

**THIRD INTERIM AND PROJECT FINAL
REPORT ON THE ACTIVITIES AND
THE CASES UNDER THE
COMPETENCE OF
THE SPECIAL PROSECUTOR'S
OFFICE (SPO)**

Trial Observations:
Analysis of Selected Issues



Organization for Security and
Co-operation in Europe
Mission to Skopje

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LIST OF ACRONYMS

ACCMIS	Automated Court Case Management Information System
BCC Skopje	Basic Criminal Court Skopje
CC	Criminal Code [of Republic of North Macedonia]
DPA	The Democratic Party of Albanians
DUI	Democratic Union for Integration
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
JES	Judge for execution of the sanctions
LCP	Law on Criminal Procedure, Official Gazette no.150/2010, 100/2012, 142/2016 and 198/2018
MoIA	Ministry of Internal Affairs
MP	Member of Parliament
PJ	Presiding Judge
PPO	Public Prosecutor's Office
SPO	Special Prosecutor's Office
UBK	Bureau for Security and Counterintelligence
VMRO-DPMNE	The Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity

EXECUTIVE SUMMARY

The OSCE Mission to Skopje's final report on the activities and the cases under the competence of the Special Public Prosecutor's Office (SPO) follows the first and the second interim reports published in August 2018, and June 2019 respectively. This report covers the period between **December 2018 and January 2020** and contains analysis of trial observation.

After the introduction setting, the scope, and methodology, this report will analyse selected issues arising from all SPO cases, both initiated and taken over, including accounts of verdicts announced after January 2020. The second chapter provides factual description of the current state of affairs in the trials under scrutiny.

The third chapter of this report gives an overview on the investigations initiated by the SPO after 30 June 2017, widely perceived as the so-called cut-off day for lodging indictments by the SPO. Considering that these are still ongoing investigations, this chapter does not enter into the merits of the cases, instead it only provides a short description of the events that led to the criminal offences alleged by the Prosecution.

The fourth chapter provides analysis of the verdict issued thus far. As explained in the first chapter, only five cases are completed, albeit none during the reporting period. In keeping with OSCE trial monitoring guidelines, the report does not assess the merits of the cases, but instead examines the verdicts from a procedural fairness perspective.

The fifth chapter analyses a number of issues that frequently appeared during the entire process of the monitoring of these trials. The main problem identified in the vast majority of the trials was the issue of the efficiency and rapidity of the criminal proceedings. The trials appear to be long primarily for two reasons: because there is an improper mechanism for the presentation of the evidence before the trial panel, and because of frequent delays and postponements of hearings.

In most of the trials the presentation of material evidence came before the witnesses' testimony. In addition, it appears that the prosecutors lack skills and/or the willingness to select and present to the panel only the evidence that is relevant to support the charges in the indictment, which in turn results in prolongation of trial sessions where material evidence is presented, including evidence that cannot always be considered significant. It was further observed that the Prosecution is inclined to propose to the panel the entire evidence acquired during the investigation phase, even though not all of this evidence always supported the indictment.

From their side, judges appear to be too lenient and tolerate the parties' requests related to submission of evidence. They do not always exercise thorough control over the admissibility of the evidence at trial, but tend to allow the introduction of all the evidence requested by the parties without an appraisal of its relevance.

During the reporting period, the postponement rate for trial sessions remained the same as in the last reporting period; 34% respectively. The courts did make substantial efforts to complete cases, scheduling more hearings. At the same time, the defence used all op-

opportunities provided for by the law to slow the flow of the hearings. This defence course of action has repercussions on the length of the trial, in contrast with the court's duty to ensure speedy resolution of criminal cases. The main cause of postponements continued to be the absence of at least one defendant (26%); a number which recorded an increase compared to previous reports. The current legal framework does not provide the court with effective tools in circumstances where defendants wilfully decide not to attend their trials. When a defendant who was regularly notified of the hearing fails to appear in court, the law allows the possibility to postpone the hearing indefinitely, as long as the defendant submits a justification through their defence counsel. Nevertheless, as emphasized in the fifth chapter, a fine may be imposed should an abuse of rights be detected.

In Chapter 5, the report also analyses issues that arose at trial regarding the disclosure of evidence. More specifically, although the current legal framework obliges the prosecution to acquit the defendant with incriminating evidence and to reveal ex-culpatory evidence, these provisions are not always fully implemented in practice. The key moment in this regard comes when the Prosecution notifies the defence that the investigation is being completed and that the defence has right to access the case file, review the writs and evidence and make a "transcript" of them. This is the last deadline by which the Prosecution must reveal the evidence at the investigative phase of the procedure. However, in practice, it is left to the goodwill of the Prosecution to give to the defence copies of the evidence contained in the case file.

The SPO not only complied with its duty to make the case files available to the defence after the closure of the investigation, but also went beyond what is required by law, providing defence counsels CDs containing the evidence gathered in support of the charges. This practice is commendable and in line with the highest fair trial standards. However, the SPO did not provide the defence with copies of the wiretapped conversations for reasons that remain unclear. Although the defence had the opportunity to raise the issue at the actual trials and, consequently the SPO's decision to withhold evidence was subject to judicial review, generally, the court did not provide a well-reasoned decision for denying the defence's request.

The report concludes with a number of recommendations to judicial actors, and the legislative and the executive branches aimed at tackling the issues identified in the report in order to improve the efficiency and fairness of the SPO and other judicial proceedings. Key recommendations to various actors would be to ensure timely and broad disclosure of evidence both inculpatory and exculpatory to the defence, regardless of its format; accurately select the evidence to introduce at trial, submitting to the court only the material which is necessary to support and prove the theory of the case. Moreover, another recommendation is to improve prosecutors' presentation skills at trial: clearly explaining the relevance of the evidence that they seek to introduce (i.e., its connection to the indictment), as well as the relationship among the different types of evidence introduced (i.e., interceptions, documents, witnesses).

Other recommendation is addressed to the defence counsels, who should take up only cases for which they can ensure efficient and quality representation, in full respect of the European best practices on professional ethics. From their side, the Bar Association, should organize trainings on professional ethics in line with the European best standards.

Courts are generally encouraged to postpone hearings only to the benefit of defendants who are genuinely unable to attend. Also, Judges are moved to make use of the trial man-

agement tools foreseen by the LCP and ensure that only relevant and pertinent evidence is presented during the trial sessions.

The report is thematically focused on the findings from trial monitoring from international fair trial standards perspective. It therefore acknowledges the developments surrounding the SPO as an institution in the reporting period, but does not specifically elaborate or comment on them.

CHAPTER I

Introduction

Scope

The OSCE Mission to Skopje's final report on the activities and the cases under the competence of the Special Public Prosecutor's Office (SPO) follows the previous two reports published in August 2018, and June 2019 respectively, dealing with the initial phase of the SPO activities, and commencement of the main trial phase.¹ The present report continues with the analysis of trial observations. Trial monitoring is widely regarded as a powerful tool to enhance the fairness, effectiveness, and transparency of judicial systems by assessing their compliance with the rule of law and international fair trial standards, without commenting on the merits of individual cases.²

At the time of writing, the majority of the SPO trials are still ongoing.³ This report covers the period between **1 December 2018 and 15 January 2020**. It analyses the compliance of the proceedings with a number of fair trial rights, as interpreted by the European Court of Human Rights (ECtHR), addressing only a selected number of issues that were deemed to deserve the most urgent attention. This report focuses on the 20 cases whose indictments were filed by the SPO and which are related to the wiretap scandal (i.e., the SPO-initiated cases). It also analyses the four cases that the SPO took over from the Public Prosecutor's Office (PPO).⁴ These cases started long before the creation of the SPO. In all of them the old Law on Criminal Procedure is applied, which is based on a continental/ inquisitorial model that was in force until 2013. The present report will also provide a short description of the SPO investigations opened after the expiration of the deadline envisaged by the SPO Law (June 2017).⁵

As with previous reports, this report was prepared in the context of the "Monitoring the Activities and the Legal Cases Under the Competence of the Prosecution Prosecuting Cases Surrounding and Arising from the Content of the Unauthorized Interception of Communications" project (hereinafter, "the SPO Project"). The SPO Project has been financed through extra-budgetary contributions provided to the Mission by the Government of Netherlands,

1 OSCE Mission to Skopje, *First Interim Report on the Activities and the Cases Under the Competence of the Special Prosecutor's Office* (hereinafter "OSCE Mission to Skopje, First Interim Report on the SPO"), 28 August 2018, at: <https://www.osce.org/mission-to-skopje/391745>.

2 OSCE-ODIHR, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, pg. 16. See also, *Maria Alcidi*,

Trial Monitoring: OSCE Methodologies, European Yearbook on Human Rights, 2014, pg. 406.

3 *Treasury, Fortress 2, Titanic 1, Titanic 2, Titanic 3, Municipality of Centar* (hereinafter "Centar"), *Torture, TNT, Toplik, Tenders, Trajectory, Transporter, Total*, By January 2020, seven out of 20 cases were adjudicated in first instance (Fortress 2, Tiffany, Three-Hundred, Tank, Trust, Trevnik, Tariff).

4 *Sopot, Spy, Monster, Magyar Telecom*.

5 See OSCE Mission to Skopje, First Interim Report on the SPO, 2018, p. 49.

the United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs (INL), and by the Embassy of Canada.

Even though the SPO, as it was initially set up, ceased to function in September 2019, for ease of reference throughout this report SPO and SPO cases will be used to refer to the cases that are subject of observation through this project.

In relation to the end of the mandate of the SPO Prosecutors in September 2019, it should be noted that the end of their mandates came after the arrest of the Chief SPO, and her subsequent detention, initially in remand and subsequently in house detention. She is currently under trial, charged with “Abuse of Official position and authorization”, pursuant to Art.353 CC.

Prior to the termination of her mandate, the Chief SPO authorized the transfer of all SPO cases to the Chief State Prosecutor. Former SPO Prosecutors returned to their respective Prosecution offices and were reassigned to the SPO cases on which they had been working, thus ensuring continuity during court proceedings.

Methodology

Trial observation by OSCE monitors in the courtroom constitutes the primary source of information for this report. Between December 2018 and January 2020, OSCE staff monitored 439 hearings in all SPO cases before the Basic Criminal Court Skopje⁶. After every hearing, monitors prepared standardized reports detailing their observations, from which the findings of this report were compiled. In addition to courtroom observation, this report also relies on publicly available information such as media and scholarly articles. Unless otherwise specified, this report does not contain an analysis of judicial documents (i.e., court decisions and parties’ written motions). During the reporting period, the Basic Court issued only five first instance verdicts. The appeal phase is ongoing in four of these cases.

The SPO Project strictly adheres to the principles of non-intervention, objectivity, and agreement as defined by the OSCE Office for Democratic Institutions and Human Rights (OSCE-ODIHR) publication *Trial Monitoring: A Reference Manual for Practitioners*.⁷ The principle of non-intervention or non-interference stems directly from the principle of independence of the judiciary.⁸ As such, it prohibits any “engagement or interaction with the court regarding the merits of an individual case” as well as any “attempts to influence indirectly outcomes in cases through informal channels.”⁹ The principle of objectivity “derives from the utility of trial monitoring as a diagnostic tool and the need to produce accurate and reliable information regarding the functioning of the justice system”.¹⁰ As such, it requires trial monitoring programmes to accurately and impartially report on legal proceedings using clearly defined and accepted standards.¹¹ Finally, the principle of agreement entails that national authorities have agreed to allow trial monitoring as part of

6 During the reporting period we monitored only two sessions in the Appellate Court

7 OSCE-ODIHR, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, pg. 18-20.

8 M. Alcidi (*supra fn. 2*) pg. 415.

9 OSCE-ODIHR, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, pg. 18. 10 *Ibid.*, p.19.

11 *Ibid.*

their commitment to the set of rules and principles established by the OSCE in the field of administration of justice.¹²

At the time of writing this report, 22 cases were ongoing in the first instance or appellate stage (both initiated and taken over cases)¹³. In keeping with the above-mentioned principle of non-intervention, the observations contained in this report relate only to the procedural fairness and efficiency of the trials (which is assessed against both international and national fair trial standards) and not to the merits of the cases. By including judicial efficiency in the scope of the analysis, this report goes beyond the traditional approach of trial monitoring programs, which are geared towards respect for the accused's rights. Judicial efficiency does not always coincide with the rights and interests of defendants. Therefore, courts must strike a proper balance between the two. The choice to include the efficiency of proceedings among the monitoring benchmarks is due to the high profile of the cases, which relate to allegations of serious breaches of the rule of law committed by high state officials and carry significant public expectations of prompt accountability in full respect for the rights of the accused.

12 Ibid., p.20.

13 Including the *Talir 1* and 2 cases, for which the Prosecutor filed indictments in November 2018.

CHAPTER II

This chapter will provide an update on the SPO-initiated cases and cases taken over by the SPO during the period 1 December 2018 until 15 January 2020.¹⁴ Previous reports provided for a detailed description of the alleged facts, thus the current chapter includes only an account of the developments in the court proceedings..

The OSCE Mission to Skopje monitors the trials in terms of their compliance with international and national standards of a fair trial. These standards include the right to a public trial, the right to be tried within a reasonable time, and the right to a defence. The latter means the right to have the assistance of a chosen lawyer, but also the right to present a defence case, propose witnesses and/or other evidence to strengthen the presumption of innocence.

SPO-initiated cases

“Centar” - the trial continues against 10 defendants (including former Prime Minister Gruevski), charged with “Violence” pursuant to Art.386(2)(1) and “Violence” pursuant to Art.386(2)(1) in conjunction with Art.23 of Criminal Code (CC). The main trial started on 16 December 2016.

During the reporting period, the Court scheduled 20 trial sessions, out of which seven were postponed. Because of these postponements, on 16 October 2019, the main trial started from the beginning, considering that 90 days had elapsed from the previous session¹⁵. Upon restart of the trial, the Presiding Judge just noted into the minutes that the testimony of the previously-heard witnesses would be read into the records; as would the material evidence already presented in front of the panel. The defence opposed this decision. After the re-start of the trial, two new defence witnesses testified and the Presiding Judge allowed for some new material evidence from the defence, including a defence expert opinion on the authenticity of the video materials presented as evidence by the Prosecution.

“Transporter” - the trial continues against 21 defendants charged with “Abuse of official position and authorization” pursuant to Art.353(5)(1) CC.

The main trial started on 13 December 2017. During the reporting period, 21 trial sessions were scheduled, out of which four were postponed. On 27 March 2019, the trial re-started from the beginning due to the replacement of one lay-judge (member of the panel). The previously heard witnesses were not called again, and their testimony was considered as having been read into the minutes. Over five trial sessions, concluding on 7 November 2019, the material evidence presented by the SPO was read into the record, consisting of

14 Of the four cases taken over by the SPO, one (*Sopot*) was concluded before the start of the period covered by this report.

15 Article 371 (3) LCP requires that cases re-start from the beginning if more than 90 days pass between sessions.

one audio file with intercepted conversations and 1.244 documents, mainly invoices for transport services. Subsequently two SPO expert witnesses testified in front of the panel, followed by the presentation of the case by the defence. The Presiding Judge instructed the defence to call no more than ten witnesses per defendant (there are 21 defendants)¹⁶. Testimony of the defence witnesses is ongoing. The Presiding Judge has indicated she anticipates a verdict soon.

