DISTRICT COURT OF PRISTINA

P Nr. 462/09

IN THE NAME OF THE PEOPLE

The District Court of Pristina, in the trial panel composed of:

EULEX Judge, Mr. Ferdinando Buatier de Mongeot, Presiding Judge
EULEX Judge, Mr. Francesco Florit , Panel member
Local Judge, Mr. Nehat Idrizi, Panel member

Assisted by the court recorder Christin Nilsson, in the criminal case against:

OVE JOHANSEN, Norwegian citizen, DOB 4th December 1962, POB Kristiansand, Norway, resident in Podgorica, Montenegro, currently in detention on remand at Prishtina Detention Centre since 09th July 2009,

Indicted by the Special Prosecutor Office on 4th November 2009 for the criminal act of Abusing official position, in co-perpetration Articles 339 paragraph 3 in connection with Article 23 of CCK, where material benefits exceeds 5000 Euro, punishable by imprisonment up to eight years, formerly Article 210 paragraph 4 of the Criminal Law of Kosovo(CLK) punishable by one to ten years where the material benefits exceeds 30.000 dinars read in conjunction with article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (complicity)

After having held the main trial on 15th, 27th and 29th of April , 07th of May, 28th and 29th of June and 06th of July 2010, in the presence of the EULEX Special Public Prosecutor Mr. Joachim Stollberg and of the Kosovo Special Public Prosecutor Mr Faik Halili, the accused and his defence Counsel Mr Betim Shala, after the panel deliberation, publicly announces the following:

VERDICT

OVE JOHANSEN is found guilty of the criminal offence of Abusing Official Position in co-perpetration, as described by article 339 paragraph 3 in connection with paragraph 1 of the CCK and article 23 of the CCK, because:

Between July 2002 to March 2003, in Prishtina, Ove Johansen acted as representative of Norway Invest R&O AS and as de facto *manager of the Kosovo based Company Norway Invest, related to "Norway Invest R&O AS", aiming at the creation and implementation of a digital network called TETRA in partnership with PTK. During the period between January and March 2003 Ove Johansen, in the above described role and in co-perpetration with Leme Xhema, Mustaf Neziri, Roger Reynolds and Ronny Sorensen, with the intention to obtain an unlawful material benefit for himself or anyway for Company Norway Invest, substantially contributed to the criminal conduct of Leme Xhema, who abused her official position as PTK General Manager by issuing an unlawful payment order of 300.000,00 Euro to the bank account of Company Norway Invest. Ove Johansen did so by participating in the necessary preliminary arrangements and invoicing for such unlawful payment, as well as in the issuance of a subsequent unjustified invoice labeled after the non existing company "ARTET". For her actions, Leme Xhema has been already convicted with a final sentence. Such transfer caused a loss of 300.000 Euros to PTK and correspondent financial gain for the beneficiary of the payment.*

Therefore, pursuant to 339, paragraph 1 and 3 and 66 paragraph 1 n. 2) CCK,
OVE JOHANSEN is sentenced to two years of imprisonment for the criminal offence described above.
Pursuant to Article 41, paragraph 1 point 1, 42, 43 and 44(1),(2),(3) of the Criminal Code of Kosovo the sentence against Ove Johansen is suspended;
the punishment shall not be executed if the defendant does not commit another criminal offence for the period of three years;
the punishment shall be executed if within the time period of two years starting from the date when the judgment becomes final Ove Johansen does not compensate the damage caused to PTK at the amount of 300.000 Euros;

Pursuant to Article 73 of the CCK the time spent in detention on remand from the date of 09 July 2009 until today and the time spent in detention on remand in the Republic of Montenegro from 05 April 2007 until 26 April 2007 shall be included in the amount of punishment.

Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) Ove Johansen shall pay the costs of the proceedings. The provisions of Article 100 paragraph 2 of the KCCP shall be complied with and a separate ruling on the amount of the costs shall be issued.

Pursuant to art. 393.2.4 KCCP, detention on remand against Ove Johansen is cancelled and his immediate release is ordered as per the attached ruling.

REASONING

1. Procedural History

On 04 November 2009, the public Prosecutor filed an indictment (PPS no.12/09) with the District Court of Prishtinë/Priština against Ove Johansen, for the criminal act of Abusing of official position contrary to article 339 paragraph 3 punishable by the imprisonment up to eight years, where material benefits exceeds 5000 EUR, in connection with article 23 of CCK (in co-perpetration), formerly Article 210 paragraph 4 of the Criminal Law of Kosovo punishable by one to ten years of imprisonment where the material gain exceeds 30.000 dinars, read in conjunction with article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (complicity).

The two co-defendants of Ove Johansen (R.S and R.R) could not be reached by the Prosecutor, being at large, and thus the proceedings against them were severed.

On 24 February 2010 the EULEX confirmation judge of the District Court of Prishtinë/Priština, after having conducted the confirmation hearing, confirmed entirely the indictment.

On 26 March 2010 the Presiding EULEX Judge of the trial panel issued the order for the scheduling of the main trial.

The panel was composed of: Presiding EULEX Judge Ferdinando Buatier de Mongeot, EULEX Judge Francesco Florit and local Judge Marie Ademi as panel members. The main trial commenced on 15th April 2010.

No objections were raised by the parties as to the composition of the Panel.

The indictment was read by the public Prosecutor and the accused pleaded not guilty.

On 27 April 2010 the Court heard the testimony of witness L Xh.

On 29 April 2009, the Court heard the testimonies of the witnesses M.N and E. T..

On 07 May 2010 the Panel and the parties agreed the steps to be taken for the international legal assistance to be asked to the Kingdom of Norway, the Republic of Italy and the Republic of Montenegro.

Subsequently, the Panel requested through diplomatic channels the international legal assistance to the Kingdom of Norway for the hearing through video conference of the witnesses T. M. and R. S.. The Panel requested as well from the Italian Republic, through diplomatic channel, to summon the witness M.D.T. (Italian citizen and formerly FIU investigator for UNMIK) for the hearing of 29 June 2010. Finally the Panel requested from to the Republic of Montenegro information as to the period spent in detention on remand by Ove Johansen in Montenegro.

On 28 June 2010 the court examined through video conference with the Oslo district court the witnesses R. S. and T.E.

On 29 June 2010 the court heard the testimony of Mr. M.D.T

On 06 July 2010, the panel changed its composition, after being informed that the local Judge Maria Ademi had meanwhile been moved to the Supreme Court.

The new panel consisted of: Ferdinando Buatier de Mongeot as presiding judge, Francesco Florit and local Judge Nehat Idrizi as panel members. No objections were raised by the parties as to the composition of the new Panel.

After the announcement of the new panel, the court restarted the whole proceeding from the beginning.

Importantly, the parties proposed as evidence in the new trial only the witnesses which had been actually examined during the previous main trial and agreed, pursuant to art. 345 KCCP, to read out in the minutes the testimonies rendered by those witnesses in the previous main trial. The trial panel decided accordingly.

The list of material evidence contained in the case file, which was announced before the examination of the defendant was as follows:

From the case file:

1. Prishtina District Court Judgment P.no 862/06 of 09 May 2008 against L.Xh. and M.N .
2. Supreme Court Judgment Ap-Kz no 435/2008 of 22 June against L Xh and M N..
3. All trial minutes in the Pristina District Court trial against L. Xh and M.N..
4. Statements of co-defendant R.S. (dated 04 May 2005 and the one given during the main trial on 28 June 2010)
5 Statements of L. Xh. (dated 13 December 2005 and the one given during the main trial on 27 of April 2010)
6. Statements of M.N. (dated 19 January 2006, 30 January 2006 and the one given during the main trial 29 of April 2010.)
7. Statement of L. J. dated 22 July 2005, which the parties agreed to considered as read out in the minutes during the hearing of 07 may 2010;
8. Interpol Oslo communication dated 11 of May 2005
9. Documentation from the civil case Norway Invest Kosovo and Kosovo Invest v. PTK and KTA case no PP-KT 324 /06
10. UNMIK Financial Investigation Unit reports of 25.04.2005 and 29 06.2005 and their annexes.
11. Meeting Agenda re. TETRA, dated 12 September 2002,
12. Letter from Norway Invest Kosovo to KTA , dated 2 December 2003
13. "Minutes from follow up meeting", 3 December 2002
14. "Minutes from follow up meeting regarding Tetra network" dated 04 December 2002
15. Meeting Minutes 12 December 2002.
16. Epstar Annex 3, Meetings Related to the phase 1
17. Minutes of Tetra Project meeting dated 06 January 2003.

18 Minutes of the meeting between KTA and Norway Invest dated 06 February 2003

19. Minutes of the meeting between KTA and Norway Invest, regarding Kosovo Data centre dated 06 February 2003.

20 .E-mail from R. R. to Ove Johansen and L. Xh. dated 27 February 2003.

