

DISTRICT COURT OF PRISHTINË/PRISTINA

KA nr. 562/12

8 October 2012

EULEX Judge Mariola Pasnik, EULEX Judge at the District Court of Prishtinë/Pristina, as Confirmation of Indictment Judge, in the criminal case against the defendants:

1.

Surname	TOLAJ
Name	Ilir
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	XX

2.

Surname	PAJAZITI
Name	Arbenita
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Female
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	Unknown

3.

Surname	SHABANI
Name	Nexhat
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	Unknown

4.

Surname	HYSENI
Name	Ismet
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	Unknown

5.

Surname	FEJZA
Name	Hajrullah
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Prishtina
ID Number	XX

6.

Surname	KUQI
Name	Zenel
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	XX

7.

Surname	FUSHA
Name	Bekim
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male

Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	XX

8.

Surname	THACI
Name	Alban
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	XX

9.

Surname	ASLLANI
Name	Basri
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Pristina
ID Number	Unknown

10.

Surname	AJETI
Name	Imer
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Prishtina
ID Number	XX

11.

Surname	BUKOSHI
Name	Bujar
Fathers Name	XX
Date of Birth	XX
Place of Birth	XX
Gender	Male
Address	XX
Nationality	Albanian
Citizenship	Kosovar
Whereabouts	Prishtina
ID Number	XX

Charged with one or more of the following offences:

1. **Abuse of Official Position or Authority**, contrary to Article 339, par. 1 and 3 of the Criminal Code of Kosovo ("CCK"), in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years (*against Ilir Tolaj, Arbenita Pajaziti, Ismet Hyseni, Zenel Kuqi, Hajrullah Fejza, Bekim Fusha, Alban Thaci, Basri Aslani and Bujar Bukoshi*);
2. **Attempted Abuse of Official Position or Authority**, contrary to Article 339, par. 1 and 3 and Article 20 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years (*against Ilir Tolaj, Arbenita Pajaziti and Ismet Hyseni*);
3. **Mistreatment in Exercising Duties**, contrary to Article 164, par. 1 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of three months to three years (*against Ilir Tolaj and Bekim Fusha*);
4. **Misuse of Economic Authorisations**, contrary to Article 236, par. 1 of the CCK, punishable with imprisonment of six months to five years (*against Ilir Tolaj, Arbenita Pajaziti and Ismet Hyseni*);
5. **Entering into Harmful Contracts**, contrary to Article 237, par. 1 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of three months to three years (*against Ilir Tolaj, Arbenita Pajaziti, Ismet Hyseni, Zenel Kuqi, Hajrullah Fejza and Bekim Fusha*);
6. **Abuse of Official Position or Authority**, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years (*against Ilir Tolaj and Nexhat Shabani*);
7. **Issuing An Unlawful Judicial Decision**, contrary to Article 346 of the CCK, in conjunction with Article 23 of the CCK, punishable by imprisonment of six months to five years (*against Ilir Tolaj and Nexhat Shabani*);
8. **Accepting Bribes**, contrary to Article 343, par. 2 of the CCK, punishable with imprisonment of three months to three years; (*against Ilir Tolaj, Hajrullah Fejza and Ismet Hyseni*);
9. **Tax Evasion**, contrary to Article 249, par. 2 of the CCK, and punishable by a fine and imprisonment of six months to five years (*against Ilir Tolaj*);
10. **Obstruction of Evidence**, contrary to Article 309, par. 1 and 2 of the CCK, punishable by a fine or imprisonment of six months to five years. (*against Ilir Tolaj and Imer Ajeti*)

Having reviewed the Amended Indictment PPS Nos. 64/11, 465/09 and 424/09, dated 4 July 2012 (English version) and 12 July 2012 (Albanian version) and filed with the District Court of Prishtinë/Pristina on 16 July 2012; and

Having conducted the confirmation of indictment hearings on 9, 21, 22, 23 August, and 3 and 5 September 2012, in the presence of all defendants and the following defence counsels: Bajram Tmava (*for Ilir Tolaj*), Naser Peci (*for Arbenita Pajaziti*), *ex officio* lawyer Sabrie Jashari (*for Nexhat Shabani*), Fatmir Aliu (*for Ismet Hyseni*), Ramë Gashi (*for Hajrullah Fejza*), Xhevdet Shala (*for Zenel Kuqi*), Osman Mehmeti (*for Bekim Fusha*), *ex officio* lawyer Ahmet Ahmeti (*for Alban Thaci*), *ex officio* lawyer Petri Dushi (*for Basri Aslani*) and Ramiz Krasniqi (*for Imer Ajeti*), Destan Rukiqi¹ and Besnik Berisha (*for Bujar Bukoshi*); and in the presence of EULEX Special Prosecutor, Maria Bamieh, of the SPRK; as well as in the presence of the injured parties: NK, representative of the Ministry of Justice, Lawyer Arianit Koci, representative of Jona Med, BD, AR and FL.

Pursuant to Article 316, par. 4 of the Kosovo Code of Criminal Procedure ('KCCP'); hereby issues the following;

RULING ON CONFIRMATION OF INDICTMENT

I.