“Trajectory” - the case against four defendants (including former Prime Minister [PM] - Gruevski) continued. The indictment charged the defendants with “Abuse of official position and authorization” pursuant to Art.353 (5) (1) CC, in conjunction to Art.22 CC, and “Accepting a reward for unlawful influence” pursuant to Art.359 (2) CC (for the former PM).

Former PM Gruevski is being tried *in absentia*. On 13 November 2019, the Court acknowledged the intervention of the absolute bar to prosecution due to the expiration of the statutory limitation and dismissed the charges against Gruevski. The trial was still ongoing against the other three defendants. However, the Prosecution appealed the decision to reject the charges against Gruevski, and the Appellate Court granted the Prosecution’s appeal and required that the First Instance Court continue the trial against him, and eventually to dismiss the charges after the trial is completed.

During the reporting period, the Court scheduled 25 trial sessions, out of which eight were postponed. The SPO presented material evidence during eight sessions, and followed with the hearing of the testimony of two SPO expert witnesses, both of whom were cross-examined by the defence.

“Total”¹⁷ - the case against one defendant and three legal entities continued. The indictment charges the defendants with “Tax evasion”, pursuant to Art.279 (2) (1) CC, in conjunction with Art.45 CC. During the reporting period, the Court scheduled 15 trial sessions, out of which eight were postponed. The trial had to re-start from the beginning twice, once on 30 May 2019 due to a change in the composition of the panel, and the second time on 17 October 2019 because of the expiration of the 90-day period between hearings envisaged by Article 371 LCP. Thus, it could be said that this trial actually started on 17 October 2019.

From October until the time of this writing, the parties presented to the Court their opening remarks, and the SPO presented its material evidence and asked the court to summon its witnesses to testify. During the presentation of the material evidence, the SPO introduced around 300 documents as material evidence in one trial session alone.

“Target – Fortress” - the case against 11 defendants continues. The indictment charged them with the offences of “Criminal association” pursuant to Art.394 (2) (1) CC, and “Abuse of official position and authorization” pursuant to Art.353 (2) (1) CC, in conjunction with Art. 45 CC.

The initial indictment charged 12 defendants, but one defendant decided to plead guilty before the main trial started, hence the trial against her was severed and the sentence delivered. The defendant was sentenced to six months of imprisonment, suspended if

16 The Presiding Judge said that if the need arises more defence witnesses would be allowed.

17 In February 2020, the Presiding Judge was appointed to the Appellate Court; therefore, it is probably that the case will start from the beginning with a new Presiding Judge.

during the probation period of two years she does not commit any other criminal offence. The trial against the remaining 11 defendants is ongoing.

During the reporting period, the Court scheduled 20 trial sessions, out of which five were postponed. Six SPO witnesses provided their testimonies to the Panel. The defence cross-examined these witnesses at length. One of them was former PM Zoran Zaev who gave lengthy testimony with regard to the wiretap materials, their management before they were transferred to the SPO, their quantity and most common targets, meetings he had with former PM Gruevski before the release of the 'bombs', etc.

The Presiding Judge announced that there were still 60 more witnesses for the Prosecution to testify, and some 960 documents to be presented as material evidence. After the Prosecution presents its case, the defence will start with the presentation of their evidence.

“Tariff” - the case against three defendants continued. They are charged with “Abuse of official position and authorization” pursuant to Art.353 (5)(4)(1) CC.

The main trial started on 19 December 2017 and continued throughout the reporting period with the Court scheduling 34 sessions. The SPO concluded its case. The Court heard the testimony of 11 defence witnesses. The defendants themselves decided to provide answers and were direct and cross-examined. After the defendants' examinations, both parties asked the Court permission to present additional evidence in response to the testimony of the defendants.

The Court granted both requests, thus it heard 12 additional defence witnesses while the defence also presented additional material evidence during four trial sessions. The SPO also presented additional material evidence and four witnesses and two expert witnesses testified. In December 2019, the parties presented their closing statements and the verdict was announced. The Court of First Instance found all the defendants guilty as charged and sentenced each of them to three years of imprisonment. The defence announced that it would appeal, which must be done within fifteen days from the moment the written judgment is served to the parties.

“Toplik” - the case against six defendants continued. The indictment charged them with “Abuse of official position and authorization” pursuant to Art.353 (5)(1) CC, in conjunction with Art.22 CC.

The main trial started on 30 January 2018, and continued through the reporting period with 14 trial sessions scheduled, out of which seven were postponed. The Court heard the testimony of one SPO witness and the prosecution presented material evidence. The SPO finished the presentation of its case and the defence started presentation of their evidence. In this regard, the Panel heard the testimony of 10 witnesses proposed by the defence.

“TNT” - the case against seven defendants continued. The indictment charged them with “Abuse of official position and authorization”, pursuant to Art.353 (3) (1) CC, in conjunction with Art.23 CC, and “Abuse of official position and authorization”, pursuant to Art.353 (5) (1) in conjunction with Art.22 CC.

The main trial started on 24 January 2018, and during the reporting period, the Court scheduled 41 trial sessions. However, in the course of the proceedings, sixteen trial sessions had to be postponed. Nine SPO witnesses testified and the SPO presented material

evidence. In addition, the previous statement of an SPO witness who became unavailable during the trial was read into the records.

The defence started to present its case, including material evidence (107 documents), and introduced the testimony of 25 witnesses and two expert witnesses. Since the main trial is approaching its end, the Presiding Judge informed the parties that they need to start preparing closing arguments. Following this announcement, one of the defendants decided to change her defence lawyer, hiring a citizen of the Republic of North Macedonia of Albanian ethnicity.

The Court immediately announced that Albanian interpretation would be provided in the courtroom, and that the defence lawyer could file his submissions to the court in Albanian. The court also stated that all its documents would be translated into Albanian starting from the moment the attorney joined the proceedings. However, the defence counsel asked that the Court provide him with a translation of the entire case file in Albanian¹⁸.

The Court considered this request an attempt to unnecessarily prolong the proceedings and asked the Bar Association to initiate disciplinary proceedings against the defence counsel. The Court based its reasoning on the fact that the defence lawyer, as a member of the Bar Association of the country, is obliged to speak the Macedonian language at a level allowing him to pass the Bar exam, thus his request could not be justified on the basis of objective needs.

In December 2019, one lay-judge who was a member of the panel for this case, submitted her resignation. The resignation was rejected. However, she insisted and presented the resignation a second time, providing personal reasons for her request. This time the resignation was accepted. Now, with a new panel member, the trial will need to re-start from the beginning.

In the meantime, one of the defendants claimed to have health problems¹⁹, and some other sessions were postponed. The trial re-started from the beginning on 6 February 2020 and the defence asked to call all witnesses to testify again. This will further prolong the proceedings. In this case, the defence appears to be using all legal means at their disposal to delay the conclusion of the trial.

“Treasury” - the case against four defendants continued. The indictment charged them with “Abuse of official position and authorization” pursuant to Art.353 (5)(3)(1) in conjunction with Art.22 CC and “Abuse of official position and authorization” pursuant to Art.353 (5)(3)(1) in conjunction with Art.24 CC.

The main trial started on 17 May 2018, but had to re-start from the beginning on 30 September 2019 due to the expiration of the 90-day period foreseen by article 371 LCP. Although the defence wanted the witnesses to be re-examined, the court decided to enter into the record the testimony of the 14 witnesses who had already testified. The court decided to play the video recordings of the previous sessions where the SPO read the content of the material evidence. Thus, instead of reading this evidence, or having it considered as read into the minutes, the court started playing the videos from the previous sessions. It remains unclear why the court decided to proceed this way.

18 See article 2 from the Law on languages, Official Gazette no.7/2019

19 He was a victim of a physical attack for reasons unrelated with the current trial.

During the reporting period, the Court scheduled 17 trial sessions, of which only one was postponed.

“Tenders” - the trial against three defendants continued. The indictment charged them with “Abuse of official position and authorization”, pursuant to Art.353 (5)(1) in conjunction with Art.22 CC.

The main trial started on 21 February 2018, and during the reporting period, the Court scheduled 15 trial sessions, out of which five were postponed. On 16 October 2019, the trial re-started from the beginning, as the 90-day period between hearings had elapsed. During the remaining sessions, 12 SPO witnesses testified, and the defence presented five pieces of material evidence. In the meantime²⁰, the composition of the trial panel changed, and as a result the trial re-started once again in February 2020.

“Torture” - the main trial against seven defendants continued. The indictment charged them with “Torture and other cruel, inhuman or humiliating activities and punishments” pursuant to Art.142 (1) in conjunction with Art.22 and Art.23 CC.

The main trial started on 9 July 2018, and during the reporting period the court scheduled 18 trial sessions, out of which four were postponed. On 22 October 2019, the trial re-started from the beginning, due to a change in the composition of the panel²¹, and because of the expiry of 90 days between sessions. The parties presented their opening statements again. The SPO presented the material evidence. Afterwards, the injured party presented its case. The injured party then introduced several videos as evidence, arguing that they demonstrated the defendants’ motives.

“Trevnik” - the case against three defendants continued. The indictment charged them with “Unlawful Construction” pursuant to Art.244-a (1) CC.

The main trial continued during the reporting period, with eight sessions scheduled. On 4 July 2019, the Court announced its verdict, acquitting all three defendants of the charges. The SPO announced it would appeal the verdict. An analysis of the verdict will follow in the next chapter.

“Titanic 3” - the case against two defendants continued. The charges against them are “Destruction of election material” pursuant to Art.164 (3) (2) (1) CC.

During the reporting period, eleven court sessions took place, whereas five sessions were postponed. Some of them were postponed to allow the Prosecutor to locate one of the key witnesses. On 4 February 2019, the Presiding Judge of the panel withdrew after the Chief SPO, Katica Janeva, severely criticized her for failing to maintain order in the courtroom. This direct attack on the abilities of the Presiding Judge to keep order in the courtroom, coming during the course of the trial, was unnecessary and excessive. While it is true that the Presiding Judge needs to exercise control over the courtroom during the trial sessions, as envisaged by Art.360 LCP, the Chief SPO was a party in the proceedings, thus her comments may appear to have been a form of pressure on the Presiding Judge.

Because of this withdrawal, the main trial started from the beginning with a newly appointed Presiding Judge on 22 February 2019. The new Presiding Judge granted the de-

20 In January 2020, the lay judges changed due to retirement.

21 One of the lay judges changed

fence's request to have the whole case file (around 100 pages) translated into Albanian based on the provisions of the "Law on the use of Languages".²²

From 22 February 2019 until 15 January 2020, the court scheduled 12 trial sessions, but three were postponed. In the course of the trial, 34 witnesses testified, with eight of them being proposed by both parties. The prosecution presented its material evidence. One defendant testified as well. The prosecution asked an important witness to be located in Germany, where she now resides, in order to have her testimony presented to the panel. Once the panel receives this testimony, the parties will present their closing arguments. The verdict will be announced soon after the closing arguments are delivered.

"Titanic 1" - the case against 21 defendants continued where the former PM, Nikola Gruevski, is one of the defendants. The indictment charged them with "Criminal association", pursuant to Art.394, "Abuse of funds for financing the electoral campaign" pursuant to Art.165-a, "Violation of voting right", pursuant to Art.159, "Violation of the voter's freedom of choice", pursuant to Art.160 CC.

During the reporting period, the Court scheduled 47 trial sessions, out of which 17 were postponed. The SPO presented material evidence to the panel, with more than 520 SMS messages and more than 1.000 documents being read into the record. A total of 19 witnesses pro-posed by the Prosecution presented their evidence to the panel.



At the time of writing, four SPO cases have been finally concluded (in *Fortress 2*, the appeal is ongoing against one defendant only)²³. Three cases are pending appeal²⁴, one pending re-trial²⁵, and 14 cases are ongoing. Of the four cases that were taken over by the SPO from the PPO, one has been concluded, two are ongoing and one is pending appeal.²⁶

SPO cases taken over from the Basic Prosecution Office

"Spy" (taken over on 25 March 2016) - the case against seven defendants continued. They are charged with "Criminal association", pursuant to Art.394 (1); "Espionage", pursuant to Art.316 (3) in conjunction with Art. 45, "Fraud", pursuant to Art.247 (3)(1), and "Blackmail", pursuant to Art.259 (2)(1) CC.

This case is a re-trial. The SPO took over the case on 26 March 2016 during the appeal-late procedure. The Court of Appeals confirmed the convictions against 13 defendants and ordered a re-trial for six defendants, which started on 27 January 2017. Another suspect was apprehended abroad (in Serbia) later and extradited to the Republic of North Macedonia. The procedure against him is also ongoing, albeit separated from the other six defendants. He is facing the same charges.

During the reporting period, ten trial sessions were scheduled. The trial started twice because too long a time had elapsed between hearings, and three times the sessions were

22 Ibid footnote No. 18

23 *Fortress 2, Tank, Tiffany, and Trust*

24 *Tariff, 300, Trevnik*

25 *Titanic 2*

26 *Sopot* is concluded because the Prosecutor dropped the charges, *Monster and Magyar Telecom* are ongoing, and in *Spy* the verdicts were announced (ongoing just against one defendant against whom the proceedings were separated in December 2019).

postponed. Five SPO witnesses, including one injured party, provided their evidence to the panel.

The rationale for the SPO taking over this case was never made public, nor did it become apparent from the developments of the trial sessions. The SPO is not obliged to provide reasons for such a decision. However, the lack of a public explanation, together with the fact that no new prosecution strategy became visible during the conduct of the trial, may affect the trust of the public in the judiciary.

On 21 January 2020, the First Instance Court acquitted five of the defendants on all charges. The case is still ongoing against one defendant, who did not appear at the hearing scheduled on 24 December 2019, thus the Court separated the case against him, and continued against the other defendants in order to save the trial from starting from the beginning for all of them.

On 16 April 2019, the procedure against the defendant extradited from Serbia was separated, and the trial against him continued. One trial session was postponed and once the trial had to re-start from the beginning, due to elapsed time between hearings. In January 2020, the parties presented their closing arguments and the verdict was announced on 11 February 2020. The Court found the defendant not guilty, acquitting him on all charges.

“Monster” - the trial against six defendants continued. They are charged with “Terrorism”, pursuant to Art.394-b (1) CC, in conjunction with the Art.22 and Art.24 CC.

This is a re-trial ordered by the Supreme Court. In its reasoning for sending the case for re-trial, the Supreme Court noted the existence of certain wiretaps, and the implications that these wiretaps might have on the case. At the request of the Basic Prosecution Office, the SPO took over the case in March 2018. The SPO did not provide the public with clear reasoning as to why there was a need for the SPO to be involved in this case. However, in the course of the trial, in mid-July and mid-August 2019 the SPO submitted to the Court a new set of evidence coming from the illegal wiretaps.

The SPO presented this evidence in the course of five trial sessions. The Court also heard the testimony of three SPO expert witnesses and 12 defence witnesses. The SPO presented other material evidence as well. In total, 28 trial sessions were scheduled, out of which only four were postponed. Some 600 wiretap conversations (both voice conversations and SMS messages) were read out during the trial sessions.

It will be up to the Court to assess the weight and importance of these wiretaps during deliberations at the end of the main trial. Only after the verdict of the first instance, will it become clear if these conversations had any importance in establishing the guilt or innocence of the defendants.

“Magyar Telecom” - the re-trial against the three defendants continued. They are charged with “Giving a bribe”, pursuant to Art.358 CC. The trial continued *in absentia*.

The SPO took over the case in January 2019. During the reporting period, the Court planned 14 court sessions, out of which seven were postponed. The trial re-started from the beginning on 25 January, and again on 28 November 2019 due to the expiration of the 60-day period between hearings.