21. E-mail from R. R. to Ove Johansen and L. Xh. dated 03 March 2003.

22. Share holder Agreements between PTK and Norway Invest.

23. Letter from Norway Invest Kosovo to KTA Meeting 02 December 2003.

24. Meeting minutes of 04 December 2003

25. Letter from E.K. dated 09 December 2003

26. Series of emails to and from Ove Johansen December 2003.

Proposed by the defendant Ove Johansen and his defence counsel:

- Registration Document for Norway Invest R&O AS dated 10 December 2001 marked as evidence "A" during the hearing of 29 April 2010
- Monthly Bank Scripts and transfers from Norway Invest R&O AS and Norwegian Investors from January 2002-October 2003 marked as evidence "B" during the hearing of 29 April 2010
- Monthly Documentation for all Transfers from Norway Invest R&O AS and Norwegian Investors from February 2002 - October 2003 marked as evidence "C" during the hearing of 29 April 2010.
- Raiffeisen Bank statement dated 17.04.2008, marked as evidence "D" during the hearing of 29 April 2010.
- Raiffeisen Bank account in the name of M. N. dated 05.05.2004 marked as evidence "E" during the hearing of 29 April 2010.
- Draft Shareholder Agreement, Mail from C. M. with attached shareholder agreement with comments marked as evidence "F" during the hearing of 29 April 2010
- Report issued by Police Chief Inspector with regard to the whereabouts

The defendant was thereafter examined during the same hearing of 6.7.2010, to which the closing speeches ensued.

On 09 July 2010 in the presence of parties and the defendant, the panel announced publicly the judgment. By the separate ruling detention on remand against the defendant was terminated with immediate effect in consideration of the conditional suspension of the sentence.

2. Applicable law and competence of the court

According to art. 2 CCK, the law in force at the time of the commission of the act is to be applied, unless a more favorable law comes subsequently into force.

Comparing the laws which could be *in abstracto* applicable to the case (i.e. the former Criminal Law of Kosovo and the Criminal Code of Kosovo of June 2004) the Panel concurs that the most favorable law (and thus the applicable law in the present case) is the Criminal Code of Kosovo.

Indeed, according to the former Criminal Law of Kosovo (CLK) the perpetrator of the criminal act of "Abuse of duty" pursuant to article 210 paragraph 4 was punished by imprisonment of one to ten years when the material gain exceeded 30.000 dinars.

On the other hand, article 339 paragraph 3 (in conjunction with article 23 of the CCK when, as in the instant case, the material benefit exceeds 5000 Euro) the perpetrator is punished by the more favourable imprisonment of one to eight years.

The competent court is *ratione materiae* the District Court, in light of art. 23,1,i, KCCP, because the prosecuted offence foresees a maximum penalty of 8 years. *Ratione loci*, the District Court of Pristina is competent, because the alleged offences took place in Pristina.

3. The allegations of the Prosecution

The Public Prosecutor filed the indictment against Ove Johansen on the 4th of November 2009 for the criminal offence of abuse of official position pursuant to art. 339 CCK, in co-perpetration with L.Xh, better described above.

Below a summary of the allegations of the Prosecutor contained in the indictment.

- From July 2002 to March 2003 Ove Johansen in his role as *de facto* manager of Norway Invest R&O AS, in co-perpetration with L. Xh. M. N., R..R. and R.S, with the intention to obtain un unlawful material benefit, substantially contributed to the criminal conduct of L. Xh who abused her official position as PTK General Manager by issuing an unlawful payment order of 300.000 Euro to Norway Invest R&O AS. The transfer caused a loss of 300.000 Euro to PTK and resulted in unlawful material benefit for Ove Johansen of 250.000 Euro. In order for the payment to be performed, he was involved in the preparations for the creation of a company named ARTET – a joint enterprise between PTK and a Norwegian company called Norway Invest R&O AS: the aim of ARTET would have been to create and implement a digital network called TETRA on the territory of Kosovo, which would have justified the payment of 300.000 EUR to Norway Invest. ARTET, though, never came into existence.
- Ove Johansen directly participated in the above described criminal course of action personally and as a manager of Norway Invest R&O AS and other companies connected to Norway Invest.
- In particular Ove Johansen was among those who created and managed the company. As the name of the company " Norway Invest R&O AS" suggest, the

company was creation of R. S. and Ove Johansen (R&O). Ove Johansen "was the one who had idea to create company" although he did not have formal role in it.

- Ove Johansen was present when the memorandum of understanding between Norway Invest R&O AS and PTK was signed.
- In addition Ove Johansen represented the company in its external relations with other parties. Furthermore Ove Johansen had the power to undertake legally binding acts for the company: For instance, Ove Johansen hired M. N. to work for Norway Invest Kosovo and that it was Ove Johansen who signed on behalf of Norway Invest the minutes of the 6 February 2003 in the meeting with KTA. Moreover Ove Johansen had authority to instruct his subordinates.
- On the other hand Ove Johansen played an essential part in the abuse of official position perpetrated by L. Xh. Indeed the amount of 300.000 EUR transfer, far from being L. Xh's. own initiative, was a fraudulent operation carefully planned and agreed upon L. Xh. and Norway Invest R&O AS.
- Norway Invest R&O AS was a dummy company established by Ove Johansen and others to carry out the fraudulent transaction with PTK It was registered in the Register of the Business enterprises in Norway on 26 01.2002, just a few months before the contacts and negotiations with PTK started. Norway Invest had no expertise in telecommunications. It had business objective of "*handling securities, purchasing and developing real estate, selling and leasing property*" and requested another company (Epstar) to prepare even the preliminary draft for the master plan of the Tetra project.
- Norway Invest R&O AS had no contact or deal with the legitimate owners of the Tetra platform, it had no workers and did not have any offices or premises in Norway, but just P.O. box.. Norway Invest R&O AS had a fully paid share capital of mere 100.000 Norwegian Kroner about 12700 Euro. It was Norway Invest (i.e. Ove Johansen) which sent the 300.000 EUR invoice to PTK (i.e. L. Xh.). Another identical invoice was sent to PTK by the non existing company ARTET; both invoices have identical details including invoice number description, company address (in Oslo) and bank account number (in Prishtina).
- After 300.000 EUR were transferred form PTK –Artet account to Norway Invest, a complex series of withdrawals and transfers by M. N. followed. During March 2003 he, who was the authorized persons for the use of Norway Invest bank account, withdrew 229.000 EUR in cash, transferred 15.000 EUR to his personal bank account and transferred 40.000 EUR to an account of Norway Invest R&O AS in Norway. The 15.000 EUR eventually were transferred from his personal bank account to one of Ove Johansen . The money that he withdrew in cash ended up in

his personal bank account; the same happened to 89.067 Euro that he received from A. S. (R. S. s wife) in Oslo.

- On 14 April and 22 April 2003 M.N made two wire transfers of 70.000 and 180.000 EUR from his private bank account in Prishtina to Ove Johansen private bank account in Belgrade. Further more Neziri stated that he acted on instructions from Ove Johansen and R. S..
- All actions of the participants in the crime since the beginning were aimed solely at illegal transfer of money for unlawful benefit of Ove Johansen and his accomplices.

4. Whether L. Xh. committed the offence of abuse of official position

L. Xh. was convicted by the District Court of Pristina on the 9th of May 2008 for the offences of abuse of official position and of entering into harmful contracts, imposing an aggregated punishment of four years.
The Supreme Court afterwards considered that the offence of abuse of official position was absorbed in the offence of entering into harmful contracts (thus the constituting elements of the abuse of official position were considered by the Supreme Court as existing).
The panel shares the conclusions reached by the District Court of Pristina as to the liability of L. Xh. for the crime of abusing official position. This despite a partially diverging factual reconstruction of the events, as it will be highlighted below, which is anyway of no obstacle to the affirmation of criminal liability.
It is necessary, for a better understanding of the events directly related to the payment of the sum of 300.000 EUR, to provide (on the basis of the elements collected during the main trial) a general background picture.
- Norway Invest R&O AS was a Norwegian company, based in Oslo, in which R.S. was formally the Chief Executive Officer. Ove Johansen was not vested formally with any managing position. The above circumstances found confirm above all in the statements of R. S. (hearing of 27 June 2010). The circumstance is clarified also in the statements of L. Xh., M. N. and Ove Johansen. The case file contains the certificate of registration of the Company in the Norwegian Registry.
- The Norwegian company Norway Invest R&O AS must be clearly separated from the other company (Kosovo based) officially named "Company Norway Invest" (but often referred to by the witnesses as "Norway Invest" or "Norway Invest Kosovo"). This latter enterprise was actually not a company, but an individual enterprise, founded in December 2002 by R. S. and having its seat in Peyton, Pristina. The distinction is drawn clearly by the witness M. N. in his statements on 29 April 2010. M. N. was the director and authorized representative of such Company. Despite officially being an individual enterprise, in the words of the defendant Company Norway Invest was meant to be a daughter company of

the Norway Invest R&O AS, which was allegedly providing the funds for every activity performed by it. Company Norway Invest was in practice the Kosovo branch of Norway Invest R&O AS, at least in the description of the defendant and of the witness R. S..

- Norway Invest R&O AS first appeared in Kosovo in the year 2002 (or even in the end of 2001[1]), aiming at starting the business of a TETRA network (i.e. a Telecom network allowing the intercommunication between emergency services). Representatives of Norway Invest were Ove Johansen and R. S.. With this aim, they created a local structure and started lobbying with the potential stakeholders or clients of such a new network[2]. The first contacts between Ove Johansen and L. Xh., general manager of PTK, happened sometime in the summer of 2002. According to the witness L. Xh., they were stimulated by R. R.

Ove Johansen and R.S. played a key role both in Norway Invest R&O AS and in Company Norway Invest. R.S. was also vested with an official quality therein, but Johansen was normally representing the company (the issue will be further clarified below).