The Amended Indictment PPS No. 64/11, 465/09 and 424/09 (hereinafter 'the Indictment'), dated 4 July 2012 (English version) and 12 July 2012 (Albanian version) and filed with the District Court of Prishtinë/Pristina on 16 July 2012, is hereby CONFIRMED in the following Counts and against the following defendants:

COUNT 1 - Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the Criminal Code of Kosovo ('CCK'), in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years:

item 1.1; against **Ilir Tolaj, Arbenita Pajaziti**

item 1.2; against **Ilir Tolaj**

item 1.3; against **Ilir Tolaj and Arbenita Pajaziti**

item 1.4; against **Ilir Tolaj, Arbenita Pajaziti and Ismet Hyseni**

item 1.5; against **Arbenita Pajaziti**

item 1.6; against **Ilir Tolaj and Arbenita Pajaziti**

item 1.7; against **Ilir Tolaj, Arbenita Pajaziti, Zenel Kuqi, Hajrullah Fejza, Bekim Fusha and Bujar Bukoshi**

item 1.8; against **Ilir Tolaj and Bujar Bukoshi**

item 1.9; against **Ilir Tolaj, Hajrullah Fejza, Bekim Fusha and Zenel Kuqi**

¹ Lawyer Destan Rukiqi was absent in the hearings of 3 and 5 September 12. However, the second lawyer of the defendant Bujar Bukoshi was present and the latter informed the Court that Lawyer Rukiqi is in the USA which shall stay there three weeks and he agreed to continue without his second lawyer.

item 1.10; against **Ilir Tolaj, Bekim Fusha** and **Zenel Kuqi**
item 1.11; against **Hajrullah Fejza, Zenel Kuqi** and **Ilir Tolaj**
item 1.12; against **Ilir Tolaj, Hajrullah Fejza, Zenel Kuqi** and **Alban Thaqi**.
item 1.13; against **Zenel Kuqi**;

COUNT 2 - Attempted Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 and Article 20 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years, (against **Ilir Tolaj, Arbenita Pajaziti** and **Ismet Hyseni**);

COUNT 3 - Mistreatment in Exercising Duties, contrary to Article 164, par. 1 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of three months to three years:

item 3.1 against **Ilir Tolaj**
item 3.2 against **Ilir Tolaj** and **Bekim Fusha**;

COUNT 6 - Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years (against **Ilir Tolaj** and **Nexhat Shabani**);

COUNT 8 - Accepting Bribes, contrary to Article 343, par. 2 of the CCK, punishable with imprisonment of three months to three years; (against **Ilir Tolaj, Hajrullah Fejza** and **Ismet Hyseni**);

COUNT 9 - Tax Evasion, contrary to Article 249, par. 2 of the CCK, and punishable by a fine and imprisonment of six months to five years (against **Ilir Tolaj**);

COUNT 10 - Obstruction of Evidence, contrary to Article 309, par. 1 and 2 of the CCK, punishable by a fine or imprisonment of six months to five *years*, (against **Ilir Tolaj** and **Imer Ajeti**).

Whereas, pursuant to Article 316, par. 1 of KCCP

II.

The Amended Indictment PPS No. 64/11, 465/09 and 424/09 (hereinafter ‘the Indictment’), dated 4 July 2012 (English version) and 12 July 2012 (Albanian version) and filed with the District Court of Prishtinë/Priština on 16 July 2012, is hereby **DISMISSED** in the following counts and the criminal proceedings are terminated against the following defendants:

COUNT I, items 1, 6, and 7 - Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years, against the defendant **Ismet Hyseni**;

COUNT I, item 12 - Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years, against the defendant **Basri Asllani**;

COUNT 4 - Misuse of economic authorization, contrary to Article 236 paragraph 1 of the CCK, against **Ilir Tolaj and Arbenita Pajaziti and Ismet Hyseni**;

COUNT 5, items 1, 2 and 3 - Entering into harmful contracts, contrary to Article 237 (1) of the CCK in co-perpetration as read with Article 23 CCK and punishable by imprisonment of three months to three years, against **Ilir Tolaj, Arbenita Pajaziti, Ismet Hyseni, Zenel Kuqi, Hajrullah Fejza and Bekim Fusha**;

COUNT 7 - Issuing unlawful judicial decision, in violation of Article 346 of the CCK, in co-perpetration in conjunction Article 23, punishable by imprisonment of six months to five years, against **Nexhat Shabani and Ilir Tolaj**.

III.

After the Indictment becomes final, the Indictment and the case record shall immediately be sent to the Presiding Judge of this Court for the main trial.

REASONING

Competence of the Court

1. This case falls under the exclusive competence of EULEX judges pursuant article 5, paragraph 1 of Law 03/L-052 and article 3, paragraph 1 of Law 03/L-53.