The Court heard the testimony of three SPO witnesses and one defence witness. For some time, the trial could not advance because one witness (S. Bogoevski), refused to

attend the trial. Mr. Bogoevski was summoned four times. In September 2019 he filed with the Court a written declaration that he knew nothing about this case. This witness is considered crucial for the SPO case, thus the case could not proceed. On 11 February 2020, just after the end of the period covered by this report, Mr. Bogoevski testified. His testimony varied significantly from his previous testimony given in front of U.S. authorities.

During the session held in January 2020, the Court informed the parties that one of the defendants was arrested in Slovenia, based on an international arrest warrant issued by the state authorities. The defendant was in pre-trial detention pending an extradition request. Eventually, the extradition request was rejected.

CHAPTER III

This chapter will give an update on the investigations that the SPO announced after 30 June 2017, which is the perceived 18-month deadline foreseen by the SPO Law to file indictments. After this deadline the SPO initiated 18 new investigations.

Updates on the 18 new investigations opened by the SPO

Between **December 2017 and November 2018**, the SPO announced **18** new investigations against **86** suspects, divided as follows:

19 December 2017: the SPO announced **seven** new investigations²⁷ **“Foreign Services”**

Suspects: Two – a former Chief of the 5th Directorate of the UBK (instigator) and a former Assistant to a Minister of Internal Affairs (material perpetrator)

Timeframe: 16 December 2014 to 27 May 2015

Alleged criminal offence: “Abuse of Official Position and authorization”, pursuant to Art.353 CC. The investigation alleges that the procurement procedure for buying wiretap equipment was illegal. One suspect is alleged to have intentionally urged the other to conduct a procurement procedure for purchasing a system for detecting, blocking and locating active GSM (Global System for Mobile Communication) systems for interception of communications for the UBK. The amount of the tender was 451.000,00 USD for the selected company. Allegedly, all three bids coming from competitors were manually completed, with almost identical handwriting, while one of the bidders did not receive an invitation but still participated in the procedure. According to the SPO, this crime was committed in order to support former PM Gruevski’s claims that foreign intelligence services were spying on the country at the time of the wiretap scandal.

“Pay Toll”

Suspects: One – a former Member of Parliament

Timeframe: June 2011 to 2015

Alleged criminal offence: “Fraud in service” pursuant to Art.355 CC in continuation. The Prosecution alleges that during his tenure as a Member of the Parliament, the suspect presented documents for travel reimbursements despite the fact that these trips never happened, or were not undertaken in the execution of his official capacity, and thus were not subject to reimbursement from the public budget. The alleged damage to the state budget is estimated to be approximately 6 million MKD.

“Roentgen (X-Ray)”

Suspects: One - a former Minister of Health

27 During the press conference, the SPO announced that it had taken over three PPO cases at the pre-investigative stage, specifically, *Skopje 2014*, *Aktor*, and *Cosmos*.

Timeframe: February 2012- 30 April 2013

Alleged criminal offence: "Abuse of official position and authorization", pursuant to Art.353 CC. This case concerns suspicion that the suspect abused his official position and authorization and favoured one company in procurements for medical equipment, appliances and information systems, thereby violating the provisions of the Law on Procurement that guarantees equal treatment of bidders in procurement procedures. The cost of the medical equipment was 53.136.481,61 MKD. The suspect also allegedly allowed another company to gain a greater benefit in the amount of 53.874.500,00 MKD in violation of the procurement procedure established by the Law on Procurement.

"Producer"

Suspects: One - a former Minister of Agriculture

Timeframe: 2009-2012

Alleged criminal offence: "Abuse of official position and authorization" pursuant to Art.353 CC.

The suspect is investigated because there is a grounded suspicion that he awarded a contract to one company in the amount of 3.563.875,00 MKD, without conducting an actual procurement procedure.

"Leaders"

Suspects: One

Timeframe 2011-2013

Alleged criminal offence: "Unlawful construction", pursuant to Art.244-a CC. The SPO investigates the construction of an illegal building.

"Tariff 2"

Suspects: One

Timeframe: 2012-2014

Alleged criminal offence: "Abuse of official position and authorization", pursuant to Art.353 CC. The SPO investigates suspected abuse in the implementation of the software ERP (Enterprise Resource Planning) for the electric company ELEM relating to the *Tariff* case.

"Transporter 2"

Suspects: 10

Timeframe: 2009-2014

Alleged criminal offence: "Abuse of official position and authorization", pursuant to Art.353 CC. The SPO continues the existing case *Transporter*, relating to the misuse of the public procurement procedure in the arrangement of the transport of elementary and high school students in the city of Bitola.

On 20 March 2018: the SPO announced **three** new investigations:

"Census"

Suspects: Two – a former PM, and the leader of DUI

Timeframe: 2011

Alleged criminal offence: "Abuse of official position and authorization", pursuant to Art.353 CC. The investigation focuses on the way the suspects stopped the ongoing process for the census of the population in 2011. Specifically, the suspects requested that the Parliament withdraw the Law on Census on the grounds that the procedure was not in line with the international standards set by Eurostat. However, according to the investigation, their real intention was to conceal truthful data on the demographic

and economic conditions of the country. The alleged damage to the state budget is 175.123.909,00 MKD

“Powerman”

Suspects: Three - a VMRO-DPMNE MP, his father, and a former mayor of Makedonski Brod

Timeframe: 2011-2014

Alleged criminal offences: “Fraud”, pursuant to Art.247 CC, and “Abuse of official position and authorization”, pursuant to Art.353 CC. The investigation focuses on an alleged unlawful sale of a state-owned building in the municipality of Makedonski Brod.

“Aktor”

Suspects: 10 – a former PM, a former Minister of Transport, and eight other persons

Timeframe: 30 August 2011 – August 2013 (procurement procedure); and 2012 – 2016 (money laundering)

Alleged criminal offence: “Abuse of official position and authorization” pursuant to Art.353 CC and “Money laundering, and other income from crimes”, pursuant to Art.273 CC.

This investigation looks into allegations that during the tender procedure for the construction of the highway Demir Kapija – Smokvica, because of the illegal involvement of two of the suspects, the cheapest bidder was disqualified because he was close to the opposition party. Thus, the investigation suspects that the winner of the tender did not fulfil the requirements for selection, however by being selected as winner of the tender it gained an illegal benefit in the amount of 480.412.974,00 MKD.

The investigation is also looking into allegations that during the period between 2012 and 2016, some of the suspects established permanent cooperation between their companies to make fictitious payments with unrealistic high prices. The suspects concluded fictitious contracts for services in their companies and laundered a total amount of 181.736.436,00 MKD, out of which 35.777.951,00 MKD was paid to one of the suspects.

On 10 and 13 October 2018: the SPO announced **seven new investigations** against **41** persons.

“Gift”

Suspects: Three – a former Finance Minister, a former Transport Minister, and the director of the company Macedonian Energy Resources Timeframe: January 2012 - July 2014

Alleged criminal offence: “Abuse of official position and authorization”, pursuant to Art.353 CC. by securing an unlawful gain for a foreign company, estimated at approximately EUR33 million. Two of the suspects were authorized to implement an intergovernmental agreement, signed by the governments of the Republic of North Macedonia and Russia on 19 June 2010, to regulate the obligations of the former USSR towards SFRY, especially those referring to the Republic of North Macedonia. The two suspects agreed that Russia’s debt towards the state should be paid through the construction of a gas pipeline for a total amount of EUR 56 million, with Russia participating with 80% and Republic of North Macedonia with 20%. However, according to a previously prepared feasibility study, the cost of the pipeline should have been much lower (EUR30/35 million). Thus the investigation tries to shed light over this difference to understand if the conduct of the suspects amounts to a criminal offence.

“Propaganda”

Suspects: Nine – a former PM, a former Secretary-General of the Government, and seven other defendants

Timeframe: 2010 - 2015

Alleged crimes: "Criminal association", pursuant to Art. 394 par. 1 CC, and "Abuse of official position and authorization", pursuant to Art.353 CC. The investigation is conducted in order to understand if public opinion was somehow influenced and if controlled dissemination of information has been provided in media outlets. The investigation wants to understand if these behaviours represented a criminal offence. The investigation alleges that the mis-influence of public opinion was done by misappropriating funds from the state budget in order to promote support for the actions of the political party VMRO-DPMNE. It appears that the promotion of one single party's activities by media was possible due to the influence two of the suspects exercised in order to award contracts for EUR 30 million to broadcasters in order to influence their editorial policy in favour of VMRO-DPMNE.

Further, the same suspects, assisted by the others, are alleged to have organised the take-over and management of seven local TV stations and one radio. The latter gained an illegal benefit of EUR 5.250.000,00.

The overall action was aimed at concealing the real ownership and control of the media. Media was financed by budget funds through the award of service contracts - the purchase of terms for broadcasting of videos by the Government of the Republic of North Macedonia. At the same time, budget funds were used to finance these projects in an indirect way. Legal entities that had concluded public procurement contracts with state authorities participated in financing media, and the suspects enabled this method of financing.

"Design"

Suspects: Four – a former Transport Minister, and three other suspects

Timeframe: 2009 and 2010

Alleged criminal offence: "Abuse of official position and authorization", pursuant to Art.353 CC. The investigation claims that a foreign company was favoured in the procedure for concluding a deal to procure 202 double-decker buses in Skopje. A Chinese company was chosen as having the most favourable bid at an issued tender, even though it was concluded that the company did not meet the required tender conditions. The procurement procedure cost the budget EUR 5.000.000,00.

The evidence suggests that the first suspect, a Minister at that time, annulled two public procurement procedures for the disputed buses, on which the economic operator from China applied, without meeting the conditions of the tender. Thus, the former Minister is alleged to have taken a decision, contrary to the provision of Art.161 of the Law on Public Procurement, adding one element to the bid, the design of the buses. This new criterion favoured the Chinese economic operator.

The tender winner submitted documentation that did not comply with the requirements of the tender announcements, namely a quality certificate ISO 9001: 2000, but the company delivered a certificate ISO / TS 16949: 2002. In addition, the bank guarantee was issued by Ohridska Banka AD Skopje, which did not hold a "B" credit rating, which was another condition in the tender documentation. The tender commission chose the Chinese economic operator despite all these deficiencies in the presented documentation.

The Chinese company won the tender, as the competitor lost points because it was not able to provide the specific design mentioned in the tender documentation even though its bid was cheaper.

The investigation tries to shed light whether the Minister was obliged to annul the public procurement procedure due to significant omissions in the procedure, but did not do so and thus acted contrary to Article 136 of the Law on Public Procurement.

“Harmony”

Suspects: Three – a former PM, a former Transport Minister, an ex-mayor of Skopje.

Timeframe: 2012 and 2013

Alleged criminal offences: “Abuse of official position and authorization” pursuant to Art.353 CC. The former PM – through his connections with Turkish citizens - helped the owners of a private University in Skopje to buy two parcels of construction land in Skopje at unrealistically low prices (1EUR/m² rather than 20EUR/m²). He did so by amending the legislation on the selling of state land. Then, another suspect instructed the ex-mayor to arrange the procedure for the selling of the land with fixed electronic bidding. In this way, the University had an unlawful gain of EUR 385,868.00

The tender of the said plots was supposed to take place via electronic bidding. In order to minimize the possibility for other participants in the bid, one of the suspects added an additional special condition - the participants, besides accreditation for higher education, should submit a disproportionately high guarantee of EUR100,000 per parcel. The University submitted its bid, which was incomplete, but with the intervention of one of the suspects, the documentation was accepted and the University was declared as winner.

“Patient”

Suspects: 15 – a former Minister of Health, and 14 other suspects

Timeframe: 2010; 2012 and 2013

Alleged criminal offences: “Abuse of official position and authorization”, pursuant to Art.353 CC. The activities involved public procurement procedures in connection with the reconstruction of several public health institutions in the Republic of North Macedonia.²⁸ In 2010, four suspects, members of the public procurement commission at the Ministry of Health, submitted an illegitimate offer to pick the most favourable bidder. The then-Minister of Health, instead of rejecting the commission’s offer, decided to choose a Bulgarian company as the most favourable bidder, even though it was allegedly evident that the company did not meet the tendering conditions, nor was it the cheapest bidder.

Evidence suggests that the suspects favoured one company although they knew that this bidder did not meet the requirements. It did not possess the necessary authorizations for the engineers for performance, and in the computations calculations, which are an integral part of the bids, did not provide a correct set of data. In choosing this company, the procurement commission totally disregarded the bidder with the lower offer.

Similar procedures are believed to have taken place again in, 2012 and 2013. The overall damage to the state budget is unclear. However, there are indications that the damage would amount to EUR 500.000,00.

“Base Stations”

Suspects: One - ex-CEO of *T-Mobile Macedonia*

Timeframe: 2009- 2010

Alleged criminal offence: “Abuse of official position and authorization”, pursuant to Art.353 CC. There are grounds to believe that the defendant secured EUR 3.522.400,00 unlawful gain for another company. For the purpose of legalizing illegal base stations, the suspect in 2011 asked one company to file a financial offer to *T-Mobile Macedonia* in order to complete a procedure to establish the legal status of its base stations, even though the mobile operator had a team of experts and licenced people who could have done the job. The said company offered a service that was three times more expensive than the one that could have been realized by the experts at the mobile network operator.

28 PHI “General Hospital Ohrid”, PHI “Clinical Hospital Tetovo” and PHI “GAK Chair”.

“Post Bank”

Suspects: Six

Timeframe: from 2001 to 2010

Alleged criminal offence: “Money laundering and other income from crime”, pursuant to Art.273 CC. There are grounds to believe that the suspects organized a structure to launder money through the Post Bank. This appears to have been done through the inclusion in the privatization process of enterprises directly chosen by the suspect. Initially, the investigation was announced against nine people: the current six, a former PM, a former Deputy PM, and a former Minister of Finance. However, the investigation against the latter three suspects cannot be undertaken due to the intervention of the absolute statute of limitations. It is unfortunate that the SPO announced an investigation against persons who can no longer be prosecuted (due to statutory limitations). The presumption of innocence is the most important principle governing criminal proceedings, this investigation included. The fact that a person’s name is associated with criminal undertakings, without the possibility to clear these allegations may have serious repercussions on the individual’s reputation, hence on his or her private and/or professional life. It would be a good practice, in order to safeguard people’s fundamental rights²⁹, and the credibility of the justice system as a whole, to consider all the limitations to an investigation, statutory limitations included, prior to publicising the names of persons involved in criminal investigations.

9 November 2018: the SPO announced **one investigation** against **13** persons.

“Empire”

Suspects: 13 – a prominent businessperson in the country, politicians, and the companies owned by them

Timeframe: 2002-2013

Alleged crimes: “Criminal Association”, pursuant to Art.394 CC; “Damage or privilege of the creditors”, pursuant to Art.257 CC; “Abuse of official position and authorization”, pursuant to Art.353 CC, “Fraud”, pursuant to Art.247 CC; and “Money Laundering and other income from crimes”, pursuant to Art.273 CC.

This is the only investigation where some of the suspects were detained (detention on remand) for a month, in its early stage. In addition, some precautionary measures were ordered. The Judge of Preliminary Procedure issued a decision for temporary freezing of some properties and bank accounts. The Prosecution states that the damage caused to the state budget amounts to EUR 6.275.280,00 and money laundered in the amount of EUR 10 million.

Talir Indictments

The investigation, in this case, started on 22 May 2017 and was conducted against six suspects, including former PM Gruevski. The investigation looked into the financing of the political party VMRO-DPMNE, and the manner in which the party’s headquarters was built.