- The Post and Telecommunications Enterprise of Kosovo (PTK) was obviously, in the project of Norway Invest, the first potential partner. To this extent, after a series of initial contacts, on the 20th November 2002 a memorandum of understanding was signed between PTK and Norway Invest R&O AS[3]. Such memorandum must be carefully analyzed in order to assess its validity and its extent.

- Firstly, in general the aim of memoranda of understanding is to clarify the "mutual understanding" of the parties so to avoid misunderstandings and confusions on the extent and meaning of terms and clauses in the course of the further negotiations. Therefore the memorandum of understanding is not per se the contract by which mutual obligations are created. This is exactly what happened in the instant case, if one analyses the contents of the memorandum.
- Secondly, the memorandum clarifies that the parties could create (sometime in the future) a joint private company *"to undertake the necessary planning for a TETRA Network in Kosovo"*.
- Thirdly, such Joint Company would carry out, in the intent of the parties, the tasks of evaluation and feasibility studies, business analysis and planning, network planning, research on the legal framework, preparation for the necessary license to be obtained by the joint company, all other procurement and implementation plans.
- Fourthly, PTK and Norway Invest would own the Joint Company 50% each.

Interestingly, the document, though involving only PTK and Norway Invest, and despite being signed by L. Xh. (on behalf of PTK) and R. S. (on behalf of Norway Invest), is written on sheets with the KTA header (KTA was not formally part of the agreement).

[1] See the statements made by the defendant Ove Johansen during his examination on 7 July 2010.

[2] See the statements of M.N. and R. S., as well as the further elaboration below.

[3] The memorandum of understanding is attached to the FIU Report of 24.5.2005 as attachment 1.

- PTK was established on 14.10.1999 directly by a Regulation of UNMIK, n. 12/1999. This regulation gave to the Post and Telecommunications Enterprise in the territory of Kosovo (PTK), as a juridical entity, the necessary authority for providing postal and telecommunications services (art. 1 of the Regulation). To such aim, the Regulation provides that PTK has authority to use available public postal and telecommunications assets in Kosovo, including any future expansion thereof.

- It is important to describe clearly the mutual relationship between PTK and the Kosovo Trust Agency (KTA), because it reflects on the configuration and amount of the powers of L. Xh. and on the levels of authorizations needed by for the performance of certain kinds of acts.

The KTA was established by UNMIK Regulation n. 2002/12 on 13.6.2002 (later amended by Regulation 2005/18), with the purpose to administer the Publicly-owned and Socially-owned enterprises and related assets, among which section 5.5.b of Regulation 2002/12 expressly includes the PTK.

The tasks of the KTA are described in section 2 of the Regulation, according to which it "*administers Enterprises as trustee for their Owners in accordance with the present Regulation and other Regulations, as well as Administrative Directions and determinations as the Special Representative of the Secretary-General may issue thereunder*"; the administrative powers of the KTA are further described by section 6 of the Regulation[4].

4 "*The Agency shall have administrative authority with respect to all Enterprises. Such authority shall include any action, other than those set out in section 6.2, that the Agency considers appropriate to preserve or enhance the value, viability, or governance of the Enterprise concerned including:*

(a) Appointing and replacing the chairman, directors and managers of an Enterprise;

(b) Creating, confirming or recomposing the supervisory board, managing board, workers' council or other managing or supervisory body of an Enterprise;

(c) Modifying the authority of any of the aforementioned bodies;

(d) Issuing instructions regarding an Enterprise's operations, in particular policies for sound financial management;

(e) Assuming direct control over an Enterprise, including its accounts and assets, and administering such accounts and assets, separately from the Agency's accounts;

(f) Carrying out external audits of an Enterprise either directly or through designated agents;

(g) Requiring any employee or contractor or other business contact of an Enterprise to provide information in his possession regarding such Enterprise;

(h) Requiring any person with control over documents regarding an Enterprise to provide access to such documents for their review, reproduction and safekeeping;

(i) Entering and inspecting the premises of Enterprises;

(j) Approving business plans and investment plans of Enterprises;

(k) Issuing or modifying charters, by-laws and other relevant documents of Enterprises;

(l) Effecting the registration in Kosovo of Enterprises not properly registered;

(m) Entering into arrangements for the management, reconstruction or reorganization of Enterprises;

(n) Granting concessions or leases with respect to Enterprises;

(o) Establishing one or more corporate subsidiaries of Enterprises, owned by those Enterprises but administered by the Agency, and transferring part or all of the assets of such Enterprises to such subsidiaries;

(p) Transforming Enterprises into Corporations;

(q) Restructuring an Enterprise into several Enterprises and/or Corporations;

Within the KTA there was an official person (in this case it was R.R[5]) who was specifically in charge of addressing the issues related to PTK and of exercising the powers described by section 6 of the Regulation 2002/12. In some specific cases, though, such powers were reserved to higher instances within the KTA: reference is made, in particular, to the authorization to the General Manager of PTK for payments of more than 25 thousand EUR.

- on 12.12.2002 Company Norway Invest opened its bank account (150100100171842);
- on 15.1.2003 Norway Invest R&O AS sent an invoice (numbered 301001) to PTK for the amount of 300.000 Euros, with the following justification: "*ARTET Business development & setup total from June 1 2002 to 10 March 2003 600.000 Euro*". The items indicated in the invoice as a basis for the billing are as follows: "*Market and business development*", "*Marketing analyses and customer relationship development up to Dec 2002*" and "*Unexpected costs 6.25%*"[6].
- on the 6th of February 2003 (according to two sheets labeled as "Formation of ARTET Joint Company – meeting minutes of 6 February 2003") representatives of the KTA and of Norway Invest (but, singularly, without the participation of any representative from PTK, which was supposed to be part of the Joint Company) participated in a meeting in which allegedly a discussion on the possible future creation of the Joint Company was held. It was also stated that "*Mr R. R. was given authority to approve a budget for PTK to cover 50% of the costs for the startup and the development of the business at present being carried out by Norway Invest approximately Euro 400.000*". The witnesses L. Xh. and M D. T. made it clear that ARTET (TETRA read in reverse) is the Joint Company to which the memorandum of understanding referred to.
- between 28 February and 1 March 2003 PTK wired a sum of 300.000 Euros to Company Norway Invest in payment of an invoice issued by Norway Invest R&O AS.
- on the 4th of March 2003 a further invoice, of identical contents as the previous one, but this time sent to PTK not by Norway Invest, but by ARTET, was issued.
- on 14 and 22 April M.N. wired to the Serbian bank accounts of Norway Invest Belgrade/Ove Johansen the total amount of 250.000 EUR.

On this basis it is now possible to assess more clearly the existence of the constitutive elements of the crime alleged.

4.1. On the position covered by L. Xh.

(r) Contracting out part of the activities of Enterprises; and

(s) Initiating bankruptcy proceedings with respect to Enterprises and/or representing such Enterprises in bankruptcy proceedings".

[5] All witnesses are clear on the issue and the same defendant does not contest it.

[6] The invoice can be found in the case file as attachment 9 to the FIU Report of 24.5.2005.

It is proved (and not contested by either party) that L. Xh. was vested with an official position within PTK. She was examined as a witness during the hearing of 27.4.2010[7], when she confirmed her quality as general manager therein. The same was stated by witnesses N. and T.

As it was clarified above, PTK at the time of the events was a publicly owned enterprise. The internal structure of the company, its direct subordination to the Kosovo Trust Agency, its discipline and legal structure make it clear that the powers and authorizations with which L. Xh. was vested were of a public nature.

This entails that as general manager of PTK, she had the capacity of official person and thus was in a position to commit the crime of misuse of official position.

The District Court of Pristina already convicted L. Xh. on such basis and the Supreme Court confirmed the sentence on this point.

4.2. On the payment of 300.000 EUR ordered by L. Xh.

It is proved that L. Xh. ordered the payment of 300.000 EUR to the bank account of Company Norway Invest and that by doing so she abused her powers. Indeed:

4.2.1. on the 28th February 2003 L. Xh. ordered the transfer of the sum of 300.000 EUR from the bank account of PTK (c/o Raiffeisen Bank, n. 1501000000007346[8]) to the sub-account named "PTK-ARTET" (c/o Raiffeisen Bank n. 1501000000098837). It is also proved that subsequently on the 1st of March 2003 the same sum of money was wired from such sub account into the bank account of Company Norway Invest c/o Raiffeisen Bank n. 150100100171842, opened on 12.12.2002. These facts are confirmed by the witnesses D. T., L. Xh. and M. N. in their statements and by the defendant (page 10 of the trial minutes of the 7th July 2010). There is, furthermore, complete documentary evidence of the payment, consisting in the invoice sent to PTK (on which see below) and in the bank documentation acquired during the investigation through an order for disclosure[9].

4.2.2. Such payment could be ordered by L. Xh. only in her quality of general manager of PTK. This circumstance is admitted plainly by her[10]. There is the additional documentary

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7 Page 5 of the trial minutes: "*I was the general director of PTK, within the responsibilities of the KTA. My position was to manage the company to provide services for the Kosovo clients, to elevate or raise the profits for the company to introduce new products and services in Kosovo, and to elevate the structure of the company to the highest level and join new European standards*".

8 The bank statements of the accounts of PTK are attached to the case file, FIU Report 25.4.2005, attachment 13.

9 The bank statements are contained in the case file, as attachment n. 13 to the FIU report of 24.5.2005. The defendant himself during the main trial provided the Panel with an additional copy of same documents.

