

ВТОР ПРЕОДЕН ИЗВЕШТАЈ

**ЗА АКТИВНОСТИТЕ И ПРЕДМЕТИТЕ ВО НАДЛЕЖНОСТ НА
СПЕЦИЈАЛНОТО ЈАВНО ОБВИНИТЕЛСТВО**

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SECOND INTERIM REPORT

**ON THE ACTIVITIES AND THE CASES UNDER THE COMPETENCE
OF THE SPECIAL PROSECUTOR'S OFFICE**

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Trial Observations: Analysis of Selected Issues

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LIST OF ACRONYMS

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

JES – Judge for the Execution of Sanctions

LCP – Law on Criminal Procedure

LoC - Law on Courts

LES – Law on the Execution of Sanctions

MoIA – Ministry of Internal Affairs

MP – Member of Parliament

PJ – Presiding Judge

PPO – Public Prosecutor's Office

SoL – Statute of Limitations

SPO – Special Prosecutor's Office

UBK - Bureau for Security and Counterintelligence

EXECUTIVE SUMMARY

The OSCE Mission to Skopje's second interim report on the activities and the cases under the competence of the Special Public Prosecutor's Office (SPO) follows the first interim report published in August 2018, dealing with the initial phase of the SPO activities. This interim report covers the period between **November 2016 and November 2018**, i.e., the two years from the start of the first SPO trial, and contains analysis of trial observation.

After the introduction setting the scope and methodology, the second chapter analyzes the law and practice regarding the presence of the defendants at trial. Although the absence of defendants is not excessively high (14%), it is the first cause of postponements of the hearings. The chapter finds that the current legal framework does not provide adequate tools to the court in circumstances where defendants willfully decide not to attend their trial. In addition, the chapter addresses the issue of SPO defendants who have escaped justice by fleeing to another country. Under current law, a considerable amount of time may elapse between the issuance of a final conviction and the moment in which a convicted person shall report himself/herself to prison (or s/he is apprehended by the authorities) during which convicts may escape.

The third chapter analyzes issues of efficiency and expeditiousness. While acknowledging a considerable improvement in the pace of trials between 2017 and 2018, and an overall postponement rate not excessively high (33%), the chapter addresses other causes of delays in SPO proceedings. First is the reluctance of judges to play an active role in case management and the failure to address and solve pre-trial procedural issues before the start of the trial, which led to lengthy debates in court and delayed the start of the evidentiary phase of the proceedings. Second is the inadequate selection of witnesses and documentary evidence by the parties, as well as the ineffective presentation of their case at trial, which, coupled with insufficient control and correction by the court, led to the introduction of evidence which appeared to be redundant or whose connection with the indictment was not always clear.

The fourth chapter addresses some of the objections raised by the defence in SPO cases, with a focus on those relating to the disclosure of evidence after the closure of the investigation. The SPO complied with its duty to make case files available to the defence and provided defence counsels with CDs containing the evidence gathered in support of the charges. However, the SPO did not provide the defence with copies of the wiretapped conversations for reasons that remain unclear. In addition, the court upheld the SPO decision without explaining its reasoning. The chapter also addressed defence complaints relating to the pace of SPO trials. According to defence counsels, due the numerous hearings of SPO cases scheduled during a week, the defence did not have adequate time to prepare its case. The chapter concludes that, in light of international fair trial standards, this complaint does not appear to be grounded, in that the problem was not related to the pace of individual cases, but the fact that some attorneys appear to have taken on many cases.

The fifth chapter revisits the process of appointment of judges by the court President in SPO cases. Between December 2016 and January 2018, the organizational chart of the Basic Court

Skopje I changed three times, by decisions of three different court presidents (two of whom were presidents *ad interim*). This prompted a negative public perception about the independence and impartiality of the judiciary. The chapter finds that the ease with which judges can be transferred within the different departments of the court is concerning and not in line with international best practices/minimum standards on the irremovability of judges and case allocation. The report concludes with a number of recommendations to the 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 SPO and other judicial proceedings.

1. Introduction

1.1. Scope

The OSCE Mission to Skopje's second interim report on the activities and the cases under the competence of the Special Public Prosecutor's Office (SPO) follows the first interim report published in August 2018, dealing with the initial phase of the SPO activities up to and including the confirmation of the indictments.¹ The present report continues with the analysis of trial observation. Trial monitoring is widely regarded as a powerful and multifaceted 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 were ongoing.³ This interim report covers the period between **November 2016 and November 2018**, i.e., two years from the start of the first trial, on 28 November 2016 (*Fortress 2* case). It analyzes 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 which were deemed to deserve the most urgent attention. This report chooses to focus on the 20 cases whose indictment was filed by the SPO and which are related to the wiretap scandal (i.e., the SPO-initiated cases). Therefore, it leaves out the cases that were taken over from the Public Prosecutor's Office (PPO).⁴ These cases started long before the creation of the SPO and had been ongoing for years before the SPO took them over. In all of them the old Law on Criminal Procedure (LCP) is applied, i.e., the former LCP based on a continental/inquisitorial model that was in force until 2013. Due to their substantial differences from the SPO-initiated cases, they will be addressed in the final report. Finally, the present report is not concerned with the SPO investigations opened after the expiration of the deadline envisaged by the SPO Law (June 2017).⁵

As with the first interim report, 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 is financed through extra-budgetary contributions provided to the Mission by the Ministry of Foreign Affairs of the Kingdom of the Netherlands and the United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs (INL).

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 *Target-Fortress, Treasury, Fortress 2, Titanic 1, Titanic 2, Titanic 3, Municipality of Centar* (hereinafter "Centar"), *Torture, TNT, Toplik, Tenders, Tank, Three-Hundred, Trajectory, Trust, Transporter, Tariff, Total, Trevnik, Tiffany*. By November 2018, five out of 20 cases were adjudicated in first instance (*Fortress 2, Tiffany, Three-Hundred, Tank, Trust*). See further at paragraph 1.3.

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

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

1.2. Methodology

Trial observations by OSCE monitors in courtroom constitute the primary source of information for the compilation of this report. Between November 2016 and November 2018, OSCE staff monitored 316 hearings in 20 SPO cases before the Basic Court Skopje 1. 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 relies also 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). In the reporting period, only five first instance verdicts were issued by the Basic Court (see below paragraph 1.3) and the appeal phase was ongoing. A comprehensive analysis of the verdicts issued in SPO cases, thus, will be conducted in the Mission's final report.

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*.⁶ The principle of non-intervention or non-interference stems directly from the principle of independence of the judiciary.⁷ 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."⁸ 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".⁹ As such, it requires trial monitoring programmes to accurately and impartially report on legal proceedings using clearly defined and accepted standards.¹⁰ Finally, the principle of agreement means that national authorities have agreed to allow trial monitoring as part of their commitment to the set of rules and principles established by the OSCE in the field of administration of justice.¹¹

At the time of writing this report, all 20 cases were ongoing in the first instance or appellate stage. 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 serious breaches of the rule of law committed by high state

⁶ OSCE-ODIHR, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, pg. 18-20.

⁷ M. Alcidi (*supra* fn. 2) pg. 415.

⁸ OSCE-ODIHR, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, pg. 18.

⁹ *Ibid.*, pg. 19.

¹⁰ *Ibid.*

¹¹ *Ibid.*, pg. 20.

officials, and carry significant public expectations of prompt accountability in full respect for the rights of the accused.

1.3. Overview of Completed Cases

During the statutory period set by the SPO Law for the filing of indictments,¹² the SPO filed 20 indictments.¹³ By the end of January 2018, all indictments were confirmed (with only one being partially confirmed).¹⁴ 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. By November 2018, five cases were adjudicated in first instance (*Fortress 2*, *Tiffany*, *Three-Hundred*, *Tank*, *Trust*), three of which reached and completed the appellate phase (*Fortress 2*, *Tiffany* and *Tank-main case*). 16 defendants were convicted in total (4 of them pleaded guilty). Below is an overview of the completed cases. Descriptions of the other cases can be found in chapter 3 of the Mission's First Interim Report on the SPO Cases.

i) *Fortress 2*, relating to the destruction of documents pertaining to the equipment used to wiretap communications, was completed in first instance on 8 November 2017. All seven defendants were found guilty of the crime of Falsifying an Official Document pursuant to Crim. Code, Art. 361(2)(1). The main defendant, Goran Grujevski (Grujevski), was sentenced *in absentia*¹⁵ to one year and six months in prison. Five other defendants received a suspended sentence of one year in prison (with a probation period of three years), and one defendant received a suspended sentence of nine months in prison (with a probation period of two years). Only two defendants appealed the verdict, Grujevski and Valentina Simonovska (Simonovska). On 10 April 2018, the Appellate Court confirmed Simonovska's conviction. However, it overturned Grujevski's conviction and ordered his re-trial on the grounds that the legal requirement for a trial *in absentia* had not been met. The re-trial of Grujevski, still *in absentia*, started on 19 September 2018 and is currently ongoing.

ii) *Tiffany*, indicting a communication and consulting company and its owner Ivona Talevska (Talevska) for Tax Evasion pursuant to Crim. Code, Art. 279(2)(1), was completed with a guilty plea by Talevska, who, on 19 February 2018, received a suspended sentence to two years in prison (with a probation period of four years). Altogether, Talevska and her company were ordered to pay over 3.700.000,00 MKD to the State in fines and compensation. On 18 July 2018, the Appellate Court confirmed the verdict.

¹² Pursuant to SPO Law, Art. 22, the SPO "may file an indictment or order discontinuation of the investigative procedure no later than 18 months from the day when he/she assumed control over the cases and materials within his/her jurisdiction." On 30 December 2015, Zaev delivered the recordings to the SPO. Therefore, by 30 June 2017, the SPO had to file all the indictments arising from those intercepts.

¹³ On 14 September 2016, the SPO submitted the first two indictments in the *Fortress 2*, and *Centar* cases. On 5 April 2017, the SPO filed its third indictment in the *Transporter* case. The SPO filed the remaining 17 indictments between 29 and 30 June 2017.

¹⁴ *Titanic 2*.

¹⁵ In July 2017, in order to evade pre-trial detention in the connected *Target-Fortress* case, Grujevski fled to Greece together with co-defendant Nikola Boshkoski (Boshkoski). On 18 May 2018, the Supreme Court of Greece denied their extradition.

iii) *Three-Hundred* – relating to the rigging of the public procurement process for the purchase of 300 vehicles for the Ministry of Internal Affairs (MoIA), was completed in first instance on 22 May 2018. Former MoIA Assistant for General Affairs Gjoko Popovski (Popovski) was found guilty of the crime of Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353(5)(1) and sentenced to nine years in prison. Moreover, Popovski shall pay almost 28 million MKD to the MoIA. In December 2018, after the period covered by this report, the Appellate Court annulled the conviction and returned the case to the court of first instance for retrial.

iv) *Tank* – relating to the purchase of a luxury vehicle for former Prime Minister Nikola Gruevski (Gruevski), was completed in first instance on 23 May 2018. Gruevski was found guilty of Receiving a Reward for Unlawful Influence pursuant to Crim. Code, Art. 359(2) and sentenced to two years in prison. Former MoIA Assistant for General Affairs Gjoko Popovski (Popovski) was found guilty of the crime of Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353(5)(1) and sentenced to six years and six months in prison. On 5 October 2018, the Appellate Court confirmed Gruevski's conviction and reduced Popovski's conviction to four years and six months. Former Minister of Internal Affairs Gordana Jankuloska (Jankuloska) was tried in a separated procedure. On 8 October 2018 she was found guilty of Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353(5)(1) 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 LCP, Art. 163. On 28 March 2019, after the period covered by this report, the Appellate Court reduced Jankuloska's conviction to four years in prison.

v) *Trust* – relating to the rigging of the tender process for the exploitation of a coalmine in Bitola, was completed in first instance on 20 July 2018. Two defendants, Sead Kochan (Kochan) and Vasilije Avirovikj (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 Crim. Code, Art. 275-c (3)(1). 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 forbidden to participate 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, after the period covered by this report, on 11 March 2019, the Appellate Court convicted Kochan to four years and eight months in prison, and Avirovikj to two years in prison (suspended sentence with a probation period of five years).

In addition to Talevska in *Tiffany*, three other defendants pleaded guilty in SPO cases. In *Centar*, Tomislav Lazarov (Lazarov) and Jordan Risteski (Risteski) pleaded guilty to the crime of Violence pursuant to Crim. Code, Art. 386 (2)(1) and received suspended sentences of six months in prison (with a probation period of two years), on 24 and 30 November 2017, respectively; in *Target-Fortress*, Elena Djilanova (Djilanova) received the same sentence on 22 November 2017 after pleading guilty to the crime of Assisting the Perpetrator after the Commission of a Crime pursuant to Crim. Code, Art. 365(2)(1).

2. Right to Be Tried in One's Presence

2.1. International Legal Framework

Although the right to participate in one's trial is not expressly mentioned by the ECHR, Art.6 - listing fair trial rights¹⁶ - the European Court of Human Rights (ECtHR) has held that the existence of this right is "shown by the object and purpose of the article taken as a whole".¹⁷ The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Art. 6.¹⁸ It is only by being present, in fact, that the accused can meaningfully exercise his/her rights set out in sub-paragraphs (c), (d) and (e) of Art. 6(3), i.e., the right to "defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

It is the duty of the authorities to summon the accused in a timely manner and inform him/her of the proceedings. According to the ECtHR, "to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice".¹⁹

The right to be present at one's trial, however, is not an absolute right and, as such, can be waived by the defendant. In the presence of such waiver, trials *in absentia* are admissible, and may be justified by the need to avoid the statute of limitation, as well as the need to adjudicate the charge before the evidence become unavailable due to the passing of time.²⁰ When it comes to trials *in absentia*, therefore, the crucial point is to establish whether the defendant freely waived his/her fundamental right to be present. The defendant's waiver may be explicit or implied thorough one's conduct, such as when the accused seeks to evade the trial.²¹ In any case, it must be established in an "unequivocal manner".²²

The ECHR distinguishes between cases in which the accused deliberately decided not to be present at trial, and cases when the accused was unaware of the proceedings due to circumstances beyond his/her control.²³ Only in the latter case it is required that the person convicted *in absentia* be given the opportunity to obtain a fresh determination of the merits of the

¹⁶ Conversely, this right is expressly guaranteed by the International Covenant on Civil and Political Rights (ICCPR), Art. 14(3)(d) as an implicit feature of the right to defend oneself and the right to a public hearing, see OSCE – ODIHR, *Legal Digest of International Fair Trial Rights*, p. 133.

¹⁷ ECtHR, *Colozza v Italy*, Application no. 9024/80, ¶ 27 (12 February 1985).

¹⁸ ECtHR, *Hermi v Italy*, Application no. 18114/02, ¶ 58-59 (18 October 2006); ECtHR, *Sejdovic v Italy*, Application no. 56581/00 ¶ 81 and 84 (01 March 2006); ECtHR, *Arps v Croatia*, Application no. 23444/12 ¶ 28 (25 October 2016).

¹⁹ ECtHR, *T. v Italy*, Application no.14104/88 ¶ 28 (12 October 1992).

²⁰ Elizabeta Ivičević Karas, *Reopening of proceedings in cases of trial in absentia: European legal standards and Croatian law*, in EU and Comparative Law Issues and Challenges Series, Faculty of Law Josip Juraj Strossmayer University of Osijek, 2018, pg. 293; Trechsel, S., *Human rights in criminal proceedings*, Oxford University Press, 2005, pg.253.

²¹ ECtHR, *Lena Atanasova v Bulgaria*, Application no. 52009/07 ¶ 52 (26 January 2017).

²² ECtHR, *Salduz v Turkey*, Application no. 36391/02 ¶ 59 (27 November 2008).

²³E. Ivičević Karas (*supra* fn. 20), pg.293.

charge from a court which has heard him/her.²⁴ In other words, only when it has not been established that s/he has waived his/her right to appear or that s/he intended to escape trial, the person is entitled to a re-trial in their presence. In *Medenica v. Switzerland*,²⁵ the Court found that the refusal of national authorities to grant a re-trial to the defendant did not amount to a disproportionate penalty, in that there was nothing in the file to warrant the conclusion that his absence had been due to circumstances beyond his control. Furthermore, regard being paid to the circumstances of the case as a whole, “the applicant had largely contributed to bring about a situation that prevented him from appearing” before the court.²⁶

The burden of proof lies on the judicial authorities. The accused shall not be left with the burden of demonstrating that he was not seeking to evade justice or that his absence was due to reasons of force majeure.²⁷ In a case where the accused had not been notified in person, the Court held that “it could not be inferred merely from one’s status as a “fugitive”, which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself”.²⁸ However, even in the absence of an official notification being received by the accused, “certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution”.²⁹ Examples given by the Court include cases “where the accused states publicly (...) that he does not intend to respond to summonses (...), or succeeds in evading an attempted arrest or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces”.³⁰ At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control.³¹

2.2. National Legal Framework

The right to be tried in one’s presence is established by LCP, Art. 70, setting forth the procedural rights of defendants. In order to ensure the presence of the accused, the court shall properly summon him/her to court. Pursuant to LCP, Art. 127, the summons is delivered via post or electronic mail by an officer of the court, or can be handed over on the premises of the court. Summonses shall be delivered at the residence or workplace of the person concerned, or at another address where the person may be found.³² Pursuant to LCP, Art. 130(1), if the defendant cannot be served because s/he did not report a change of address or it is clear that s/he

²⁴ ECtHR, *Sejdovic v. Italy*, Application no. 56581/00 ¶ 82 (01 March 2006).

²⁵ ECtHR, *Medenica v. Switzerland*, Application no. 20491/92 ¶ (14 June 2001).

²⁶ ECtHR, *Medenica v. Switzerland*, Application no. 20491/92 ¶ 57- 59 (14 June 2001).

²⁷ ECtHR, *Colozza v Italy*, Application no. 9024/80 ¶ 30 (12 February 1985).

²⁸ ECtHR, *Sejdovic v. Italy*, Application no. 56581/00 ¶ 87 (01 March 2006).

²⁹ ECtHR, *Sejdovic v. Italy*, Application no. 56581/00 ¶ 99 (01 March 2006).