Preliminary procedural findings

2. During the confirmation hearing, all Defence Counsels raised the issue of eventual breaching of article 305, paragraph 1 of KCCP. According to them, the Indictment filed against their clients does not comply with the procedure requirements as foreseen by the aforementioned article. It was also stressed out that the KCCP does not recognize “the amended indictment” term. Further, the Defence Counsels stressed out that the defendants are not “official persons” as the Article 107 of the Criminal Code of Kosovo (CCK) foresees.
3. It is the opinion of the Confirmation Judge that, going through the Indictment 64/11, 465/09 and 424/09 (hereinafter ‘the Indictment’), dated 4 July 2012 (English version) and 12 July 2012 (Albanian version) and filed with the District Court of Prishtinë/Pristina on 16 July 2012 and the amendments to the indictment, dated 6 August 2012 and filed with the Court on 9 August 2012, there is not a single fact in which doubts may arise: all facts are sufficiently described regarding each of the defendants, thus the undersigned judge considers that this indictment satisfies the requirements of Article 305, paragraph 1, subparagraphs 1 through 7 of KCCP. As for the arguments that the law does not recognize the term “Amended Indictment”,

it is clear that subject of the confirmation hearing is the Indictment filed with the Court on 16 July 2012 and the amendments of the Indictment filed with the Court on 9 August 2012. The law does not explicitly prohibit the prosecutor to make amendments/supplementations before the indictment becomes final. As for the arguments that the defendants cannot be considered as “official persons” the Court concludes that all of them² were Civil Servants bound by the law of Civil Servants articles 5 and 52. Law number no 2010/03 L-149 and are considered as official persons for the purposes of art 107 CCK. In other words, the defendants Ilir Tolaj as Permanent Secretary of the Ministry of Health (MoH), Arbenita Pajaziti as Procurement Officer, Nexhat Shabani as Head of Public Procurement Review Body, Ismet Hyseni as Procurement Officer and Director of Procurement, Hajrullah Fejza as Head of Quality Control, Zenel Kuqi as Head of Procurement, Bekim Fusha as Chief of Pharmacy, Alban Thaci as Procurement Assistant, and Bujar Bukoshi as the Minister of MoH, exercised in the events described in the Indictment specific official duties based on authorization provided for by law. Therefore, pursuant to Article 107, par. 1, sub.3 of the Criminal Code of Kosovo (CCK) all of them are official persons.

Procedural history

4. After completing the investigation³, on 4 July 2012 the EULEX Special Prosecutor, Maria Bamieh, filed the Indictment PPS nos. 64/11, 465/09 and 424/09 at the District Court of Prishtinë/Priština. The Special Prosecutor subsequently, and of her own volition, filed an Amended Indictment (again PPS nos. 64/11, 465/09 and 424/09). It should be noted that the Amended Indictment carries two different dates – the English version of the document bears the date 4 July 2012 whilst the Albanian version is dated 12 July 2012. It is assumed that the date of the English version was simply not updated when the amendments were made. In any event, both the English and Albanian language versions of the Amended Indictment were filed with the District Court of Prishtinë/Pristina at the same time on 16 July 2012.
5. On 12 July 2012 the Prosecution filed a termination of Investigation against LM, HE and EM⁴.
6. The Court issued a separate Ruling on the admissibility of the evidence on 11 September 2012 which was partially modified by the Appeal Ruling dated 18 September 2012.

² Excluding the defendant Bujar Bukoshi who had a political position and no argument was raised in this regard, and the defendant Imer Ajeti who is not subject of these arguments.

³ A detailed description of procedural history is given by the Ruling of 11/09/12, thus the Court sees as unnecessary to repeat it. Though minor issue but it is to be mentioned that the Court found a typo in pg 9, item 8 of the cited Ruling where also the Article 167 of CCK was mistakenly written. It should have been only the Article 164.

⁴ As stressed out in the Ruling of 11/09/12, in the case files there is NO formal Ruling on the expansion of the investigation against EM.

7. All the parties had fulfilled the obligation related to the disclosure of evidence, as provided by Articles 307 and 308 of the KCCP.
8. The Special Prosecutor did read the indictment out and asked the Court to confirm in its entirety because there is enough evidence to support the well grounded suspicion that the all defendants have committed the criminal offences they are indicted of.
9. All the defendants were fully aware of the content of the indictment and pleaded not guilty on all counts of the Indictment.
10. Specific arguments such as; violation of the procedural provisions in terms of the time frame of the investigation, the admissibility of evidence; immunity of the defendant Bujar Bukoshi and other general remarks regarding which the Court has given detailed reasons with the Ruling dated 11 September 2012 therefore sees as unnecessary to elaborate the same issues again.
11. None of the defendants did plead guilty and all them through their Defence Counsels provided the Court with the counter evidence proposing the dismissal of the Indictment.
12. The Court has also received some additional evidence by the SPRK Prosecutor which is not taken into consideration for the purpose of this Ruling. All pieces of evidence received after 5 September 2012, shall be evaluated and appreciated by the Main Trial Panel.
13. The Confirmation Judge has analyzed all case files in such a way as not to prejudice the outcome of the main trial as requested by the Article 317, par. 2 of KCCP.