10 See trial minutes of the 27.4.2010, page 11.

evidence consisting of the order for payment signed by L. Xh.. Further oral proof of it comes from the statements of M. N., R. S.[11] and M. D. T.[12]

L. Xh., though admitting having ordered the payment, affirmed that she lawfully did so, having been ordered by Mr R. R. who inside the KTA was the official in charge of PTK. This defence is not valid, as it will be highlighted below.

4.2.3. It is proved that there was no contract or legal justification for the payment to be ordered, and additionally that L.Xh. lacked the necessary clearance from KTA. Contrary to this, the defendant kept on alleging that it was clear to the parties that there had been not only an agreement according to which the start-up expenses should be split up in equal shares, but also that a line of budget had been approved by KTA for the payment of an initial contribution of 300.000 Euros from PTK to Norway invest.

The following proves that the defendant is wrong:

a. the memorandum of understanding of November 2002 did not create a binding obligation on PTK to pay 50% of the expenses sustained by Norway Invest R&O AS. The memorandum makes no reference whatsoever to expenses to be sustained, limiting itself to stating that the future Joint Co would be owned 50% by each of the parties.

In addition, it is particularly relevant to note that the memorandum clarifies that in the intention of the parties it would be the Joint Company (if and when established), to conduct the "*evaluation and feasibility studies, business analyses and planning, network planning, researches*".

One can conclude from this that the creation of the Joint Company was a precondition for the same existence of any sharable expense.

The Panel notes, furthermore, that according to the witness E. T., who at the time of the events was the head of the KTA Legal Department, also the conclusion of such a memorandum of understanding would have required the prior approval of KTA (an approval which was missing[13]). The statements of E. T. are reliable. Indeed, there was a direct professional involvement of the witness in the events and the knowledge of the witness is of a technical kind, in view of his quality and role in KTA. The statements of the witness are characterized by a high degree of precision and accuracy and no elements of subjective or objective unreliability were highlighted. The defence itself, in particular, did raise no concerns about the reliability of witness T..

[11] See statements of 27.4.2010 page 12-13.

[12] See trial minutes of 29 June 2010, pages 3; 6 ff.

[13] Not being sufficient the mere involvement of Mr R. R., head of the telecommunications section in KTA, but being necessary the approval of the KTA Board or, before the Board was established, the joint approval of the two managing directors of KTA. See trial minutes of 29 April 2010.

b. The "Joint Company" mentioned in the memorandum of understanding was never created.

It was clarified by the witnesses and by the defendant himself that the Joint Company in the intention of the stakeholders should have been named ARTET. It is proved that between PTK and Norway Invest there had been meetings, in which apparently also representatives of KTA took part. It is proved as well that draft versions of a "shareholder agreement" for the legal creation of ARTET were exchanged between the parties and that KTA was involved in the exchange of emails.

But all the witnesses (R.S., L. Xh., M. D. T., M. N.) clarified that in the end, due to the decision of KTA not to proceed further with the project, the shareholder's agreement was never finalized. The circumstance is accepted by all the parties and by the defendant himself.

c. There is no evidence of any other kind of agreement/obligation binding PTK to concur in the expenses sustained by Norway Invest in its lobbying activities. In particular, the "Meeting minutes[14]" of the 6th February cannot be interpreted as providing sufficient evidence of such an agreement.

First of all the minutes of 6th February are (as already affirmed by the District Court verdict in the case against L. Xh. and M. N.) highly doubtful and suspicious, in light of the testimony of L. J.[15] and E. T., which radically diverge from them. This suggests the Panel to evaluate them with care.

The document describes (in a conditional manner) the future prospective coming into existence of the Joint Company ("*the roles that PTK and Norway Invest would play*", "*ARTET would be set up as a private company*").

Secondly, it is clear that the minutes do not indicate that the parties were thereby concluding the shareholder's agreement. They were rather in the phase of discussion ("*Norway Invest will put up a proposal for the shareholders agreement and the Company Articles of the Association, rules and regulations, for review by PTK and KTA*"). This means that at time a final proposal for the formation of ARTET had not been reached. This circumstance is important in order to properly interpret the following sentence, contained in the said minutes: "R. R. *was given the authority to approve a budget for PTK to cover 50% of the costs for the startup and the development of the business case at present being carried out by Norway Invest approximately 400.000 Euro*". Such sentence cannot be interpreted as if R. was thereby already announcing the actual existence of the budget. Indeed:

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[14] Attachment 3 to the FIU Report of 24.5.2005.

[15] The statements made by L. J. during the investigations were read out during the main trial. They are contained as an attachment to the FIU report of 24.5.2005.

a. Such sentence is very generic and laconic. Notably, it is not even precise as to the exact amount of the sum which would be budgeted (*"approximately 400.000 Euro"*).
b. It is in contrast with what is contained in other documents attached to the case file: reference is made to the minutes of the KTA Board of Directors Meeting[16], where L. J. (deputy managing director of KTA) clearly stated that no authorization had been given and no budget had been approved.

The defendant himself, during his examination, was not able to provide sufficient evidence (but only mere allegations) of the source of the obligation of PTK to pay. He, very generically, stated that the issue was clear to the parties since the very first meetings, which took place between them in July 2002 and that there would have been no problems whatsoever if the project had "taken off" and had not been suspended by KTA[17]. In any event, he himself clearly admitted, answering a precise question of the Presiding Judge, that the obligation of PTK to pay would have required the previous creation of the joint company (*"**Ove Johansen:** It is not strange, normally the parties discuss that if there will be an agreement that would be the content of the agreement, in terms of sharing the expenses. **Presiding Judge:** It is one thing to discuss something and another is to sit down and formalize an agreement. Yourself are saying that "if"*

[16] Attachment 7 to the FIU Report of 24.5.2005

[17] For a better understanding it is worth recalling here the statements made by Ove Johansen when he was answering to the examination in front of the trial panel on 6 July 2010:

Presiding Judge: *Were these expenses up until June 2002 among the expenses that should have been included in the 50% split with PTK?*

Ove Johansen: *No it says from the 1st June 2002 which is the day that PTK contacted Norway Invest. You can see that from the invoices.*

Presiding Judge: *Where in your opinion does the MOU say that the expenses should be split 50/50*

Ove Johansen: *Already since July 2002 there was this agreement*

Presiding Judge: *Where is there evidence of this?*

Ove Johansen: *In the minutes.*

Presiding Judge: *If you can remind us of these minutes, if you can show us please.*

Ove Johansen: *I will try and find it. You have it in the thick book.*

Presiding Judge: *The minutes of what?*

Ove Johansen: *The minutes between PTK/KTA and Norway Invest, last one of which was conducted in January it is enclosed in the case file as 1 2 and 3 to the UN. It is a report dated April 2008 submitted in Leme Xhema's case it is a report to the UN in New York.*

Presiding Judge: *Mr Johansen, you know that in July 2002 there was between PTK and NI not even an MOU (which is already per se a non binding form of agreement), therefore it seems incredible to me that even before such MOU there was already an agreement to split expenses 50/50!*

Ove Johansen: *It is not strange, normally the parties discuss that if there will be an agreement that would be the content of the agreement, in terms of sharing the expenses.*

Presiding Judge: *It is one thing to discuss something and another is to sit down and formalize an agreement. Yourself are saying that "if" there had been an agreement concluded, then the parties would agree also on how to share the expenses. But there is a big "if", a big condition preliminary to that, which must be fulfilled.*

Ove Johansen: *It was clear to the parties that if an agreement had been concluded that would have been the provision".*

there had been an agreement concluded, then the parties would agree also on how to share the expenses. But there is a big "if", a big condition preliminary to that, which must be fulfilled. ***Ove Johansen:*** *It was clear to the parties that if an agreement had been concluded that would have been the provision*")

d. Even admitting that a budget had been approved, and that KTA had authorized PTK to contribute in the expenses allegedly sustained by Norway Invest, there is no evidence of the existence and of the amount of expenses sustained by Norway Invest with regard to the TETRA Project.
The defensive strategy of Ove Johansen to this extent was clear: he claimed during his examination and throughout the trial that Norway Invest had invested over one million EUR in Kosovo. In particular, Ove Johansen during his examination affirmed that:

a. Since November/December 2001 five to ten international consultants had been working on the project, who had to be paid 15.000 EUR a month[18];
b. That the cost of local staff and office rental was around 45.000 Euros a month[19];
c. That several presentation and training activities were being organized weekly by Norway Invest in Kosovo;
d. That in the end (March or April 2003) the expenses "grew to over 100.000 Euros" per month, in consideration of the study trip to Finland organized for a significant group of officials from Kosovo.

The overall expenses which were alleged in the invoice were 600.000 EUR, half of which was claimed back by Norway Invest.
During his examination, as well as on other occasions during the main trial, Ove Johansen claimed that the overall amount of expenses sustained by Norway Invest was even much higher (up to 1.1. Million Euros, to which another 6-700.000 Euros were to be added, spent by Noway Invest in relation to the Kosovo Data Center project, that is another IT Project that they were trying to develop in joint venture with PTK).
During the examination of the co-defendant R..S, Ove Johansen claimed that the total amount of expenses sustained by Norway Invest was, until the date of 1.March 2003, of around 790.000 Eur.
This carousel of diverging sums put forward by the defendant (and, on the occasion of the rogatory of 28 June 2010, by his codefendant R. S.) is demonstrative of the

[18] See examination of Ove Johansen, trial minutes of 6 July 2010, pag. 10
[19] See again trial minutes of 6 July 2010, pag 10: the defendant claims that 19.000 EUR per month were for salaries, 9.500 were for rental expenses, 2.000 for taxes to Pristina Municipality, 2.000 to 5.000 EUR in generators and fuel, 7.000 or 8.000 in operational costs

uncertainty of the alibi which the defendant tries to activate (and it is just the case to underline that the statements of R. S. must be considered with the greatest care, considering the fact that he, being a co-defendant, has all the interest to lie in favor of Ove Johansen).

