 398 C.C.K..

Having come to this stage, and pursuant to Articles 90, par. 1, subparagraph 6 of the P.C.C.K., we see that the term to the statutory limitation is 2 years and the absolute bar on prosecution of the criminal offence of falsifying documents is 4 years, as per Article 91, par. 6. P.C.C.K. and such term of 4 years has already elapsed (on 21/07/2010), as the last document of the above mentioned documents [39] is dated 21/07/2006; the said term had elapsed even before the date on which the prosecutor issued a ruling to initiate investigations, 10/12/2011.

Therefore, accordingly, pursuant to Article 363, par. 1.3, C.P.C.K., the court rejects the charge related to this defendant in count 1 of the indictment.

-**Accepting bribes (contrary to article 343.1 Provisional CCK)** – defendants N. K., S. H. and S. F. **(count 2)**

In the previous version, art. 343., par. 1, P.C.C.K., the criminal offence was described as follows: "*(1) An official person who solicits or accepts a gift or some other benefit for himself, herself or another person or who accepts a promise of a gift or some other benefit to perform within the scope of his or her authority an official or other act which he or she should not perform or to fail to perform an official or other act which he or she should or could have performed shall be punished by imprisonment of six months to five years. (2) An official person who solicits or accepts a gift or some other benefit for himself or herself or another person or who accepts a promise of a gift or some other benefit to perform within the scope of his or her authority an official or other act which he or she should*

[39] We mentioned only these documents as the court should not go beyond the indictment, Article 360, par. 1, C.P.C.K., "*the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial*".

have carried out or to fail to perform an official act which he or she may not perform shall be punished by imprisonment of three months to three years. (3) An official person who, following the performance or omission of an act provided for in paragraph 1 or 2 of the present article, solicits or accepts a gift or some other benefit for himself, herself or another person in relation to such performance or omission shall be punished by a fine or by imprisonment of up to one year. (4) The gift or other benefit received shall be confiscated".

In comparison to the new version of the criminal offence, as per article 428 C.C.K., the former paragraphs 3 and 4 do not exist anymore. In relation to the two first paragraphs, there has been slight changes in the wording used and in the punishments provided for; in paragraph 1 of the current article 428 (new code) a fine has been added to the imprisonment (from 6 months to 5 years) and in paragraph 2 the punishment is considerably more severe, from 3 years to 12 years of imprisonment (apart from a fine), whereas before in the old code the foreseen punishment was only from 3 months to 3 years of imprisonment, without any fine. On the other hand, the new version comprises a new aggravating circumstance (current par. 3), "*when the offence under paragraph 1 of this Articles results in a benefit exceeding fifteen thousand (15.000) EUR, the perpetrator shall be punished by fine and imprisonment of one (1) to eight (8) years*".

In both versions, as to the perpetrator, it is a criminal offence that is not common but specific, meaning that the perpetrator must be an official, not anyone can commit this criminal offence.

The *mens rea* (*i.e.* the subjective element) is the intent. In both versions the criminal offense must be committed only with direct intent.

With regards to the manner of commission, this criminal offence, in both versions, can be committed by an act or by an omission.

The criminal offense protects the juridical value of the public interest in fighting corruption, "*all definitions define corruption as the abuse of public authority in order to obtain an unlawful benefit for the person who carries out this function*" [40]. It is envisaged that all officials in their official duties should take into

[40] Commentary, article 428, point 11.

consideration only their duties in order to protect the public interest, and never their own private or personal interests.

The criminal offence can be proper or improper: improper if the perpetrator's action or omission is not against the official (par.1) duties and proper if it is against, if it is a violation (par. 2).

The new law is not more favourable to any of the defendants, not only because a fine is now prescribed together with the imprisonment but also because the defendants K. and F. would fall, if the facts mentioned in the indictment were established, in the aggravated category of paragraph 3 of Article 428 of the new C.C.K. (and this is mentioned because the court is not bound by the legal classifications made by the prosecution, as already stated).

From the facts established beyond reasonable doubt it is not possible to say the said defendants have received gifts or benefits, bribes. It was only possible to establish that "during the execution of the contract of projection and construction of the industrial park in Drenas, one day whilst the defendant K. was together with (now witness) H.Z. having coffee at Hotel Palace in Mitrovica, upon idea of the latter, the defendant B. went there after having phoned and asking K. where they were, sat with them and talked about trivial things".