At the end of the investigation, in order to better and more efficiently conduct the main trial, the SPO decided to file two indictments, thus splitting the results of the investigation in-

29 For example, the right to private life, as guaranteed by article 25 of the Constitution of North Macedonia, as well as article 8 of the ECHR.

to two parts. The SPO filed the two indictments on 22 November 2018. One indictment (*Talir 1*), charged six defendants with “Abuse of official position and authorization”, pursuant to Art.353 CC, and “Money laundering and other income from crimes”, pursuant to Art.273 par.1 CC in conjunction with Art.22 and Art. 45 CC.

The main defendant is accused of abusing his official position and violated the Law for financing political parties and the Law on corruption from 2009 until 2015 by securing money from anonymous and illegal sources to finance VMRO-DPMNE. He did this with the help of the other two defendants, who pressured representatives of legal entities who had contracts with state organs, public enterprises or units of local self-government, forcing them to make cash payments to finance the party in exchange for receiving profitable public procurements.

The defendant did not return these assets to the entities that provided them, nor did he put them into the budget of the Republic of North Macedonia, as he was obligated to do in accordance with the Law for financing political parties. As a result, he is alleged to have caused damage of at least 283.432.656,00 MKD or 4.6 million EUR. In order to hide the fact that the money was the proceeds of crime, the defendants, from 2011 until 2015, organized the money to be paid to different people, entering false data, with names of individuals who were not actually making the payments.

One defendant, charged with “Money Laundering and other income from crimes”, pursuant to Art.273 par. 1 CC decided to plead guilty and bargained with the SPO. She was sentenced to a two year suspended sentence, which will not be executed if she does not commit a new criminal offense in the coming five years.

The second indictment filed from this investigation (*Talir 2*) charges two defendants with “Abuse of official position and authorization”, pursuant to Article 353 CC. The defendants are accused of abusing their official position, enabling one legal entity to build the headquarters of the political party VMRO-DPMNE.

The current legislative framework³⁰ imposes on any business enterprise a limit of 75% of their annual income coming from state/local budget. The legal entity, subject of the indictment, at the time of providing the construction services to VMRO-DPMNE had already reached its legal threshold. The indictment claims that the defendants, contrary to these legal provisions, permitted the political party VMRO-DPMNE to obtain substantial property gain in amount of 507.164.424 MKD or 8.25 million EUR.

The two indictments have been confirmed and the cases are ready for the main trial. In *Talir 1*, the Court has already scheduled some ten sessions, but still the main trial did not formally start as in none of the sessions were the conditions to start the main trial fulfilled. Former PM Gruevski is to be tried *in absentia*, as he obtained political asylum in Hungary in 2018.

In *Talir 2*, the main trial started, one defendant was present while former PM Gruevski is being tried *in absentia*. The parties presented the opening statements and a defence counsel ex-officio was appointed to represent Gruevski.

30 See Law on political parties, Official Gazette no. 76/2004, 5/2007, 8/2007, 5/2008 and 23/2013; Law on financing political parties, Official Gazette no. 76/2004, 86/2008, 161/2008, 96/2009, 148/2011, 142/2012, 23/2013 and 140/2018; Law on obligations, Official Gazette no. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013.

CHAPTER IV

Comprehensive analysis of completed cases

Only five cases have been completed³¹ during the life of this project, one of them due to a guilty plea from a defendant, and another due to Prosecution's decision to withdraw the indictment. *Fortress 2*, is still pending appeal against one defendant, whereas the verdict became final in relation to all the other defendants. The cases that are pending appeal are also included in this section (*300, Trevnik, Fortress 2 and Titanic 2*)³², although they are not finally completed.

As noted previously, the purpose of trial monitoring is to "enhance the fairness, effectiveness, and transparency of judicial system"³³, in other words to understand if the fair trial standards as enshrined within Article 6 of the ECHR, and national legislation have been respected. The analysis of the verdicts that follows will, therefore, focus only on the procedural aspects of the trial: presumption of innocence, right to be tried within a reasonable time, right to a public trial, and the right to a reasoned decision.

i) "Fortress 2" - related to the destruction of documents pertaining to the equipment used to wiretap communications. The case was completed in the first instance on 8 November 2017. This is probably one of the most important cases from all of those presented to the Court by the Prosecution, as the case tries to shed light on the process of illegal wire-tapping. This case analysed the phenomenon that shocked the whole country and ascertained who was responsible.

The indictment charged seven defendants with "Falsifying an official document", pursuant to Art.361 CC, which carries a punishment from three months to five years of imprisonment. The indictment states that Goran Grujevski, a former chief of the Directorate for Security and Counterintelligence (UBK), and six other UBK employees illegally created a Commission entrusted with the destruction of the materials arising from the illegal wire-tapping.

The Court of First Instance, with its decision dated 8 November 2017, found all defendants guilty as charged and sentenced 5 of them to suspended sentences and Grujevski (who fled to Greece and was tried *in absentia*) to one year and 6 months of imprisonment. The verdict is well reasoned, explaining in detail the evidence considered relevant to adjudicate the case. The verdict also explained in detail why the defence theory of the case was not considered credible. In addition, the verdict gave a complete overview of the particular

31 *Tank, Trust, Tiffany, Sopot and Fortress 2* (this last one for all except G. Grujevski)

32 First instance verdicts were also announced in *Tariff* and *Spy*, but the written judgements had not been issued at the time of writing. Also, the appellate procedure for *Titanic 2* has been completed and the case is set for a re-trial.

33 See *Trial Monitoring A Reference Manual for Practitioners*, page 16, available on <https://www.osce.org/odhr>.

circumstances (mitigating and aggravating) of each defendant that were taken into consideration in order to establish the proper sentence for each of the defendants.

Only two defendants appealed the verdict, Grujevski, and Valentina Simonovska. On 10 April 2018, the Appellate Court confirmed Simonovska's conviction. However, it overturned Grujevski's conviction and ordered his re-trial stating that the first instance wrongly ascertained the existence of the legal requirement for a trial *in absentia*. The re-trial of Grujevski, again *in absentia*, started on 19 September 2018 and was concluded on 20 November 2019 in first instance and Grujevski was again found guilty and given the same sentence as in the initial trial.

During the initial first instance trial, a few procedural issues arose. First, the defence objected to the presentation of evidence that was "classified information". The prosecution managed to get certain documents declassified by the Ministry of Internal Affairs (MolA), as competent institution in this matter. The Court excluded the public from the trial sessions when classified documents were presented³⁴.

The SPO filed the indictment on 15 September 2016, and the criminal trial was completed by 10 April 2018. It could therefore be said that the right to be tried within a reasonable time, as envisaged by Article 6 (1) ECHR was respected.

Probably the most important issue from a procedural perspective was the trial *in absentia* of the main defendant, Goran Grujevski. The decision of the Appellate Court to return the case for re-trial only for this defendant was addressed in the Second Interim Report³⁵. During the re-trial, the Prosecution asked the court to admit additional evidence consisting of 56 classified documents. Presentation of this evidence occurred in closed session, however OSCE monitors were allowed to participate³⁶, as a recognition of their expert public status (see Article 355 par. 2 LCP). In addition, the Prosecution availed itself of the testimony of the convicted co-defendants who testified about their role in the destruction of the said documentation, and the role of Grujevski in the entire process.

Trials *in absentia* as such are not prohibited by the ECHR as a standard. The right to defence in such cases needs to be ensured through other measures foreseen by Article 6 ECHR, namely through a chosen lawyer, who would have adequate time and facilities to prepare the defence. It could be affirmed that with the information in the Appellate Court's possession at the time of its deliberation, it was rather clear that the defendant would not choose to participate in person during this proceeding. Hence, also in the light of the fact that the re-trial took place in the absence of the defendant, Appellate Court's decision in this matter remain unclear.

ii) "**Tiffany**" - related to the criminal offence of Tax Evasion, where the indictment charged one company and its owner with "Tax Evasion" pursuant to Art.279 (2) and (1) of the CC. The punishment envisaged by the law for this criminal offence is at least four years of imprisonment. The trial ended with a guilty plea from the defendant, who in turn was sentenced to 2 years of imprisonment, suspended in case she does not commit any

34 However, pursuant to article 355 (2) LCP, OSCE monitors were allowed to stay in the courtroom.

35 See *Second Interim Report*, p.12, of the English version

36 The OSCE Mission to Skopje welcomes the changed approach by the BCC Skopje to allow the OSCE monitors' presence as expert public at some of the *in camera* trial sessions. This demonstrates the Court's dedication to enabling transparent and open processes in these cases, as well as in their work in general.

other criminal offence in the next four years. The court ordered that the defendant pay more than 3.700.000,00 MKD to the State in fines and compensation. On 18 July 2018, the Appellate Court confirmed the verdict.

This case was completed promptly due to the defendant's choice to take advantage of the legal benefits when pleading guilty. In fact, the Court was lenient with the defendant and imposed on her a suspended sentence. However, both parties decided to exercise their right to appeal against this verdict.

The defence, in its appeal against a judgment issued based on an admission of guilt, maintained that the confession made during the first instance hearing was made under media pressure. For its part, the SPO appealed the sentence handed down by the Court of First Instance, arguing that it was too low and did not take into account the gravity of the facts.

The Appellate Court rejected both appeals, ruling that a confession made under media pressure is still a confession. Media Pressure does not represent unlawful coercion of the defendant. The law foresees other conditions under which a confession cannot form the basis of a guilty verdict³⁷. In this case, none of those conditions were present. The Court of First Instance clearly instructed the defendant of the consequences of entering a guilty plea and properly inquired if the defendant completely understood these consequences. The chosen defence lawyer assisted the defendant during the hearing when she plead guilty. Thus, the Appellate Court acknowledged the legality of the first instance decision and upheld it.

The Appellate Court also dismissed the SPO's appeal on sentencing. The Higher Court upheld the decision of the first instance court, ruling that it had properly taken into consideration both mitigating and aggravating circumstances of the case, and as such gave the proper weight (in terms of punishment) to the admission of guilt.

The right to appeal a verdict is fundamental for both parties. It ensures that no errors are made, and most importantly, it plays a supervisory role in the work of the judges from first instance courts. However, in this case, the exercise of this right appeared to have unnecessarily prolong a criminal trial, which had been concluded and should have entered its execution phase. The execution of the sentence in its monetary part (payment of the fines and compensations) is dealt with elsewhere in this report.³⁸

iii) " Three-Hundred (300)" – involved a public procurement process for the purchase of 300 vehicles for the Ministry of Internal Affairs (MoIA). The indictment charged one defendant only (the former assistant to the Minister of MoIA) with the criminal offence of "Abuse of Official position and authorization", pursuant to Article 353(5)(1) CC, which foresees a punishment of imprisonment for at least five years.

The first instance verdict issued on 22 May 2018 found the defendant guilty as charged and sentenced him to nine years in prison. Moreover, the defendant was ordered to pay almost 28 million MKD to the MoIA. The defendant appealed this verdict, submitting that the first instance judgment did not explain properly the intent to commit the criminal offence. The defendant also questioned the existence of damage within the Ministry's budget since the cars purchased during the incriminated procedure are still in use of the Ministry.

37 Pursuant to LCP, Art.12, paragraph 1.

38 See Chapter V

Another point raised by the appeal was the authenticity of the phone interceptions, with the defence arguing that it was impossible to verify such authenticity, and that therefore this evidence should be excluded from the case file. The expert report was also criticised by the defence, as the expert was not an authorized expert at the time the expertize was conducted. On 26 December 2018, the Appellate Court nullified the conviction and returned the case to the First Instance Court for retrial.

The Appellate Court indicated a few violations were committed during the first instance trial, namely that the expert witness did not have a license at the time of issuing his expert opinion, and that the Presiding Judge refused to read parts of the material evidence into the record. The Appellate Court also instructed the First Instance Court to ascertain if the Law on public tenders was respected when the incriminated cars were bought.

The First Instance Court concluded the re-trial on 22 October 2019, announcing the same punishment previously imposed on the defendant, 9 years of imprisonment and the obligation to compensate the state budget with the loss caused by his criminal behaviour (28 million MKD).

iv) **“Tank”** - examined the purchase of a luxury vehicle for former PM Nikola Gruevski in 2012. The investigation unveiled the unlawful mechanism of acquiring a luxury car for the exclusive use of a person, upon the specific request from the user (former PM Gruevski). In general, public acquisitions are performed based on a needs analysis, having in mind the necessity to award the tender to the cheapest bidder. In this particular case, the investigation showed that the purchase process from public money started with the order from Gruevski, who wanted a particular type of car for himself. Thus, no needs analysis was conducted. The tendering process was arranged in a way that there would not be more than one bidder fulfilling the requirements.

The First Instance Court announced its verdict on 23 May 2018. Former PM Gruevski was found guilty of “Receiving a Reward for Unlawful Influence” pursuant to Art.359 par. 2 of the CC and sentenced to two years in prison. A former MoIA Assistant for General Affairs was found guilty of the crime of “Abuse of Official Position and Authority” pursuant to Art.353 par. 5 and 1 of the CC and sentenced to six years and six months in prison. The verdict was well-reasoned and clearly presented the evidence the Court found credible in order to establish the guilt of the defendants. It also explained clearly why the defence’s theory was rejected. On 5 October 2018, the Appellate Court confirmed former PM Gruevski’s conviction and sentence but reduced the other defendant’s sentence to four years and six months.

The former Minister of Internal Affairs Gordana Jankuloska was tried in a separated procedure. On 8 October 2018, she was found guilty of “Abuse of Official Position and Authorization” pursuant to Art.353 para 5 and 1 of the CC and sentenced to six years in prison. On request of the SPO, the court placed Jankuloska under the prohibition to leave her place of residence due to flight risk pursuant to Art.163, paragraph 1 LCP. On 28 March 2019, the Appellate Court reduced Jankuloska’s conviction to four years in prison.

Notwithstanding former PM Gruevski’s subsequent flight from justice, the trial disclosed “white-collar crime” corruption bringing to justice high-ranking officials. Furthermore, the entire duration of the trial from the actual filing of the indictment until the final verdict, was relatively short, around 16 months for former PM Gruevski and the other defendant, and approximately 21 months for Jankuloska, due to her pregnancy and motherhood.

During the trial against the first two defendants, 27 witnesses testified and material evidence was introduced in front of the trial panel. The trial panel decided that material evidence (118 documents for the first two defendants and 121 documents for the third defendant) would be read into the minutes by indicating the title of the document, date of issuance and its author, as opposed to reading the whole content of the document. This procedure was applied to the evidence presented by both the prosecution and defence.

This allowed the both trial panels³⁹ to acquire all the evidence presented by the parties and finish the proceedings within a reasonable time, ensuring that the rights of the defendants were fully respected. The defence had the time to properly prepare as the material evidence was disclosed to them in a timely manner. By reading only the title of the document, versus reading the whole content, the defence was given an indication of which particular documents the prosecution was founding its case on, allowing for proper preparation.

The trial panel in this case managed to reach a proper balance between the right to adequate facilities to prepare the defence, and the right to be tried within a reasonable time, and it showed that speedy proceedings could be achieved without impairing in any way the rights of the accused.

This balance should always be respected in a criminal trial, and the way the panel dealt with the material evidence presented by the parties could be an example for other panels in similar circumstances. The timely disclosure of evidence from the Prosecution side had a very positive impact on the whole development of the trial. It will be shown in Chapter V that the decision in some other cases to read the whole content of all material evidence presented by the parties had a significant impact on the length of the trials, without presenting any benefits.