Regarding confirmed parts of the Indictment Count 1, item 1 to 13:

14. The following evidence was considered relevant to these counts as documented within case file:

Count 1.1 (Binder 16 a Tab 2): Evidence Yess pharm contract dated 21/09/06 1.1; Yess pharm request dated 03/09/07 1.2; Memorandum of understanding dated 20/09/07 1.3; Office document dated 30/07/07. 1.4; Payment approval forms dated 08/11/07 delivery reports and packing lists .1.5; Packing list 1.6; Inspection report 1.7; Contract for medications dated 21/09/06 between Jona Med and MOH 2.1; Request dated 29/05/07 email dated 30/10/06 2.2; Request dated 11/09/06 2.3; Report dated 10/11/06 2.4; Tender implementation report 2.6; Announcement of tender 14/03/07 2.7; Request 9/10/06 2.8; letters from Jona Med to MOH 14 /03/08; letter dated 16/05/2011; letter dated 03/06/08 page 209 binder 32; Letter of 11/09/07 Jona Med to Ilir Tolaj page 255 binder 32 ; Letter of 07/12/2006 page 259 Binder 32; Letter of 14/03/2008 Jona Med to AG Page 215 Binder 32; letters from Jona Med lawyers to MoH, Gail Warrander 29/05/2007; Decision of Economic Court dated 24/06/09 page 179 binder 32; Letter Jona Med to MoH, Ilir Tolaj, Procurement and Pharmaceutical 07/02/2006; Letter to Jona Med, dated 30/10/2006, P262 B32; Letter to MoH dated 09/10/2006, page 263; Document page 280 -282 B32; Sutures Koslabor invoices page 407, dated 17/12/2007 P-409 B32; Koslabor invoice 14/12/2007 P 409 B32; Exclusive Gjilan invoice 28/12/2007, p. 410 B32.

15. First seven listed documents (related to Yess Pharm) show that the Ministry of the Health (MoH) were in breach of their contractual obligation to Yess Pharm and one day before the contract was due to expire the Ministry through Ilir Tolaj entered into a memorandum of understanding for Yess Pharm. However, when Jona Med asked for similar Memorandum of Understanding it was not done.
16. Specifically, in relation to Jona Med the documents mentioned in item 14, starting from “*Contract for medications dated 21/09/06 between Jona Med and MoH 2.1 to Exclusive Gjilan invoice 28 December 2007 p 410 B32*” of this Ruling support the count 1.1.
17. All these documents show that Jona Med raised the issue to the then minister of MoH and the defendant Ilir Tolaj regarding the non-performance of the contract but no solution was found. Moreover, in the case files are also statements of the witnesses *LM, AL, FC, and BD* that satisfies requirements for establishing the well-grounded suspicion that all defendants have committed the criminal offence under this item.
18. As for the **Count 1.2**, the following evidence established the well-grounded suspicion that the defendant Ilir Tolaj has committed this criminal offence; *AP’s statement, the statement of the defendant Ilir Tolaj, given in the presence of his Defence counsel.* The statement of AP corroborates with the statement of the defendant Ilir Tolaj, and the statement of Arbenita Pajaziti. Therefore, the Court concludes that the above-mentioned evidence satisfy requirements for the establishing the well-grounded suspicion that the criminal offence has been committed under this item.
19. As for the **Count 1.3**, the evidence show that both Ilir Tolaj and Arbenita Pajaziti through AP made RH to sign a false declaration that the latter was part of the evaluation commission. The evidence such as: *RH’s statement; AP’s statement; Ismet Hyseni’s statement; the Request for nominating the commission members dated 06/12/2007, 8.1; Evidence number 13.1 Request for nomination of committee members dated 26/12/2007; Arbenita Pajaziti’s statement; Contract between MoH and Koslabor 9.1; Offer for three lots 9.2; Three invoices from Jona Med 9.3; Two invoices from Koslabor with packing lists 9.4; Certificates of product analysis lot number 070910; Acceptance report Signed by AP 9.6; Acceptance report signed by Arbenita Pajazit and the Acceptance documents for products no 168 and 171 9.8,* are considered by the Confirmation Judge in order to check whether they establish the well-grounded suspicion that the criminal offence has been committed. The above-mentioned evidence establish the well-grounded suspicious that both defendants in one or another way made RH to sign the false declaration.
20. As for the **Count 1.4**, the allegations that the defendants Ilir Tolaj, Arbenita Pajaziti and Ismet Hyseni have had improper contacts with the economic operators during the tender process are supported with the following evidence; *Arbenita Pajaziti’s statements given in front of the prosecutor; AL’s statement given in front of the prosecutor; Statement of Ilir Tolaj, and Ismet Hyseni’s statements.* It is to be mentioned that the above-mentioned evidence has satisfied the requirements of the well-grounded suspicion that all the defendants have committed the criminal offence under this item.