It is easy to understand, it is known that a meeting of an official person with a person involved in an ongoing contract may not be wise, may give rise to suspicions; the old saying applies obviously to officials, "it is not enough for Caesar's wife to be respectable, she must also appear to be respectable"…

-**Entering into harmful contracts (contrary to article 237.1 and 2 Provisional CCK)** – defendant N. K. **(count 3)**

Article 237 of the Provisional Criminal Code of Kosovo read *"(1) A representative or an authorised person of a business organization or legal person which engages in an economic activity who enters into a contract that he or she knows to be harmful for the business organization or legal person,* ***or*** *enters into a contract contrary to his or her authorisations and thereby causes damage to the business organization or legal person shall be punished by imprisonment of three*

months to three years. (2) When the perpetrator of the offence provided for in paragraph 1 of the present article accepts a bribe or causes damage exceeding 100.000 EUR, the perpetrator shall be punished by imprisonment of one to ten years".

In the new version, article 291 C.C.K., the second paragraph (aggravating circumstance if the action was the result of a bribe or if the damage caused exceed 100,000 EUR) kept the wording, whereas in the first the legislator has changed it in defining the perpetrator, having replaced the words "*a representative or an authorised person of a business organization or legal person*" for "*a responsible person*" – but the sanction remained the same.

As there are no changes that, in accordance with eventual relevant established facts, might raise the issue of the most favourable law, hereinafter all references will made to the version in force at the time, Article 237 P.C.C.K.

The juridical value protected by this criminal offense is the honesty in conducting business on behalf of an organization or legal person and to fulfill the public interest.

As far as the perpetrator is concerned, this criminal offence can be perpetrated only by a person who has the possibility of being responsible for the decision on behalf of an organization, "responsible", "authorised person". Therefore, again, in these regards, it is not a common criminal offense, rather a specific one (in the sense explained earlier).

The *mens rea* (the subjective element) is the intent, "knowing" (as in this particular offence the legislator has used the verb 'know') that the entered contract will be harmful, the "contract may be various, starting from **purchase** and sale, quality of goods, transport, control, shipment, **construction**, maintenance, and others, depending on the nature of the subject to contract entered into" [**emphasis added**] [41]. In respect of the issue of "knowing" and "intent", it is worth pointing out that the concept of "knowing" must be interpreted in accordance with the reasonable expectation of an ordinary citizen, something that due to his / her daily functions and tasks the individual should know, so he or she cannot rely on the excuse of not knowing the law – as the same applies to every law in general.

[41] Commentary, first point 1.

With regards to the manner of commission, this criminal offence, in both versions, can be committed only by an act, which is engaging in the contract, "it is the duty of these persons to act responsibly and to defend the interest of the organization or legal person who enters into a contract. The contract must be in the interest of the contracting party; otherwise the business organization would not have any interest on entering into the contract. So, the contract must not be harmful for a party, otherwise it would be in contradiction to the grounds and principles of the business organization [42]. (…) If they act **in opposition with certain authorization** and the contract is entered into to the detriment of the organization or the legal person, then it takes a character of the dangerous act for it, in the interest of which the contract is entered into consequently it is envisioned as criminal offense **[emphasis added]**" [43]. In fact, "this criminal offense is divided in two forms: a) as entering into harmful contracts and b) **entering into a contract contrary to the authorizations**" [**emphasis added**] [44] and it is worth noting that "the harm is not always material, it can also be not immaterial" [45]; "the other form of this criminal offense is when the perpetrator enters into a contract opposite to the given authorizations. For this form it is not required that the perpetrator has to know that the contract is harmful for the organization or the legal person" [46] and "The consequence of the criminal offense is the harm caused to the organization or the legal person. This consequence must be in the causal connection with the contract entered into, it means, from the moment of entering into the cumbersome contract it consequently resulted in causing of the offense. The harm may be material or not material caused to the organization or the legal person on whose account the contract is entered into" [47] .

The law also describes a different way of committing the criminal offense (*harmful for the business organization or legal person, or enters into a contract contrary to his or her authorisations and thereby causes damage to the business organization*"), if it is a contract **contrary to the authorisations** (provided for in the law) [**emphasis added**] then there must be a damage that is particularized ("*and thereby causes damage*"), it is not enough to say there is a damage, there

[42] Commentary, first point 2.
[43] Commentary, first point 3.
[44] Commentary, first point on the specific analysis of par. 1.
[45] Commentary, third point, *in fine*, on the specific analysis of par. 1.
[46] Commentary, fifth point, *in fine*, on the specific analysis of par. 1.
[47] Commentary, sixth point, *in fine*, on the specific analysis of par. 1.

must be evidence of the amount of it. Therefore, in such a manner of committing the criminal offence, *i.e.,* exceeding authorisations (namely those provided for in the law…), or acting "contrary" to them, a specif amount of damage is required. In this case no amount of damage was particularized or established.