Although from the procedural aspect the *Tank* case was conducted efficiently, the execution of sentence aspect presented a particular concern in regards to the overall effectiveness of the process.⁴⁰

v) **“Trust”** – related to the tender process for the exploitation of a coalmine in Bitola. Two defendants, businessmen Sead Kochan and Vasilije Avirovikj were found guilty of “Abuse of a Public Call Procedure, Procedure for Awarding a Public Procurement Agreement or a Public or Private Partnership” pursuant to Art.275-c par. 3 and 1 of the CC. Kochan and Avirovikj were sentenced to six and three years in prison, respectively. The two companies of the defendants, which had also been indicted, were found guilty of the same crime, fined two million MKD each, and banned from participating in public procurement processes for three years. The court also ordered the confiscation of the companies’ properties in the sum of 1,063 billion MKD. The third defendant Safet Vatikj was acquitted. Kochan and Avirovikj appealed the verdict and on 11 March 2019, the Appellate Court reduced Kochan’s sentence to four years and eight months in prison, and Avirovikj’s to two years in prison suspended with a probation period of five years. The Appellate Court upheld the acquittal of Vatikj.

During the main trial phase, the Court heard 10 expert witnesses, relevant wire-tap conversations were played, and material evidence introduced to the panel, mainly through the

39 Since Jankulovska was tried separately, it was another panel (same judges but different lay-judges).

40 For more on the execution of sentences issues see Chapter 5.

testimony of expert witnesses. The proceedings were conducted within a reasonable time, while also ensuring implementation of all defence guarantees.

The Court established that the defendants participated in a public tender for adjudication of the exploitation of a coalmine in Bitola. This participation was based on false documentation presented to the Commission in charge of the selection of the best bidder. The Commission awarded the bid to the defendants, but such decision was contaminated by the fact that the documents submitted to the attention of the Commission were false.

As will be discussed in Chapter 5, this case presented particular concerns regarding the execution of sentences.

vi) “Titanic 2” – involved six defendants accused of “Accepting a reward for unlawful influence” pursuant to Art.359 (5) and (4) of the CC, “Abuse of official position and authorization” pursuant to Art.353 (5) and (1), in conjunction with Art.22, and Art.23 of the CC.

This case involves allegations that the defendants conspired to fix a vote in the State Election Commission on an appeal filed by the political party VMRO-DPMNE. This case is vested with high importance because the perpetration of such criminal offences is perceived as an attack on democracy. The mere fact that the vote of the people is falsified annuls in practice the right to freely express the vote, and the duty to respect any outcome of such democratic participation. Manipulation of the outcome of any voting process makes the whole democratic exercise void of its true significance: that the people from the communities involved are able to choose the person who will represent them.

The investigation and the main trial unveiled illegal practices during the election of the mayor of Strumica in 2013. The indictment presented by the SPO was completely confirmed by the verdict⁴¹. The Court of First Instance decided that the evidence presented by the SPO proved that the behaviour uncovered by the wire-tapping had criminal relevance. The First Instance Court considered as proven that in March 2013 the defendant Sasho Mijalkov – at the time the Director of the Administration for security and counterintelligence, used his real influence and asked the defendant Menduh Tachi, president of the political party DPA to urge the representative of DPA in the State Electoral Commission (SEC) to vote to adopt the appeal of VMRO-DPMNE for Strumica, which would give benefit to the political party VMRO-DPMNE.

Tachi’s behaviour unlawfully enabled VMRO’s candidate to participate further in the election process for the election of a mayor of Strumica municipality. The defendant Menduh Tachi urged the defendant Bedredin Ibraimi, who was an official member of the SEC, to use his official position and authorization and vote for adoption of the appeal of VMRO-DPMNE in order to allow their candidate to run for the second round of elections. The Court found that defendant Ibraimi voted as instructed even though there was no legal basis for the VMRO appeal.

The consequences of granting such an appeal were that a second round of elections was organized. Consequently, the consequences of the defendants’ behaviour are extremely important both in terms of democratic rules and in terms of budget implications for organizing the second round of elections.

The First Instance Court sentenced S. Mijalkov to three years’ imprisonment for the criminal offence of “Accepting a Reward for Unlawful Influence”, M. Tachi to three years and

41 However, the Appellate Court ordered a re-trial in December 2019.

two months' imprisonment for "Instigation", and the SEC members to three years' imprisonment for the criminal offence of "Abuse of Official Position and Authorization", except for Bedredin Ibraimi, who was sentenced to four years and six months imprisonment. On the SPO's request, the court issued the precautionary measure of pre-trial detention pending appeal against S. Mijalkov and B. Ibraimi.

The defence appealed this verdict alleging that the first instance judgment violated both the Criminal code and the LCP. They claimed firstly that the Prosecutor did not hold the competence to prosecute this case, and that the indictment was filed late (beyond the 18 months foreseen by the law). In addition, the defence argued that the judgment did not take into consideration the evidence presented by the defence, as it was grounded only on the evidence presented by the Prosecution.

The defence claimed that the first instance judgment erroneously established the factual situation, therefore, the elements of the criminal offences presented in the indictment were not proved. All defendants asked for the case to be sent back for re-trial, or alternatively, that they be acquitted.

The Appellate Court granted the defence's appeal and ordered a re-trial of the entire case. The Appellate Court endorsed the defence's claims that the factual situation was not clearly established. It also decided that the criminal offences (if they were committed) were not perpetrated in co-perpetration for four out of six defendants. Thus, for these defendants, the Prosecution would have to prove that independently from each other they did commit the criminal offences they are charged with.

The Appellate Court also stressed the need to disclose to the defence all wiretaps related to the events under scrutiny by the indictment, maintaining that since the wiretaps were not fully disclosed to the defence the information they contain cannot be held as reliable when constructing the factual situation. It also instructed the First Instance Court to *establish the facts and circumstances under which the elections were conducted at the polling station 1727*⁴², to re-analyze the evidence presented in order to properly establish the factual situation and from there to determine, lawfully, if the defendants are guilty or not.

The Appellate Court remained silent on the defence's contention that the case should not have taken place because the indictment had been filed after the 18-month period foreseen in the SPO law.

vii) "**Trevnik**" - involved three defendants charged with "Unlawful construction", pursuant to Art.244-a par.1 CC. The trial started on 27 June 2018 and ended on 4 July 2019 with the announcement of the verdict.⁴³

The indictment alleged that the three defendants built three-holiday houses on their own land, without having the required building permits. The Prosecutor alleged that since the work started without the authorizations, this behaviour is encompassed by the wording of Art.244-a par. 1 of CC, namely "Unlawful constructing".

The defence argued that it is true the work started without the proper authorization, but that this was the fault of the Municipality, which did not grant authorization in a timely manner. The defendants proved during the main trial that currently the buildings were le-

42 Appellate Court Verdict KOKZ – 32/19 from 06.12.2019

43 The indictment charged one well known journalist and his two brothers

galized, having been registered in the Public Cadastre of the Municipality. The buildings were enrolled for the payment of all public utilities, including paying property taxes.

The Court of First Instance announced a verdict on 4 July 2019, founding the defendants not guilty, ruling that the defendants' behaviour did not constitute a criminal offence. The court issued a very well-reasoned decision, where it analysed carefully all the evidence presented by the parties. After these considerations, the Court explained its decision with an in-depth analysis of the civil regulations on civil constructions, and at the same time quoting a Constitutional Court decision where it was highlighted that the right to property as guaranteed by the Constitution needs to be properly protected.

Therefore, for the Court, the mere initiation of construction without a proper permit would not constitute a criminal offence if, by the termination of the construction, such permits are obtained. The building needs to fully respect the permit obtained, and the permit itself needs to fully respect the urbanization plans of the Municipality where the construction takes place. In addition, the new constructions need to be enrolled with the Cadastre Registry and pay all the utilities, and other taxes.

The SPO appealed this verdict.

viii) “Sopot” - this case was taken over by the SPO, exercising its rights under article 11 of the SPO Law.⁴⁴ The case investigated a 2003 landmine explosion in which two NATO soldiers and a Macedonian national died. The indictment charged 12 defendants with “Terror and Endangerment of the Constitutional Order and Security”, pursuant to Art.313 par. 2 of the CC, in conjunction with Art.22 CC. On 10 July 2017, during re-trial before the Basic Criminal Court Skopje, the case was taken over by the SPO. On 19 March 2018, the SPO dropped the charges in the case stating that the only evidence against the defendants was a witness statement obtained through torture. This statement, therefore, was inadmissible evidence. Because of withdrawal of the indictment by the SPO, the Court rendered a verdict “rejecting the indictment”, pursuant to Art. 402 par. 3 LCP and the case was closed.

The SPO did not announce if there was any other investigation into these events, which would point to other defendants, or if there is the possibility of finding new evidence against the same defendants. However, after the Court's judgment rejecting the indictment, these defendants cannot be tried again for the same facts.

As mentioned above, the SPO assumed jurisdiction over this case, exercising its prerogatives under the Law. Nonetheless, at the moment of taking over this case, no reasoned decision was produced, and even now, after the completion of the criminal case, the reasons for the SPO taking over the case are not clear. Article 11 of the Law does not require the SPO to provide a reasoned decision at the moment it takes over a case. However, article 8 of the Law imposes on the SPO a duty to regularly inform the public on the work and the progress of the office.

The quantity and quality of the information provided to the public could differ depending on the stage of the investigation, in order to preserve the confidentiality of the investigation. However, this assumption no longer applies to the “Sopot” case, as the case is closed. This lack of information leaves space for suppositions and can have a negative impact on public perception of the application of the law. The case at hand involved the commission

44 See art 11 of the SPO Law

of a serious criminal offence that shocked the entire population. Without clear reasoning on why this case was taken over, and especially in the light of its closure, many questions remain unanswered.



The number of cases completed during the life of this project is very low, four cases completed in the appeal, four cases completed in first instance and one ordered re-trial⁴⁵ out of the 20 indictments filed by the SPO within the legal deadline imposed by the Law. This number is even lower if the fact that in one case the defendant chose to plead guilty is considered.

An analysis of these cases shows that the Court managed very well cases with a small number of defendants.⁴⁶ The judgments issued by both first and appellate instances were well written, the evidence presented by the parties was analysed in-depth, and the verdicts issued were well reasoned.

The same also applies for the two judgments that have been appealed: *300* and *Trevnik* respectively, though only the decision of the higher court will establish whether the reasoning of these verdicts passes the test of the appellate procedure.

In these completed cases, the Court decided to read only the title, date and author of the documents presented as evidence, as opposed to reading the whole content of the documents during the court session. The Presiding Judges of the respective cases knew how to strike a balance between efficiency of the proceedings, the need to proceed with speed, and the obligation to ensure that the defendants were properly protected, and defendants' rights are respected.

Another issue that comes out is that during these trials, the Court of First Instance avoided re-starting the trials due to the expiration of the 90-day limit of time between sessions foreseen in the law. This factor also contributed greatly to the conclusion of the cases within a reasonable time.

45 Finally completed: *Trust, Tank, Tiffany, Fortress 2*; cases completed in first instance: *Fortress 2* (for Grujevski) *Trevnik, Tariff, 300* (also the re-trial completed in first instance); waiting for re-trial *Titanic 2*.

46 *Fortress 2* had 7 defendants, but only 2 of them appealed the first instance judgement. The other cases had a maximum of 3 defendants.

CHAPTER V

Analysis of specific issues

Monitoring by the OSCE Mission to Skopje indicates that, in general, the court is very much aware of the rights of the defence and of the need to ensure equality of arms between the parties. Due consideration is given to defence requests, and when justified by the needs of the trial, they are granted. Many defence witnesses (including expert witnesses) provided their evidence. The defence in these cases was also able to present various documents in support of its cases.

Two procedural aspects come across in all monitored cases: postponements and re-starts of trials as a result of postponements; and the presentation of material evidence, which in many cases was a very lengthy and time-consuming process. Here the court needs to carefully balance two interests, which is not always easy to do, namely, the need to proceed speedily, as a criminal trial needs to be as short as possible; and the right of the defence to comment on all evidence proposed by the Prosecution, in order to better present its strategy.

In the previous reports, a number of recommendations were made to various actors involved in the criminal proceedings. This section will explore if the recommendations suggested in these reports could still be considered as relevant and analyse issues noted by monitors during the last 13 months.

Transparency

One of the recommendations from the First Interim Report⁴⁷ advised the SPO to ensure full transparency in its undertakings, both with regard to the cases it initiated and with the cases it took over from the PPO. Unfortunately, as observed above⁴⁸ this recommendation was not always followed. The new investigations initiated by the SPO lacked clarity with regard to the fate of the investigations, there is uncertainty about what is going to happen with these investigations, and if there are going to be any indictments filed in any of these cases⁴⁹.

In the three cases⁵⁰ that the SPO took over from the PPO, there is still ambiguity as to the reasons behind the SPO's decision to take jurisdiction. From the monitoring of the main trials and the evidence so far produced in front of the trial panels, in only one case (Monster) did the reasons for such a take-over become clear (the existence of wiretaps related to the case). The SPO introduced these wiretaps as evidence and it will be known only at the end of the trial if they were relevant or not. Once the prosecution introduced the wiretaps as evidence to the panel, it is entirely the panel's prerogative to decide in deliberation, what weight to give to the wiretaps, if they prove guilt or reinforce the innocence of the defendants.

47 See *First Interim Report* available on <https://www.osce.org/mission-to-skopje>

48 See Chapter IV

49 As the SPO Law imposes transparency in its Art. 8

50 Initially there were four cases taken over by SPO, but one case (*Sopot*) was concluded

In the other two cases, *Magyar Telecom* and *Spy*, trial monitoring has provided no indication of the reasons the SPO exercised its power to take over these cases. This lack of transparency has a negative impact on the public perception of the judiciary, and on the extent of the rule of law within the country.

Disclosure and Presentation of Evidence

The Second Interim Report⁵¹ recommended that the SPO *ensure timely and broad disclosure of the evidence and accurately select the evidence to introduce at trial, and improve prosecutors' presentation skills at trial*. From trial monitoring during the 13 months covered by this report, it appears that these recommendations are still valid.

In terms of efficiency and reasonable time of the criminal trial, it is of utmost importance that defence has early access to the evidence in order to prepare a meaningful strategy. It is also very important that the Prosecutor has a strategy and makes choices about the evidence to introduce at the main trial, including the way such evidence is presented to the panel. Likewise, it is important that Prosecutor knows the case well, including the elements of the criminal offences that need to be proved during the main trial.

The Mission's monitors observed that the parties in the SPO cases did not try to agree if there were any uncontested features during the trial so that the evidence could be concentrated on the contested components. Pre-trial conferences would have been helpful to discuss any elements the defence would not contest and if the panel would acknowledge such an agreement of the parties.

Such initial agreements between the parties could have had a significant impact on the way the trials unfolded and on the quantity of the evidence produced in front of the main trial panel, which would have had an impact on the length of the trials.

Early access (or lack of it) to the evidence, as well as the way evidence is presented during the trial can have a significant impact on the length of the trial. It is not a coincidence that all the ongoing trials in first instance (fourteen cases) encountered considerable problems in terms of introducing evidence to the panel.

These problems appear to represent a vicious circle: the evidence is not disclosed or is disclosed late, and then the Prosecutor needs to actually present the entire material evidence in full to the panel so that the defence can comment on it. This increases the length of the trial and creates a serious risk that the right to be tried within a reasonable time will be violated without ensuring the right to a proper defence. Reading such documents entirely during the session does not ensure the defence acknowledges the evidence against the defendant, nor was it established that the panel would pay more attention to those documents in their deliberation if they were read during the session. The only way out of this vicious circle is through better preparation for the trial phase, as well as a timely disclosure and a good prosecution strategy for the case.