21. *As for the **Count 1.5** of the Indictment* the following evidence was evaluated; *the statements of Arbenita Pajaziti; Statement of AL; Evidence from the Pharmaceutical licensing authority; Suspension document relating to Arbenita Pajaziti page 205 binder 32; Statement given to prosecutor by AS; Statement given to the Prosecutor by BS; Documents form the Pharmaceutical Licensing Authority; Letter of Jona Med to Ilir Tolaj, dated 11/09/07 page 255; Request for nomination of committee members 13.1 binder 16B; Statement under oath 13.2 Binder 16 B.* All the above-mentioned evidence, especially statement of the defendant Arbenita Pajaziti admitting to have sold her license to AS and working for him and the Ministry of Health, and the statement of AL confirming the close relationship between BS and Arbenita Pajaziti as well as the statement of AS admitting that the defendant Arbenita Pajaziti did sell her license to him confirm the well-grounded suspicion that the defendant Arbenita Pajaziti has committed the criminal offence as charged of.
22. *As for the **Count 1.6** of the Indictment,* the following evidence are considered to have established the well-grounded suspicion that the defendants Ilir Tolaj and Arbenita Pajaziti have committed the criminal offence they are charged of. Specifically, *the statement of BG; Invoice 2218/07 and follow up documents regarding the delivery of the products; IH's statement; NZ's statement; BS's statement; AS's statement; Ilir Tolaj statement before the Public prosecutor stating to have attended the "bank guarantee" meeting as a mere observer; Contract between MoH and Koslabor 9.1; Offer for three lots 9.2; Acceptance report of the defendant Arbenita Pajaziti; Notes 07/ 03/08; Advance payments Financial policy and treasury instructions -02 on public spending; Document page 280 -282 B32; Sutures Koslabor invoices page 407 17/12/2007 P-409 B32; Koslabor invoice 14/12/ 2007, P 409 B32; Invoice dated 28 December 2007 of the company Exclusive from Gjilan, p 410 B32; Three invoices from Jona Med 9.3 B16 a; Two invoices from Koslabor with packing lists 9.4 B16 A; Certificates of product analysis lot number 070910 9.5/B16 A; Acceptance report Signed by AP 9.6 B16 a; Acceptance documents for products no 168 and 171 9.8; HZ's statement, 10; Contract Lirimed and MOH 10; Invoices 711 and 712 license KAMP Certificates of insulin analysis; Invoice number 8527 book of purchases copy book of invoices copy goods receipt number 181 and 182; Official letter dated 24/03/08; Recommendation dated 20/11/07; ZG's reply dated 21/12/07 with the email from Ilir Tolaj; Offer of Exclusive 27/12/07, 15.2; Invoice 6394 dated 28/12/2008 along with packing list 6395 invoice 384/08 15.3 acceptance letter number 185 dated 28/12/2008; Invoiced number 6395 with packing list packing list 6395; invoice 248/08; acceptance letter 188; invoice 1015/08; acceptance letter 189; invoice 348/08; acceptance letter 192; DUD 432 dated 27/01/08; DUD 10821 dated 22/12/07; acceptance and inspection report AP and acceptance and inspection 15.4 ac; Certification on temporary receipt; Tender guarantee number 126/2007 dated 28/12/07 16.1; Performance security blank dated 20/03/08.* All these evidence show that the meeting was called by the defendant Ilir Tolaj and then was run by the defendant Arbenita Pajaziti and Mr. Tolaj, and that the economic operators did attend the meeting. Considering the aforementioned evidence the Court concludes there is a well-grounded suspicion that the defendants have committed the criminal offence under this item.
23. *As for the **Count 1.7**,* the following evidence are evaluated and considered to have established the well-grounded suspicion that the defendants Ilir Tolaj, Arbenita Pajaziti, Bujar Bukoshi, Hajrullah Fejza, Bekim Fusha, Zenil Kuqi acting in co-perpetration have committed the criminal offence they are charged of. It was

specifically evaluated: *BD's statement; FC's statement; LM's statement; Ismet Hyseni's Statement; the facts that Jona Med only won contracts during the time when the defendant Ilir Tolaj was suspended from the Ministry and the only contracts Jona Med company won was when Ilir Tolaj was suspended as stated by Ismet Hyseni and BD and FC; Demetech email dated 23/01/2008 to Ilir Tolaj page 222 Binder 32; Letter from Ilir Tolaj to Demetech at page 223 - 230B 32; Contract MoH and exclusive 15.1; the CD Tolaj press statement indicating he sent the inspectors to Jona med; Failure to extend the one plus one contract because Yess Pharm and Jona Med had filed Law suits against the MoH; evidence of HK that the contracts were not extended because of the legal action taken against the MoH; AG's statement and AR's statement; Bujar Bukoshi's Criminal report dated 17/06/10; Ilir Tolaj's Criminal report dated 19/11/10 etc.*