The court is not bound by the legal classification done by the Prosecution in relation to the acts, facts, as Article 360, par. 2, C.C.K. states and what was said earlier in the analysis of such criminal offence is valid here.

In this count we are discussing the annex contract (the first of the two…) and the court notes in the first place, that such contract made by the defendant N. K. on behalf of the Ministry of Trade and Industry together with and "Eltoni" company makes no reference, at all, to any legal provisions or to any legal grounds that would allow it.

Furthermore, the trial panel, the court, is of the opinion that the unlawfulness of such "annex contract" is so blatant that it does not take a complex elaboration to see it and how the abuse of official authority, how the limits of the (legal) authorisations were exceed by the defendant N. K. in relation to the project and construction of the industrial park in Drenas benefiting the company "Eltoni" through the annex contracts without complying with the laws on procurement, without any (other) tender or, in other words, to transform a contract of 144.000 Euros / 69.825,25 Euros price per unit [but… without any mention to the number of units and despite the reference in the contract, point 6 of section 4, "this shall be a contract based on unit price and price offered for the project / lump sum (…)"] into a contract of 1.730.000 Euros and stipulate another "annex contract" in the amount of 14.580 Euros (see Articles 1 and 2 of the said annex contract dated 20/07/2006). All this when, in accordance with Article 34.2 d) of the Law on Procurement 2003/17 and only if all requirements set there were met…, the initial contract might reach 10% more, 144.000 Euros + 14.400 Euros = 158.400 Euros.

Despite the fact the court needs not to address every single argument used by the defence, what happened is against the logic underlying procurement, good governance, use of public funds in a transparent way: even the so called design and build projects that the defendant K. addresses in his closing statements has a lump sum as one of the elements of such contracts ("the price and payment structure of the contract is based on a lump sum with interim stage or periodic payments"; see,

for instance, "Design and Build Contract")[48] and in no-way, when it comes to public funds, it derogates the applicable laws on procurement. Contracts cannot be made against the law or in a specific way to create the appearance they are lawful; all elements must be there (as "number of units", "total value of the project", be it the case, and its object must be clear and transparent since the beginning, so applicants can submit proper tenders for evaluation…). There is no *carte blanche* or "free rein" when it comes to use public funds… Officials must abide by the law.

Any contract is by nature a material benefit for a company ("material benefit" and "profit" are different concepts and "material benefit" was the one used by the legislator), for a constructer, and the contracts to be entered by a public entity are governed by the Law on Procurement.

The court poses a rhetorical question, how could it be lawful, possible, to have a tender (with all details and procedures it implies) for a contract in the amount of 144.000 Euros (and price per unit 69.825,25 Euros, regardless no number of units is mentioned…) and have one in the amount of 1.730.000 Euros (or, if deducted 144.000 Euros, 1.586.000 Euros, or even 1.571.600 Euros if instead of deducting the amount of the winning bid, the initial contract of 144.000 Euros, the amount of 158.400 Euros was deducted) without a tender (and the contract notice in the open procedure mentioned no units), decided by a single person who takes the decision and signs it? This contract benefited "Eltoni" Company, as it was made without any tender and the State was deprived of knowing what other proposals might exist. What was the purpose of having a commission, not an individual, assessing the initial bids?

The Law on Procurement 2003/17, in force at the time, was completely ignored and its purpose blatantly violated by the defendant, as the said Law on Procurement states in it section 1 its purpose: "*1.1 The purpose of the present law is to ensure the* ***most efficient, cost-effective, transparent and fair use of public funds, public resources and any other funds and resources of contracting***

[48] "•Can be used on large or smaller scale projects, but generally where detailed provisions are necessary. •The Contractor is responsible for completing the design, as well as carrying out the works, and the employer must provide detailed documents to outline their requirements. •The price and payment structure of the contract is based on a lump sum with interim stage or periodic payments. •Provisions are included for collborative working, sustainability, advanced payment, bonds (advance payment, off-site materials, retention), third party rights and collateral warranties. •For use on both private and public sector projects. See also Public Sector Supplement. •Pre-Construction Services Agreement (General Contractor) (PCSA) and Pre-Construction Services Agreement Specialist) (PCSA/SP) can be used with this contract. •This contract can be used with the Framework Agreement (FA)" – In http://www.jctltd.co.uk/category/design-and-build-contract