³⁰ ECtHR, *Sejdovic v. Italy*, Application no. 56581/00 ¶ 99 (01 March 2006); ECtHR, *Stoyanov v Bulgaria*, Application no. 25714/05 ¶ (25 March 2014).

³¹ ECtHR, *Medenica v. Switzerland*, Application no. 20491/92 ¶ 57 (14 June 2001).

³² LCP, Art. 128 (1).

intentionally avoids being found, the court officer shall post the summons on the board in the courthouse. After eight days, the summons shall be considered properly delivered.

Outside of the circumstances in which the requirements for a trial *in absentia* are met (see below paragraph 2.2.1.), the defendant must be present at his/her trial. As a general rule, if the defendant is absent, the hearing must be postponed.³³ Pursuant to LCP, Art. 157(1) and 365(1), the court may issue an order to forcibly bring the accused to court in two circumstances: 1) when, despite being properly summoned, the defendant fails to appear without providing a justification for his/her absence; 2) when the defendant cannot be summoned and specific circumstances indicate that s/he intentionally avoids receiving the summons. In both cases the court may also issue a detention order against the defendant in accordance with LCP, Art. 165(1)(4). In the first case, circumstances must show that the defendant intentionally avoided appearing; in the second case, two failed attempts to summon the defendant must have been made. Pursuant to LCP, Art. 165(4), “the detention shall last until the proclamation of the verdict but no longer than 30 days”.

As can be seen, the LCP aims to provide the court with the necessary tools to ensure that the trial is held without delays. However, this goal appears to be defeated by the lack of clear indications as to when the absence of the defendant may justify the postponement of the hearing. The LCP does not contain nor define the concept of “valid justification”. Conversely, it appears to give defendants the possibility to allege any kind of reasons for the impossibility to attend the trial. As a consequence, the LCP leaves the judge broad discretion to decide whether to accept such justification and postpone the hearing, or issue an order to force the accused to appear before the court. Even when an order to forcibly bring the defendant is issued, however, it is unlikely that the authorities will be able to apprehend and bring the accused to court in due time. The LCP, therefore, specifies that, if the defendant cannot be brought immediately, the court shall postpone the hearing and order for the defendant to be brought at the next hearing.³⁴ If the defendant justifies his/her absence before being brought before the court, the presiding judge shall withdraw the order.³⁵ As will be seen in the next paragraph, in SPO cases judges tended to be very sympathetic towards absent defendants and postponed the hearing in all cases.

2.2.1. Trial *In Absentia*

The LCP provides, as a general rule, that the trial must be held in the presence of the accused, unless the conditions are met to hold a trial *in absentia*. Pursuant to LCP, Art. 365(3), the defendant may be tried *in absentia* only if s/he has fled or is otherwise inaccessible to state institutions, and in the presence of unspecified “especially important reasons” to hold the trial. Pursuant to LCP, Art. 365(4), the court shall issue a decision to try a defendant *in absentia* upon the request of the prosecution; any appeal against this decision shall not prevent the continuation of the trial *in absentia*.

³³ Pursuant to LCP, Art. 367, the only instance in which the main hearing can be held in the absence of the defendant (or his/her defence counsel) is when the evidence in the case file unequivocally point to an acquittal and the judge shall issue a verdict rejecting the charges.

³⁴ LCP, Art. 365(1).

³⁵ LCP, Art. 365(1).

Pursuant to LCP, Art. 456(1), a person convicted *in absentia* has the right to request the repetition of the procedure when s/he becomes available to the state authorities and within one year from the day in which s/he becomes aware of the conviction. Pursuant to this provision, in the presence of such request, the procedure “shall be repeated.” This implies that the person convicted *in absentia* has the right to be retried in his/her presence as soon as this becomes possible, regardless of the reasons for which s/he did not attend the trial. In this respect, the national legal framework appears to award more guarantees than the ECHR, which does not mandate national authorities to re-try a defendant who has willfully waived the right to attend the trial (for example, by escaping).

Finally, it is worth connecting the institute of trials *in absentia* with the provisions of the Criminal Code (Crim. Code) on the Statute of Limitations (SoL) for enforcing sentences. Similarly to the SoL envisaged for the start and completion of the prosecution, which is tied to the commission of the crime (or the consequences arising therefrom) and the sentence prescribed by law,³⁶ the Crim. Code foresees a “relative” and an “absolute” SoL for the enforcement of sentences, which is tied to the entry into force of a final conviction. The relative SoL for the enforcement of sentences is set forth in Crim. Code, Art. 109, pursuant to which a conviction verdict may not be enforced after i) 30 years from the entry into force of a sentence to life imprisonment; ii) 20 years from the entry into force of a sentence to imprisonment of more than ten years; iii) ten years from the entry into force of a sentence to imprisonment of more than five years; iv) five years from the entry into force of a sentence to imprisonment of more than three years; v) three years from the entry into force of a sentence to imprisonment of more than one year and iv) two years from the entry into force of a sentence to imprisonment of up to one year or a fine. Although these deadlines are interrupted “by any activity undertaken by the competent authorities for the purpose of enforcing the sentence”,³⁷ the Crim Code envisages an absolute, insurmountable, deadline after which the conviction may no longer be enforced, which applies when twice the time prescribed for the relative SoL elapsed. As a consequence, when the absolute SoL applies, the re-trial of persons convicted *in absentia* is no longer possible.

2.3. Absence of Defendants in SPO Cases

The absence of defendants was the main cause of postponements of SPO cases. Out of 316 monitored hearings, the absence of at least one defendant was registered 46 times (14%).³⁸ Out of 104 postponements, 44 were due to the absence of the defendant.

Below is the percentage rate of defendants' absence for every case in the reporting period (November 2016 – November 2018).³⁹

³⁶ Crim. Code, Art. 107 and 108. See also, OSCE Mission to Skopje, *First Interim Report on the SPO*, 2018, pg.78.

³⁷ Crim. Code, Art. 111(3).

³⁸ In three instances, the court separated the procedure against the absent defendant and the trial continued.

³⁹ These data do not take into account two procedures which have been separated from the respective main case, due to the repeated absence of one of the defendants. Specifically, the separated procedure against Dimce Krstev in *Centar*, and the separated procedure against Gordana Jankuloska in *Tank*.

- *Treasury*: 40%, i.e., 4 times out of 10 hearings
- *Target - Fortress*: 40%, i.e., 4 times⁴⁰ out of 10 hearings
- *Total*: 33%, i.e., 4 times out of 12 hearings
- *Torture*: 28%, i.e., 3 times out of 11 hearings
- *Centar*: 28%, 8 times out of 28 hearings
- *Titanic 3*: 19%, i.e., 3 times out of 16 hearings
- *Transporter*: 18%, 3 times out of 17 hearings
- *Fortress 2*: 18%, 2 times out of 11 hearings
- *Titanic 1*: 17%, 4 times out of 23 hearings
- *TNT*: 12%, 2 times out of 17 hearings
- *Three-Hundred*: 12%, 2 times out of 16 hearings
- *Trust*: 10%, 3 times out of 29 hearings
- *Tremik*: 8%, 1 time out of 12 hearings
- *Toplic*: 7%, 1 time out of 14 hearings
- *Tank*: 6%, 1 time out of 16 hearings

In five cases (*Tariff*, *Trajectory*, *Tenders*, *Tiffany* and *Titanic 2*) defendants were never absent.

In three instances, the court separated the procedure against one of the defendants, due to his/her repeated absence. Specifically, in *Centar*, the court separated the procedure against defendants Dimce Krstev (20 November 2017) and Mitko Pecev (10 October 2018); in *Tank*, the court separated the procedure against former Ministry of Internal Affairs (MoIA), Gordana Jankuloska (18 April 2018).⁴¹ Following the separation of the procedure, these trials continued autonomously from the main case, so that the latter could proceed.

In nearly all cases, defendants justified their absence and, in the great majority of cases, they did so by submitting medical documentation (27 times). On the day of the hearing, defence counsels would present a medical certificate on behalf of their client requesting the court to postpone the session to another day. On a few occasions, the medical certificates were submitted at a later stage (i.e., before or at the following hearing). In all these cases judges promptly accepted the justification and postponed the hearing without further inquiries. In other cases the defendants' absence was due to other work commitments, mainly related to the defendants' political functions (six times). The case *Titanic 3* was postponed three times⁴² due to the fact that defendant Ejup Alimi (Alimi), a member of parliament (MP), was outside of the country for political engagements or had to participate to a parliamentary session.⁴³ Similarly, on 15 October 2018, the *TNT* case was postponed due to the fact that one of the defendants, former Prime Minister and MP Nikola Gruevski, had to participate in a parliamentary session. On 1 June 2018

⁴⁰ In one instance the authorities failed to bring a defendant (Sasho Mijalkov) from prison, after he was placed in pre-trial detention.

⁴¹ The procedure against Jankuloska was separated also in *Target-Fortress* (19 June 2018). However, following her improved health conditions, the cases were merged again on 8 October 2018.

⁴² 16 March 2018; 19 June 2018; 20 September 2018.

⁴³ In addition, on 28 June 2018, the hearing was interrupted and adjourned due to the fact that Alimi had to attend an event in Brussels.

and 16 October 2018, the *Centar* case was postponed due to working obligations of one of the defendants, a Gazi Baba⁴⁴ municipal council member.⁴⁵

Overall, in the reporting period, the rate of absent defendants in SPO cases is not excessively high (14%). However, the absence of at least one defendant remained the first cause of postponement of SPO cases in both 2017 and 2018 (see graphic pg. 25-26 showing a percentage of absent defendants of over 40% in both years).

OSCE monitors observed that judges tend to passively accept any justification provided by the defendant, rather than exercising a thorough scrutiny over the reasons for the defendants' absence. As seen in paragraph 2.2, this is facilitated by a legal framework which lacks clear indications as to when the absence of the defendant may justify the postponement of the hearing. The court should exercise its discretion to adjourn hearings only to the benefit of defendants who are genuinely unable to attend. Therefore, when evidence of a medical practitioner is submitted, the court should not accept it by default, but rather consider whether the justification genuinely demonstrates unfitness to stand trial. In a system where the presence of the defendant at trial is obligatory, it is particularly important that the defendant's right to be present at trial is not abused in order to postpone the hearings and delay the proceedings. This is especially true in view of the fact that, when a hearing is postponed for more than 90 days, the trial shall start from the beginning.⁴⁶ In this respect, it would be useful to introduce a provision in the LCP which empowers judges to order an independent medical examination, whenever the judge has reasons to question the defendant's impossibility to attend the trial.

By the same logic, in principle, working obligations of defendants or business trips should not be considered a legitimate reason to postpone the hearing. The case is different 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 interests of justice and those of the legislative power are both constitutionally protected. The court, therefore, should strike a fair balance between the efficiency of the proceedings and the carrying out of official functions in the interest of the State. Although this balance might entail an adjournment of the hearing, the court should apply the criteria of legitimate aims and proportionality,⁴⁷ postponing the hearing only in the presence of well-documented reasons. When a defendant is an MP, it is crucial that the timeframe of the trial is set in advance, having regard to the parliament's agenda and order of business, so as to avoid overlaps between hearings and parliamentary sessions.

⁴⁴ Municipality in the east part of Skopje.

⁴⁵ On 1 June 2018, the defendant was on a working trip outside of the country. On 16 October 2018, he had to attend a session of the Gazi Baba municipal council.

⁴⁶ LCP, Art. 371(3); see also chapter 3, paragraph 3.2.

⁴⁷ These criteria were developed by the ECtHR on matters of parliamentary immunity. Pursuant to the ECtHR's functional approach to parliamentary immunity, "where it actually serves to protect the free discharge of the constitutional tasks of parliament, immunity constitutes a justified limitation to access to justice. Where it goes beyond this necessary protection, its application violates the Convention", see Sascha Hardt, *Parliamentary immunity in a European context*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2015 pg.9, at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536461/IPOL_IDA\(2015\)536461_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536461/IPOL_IDA(2015)536461_EN.pdf).

2.4. *In Absentia* Proceedings in SPO Cases

Out of 135 defendants in SPO cases, three became unavailable to the state authorities in the course of the proceedings. Goran Grujevski (Grujevski), former Chief of the 5th Directorate of the UBK⁴⁸, indicted in the cases *Fortress 2*, *Treasury* and *Fortress-Target*; Nikola Boshkoski (Boshkoski), former UBK employee, indicted in *Fortress-Target*; and Former Prime Minister Nikola Gruevski (Gruevski), indicted in the cases *Tank*, *Centar*, *TNT*, *Trajectory* and *Titanic 1*.

2.4.1. Goran Grujevski and Nikola Boshkoski

Shortly after the filing of the indictment by the SPO,⁴⁹ in July 2017, Grujevski and Boshkoski fled the country in order to evade pre-trial detention imposed by the Appellate Court in the *Fortress-Target* case.⁵⁰

At the time of the escape, the *Fortress 2* trial against Grujevski (and six other defendants) was ongoing.⁵¹ On 2 October 2017, the Basic Court granted the SPO's request to try Grujevski *in absentia* pursuant to LCP, Art. 365(3) ("the defendant has fled or is otherwise inaccessible to state institutions"). Notably, the Basic Court did not mention the flight of the defendant as a reason to try him *in absentia*, but only the fact that he was unavailable to the state authorities.⁵² The Basic Court considered that the unavailability of the defendant was unequivocally established by two official communications issued by the MoIA.⁵³ Therefore, a trial *in absentia* was justified because "it is unclear when Grujevski will be available to the authorities, and, since the procedure involves numerous defendants, it is important to reach a decision within a reasonable time".⁵⁴ The family of Grujevski appointed three defence counsels (Ljupco Shvrovgvski, Mile Petrovski and Petar Vasilev) to represent him *in absentia* and the trial continued.

In the meantime, on 19 October 2017, Grujevski and Boshkoski were arrested in Thessaloniki (Greece) airport, where they were trying to leave for Hungary in possession of counterfeit Bulgarian passports.⁵⁵ An extradition request was sent. However, on 18 May 2018, the Supreme Court of Greece denied it.⁵⁶

On 8 November 2017, in the case *Fortress 2*, the Basic Court sentenced Grujevski *in absentia* to one year and six months in prison for the crime of Falsifying an Official Document pursuant to Crim. Code, Art. 361(2)(1). Grujevski's defence appealed the verdict. On 10 April 2018, the

⁴⁸ Bureau for Security and Counterintelligence.

⁴⁹ 29 and 30 June 2017.

⁵⁰ On 17 July 2017 the Appellate Court imposed pre-trial detention against them due to the risks of flight and witness tampering. On 26 July 2017 the Supreme Court upheld the Appellate Court's decision.

⁵¹ The trial began in November 2016.

⁵² *Fortress 2*, Basic Court verdict, pg.14.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Meta.mk, *Grujevski and Boskovski have been arrested in Thessaloniki*, 19 October 2017, at: <https://meta.mk/en/grujevski-and-boskovski-have-been-arrested-in-thessaloniki/>.

⁵⁶ Meta.mk, *Supreme Court in Athens rules against extradition of Grujevski and Boskovski*, 18 May 2018, at: <https://meta.mk/en/supreme-court-in-athens-rules-against-extradition-of-grujevski-and-boskovski/>; VOA, *The Greek Supreme Court rejected the request for extradition of Grujevski and Boskovski*, 18 May 2018, at: <https://mk.voanews.com/a/4399583.html>.

Appellate Court overturned Grujevski's conviction and ordered his re-trial before the Basic Court on the grounds that the legal requirement for a trial *in absentia* had not been met.⁵⁷ According to the Appellate Court, the Basic Court erred in deciding to try Grujevski *in absentia* when the extradition procedure was still ongoing, in that "when an extradition procedure against a defendant is pending, the court may try the person *in absentia* only if the requested country refuses the extradition".⁵⁸ Therefore, the Appellate Court ordered the re-trial of Grujevski due to "an essential violation of the criminal procedure provisions" pursuant to LCP, Art. 436(1).⁵⁹ During the re-trial, "every material and verbal evidence will have to be re-admitted, so that the facts will be determined in a proper manner and with the right application of the law the court will reach a rightful and lawful decision".⁶⁰ The re-trial of Grujevski started on 19 September 2018 and is currently ongoing. Notably, this re-trial is also conducted in the absence of Grujevski who has not returned to the country.

The Appellate Court decision grants important guarantees to a defendant who has unequivocally and freely waived his right to attend the trial against him. As seen in paragraph 2.1, human rights law entitles a defendant convicted *in absentia* to a retrial only when his/her willingness of waiving the right to appear or escape trial had not been established in an unequivocal manner. This is clearly not Grujevski's case. Grujevski fled the country while the *Fortress 2* trial was ongoing and after having attended six of its hearings.⁶¹ It is unquestionable, thus, that Grujevski was aware of the criminal proceedings against him. The LCP requirements - pursuant to which a defendant may be tried *in absentia* if s/he has fled or is otherwise inaccessible to state institutions - were also fulfilled. By forbidding a trial *in absentia* before a final decision on the extradition, the Appellate Court imposed a requirement not foreseen in the law. Neither the LCP nor the Law on International Cooperation in Criminal Matters,⁶² in fact, mention the outcome of extradition proceedings as a factor impacting on the possibility to try defendants *in absentia*. Moreover, ordering a second trial *in absentia* against a defendant whose extradition has been denied and has not manifested any intention to return to the country appears to be a waste of resources, especially in view of the fact that the LCP entitles Grujevski to request a re-trial in case he will return to the country.⁶³

The Appellate Court's ruling had repercussions on other two crucial cases where Grujevski is indicted, relating to the responsibilities for the wiretap scandal, *Fortress-Target* (trial started on 22 December 2017) and *Treasury* (trial started on 5 February 2018). In the former, Nikola Boshkoski, who fled with Grujevski in July 2017, is also a defendant. In both cases, the court followed the Appellate Court precedent in *Fortress 2* and postponed the hearing several times

⁵⁷ LCP, Art. 415(1)(3), "the main hearing was held in the absence of a person whose presence at trial is compulsory according to the law", and LCP, Art. 436(1) "the second instance court, granting the appeal ex-officio, with a decision, shall nullify the first instance judgment and return the case for a retrial, if it establishes that there was an essential violation of the criminal procedure provisions, unless it decides to hold a hearing before it".

⁵⁸ *Fortress 2*, Appellate Court verdict, pg.11-12.