24. It appears from the above-mentioned evidence that both Ilir Tolaj and Arbenita Pajaziti told Jona Med's representatives that they would never win another contract if the Jona Med Company did not withdraw the lawsuit filed against the MoH. It also appears that when Jona Med won some contracts while the defendant Ilir Tolaj was suspended, those contracts were not extended after the defendant Ilir Tolaj was appointed as the Minister's advisor in the period of April 2010–October 2010. Further to this, there is evidence confirming the role of the defendant Bujar Bukoshi in this process by refusing to extend “one plus one” contract just because Jona Med filed a law suit against the MoH. Moreover, there is also evidence establishing the well-grounded suspicion that the defendant Hajrullah Fejza, Bekim Fusha and Zenel Kuqi through their specific actions assisted in this campaign by manipulating the tenders and unlawfully eliminating Jona Med from the LOT 20 “tender for sutures”. Therefore, considering the aforementioned evidence the Court concludes there is a well-grounded suspicion that the defendants have committed the criminal offence under this item.
25. *As for the **Count 1.8** of the Indictment*, the Court has evaluated and considered that the *statements of HK, AR, AG and FC* have established the well-grounded suspicion that both the defendants Ilir Tolaj and Bujar Bukoshi, acting in co-perpetration have committed the criminal offence they are charged of. It is apparent that all other contracts were extended but only those of Jona Med and Yes Pharm were not because of the law suits filed against the MoH. Due to non extension of the contracts the MoH published several advertisements for the same products as those that Yess Pharm and Jona Med were supposed to provide with the not-extended one plus one contracts. All these allegations were enough for the Confirmation Judge to conclude that there is a well grounded suspicious that both the defendant Ilir Tolaj and Bujar Bukoshi have committed the criminal offence under this item.
26. *As for the **Count 1.9** of the Indictment Lot 20 tender 206/11/029/111*, the Court has evaluated and considers that the statements of “*BM, BM, tender documents and exchanged e-mails*” all together establish the well-grounded suspicion that Ilir Tolaj, Hajrullah Fejza, Zenel Kuqi and Bekim Fusha have committed the criminal offence they are charged of. Based on the evidence, it appears that on 10 November 2010 the Ministry of Health announced a tender for surgical sutures, with the number 71300/10/647/111. The tender was annulled on the basis that there were not three responsible economic bidders: there were in fact sufficient responsible bidders for the tender to have proceeded. The same tender (with the same number) was

announced on 20 December 2010 but was again annulled on 01 March 2011. The reason for the annulment was again a lack of responsible economic bidders. In both of the annulled tenders Jona Med had been the lowest bidder. On 02 March 2011 the same tender was announced for a third time but with a new number, 206/11/029/111. It also appears that Jona Med was again the lowest bidder for the lot with the sutures. However, on 15 April 2011 they received a notification that they were eliminated from further participation in procurement activity related to the lot. The erroneous reason given was that the catalogue presented in their tender file did not contain the articles required in the points 5 and 6. In the case files is a letter dated 12 May 2011 by Demetech confirming that they had presented the articles in the catalogue and that there would be no problem producing the products. Nevertheless, the Ministry of Health awarded the tender to the company called Lirimed. Lirimed's offer was for 921,872.30 EUR while Jona Med's offer was for 466,055.60 EUR. The difference in bids amounts to 455,816.70 EUR. Since the contract was for a three year period, the representative figure for damage caused to the Ministry of Health and budget of Kosovo by selecting Lirimed rather than Jona Med is 1,367,450.10 EUR, and that such a decision was contrary to Article 5 of the Law on Public Procurement which imposes an obligation to ensure that public funds and public resources are used in the most efficient and cost-effective manner taking into account the purpose and object of the procurement. The evidence show that the evaluation commission for the tender, as announced under number 206/11/029/111, was composed of BM (as the Official for capital projects), Bekim Fusha (as a pharmacist) and Hajrullah Fejza (as a doctor). According to BM, the evaluation of all the tenders was done and the commission voted unanimously for Jona Med, each of the commission members signing the report which declared Jona Med the winner. However, in order for the assessment report to be final it had to be signed by Zenel Kuqi as the Procurement Manager but the latter did not sign the report but instead asked the commission to reevaluate and reassess the offers. All this justifies the well grounded suspicious that the defendants have committed the criminal offence they are charged of.

27. *As for the **Count 1.10** of the Indictment*, the Court concludes that there is enough evidence to support the well-grounded suspicious that the defendants Ilir Tolaj, Bekim Fusha and Zenel Kuqi have committed the criminal offence as charged for. In the case files is evidence proving that during 2010 and in the early 2011 there were a number of advertisements for the drug but Sante Pharm was the only bidder as the only authorized company to provide the drug. However, each time the tender was annulled and the Ministry did not ask the Public Procurement Agency to revoke the article for open tender given there was only one supplier. The statement of MA, XX of Sante Pharm confirms that the defendant Zenel Kuqi did not respond to him within legal deadlines with the directions of Ilir Tolaj because of the statements of MA given in press regarding the irregularities within the MoJ. Considering the aforementioned the Court concludes that there exist the well-grounded suspicion that the defendants have committed the criminal offence under this item.
28. *As for the **Count 1.11** of the Indictment*, the statements of FL, CG and BB speak on the allegations concerning this offence. Since FL refused to pay the requested "cut", his contract was not extended and the MoH announced Emergency tender number

71300 07 789 126. The Prosecutor with the Indictment has described each of the defendants' actions thus the Court concludes that there exist enough evidence to support the well-grounded suspicion that the defendants have committed the criminal offence under this item.

29. *As for the Count 1.12 of the Indictment*, the case files contain sufficient evidence such as; tender documents for the supply of medicine and expenditures related to "Almakos Contract". The contract was for the supply of Gauze. The defendants failed to check the documents to ensure that there were three responsible bidders and to check that there was no conflict of interest. This enabled the economic operators to fix prices. The court concludes that based on the evidence there exist the well grounded suspicion that all the defendants have committed the criminal offence under this item.