In SPO cases, Prosecution disclosed to the defence all material evidence except the wire-taps. The lack of wiretaps disclosure induced the defence to frequently insist in having all

51 See *Second Interim Report* available on <https://www.osce.org/mission-to-skopje>

audios played during the trial sessions. This led to long trials, without fully ensuring the rights of the defence. The issue of disclosure and its practical consequences during the trial sessions will be analysed below.

In terms of disclosure obligations, the LCP foresees in Art.302 the prosecution's obligation to inform the suspect that the criminal investigation against him/her is terminated and that he/she and/or their defence lawyer(s) "have the right to review the files and evidence and copy them respectively."⁵² The same article obliges the Prosecutor to actually disclose⁵³ "to the defendant all the evidence that was collected during the investigation procedure", [...], "as well as any exculpatory evidence."⁵⁴ This provision is applicable before the indictment is filed.

In the terminology of the LCP, the defendant and his/her defence lawyer are invited to make notes from the Prosecution case file⁵⁵. However, in the Commentary to the LCP, it is recognized that these "*transcripts*" should be understood as the right to make copies inside the prosecution office.⁵⁶ Due to the sensitivity of the information surrounding a prosecution office, it is not advisable to have the entire case file taken outside the prosecution office. Therefore, the most obvious solution would be to have the Prosecution prepare copies for the defence.

The general rules on accessibility to the files are foreseen in Articles 70 and 79 of the LCP. Article 70 LCP establishes the rights of the defendant during the entire criminal procedure phase, applicable from the investigation until a final verdict is passed. One of these rights is "access to the file"⁵⁷ as well as the right to "be familiar"⁵⁸ with both inculpatory and exculpatory evidence in the file.

Article 70 of the LCP refers to the defence counsel's rights to access the file and also to receive copies of certain documents that exist in the prosecution file,⁵⁹ which also establishes the Prosecutor's obligation to disclose evidence in his/her possession. This must be done before the filing of the indictment. The defence always has the right to have access to the file, and at certain points has the possibility to ask for copies of specific documents.

There are significant differences between "disclosure" and "access to the file". The defendant and/or his defence lawyer need to be physically in possession of the evidence acquired throughout the investigation in order to prepare their defence. The possibility to inspect the content of the files cannot be enough to ensure proper defence.

At the international level, the ECtHR does not set a standard on how and when disclosure needs to be done. The Court looks more into the issue of how and if the defence had been put in the position to carry out a meaningful defence. A meaningful defence is performed

52 See Art 302 (3) LCP

53 Emphasis added

54 See Art 302 par. 5 LCP

55 The LCP, uses the term "prepis", which literally means "transcript"

56 In the words of the Commentary "*the word "transcript" is inappropriate and should be interpreted beyond and the suspect to be allowed to make a copy of the evidence no matter what form it is*", see p.663, "Commentary on the Law on Criminal Procedure", G.Kalajdziev, G.Lazetic, L.Nedelkova, M.Denkovska, M.Trombeva, T.Vitlarov, P.Jankulovska, D.Kadiev, OSCE, 2018, Skopje

57 See Art 70 (2) LCP

58 Ibid footnote No. 56

59 See art 79 (2) LCP

when adequate time and facilities are in place. The ECtHR has interpreted “facilities” in a broad way to include “*the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of the investigations carried out throughout the procedure*”.⁶⁰

The European Court has further developed through its jurisprudence the principle of “*equality of arms*” as an expression of the right to a fair trial guaranteed by Article 6 (1) of the ECHR. This principle requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.⁶¹

Therefore, the “equality of arms” principle means that both parties are in the same position. The Prosecutor, as the initiator and defender of the indictment, has the evidence at his/her disposal all the time and would thus have sufficient time to prepare in order to defend the indictment. Consequently, in the application of this principle, at the beginning of the trial the defence should be in possession of the evidence to the same degree as the Prosecution.

Some courts outside Skopje, in the application of this guideline coming from Strasbourg, have started to send to the defence a copy of the case file together with the indictment, once it is filed.⁶² This is a very good practice, and its expansion to all courts in the Republic of North Macedonia would be an excellent way to improve the judicial system as a whole. However, such an obligation should probably lie with the Prosecution, rather than the Court, as the Prosecution is the initiator of the investigation and owner of the indictment.

In the ongoing SPO cases the Courts asked the Prosecutor to read in relevant parts or the entirety of the content of the material evidence they introduce in cases where the defence did not agree to have those documents considered as read into the minutes.

The defence justified such requests with their right to be acquainted with the content of the evidence against them. The Court generally granted such requests as an expression of their role in ensuring the equality of arms for the parties in the procedure. The result of this practice was extremely lengthy trials, where no benefit for the defence can be detected.

It must also be underlined that in all SPO cases the defence received all the evidence, except for the wiretaps. No valid explanation was offered as to why the wiretaps were not disclosed. The defence could listen to the wiretaps at the court premises, at their convenience. In those cases in which the number of phone conversations was considerable, this practice of listening to the phone conversations at the court premises cannot be considered as “*adequate facilities*” according to the ECtHR standards.

As mentioned above, a proper defence that enjoys time and facilities would mean that the defence already possessed material documents at the time they were introduced to the trial panel. Reading such documents entirely during the session does not constitute a manner to ensure the defence acknowledges the evidence against the defendant. It was not established that the panel would pay more attention to those documents in their deliberation if they were read during the session.

60 Jesper vs. Belgium, application No. 84/03/78

61 See Niderost-Huber vs Switzerland, Application No. 18990/91, para 23

62 Through an informal communication with judges from different courts, we received informal information that some courts have adopted this practice, however, it all depends on the volume of the case file and the capacities of the court.

The presentation of material evidence becomes even more problematic in those cases where the trial had to re-start from the beginning.⁶³ In many of these cases, the defence agreed to have the previous testimony of the witnesses read into the record, but they insisted on having the material evidence in its entirety read once again into the record. Rather than pursuing the swiftest possible outcome for their clients, it appears that in these cases the defence aimed to delay completion of the trial as long as they could.

This request of the defence to have the material evidence read again meant that in many cases all participants in the trial (panel, prosecution, defence, and the public) sat in the courtroom for hours watching videos⁶⁴ from the sessions before the re-start in which the Prosecution read the material evidence⁶⁵. It is not clear how this lengthy repetition could contribute to establishing the judicial truth and or safeguard the rights of the accused.

This way in which trials were conducted appeared to considerably diminish the role of witnesses. As noted above, in some of the re-started cases the parties agreed not to call witnesses again, while the material evidence was read again. While the conduct of criminal trials must have some margins of discretion, witnesses are an important tool to prove a certain theory of the case. The panel will arrive at a conclusion in deliberation based on the witness story. Every judge will believe or not the story put forward by the witnesses through the direct contact the judge had with them during their testimony in court. Witness behaviour throughout the testimony tells as much as the words spoken.

The method of introducing material evidence during the trial, which, as already noted, unnecessarily prolongs the proceedings without ensuring that the equality of arms is actually in place, derives from a restrictive interpretation of the provisions of Article 392 (4) LCP, which specifies that the material evidence *shall be read, unless agreed otherwise by the parties. The Commentary of the LCP which refers to this article points that it is quite wrong the parties' practice to let the court present this evidence - reading the written evidence, reproducing of electronic evidence, recordings, material evidence.*⁶⁶

The Commentary also emphasizes the need for the parties to explain the relevance of the particular piece of evidence introduced, stressing which particular point of the indictment that particular piece of evidence would prove or disprove. In the Commentary's words [...] *cannot know better than the parties what fact is proved by each of these pieces of evidence or to which part of some piece of evidence should be given separate attention.*⁶⁷

A selection of the relevant portions of the documents presented as material evidence, with a clear indication of which point of the indictment that document proves would be a better way to adduce evidence in criminal trials. This would ensure that the evidence is born in front of the panel, that the defence knows on what evidence the Prosecution rests its case, and that the process would not be time-consuming.

63 As outlined elsewhere in this report, the trial started all over again mainly because of elapse of time (more than 90 days from the last trial session), or in few cases when the composition of the trial panel has changed.

64 All the trial sessions are video-recorded as per article 374 (1) LCP, thus the Court simply plays the old videos.

65 This happens for example in *Treasury*

66 See Commentary to the LCP page 805

67 Ibid footnote No. 66

The parties also did a poor job in using witnesses to introduce material evidence to the panel. A witness is a person who has first-hand information about the facts and/or the involvement of the defendant in the developments of the events leading to the criminal event. Generally, a witness would also have information about the existence, creation and use of certain material evidence.

Presenting material evidence through the testimony of witnesses would reduce the time employed to read them, and would present a better scenario to the panel. The Court would acquire at the same time both witness statements and the material evidence that is mentioned during the testimony. It is not clear why the panels in many SPO cases chose to start the evidentiary proceedings by reading the material evidence (phone conversations included), and not with the witnesses.

Reading the material evidence before witness testimony presents another disadvantage. During our trial monitoring, it was observed that various trial sessions were postponed due to the absence of the witnesses. In such circumstances, the trial panel could have employed that particular session to read some of the material evidence proposed by the parties. In this way, the trial session would have been saved, the trial advanced, and, most importantly, the risk of having to restart the trial, due to long gaps between sessions would have been diminished considerably. However, as the material evidence was already read at the beginning of the trial, this approach could not be used in the SPO cases.

Another shortcoming identified in the previous report is the [non]selection of evidence proposed by the parties, especially by the Prosecution. The Prosecution read a large number of documents and proposed that the court listens to a large number of phone conversations, without a clear indication of which point of the indictment this evidence proved. In this sense, a good practice would have been for the Prosecutor to have selected the most representative evidence, both in terms of witness testimony and material evidence, and presented this to the panel.

In line with the provisions of LCP, the selection of evidence should be made already at the time of the filing of the indictment. Article 321 (2) LCP clearly specifies that the indictment should be accompanied by *all material evidence, minutes and recordings from the examination of the persons and a list of evidence that she/he moves to be presented during the main hearing*.⁶⁸ The Prosecutor is not obliged to file with the Court the entire case file of the investigation, but only the evidence she/he relies upon in order to secure a conviction. However, in the national jurisprudence, it appears that the "list of evidence" is interpreted extensively, so as to include all the orders that would allow the Court and the defence to evaluate if the evidence presented was gathered legally.⁶⁹ Nevertheless, this obligation should not prevent the Prosecutor from selecting the evidence she/he considers would secure a conviction at the end of the trial.

In some other jurisdictions the Prosecutor is obliged to file with the Court, together with the indictment, the entire case file of the investigation. In the Republic of North Macedonia, however, the situation is different. The Prosecutor must undertake a selection of all the materials acquired during the investigation, and establish what evidence is needed in order to secure a conviction. However, from trial observations, it is clear that in many of

68 See Art.321 LCP

69 See Commentary to LCP, pages 688 to 689

the SPO cases this selection was not performed, or not performed properly, hence the large volume of evidence presented during the trials, which was not always warranted by the trial needs.

For example, in one case, more than 1.000 phone conversations were played in Court. While this report will not make any consideration on the merits of any of the cases under scrutiny here, it is still very difficult to conceive that all 1.000 conversations were pertinent and relevant to the criminal charges the Prosecutor was called to defend.

In such circumstances, the Prosecutor should have filed with the Court the entire file of the investigation but played in Court only those conversations that proved a particular point of the indictment.

The problem of the phone interceptions (including SMSes) played (or read) during the Court sessions represents a very good example to illustrate the clear distinction that the Prosecutor should make between the totality of the materials acquired during the life of an investigation, and the evidence reached. The totality of the investigative actions undertaken represents the entirety of the investigation case file. Evidence is provided only by those information/documents/witnesses who can prove the existence of the criminal event and the defendant's guilt. The Prosecution should file with the Court the entire file of the investigation and present during the trial sessions only the evidence that would sustain the indictment, ensuring a guilty verdict.

Similarly, Monitors noted that the number of witnesses presented by both parties was not always justified by the needs of the trial. When in doubt, the method adopted appears to have been to present more evidence rather than less, regardless of relevance.

To give a few examples, the report makes a note of one case where the Prosecution introduced pay slips of people as material evidence alleging that they were false, but it also introduced the payslips of the defendants, who all admitted such payments, and no other evidence would indicate that the payments were false. It was obviously an error in preparing the set of documents to be presented to the Court, but it left the impression of negligence on the Prosecution's side.⁷⁰

In the same case, (21 defendants), the Prosecutor presented to the Court more than 1000 phone conversations without providing any explanation as to which point of the indictment these conversations would prove or why they were important. The Prosecutor did not explain how these audio recordings were connected to each other, nor with the other material evidence presented. This lack of explanation does not contribute to developing a theory of the case or a logical presentation of the interrelations between various pieces of evidence.

Also in this case, the Prosecutor read a large number of documents (some 6.000) during the trial sessions. In addition, the Prosecutor proposed some 190 witnesses. In this particular case, since its inception on 9 May 2018 until the writing of this report, more than 60 trial sessions have taken place. However, due to the large volume of evidence presented it is not possible to foresee in the near future a conclusion of the main trial.⁷¹

Certainly, in these situations, the Presiding Judge should have intervened and rejected the administration of evidence that was not useful for proving the indictment. Article 385 (3)

70 *Titanic 1 case*

71 *Titanic 1 case*

LCP gives the power to the Presiding Judge to refuse evidence that is considered unnecessary.⁷² However, in the SPO cases monitored the Presiding Judge rarely made use of this power, and instead allowed superfluous evidence to be produced.

The Presiding Judge also has the power to refuse the proposal of evidence that they consider irrelevant. Evidence is considered irrelevant if it does not help in any way the decision-making process, meaning that *there is no connection between the facts that need to be established and the decisive facts*⁷³ In this way, the Presiding Judge has the power to guide and control the evidence that needs to be presented during the main trial. Unfortunately, it appears from monitoring of the SPO cases that the Judges made little or no use of this provision.

In one case, the defence presented a list of almost 200 witnesses. While the number might be justified by the large number of defendants (21), it is still difficult to envisage circumstances about which these witnesses could testify in such a way as to avoid repeating what previous witnesses had already said. Here the Presiding Judge could usefully have ensured that only those witnesses whose testimony was essential would be heard during the trial. During the course of the trial, the Presiding Judge could also have rejected some evidence that was allowed in the beginning under the terms of article 385 (1) LCP which obliges the Presiding Judge to pay the necessary attention to *efficiency and economics of the proceedings*.⁷⁴

In another case, the Court read during the trial sessions more than 600 SMS messages that were exchanged between defendants, or defendants and other persons not involved in the proceedings. In the same case, more than 200 conversations were also played in Court. Some of the material evidence was read in its entirety and some only in the relevant part. It is difficult to conceive that only by reading all these conversations (both voice and SMSs) would the Prosecution be able to prove the indictment. A more proactive role of the Presiding Judge could have ensured that a shorter list of conversations would be actually read in court, without jeopardizing the Prosecution case.