⁵⁹ Pursuant to this provision, the Appellate Court shall nullify the first instance judgment and return the case for a retrial, if it establishes that there was an essential violation of the criminal procedure provisions.

⁶⁰ *Fortress 2*, Appellate Court verdict, pg.11-12.

⁶¹ The last hearing attended by Grujevski in *Fortress 2* was the one of 3 July 2017.

⁶² Official Gazette no. 124/2010.

⁶³ LCP, Art. 456(1), see *supra*, 2.2.1.

pending the decision of the Greek Supreme Court.⁶⁴ The court ordered a trial *in absentia* only after the decision of the Greek Supreme Court denying the extradition.⁶⁵

2.4.2. Nikola Gruevski

Former Prime Minister Nikola Gruevski (Gruevski) fled the country between 8 and 11 November 2018⁶⁶ in order to evade prison in the case *Tank*, where, on 5 October 2018, the Appellate Court confirmed his conviction and sentence of two years for the crime of Receiving a Reward for Unlawful Influence pursuant to Crim. Code, Art. 359(2). On 20 November 2018, the Government issued a press release stating that a request for extradition was sent to the Hungarian authorities.⁶⁷ This press release followed a Facebook post by Gruevski where he informed the public that Hungary had granted him political asylum.⁶⁸ On 21 November 2018, the Hungarian government publicly stated that it would not extradite Gruevski.⁶⁹ However, to date, the Hungarian authorities have not officially responded to the extradition request.

At the time of the escape, four other trials against Gruevski were ongoing: *Titanic 1*, *Centar*, *Trajectory* and *TNT*. In all these cases, the court departed from the precedent of the Appellate Court in *Fortress 2* and ordered a trial *in absentia* for Gruevski before an official denial of the extradition request by the Hungarian authorities.

In *Titanic 1*, on 14 November 2018, the court ruled that, before deciding whether to try Gruevski *in absentia*, it should issue an order to forcibly bring him to court pursuant to LCP, Art. 365(1). The decision to try him *in absentia* was reached at the subsequent hearing, on 23 November 2018. Conversely, in the *Centar*, *Trajectory* and *TNT* cases, the court decided immediately to try Gruevski *in absentia* on 15, 16 and 22 November respectively.

2.4.3. Controversy Over the Responsibility for Gruevski's Escape

Gruevski's escape sparked controversy and disappointment throughout the country. Notably, Gruevski was not in detention and fled after over one month from the issuance of a final conviction against him, on 5 October 2018. Inevitably, questions arose regarding the institutional responsibility for this flight and, in a somewhat chaotic exchange, the SPO, the Basic Court and the MoIA, blamed each other publicly.⁷⁰ In particular, the MoIA criticized the court for not issuing a detention order against high profile defendant Gruevski, while easily imposing

⁶⁴ *Target-Fortress* was postponed four times, *Treasury* three times.

⁶⁵ In *Treasury*, the court ordered a trial *in absentia* against Grujevski on 28 June 2018; In *Target-Fortress*, the court ordered a trial *in absentia* against Grujevski and Boshkoski on 8 October 2018.

⁶⁶ On 13 November 2018, through a Facebook post, Gruevski informed the country that he was in Hungary where he would seek political asylum.

⁶⁷ Government's press release: <https://vlada.mk/node/15841>.

⁶⁸ Gruevski's Facebook post: https://www.facebook.com/NGruevski/posts/10156958775747716?__tn__=K-R.

⁶⁹ See, Nova TV, *The Hungarian Government has announced that it will not extradite Gruvski*, 21 November 2018, <https://novatv.mk/ungarskata-vlada-najavi-deka-nema-da-go-ekstradira-gruevski/>.

⁷⁰ Frosina Fakova-Serafinovic, *Who let Gruevski escape?*, Nezavisen, 14 November 2018, at: <https://nezavisen.mk/en/news/2018/11/103951/>. See also the debate on Telma TV, *Who will take responsibility for Gruvski's escape*, at <https://telma.com.mk/top-tema-nvs-koj-ke-prezeme-odgovornost-za-begstvoto-na-gruevski-14-11-2018/>.

detention in less serious cases.⁷¹ The President of the Basic Court pointed the finger at the SPO, clarifying that, by law, the court could not have issued a detention order against Gruevski in the absence of a request from the prosecution, which made no such request in any phase of the procedure.⁷² In this respect, the President of the court noted that, unlike in the case of Gruevski, the SPO did request a detention order due to flight risk when Gjoko Popovski (Popovski) was convicted in first instance for abuse of office in the case *Three-Hundred*.⁷³ To this criticism, the SPO responded that it had requested pre-trial detention for Gruevski several times in a different case (*Titanic 1*), where Gruevski was charged with a more serious crime,⁷⁴ but the court had always rejected it. Moreover, the SPO noted that Gruevski, who had his personal and diplomatic passports confiscated, had always respected the obligation to report to the court once a month,⁷⁵ and had never failed to appear at trial.⁷⁶

The LCP states that the prosecution is the authority responsible to request a detention order to the court throughout the investigation and during the course of the trial, up until the issuance of the first instance verdict.⁷⁷ Once the verdict is issued, the court is in charge and may impose detention against the convict even in the absence of a request from the prosecution.⁷⁸ The reason for this passage of responsibility lies in the different grounds upon which a person may be detained before and after conviction. During the investigation and throughout the trial, the suspect/accused is presumed innocent and the prosecution carries the burden to prove his/her guilt in front of the court. Detention prior to conviction, therefore, shall be issued only upon request of the prosecution as a last resort measure to prevent the defendant from fleeing, tampering with evidence or re-offending.⁷⁹ After a conviction in first instance, the presumption of innocence is attenuated. However, since the conviction has not become final yet, detention throughout the appellate phase shall be grounded on the same legal basis (the predominant risk being that of flight pending appeal). As seen, the LCP empowers the court to impose detention at this stage, with or without a request from the prosecution. After a final conviction is issued, the presumption of innocence ceases to exist. Therefore, at this stage, detention serves the purpose of executing the sentence, not that of a precautionary measure. The procedure for

⁷¹ Sakam Da Kazham, *Responsible are those who did not impose detention and let him free to move around the country, said Spasovski regarding Gruevski's escape*, 13 November 2018, at <https://sdlk.mk/index.php/makedonija/odgovorni-se-onie-koi-ne-mu-odredija-pritvor-i-go-pushtija-slobodno-da-se-dvizhi-niz-drzhavata-kazha-spasovski-za-begstvoto-na-gruevski/>.

⁷² Telma, *Djoler: the court is not responsible for Gruevski's escape*, 13 November 2018, at <https://telma.com.mk/dholev-nema-odgovornost-kaj-sudot-za-begstvoto-na-gruevski/>.

⁷³ Fakova-Serafinovic, *supra*, fn.70. Popovski was sentenced to nine years in prison on 22 May 2018, one day before the first instance conviction of Gruevski. Unlike Gruevski, Popovski remained in pre-trial detention throughout the appellate phase.

⁷⁴ In *Titanic 1* Gruevski is charged with the crimes of Criminal Association pursuant to Crim. Code, Art.394 (1), Abuse of Funds for Financing the Electoral Campaign pursuant to Crim. Code, Art.165-a (1) and Violation of Voting Rights pursuant to Crim. Code, Art.159 (2)(1).

⁷⁵ The precautionary measures of passport confiscation and obligation to report to the court were imposed *in lieu* of detention in the case *Titanic 1*.

⁷⁶ Radio Free Europe, *The SPO denies responsibility for Gruevski's escape*, 14 November 2018, at: <https://www.slobodnaevropa.mk/a/29600124.html>; Net Press, *Janeva explains why the SPO did not ask detention for Gruevski*, 13 November 2018, at <https://netpress.com.mk/janeva-objasnuva-zasto-ne-bil-baran-pritvor-za-gruevski/>.

⁷⁷ LCP, Art. 171 and 172. The prosecution shall request a detention order based on the grounds listed in LCP, Art. 165: risk of flight, tampering with evidence and re-offending.

⁷⁸ However, the court shall request the prosecutor's opinion, see LCP, Art. 174 (1)-(3). See also, OSCE Mission to Skopje, *Commentary to the Law on Criminal Procedure*, 2018, pg. 429-430.

⁷⁹ LCP, Art. 165.

enforcing sentences is set forth in the Law on the Execution of Sanctions (LES)⁸⁰ and in the Rulebook of the courts,⁸¹ pursuant to which the Appellate Court shall deliver the final verdict to the Basic Court,⁸² which shall in turn prepare an execution order and deliver it to the Judge for the Execution of Sanction (JES), together with the verdict.⁸³ Notably, the law does not envisage any deadline for the above-mentioned passages. Therefore, several weeks may elapse between the issuance of the final verdict by the Appellate Court and the start of the execution procedure. Once the JES receives the execution order from the Basic Court, s/he “shall take the necessary actions to execute the sentence of imprisonment immediately and in no longer than eight days”.⁸⁴ Specifically, s/he shall summon the convict to report to prison by handing over the execution order to the convict in person.⁸⁵ The convict shall be given a minimum of eight days and a maximum of 13 days to reports himself/herself to prison, with the warning that, if s/he fails to do so, s/he will be apprehended by the police.⁸⁶

The Appellate Court pronounced its verdict on 5 October 2018. The Basic Court, however, received it only 14 days later, on 19 October 2018.⁸⁷ It was not until 26 October 2018 that the JES delivered the execution order to Gruevski in person, summoning him to the Shuto Orizari prison by 8 November 2018.⁸⁸ On 2 November, the JES rejected Gruevski's request to suspend the execution of his sentence⁸⁹ pursuant to LES, Art. 89(1)(4).⁹⁰ This decision was upheld by the Criminal Council on 9 November.⁹¹ According to one media article, Gruevski was last seen by his bodyguards on the night of 8 November 2018.⁹²

As can be seen, more than 20 days passed between the issuance of the verdict and the delivery of the execution order. Although this time is in line with the country's practice on enforcement of convictions, it appears excessive considering the high-profile of the case and the interest of the public in the timely accountability for the crimes arising from the wiretap scandal. The delay appears to be rooted in the fact that neither the LCP nor the LES set clear deadlines for the

⁸⁰ Official Gazette n. 2/2006 (latest amendment n.209/2018).

⁸¹ Official Gazette n. 66/2013 (latest amendment n. 114/2014).

⁸² i.e., the same Trial Chamber which issued the first instance verdict.

⁸³ LES, Art. 84; Courts' Rules of Procedure, Art. 234 and 307.

⁸⁴ LES, Art. 85.

⁸⁵ LES, Art. 86(1). In addition, pursuant to LES, Art. 89(1), the convicted person may request the postponement of the execution of the sentence based on the grounds envisaged therein.

⁸⁶ LES, Art. 86(2) and (3). See also Courts' Rules of Procedure, Art. 309.

⁸⁷ Basic Court's website, press release: <http://www.sud.mk/wps/poc/osskopje1/lut/p/wcm/oid:5ef28c1f-626a-44ad-89eb-7016613a4017>.

⁸⁸ Mihailo Vidimilski, *On November 8th ex Prime Minister Nikola Gruevski shall report to the prison in Shuto Orizari where he is expected to serve two years in prison for the purchase of a luxury Mercedes*, Channel 5 TV, 26 October 2018, at <https://kanal5.com.mk/articles/353341/gruevski-do-8-noemvri-treba-da-se-javi-vo-zatvorot-shutka>.

⁸⁹ Basic Court's website, press release: <http://www.sud.mk/wps/poc/osskopje1/lut/p/wcm/oid:91ad4a90-8db6-4571-a8f6-40bda937c456>.

⁹⁰ Pursuant to this provision, the convict may request a postponement of the execution of the sentence for completing a work-related activity whose interruption would cause significant damage. Media reported that such request was due to Gruevski's work obligations as an MP and the fact that he was in the process of writing a book based on his PhD dissertation. See Elena Ivanovska Mukoska, “*Gruevski demands postponement of the prison sentence due to unfinished obligations*”, Telma, 29 October 2018, at <https://telma.com.mk/gruevski-bara-odlozhuvane-na-zatvorskata-kazna-poradi-nezavrsheni-obvrski/>; Fadil Veseli, *Gruevski demands postponement of the prison because he wrote a book*, AlsatM, 31 October 2018, at <https://bit.ly/2UB54Py>.

⁹¹ Basic Court's website, press release: <http://www.sud.mk/wps/poc/osskopje1/lut/p/wcm/oid:c9e56bcb-cc15-4197-a06c-193a70ad98df>.

⁹² Deutsche Welle, *Gruevski only pretended to prepare for jail*, 25 November 2018, at: <https://p.dw.com/p/38r5A>.

enforcement of convictions. Specifically, they do not envisage a time by which the Appellate Court must send the decision back to the Basic Court, nor a time by which the Basic Court must deliver the executive order to the JES. The LES contains deadline only for the executive phase in the strict sense, i.e., only once the executive order has reached the JES.

2.5. Conclusion

The rate of absent defendants in SPO cases is not excessively high (14%). However, the absence of at least one defendant remained the first cause of postponement of SPO cases in both 2017 and 2018. The right of defendants to be present at trial has always been respected by the court. In three instances the judges separated the procedure against defendants who had failed to appear several times, in a commendable effort to prevent the stalling of the trial against their co-defendants. The overall legal framework regulating the presence of defendants, however, does not provide adequate tools to the court in circumstances where defendants willfully decide not to attend their trial (especially by escaping).

This chapter has addressed two scenarios. First, the scenario where a defendant who has been regularly notified of the hearing and is present in the country fails to appear in court. In such case, the law allows for the possibility to postpone the hearing indefinitely, as long as the defendant submits a justification through his/her defence counsel. The LCP should contain indications as to which justifications are acceptable and which are not. Specifically, it would be useful to qualify the defendants' impossibility to be present as "legitimate" and "absolute", so as to limit the court's discretion to postpone the hearing. The court should exercise its discretion to adjourn 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. In this respect, the Italian Code of Criminal Procedure (CCP) could offer a good term of comparison, in that it specifies that the judge shall postpone the hearing only when it appears that the absence of the defendant is due to the "absolute impossibility to attend due to unforeseeable circumstances, force majeure, or other legitimate impediment".⁹³ In addition, it would be useful to introduce a provision in the LCP which empowers judges to order an independent medical examination, whenever there is a doubt about the defendant's fitness to attend trial.

The second scenario concerns defendants who have fled the country in order to escape pre-trial or post-conviction detention. In the reporting period, three defendants escaped justice. The national legal framework awards to these defendants more guarantees than required by international standards, in that it entitles them to obtain a re-trial as soon as they become available to the state authorities. This provision prioritizes the right of the accused to be tried in his presence to the detriment of the efficiency of the proceedings. Moreover, the judicial interpretation of the legal framework on trials *in absentia* is inconsistent. In the case *Fortress 2*, the Appellate Court held that a trial *in absentia* against a defendant who has fled to another country (Goran Grujevski) can be ordered only after an official denial of the extradition request. By forbidding a trial *in absentia* before a final decision on the extradition, the Appellate Court imposed a requirement not foreseen in the law. A second trial in the absence of Grujevski is

⁹³ Italian CCP, Art. 420ter.

currently ongoing before the Basic Court, in what might be seen as a waste of time and resources. The precedent set by the Appellate Court in *Fortress 2* was not followed by the panels of the Basic Court adjudicating the four cases where former Prime Minister Gruevski is indicted. Following Gruevski's flight to Hungary, the court ordered his trial *in absentia* before an official confirmation from the Hungarian authorities that the extradition was denied. It is unclear whether the Appellate Court ruling in *Fortress 2* will have an impact on the four ongoing trials *in absentia* against Gruevski.

The flight of former Prime Minister Gruevski represents a serious setback in the accountability process for the crimes arising from the wiretap scandal. Notably, in view of the absolute SoL for the enforcement of his sentence (see *supra* paragraph 2.2.1), a re-trial against Gruevski will no longer be possible after October 2024. Notably, since Gruevski is indicted in other four ongoing cases (*Centar*, *Trajectory*, *TNT*, *Titanic 1*), the absolute SoL for the prosecution of those cases is also elapsing.⁹⁴ The chapter pointed to relevant shortcomings in the legal framework on the execution of sentences. Specifically, by failing to set clear deadlines for the enforcement of final convictions, the law allows for an excessive amount of time between the issuance of a conviction and its execution, which facilitates the possibility for convicts to escape.

⁹⁴ In *Centar*, where Gruesvki is charged with Violence pursuant to Crim. Code, Art. 386(2)(1), the SoL applies on 10 June 2019. In *Trajectory* where Gruevski is charged with Accepting a Reward for Unlawful Influence pursuant to Crim. Code, Art. 359(2), the SoL applies on 31 October 2019. In *TNT*, where Gruevski is charged with Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353(3)(1), the SoL applies in December 2022. In *Titanic 1*, where Gruevski is charged with, among other crimes, Criminal Association pursuant to Crim. Code, Art.394(1), the SoL applies in 2034. These calculations have been made pursuant to Crim. Code, Art. 107 and 108. In the absence of an explicit indication in Crim. Code, they are based on the assumption that the SoL is tied to the date of the alleged commission of the crimes as per indictment, rather than the manifestation of the consequences the crimes.

3. Reasonable Length of Proceedings, Trial Management Practices and Procedural Efficiency

3.1. International Legal Framework

Pursuant to ECHR, Art. 6(1), “[i]n the determination (...) of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time”. Similar wording is contained in other human rights conventions - such as the International Covenant on Civil and Political Rights⁹⁵ (ICCPR) - and in the Statutes of international tribunals,⁹⁶ which refer to the “right to be tried without undue delay”. The main purpose of this guarantee is to “ensure that accused persons do not have to lie under a charge for too long and that the charge is determined.”⁹⁷ In addition, procedural delays and adjournments may also jeopardize the effectiveness and credibility of the administration of justice.⁹⁸ This guarantee relates to all stages of the proceedings, from the formal charging of the accused until the final judgment on appeal.⁹⁹ What constitutes a reasonable time has to be assessed on a case-by-case basis. Among the factors to be taken into consideration are the complexity of the case, the conduct of the accused and the conduct of the relevant authorities.¹⁰⁰

The complexity of a case may stem from the number of charges, the number of defendants and witnesses, or the international dimension of the case. With respect to the conduct of the accused,¹⁰¹ the European Court of Human Rights (ECtHR or European Court) “does not require a person charged with a criminal offence to cooperate actively with the judicial authorities”.¹⁰² Accused persons, in fact, are entitled to take “full advantage of the resources afforded by national law in their defence.”¹⁰³ In one case the European Court considered that “[e]ven if the large number of counsel present at the hearings and their attitude to the security measures slowed down the proceedings to some extent, they are not factors that, taken alone, can explain the length of time in issue”.¹⁰⁴ However, the situation is different when there is evidence showing that the accused and his counsel have displayed a “determination to be obstructive”,¹⁰⁵ in

⁹⁵ ICCPR, Art. 14(3)(c).