Contrary to what Ove Johansen stated it can be noted that:

a. the claim that some alleged international consultants were being paid directly by Norway Invest R&O AS adds nothing in favor of the defendant, since he was vague as to the total amount of the international consultants allegedly hired by Norway Invest and as to the time span in which each one worked for the company. The defendant was not clear as to whether these consultants were working only on the TETRA project or (as it seems to be the case) also on other different projects. None of the witnesses among those indicated by the defendant at the hearing of 6.7.2010 (on the occasion of the reopening of the main trial after the change of one of the panel members) provided confirmation of the extent and amount of the sums spent thereto;
b. with regard to the alleged sum of 45.000 EUR for running expenses, it must be stressed that according to what M. N. stated, for some months starting from July 2002 the number of employees was of only two (i.e. M. N. himself and M. D.) and that from then on gradually some other employees were recruited, until the amount of 12-13. One cannot see, therefore, how it is possible to give credit to the allegations of Ove Johansen on the amount of the average monthly expenses of Company Norway Invest.
c. With regard to the sums allegedly spent for the presentations, the defendant is even more vague as to the amount involved. In any case it can be argued that such presentations fell within the scope of the normal activities of the employees of Norway Invest, and thus it is hard to conceive them as an additional line of budget.
d. The "fact finding trip to Finland" organized by Norway Invest actually took place after the payment took place, from 5 to 9 March 2003[20].

Contrary to the statements of Ove Johansen, furthermore, it is particularly important to note that no supporting documents whatsoever were made available to the court of expenses allegedly incurred by Norway Invest. The defendant claims that the FIU investigators were provided with 250 pages of supporting documentation. Once more, though, the defendant is totally vague on the identity of such alleged documents.

And that no significant supporting documents were sent by Norway Invest to PTK

[20] See page 20 of the verdict of the District Court of Pristina in the case against L. Xh. and M. N.

is further confirmed also by the email which was sent by R. R. to Ove Johansen and other recipients on the 27 February 2003 (i.e. only one day before the payment was ordered by PTK to Norway Invest). In this email R. writes that "*the invoice sent to B. R.*" (i.e. Norway Invest's invoice) "*cannot be used to transfer funds from PTK to a Norway Invest account unless detailed supporting invoices are supplied from the original supplier or the actual costs internal to Norway Invest are specified*". This can only mean that the invoice had not been provided with supporting documents. It is the case to add that also L. Xh could not confirm having seen such invoices. Additionally, the UNMIK investigator who was in charge of the investigation, M. D T., confirmed that the supporting documents which Ove Johansen alleged as a support for the payment of 300.000 could not be found during the investigation (page 8 of the trial minutes of 29 June 2010). Not even the consultation of the bank statements of Norway Invest provides the defence of Ove Johansen with better solidity as to the extent and amount of expenses incurred by Norway Invest for the TETRA Project.

Indeed, even assuming that all the sums which were wired from Norway into the accounts of Norway Invest had been used for the TETRA Project (and thus, in the theory of the defendant, hypothetically eligible for reimbursement in the percentage of 50%), still the following must be stressed:

- the total amount transferred is much lower than 600.000 EUR. In particular:
    - the sums wired from Norway Invest R&O AS into the bank account of Company Norway Invest (Raiffeisen Bank n. 1501000000071842) were up to the 10 March 2003 of around 147.000 EUR .
    - The sums wired from Norway Invest R&O AS into the personal bank account of M. N. (Raiffeisen Bank n. 1501001000440084) were, up to the same date, 123.320 euros.

  Therefore, even accepting (as alleged by the witness M.N) that all the sums which were wired into his personal bank account were used for the activities of Norway Invest, one must conclude that there is no evidence of the fact that the money paid by Norway Invest was amounting to 600.000 EUR.
- it is totally unclear how those sums were spent (indeed, the bank statements show that the money was withdrawn in cash from the bank accounts of Norway Invest: the defendant provided mere allegations as to the destination and amount of these sums). The case file contains evidence exclusively of an invoice billed to Norway Invest by Epstar, a consultancy company which provided the

planning for the future ARTET company (and the sum paid to Epstar was in the range of 16.000 Euros[21]).

- the lobbying activities of Norway Invest remained totally uncertain as to their actual extent. It can be regarded as proven that Norway Invest had the possibility to attract the interest of high ranking officials. It does not imply, though, that PTK had to pay for this activity, which must be better regarded as the typical activity which a prospective business partner (such as Norway Invest) tries to make in order to convince the counterpart as to the profitability and feasibility of the investment being proposed;
- it must be added that only a part of the activities allegedly performed by Norway Invest was referable to the TETRA project. The defendant himself (and the documentation present in the case file confirms the allegation) stated that Norway Invest invested a good share of its activities and funds in the creation of the Kosovo Data Centre and in other smaller projects. Thus for a further reason it is not possible to admit that all the sums claimed by Ove Johansen as spent by Norway Invest (and which, as it has already been highlighted, were less than what indicated in the invoice of 15.1.2005 as "sharable" expenses) were eligible for partial reimbursement by PTK in the framework of the TETRA project.

A general conclusion can be drawn on the issue of the sums (for the main part allegedly) spent by Norway Invest in Kosovo.

This in consideration of the nature of the relationship between PTK and Norway Invest, which were (in the allegation of the defendant) potential partners in a shareholders agreement. Ove Johansen claims that Norway Invest had decided to invest in Kosovo and was trying to convince the potential partner of the profitability of the business, through lobbying (at various levels) and presentation activities. Therefore, it must be excluded that (as, on the contrary, Ove Johansen seems naïvely to claim[22]) PTK should have contributed *by default* in all the expenses that the Norwegian company was due to sustain in order to create and start up its local branch (i.e. registration costs, administrative costs, rental of the premises,

[21] See the verdict rendered by the District Court of Pristina, confirmed on this by the Supreme Court, page 19, point 3.

[22] See minutes of the 6 July 2010, pag. 17:

Presiding Judge: *When did Norway Invest start investing and paying in this project*

Ove Johansen: *Dec 2001. So normally they should pay if they want to be a partner and on top of that the owners of PTK wanted to own the network designed by Norway Invest, should they have gotten it for free? They more or less got it for free because they stole it. Now I am talking about the owners, they paid ed a part of what they should, if you look at the letter from E. M. dated 9.12.2003 he says that the project was cancelled and that all costs over this 300k was at Norway Invest 's own risks and so PTK understood perfectly what they have done and so did KTA. Also the what they paid, it is only the police officer's of the FIU who did not understand.*

recruitment of the staff, etc.). On the contrary, such kind of expenses should by default have been borne by Norway Invest, which was proposing itself as a reliable partner in a *prospective* 50%/50% business relationship with PTK. The activity undertaken by initiative of Norway Invest was in the opinion of the panel part of the entrepreneurial risk of Norway Invest and there is no reason why it should have been put on the shoulders of PTK without a proper legal basis. This is also the conclusion reached by the Special Chamber at page 18[23].

e. The Special Chamber of the Supreme Court of Kosovo rejected the claim of Norway Invest against PTK and KTA[24]. In this claim Norway Invest Kosovo and Kosovo Invest (both companies were created in the second part of 2003 by Ove Johansen taking over the position of Norway Invest R&O AS) requested from PTK and KTA the payment of 11.756.000 EUR plus interests for breach of contract and subsequent loss of future income. Alternatively the claimants asked the payment of 1.877.000 Euros on the basis of non contractual liability. To these claims the answer of the Special Chamber was very clear, and it fully confirms the conclusions reached by the Trial Panel in this criminal proceeding:

a. the Special Chamber clearly excluded that the memorandum of understanding signed on 20 November 2002 between Norway Invest and PTK constituted an established contractual relationship (page 16 of the verdict); this was a "*prior to contractual agreement*" (page 17 of the verdict);
b. it affirmed that the memorandum of understanding merely determined their understanding on the future establishment of ARTET, but nowhere in it did the parties set forth the liability of the founders for expenses (see page 18 of the verdict of the Special Chamber);
c. it excluded therefore that PTK could be held liable towards Norway Invest, because "*the law requires that such kind of liabilities must be foreseen in written agreements of this nature*" (page 18 of the Special Chamber's verdict);
d. it affirmed that the activities performed by Norway Invest were exclusively expression of a "*good will to continue with preparations for the implementation of future business that were not created*" (verdict of the Special Chamber, page 18).

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[23] It is therefore false what the defendant states (i.e. that the Special Chamber of the Supreme Court ruled that there was a binding agreement between Norway Invest and PTK).