authorities *in Kosovo by establishing the requirements and rules that shall be observed,* ***the procedures that shall be followed****, the rights that shall be respected,* ***and the obligations that shall be performed, by*** *persons, economic operators, undertakings, contracting authorities, works concessionaires, and* ***public bodies conducting, or involved, participating or interested in, a procurement activity involving or relating to the use of such funds and/or resources****. 1.2* ***The present law also aims to ensure the integrity and accountability of public officials****, civil servants and other persons conducting or involved in a procurement activity by requiring* ***that the decisions*** *of such individuals, and the legal and factual bases for such decisions, are free of any personal interest,* ***are characterized by*** *nondiscrimination and* ***a high degree of transparency, and are in compliance with the procedural and substantive requirements of the present law****. 1.3 Finally, the present law is intended to promote the establishment of an institutional culture of unbiased, ethical and materially disinterested professionalism among all public officials, civil servants and other* ***persons conducting or involved in a procurement activity by requiring such individuals to conduct themselves in a manner that is informed solely by the objective of achieving the most efficient, cost-effective, transparent and fair use of public funds and public resources while strictly complying with the procedural and substantive requirements of the present law***" [**emphasis added**].

According to section 2 of the same Law, on its scope, "***1.The present law shall apply to the procurement activities of contracting authorities and works concessionaires, as those terms are defined herein. Such authorities and concessionaires are required, in the conduct of their procurement activities, to observe and comply with the applicable procedural and substantive requirements of the present law****. 2.2 The present law also applies to all persons, economic operators, undertakings, as those terms are defined herein, involved, participating or interested, directly or indirectly, in a procurement activity covered by the present law; such persons, operators, undertakings are also required to observe and comply with the applicable procedural and substantive requirements of the present law*" [**emphasis added**].

Many other provisions might be quoted, but rather only references will be made to other provisions that were not abided by. The present situation does not fall in any of the exemptions set in section 3 and the relevant definitions are set in section 4.

Section 5 clarifies the concepts of cost-effectiveness and efficiency, as "all contracting authorities (…) are under an obligation to ensure that public funds and public resources are used in the most efficient and cost-effective manner taking in to account the objective and purpose of the procurement". It is important to bring the attention to the concept of **large value contracts**, as per section 18, par. 1, b), "*18.1 The following shall be considered as a "large value contract: (...) works or immovable property contracts the estimated value of which is equal to or greater than, or can be reasonably expected to be equal to or greater than, 250.000 Euros*" – significantly less than the amounts discussed in this case…

To comply with section 24, par. 1, the defendant K., as head of the procurement department in MTI signed the said annex contract.

Section 27 clearly states that "*for each proposed public contract, other than a minimal value contract, a contracting authority shall draw up a tender dossier providing all relevant information on the concerned contract, including all material terms and conditions thereof, the applicable procurement procedure, any applicable eligibility requirements or selection criteria, the procedure governing complaints and such other information as the present law may require or the contracting authority deems necessary (...)*" and the definition of "public contract" can be seen in section 4 and the definition of "minimal value contract" is set in section 18, par. 4, it is "*(...) any public contract the estimated value of which is less than, or can reasonably be expected to be less than 500 Euros*".

The facts do not fall in the scope of section 31 (general restricted procedures) and in any case the requirements were not met, in the same way section 32 does not apply.

Also, the legal requirements of section 33 were not observed as well as the ones set in section 34, as pursuant to par. 2 d) (i) "*a contracting authority may seek an authorization to use negotiated procedures without prior publication of a contract notice to conduct a procurement activity having as its object the award of (...) a service or works contract: for the performance or execution of additional services or works that were neither included in the original conception of a previously awarded works project nor provided for in the concerned works contract previously concluded, but which have, through unforeseen circumstances, become necessary for the performance of the services or works described in such project and contract. Provided, however, that this Section 34.2.d(i) may only be*

invoked if (a) the contract covering such additional services or works is to be awarded to the economic operator performing the original services or works and (b) such additional services or works cannot be technically or economically separated from the main contract without major inconvenience to the contracting authority. ***Provided, further, that this Section 34.2.d(i) may only be invoked to cover one or more contracts for additional services or works that, alone or in the aggregate, have a value that is not greater than ten percent (10%) of the value of the original contract***" [**emphasis added**].