⁹⁶ Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, Art. 20(4)(c) and 21(4)(c), respectively; Rome Statute of the International Criminal Court, Art. 67(c).

⁹⁷ ECtHR, *Wemhoff v. Germany*, Application no.2122/64, ¶ 18 (25 April 1968); ECtHR, *Kart v. Turkey* [GC], Application no.8917/05, ¶ 68 (03 December 2009); See also UN Human Rights Committee, *CCPR General Comment 32* (2007), ¶ 35.

⁹⁸ ECtHR, *H. v. France*, Application no.10073/82, ¶ 58 (24 October 1989); ECtHR, *Bottazzi v. Italy*, Application no.34884/97, ¶ 22 (28 July 1999); See also OSCE –ODIHR, *Legal Digest of International Fair Trial Rights*, 2012, pg. 126. UN Human Rights Committee, *CCPR General Comment 32* (2007), ¶ 35.

⁹⁹ UN Human Rights Committee, *CCPR General Comment 32* (2007), ¶ 35.

¹⁰⁰ ECtHR, *König v. Germany*, Application no.6232/73, ¶ 99 (28 June 1978); ECtHR, *Neumeister v. Austria*, Application no. 1936/63, ¶ 21 (27 June 1968), pg.38; ECtHR, *Ringeisen v. Austria*, Application no.2614/65, ¶ 110 (16 July 1971); ECtHR, *Pélissier and Sassi v. France* [GC], Application no. 25444/94, ¶ 67 (25 March 1999); ECtHR, *Pedersen and Baadsgaard v. Denmark*, Application no. 49017/99, ¶ 45(19 June 2003). UN Human Rights Committee, *CCPR General Comment 32* (2007), ¶ 35.

¹⁰¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, pg. 270.

¹⁰² ECtHR, *Yagci and Sargin v. Turkey*, Application no.16419/90&16426/90, ¶ 66 (08 June 1995).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

particular, when the accused increasingly resorts to actions likely to delay the proceedings, such as systematically challenging judges.¹⁰⁶

As far as the judicial authorities are concerned,¹⁰⁷ in one case involving Turkey the ECtHR deemed them responsible for the unreasonable delay of the proceedings because, contrary to national law, the courts had held only an average of one hearing per month, and waited for almost six months before acquitting the accused on the basis of newly abrogated articles of the Criminal Code which had formed part of the criminal charges against them.¹⁰⁸ Similarly, domestic courts in Russia were held responsible for the non-attendance of witnesses and defendants which caused the postponement of the proceedings, in that it was in their power to discipline them.¹⁰⁹ In the same case, the judicial authorities were deemed responsible because the trial had to start anew on four occasions owing to replacements of the trial chamber, “resulting overall in an inordinate delay of four years”.¹¹⁰

3.2. National Legal Framework on Adjournments and Postponements

Pursuant to LCP, Art. 359(1), the main hearing shall be held without interruptions. If it is not possible to complete the main hearing during a single session, the Presiding Judge (PJ) shall adjourn the hearing to the following working day. This article enshrines the principle of the “concentration” of the proceedings in a limited period of time. The goal is avoiding long intervals between the presentation of the evidence, the closing arguments, and the deliberation on the verdict, in order to make sure that the latter accurately reflects the findings of the trial. In other words, this principle is aimed at preventing the negative impact of time on the memory of the participants (especially the witnesses) and the judges. In practice, however, the workload of the court (i.e., the multiple concurrent trials scheduled everyday) does not allow for such a speedy pace. Most frequently, therefore, the court adjourns or postpones the hearing to a date that can be quite distant.

The LCP distinguishes between adjournment and postponement of a hearing. Generally speaking, the adjournment of hearings lies within the physiology of the criminal trial process. When a court hearing is adjourned, it means that the hearing was held but – as it is most often the case – the trial could not be completed on that same day. Hence, the court disposed its continuation at a later date. Pursuant to LCP, Art. 372(1), an adjournment may occur when the PJ orders a recess, or due to the close of business, or in order to collect certain evidence in a short period of time or for the purpose of the preparation of the prosecution or the defence

¹⁰⁶ ECtHR, *Eckle v. Germany*, Application no. 8130/78, ¶ 82 (15 July 1982); *Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal*, Application no. 56637/10, 59856/10, 72525/10, 7646/11 & 12592/11, ¶ 48 (30 October 2014).

¹⁰⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, pg. 270.

¹⁰⁸ ECtHR, *Yagci and Sargin v. Turkey*, Application no.16419/90&16426/90, ¶ 68(08 June 1995).

¹⁰⁹ With respect to the defendant, since he was detained in custody throughout most of the trial, his attendance was dependent on the domestic authorities in charge of transporting him from the remand prison to the courthouse, See ECtHR, *Tyebko v. Russia*, Application no. 56097/07, ¶ 68 (11 June 2015).

¹¹⁰ ECtHR, *Tyebko v. Russia*, Application no. 56097/07, ¶ 68 (11 June 2015).

case. In any event, an adjournment shall not be longer than eight days and the court session must always resume before the same judge.¹¹¹

Conversely, when a court hearing is postponed, it means that the hearing did not take place at all due to “pathological” reasons. A postponement occurs in all the instances in which the essential conditions for holding the trial are not met. For example, due to the absence of one of the essential actors in the proceedings (see following sub-paragraph 3.2.1.) or one of the reasons listed in LCP, Art. 370(2).¹¹² The PJ shall postpone the hearing only for the duration of the time of the impediment. Moreover, the court shall regularly inform and update the President of the Court regarding the continuous existence of the reasons to postpone the hearing, so that s/he can adopt the necessary measures to speed up the proceedings.¹¹³ The decision to postpone the hearing cannot be appealed.¹¹⁴

LCP, Art. 371, regulates the scenarios that may occur following the postponement of the hearing. In particular, it stipulates that the main hearing shall start from the beginning (i.e. the trial begins anew) in two cases: i) when the individual judge or the composition of the Trial Chamber has changed,¹¹⁵ ii) when more than 90 days have passed from the previous hearing.¹¹⁶ The first provision aims at ensuring the identity between the judges before whom the evidence is presented and those who reach the verdict.¹¹⁷ The second provision aims to avoid an excessive lapse of time passes between one hearing and another, in light of the above-seen principle of “concentration” of the proceedings. The occurrence of any of these scenarios could have serious consequences for the right to be tried within a reasonable time and the overall efficiency of the proceedings. For this reason, the LCP provides that, in both cases, the parties may agree not to re-examine the witnesses that already testified but simply read their statement for the record.¹¹⁸

3.2.1. Postponing the Main Hearing due to the Absence of One of the Trial Actors

In addition to the defendant,¹¹⁹ the presence of the prosecution and the judge is also essential for the hearing to be held. Pursuant to LCP, Art. 479(1), “the main hearing shall be conducted in the presence of the public prosecutor (...) and the defendant”. Pursuant to LCP, Art. 357(1), the continuous presence at the main hearing shall be compulsory for the PJ and the members of the Trial Chamber. With respect to the defence counsel, LCP, Art. 74, lists the cases in which his/her participation in the proceedings is mandatory.¹²⁰ Whereas the absence of the judge and

¹¹¹ LCP, Art. 372(2)(3).

¹¹² Specifically: i) the need arises to collect new evidence which will require a long period of time, ii) the defendant became mentally ill or mentally incoherent during the main hearing, iii) in the presence of other serious reasons.

¹¹³ LCP, Art. 370(2). With the same decision, the court may order the necessary measures to safeguard the evidence which may be lost or destroyed due to the postponement, see Art. 370(4).

¹¹⁴ LCP, Art. 370(5).

¹¹⁵ LCP, Art. 371(2).

¹¹⁶ LCP, Art. 371(3).

¹¹⁷ Among the essential violations of the criminal procedure, LCP, Art. 415, lists the case in which a judge who did not attend the main hearing participated in the deliberation of the verdict.

¹¹⁸ LCP, Art. 371(2) and LCP, Art. 371(3).

¹¹⁹ See chapter 2 of this report.

¹²⁰ Specifically, i) when the accused is incapable of defending himself/herself successfully or when s/he is being tried for a crime for which the law entails a sentence to life imprisonment, ii) during the detention period, iii) at the time of the delivery of an indictment for a criminal offence punishable with a prison sentence of minimum 10 years, iv) during the negotiation of a guilty plea agreement with the prosecution, v) immediately after the decision to try the

the prosecutor causes the postponement of the hearing in all cases, the absence of the defence counsel causes the postponement of the hearing only when his/her presence is mandatory.¹²¹

In case the prosecutor and the defence counsel cannot attend the hearing, they have the obligation to inform the court and indicate the reasons for their unavailability on that day.¹²² With respect to the defence counsel, LCP, Art 366, provides that counsel shall inform the court of the reason for his/her absence “as soon as s/he becomes aware of it”. If the defence counsel fails to appear without justification or leaves the courtroom before the end of the session, the court shall request the defendant to appoint another counsel and postpone the hearing for minimum 15 days in order to give the new counsel time to prepare.¹²³ The same procedure applies when the defendant decides to dismiss his/her counsel (or the counsel resigns from the case) in the course of the hearing.¹²⁴ In all the other cases of withdrawal of the power of attorney or counsel’s voluntary resignation (i.e., when the decision is taken out of court pending sessions), “the main hearing shall continue without any delay”.¹²⁵

In order to deter negligent behaviors by the parties (i.e., prosecution and defence), the LCP envisages sanctions if they fail to inform the court about the reasons for their absence. In particular, the court may hold the parties in contempt pursuant to LCP, Art. 88(1) and fine them with an amount between 200 and 1200 EUR.¹²⁶ In addition, defence counsel may be held accountable for “all the costs that have been sustained as a result of the postponement, if he or she can be considered responsible”.¹²⁷

Finally, the presence of the witnesses or expert witnesses summoned by the parties is also necessary (although, strictly speaking, not essential) for a smooth handling of the proceedings. Pursuant to LCP, Art. 368(1), if a witness or an expert witness fails to appear despite being properly summoned, the court may order that s/he is immediately brought to court by the police. Pursuant to the second paragraph of the same provision, although the main hearing may commence in the absence of a summoned witness or expert witness, the court has the discretion to decide whether to adjourn or postpone the hearing. Similarly to the parties in the proceedings, the court may hold absent witnesses in contempt and fine them with an amount between 200 and 1200 EUR.¹²⁸ With respect to expert witnesses, LCP, Art. 237(3) prescribes that the fine shall be from 500 to 1,500 EUR and, when the expertise was performed by a “professional institution”, the fine shall be from 1000 to 3000 EUR.

defendant *in absentia*. In all the above-listed cases, if the defendant does not appoint a defence counsel of his/her own choosing, the court appoints one *ex-officio*. See LCP, Art. 74(1) to (6).

¹²¹ See LCP, Art. 364(1), regulating the absence of the prosecutor at the main hearing, and LCP, Art. 366, regulating the absence of defence counsel at the main hearing. See also LCP, Art. 348(2) regulating the invitation of the parties at the main hearing. Pursuant to this provision, when the defence is not mandatory, the invitation of the defendant shall specify that the hearing shall not be postponed due to the absence of defence counsel.

¹²² LCP, Art. 364(1) and 366.

¹²³ LCP, Art. 371(4).

¹²⁴ LCP, Art. 371(4). This provision also specifies that “In the further course of the main hearing, a repeated cancellation or revocation of the proxy shall be only allowed with a decision by the Trial Chamber, if established that it is not being done in order to delay the proceedings”.

¹²⁵ LCP, Art. 371(5).

¹²⁶ LCP, Art. 364(1) and 366.

¹²⁷ LCP, Art. 366.

¹²⁸ LCP, Art. 368(3), 224 and 88(1).

3.3. Causes for Postponements and Delays in SPO Cases

Out of 316 monitored hearings between November 2016 and November 2018, 104 were postponed. The postponement rate is thus 33%. Between 2017 and 2018 the number of postponements decreased. The postponement rate in 2017 was 56,5% (for ten ongoing cases), whereas between January and November 2018 it was 29% (for 19 ongoing cases).¹²⁹

As seen in chapter 2 of this report, the absence of one of the defendants is the main cause of postponements of SPO cases (44 times). The other main causes of postponement were: i) procedural issues and defence objections (24 times); ii) the absence of defence counsels or a change in the composition of the defence team (16 times); iii) the absence of one of the judges or a change in the composition of the trial chamber (14 times); other causes, such as the absence of one or more witnesses (4 times) or the unavailability of the courtroom (2 times). The absence of defendants in SPO cases was addressed in chapter 2 of this report. The following subparagraphs deal with the most important of the other causes listed above.

¹²⁹In 2016 only two cases were ongoing (*Centar* and *Fortress 2*), with one hearing per case, none of which was postponed.

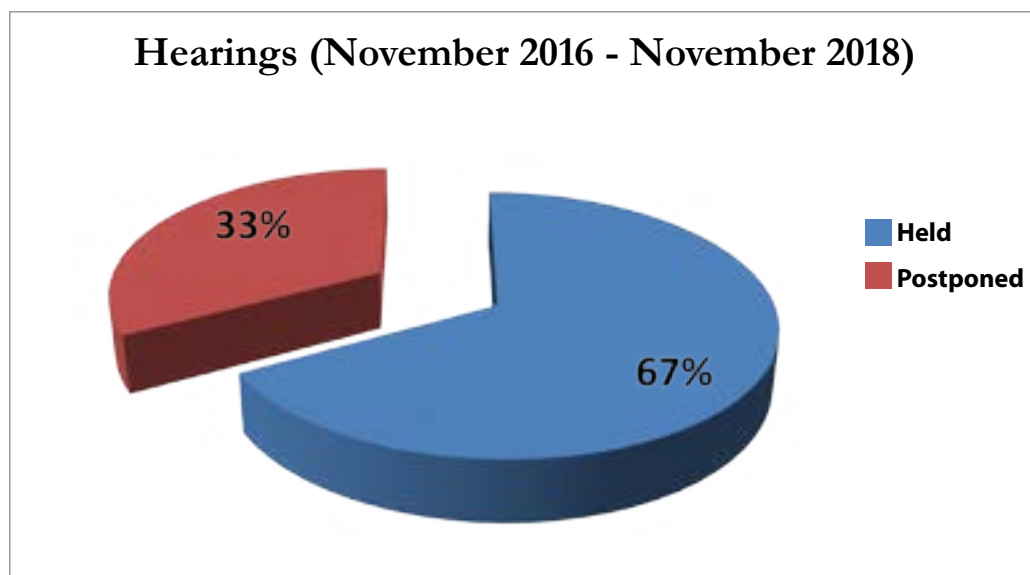
POSTPONEMENTS IN SPO CASES November 2016 – November 2018

Number of cases: 20¹

Total number of hearings (first instance): 316

Total number of postponements: 104

Postponement rate: 33 %

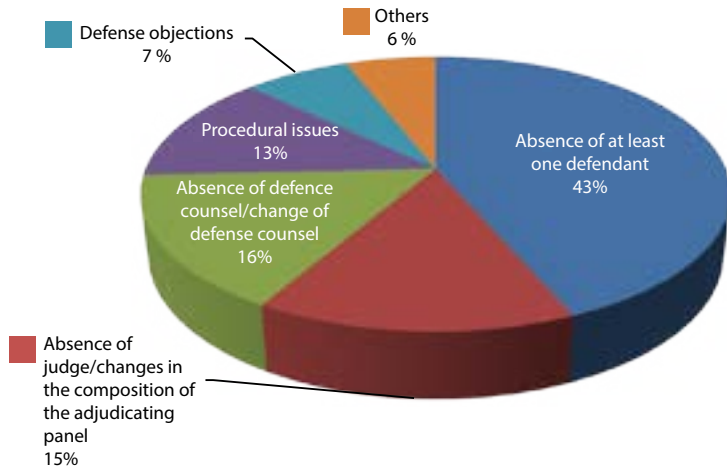


Postponement rate by case

1. TOTAL (75%)
2. TARGET-FORTRESS (60%)
3. CENTAR (48%)
4. TENDERS (46%)
5. FORTRESS 2 (45%)
6. TOPLIK (43%)
7. TITANIC 3 (37.5%)
8. TITANIC 1 (35%)
9. TORTURE (36%)
10. TNT (35%)
11. TITANIC 1 (35%)
12. TRANSPORTER (35%)
13. THREE-HUNDRED (25%)
14. TREVNIK (25%)
15. TRUST (24%)
16. TRAJEKTORY (22%)
17. TITANIC 2 (22%)
18. TARIFF (9%)
19. TANK (6%)
20. TIFFANY (0%)

¹ These data relate to the SPO-initiated cases (the cases taken over from the PPO and the separated procedures are excluded) and refers to the first instance proceedings.