[24] The verdict of the Special Chamber (rendered on 25 November 2005 in case n. SCC-04-0063) is present in the case file. Parties thereto are as claimants Norway Invest Kosovo and Kosovo Invest (both companies which were enacted by Ove Johansen, taking over the position of Norway Invest Kosovo) and as respondents and counterclaimants PTK and KTA. It is important to note that PTK in its counterclaim asked back from Norway Invest the sum of 300.000 Euros which constituted an "illicit enrichment".

f. Even if a legal basis for the payment of the invoice to Norway Invest had been proved, L. Xh. did not anyway have the necessary authorization to order such payment. The circumstance is made clear by the witness E. T., who at the hearing of 29 April 2010 clarified that a money transfer of 300.000 Euros would have required the approval both of R. R. and of the Deputy Managing Director of KTA for Publicly Owned Enterprises[25]. And the latter authorization was clearly missing, as it was stated by the same Deputy Managing Director (at the time L. J.) on the occasion of the meeting of the KTA Board of Directors held on the 20th of May 2003[26], whose minutes at page four state as follows: *"Then Mr J. spoke about the second issue regarding PTK, which was a project called "ARTET". The project is a joint venture with Norway Invest, PTK was to contribute 300.000 Euros to develop a feasibility study of a new business regarding a mobile system for security providers. There is no contract, no final decision and no money was paid by PTK"*.
L. Xh. in the trial against herself naïvely claimed, and widely recalled during the hearing in which she was heard as a witness, that she ordered the payment because she was ordered by R. R. and that she had no possibility whatsoever to oppose such an order.
This cannot be accepted, in consideration of the personal powers with which she was vested. The fact that R. R. was the person who, in KTA, was exercising the control over PTK (as stated by all the witnesses) and the fact that it was R. R. to "warmly recommend" L. Xh. for the position of Managing Director of PTK (as stated by E. T. during his examination as a witness on 29 April 2010) is not enough to release her from her responsibility for non complying with her duty to act (in managing PTK) according to the law, and in particular in regard to the sensitive issue of the payment of big sums.

4.2.4. The unlawful payment ordered by L. Xh. caused a damage to PTK and an identical illicit enrichment for Norway Invest.

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[25] ***Presiding Judge:*** *So for a financial transaction of 300.000 what was the level required, who had to sign if you recall?*
E. T.: *It would have to be section chief Roger Reynolds and with this amount it would also require the signature of the deputy managing director of POE at KTA.*
Presiding Judge: *Since when was this internal regulation implemented, was it already in place in 2003*
E.t T.: *It was one of the earliest measures imposed taken by KTA because PTK is one of the most valuable and profitable enterprises in Kosovo, meaning that there was a big amount of liquidity around, and KTA was well aware that this had to be controlled, because if liquidity disappears the blame would go back to KTA, Measures to control financial activities was one of the first things undertaken*
Presiding Judge: *So you assume that it was in place in 2002*
E. T.: *Yes I am pretty sure, because it was one of the first measures established by the KTA just as a background pillar 4 of the KTA took over all POE in July 2002 and because there were already certain rumors about impropriety about financial transactions in POE this was one of the first and main measures that KTA looked into.*

[26] The minutes are attached to the "Criminal report n. 30/FIU – 15 Jan 2006, as part of its attachment 1.

The conclusion is automatic when one considers that there was no legal obligation for PTK to pay to Norway Invest and that, in any case, there was no evidence of the activities performed by Norway Invest in favor of PTK.

4.2.5. L. Xh. was conscious of the unlawfulness of the payment. This conclusion (already reached by the District Court and by the Supreme Court in the trial against her) is necessary when one considers her personal quality of managing director of PTK. Despite her attempts to discharge all responsibility for what happened on R. R., it is not believable that she was not aware of the specific rules that regulated the payment of significant sums from PTK. Additionally it was surely clear to her (being it quintessential to the daily exercise of her powers as director) that the power to order the payment was exclusively with her and that R. R. had only a power of control and (to some extent) authorization.

Furthermore, as correctly noted by the District Court of Pristina in the verdict rendered against L. Xh.,

- she did not object to pay for services that were billed on 15.1.2003 but concerned the future (the invoice covering the period until 10.3.2003);
- she did not object to pay a bill of Norway Invest R&O AS covering a period starting from 1.6.2002 to an account of Company Norway Invest (a company which was initiated only on 10.12.2002);
- the payment did not get the approval of KTA: the signature of R. R. on the transfer order cannot be interpreted as an approval of the payment by KTA and L. Xh., being a general manager responsible for financial accountability, should have noticed the highly suspicious position covered in that circumstance by R. R. (being both division manager of KTA/PTK and chairman of the (non existing) ARTET company;
- whatever activities were undertaken by Norway Invest R&O AS, their value was grossly overestimated, as shown above, and this must have been known by L. Xh. considering her professional capacities as a general manager.

The panel excludes that there was a duty of L. Xh. to obey alleged orders from R. R..

First, the fact that this order was given is a mere allegation of L. Xh. (who also in the main trial against Ove Johansen constantly tried to depict herself as a mere puppet in the hands of R. R.), who did not provide any evidence of that. Moreover, the needed clearance from KTA was missing and therefore, as highlighted by the witness E. T., the alleged order of R. R. (even admitting its existence) would have been manifestly unlawful.

Finally, even if we should consider the signature of R. as an authorization to the payment, it would not amount to an order (and thus once more the defence of L. Xh. would not be grounded).

5. Whether Ove Johansen concurred in the criminal offence committed by L. Xh.

Ove Johansen is accused of being co-perpetrator together with L. Xh. in the commission of the crime of abuse of official position.

L. Xh. was vested with the quality of official person. She had the public authorizations and powers, in her position of general director of PTK (a public company) and therefore she was the one who *directly* could abuse those powers (so called "*intraned*").

Ove Johansen was not directly and formally vested with official powers. He was, technically speaking, an "*extraneus*". The provisions contained in art. 23 KCCP provide a legal basis for the affirmation of his liability for the aforementioned crime. According to such norm, "*When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence*".

Affirming that the "substantial contribution" in the commission of a crime makes the co-perpetrator liable as if he had committed the crime himself, means that if there is evidence that Ove Johansen causally contributed to L. Xh. performing the unlawful payment to Norway Invest R&O AS and that the requirement of the *mens rea* is fulfilled, then Ove Johansen can be convicted at the same title as L. Xh., regardless of his being vested or not with the official position.

The conclusion of the Panel is that Ove Johansen, acting in Kosovo as *de facto* representative of Norway Invest, had a willful and active role in stimulating, organizing and receiving from L. Xh. the unlawful payment.

Therefore it must be concluded, beyond reasonable doubt, that Ove Johansen concurred in the offence committed by L. Xh.

The above can be concluded from the following elements:

5.1. Ove Johansen was the initiator of the business which subsequently was baptized Norway Invest R&O AS. Despite the attempts of the defendant to depict himself as a mere consultant of this company[27], the Panel has come to the clear conclusion that his role (at least in the Kosovo based company, but most likely also in the Norwegian structure) was prominent, and was that of a representative-coordinator-overall manager. It is sure that Ove Johansen was the creator of the structure. He admitted, during his examination, having had the original idea (on the basis of the previous experiences he had led in Kosovo[28]) of this kind of investment. He (according to his same words) was involved in the launch of the initiative of Norway Invest not only in Kosovo, but also in Serbia and in Montenegro. His name appears even in the Company's name: indeed, the acronym "R&O" which appears

[27] See the statements made during his final examination.

[28] Page 7 of the minutes of 6.7.2010: "*Ove Johansen: I led the committee group that started the Kosovo cadastre registry agency KCA. So this was only an add-on that was needed in Kosovo*"

after Norway Invest nothing else means but "R. and Ove". The defendant during his examination tried with little success to allege that he was unaware of the fact that his name had been added to the name of the company upon exclusive initiative of R. S. This naïve theory is against the common experience that it is the owners/founders who put their names in the Company's name. It is also against all the factual elements (which will be recalled below) showing the prominent role of Ove Johansen in the company. And in any case, even if it were true that R. S. had included Ove Johansen's name in the Company's name without informing the former, this would anyway be meaningful as to the prominence of Ove Johansen in the company.

5.2. Ove Johansen signed documents on behalf of Norway Invest. This is true, for instance, with regard to the signature of the employment contract of M. N., director of Company Norway Invest[29]. The case file contains also minutes signed by Ove Johansen in the quality of CEO of Norway Invest (such is the case of the minutes of 6th February 2003 ("Formation of ARTET Joint Company" and "Overview of Kosovo Data Centre": attachments 3 and 4 to the FIU Report of 24.5.2005). It is interesting to note that these signatures and this quality prove that Johansen lies when he states that from December 2002 onwards he resigned from his positions in Norway Invest. Therefore, the range of activities in which the defendant was representing the society was wide, covering both the external and the internal representation of the society.

Other documents which provide evidence of the managing activity of Ove Johansen are the emails which were sent to him by R. R. on the occasion of the payment of the invoice of 300.000 EUR. Contrary to what the defendant stated (according to whom he was in no way involved in the invoices instrumental to the unlawful payment of 300.000 EUR from PTK to Norway Invest), the above mentioned emails are addressed by R. R. (KTA) to Ove Johansen (for Norway Invest) and to L. Xh. (for PTK). P. B. was addressed exclusively in CC[30]. This further highlights his managerial powers also with regards to the financial aspects of Norway Invest, which are not feasible by a mere project manager/consultant.