30. *As for the Count 1.13 of the Indictment*, the Court concludes that the defendant Zenel Kuqi has committed the criminal offence as charged for. The defendant did not provide case files concerning the tender no. 20611095111, dated 13 July 2011⁵ upon the request of the Prosecution Office. Moreover, the documents were not found during the search at the MoH on 12 January 2012. All this establish the well-grounded suspicious that the criminal offence has been committed under this item.

COUNT - 2 of the Indictment- Attempted abuse of official position, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 and Article 20 of the CCK (Ilir Tolaj, Arbenita Pajaziti and Ismet Hyseni)

31. This count of the Indictment is supported by *the statements of BD and LM*. The Court has checked and evaluated the aforementioned statements and concludes that based on those there is enough evidence to support the well-grounded suspicious that the defendants have committed the criminal offence under this item.

COUNT - 3 of the Indictment- mistreatment in exercising official duties, contrary to Article 164 of CCK (Ilir Tolaj and Bekim Fusha)

32. *As for the Count 3.1 of the Indictment*, the case files contain evidence that the defendant Ilir Tolaj mistreated FC because of the law suit filed by Jona Med against the MoH. The action was undertaken in the meeting held at MoH premises. The statement of FC establishes the well-grounded suspicion that the defendant Ilir Tolaj has committed this criminal offence.

33. *As for the Count 3.2 of the Indictment*, the Court has taken into consideration the statements of BM and DK, and statements of the defendants **I**Bekim Fusha and Ilir

⁵ The date was corrected by the Prosecutor during the confirmation hearing dated 21 Aug 2012, pg. 8

Tolaj. All these statements confirm the existence of the well-grounded suspicion that the offence has been committed in co-perpetration by both defendants, as prescribed in the Indictment.

COUNT - 6 of the Indictment - Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years (against Ilir Tolaj and Nexhat Shabani);

34. When deciding whether the well-grounded suspicious exist that the defendants Ilir Tolaj and Nexhat Shabani have committed this criminal offence, the Court has evaluated the following evidence: *the statements of the witnesses RG and SR* where they both confirm to have not participated in the review panel of PPRB. Moreover, the statement of the defendant Nexhat Shabani indirectly corroborates with the aforementioned statements, and also Ilir Tolaj's involvement in the commission of this criminal offence is established. Thus, the Court concludes that there is grounded suspicion that both defendants have committed the criminal offence under this item.

COUNT - 8 of the Indictment – Accepting Bribes, contrary to Article 343, par. 2 of the CCK, punishable with imprisonment of three months to three years; (against Ilir Tolaj, Hajrullah Fejza and Ismet Hyseni);

35. This count is supported with the statements of the witness of the following economic operators: *Jona Med, Pro Pharm Helevtica ad Sante Pharm*. Additionally, the Court has evaluated also the statements of the witness *CG and BB*, which all together satisfied the requirements for the existence of the well-grounded suspicion that all indicted defendants have committed the criminal offence under this item.

COUNT - 9 of the Indictment - Tax Evasion, contrary to Article 249, par. 2 of the CCK, and punishable by a fine and imprisonment of six months to five years (against Ilir Tolaj);

36. The Court has taken into consideration Kosovo Tax Administration Reports, the statement of the defendant Ilir Tolaj and the evidence collected through the lawful order for the disclosure of financial data which were enough to prove the existence of the well-grounded suspicion that the defendant has committed the criminal offence as charged for.

COUNT - 10 of the Indictment - Obstruction of Evidence, contrary to Article 309, par. 1 and 2 of the CCK, punishable by a fine or imprisonment of six months to five years, against Ilir Tolaj and Imer Ajeti.

37. The main evidentiary basis of the prosecution in this count is the intercepted telephone evidence of calls made to and from Ilir Tolaj whilst in detention on remand. In breach of prison rules he had two mobile telephones in prison. One of these mobile phones was being intercepted following a court order. The intercepts show that Ilir Tolaj, Imer Ajeti and with the assistance of others made efforts to obstruct the progress of the case and to secure Ilir Tolaj's release from detention on remand and ultimate acquittal. The lawful intercepts show that both the defendants, through the intermediaries, were trying, to contact the Chief EULEX Prosecutor JN

and to get the President of the Assembly of EULEX Judges, FF, to direct the course of the proceedings. Additionally, the intercepts show that efforts were made and have intimated that the defendants are willing to pay for any interference in the case. The court concludes that there is enough evidence to support the well-grounded suspicion that both defendants have committed the criminal offence under this item.

Discussion regarding the well-grounded suspicion and the evidence taken into consideration for the confirmed part of the Indictment