Reasons for postponement



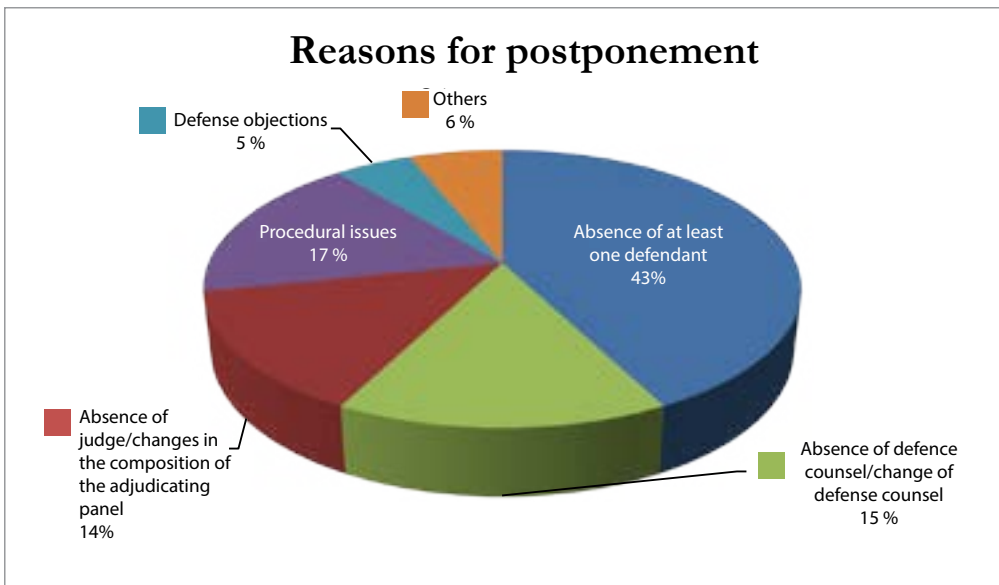
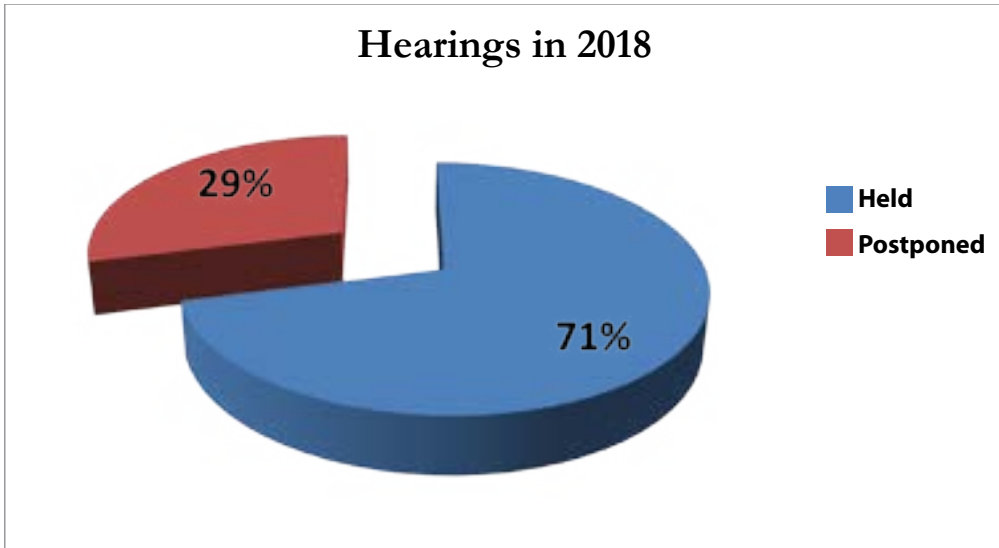
POSTPONEMENTS IN SPO CASES (2018)

Number of cases: 19¹

Total number of hearings: 268

Number of postponed hearings: 78

Postponement rate: 29%



¹ These data relate to the SPO-initiated cases (the cases taken over from the PPO and the separated procedures are excluded) and refers to the first instance proceedings.

POSTPONEMENTS IN SPO CASES (2017)

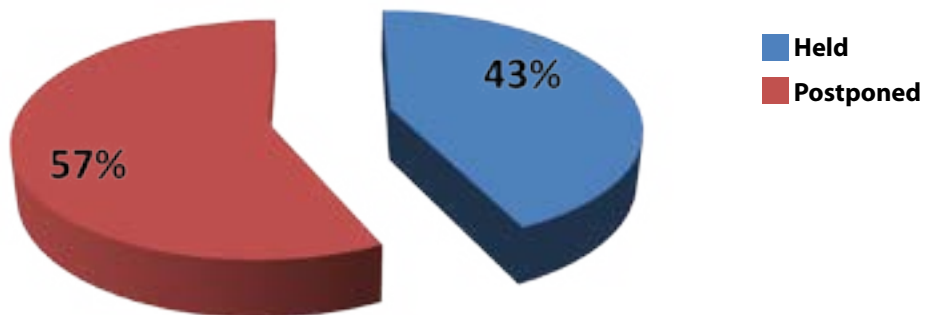
Number of cases: 10¹

Total number of hearings: 46

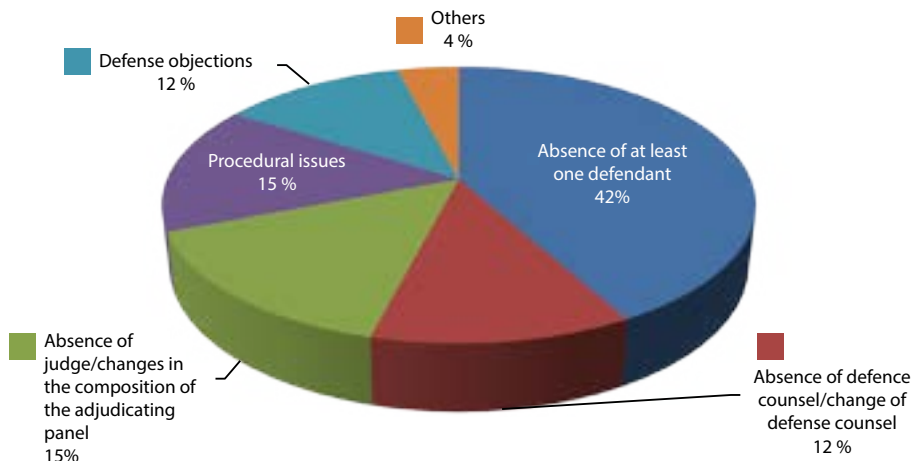
Number of postponed hearings: 26

Postponement rate: 56,5%

Hearings in 2017



Reasons for postponement



¹ These data relate to the SPO-initiated cases (the cases taken over from the PPO and the separated procedures are excluded) and refers to the first instance proceedings.

3.3.1. Procedural Issues and Defence Objections

On 17 occasions, hearings were postponed due to procedural issues. Specifically, issues such as unavailability of the case file due to the fact that a higher court was deciding on an incidental motion (8 times), disclosure problems (5 times), issues relating to the minutes of the court session (2 times), delay in the declassification of documents by the Ministry of Internal Affairs (MoIA) (1 time), amendments to the indictment in the course of the trial (1 time). On seven occasions, hearings were postponed due to defence objections, relating to three big themes that underpinned SPO trials: i) lack of audio-video recording equipment in the courtrooms (3 times); ii) requests of recusal of judges and/or SPO prosecutors (3 times); and iii) challenge of the legality and admissibility of SPO expert witnesses (1 time). Although the number of actual postponements due to these reasons was not very high, the above objections were raised in nearly all cases, prompting long discussions in the courtroom and causing delays to the proceedings.

3.3.2. The Absence of Defence Counsels or a Change in the Composition of the Defence Team

On 16 occasions, the hearing was postponed due to the absence of one or more defence counsels (14 times) or due to a change in the composition of the defence team (twice). In nine instances, the absence of defence counsels was due to the fact that they were engaged in another trial scheduled on the same day and time. For this reason, on four occasions the PJ found counsels in contempt and fined them with 1000 EUR each, pursuant to LCP, Art. 88(1).¹³⁰

3.3.3. The Absence of One of the Judges or a Change in the Composition of the Trial Chamber

The absence of the PJ was registered 11 times. In nearly all cases, the absence was due to health reasons.¹³¹ On three occasions, however, the hearing was postponed due to a change in the composition of the trial chamber.¹³² These changes must be seen in connection with the reorganization of the Basic Court Skopje I, operated by the newly appointed Court President. Although the impact of the new annual chart was minimal in terms of postponements (only three hearings were postponed in cases which had hearings scheduled soon after the entry into force of the new organizational chart), chapter 5 of this report revisits that process, given that the principle of irremovability of judges and the process of case allocation are crucial for guaranteeing the independence and impartiality of the judiciary.

¹³⁰ In *Centar*, on 5 November 2018; in *Toplik*, on 21 September 2018; in *Titanic 3*, on 27 April 2018; in *TNT* on 29 August 2018.

¹³¹ Only in two occasions, in *Tenders*, the Presiding Judge (PJ) had other work obligations.

¹³² *Centar* on 27 December 2017, *Trajectory* on 26 December 2017, *Target-Fortress* on 17 January 2018.

3.4. The Overall Pace of SPO Trials

The majority of SPO indictments (17 out of 20) were filed between 29 and 30 June 2017.¹³³ By the end of January 2018, all 20 SPO indictments were confirmed.¹³⁴ The majority of SPO trials started between December 2017 and April 2018.¹³⁵ The average time period between the filing of indictments and the beginning of the trial was 194 days (over six months). As noted in the Mission's first interim report on the SPO cases,¹³⁶ this time appears to be excessive. Regrettably, the LCP does not envisage a clear deadline for indictments to be confirmed by the court.¹³⁷ The average time period between the confirmation of the indictments and the beginning of the trial was 68.5 days (over two months). *Titanic 2* was the case where the longest time passed between indictment confirmation and the beginning of the trial (144 days), followed by *Transporter* (100 days), *Titanic 1* and *Titanic 3* (95 days); *Toplik* was the case where the shortest time elapsed between indictment confirmation and beginning of the trial (30 days). In all but one of the SPO cases the length of time between confirmation of the indictment and start of the trial was not in line with LCP, Art. 345(2), pursuant to which the PJ shall schedule the main hearing within 30 days from the date of the receipt of the indictment (or 60 days for organized crime charges).¹³⁸ By March 2018, almost all the 20 trials were ongoing. The hearings of each case were generally scheduled quite far apart from each other. In the reporting period, the highest number of hearings scheduled in one month was registered in *Tank* (with six hearings scheduled in April 2018), and *Titanic 1* (with six hearings scheduled in November 2018). In all the other cases, the number of hearings scheduled per month rarely exceeded three. The total average of hearings in SPO cases was one per month (per case). In one case, *Tenders*, on one occasion more than 90 days passed between one hearing and the next. Therefore, on 29 October 2018, the trial started from the beginning pursuant to LCP, Art. 371(3). As the parties agreed to re-admit the opening statements and the material evidence into the trial record, the re-start of the trial did not cause an excessive delay.

3.5. Trial Management Practices in SPO Cases

3.5.1 International and Comparative Legal Framework on Pre-Trial Preparation

Pre-trial management and preparation are essential in order to ensure that the trial is conducted in the most fair and expeditious manner. This is especially true in complex cases, with large volumes of evidence and large number of witnesses called by both parties. The importance of the pre-trial stage is well-explained by the Manual on Developed Practices of the International Criminal Tribunal for the former Yugoslavia (ICTY), pursuant to which “without robust pre-trial

¹³³ The remaining three were filed on 14 September 2016 (*Fortress 2* and *Centar*) and on 5 April 2017 (*Transporter*).

¹³⁴ With only one being partially confirmed (i.e. *Titanic 2*).

¹³⁵ Five cases started before December 2017, namely, *Fortress 2* (November 2016), *Centar* (December 2016), *Transporter* (September 2017), *Trust* and *Three-Hundred* (November 2017).

¹³⁶ OSCE Mission to Skopje, *First Interim Report on the SPO*, 2018, pg. 80.

¹³⁷ LCP, Arts. 331 and 332 only mandate the court to schedule a session or a hearing for reviewing the indictment within eight days and 15 days, respectively, from the receipt of the defendant's objection to the indictment. However, they do not impose a time by which the indictment must be confirmed or rejected.

¹³⁸ If the PJ does not schedule the main hearing within this deadline, s/he shall inform the President of the Court, who shall take the necessary measures to schedule the main hearing.

management, trials will be unduly lengthy, witnesses will be called needlessly, valuable court time will be taken up with procedural issues instead of hearing evidence”.¹³⁹

The primary case management tool typical of the Anglo-Saxon jurisdictions is the so-called “status conference” (or “pre-trial conference/preparatory hearing”). A status conference is a meeting held before trial between the parties and the judge aimed at laying out the progress of the case and set a timeline for discovery matters at trial.¹⁴⁰ A very important part of a status conference is determining what evidence will be allowed at trial, excluding evidence and testimonies illegally obtained, or irrelevant. Through status conferences, the court monitors the progress of the cases and gives the necessary directions in order to ensure fair, expeditious and cost-effective proceedings.¹⁴¹

Periodic status conferences were essential case management tools at the ICTY,¹⁴² through which the pre-trial Judge¹⁴³ (hereinafter “the judge”) would make sure that the case was “ready” for trial. To this end, the judge would establish a work plan indicating the obligations of the parties and the deadlines for complying with these obligations.¹⁴⁴

Following the example of the ICTY, the courts of Bosnia and Herzegovina (BiH) introduced a similar system of pre-trial management.¹⁴⁵ Art. 233-a of BiH Code of Criminal Procedure (CCP) prescribes that during the preparation for the main trial, the court may hold a hearing with the parties in order to “consider issues relevant to the main trial”. The meaning of this provision was progressively expanded by the practice of the courts and it became the legal basis to hold status conferences, which are, by now, a well-established practice in the courts of BiH.¹⁴⁶

3.5.2 National Legal Framework on the Role of the Presiding Judge

The LCP endows the PJ with broad managerial powers during the main hearing. Pursuant to LCP, Art. 358(1), “the Presiding Judge (...) shall preside over the main hearing”. This duty

¹³⁹ ICTY, *Manual on Developed Practices*, 2009, pg. 53, at: http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf.

¹⁴⁰ See US Legal at: <https://definitions.uslegal.com/s/status-conference/>.

¹⁴¹ Status conferences shall not be confused with hearings for confirming the indictment, where the court assesses whether the prosecution presented sufficient evidence for the case to go to trial. The purpose of examining the solidity of the indictment before trial is ensuring that there is sufficient evidence against the defendant to merit a trial taking place.

¹⁴² Rule 65-*bis* and 65-*ter* ICTY Rules of Procedure and Evidence (RPE). See also, ICTY, *Manual on Developed Practices* (*supra*, fn. 139), pg. 56-60.

¹⁴³ The pre-trial Judge was one of the judges of the Trial Chamber designated by the PJ.

¹⁴⁴ Rule 65-*ter* (D)(ii) ICTY RPE. Pursuant to Rule 65-*ter* (E)(i), one such obligation was the filing of pre-trial briefs and evidence lists, whose contents were regulated to the utmost detail. Among others, the prosecution's pre-trial brief contained, for each count of the indictment, a summary of the evidence which the prosecution intended to rely on, as well as the description of the form of responsibility incurred by the accused. Pursuant to Rule 65-*ter* (E)(ii), the list of witnesses included a summary of the facts on which each witness would testify, as well as the relevant points of the indictment to which the testimony referred to. Importantly, the list indicated also the estimated time required for each witness and the total time estimated for presentation of the prosecution's case (see Rule 65-*ter* (E)(ii)(f)). Pursuant to Rule 65-*ter* (F), The defence's pre-trial brief included a written statement setting forth in general terms the nature of the accused's defence, the matters with which the accused takes issue in the prosecution's pre-trial brief.

¹⁴⁵ Judge Minka Kreho, *Essay on Trial management practices in BiH*, on file with the Mission.

¹⁴⁶ *Ibid*.

includes ensuring the elimination of “anything that might delay the proceedings and does not serve the purpose of clarifying the issues”.¹⁴⁷ By the same logic, when a case is particularly complex due to, for example, the number of defendants or the volume of the evidence, “the PJ may decide to deviate from the regular order of the main hearing”.¹⁴⁸ This means that, for example, s/he may decide to separate the presentation of evidence relating to certain crimes or certain defendants. In other words, the PJ is entitled to adapt the order of the procedural actions to the needs of the case.¹⁴⁹

Pursuant to LCP, Art. 347, the PJ has a very significant role also in respect to the admission of evidence at trial. In addition to the power to exclude unlawful evidence,¹⁵⁰ the LCP expressly allows the PJ to declare inadmissible the evidence which is “unclear, incomplete or aimed towards a significant postponement of the procedure” or when it aims to establish facts which are not relevant for the case.¹⁵¹ Most notably, LCP, Art. 347(2), gives the PJ an important case management tool by allowing him/her to summon the parties to appear before the court “in order to elaborate on their requests regarding the admission of evidence or their objections thereto”.¹⁵²

The scope of this provision is quite narrow, in that its purpose appears to be only deciding on possible exclusion of evidence.¹⁵³ However, following the example of BiH (see *supra* paragraph 3.5.1), the interpretation of Art. 347(2) could be expanded so as to provide a legal basis for the introduction of status conferences to hold prior to trial and, if the need arises, also in the course of the trial. Status conferences are a key trial management tool aimed at streamlining the course of the proceedings, avoiding delays and inefficiencies. Specifically, status conferences would be very useful for: i) establishing the issues that it is best to address and solve before the start of the trial, such as challenges to the competence of the judge or the prosecution, conflict of competence between courts or prosecution offices, or questions relating to the admissibility of evidence (i.e., arguments that certain evidence should be excluded from the trial or that certain persons must or cannot testify); planning the time needed for the reading of the indictment and the opening arguments of the parties; ii) establish/estimate the number of witnesses that are needed in order to prove each count of the indictment as well as the time that this requires; iii) estimate the time for the presentation of the material evidence.

3.5.3. National Legal Framework on Evidentiary Rules

The reformed LCP adopted a hybrid system, part inquisitorial and part adversarial.¹⁵⁴ With respect to evidentiary rules, the LCP enshrines a party-driven procedure, with the parties being

¹⁴⁷ LCP, Art. 358(2).

¹⁴⁸ LCP, Art. 359(2).

¹⁴⁹ OSCE Mission to Skopje, *Commentary to the Law on Criminal Procedure*, 2018, pg. 734.

¹⁵⁰ LCP, Art. 347(1)(1), which empowers the PJ to exclude evidence gathered in an unlawful manner, evidence that cannot be used or which relate to facts that, by law, cannot be proven. Notably, unlawful evidence shall be excluded even earlier, at the confirmation of the indictment phase, pursuant to LCP, Art. 336(4).

¹⁵¹ LCP, Art. 347(1)(2) and (3).

¹⁵² LCP, Art. 347(2).

¹⁵³ This is supported by the title of the article: “Rejection of tendered evidence”.