In the same case, the Prosecutor proposed as evidence both a draft law and the final version approved as a law. The Presiding Judge, using his powers given by the law, could have impeded the reading of such documents because a law cannot be considered as evidence, much less a draft law.⁷⁵

Postponements

The previous report analysed the issue of adjournments and postponements.⁷⁶ It also provided a detailed explanation of the difference between them. Here, the report briefly recalls that “adjournment” follows the natural path of the criminal trial. It intervenes in (almost) all those cases when the criminal procedure is not completed during a hearing. Thus, when the working day ends or there is a need to collect new evidence that does not take long, an adjournment is declared.⁷⁷

72 Art.385 (3) reads: “The Presiding Judge of the Trial Chamber shall refuse presentation of evidence if he or she considers it unnecessary and of no importance for the case and shall briefly the reason for it”

73 Art.347 (1) item 3 LCP

74 See Art.385 (1) LCP

75 In *Trajectory* case, during the trial hearing held on 4 April 2019

76 See page 19 and subsequent of the *Second Interim report* (English version)

77 See also LCP, Art.372 paragraph 1

A postponement, on the other hand, takes place when the hearing, for various reasons, cannot be held. When a postponement is decided it means that the trial session did not take place and the time limits of 90 days between sessions continues running from the previous session, and the trial is automatically, therefore, prolonged.⁷⁸ If several sessions cannot be held for various reasons, then the risk is that the 90-day time limit will expire and the trial will need to be re-started from the beginning, prolonging the proceedings and violating the right to be tried within reasonable time.

Out of 338 hearings monitored between 1 December 2018 and 15 January 2020, not counting the hearings for cases taken over from the PPO, the re-trials and the separated procedures in a number of cases,⁷⁹ 114 were postponed. The postponement rate was therefore 34%; almost the same as the rate reported in the Second Interim Report, namely 33%.

The fact that the Courts scheduled (or tried to schedule) more hearings during the 13-month period covered by this report in order to finalise the cases is a very good sign. The Courts, generally took their role in ensuring a fair and rapid resolution of the criminal cases very seriously. However, the same cannot always be said for the defence.

The main causes for the postponements during the period covered by this report were:

1. The absence of at least one of the defendants **(30 times)**.
2. Absence of a judge or lay judge, or changes in the composition of the adjudicating panel **(22 times)**,
3. Other reasons, which include external events, not directly connected to the procedure, expert witnesses not being prepared to testify, technical issues with the audio and video recording equipment, or the ACMIIS system, allowing time for preparation by *ex-officio* appointed defence lawyers, the status of the SPO, etc. **(22 times)**
4. Absence of witness/expert witness **(12 times)**.
5. Overlapping cases, or scheduling at least two cases with the same participating parties at the same time **(11 times)**
6. Absence or change of a defence counsel **(8 times)**,
7. Procedural issues, among which declassification of documents, acquiring an expert opinion, addition of evidence and/or witnesses, defendants not being escorted from detention, etc. **(6 times)**, and
8. Absence of the Prosecutor **(3 times)**

Given that the hearings for the SPO *TNT* case were scheduled on a frequent basis, starting from the second half of December 2019 until the end of the reporting period, several other cases that shared the same panel composition, and/or involved the same defendants/ defence lawyers, were postponed or cancelled, including *Monster*, *Trajectory*, *Titanic 1*, *Toplik*, *Talir*, and *Talir 2*.

78 See Articles 370 and 371 from the LCP.

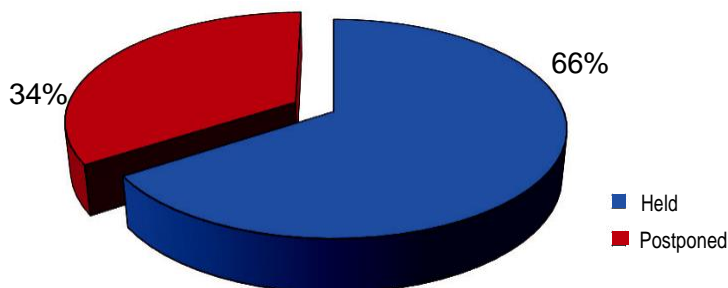
79 *Spy case* (separated procedure); *Centar Violence case* (separated procedures for Mitko Pecev and Dimce Krstev); Re-trials for *Fortress 2* and *Three hundred* (300)

Postponements of hearings in the period 1 December 2018 – 15 January 2020

Total number of hearings (first instance): 338

Number of postponed hearings: 114

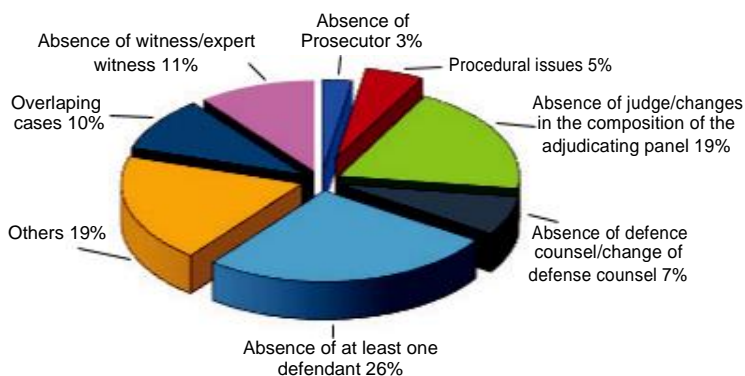
Postponement rate: 34%



Postponement rate by case:

1. Titanic 1	36%	10. Tenders	33%
2. Titanic 2	22%	11. Tariff	24%
3. Titanic 3	31%	12. Total	53%
4. Torture	22%	13. Trevnik	13%
5. Fortress/Target	25%	14. Trajectory	32%
6. Transporter	19%	15. Talir	93%
7. TNT	39%	16. Talir 2	75%
8. Treasury	6%	17. Centar violence	35%
9. Toplik	50%		

Reasons for postponement



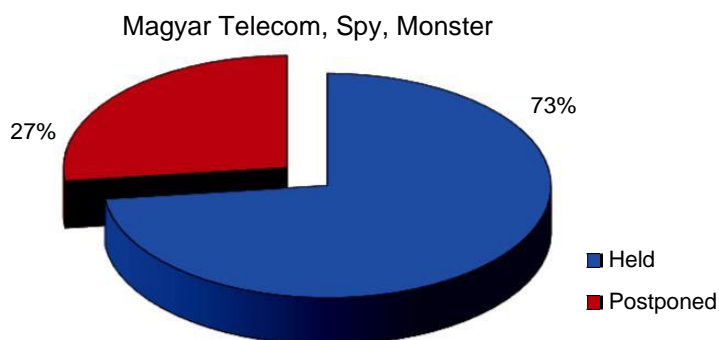
1. Absence of at least one defendant	26%
2. Procedural issues	5%
3. Absence of judge/changes in the composition of the adjudicating panel	19%
4. Absence of defence counsel/change of defence counsel	7%
5. Overlapping cases	10%
6. Absence of witness/expert witness	11%
7. Others	19%
8. Absence of Prosecutor	3%

Postponement of hearings – Cases taken over from the PPO

Out of 52 hearings monitored between 1st December 2018 and 15th January 2020 for cases taken over from the PPO not including separated procedures,⁸⁰ 14 were postponed. The postponement rate was thus 27%.

Main causes for the postponements of these cases were:

1. Absence of summoned witnesses	seven times
2. Absence of a judge or lay judge, or change in the composition of the adjudicating panel	four times
3. Absence of at least one of the defendants	two times
4. Other reasons	one time

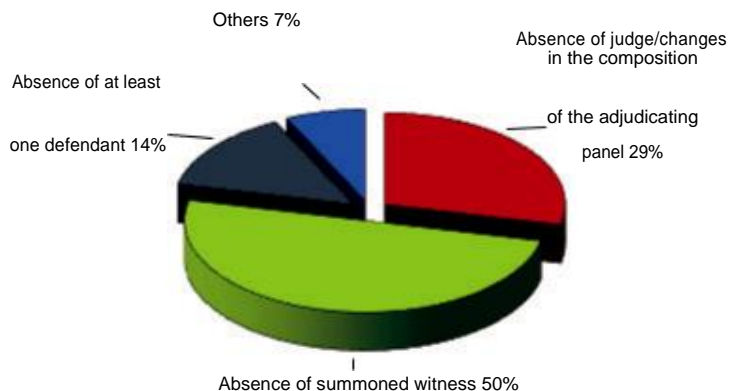


Postponement rate by case:

1. Magyar Telecom	50%
2. Spy	30%
3. Monster	14%

⁸⁰ Spy case (separated procedure)

Reasons for postponement



Absence of summoned witnesses	50%
Absence of judge/changes in the composition of the adjudicating panel	29%
Absence of at least one defendant	14%
Other	7%

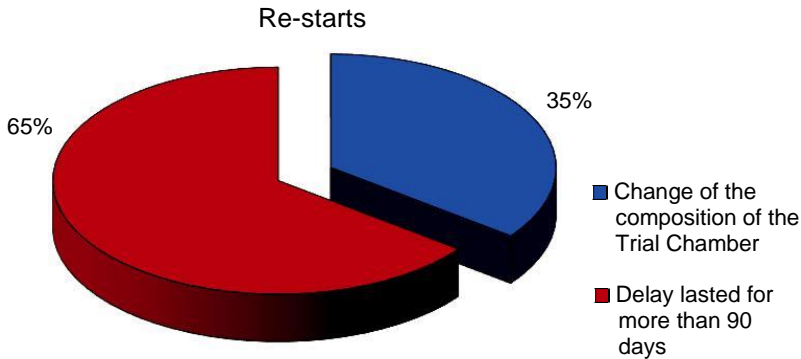
Re-starts of trials

According to Article 371 LCP, the main hearing shall start from the very beginning if the individual judge or the composition of the Trial Chamber has changed (paragraph 2) or if an interruption, lasting more than 90 days between hearings takes place. In such cases, all the evidence needs to be presented again (paragraph 3).

During the reporting period, there were 17 re-starts of trials in a total of 14 cases, meaning that a re-start in some cases occurred more than once. This data refers to the SPO cases and cases taken over from the PPO. Six re-starts were due to changes in the composition of the Trial Chamber and 11 due to inactivity.

The *Total* case had to start anew both because of the expiration of the 90-day period and due to a change in the composition of the Trial Chamber. The *Spy* case started anew twice, both times due to the passage of 60 days (old LCP provision) between sessions. In the separated procedure in *Spy*, the trial also had to start anew twice because of the passage of 60 days between hearings.

The *Torture* case started anew once, for both reasons mentioned above.



As previously noted, during the period covered by this report the Court increased the number of scheduled trial sessions, which is commendable. Nevertheless, the percentage of hearings postponed remained the same.

From these numbers, it immediately becomes noticeable that the absence of the defendant and procedural issues are the most significant causes of postponements. Within the category of procedural issues, the most common was the absence of witnesses. As mentioned above, in these particular cases, the sessions could still have been saved if material evidence would have been presented. However, because the main trials started with presentation of the material evidence this was not possible.

The absence of the defendant is also an important reason for postponing hearings. Although the LCP recognizes trial *in absentia* as a matter of principle, it is only allowed in extremely limited cases. Article 365 (3) LCP stipulates that the defendant may be tried in absentia only in those cases where *he/she has fled or is otherwise inaccessible to the state institutions, in the event where there are especially important reasons for the person to be tried, although he/she is absent.*⁸¹

The presence of the defendant during the main trial hearing is seen as an expression of his right to a fair trial. Through his/her presence, the defendant would have first-hand knowledge of the evidence against them, could cross-examine the Prosecution witnesses, and comment on all the other evidence adduced. The defendant can suggest evidence in his/her favour being presented to the panel, and can choose to testify.

The right to be present is therefore an extremely important tool to ensure that a defendant's right to defence is respected and the trial is conducted according to fair trial standards. However, this right cannot and should not be abused. When abuse occurs, this should be punished. In this regard, Art 6 (2) LCP vests the Court with the authority to ensure that parties do not abuse their rights, and paragraph 3 of the same article foresees a pecuniary punishment for whoever misuses the rights established within the LCP.⁸² Generally, in the SPO cases monitored, the Court did not effectively apply this right.

In some instances where the defendant was not present, Presiding Judges postponed the hearings, ordering the defendant to be brought by the Police to the next hearing. Many

81 See Art.365 (3) LCP

82 See art 6 LCP

times the defendant justified his/her absence with medical reasons, but the Court did not always find this justification trustworthy⁸³. In those cases where the Court has reasons to believe that the defendant is trying to prolong unnecessarily the proceedings, Article 6(3) LCP allows the imposition of a fine. However, in the SPO cases monitored this provision was never used.

Length of Trials & Execution of Sanctions

The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment⁸⁴. When determining whether the duration of criminal proceedings has been reasonable, the court should take into account factors such as the complexity of the case, the number of the defendants and the conduct of both the defendant and the relevant authorities during the trial.

Article 6 ECHR does not require applicants to cooperate actively with the judicial authorities, nor can they be blamed for making full use of the remedies available to them under domestic law. However, their conduct constitutes an objective fact which cannot be attributed to the respondent State and that must be taken into account in determining whether the length of the proceedings exceeds what is reasonable⁸⁵.

The first trials to commence were those whose indictments had been filed earlier: *Fortress 2*, which started on 28 November 2016; *Centar*, which started on 16 December 2016; and, *Transporter*, which started on 28 September 2017. The remaining 17 trials commenced between November 2017 and April 2018 (*Talir 1* and *Talir 2* started in February and September 2019, respectively; but the indictments were filed after the initial 18-month deadline).

At the time of writing this report, out of 22 SPO-initiated cases (including *Talir 1* and *Talir 2*), only eight had finished in the first instance (including the separated procedure for *Tank* case), and retrials had been ordered and concluded for two of them⁸⁶. In the *Titanic 2* case, the Court of Appeals, acting upon defence appeal, ordered a re-trial in December 2019, thus the re-trial will start soon. The number of cases completed in both first and second instance is only four: *Tank*, *Tiffany*, *Trust*, and *Fortress 2* (for all except G.Grujevski). None of them was completed within the reporting period.