5.3. Ove Johansen was regarded as the manager or representative of Norway Invest, together with R. S.. In particular, when R. S. was present, he had a formally more prominent role, and when he was absent (which was the rule) the leading role remained with Ove

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[29] See trial minutes of 29 April 2010, page 7:
Public Prosecutor: *You have had a contract with Norway Invest R&O AS?*
M. N.: *Yes, as far as I remember.*
Public Prosecutor: *Who has signed the contract, you and from the other side?*
M. N.: *Mr Johansen.*

[30] This email was already mentioned above (sub 4.2.b). By it R. R. was giving precise instructions to the defendant and to L. Xh. on how to prepare the invoices to be sent to PTK by Norway Invest and on the fact that supporting documentation was needed, not being possible otherwise to execute the payment.

Johansen. This is confirmed by the witnesses L.Xh.[31] and M N[32]. Also the co-defendant R.

[31] See minutes of 27.4.2010, page 8 and following:
*"**Public Prosecutor**: During the negotiations with Norway Invest, who represented Norway Invest?*
***L. Xh.**: Ronny Sorensen and Ove Johansen. I signed the agreement with Ronny Sorensen, the MOU.*
***Presiding Judge**: What were the roles of Ronny Sorensen and Ove Johnasen during negotiations with PTK?*
***L. Xh.**: On the basis of the signed agreement with Ronny Sorensen, and as far as I remember during the meetings we had regarding presentations, I presumed he may have been the general director or an investor or a shareholder. I don't know their structure. But later on and also through the first meetings present was Ove Johansen, who was involved right from the first day for the MOU and the ARTET project, and who took part regularly in the meetings at the PTK. Based on the records I have seen, Mustafa Neziri too, but the legal representative of it I don't know exactly. For the staff of the PTK, Mr Johansen communicated permanently with the engineers of the PTK, Roger Reynolds and the KTA.*
Later on at page 29 of the minutes, answering a question of the presiding judge she added:
***Presiding Judge**: The panel has a couple of questions. So you told us that you met Ove Johansen three times before the signature of MOU and sometimes after the signature, can you be precise how many times afterwards?*
***L. Xh.**: I do not remember maybe two times, not more then three.*
Presiding Judge: Was Ove Johansen together with Mustafa Neziri and Ronny Sorensen?
***L.Xh.**: He was never alone, always with two or three people.*
Presiding Judge: Was he the leading person, mr Ove Johansen?
L. Xh.: Yes".

[32] The statements of Neziri as to the quality of Ove Johansen provide a good insight into Company Norway Invest, and are important in consideration of the role of Neziri and his daily cooperation with the defendant. The following statements are relevant, taken from page 7 of the minutes of 29.4.2010:
***Public Prosecutor**: Regarding you contracts, when you signed the contracts with Norway Invest R&O AS, with whom did you have the negotiations?*
***M. N.**: With Ronny Sorensen and Ove Johansen.*
***Public Prosecutor**: With both?*
***M. N.**: When we were talking about it they were both present, but when I signed it it was with Ove Johansen: and one engineer.*
***Public Prosecutor**: Who was in lead of the negotiations?*
***M. N.**: That is what I was trying to tell you now, initially I asked them for 2 weeks to think of this job, as I had a job at that time, and I wanted to know what I was going to do.*
***Presiding Judge**: The question was simple, who was leading the negotiation on the side of Norway Invest R&O AS, was it both, or more Ronny Sorensen or more Ove Johansen?*
***M. N.**: Initially when we started negotiations they were both present, maybe Ronny Sorensen was a little more forward, but then he went to Norway. He was the main man.*
***Presiding Judge**: After you signed the contract, during your participation in negotiations with Norway Invest R&O AS, who had the lead?*
***M. N.**: The second man in charge was Ove Johansen.*
Public Prosecutor: When you were supervised, who was your contact person?
***M. N.**: In Kosovo it was Ove Johansen, when Ronny Sorensen was here it is known (gestures with hands).*
***Presiding Judge**: what do you mean? It was Ronny Sorensen?*
***M. N.**: Yes, he was the head.*
The same Neziri, after being confronted by the trial panel, stated (page 17 of the minutes of 29.4.2010) that Ove Johansen was the President of the Board of Directors of Norway Invest (thus not a mere consultant, as the defendant tries to sustain) and had significant managerial powers, as follows:
***Public Prosecutor**: The answer was "I would withdraw the money on the instructions of Ove Johansen: and Ronny Sorensen. As the owner of the company Ronny Sorensen had also the right to withdraw money from the bank account. There were cases were Ove Johansen: the president of the board of directors asked me to withdraw or transfer money, and every time I asked Ronny Sorensen what to do. The latter verbally*

S. made statements which corroborate the above conclusion (even though in front of the trial panel S. was clearly keen on trying not to expose the co-defendant, whereas in front of the investigators he did not have this kind of scruples[33]). Indeed, R. S. was examined on the 28th June 2010 through international legal assistance (duly enacted through the Ministry of Justice and subsequently via diplomatic channel) , performed via video conference with the Court of Oslo in Norway, in the presence of the competent Norwegian judge.

R. S. was also examined during the investigation and was widely confronted, during the main trial, with the statements he rendered during the previous stage.

With regard to the role and powers of Ove Johansen, he stated significantly:

- that Ove Johansen was involved in the negotiation of the memorandum of understanding (page 16 of the minutes);
- that the acronym " R&O" means " R. and Ove";
- that Ove Johansen is the person who had had the idea to start the business (trial minutes, page 28);
- that Ove Johansen is the person who was in control in Kosovo (page 29).

R. S. stated that he (and not Ove Johansen) was the CEO of Company Norway Invest. Contrary to this, as clarified above, there are documents signed personally by Ove Johansen, which indicate that he (and not R. S.) was the CEO, or at least that he acted as he were the CEO, to the point of signing official documents in the framework of meetings aimed at the implementation of the core business of the company (that is the formation of ARTET).

One conclusion can be drawn from this: even if formally Ove Johansen was not the CEO of the company, for sure on several occasions he was acting as such.

All in all, the statements of the witnesses taken singularly, and much more if considered jointly, lead to conclude that Ove Johansen's position was of substantial control over the

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advised me telling that Ove Johansen: is the president of the board of directors and therefore you must obey his orders, even so every time I had to make such transfers, I would first ask R. S.."

***Presiding Judge:** What you stated to the police, do you confirm now? That this is what happened during your work with Norway Invest. Is this correct?*

***M. N.:** 98% yes. It says there Ove Johansen and R. S.. But every request made by Ove Johansen I had to have approved by R. S..*

***Presiding Judge:** Is it true that R. S. told you that everything Ove Johansen ordered you to do you had to obey?*

***M. N.:** Yes.*

Also with regard to the decisions on how and where to allocate the funds of Norway Invest, the witness again stated that the company had in practice a twofold management, composed by S. and J.:

***M. N.:** All money was administered and spent as I was told by my bosses.*

***Public Prosecutor:** The name of your bosses?*

***Presiding Judge:** He already answered. R S. and Ove Johansen.*

[33] Indeed, in front of the investigators Sorensen made quite sharp statements against Johansen,in the clear intent to discharge his responsibilities: e.g. "*Together with Mustafa Neziri, he was the one that actually controlled the business*", "*Ove Johansen was involved in arranging everything which was related to the creation of Company Norway Invest*"

company in Kosovo. The fact that formally he was not vested with such power did not prevent him from signing the employment contract of the managing director and did not preventing him from acting in the daily operations as de facto manager. And in any case the synergy between Ove Johansen and R. S. which arises from the testimonies reflects perfectly the synergy which was clear at the start of the company in Norway (icastically depicted in the name of the company "R&O".

5.4. It is not true that the defendant (as he tried to allege during his examination on 6 July 2010[34]) resigned from every responsibility within Norway Invest as of December 2002, to be substituted *in toto* by Mr P. B. On the contrary, the statements of the witness M. N. and the documents contained in the case file prove that Ove Johansen was still *de facto* very present in the life of Norway Invest. The same defendant contradicted himself when he (trying to justify the money transfers of April 2003) stated that he was at that time working for Norway Invest in Belgrade.

M. N. stated that the money orders that he made to the bank accounts of Norway Invest Belgrade (a company which intertwined with the person of Ove Johansen) were made upon order of his bosses, Ove Johansen and R. S. (the last word being of R. S.). Additionally, M. N. stated that R. S. ordered him to obey to the instructions of Ove Johansen. Two other circumstances already highlighted contradict the defendant's statements, i.e.:

- the minutes of the meetings of the 6th of February 2003 signed by Ove Johansen as CEO of Norway Invest;
- the email exchange of 27 February 2003 with R. R. and L. Xh..

This means that the fact that a new technician (P. B.) appeared in the life of Norway Invest as (allegedly) project manager (also in consideration that the defendant himself admitted that his technical competence in the field was not superior to that of an average man[35]) does not mean that the prominent presence of Ove Johansen ceased to exist. And, finally, if it were true that Ove Johansen did not play any role in the company as of March 2003, then it would be impossible for him to substantiate the lawfulness of the payments he received in March/April his Belgrade accounts (allegedly on behalf of Norway Invest).

[34] See trial minutes of 6.7.2010, page 8: "*Ove Johansen: .... The reason I got these 9 months in prison was because the books were not finished for the last year when we went bankrupt. That is why I was not in Kosovo in 2003 more or less because I was serving that sentence; I have one thing I want to say to the prosecutor.*
Presiding Judge: This is a moment for questions, you will have time for statements later.
Ove Johansen: I got this sentence in November 2002 and I immediately said to those who controlled Norway Invest in Norway I quit, so it will not be a problem for Norway Invest R & O AS so they got a new project manager in November 2002 named Peter Butcher".