¹⁵⁴ OSCE Mission to Skopje, *First Interim Report on the SPO*, 2018, pg. 11.

involved in gathering evidence and putting on their respective cases.¹⁵⁵ The evidentiary phase begins with the presentation of the evidence by the prosecution (witness testimonies and documentary evidence), followed by the presentation of the evidence of the defence. During this phase, parties are expected to lead the evidence by asking questions.¹⁵⁶ The LCP embeds certain principles of evidence found in the adversarial systems. Pursuant to LCP, Art. 383, “in hearing a case, direct examination, cross-examination and re-direct examination shall be allowed”.

Direct examination is the questioning of a witness by the party who called him/her. It is the first examination of a witness upon a matter not within the scope of a previous examination of the witness. The purpose of the direct examination is to elicit evidence in support of facts that the party seeks to prove. Direct examination questions are open-ended, allowing the witness to tell a story to the court.¹⁵⁷ In direct examination, the witness is generally “favorable” to the party who has called him/her. For this reason, leading questions (i.e., questions that suggest the witness the answer that the examining party desires¹⁵⁸) are not allowed.¹⁵⁹

The purpose of the cross examination is to discredit the testimony or the witness in front of the judges.¹⁶⁰ Therefore, cross-examination questions tend to be very pointed and specific, suggesting either a “yes” or “no” answer, and are limited to the subjects covered in the direct examination or to matters relevant to assess the credibility of the witness. Very importantly, during cross-examination the party may ask leading questions, in which he/she is allowed to suggest answers to the witness.

During the evidentiary phase, the PJ maintains his/her supervisory and managerial role. Pursuant to LCP, Art. 385(1), the PJ “shall control the manner and order of examination of witnesses (...), providing for the efficiency, economy of the proceedings and as the need arises, for the establishing of the truth.” Most importantly, the PJ shall rule on the objections of the parties with respect to the admissibility of the questions.¹⁶¹ In particular, upon objection, s/he prohibits “questions and answers to questions that have been previously asked, if he or she considers it inadmissible or irrelevant for the case”.¹⁶² Finally, s/he ensures the economy of the proceedings by refusing the “presentation of evidence if he or she considers it unnecessary and of no importance for the case and shall briefly explain the reasons for it”.¹⁶³

¹⁵⁵OSCE Mission to Skopje, *Evidence and Objections: Domestic and International Standards*, at: <https://www.osce.org/mission-to-skopje/315111?download=true>, 2017, pg. 7-9.

¹⁵⁶ Ibid.

¹⁵⁷ Examples of direct examination questions include: “Where do you live? How many children do you have? Where do you work?”

¹⁵⁸ Example of a leading question: “Isn’t it true that you told John Doe that the car had been stolen?” as opposed to “Did you say anything to John Doe?” which is not leading.

¹⁵⁹ LCP, Art. 384(2) and 385(4).

¹⁶⁰ In the country’s system there is no jury.

¹⁶¹ LCP, Art. 385(8), “[t]he judge shall rule immediately, with a decision, on any objections raised verbally during the process of examination of witnesses, expert witnesses and the injured party at the main hearing”. Moreover, pursuant to LCP, Art. 385(7), s/he “shall take care of the admissibility of questions, validity of answers, fair examination and justification of objections”.

¹⁶² LCP, Art. 385(2).

¹⁶³ LCP, Art. 385(3).

3.5.4. Pre-Trial Issues in SPO cases

The defence teams in the SPO cases filed many motions on preliminary issues. In addition to objections relating to the lack of audio-video recording equipment in courtroom (see chapter 4 of this report, paragraph 4.5.1), in many cases defence counsels filed motions disputing the competence of the SPO and challenged the legality of certain evidence, particularly the intercepted conversations. Even following the Appellate Court's rulings in favour of the admissibility of the intercepted conversation for the purpose of the confirmation of the indictments, the defence continued to challenge their admissibility at the start of the trial in nearly all cases.¹⁶⁴ Moreover, the defence denounced shortcomings during the disclosure process and objected to the legality and admissibility of the testimony of some SPO expert witnesses. While the content of some of these objections will be addressed further in the report, this paragraph deals with the way in which the motions were raised by the parties and handled by the court.

It appears that PJs never made use of the trial-management tool provided by LCP, Art. 347(2). In other words, they never summoned the parties to appear before the court prior to the commencement of the trial, in order to settle preliminary issues relating to the exclusion of evidence. In one case, the court expressly rejected the request of the defence to that effect.¹⁶⁵ As a consequence, in all cases the defence raised its objections for the first time at the main hearing. A considerable part of the first hearings of each case was thus spent discussing preliminary issues, delaying the commencement of the evidentiary phase. During the discussions over preliminary issues, PJs fully respected the right of the parties to present their arguments, allowing for ample time for the defence to address its requests to the court and for the SPO to respond to them. However, this often resulted in lengthy and repetitive debates, with defence counsels re-stating each other's arguments over and over, and the SPO responding to the same objections.

While acknowledging that it is essential to grant sufficient time to the parties' cases, judges could interpret their managerial role more proactively in order to avoid inefficiencies and delays. This is especially true when it comes to preliminary issues. PJs should make full use of the trial management tools that the LCP provides them with, calling the parties before the court in order to settle preliminary evidentiary matters pursuant to LCP, Art. 347(2). As argued in paragraph 3.5.2, the scope of this provision could be expanded to cover all the possible preliminary issues so that, once they are settled, the trial will not be "burdened" with questions that are not strictly related to the substance of the case at hand. Most importantly, introducing the mechanism of status conferences would allow the PJ to plan the unfolding of the trials with the parties in advance, agree on the amount and type of evidence that will be introduced, excluding those which are manifestly irrelevant or redundant.

¹⁶⁴ The Appellate Court's rulings, which came after the same court's decision of August 2017 to admit the wiretaps as evidence at trial in the *Centar* case, expressly left open the possibility for the defence to re-challenge the admissibility of the wiretaps after the commencement of the trial. For more details, see OSCE Mission to Skopje, *First Interim Report on the SPO*, 2018, pg. 71-77.

¹⁶⁵ *Trust*, on 14 November 2017.

3.5.5. Evidentiary Phase in SPO Cases

In the period covered by this report many of the ongoing cases¹⁶⁶ were still at the early stages of the presentation of evidence by the SPO. Only four cases – *Tariff*, *Trevnik*, *Titanic 3* and *Titanic 2*, reached the stage of the presentation of evidence by the defence (which, by law, follows that of the prosecution). Therefore, the analysis and observations contained in the following paragraphs must be understood within the said limitation.

3.5.5.1. Intercepted Communications

In the period covered by this report, the SPO introduced wiretaps as evidence in nearly all cases.¹⁶⁷ Almost 2000 wiretapped conversations were heard in the courtroom (the audio-files were played on a laptop equipped with two speakers). More than half of the conversations were played in the case *Titanic 1*, against the former Prime Minister and other senior government officials for alleged electoral violations. Another case with a significant number of wiretaps was *Trajectory* - against the former Prime Minister and other senior government officials for allegedly abusing their positions while selecting a contractor for constructing two highway sections – with 315 conversations. In three cases – *Titanic 1*, *Trajectory* and *TNT* - the SPO also introduced as evidence intercepted text messages (over 1000 SMSs), which were projected on a screen while the SPO read their contents to the court.

In all cases, the SPO did not provide information regarding the context in which the conversations/SMSs took place and/or their relation to the indictment. In some cases¹⁶⁸ the SPO did not state the names of the wiretapped persons before playing the audio-files in court,¹⁶⁹ leaving the judges and the public to guess the authors from the voices and the topic of the conversation. In at least two cases¹⁷⁰ this was done on the request of the defence, according to which associating names to the conversations would have been unfair, since the SPO could not prove the identity of the persons speaking on the wiretaps.

This method of presenting evidence is not the most effective. In the absence of any explanation from the SPO, it was difficult for the public or the judges to understand the contents of many of the conversations. In some cases, entire hearings were spent only listening to wiretaps, without any information about their relevance or connection with the key facts of the case. OSCE monitors' impression is that the SPO did not sufficiently select incriminating conversations, introducing into evidence both relevant and irrelevant material. The situation was even more confusing when the names of the interlocutors were not stated.

¹⁶⁶ By November 2018 five cases were completed in first instance (*Fortress 2*, *Tank*, *Tiffany*, *Three-hundred* and *Trust*) and, thus, 15 cases were ongoing.

¹⁶⁷ Except for *Fortress 2*, *Target-Fortress*, *Transporter*, *Centar*.

¹⁶⁸ *Tank*, *Trust*, *Trajectory* and *Titanic 1*.

¹⁶⁹ The SPO introduced the conversations by merely reading the phone numbers from which they originated, as well as the time and date of the conversation.

¹⁷⁰ *Trajectory* and *Titanic 1*.

The same considerations are true for the SMSs. In at least one case, the SPO read almost 260 text messages for three hours without interruptions.¹⁷¹ Although in the case of the SMSs the SPO did state the names of the sender and the receiver, many SMSs contained abbreviations or coded words which were not explained.

3.5.5.2. Documentary Evidence

By documentary evidence it is meant any kind of evidence that can be introduced in the form of documents (such as contracts, receipts of payments, urbanistic plans etc.), as well as any media on which information can be preserved (such as photographs, audio and video-recordings). In the period covered by this report, the SPO introduced over 4000 pieces of documentary evidence at trial. The case with the largest amount of documentary evidence was *Trust*, with 1560 documents,¹⁷² followed by *TNT*,¹⁷³ *Treasury*,¹⁷⁴ and *Tenders*,¹⁷⁵ with more than 600 documents. The SPO moved this evidence into file by reading exhibit number and title of each document for the record (i.e., by reading the list of evidence in court). Given the large number of documents, in all cases the parties agreed to read the actual content of the documents (or part of it) only when the defence deemed it necessary.¹⁷⁶ Even so, in some cases the reading of the SPO list of evidence lasted for hours.¹⁷⁷ In some cases, the SPO accompanied the reading with the projection of the contents of the documents on the wall.¹⁷⁸

The same considerations made for the presentation of the wiretapped conversations can be applied to the documentary evidence. The SPO did not give any background or contextual information regarding the evidence that it introduced, or its relevance to the case. In addition, the SPO did not explain how the documents related to the rest of the evidence in the case (wiretaps and witness testimonies). From the exchanges between the judges and the parties in courtroom, it was clear that the SPO and the judges believed that such explanation and background information was not necessary, in that “everything will be clarified during the closing arguments”.¹⁷⁹ As a result, the presentation of the SPO documentary evidence was extremely difficult for the public to follow. The same is presumably true for the judges, who, pursuant to the reformed LCP, have only limited knowledge of the materials that the parties introduce at trial.

Video-recordings were introduced as evidence by the SPO in two cases, *TNT* and *Torture*. In *Torture*, 51 video recordings were played in the course of three hearings.¹⁸⁰ By explicit admission of the SPO, some parts of the videos that the SPO introduced as evidence were completely

¹⁷¹ *Trajectory*, 26 October 2018.

¹⁷² Hearing of 23 November 2017.

¹⁷³ Hearings of 3 July, 10 September, 25 October and 30 October 2018.

¹⁷⁴ Hearings of 10 September, 27 September, 2 November, 15 November and 29 November 2018.

¹⁷⁵ Hearings of 14 May and 20 June 2018.

¹⁷⁶ Pursuant to LCP, Art. 392(4), any exhibit entered into the trial record shall be [fully] read, unless agreed otherwise by the parties.

¹⁷⁷ On 24 April 2018, in *Three-Hundred*, the SPO read the list of evidence for five hours. The same happened in *Tenders* on 14 May 2018.

¹⁷⁸ *TNT*, *Tenders*, *Tremnik* and *Toplik*.

¹⁷⁹ Among others, hearing of the case *Trust*, 23 November 2017 and *Tenders*, 29 October 2018.

¹⁸⁰ 3 October, 1 November and 20 November 2018.

irrelevant to the case. For this reason, the SPO requested to be allowed to play only the relevant portions (i.e., one or two minutes out of 45). The defence opposed this request and demanded that the SPO play each video in its entirety, alleging that, since “the defence was watching these videos for the first time”, it had to be sure that the videos did not contain relevant information. It is unclear why the SPO did not select the relevant part of the videos in advance and introduced in court evidence that, by its explicit admission, was redundant and unnecessary for the case. However, the underlying problem appears to be that the videos were not disclosed to the defence in advance. In the absence of prior disclosure, the defence was justified in requesting the entire videos to be played. Through advance disclosure, and with the defence agreeing to play only excerpts of the videos in question, the efficiency of proceedings would have been maximized.

3.5.5.3. Witness Testimonies¹⁸¹

In the reporting period, 350 SPO witnesses testified. The case with the greatest number of witnesses was *Titanic 1*, where the SPO proposed 191 witnesses.¹⁸² In at least eight cases, many of the witnesses called by the SPO were also called by the defence as defence witnesses.¹⁸³ This posed questions as to whether and when the defence had the right to conduct direct examination of its witnesses who were also SPO witnesses. In some cases, the PJ decided to merge the presentation of the prosecution and the defence cases by allowing the defence to conduct the direct examination right after the cross examination.¹⁸⁴ In other cases, the PJs decided to call the witness again during the presentation of the defence case.¹⁸⁵ Either way, in all cases PJs were respectful of the right of the defence and allowed counsels to conduct the direct examination of the witnesses they had called.

The fact that prosecution and defence often relied on the same witnesses is somewhat unusual. On some occasions, the SPO called to the stand witnesses who were clearly “hostile” and more supportive of the defence case, rather than that of the SPO. As a result, the defence often waived the right to cross-examine them or withdrew them from its evidence list, in that during the direct examination the witnesses had told a story in favor of the defendants. This was particularly evident in the cases *Three-Hundred* - against one Assistant to the former Minister of Internal Affairs accused of abusing his position in the purchase of 300 vehicles through public procurement- and *Tank* - against the former Prime Minister, former Minister of Internal Affairs and one of her assistants in relation to the abuse of a public procurement procedure for the purchase of a luxury car.¹⁸⁶ In both cases, some of the SPO witnesses testified that the public

¹⁸¹ This term includes expert witnesses.

¹⁸² At the time of writing this report, this case had not reached the stage of the examination of witnesses.

¹⁸³ *Centar, Transporter, Trust, Three-Hundred, Toplik, Tank, Titanic 3* and *Titanic 2*. Only in *Tank, Three-Hundred, Trust, Tariff* and *Trevnik* the defence had additional witnesses to that of the SPO. Specifically, the defence called twenty-six witnesses in *Tank*, two witnesses in *Three-Hundred*, four witnesses in *Trust*, nineteen witnesses in *Tariff* and one witness in *Trevnik*.

¹⁸⁴ *Tank, Titanic 3, Centar, Transporter, Trust* and *Three-Hundred*.

¹⁸⁵ *Toplik* and *Titanic 2*.

¹⁸⁶ Both cases were completed in first instance during the reporting period. The *Tank* case was completed also in second instance against two of the defendants, whose convictions have become final (see chapter 1, paragraph 1.3).

procurement procedures in question had been completely lawful.¹⁸⁷ Therefore, one is left to wonder about why the SPO decided to call these witnesses in the first place and about the SPO's theory of the case.

In other cases, SPO witnesses were merely unhelpful, in the sense that they claimed they did not remember anything about a certain episode, or they were not there, or they were not in a position to know what they were being asked. For example, in the case *Transporter* - relating to the rigging of the public procurement procedure for the transports of students in the municipality of Bitola – the four SPO witnesses who testified at the hearing of 27 April 2018¹⁸⁸ could not respond to many of the SPO questions because they related to procedures that were outside of their competence or to facts they had not witnessed to. Moreover, in some cases some of the testimonies seemed superfluous or redundant.

In the absence of any indications that these witnesses had changed the statements they had given during the investigations (the SPO did not appear surprised at how the testimony was unfolding, and did not seek to put previous statements to the witnesses during the examination in court pursuant to LCP, Art. 388(4)¹⁸⁹), it is reasonable to conclude that the SPO did not always adequately choose the persons to call in support of its case. Calling to the stand witnesses who, in the best case scenario, do not bring useful information to the court and, in the worst case scenario, do not confirm the prosecution's theory of the case, does not foster smooth and efficient proceedings.

A second noticeable problem related to the questioning of the witnesses. In many cases, the SPO started the direct examination with the question “tell me everything you know about...”¹⁹⁰, which is very open-ended and does not sufficiently direct the witness to focus his/her response on what is important for the case. In some cases, this allowed the witnesses to provide very long responses that went far from the point of the discussion. More generally, both the SPO and the defence, appeared to struggle with direct and cross-examination techniques.

3.6. Conclusion

Between November 2016 and November 2018, the postponement rate of the 20 SPO cases considered by this report was 33% (1/3). The break-down of this data shows a considerable improvement in the pace of trials between 2017 (postponement rate of 56,5% for 10 ongoing cases) and 2018 (postponement rate of 29% for 19 ongoing cases).¹⁹¹ Thanks to the efforts of all

¹⁸⁷ *Tank*, hearing of 10 April 2018, where three SPO witnesses testified. Specifically, one advisor in the MoIA cabinet for public procurement, the Chief of the same MoIA cabinet, and one employee of the company in which favour the public procurement process was rigged. *Three-Hundred*, hearing of 23 March 2018, where four SPO witnesses (all MoIA employees) testified.

¹⁸⁸ One employee of the Bitola Municipality (accounting services), the director of a transport company in Bitola, one employee of the Ministry of Finance, and the Chief of the Education Department of the Municipality of Bitola.

¹⁸⁹ Pursuant to LCP, Art. 388(4), if during the trial concrete evidence emerges which lead to conclude that the witness was exposed to violence, threat, promises of financial rewards or other benefits in order not to testify or give a false testimony, any statements given in front of the public prosecutor during the preliminary procedure may be admitted as evidence by a decision of the court.

¹⁹⁰ *Tank*, SPO direct examination of five witnesses at the hearing of 20 March 2018.

¹⁹¹ No postponements were registered in 2016.

the actors involved, by late 2018 the number of postponements no longer qualified as a structural problem.

This chapter, however, has highlighted other causes of delays in SPO trials, which had an impact on the overall efficiency of the proceedings. Such causes can be grouped into two main categories, which relate to the management of the hearing by the PJ and the way in which evidence was introduced by the parties at trial.