It is not possible to say at one moment, because it is convenient, that the project (the tender) was only for "design" and for this purpose to say that it was "design and construction" - as in this case still there would not be any unforeseen circumstances; but, even if it was not like this, still the limit of 10% of the amount of the original contract cannot be ignored and violated…

Nevertheless, if all this was not enough, other facts speak for themselves: the date of the request to the Public Procurement Agency to enter negotiated procedures pursuant section 34 was 20/06/2006 and the amount requested was 14.580 Euros for additional works, claiming that the value of the contract was 1.700.000 Euros approximately; on 20/07/2006 the only contract existing to that date, the one dated 07/10/2005, had its amount changed from 144.000 Euros, price per unit (although there is not a single reference in the bid and later in the contract signed to how many units the project would take…) 69.825,25 Euros, to 1.730.000 Euros and finally, the additional works in the amount of 14.580 Euros mentioned in the request dated 20/06/2006 were not included in the first annex contract that followed, dated 20/07/2006, but only in the second annex contract, dated 28/09/2006…

Although it is not directly being addressed in this count, it is important to mention the sequence of commitment of funds and payments that took place along the said months, as per the facts established, this to say that in the panel's opinion conducting public contracts in this way is totally unacceptable, it is the same as if there was no law on procurement at all, (almost) everything was wrong and it seems that almost everything was being done, including paperwork ("the documents"…) just to create an illusion that things were being done in accordance with the law. What happened in this case also raises the rhetoric question of asking

what the initial procurement procedure was for, what was the usefulness of the bids that were evaluated by the commission to award the tender…

The purpose of the procurement legislation is to make sure this kind of situation will not happen and the public's money will be spent properly. In other words, if the law sets a threshold above which a new invitation to tender must exist (in this case it is 10%), it is precisely to make sure that public money will be well spent and the best bid will be awarded the contract. In this regards, we now quote ***a fortiori*** Section 6.6 of the Law 2003/17, and said ***a fortiori*** as here we did not even have a new procurement, open procedure leading to a tender: "*6.6 When conducting any procurement activity, all contracting authorities shall take reasonable and necessary measures* ***to ensure (i) the widest possible participation****, in light of the value and object of the procurement, of potentially interested economic operators; (ii) the proper publication, dispatch and/or availability, as required by the present law, of all notices, invitations, information and documents relating to a procurement activity; (iii)* ***the elimination of practices, criteria, requirements and technical specifications that discriminate in favor or against one or more economic operators****; (iv)* ***that all technical specifications and all selection and award requirements and criteria, including the relative importance of each such requirement and criterion, and the methodologies for selection and award, are specified in the concerned contract or design contest notice, the invitation to tender or participate****, and/or the tender dossier; (v) that no requirement, criterion or specification that has not been so specified is used in the selection and award process; and (vi) that the selected tender conforms, in all material respects, to the requirements, criteria and specifications that have been so specified*" [**emphasis added**].

Considering everything that was said, all elements constituent of the criminal offence of abusing official position or authority are present and the defendant N. K. committed it also in this count.

Concurrency of criminal offences

In the defendant N. K.'s case it is important to clarify that he has committed two criminal offences of abuse of official position or authority pursuant Article 422 C.C.K., not only one in continuation.

According to Article 81 C.C.K., "a criminal offence in continuation is constituted of several same or similar offences in a certain time period by the same perpetrator, and that are considered as a whole due to the existence of at least two (2) of the following conditions: 1.1 the same victim of the criminal offence; 1.2 the same object of the offence; 1.3 the taking advantage of the same situation or the same time relationship; 1.4 the same place or space of commission of the criminal offence or the same intent of the perpetrator".

Taking into consideration the established facts it is not possible to conclude the defendant committed only one, as a whole, criminal offense; only the condition "same intent of the perpetrator" is met, to materially benefit the company "Eltoni" and the law requires that at least two of the said conditions are met.

The general doctrinal approach to the concurrence of criminal offences is that, as a rule, the number of criminal offences corresponds to the number of offences committed, the exception is when the multiple offences (at least two) were committed in a way matching the conditions set in the law, when the manner of commission is identical, the general situation or framework is basically the same in a way that it is possible to assert that the perpetrator's guilt is substantially diminished. To assess this diminishment of guilt, the conditions set in the law are used; in short, the criminal offence in continuation exists only when to the individual (the perpetrator) only one judgment of guilt, not more, can be made, which is not the case, also because the manner of commission of the second offence was significantly different; it is another criminal offence, not a repetition, so to say, of the previous (that would be the case, for instance, in relation to other unlawful payments other than the one mentioned in count one).