38. In the Kosovo Code of Criminal Procedure (KCCP), the term “well-grounded suspicion” refers to the quantum and quality of evidence that exists in a given case to support a reasonable, objective belief or “suspicion” that a particular individual has committed the criminal offence(s) for which has been indicted. For example, the Article 316 (1), item 4 of the KCCP authorize the Confirmation Judge to dismiss an Indictment unless there is “sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.”
39. “The Code is not explicit as to the standard of “sufficient evidence” referred to in Article 316 paragraph 1 item 4 of KCCP. The interpretation should be based on the role of the confirmation judge, who decides after the completion of the confirmation hearing, but must not prejudice the adjudication of the matters which will be considered in the main trial (Article 317 paragraph 1 KCCP). Thus, the standard must be that such evidence, if accepted, may lead to a conclusion that it is more probable that a specific offence was committed than not. In this regard, the evidence submitted by the prosecution should be able to suggest that all elements of the offence have been committed.” – KSC, 25th October 2004.
40. The final credibility of the all evidence used to support the indictment will depend on several factors to be verified within the main trial. So far, the defense has not presented any line of defense capable of inverting the evidential strength of all evidence presented by the prosecution. All the statements of the defendants followed a line of material defense based on evidences not presented by the prosecution which were not convincible at this procedural stage.
41. It is the opinion of the Confirmation Judge that, regarding the standard of proof at this stage of the proceedings, the presented evidence is sufficient to justify the existence of a well-grounded suspicion that all defendants have committed the criminal offence as in the confirmed part of the Indictment.

Regarding the dismissed part of the Indictment and termination of the criminal proceedings (point II of the enacting clause)

COUNT I, items 1, 6, and 7, Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years, against the defendant Ismet Hyseni

42. With the motion filed within the Court on 5 September 2012, the Prosecutor withdrew charges 1.1, 1.6 and 1.7 of the Count I of the Indictment as well as the charge of the Count 4 of the Indictment thus the Court decided accordingly. The Court has dully notified the injured parties and none of them were interested to continue criminal prosecution against the defendant. Therefore, it was decided as in the enacting clause of this Ruling.

COUNT I, item 12, Abuse of Official Position or Authority, contrary to Article 339, par. 1 and 3 of the CCK, in conjunction with Article 23 of the CCK, punishable with imprisonment of one to eight years, against the defendant **Basri Asllani**

43. During the confirmation hearing dated 3 September 2012⁶, the Prosecutor withdrew the indictment against the defendant Basri Asllani. Though dully notified, none of injured parties were interested to continue criminal prosecution against the defendant. Therefore, it was decided as in the enacting clause of this Ruling.

COUNT 4 Misuse of economic authorization, contrary to Article 236 paragraph 1 of the CCK, against **Illir Tolaj, Arbenita Pajaziti and Ismet Hyseni**

44. As for the defendant Ismet Hyseni, see reasons under item 42 of this Ruling.

45. With regard to the defendants Illir Tolaj and Arbenita Pajaziti the Court took into consideration several facts for such a decision. The Article 107, par. 2 provides meaning of the term “responsible person”. The offence of misuse of economic authorization can only be committed by “special” category of the individuals and in this case none of the defendants fall under such category. It is evident that though the MoH enters into contractual obligations, the actors of MoH did not engage in economic activity. The MoH is not a business organization nor has a meaning of the legal person for the purposes of Article 236 of CCK in conjunction to Article 107, par.2 of CCK. Therefore, the Court concludes discussion regarding this topic.

COUNT 5, items 1, 2 and 3 Entering into harmful contracts, contrary to Article 237 (1) of the CCK in co-perpetration as read with Article 23 CCK and punishable by imprisonment of three months to three years, **Illir Tolaj, Arbenita Pajaziti, Ismet Hyseni, Zenel Kuqi, Hajrullah Fejza and Bekim Fusha**

46. With regard to this Court, the Court *mutatis-mutandis* relies on the same arguments as under item 45 of this Ruling.

COUNT 7 Issuing unlawful judicial decision, in violation of Article 346 of the CCK, in co-perpetration in conjunction Article 23, punishable by imprisonment of six months to five years, against **Nexhat Shabani and Illir Tolaj**

⁶ Minutes of the confirmation hearing dated,3 Sep 12, pg. 2

47. With regard to this Count the Court concludes that neither Nexhat Shabani nor Ilir Tolaj can be perpetrator of this criminal offence. The Article 346 of CCK clearly indicates the individuals which can be considered as perpetrators of this particular criminal offence. The perpetrators of this criminal offence can only be individuals exercising functions within judicial institutions e.g. Judges, lay Judges or Minor Offence Court Judges. It is evident that both the defendants exercised public functions within Administrative and NOT Judicial Institutions. The defendant Nexhat Shabani was Head of PPRB and the defendant Ilir Tolaj was Permanent Secretary of the MoH. The Prosecutor's arguments that the defendant Nexhat Shabani, has acted in judicial capacity making decisions based on evidence does not stand because of the mere argument that judicial power in Kosovo is exercised by the Courts. Since it is obvious that none of the defendants can be considered as the perpetrators of this criminal offence the court concludes discussions regarding this issue.

Therefore, for the above-mentioned reasons it is decided as in the enacting clause of this Ruling.

The confirmation Judge

Mariola Pasnik

LEGAL REMEDY:

Pursuant to Article 317 (2) of the KCCP, only the prosecutor and the injured parties can appeal this Ruling within 3 days from the time of being served with the Ruling. The appeal must be addressed to the three judge panel of the District Court of Prishtina.

Whereas, for the confirmed part of the Indictment no appeal shall be permitted because pursuant to Article 317, par. 2 of KCCP, only the prosecutor and the injured party can appeal thus this Article is *lex-specialis* as to the general provision of the Article 431, par. 1 of KCCP.