First, the failure to address and solve pre-trial procedural issues (e.g., objections regarding the admissibility of certain evidence or complaints relating to the disclosure process) before the start of the trial, led to considerable delays in the commencement of the evidentiary phase of the proceedings. The most appropriate setting for addressing and ruling on pre-trial motions would have been a status conference pursuant to LCP, Art. 347. In the absence of such a mechanism, the defence raised objections relating to preliminary issues at the start of the trial, prompting discussions that lasted for hours.

Second, this chapter has analyzed the modality in which intercepted conversations (nearly 2000 audio-files), documentary evidence (over 4000 documents) and witness testimonies (350 witnesses) were introduced at trial by the SPO. The general finding is that, in many cases, the SPO did not adequately select the material to introduce at trial and did not properly explain the relevance of the evidence in question and its connection to the indictment. Given the complexity of the SPO cases and their importance for the public interest, it is essential that the judges (and, to the extent possible, the public) are presented the key facts and evidence of the cases in a clear, logical and focused manner. Moreover, both the SPO and the defence appeared to struggle with direct and cross-examination techniques.

4. Balancing Efficiency with Fairness

4.1. Right to Adequate Time and Facilities to Prepare One's Defence

Expediency and efficiency are important components of the right to a fair trial. However, they cannot justify deviations from the law and breaches of the rights of the accused.¹⁹² The efficiency of trial proceedings must be balanced against the defendant's right to have adequate time and facilities to prepare his/her defence. This right is envisaged by ECHR, Art. 6(3)(b)¹⁹³, which protects the accused against a hasty trial.¹⁹⁴ The substantive defence activity on behalf of the accused may comprise everything that is "necessary" to prepare the main trial. The accused must have the opportunity to organize his/her defence in an appropriate way and without restriction as to the opportunity to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.¹⁹⁵

4.1.1. Adequate Facilities: Access to the Case File

The facilities available to everyone charged with a criminal offence should include the opportunity to acquaint himself/herself for the purposes of preparing his/her defence with the results of investigations carried out throughout the proceedings.¹⁹⁶ The prosecution's duty of disclosure of evidence, thus, is at the heart of an accused's right to a fair trial. Owing to the nature of criminal investigations, prior to trial, the prosecution has more time and resources at its disposal than the defence for preparing its case. Moreover, it has privileged access to certain information. The disclosure of evidence by law enforcement authorities, thus, is also instrumental to grant the equality of arms in criminal proceedings.

In the civil law model, the disclosure phase takes the form of the right to access the investigative file, which occurs, at the latest, at the end of the investigation.¹⁹⁷ By established jurisprudence of the ECtHR, at the end of the investigation, the defence must be given full and unrestricted access to the prosecution's file, in adequate time prior to the beginning of the trial.¹⁹⁸ The right to access the case file encompasses *all material in the possession of the prosecution*, including exculpatory evidence. This full and unconditional access may be restricted only for legitimate purposes. For example, in order to preserve the fundamental rights of other individuals, such as witnesses at risk of reprisals, or to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm national security.¹⁹⁹ A decision to refuse

¹⁹² "Although it is important to conduct proceedings at a good speed, this should not be done at the expense of the procedural rights of one of the parties"; See ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04, ¶ 540 (15 December 2014).

¹⁹³ OSCE – ODIHR, *Legal Digest of International Fair Trial Rights*, pg. 121 and 128.

¹⁹⁴ ECtHR, *Borisona v. Bulgaria*, Application no. 56891/00, ¶ 40 (21 March 2007); ECtHR, *Malofeyeva v. Russia*, Application no. 36673/04, ¶ 115 (30 August 2013).

¹⁹⁵ ECtHR, *Koronev and Karpenko v. Ukraine*, Application no. 17444/04, ¶ 66 (21 January 2011).

¹⁹⁶ *Ibid.*

¹⁹⁷ Michele Caianiello, *Access to and Limits on Evidence Dossiers in Civil Law Systems*, The Oxford Handbook of Criminal Process, Edited by Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser, 2019, pg. 564.

¹⁹⁸ M. Caianiello, *supra* fn. 197, pg. 575-576, referencing to the Öcalan case, where the ECtHR found a breach of the right to a fair trial because the defence was granted access to the file only a few weeks before the start of trial, and the investigations had been very complex and produced an enormous amount of evidence. See also ECtHR, *Öcalan v. Turkey*, Application no 46221/99, ¶ 30, 36, 138-149 (12 May 2005).

¹⁹⁹ ECtHR, *Dowsett v. U.K.*, Application no.39482/98, ¶ 42 (24 June 2003).

access to certain materials shall not be made by the prosecutorial or investigative authorities unilaterally, but by a judicial authority (or it should at least be subject to judicial review). In *Rowe and Davis v. UK*, the ECtHR found that, when “the prosecution itself attempts to assess the importance of concealed information to the defence and weight this against the public interest in keeping the information secret” the right to a fair trial is violated.²⁰⁰ In particular, the prosecution must lay the evidence in question before the trial judge so as to permit him/her to rule on the question of disclosure.²⁰¹ In this respect, the judge has a “duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld”.²⁰² In doing so, s/he must weigh the public interest to conceal evidence from the defence against the interests of the accused, and must afford the defence an opportunity to participate in the decision-making process to the maximum extent possible.²⁰³ Importantly, this assessment must result from a reasoned decision.²⁰⁴

When certain investigative or procedural actions are carried out, the defence can be allowed to inspect the prosecution's file even before the completion of the investigation. One such case is the arrest and pre-trial detention of the suspect pending the commencement of the trial. Due to the “dramatic impact of deprivation of liberty on the fundamental rights of the person concerned”,²⁰⁵ counsel must be given access to those *documents in the investigation file which are essential* in order to challenge effectively the lawfulness of his client's detention.²⁰⁶ Consequently, as far as pre-trial custody is concerned, the access to the case file is restricted to the evidence that is “essential” to effectively challenge the detention.

In addition to the ECtHR, the EU has developed its own set of rules on the access to the case file. Art. 7 of the EU Directive 2012/13 on the Right of Information in Criminal Proceedings regulates the “access to the materials of the case”, mirroring the ECtHR jurisprudence on the matter.²⁰⁷

4.1.2. Adequate Time

With respect to the requirement of adequate time, the majority of ECtHR's case law relates to issues concerning the amount of time for the inspection of a file, the period between the notification of charges and the holding of the hearing, or other “occurrences” after which the defence must be given some time to adjust its position, prepare a request or lodge an appeal.²⁰⁸ Such “occurrences” may include changes in the indictment,²⁰⁹ introduction of new evidence by the prosecution,²¹⁰ or a sudden and drastic change in the opinion of an expert during the trial.²¹¹

²⁰⁰ ECtHR, *Rowe and Davis v. UK*, Application no. 28901/95, ¶ 63 (16 February 2000).

²⁰¹ *Ibid.*, ¶ 66.

²⁰² ECtHR, *P.G. and J.H. v. U.K.*, Application no.44787/98, ¶ 71 (25 September 2001).

²⁰³ ECtHR, *Mirilashvili v. Russia*, Application no.6293/04, ¶ 205-206 (11 December 2008).

²⁰⁴ *Ibid.*

²⁰⁵ ECtHR, *Fodale vs Italy*, Application no. 70148/01, ¶ 42 (23 October 2006).

²⁰⁶ *Ibid.*, ¶ 41.

²⁰⁷ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0013&from=EN>. See also M. Caianiello, *supra* fn. 197, pg. 576-579.

²⁰⁸ ECtHR, *Mimoshvili v. Russia*, Application no. 20197/03, ¶ 141 (28 June 2011).

²⁰⁹ ECtHR, *Pélissier and Sassi v. France*, Application no. 25444/94, ¶ 62 (25 March 1999).

²¹⁰ ECtHR, *G.B. v. France*, Application no. 44069/98, ¶60-62 (2 January 2002).

²¹¹ *Ibid.*, ¶69-70.

For the most part, the ECtHR case law assesses the adequacy of the time in relation to issues and phases of the procedure pertaining to the same case. In other words, it does not take into consideration factors such as the overall time that defence counsels may dedicate for preparing a case in relation to their other commitments.

4.2. National Legal Framework on the Access to the Case File

The general right of the defendant to have adequate time and facilities to prepare his/her defence is enshrined in LCP, Art. 70, which specifies that this right includes the possibility to access the case file and “be familiar with any available incriminating or exculpatory evidence”, as well as communicate with a defence counsel of one’s choosing. The corresponding obligation of the prosecutor to “make available to the defendant all the incriminatory evidence that was collected during the investigation, as well as any exculpatory evidence that might be useful for the Defence” is set forth in LCP, Art. 302(5).

The LCP enshrines a “passive” disclosure process, in the sense that it does not impose an active obligation for the prosecutor to make copies of the evidence and deliver it to the defence, but rather a passive obligation to make the case file available to defence counsel for inspection. Pursuant to LCP, Art. 302, the prosecutor must notify the suspect and his/her counsel the completion of the investigation procedure. Pursuant to Art. 302(3), such notification must inform the suspect that the case file is located in the PPO premises, and the suspect and his/her counsel have the right to access it and make copies (*prepis*) of the evidence contained therein. The purpose of this disclosure is giving the opportunity to the suspect to get acquainted for the first time with the evidence against him/her collected during the investigation. This disclosure is essential for the defence in order to prepare the strategy in view of the confirmation of the indictment process and, possibly, the start of the trial.

The English version of the LCP translates the word “*prepis*” with “copy”. However, in local practice the word “*prepis*”, in this context, expresses a concept that in English better translates as “taking notes”. In other words, the defence must be allowed to access the case file but does not have the explicit right to either photocopy documents within the prosecution’s premises, or take any piece of evidence outside in order to do so. It is thus left up to the goodwill of the prosecution to provide the defence with copies of the evidence contained in the case file. This legal framework falls short of established best practices, in that it does not sufficiently guarantee substantial access to the case file to the defence, especially in complex cases with large volumes of evidence. In addition, as the Commentary on the LCP points out, the word “*prepis*” is inadequate, given all the possible types of evidence contained in the prosecutor’s file.²¹² In addition to “traditional” documents the case file may contain various types of digital evidence, such as e-mails, digital photos, videos and audio-files contained on CDs or USB sticks. The word “*prepis*”, therefore, should be given an extensive interpretation, so as to allow the defence to make copies of all kinds of evidence, regardless of its format.²¹³ The only way to make this possible would be allowing defence counsels to use the photocopiers in the prosecution premises, as well as providing copies of digital evidence upon the defence’s request.

²¹² OSCE Mission to Skopje, *Commentary on the Law on Criminal Procedure*, 2018, pg. 663.

²¹³ *Ibid.*

Paragraph two of LCP, Art. 302 – governing the notification of the closure of the investigation to the suspect – states that, prior to the completion of the investigation, the prosecutor “shall be obliged to examine the suspect”.²¹⁴ At the latest, therefore, the prosecution should invite the suspect for questioning when it notifies him/her the closure of the investigation. This provision does not state whether, prior to questioning, the suspect or his/her defence counsel shall have access to the case file. However, LCP Art. 206(1)(5), located in the general provisions and entitled “informing the defendant of his/her rights”, establishes that, before the examination of the defendant, s/he shall be informed of (...) “the right of access the case-file and go through the objects that were seized”. The questioning of a suspect towards the end of the investigation serves the purpose of giving the suspect the “last chance” to state his/her version of the facts, before the filing of the indictment. Given that the investigation is (almost) completed, the questioning of a suspect in this phase does not have an investigative purpose, but rather a defensive one. In order to ensure the substantial right of the accused to be heard, thus, the accused and his/her counsel should be given adequate time to inspect the case-file, so that the accused can make an informed decision on whether giving a statement to the prosecution or not.

4.3. Disclosure Process in SPO Cases

In all cases the SPO duly complied with the obligation to invite suspects for questioning before the closure of the investigation. Prior to that, the SPO invited both the suspects and their counsels to inspect the case files at the SPO premises. As foreseen by the law, counsels were allowed to take handwritten notes of the contents of the documents, but were forbidden to make copies of them. Given the large volume of evidence gathered in SPO cases (thousands of documents and audio-files), this method, while in accordance with existing law, does not comply with international best practice on the defence right to be acquainted with the inculpatory evidence before deciding whether to give a statement to the prosecutor.

At the end of each investigation, the SPO provided defence counsels with CDs containing copies of all the evidence that it intended to use in support of the charges with the exception of the audio-files of the intercepted conversations and their transcripts. However, it invited counsels to listen to the conversations at the SPO premises. In all cases, counsels did not avail themselves of this opportunity (see the following paragraph for more on this). Subsequently, the SPO submitted the case files containing the documentary evidence and the audio-files to the court for the purpose of confirmation of the indictment. After the indictments were confirmed the case files were transferred to the Trial Chamber pursuant to LCP, Art. 344.

At the start of the trials, the defence requested the Trial Chamber to order the SPO to provide them with copies of the audio-files containing the wiretapped conversations, give them time to listen to them, and assess their authenticity through an independent expert analysis. According to the defence, the failure of the SPO to provide them with the audio-files in question was a grave breach of the equality of arms and a violation of the rules of disclosure. The SPO opposed this

²¹⁴ LCP, Art. 302(2). Naturally, the suspect may refuse to respond in view of the principle against self-incrimination and, more broadly, as part of his/her defence strategy. The right to not respond to the prosecution's questions is expressly envisaged in LCP, Art. 206(1)(2).

request in all cases. In *Trajectory* the SPO explained that the 315 intercepted communications that the SPO intended to use as evidence in that case were submitted only to the court, in order to avoid risks of alterations or duplication of the materials, especially in view of the fact that the majority of them had never been played in public.²¹⁵ In all cases the court denied the defence request to receive copies of the wiretapped conversations. However, it made the court premises available to the defence for the purpose of listening to the conversations and, when the defence requested it, ordered the SPO to provide the defence with the transcripts of the conversations. Notably, the court did not articulate its reasoning for denying the defence request to receive copies of the wiretapped conversations.

4.4. Defence Objections in SPO Cases

4.4.1. The Lack of Audio-Video Recording Equipment in Courtroom

Pursuant to the LCP, hearings must be audio-video recorded and the record of the hearing must be connected with the automated case management information system of the court (ACCMIS).²¹⁶ In the absence of the technical conditions to do so, minutes must be taken by a stenographic reporter.²¹⁷ For reasons that were most likely due to budget constraints, however, many courtrooms have not been equipped with audio-video recording devices, and none of them with steno machines. Non-stenographic minutes taken by a minute-taker present in courtroom,²¹⁸ thus, are the standard way of recording the majority of trials in the country.

The recording of the hearings by a minute-taker present in courtroom is certainly not the most effective way of recording. With this method, the judge and the parties are obliged to dictate their speeches to the minute-taker. As a result, the immediacy and efficiency of the trial are lost. Moreover, the judge has to interrupt the parties and the witnesses while they are talking in order to give the minute-taker sufficient time to type. The problem, thus, is primarily one of inefficiency. However, an accurate trial record is also essential for the fairness of the proceedings. In complex cases with lengthy testimony, there is a risk that the transcripts prepared by a minute-taker do not adequately reflect the testimony of certain witnesses in that the testimony is often re-phrased and summarised. This does not allow a proper assessment by the court of the witness' credibility.²¹⁹

²¹⁵ Focus, *Gruenski and Janakieski refused to listen to 315 "bombs" that are evidence in Trajectory at the SPO's, but now they are requesting it from the court*, 18 December 2017, at: <https://fokus.mk/gruenski-i-janakieski-vo-sjo-ne-sakale-da-slushat-315-bombi-koi-se-dokaz-vo-traektorija-no-sega-toa-go-baraat-od-sudot/>.

²¹⁶ LCP, Art. 374(1)(5).

²¹⁷ LCP, Art. 374(3). Pursuant to subsequent paragraph (4) "[w]ithin 48 hours of the main hearing, the stenographer's record of the main hearing shall be decoded and reviewed, signed by the person that is maintaining it, the parties, the individual judge, i.e. the Presiding Judge of the Trial Chamber and annexed to the rest of the case file".

²¹⁸ The minute-taker types extensive notes on a computer.

²¹⁹ This problem was also detected in Kosovo criminal proceedings, see OSCE Mission to Kosovo, *Review of the Implementation of the New Criminal Procedure Code of Kosovo*, June 2016, pg. 34, at: <https://www.osce.org/kosovo/243976>.

Starting from 6 December 2017 in the case *Trajectory* defence counsels in SPO cases began to raise objections in relation to this method, pointing out that it violated the LCP.²²⁰ Both judges and SPO prosecutors were taken aback by this move, in that defence counsels had never objected to the non-stenographic way of recording hearings before (in both SPO and non-SPO cases). In some cases, the court postponed the hearing in order to make arrangements for equipping the courtroom with a portable video-camera. In other cases, the court overruled the defence objection. Even when the objection was overruled, however, judges ordered the recording (through one or two portable cameras) of the ensuing hearings in the case. With few exceptions,²²¹ therefore, SPO cases were all audio-video recorded. Notably, the portable cameras were not connected to the ACCMIS system and thus the minute-taker continued to be used. As a result, the majority of SPO cases were both audio-video and manually recorded.

4.4.2. The Request of Recusal of the Trial Chamber

A second issue was defence requests for the recusal of judges pursuant to LCP, Art. 33(1)(1) - i.e., the judge is a damaged party in the case - and LCP, Art. 33(2) - i.e., circumstances exist that cast doubts on the judge's impartiality. The defence request was prompted by an interview of Chief SPO Prosecutor Katica Janeva broadcasted by *Televizija 24* on 21 March 2018, where Janeva stated that some of the judges in her cases were among the persons caught in the intercepted conversations.²²² Following this interview, between the end of March 2018 and the beginning of May 2018, the defence filed motions to disqualify the trial chamber in seven cases.²²³ In all cases, the PJ suspended the hearing and submitted the motion to the President of the court, who, by law, was competent to decide on the request.²²⁴ Since the SPO refused to reveal the name of the judges in question, the defence argued that they were forced to request the recusal of all judges who would make any kind of decision in the case. Therefore, they also filed motions to disqualify the President of the court and the judges of the Appellate Court who, by law, are competent to decide on requests of recusal of the President of the court.²²⁵ In one case, the issue arrived before the Supreme Court.²²⁶ The defence requests were consistently denied. However, they caused the interruption of the hearings for hours and, in three cases, the postponement of the hearing pending the decision.