The reason why the more lenient punishment in concurrent criminal offences is provided by the Law is to provide the court with the legal tools to allow it to be just in the light of the diminished guilt, it is not to give the perpetrator a discount for having practiced more than one criminal offence.

Brief references to forms of acquittal: due to evidence of being innocent and acquittal due to presumption of innocence

A final issue to be addressed is the two ways of being acquitted. A decision of acquittal can be reasoned in two ways: either because it has been established the accused did not perpetrate the facts he or she is charged with or because it was not possible to establish what exactly might, or might not, have happened, which occurs when the core facts remain unclear and only the part of the facts could be established. The latter may happen due to complete lack of evidence or because the evidence has not been produced in a manner that allows the panel to establish them beyond the reasonable doubt. When after the presentation of evidence the court is still in doubt, or at least in not beyond a reasonable doubt, the legal solution is to consider the fact as not established – as any doubt must be considered in the light of the principle *in dubio pro reo*.

Of course it is better for a defendant who is being acquitted to have the court pronouncing innocence, rather than simply stating that it was not possible to prove the facts beyond reasonable doubt and, therefore, that he or she is being acquitted as a direct consequence of the principle *in dubio pro reo*.

Sentencing

Count 1 (defendants N. K., A. Z., S. H. and S. F.): Abuse of official position as per Article 422 C.C.K., read together with Articles 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45 and 73 C.C.K.

According to Article 41 C.C.K., "the purposes of punishment are: 1.1 to prevent the perpetrator from committing criminal offenses in the future and to rehabilitate the perpetrator; 1.2. to prevent other persons from committing criminal offenses; 1.3. to provide compensation to victims or the community for losses or damages caused by the criminal conduct; and 1.4. to express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law".

The criminal offence of abusing official position or authority as per Article 422 C.C.K., is punishable with imprisonment from 6 months to 5 years, whereas,

taking into consideration the established facts, par. 3 of Article 339 P.C.C.K. would apply, according to which "when the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years". In this situation, as per Article 3.2 C.C.K., that encompasses the principle of the most favourable law, "*in the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply*". Therefore, as both the minimum and maximum of imprisonment set in the law are lower in the new code, it is obvious that the new law is more favourable, Article 422 C.C.K., "*imprisonment from 6 months to 5 years*". The punishment of imprisonment, as per Article 45, pars. 1 and 2, C.C.K., *"(...) may not be shorter than thirty (30) days or more than twenty five (25) years. (...) The punishment of imprisonment is imposed in full years and months (...)*".

Pursuant to Article 73, pars. 1 to 3, C.C.K., *"(1).when determining the punishment of a criminal offense, the court must look to any minimum and maximum penalty applicable to the criminal offense. The court must then consider the purposes of punishment, the principles set out in this chapter and the mitigating or aggravating factors relating to the specific offense or punishment. (2). The punishment shall be proportionate to the gravity of the offense and the conduct and circumstances of the offender. (3). When determining the punishment the court shall consider but not be limited by following factors: 3.1. the degree of criminal liability; 3.2. the motives for committing the act; 3.3. the intensity of danger or injury to the protected value; 3.4. the circumstances in which the act was committed; 3.5. the past conduct of the perpetrator; 3.6. the entering of a guilty plea; and 3.7. the personal circumstances of the perpetrator and his or her behavior after committing a criminal offense*". These are the factors the court will take into account, except the subparagraph 3.6, which does not apply here; on the contrary, the defendants never accepted their guilt, though in different ways.

The minimum and maxim are therefore 6 months and 5 years, respectively, unless the court aggravates or mitigates the punishment, pursuant to Article 74. In terms of aggravating circumstance, as this is the first conviction of the defendants, the court decides not to apply the aggravating circumstance from Article 74, par. 2. 9, "*any abuse of power or official capacity by the convicted person in the perpetration of the criminal offence*", as it is the core of the criminal offence itself

and, as pointed out, this is the first conviction. As far as the mitigating circumstances are concerned, par. 3 of the same Article, the court might consider, in relation only to the defendant Z., the fact that had not been his audit and reporting, probably these facts would not have been investigated. According to Article 75, par. 1.2, "*when the court finds that there are particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment*". However, it is worth pointing that only disclosed parts of the facts and never admitted his guilt along the trial with regards the whole set of facts, considering he was acting permanent secretary.