[35] See trial minutes of 6.7.2010, page 7:
"*Public Prosecutor: This means that you have no qualifications in the area of IT?*
Ove Johansen: No not more than a normal human being".

5.5. Ove Johansen was aware that the payment of 300.000 Euro from PTK to Norway Invest was undue.

The defendant defended himself by stating:

- that he could not know (being external to PTK) that L. Xh. did not have the authority to order the payment;
- that Norway Invest had performed the activities in favor of PTK;
- that therefore these activities were billable and payable.

This conclusion cannot be shared, for the following reasons:

a. Ove Johansen could not ignore that the condition for PTK's concurring in the expenses was the existence of a binding agreement between PTK and Norway Invest. It is a basic principle, that even the most unprepared operator in this field knows, that the law prevents public companies from paying sums of money without a legal obligation supporting the payment. It is important to note that Ove Johansen claimed being a very expert international operator in this field [36]. And it is important to add that the payment which Norway Invest was requesting to PTK was for services which were still allegedly to be rendered by Norway Invest. This, considering the fact that PTK was a publicly owned enterprise, is particularly surprising.

b. Ove Johansen knew that in the instant case such an agreement was not existing. It remains a mere allegation of his that there was an agreement according to which PTK should concur in the expenses incurred by Norway Invest.

And the law is clear (as it was highlighted also in the verdict of the Special Chamber) in that only a written agreement (and a detailed one, according to the requirements set forth by section 29.1 of the UNMIK regulation on Business Organizations) could be binding for PTK.

c. Ove Johansen in his defence was always unable to point precisely at the source of the legal obligation for PTK to concur in the expenses. The defendant in his examination at times referred to the memorandum of understanding, at other times stated that it was understood between the

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[36] Page 6 of the trial minutes of 6.7.2010:
Ove Johansen: *My education is an engineer I have been leading projects like this approximately 1000 of them, which include emergency systems mainly from multinational companies and worldwide insurance companies. I have led projects in Australia, China France Germany, UK, US and maybe 20 other countries. I have all approvals according to Central European Norms. I was the only one at least in north Europe who had all the approvals. Normally I led about 100 engineers on these projects.*

parties since the very beginning that there would be a 50/50 contribution in the expenses. But he was unable to indicate precise documents where this is stated.

d. The amount of alleged expenses eligible for reimbursement in the TETRA project was much lower than what indicated in the invoice (and this was for sure evident to Ove Johansen, given his role and quality in the company);

5.6. Acting as manager of Norway Invest, he is the one who mostly pushed for the conclusion of the shareholder's agreement for the creation of the Joint Company. This, despite the contrary allegations of the defendant, arises from the evidence contained in the case file. Apart from the meeting minutes and email exchanges until March 2003 already examined above, the defendant is the one who tried until the end (through the creation of companies which followed to Company Norway Invest) to conclude the agreement with PTK or at least to recover (part of) the loss of Norway Invest.
It was also already clarified that Ove Johansen was well aware of the identity and role of L. Xh. within PTK, as well as of her powers in the quality of managing director.
Having the above in mind, the Panel concurs that Ove Johansen, in his factual position of manager of Norway Invest, requested the payment of the undue sum of 300.000 EUR. This is, first of all, obvious in terms of mere logic, given:

- his prominent position in Norway Invest;
- the particular importance of the payment: this was not only particularly relevant: it would also have implicitly confirmed that the agreement between Norway Invest and PTK was concluded.

This is also made clear by the fact that Ove Johansen was behind the invoicing process of such payment (see the already mentioned email exchange of 27/2 – 3/3/2003 in which R. R. instructs the persons involved - Ove Johansen and L. Xh. - on how to arrange the invoicing in order for the payment to be formally completed).
The above entails that not only Ove Johansen gave cause to the payment: he also enabled the counterpart L. Xh. to have a documentary justification of it.
There is also sufficient evidence in the case file that the management of Norway Invest was well aware of the absence of a convincing legal basis for the payment (and thus of the inexistence of a credit of Norway Invest towards PTK) and tried a documentary *escamotage* in order to get around such legal difficulty: this is made clear by the fact that around one month after the issuance of the first invoice from Norway Invest to PTK, another identical invoice (but fictitiously issued by the non existing company ARTET) was issued to PTK for the same debt.
This can find a logical explanation only admitting that the management of Norway Invest and the management of PTK were trying to provide a credible justification to the unlawful

payment, being it clear to both that, based on the agreements that were being drafted, only ARTET (*once created*) would have been entitled to obtain financial contributions from PTK and thus only ARTET could have lawfully issued invoices to PTK.

It is worth adding that Norway Invest/Ove Johansen had a very strong interest in obtaining the payment. Such interest was of a twofold nature.

Firstly, it would have meant a boost of oxygen for the company.

Secondly, it would have reinforced the position of Norway Invest towards PTK in the course of the negotiations, entailing a further factual step on the road towards the conclusion of a contractual relationship.

The strong interest of Norway Invest is easily verifiable by looking at the amount of revenue which was expected in case the project had been concluded: the claim against PTK/KTA quoted in the verdict of the Special Chamber of the Supreme Court indicate the sum of 11.700.000 EUR for contractual loss.

For the above it must be concluded that Ove Johansen willfully contributed in the conduct of L. Xh. when she ordered the payment of 300.000 Euro from PTK to Norway Invest.

Two factual allegations contained in the indictment were not sufficiently proved in the course of the main trial.

a. The Prosecution alleged that Ove Johansen took personal financial advantage from that payment.

There are in the case file, indeed, strong hints in that direction.

It is proven, in fact that once the payment from PTK had been received from the Norway Invest account two money orders of total 250.000 EUR were made by M. N. to the bank account of Norway Invest Belgrade, where the authorized person to operate was Ove Johansen.

The Panel notes, though, that after the money was paid to Norway Invest and before M. N. ordered the payments to Ove Johansen, other significant sums of money were received by Norway Invest from Norway. There is a reasonable doubt, therefore, that the money which was sent to Ove Johansen was actually coming from Norway.

b. The Prosecution alleged that the creation of Norway Invest itself had no real substance and was merely aimed at defrauding PTK of 300.000 EUR.

Also in this case there are only serious suspicions in that direction (consisting in the fact that Norway Invest did not have a solid financial backbone, in the fact that the technical capacities of the company and of Ove Johansen remained hazy, that there is no clarity as to the nature and amount of expenses sustained by Norway Invest in Kosovo). On the other hand, though, it is proved that Norway Invest actually invested sums of a certain significance in Kosovo (at least as to the rental of the premises in Peyton and as to the recruitment of some employees). This introduce a reasonable doubt as to the allegation of the Prosecutor,

being it possible to argue (as an alternative reconstruction) that actually an investment had been made and that it did not turn out to be successful.

This in no way means, though, that the defendant did not contribute in the abuse of official position committed by L. Xh.: it was highlighted above that the constitutive elements of the criminal offence remain fully proved.

6. The punishment

According to art. 34 of the CCK, the purposes of punishment are to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and to deter other persons from committing criminal offences.
When calculating the punishment the panel shall calculate *inter alia* the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behavior after committing a criminal offence.
In the instant case the Panel took into consideration as aggravating circumstances the high amount of money which was the object of the payment, and the subsequent high damage caused to the budget of PTK. It must, additionally, be considered that the defendant was already convicted in Norway for a criminal offence of unfaithful accountancy and for a minor criminal offence (connected to road circulation).
As mitigating circumstances (to be assessed in light of art. 44, para 1, read in conjunction with 66, CCK) the Panel considers the fact that the defendant, differently from the co-perpetrator L. Xh., was not vested with an official position: this makes his position lighter if compared to the latter, who as an official person was faced – from a subjective and objective point of view - with a higher standard of personal diligence and faithfulness in dealing with the public powers entrusted to her.
Another mitigating circumstance which the panel considered is the fact that there is not full proof that the money paid by PTK ended up in the pockets of Ove Johansen. Thus, there is only evidence of the fact that the actions of the defendant led to the enrichment of Norway Invest and that the motive of Ove Johansen for accepting the unlawful payment might have been an excessive zeal in pursuing the aims of Norway Invest.
Also the difficulties connected to doing business in Kosovo at the time in which the defendant acted must be considered (in an *in dubio pro reo* approach) in favour of the defendant.

The punishment therefore will be executed if within the time period of two years starting from the date when the judgment becomes final Ove Johansen does not compensate the damage caused to PTK at the amount of 300.000 Euros

This in consideration:

- of the fact that a significant part of the punishment already took place;
- of the severe condition (compensation of the damage of 300.000 Euros) attached to conditional suspension.

It is therefore decided as in the enacting clause.

Pristina, 9.7.2010

The Presiding Judge
Ferdinando Buatier de Mongeot

The Panel Member
Francesco Florit

The Panel Member
Nehat Idrizi

The Court recorder
Christin Nilsson

Legal Remedy

Pursuant to art. 400 PCPCK, an appeal must be announced within 8 days from the announcement of this verdict.

Pursuant to art. 407 PCPCK, the appeal shall be filed through the District Court of Pristina to the Supreme Court of Kosovo within fifteen days from the date the copy of the judgment has been served.