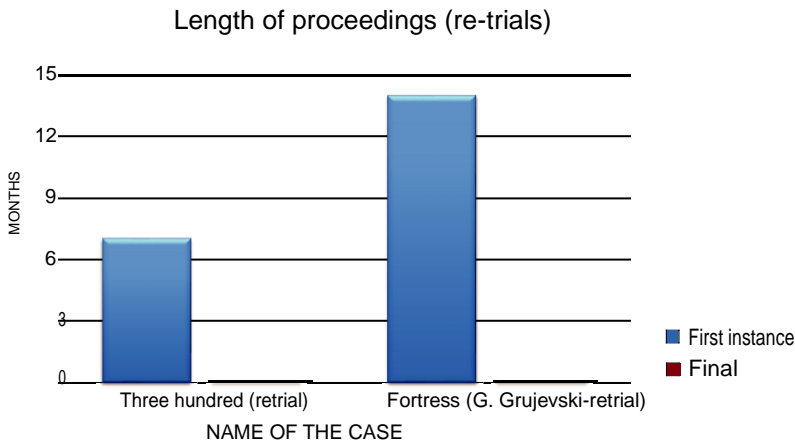
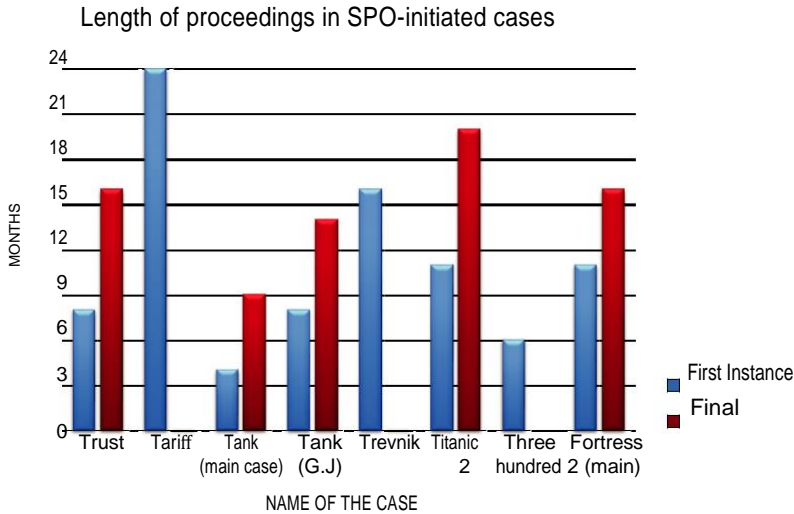
Out of the eight cases completed in the first instance, there was only one acquittal. In one completed case, the defendant pleaded guilty thus resulting in only one hearing (*Tiffany* case). In the *Centar* case, two defendants pleaded guilty (the trial is ongoing against the remaining defendants), one defendant in each of *Talir 1* and *Target Fortress* also pleaded guilty, but the cases are still ongoing against the others. The defendants who pleaded guilty were sentenced to imprisonment, which was suspended provided they do not commit other criminal offences during the probation period. The length of the first instance proceedings in completed cases varied from four months (*Tank* – main case) to two years (*Tariff*). The trial for *Tank* (main case) started on 30 January 2018 and it became final on 05 October 2018. The procedure was separated for one of the defendants, namely the former Minister of Internal Affairs, due to a risky pregnancy; however, this case was still completed in less than 14 months.

83 For example in *Transporter*, the Presiding Judge did not believe the asthma diagnosis of the defendant and ordered for her to be brought by the police for the next hearing (during the court hearing held on 2 December 2019)

84 See the ECtHR jurisprudence in *Boddaert vs. Belgium*, § 36

85 See Guide on Art. 6., ECHR available on https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

86 *Fortress 2* (for one defendant only), and 300



With regard to the cases that SPO took over, after the reporting period verdicts were rendered in the *Spy* case against five out of six defendants on 21 January 2020. In the separated case (from the original *Spy* case⁸⁷) the verdict was announced on 11 February 2020, acquitting the defendant from all charges.

When it comes to the execution of the sentence, as was mentioned in the *Second Interim Report*, several weeks, and in some cases even months, may elapse between the issuance of the final verdict by the Appellate Court and the start of the execution procedure. At the time of writing of this report, the decisions were final for four defendants who have been sentenced to prison.

⁸⁷ The procedure against one defendant was separated back in April 2019.

All of the defendants in *Fortress 2* (except Goran Grujevski, who was tried *in absentia* and for whom a retrial was ordered) were sentenced to probation. One of them appealed the first instance verdict and the appeal was rejected. The execution phase for *Tank* (main case) was elaborated in the previous report when it comes to the ex-PM⁸⁸, while the other defendant is currently serving his prison sentence of 4 years and 6 months.

On 11 March 2019, the Appellate Court, in the *Trust* case, sentenced the defendant Sead Kochan to 4 years and 8 months in prison. Three months later, on 13 June 2019, the verdict was sent to the Basic Court and on 20 June 2019 the Judge for execution of sentences (JES) issued an order for the execution of Kochan's sanction. He should have reported to prison on 17 July 2019. Kochan sent numerous requests for postponement that were denied and in addition, he filed a request to the Supreme Court for extraordinary review of his verdict. On 02 August 2019, Kochan started serving his sentence and in the meantime, the public was informed that the confiscation of his property, in the amount of EUR 17 million, had begun.

Even though the verdict in *Tank* (separated procedure) is final and the ex-Minister of Internal Affairs was sentenced to four years of imprisonment on 25 June 2019, a few days before the defendant was ordered to report to prison the Supreme Court postponed her imprisonment, pending a decision on the request for extraordinary review of the verdict that she had filed after the conviction. The Supreme Court does not have a deadline for issuing a decision on the extraordinary legal remedy filed by the convicted person.

On a general note, the execution of sanctions in SPO cases does not appear very problematic. So far, the defendants in these cases have mostly been given suspended sentences or acquitted. However, the very small number of completed cases cannot form a basis for a more comprehensive analysis of the execution of sanctions generally.

Use of closed sessions

Another issue that was observed by the monitors concerns the use of closed sessions. The general rule is that criminal trials are open to the public, and that closed sessions are the exception. This section gives an overview of the use of closed sessions in the SPO trials.

The LCP, in Article 5, establishes the right to a 'fair and public trial'⁸⁹. The principle of publicity is further elaborated in article 353 LCP, which establishes that the main hearing is open to the adult public⁹⁰. The main hearing may be closed to the public in particular circumstances envisaged by article 354 LCP⁹¹. The conditions listed by the law are restrictive. The decision to exclude the public for a part or the entire main hearing lies with the Trial Chamber, acting *ex-officio* or upon a motion from the parties⁹².

The same principle is to be found in Article 6 of the ECHR, which dictates, 'everyone is entitled to a fair and public hearing'⁹³. However, Article 6 ECHR continues, providing for

88 See *Second Interim Report*, page 13 and subsequent, *English version*

89 See Art 5 LPC

90 "Only persons of age may attend the public hearing" says article 353 (2) LCP

91 Article 354 LCP, in its important part says "in order to protect a state, military, official, or an important business secret, preserve public order, protect the privacy of the defendant, witness or injured party, protect the safety of the witness or the victim and/or to protect the interests of the juvenile person"

92 Article 354 LCP

93 See article 6 ECHR

the exception to the principle of publicity in the following terms: *the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*⁹⁴.

The European Court, in its jurisprudence, has extensively described this right, affirming that the right to a public hearing implies “the right to an oral hearing”⁹⁵. Moreover, this principle enables, as per Court’s jurisprudence, for the visibility of the administration of justice, which in turn leads to trust in the administration of justice and more, generally, to the implementation of the principle of a fair trial, as a fundamental principle of any democratic society⁹⁶.

In the SPO trials, from their initiation until 15 January 2020, the Trial Panel ordered closed sessions in only nine cases⁹⁷. Out of all trial sessions scheduled during this period, only 25 were closed to the public. Even then, however, only a portion of the hearing was closed, in order to cover evidence that was considered sensitive.

The Trial Chamber ordered closed sessions (parts of the sessions closed to the public) for the following reasoning: because classified information was disclosed to the Panel (in 20 situations), and in order to protect the privacy of the defendants in the remaining five cases. In one case privacy was invoked in relation to the health problems of the defendant, whereas in a second case it was required to protect the privacy of a person who was not involved in the proceedings.

In the remaining three instances when privacy was invoked as a reason to close the hearing to the public very intimate and private conversations were played. It is commendable that the Court closed that part of the hearing, as the privacy and dignity of the defendants must be protected always. However, it is hard to imagine the relevance of such conversations, when the charges the Prosecutor sought to prove involved abuse of office⁹⁸. Thus, also in these situations, the Presiding Judge could have played a more proactive role and made a decision as to whether or not the evidence would be relevant.

Generally, on the issue of the use of closed sessions, it can be concluded that the Court played a diligent role in balancing all the rights involved and giving proper protection to all of them. The exception was indeed used for clear and limited purposes.

Other issues

Two other issues noted during court monitoring are presentation of closing arguments and the use of expert witnesses. The way the parties presented closing arguments was a direct consequence of the modalities by which evidence was presented throughout the trials.

94 Ibid footnote No. 93

95 *Döry v. Sweden*, § 37.

96 See for example *Sutter v. Switzerland*, § 26; *Riepan v. Austria*, § 27; *Krestovskiy v. Russia*, § 24

97 In cases *Trajectory*, *Titanic 1*, *Torture*, *Centar*, *Fortress 2*, *Treasury*, 300, *Trevnik*, *Monster*

98 Very intimate and private conversations were played in *Trajectory* (charges: Abuse of official position or authorization), and *Titanic 1* (charges Criminal association; Violation of voting rights; Abuse of official position and authorization; Violation of the voter’s freedom of choice)

Closing arguments

In criminal proceedings closing arguments have a special place in an attorney's tool kit: *summation is counsel's chance to wrap up the case, explain the evidence, synthesize conflicting facts, and tie together the facts and the law.*⁹⁹

The parties present their closing arguments after the evidentiary procedure is completed. The "new" LCP did not introduce many changes to the provision itself; however, since the "new" LCP and its accusatorial elements came into effect, the parties have paid more attention to the elaboration and presentation of their closing arguments.

The law does not stipulate how long a closing argument should last. In cases where the defence has more than one attorney and each one of them wants to present a closing argument, the LCP explicitly provides the judge with the opportunity to limit the duration of the closing arguments and not to allow them to repeat themselves.¹⁰⁰

During the trial monitoring of the SPO cases, it was noted that before the hearing commenced, the parties would deliver to the court their closing arguments on a USB stick so that they could be directly entered into the record by the court clerk, and then they would read them out loud, word by word. This practice contributed to the effectiveness of the procedure, as less time was involved in typing down the closing arguments.

During the evidentiary procedure, it was repeated several times that parties will elaborate on the importance of a specific piece of evidence within the closing arguments. Closing arguments should be a summary of the trial, focusing on the most important elements. However, in the SPO cases closing arguments were frequently lengthy and the prosecutor or defence lawyer would provide very detailed information about a particular piece of evidence without indicating its real value within their entire strategy or how it would then strengthen their argument¹⁰¹.

Presenting closing arguments is primarily a jury-oriented procedural tool because it serves to persuade the jurors of the strength of the speaker's evidence.¹⁰² Criminal procedures in North Macedonia are led by a trial panel – judges and lay judges who are much less in need of the parties' summation and explanation of the evidence. Closing arguments should, therefore, be focused on what is most important about the theory of the case or attack any weaknesses in the other side's case, while also emphasizing the evidence that supports the party's theory. It should explain to the trial panel why the evidence acquired does or does not support a guilty verdict.

Use of expert witnesses

The SPO used the same expert in several cases. The defence contested this particular expert because they argued that his license had expired and was not renewed at the time he provided his expertise to the Prosecution¹⁰³. The situation becomes more serious when in

99 "International Criminal Procedure: Principles and Rules", p. 671

100 Art.395(2), LCP

101 For example parties would provide information like the name, the archive number of the evidence, when were these evidence presented; if they referred to a witness testimony, they would go in details explaining his/her statement (for example, *Trevnik* case, or *Tank* case)

102 "International Criminal Procedure: Principles and Rules", p. 671

103 This situation was encountered for example in cases *300, Tank, Trajectory, Tenders*

the “300” case, one of the reasons for sending the case back for re-trial was to ascertain if the expert did or did not have the license when providing his expert opinion.

The expert acknowledged that his licence expired in April 2018, and he received the renewal of the license in July 2018. Thus, there is a gap of three months. However, he emphasised that he duly submitted a request for renewal to the Ministry of Justice¹⁰⁴ with all the required documentation. He did so six months before the expiry of the license.

The Law on expertise, more precisely in Art 19 par. 5, regulates this issue. This provision explicitly states that renewal is granted upon request, which must be submitted “no later than two months before the expiry”¹⁰⁵. Thus, the law envisages a clear obligation on the part of the expert (to submit a request within a specified deadline of two months before the expiry). The same article puts also a very clear obligation on the Ministry of Justice, which must reply to such requests before the expiry of the current license. The law in its entirety does not foresee the situation of late reply (beyond expiry of the license) from the authorized institution.

This is a classic example of consensual silence from the administration, as this is a purely administrative matter. The lack of efficiency from the administration side can never have a negative impact on the citizen who is abiding by the same rules that were issued by the Public Administration. In the matter under examination here, the expert did comply with all the requirements imposed on him by the administration. The fact that the extension of the licence came only after the expiry of the current one can in no way have a negative impact on the citizen.

It should be presumed that the expert’s license was valid throughout the entire period of time, provided the license was renewed. The direct consequence of this reasoning is that this particular expert did not have any legal impediment to provide his expert opinion on the matters within his area of expertise.

To consider otherwise would actually mean to penalise a citizen for the lack of efficiency of the public administration and to ask the citizen to incur the costs of the late (and unjustified) delay in the provision of the public service by the public administration. Thus, in the case under examination, it may be concluded that the expert had always had the qualities required for re-certification. Obviously, the weight and relevance of his/her expert opinion and its probative value rests entirely with the trial panel.

104 As the authority having competence in issuing and/or renewing expert licenses.

105 See article 19 paragraph 5 from the Law on expertise, Official Gazette no.115/2010, 12/2014, 43/2014, 104/2015, 148/2015, 192/2015 and 64/2018.

RECOMMENDATIONS

To the Prosecution

Given the complexity of these cases and their importance for the public interest, it is important that the judges and the public are made aware of the case theory of the prosecution in a clear and effective manner. To this end, the PPO should:

- **Ensure timely and broad disclosure** of both inculpatory and exculpatory evidence to the defence, providing defence counsels with copies of all evidence included in the case file, regardless of its format;
- **Accurately select the evidence to introduce at trial**, submitting to the court only the material which is necessary to support and prove the theory of the case;
- **Improve prosecutors' presentation skills at trial**: clearly explaining the relevance of the evidence that they seek to introduce (i.e., its connection to the indictment), as well as the relationship among the different types of evidence introduced (i.e., interceptions, documents, witnesses).

To Defence Counsels

- In accordance with European best practices on professional ethics, counsels should take up only cases for which they can ensure efficient and quality representation.

To the Bar Association

- Bar Association, as part of continuous training programmes, should organize trainings on the professional ethics, in line with European best standards, governing the exercise of the rights and duties of defence lawyers.

To the Basic Criminal Court Skopje

- **Postpone hearings only to the benefit of defendants who are genuinely unable to attend**, for example, due to serious health conditions or for reasons beyond their control. By this logic, in principle, working obligations of defendants or business trips should not be considered a legitimate reason to postpone a hearing. When the working obligation of the defendant stems from his/her official functions envisaged by the Constitution (i.e., a defendant MP who must attend a parliamentary session), the timeframe of the trial should be set in advance, bearing in mind the Parliament's agenda and order of business, so as to avoid overlaps between hearings and parliamentary sessions;
- **Take an active role in case management:**
 - Judges should make use of the trial management tool envisaged by the LCP, Art.347(2) in order to address evidentiary issues that have the potential to derail or burden the course of the trial;
 - Judges should actively oversee the admission of evidence at trial, excluding evidence that is redundant or irrelevant;

- **Interpret the legal framework on disclosure of evidence in line with international standards:** judges should oversee the disclosure process, ruling on the parties' requests with well-reasoned decisions, and ensure defence counsels' substantial access to the case file.

To the legislative and executive branches of power

- **Strengthen the legal framework on the presence of defendants at trial:**
 - The LCP should contain indications as to which justifications are acceptable and which are not. Specifically, it would be useful to introduce a general clause in the LCP by which only "legitimate" and "absolute" impediments may be accepted by the judge as a cause to postpone the hearing;
- **Align the legal framework on trials *in absentia* with international standards:** when a defendant unequivocally waives his/her right to be present at trial she/he should not be entitled to a re-trial in the future;
- **Consider introducing an obligation on the Prosecution to file with the court together with the indictment the entire investigation case file**
- **Consider introducing the mechanism of "status conferences" in the LCP,** in order to assess the progress of the case, set a timeline for the evidentiary phase during trial, and agree on uncontested elements.