Article 73 C.C.K. provides the criteria to determine the punishment based on the facts: N. K. showed a high intensity of danger, injury to the protected values, as he is the procurement official, entered the initial and annex contracts, blatantly violated the applicable norms and his guilt, intent, is intense in both cases; A. Z. was the permanent secretary and as such has the greatest responsibility in overseeing the process as chief administrative officer but the court considers also that he was the one who enabled the investigation of the facts; S. H. has in his favour the fact that he was only replacing the certifying officer (who for identical acts, not to say worse, was not even indicted) and finally S. F. has somehow a lesser lever of criminal liability when compared with the other defendants and their roles (considering the contractual duties of the "North" company and also the duties of the other defendants). If on one hand all of them have no criminal record, on the other hand they are persons holding University Degrees (and in the case of N. K. and S. H. their current professions, as they are still public servants working at the Infrastructure Ministry and PTK internal inspections, respectively) and the general prevention of this sort of criminal offence in Kosovo could not be higher, as the citizens expect that officials abide by the law and their work aims at benefitting the country and citizens, no-one or nothing else.

Considering everything stated so far, established facts, norms and principles, the court determines the following punishments of imprisonment: N. K. 12 months of imprisonment, A. Z. 10 months of imprisonment, S. H. 8 months of imprisonment and S. F. 7 months of imprisonment.

Count 3 (defendant N. K.): Abuse of official position as per Article 422 C.C.K., read together with 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45, and 73 C.C.K.

Following the same norms, principles, facts and criteria mentioned above, the court applies a punishment of imprisonment of 18 months to the defendant N. K..

Aggregate punishment (defendant N. K.)

The aggregate punishment of the defendant N. K., pursuant to Article 80 C.C.K., has to be determined. "*If a perpetrator, by one or more acts, commits several criminal offenses for which he or she is tried at the same time, the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts*" (Article 80, par.1, C.C.K.), and "*the court shall impose an aggregate punishment in accordance with these rules (...) if the court has imposed a punishment of imprisonment for each criminal offense, the aggregate punishment must be higher than each individual punishment but the aggregate punishment may not be as high as the sum of all prescribed punishments (...)*" (Article 80, par. 2.2.. C.C.K.).

Pursuant to Article 80, par. 2.2. C.C.K., the punishment has to be determined between the minimum of 18 months of imprisonment and the maximum of 30 (12 + 18) months of imprisonment and it is hereby set in 26 months of imprisonment for the commission of two criminal offences of abuse of official position or authority, pursuant to Article 422 C.C.K.

Immediate execution *vs.* suspension of sentences

A sentence of imprisonment may be suspended pursuant to Articles 50 to 52 C.C.K., "*the purpose of a suspended sentence is to not impose a punishment for a criminal offense that is not severe when a reprimand with the threat of punishment is sufficient to prevent the perpetrator from committing a criminal offense*". The requirements for suspending a sentence of imprisonment are set in Articles 51 and

52, "*the court may impose a suspended sentence on the perpetrator in accordance with the provisions of this Code*", namely, "*in imposing a suspended sentence, the court shall determine a punishment for the perpetrator of the criminal offense and at the same time order that this punishment shall not be executed if the convicted person does not commit another criminal offense for the verification time determined by the court. The verification period cannot be less than one (1) year or more than five (5) years*" (Article 51, par.2, C.C.K.) and "*a suspended sentence may be imposed on a perpetrator of a criminal offense for which the punishment of imprisonment of up to five (5) years is provided for by the law (...) a suspended sentence may be imposed on a perpetrator as foreseen in paragraph 1 and 2 of this Article when the court imposes a punishment of a fine or of imprisonment of up to two (2) years, either for a single offense or concurrent offenses*" (Article 52, pars. 1 and 3, C.C.K.) and "*when determining whether to impose a suspended sentence, the court shall consider, in particular, the purpose of a suspended sentence, the past conduct of the perpetrator, his or her behavior after the commission of the criminal offense, the degree of criminal liability and other circumstances under which the criminal offense was committed*" (Article 52, par. 4, C.C.K.).

Despite the gravity of this kind of criminal offence, the demands posed by the general prevention, as explained above, the harmfulness for good governance and to the society as a whole, which lead to a very high need of preventing recidivism or the perpetration of alike criminal offences by other individuals, on one hand, and high need of punishment, on the other hand, it is also true that other factors have to be considered in relation to the defendants A. Z., S. H. and S. F. (as to the defendant N. K. it is not possible to consider a suspended sentence, as his punishment of imprisonment is higher than 2 years).

Among these factors we can point out that the case many years have elapsed since the commitment of the facts and up to this moment there is no news they have in the meantime committed other criminal offences; it is their first confrontation with the formal system of control, which is the criminal law.

A factor to be considered here is their current professional activity, as H. (graduated in economics) still holds a public servant position, as said (at PTK internal inspections). However, the defendant Z., in this regards, is currently

economist, auditor and university teacher but this defendant, and the defendant F. is free-lancer consultant.

Their personal and family conditions also have to be considered; in the case of the defendant H. he also has two young children (1 year and 5 months and 3 years old) and also F. is father of two children (8 and 10 years old) who need a father to raise them. The children of the defendant Z. are grown up (28, 32, 34 years old).

The main goal of the criminal system is to prevent, to avoid the (re)occurrence of criminal offences and to educate, to rehabilitate, rather than punishing, *stricto sensu*, the perpetrators. As the court believes the main goals of a judgment can be achieved also with a suspended sentence, the court will impose suspended sentences, pursuant to Article 52, par.2, C.C.K., and the punishments shall not be executed if the convicted persons do not commit another criminal offence for the verification time. The court sets the verification period in 2 years for the three defendants.

Pursuant to Articles 52, par. 3, and 59 C.C.K, the suspension also includes the obligation of refraining from changing residence without informing the probation service.

The court does not apply also the obligation of compensation as Article 59.1.12 C.C.K. does not allow compensation to a third entity (as the fire brigade, a home for abandoned children, etc.), only to the victim (the Ministry of Trade and Industry, the budget of Kosovo) – as the material benefit (that leads to the concept of "restitution") was established as having occurred to "Eltoni" Company (not to the defendants themselves) and the civil decision convicting "Eltoni" (owned by H. B.) in the amount of 45.000 Euros plus interest has become final.

Accessory punishment(s)

In relation to an accessory punishment to the defendant N. K. (whose sentence is not suspended), the court decided not to impose the accessory punishment foreseen in Article 62, par. 2.1, read together with Article 65 C.C.K. "*prohibition on exercising public administration or public service functions*".

Confiscation of objects

There are no objects listed in the indictment subject to forfeiture.

Property claim

The property claimed, compensation for damages, filed with the Court by the Ministry of Trade and Industry on 22 May 2012 was grounded in regards to the "defendants which by their action caused the damage to the MTI, requested that the court assigns the contribution of each defendant and in accordance with that contribution to assign the level of damage to compensate. However, if the specific individual damage could not be established, then the defendants should be held as joint debtors and compensate the MTI in the amount of 45000 Euros, in joint liability".

This claim has to be rejected as the said amount was the object of a civil claim that is already adjudicated, by a final judgment. On 22 May 2012 the claimant could not ignore that in the case number 164/2008, by a judgment dated 04/05/2011, the Supreme Court of Kosovo had refused as ungrounded the appeal of the respondent "Eltoni" company and confirmed the ruling of the Commercial Court of the District of Pristina, case number 272/2007, dated, 18/06/2008, in which the claimant was also the Ministry of Trade and Industry, in Pristina, against the respondent NNP "Eltoni" and the court had adjudicated in favour of the claimant and as a consequence the respondent "Eltoni" was convicted to return to the claimant the amount of 45.000,00 Euros with the annual interest of 2,5%, commencing on 19/04/2007, up to the final payment in the term of 8 days, from the day the judgment would become final (04/05/2011); if failed to do so, there would be a compulsory execution. The claimant cannot claim in the criminal proceedings the same amount that already claimed in the civil court and already adjudicated by a final judgment.

The costs of the proceedings

Pursuant to Article 450 C.P.K. the costs of the proceedings shall be paid by the defendants who were convicted. Pursuant to Article 450, par. 2.6, the scheduled amounts are 150 Euros to each of the defendants, in the total amount of 600 Euros.

Final

The court, *ex officio*, sees no need of announcement of this judgment (enacting clause) in the press or radio or television, Article 365, par. 1.1.6, C.P.C.K, to protect the values of Justice and Public Interest

Until de final conclusion of the proceedings, any change in the address of any participant has to be reported to the court, in accordance with Article 368, par. 3, C.P.C.K.

Proceed in accordance with the procedure provided for in Articles 474, par. 3, and 369, pars. 3 and 4, C.P.C.K.

Legal remedy: Pursuant to Articles 374, par. 1.1, and 380, par. 1, an appeal against this judgment may be filed within 15 days of the day its copy has been served to the parties. The appeal should be addressed to the Court of Appeals through the Basic Court of Pristina.

Done in English (authorised language), in Pristina on the 21st of September 2015,

The Presiding Judge

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(EULEX Judge Jorge Martins Ribeiro)