²²⁰ After *Trajectory*, the same objection was repeated in *Centar* and *Total* (7 December 2017), *Transporter* (13 December 2017), *Three-Hundred* (28 December 2017) and *Tank* (30 January 2018).

²²¹ The only cases started prior to January 2018 in which the defence did not raise objections relating to the modality of recording were *Fortress 2*, completed in first instance on 8 November 2017, and *Trust*, completed in first instance on 20 July 2018. These cases thus were not audio-video recorded.

²²² The full interview is available here: <https://www.youtube.com/watch?v=mWQn1doFMEM>.

²²³ *Toplik*: 30 March 2018; *TNT*: 5 April 2018; *Tank*: 10 April 2018; *Titanic 1*: 12 April 2018; *Transporter*: 13 April 2018; *Trajectory*: 17 April 2018; *Centar*: 19 April 2018. In two cases, *Tank* and *Titanic 3*, the defence also requested the disqualification of the SPO prosecutors acting in the case and of the Chief SPO Katica Janeva due to the fact that, as a beneficiary of the State Budget, the SPO could be a "damaged party in the case". In *Titanic 3*, an additional reason brought by the defence was the fact that Janeva had stopped the investigation against two suspects who later became witnesses in the case. In both cases, the defence motions were submitted on the hearing of 8 May 2018 and were denied by Chief SPO Janeva herself.

²²⁴ LCP, Art. 36(1).

²²⁵ LCP, Art. 36(2).

²²⁶ *TNT*, 5 April 2018.

Although Janeva's revelation in the interview was incautious, in the absence of more specific indications a sweeping statement made during an interview should not be the sole reason to file a motion for the recusal of a judge. If the intercepted conversations in the SPO possession cast doubts on the impartiality of the judges in one or more of the cases, it would have been the duty of the SPO to request the recusal of these judges pursuant to LCP, Art. 35.²²⁷ An SPO failure to do so could have amounted to a breach of the prosecutorial Code of Ethics.²²⁸ The motions of the defence, thus, appeared to be premature and motivated by dilatory purposes. In addition, it should be recalled that, on 15 September 2018, the SPO submitted a Special Report on Judicial Misconduct to the Parliament²²⁹ whereby it revealed that the interceptions in its possession indicated grave misconduct on the part of four judges, none of whom was sitting in the adjudicating panel of the above-mentioned cases.

4.5. The Pace of SPO Hearings and Defence Rights

By March 2018, almost all the 20 trials were ongoing, with two or more hearings in one case or another scheduled every day of the week. Defence counsels were vocal²³⁰ in denouncing a violation of their right to meaningfully represent their clients for two reasons: 1) many hearings were overlapping and thus, in several occasions, they were put in a position to choose which hearing to attend; 2) hearings were scheduled very close to each other. Having to be in court five days a week, they claimed that their right to have adequate time to prepare a defence was seriously curtailed.

In this respect, it bears highlighting that the majority of SPO defendants were represented by the same group of attorneys (around 12). Each of these counsels was engaged in a minimum of three to a maximum of seven cases. In addition, some of the defence counsels in SPO cases were also engaged in another high-profile case that was being tried before the Basic Court during the same period,²³¹ with hearing scheduled twice a week. This circumstance, coupled with the fact that some persons stood accused in more than one SPO case, made the agenda of the defence counsels extremely busy.

With respect to the alleged insufficient period of time between hearings, the defence attorneys' complaint related to the time between hearings of different cases. The hearings within the same case, in fact, were generally scheduled quite far apart from each other. In the reporting period, the highest number of hearings scheduled in one month was registered in *Tank* (with six hearings scheduled in April 2018), and *Titanic 1* (with six hearings scheduled in November 2018). In all the other cases, the number of hearings scheduled per month rarely exceeded three. The total average of hearings in SPO cases was one per month (per case).

²²⁷ Pursuant to LCP, Art. 35(6), the party requesting the recusal of a judge shall indicate the circumstances upon which the request is based.

²²⁸ Prosecutorial Code of Ethics, Art. 1 and 4, envisaging the duties of professionalism, independence and impartiality.

²²⁹ SPO website: <https://bit.ly/2WZ1vjN>.

²³⁰ TV station Telma, *Lawyers complain about frequent hearings*, 29 August 2018, at: <https://telma.com.mk/advokatite-se-zhalat-na-prechesti-rochishhta/>.

²³¹ The "27 April Parliament Terrorism case", relating to the storming in the Parliament on 27 April 2017 by 35 demonstrators, who are accused of terrorist endangering of the constitutional order.

The defence counsels' allegations do not appear to be grounded in light of international human rights standards. As seen in paragraph 4.1.2., the ECtHR case law relates to the time elapsing between phases of the same proceedings (e.g., the time allocated for disclosure of evidence after the investigation, or the time between the notification of charges and the holding of the hearing) but does not (and cannot) measure the adequacy of the time to prepare the defence against the overall workload of defence counsel. It is the duty of defence counsel not to take more cases that s/he can handle and/or be able to divide the work among his/her associates. Although the Defence Counsel's Code of Professional Ethics of North Macedonia appears to limit the possibility to refuse legal assistance in criminal cases to exceptional circumstances,²³² it is a widely shared principle of professional ethics that counsels should take up only the cases for which they can ensure efficient and quality representation. Pursuant to the Council of Bars and Law Societies of Europe (CCBE) Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, "[a] lawyer shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work".²³³ Similarly, the American Bar Association (ABA) has developed clear standards regarding appropriate workload, pursuant to which "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defence counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters".²³⁴

4.6. Conclusion

The major finding of this chapter relates to the legal framework and practice on the disclosure of evidence. As seen in paragraph 4.1.1., the standard set by the ECtHR in terms of pre-trial disclosure is clear: defence access to the case file after the closure of the investigation may be restricted only to preserve the fundamental rights of third parties (e.g., witnesses at risk of reprisals), or to safeguard an important public interest (e.g., national security). The assessment on the fulfilment of these conditions cannot be made by the prosecution unilaterally, but by the judge through a well-reasoned decision. In SPO cases, these standards were only partially met. The SPO not only complied with its duty to make the case file available to the defence after the closure of the investigation, it went beyond what strictly required by the law in providing defence counsels with 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 have not been

²³² Pursuant to Defence Counsel's Code of Professional Ethics, Art. 6, counsel may refuse his/her services in criminal cases "only in particularly exceptional circumstances, both of objective and subjective nature, such as illness of the lawyer, defendant's failure to pay the legal fees in previous cases and the like", see website of the Bar Association of North Macedonia: <https://www.mba.org.mk/i/index.php/mk/akti/kodeks-etika>.

²³³ CCBE, *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*, Principle 3.1.3., pg. 17 at: https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf. See also Michael G. Karnavas, *Lawyer's Ethics*, OSCE Mission to Skopje, 2016, pg. 71, at: <https://www.osce.org/mission-to-skopje/315081?download=true>.

²³⁴ ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-1.8, at: https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

adequately explained. Notably, the SPO did not object to the possibility of disclosing the contents of the conversations to the defence, in that it invited counsels to listen to the audio-files at its premises as part of the disclosure process. What the SPO refused to do was to give the defence copies of the audio-files, alleging that this would prevent the defence from altering or copying the conversations. This justification fails to explain why these audio-files are different from the rest of the evidence in the cases. In addition, the court did not justify the reasons why it upheld the SPO's request. Finally, the chapter addressed the complaints of defence counsels regarding the lack of adequate time to prepare the defence, due to the numerous hearings scheduled during the week. The majority of SPO defendants were represented by the same group of attorneys, each of whom was engaged in a minimum of three to a maximum of seven cases. Since hearings within the same case were generally scheduled quite far apart from each other, the defence attorneys' complaint related to the time between hearings of different cases. These allegations do not appear to be grounded in light of international human rights standards. Pursuant to the ECtHR jurisprudence, the adequate time to prepare the defence is measured between phases of the same proceedings and not against the overall workload of defence counsel. It is a widely shared principle of professional ethics that counsels should take up only the cases for which they can ensure efficient and quality representation.

5. The Right to be Tried by an Independent and Impartial Court

5.1. The Principle of Irremovability of Judges

The right to be tried by an independent and impartial court is envisaged by ECHR, Art.6. Judicial independence requires a general institutional framework and guarantees that provide for its effective implementation. Irremovability of judges is one of these guarantees. As such, it is recognised by the most authoritative texts at the European level, such as the Recommendation (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges,²³⁵ Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges,²³⁶ and the European Charter on the Statute of Judges (1998).²³⁷ Judicial irremovability is also recognised in international instruments such as the UN Basic Principles on the Independence of the Judiciary (1985).²³⁸

As a corollary of judicial independence, the principle of irremovability mandates that judges have guaranteed tenure until a mandatory retirement age or the expiry of their term of office. The European Charter on the Statute of Judges affirms that judicial irremovability extends to the appointment or assignment of a judge to a different office or location without his/her consent (i.e. a judge may not be transferred to a different post or switched to other functions without his/her consent).²³⁹

The irremovability rule, however, may be derogated due to objective reasons connected to the best functioning of judicial offices, a public interest, or disciplinary sanctions. In its Report on Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary, the European Network of Councils for the Judiciary (ENCJ) explains that there are acceptable exceptions to the general rule of irremovability. For example, when disciplinary proceedings establish improper/unlawful conduct by a judge in a specific post, or in the presence of objective lawful circumstances that raise questions about the impartiality in the exercise of the judicial function in the office (e.g., personal relationships or kinship with lawyers or other judges who deal with the same cases).²⁴⁰ According to the ENCJ, “judicial irremovability should be understood and applied in accordance with the public interest or the public service of justice, the aims of professional evaluation, and the human resource policy regarding the judiciary”.²⁴¹ In any case, it is imperative that “the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external

²³⁵ Committee of Ministers of the Council of Europe, Principle 1.3 of Recommendation (94)(12), 1994.

²³⁶ CCJE, Opinion No 1, 2001, ¶ 57-60.

²³⁷ European Charter on the Statute of Judges, 1998, ¶ 3.4.

²³⁸ UN Basic Principles on the Independence of the Judiciary (1985), ¶12.

²³⁹ European Charter on the Statute of Judges, 1998, ¶ 3.4.

²⁴⁰ ENCJ, *Development of Minimal Judicial Standards III – Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary*, 2012-2013, pg.19-20.

²⁴¹ Ibid., pg.20.

influences and whose decisions are subject to challenge or review". Judges, therefore, may be transferred only in the presence of specific circumstances determined by law or otherwise established in a general and abstract manner,²⁴² in order to prevent the authorities from transferring judges "as a means of threatening judicial autonomy and decision-making independence."²⁴³

Another important guarantee of judicial independence is the process of cases allocation among the different judges of the court. According to the Council of Europe's plan of action on strengthening judicial impartiality, the allocation of cases within a court should follow objective pre-established criteria. Cases should not be withdrawn from a particular judge without valid reasons and decisions on the withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure.²⁴⁴ More broadly, regulations must be in place in order to ensure that presidents and superior courts respect the independence of individual judges. To this end, the powers of court presidents and superior courts should be clearly defined in a way that protects the decision-making competence of the individual judge.²⁴⁵

5.2. National Legal Framework on the Irremovability of Judges

The principle of irremovability of judges is enshrined in Art. 99 of the Constitution of North Macedonia, pursuant to which "a judge is elected without limitation of duration of the term of office" and "a judge cannot be assigned to another post without his/her consent".²⁴⁶ This principle is repeated in Art. 39(3) and (6) of the Law on Courts.²⁴⁷ The same law empowers the President of the court to issue an annual organizational chart whereby s/he appoints judges to the various departments of the court, based on the opinion of the general session of the Supreme Court.²⁴⁸ Importantly, the President must take into consideration the specialization of the appointed judges in the relevant field of law (civil, criminal, administrative, commercial law).²⁴⁹ Judges who are appointed through the annual organizational chart may appeal the President's decision to the Supreme Court.²⁵⁰ Pursuant to Art. 113 of the Courts' Rules of Procedure, the President may "amend" or "integrate" the annual organizational chart in the course of the year when there is a change in the conditions under which it was initially adopted, in order to ensure the efficiency of court proceedings.

Only exceptionally, Court presidents may transfer judges to a different department in the course of the year in order to meet workload requirements, and only for a period of one

²⁴² Ibid., pg.19.

²⁴³ Ibid., pg.20.

²⁴⁴ Council of Europe, *Plan of action on strengthening judicial impartiality*, 2016, pg. 23, at: <https://rm.coe.int/1680700285>.

²⁴⁵ Ibid.

²⁴⁶ Constitution of the Republic of North Macedonia, Art. 99 (1)(2).

²⁴⁷ Law on Courts, Art. 39(3) reads "a judge cannot be transferred from one court to another against his/her will"; Law on Courts, Art. 39(6) reads: "a judge cannot be transferred from to a different court department against his/her will".

²⁴⁸ Law on Courts, Art. 39(4); Courts' Rules of Procedure, Art. 112.

²⁴⁹ Ibid.

²⁵⁰ Law on Courts, Art. 39(11).

year.²⁵¹ The decision of the President shall be in writing and well-reasoned.²⁵² The transfer of judges to a different court is equally exceptional, temporarily limited, and must be done by the Judicial Council for reasons listed in the law (replacing a judge, workload requirements, efficiency reasons, complexity of the cases).²⁵³ The decision of the Judicial Council may be appealed before the same Council.²⁵⁴

With respect to the allocation of cases, the relevant provision is Art. 7 of the Law on Courts, pursuant to which cases are distributed among judges electronically through the Automated Computer System for the Management of Court Cases (ACCMIS) “in the absence of any influence on the manner of distribution by the president of the court, the judge or the court administration”.

5.3. Reshuffle of Judges in SPO Cases

On 20 December 2017, the newly appointed President of the Basic Court Skopje I²⁵⁵ issued the annual organizational chart of the court (effective as of 1st January 2018) pursuant to Law on Courts, Art. 39(4). With the annual chart, the Department of Organized Crime and Corruption (DOCC) of the Basic Court - whose judges are competent for SPO cases - was substantially reorganized. Some judges who previously belonged to the DOCC were transferred to the Misdemeanors Department of the Basic Court (including the former court's president²⁵⁶); other judges who previously belonged to the Misdemeanors Departments and the General Crimes Departments, were moved to the DOCC. The Basic Court did not release public and official information about the 2018 reshuffle.²⁵⁷ The new annual chart affected all SPO cases except for two.²⁵⁸ Although, at that time, only eight SPO cases were ongoing, the remaining ten cases had already been assigned to a trial chamber prior to January 2018 and, in many instances, the first hearing had been scheduled. In other words, on 1 January 2018, the judges assigned to 18 SPO cases changed and, in eight of these cases, the change occurred in the midst of the trial. In the absence of any explanation to the public, some media speculated that the changes were politically motivated. In particular, these media alleged that the newly appointed President replaced the judges who were critical towards the SPO (and sympathized with the opposition party VMRO-

²⁵¹ Law on Courts, Art. 39(8). This decision must be based on the favourable opinion of the general session of the Supreme Court.

²⁵² Ibid.

²⁵³ Law on Courts, Art. 39(9)(10).

²⁵⁴ Law on Courts, Art. 39(12).

²⁵⁵ The current President of the Basic Court Skopje 1, Ivan Djolev, was sworn in on 10 November 2017.

²⁵⁶ Dejan B., *EXCLUSIVE: Vladimir Panchovski moves to the Misdemeanors Department!*, Sudstvo, 15 November 2017, at: <https://bit.ly/2WRuJBe>.

²⁵⁷ The website of the court contains only the 2014 and 2015 organizational charts (<https://bit.ly/2KnBZDx>). However, the President's reshuffle received large coverage by both specialised and non-specialised media outlets, which will be referred to in this paragraph. See Meta.mk., *Djolev introduces a new organizational chart, new judges will be assigned to some SPO cases*, at: <http://meta.mk/dholev-donol-nov-rasporod-vo-krivichen-del-od-predmetite-na-sjo-ke-dobijat-novi-sudii/>.

²⁵⁸ *Fortress 2*, completed in November 2017, before the new organizational chart came into force, and *Trust*.

DPMNE some of whose highest officials are indicted in SPO cases) with more favourable judges, closer to the government in power.²⁵⁹

Notably, the 2018 reshuffle came after two previous internal reorganizations of the Basic Court occurred in February and March 2017, by decision of two consecutive acting court Presidents.²⁶⁰ These previous reshuffles gave rise to even stronger criticism among the public in that, at the time, the reorganizations of the court were perceived as being aimed at hampering the work of the SPO.²⁶¹ In both occasions, the Basic Court issued a press release clarifying that the acting Presidents had acted within the powers conferred to them by the law and that the new organizational charts had the sole purpose of ensuring the efficiency of the court. Specifically, the press release issued on 21 February 2017 clarified that “the reallocation of judges within the departments of the court is a prerogative of the President or the acting President, and thus the allegation that the reshuffle was made in order to favour or punish certain judges is baseless.”²⁶² Similarly, the press release issued on 29 March 2017, clarified that the reorganization was due to objective reasons, such as addressing the backlog of cases, preventing the expiration of the procedural deadlines envisaged by the law or alleviating the workload of certain judges.²⁶³ Some of the judges involved in the 2017 reshuffles appealed to the Supreme Court pursuant to the Law on Courts, Art. 39(11). Whereas complaints arising from the February 2017 re-shuffle were mostly accepted by the Supreme Court,²⁶⁴ those arising from the March 2017 reshuffle were

²⁵⁹ S. K. Delevska, *Djolev transferred to the misdemeanor department of the Basic Court all judges for whom he had information and evidence that they were obedient to the previous government and who blocked the work of the Special Public Prosecutor's Office*, Sakam Da Kazam, 20 December 2017, at: <https://sdk.mk/index.php/makedonija/nov-rasposed-vo-krivichniot-sud-mihajlova-petrovska-ke-sudat-prekrshotsi-zaedno-panchevski/>; Dejan B., *EXCLUSIVE: Vladimir Panchevski moves to the Misdemeanors Department!*, Sudstvo, 15 November 2017, at: <https://bit.ly/2WRuJBe>; Nova TV, *A new organizational chart of judges in the Criminal Court*, 20 December 2017, at: <https://novatv.mk/nov-rasposed-na-sudii-vo-krivichniot-sud/>.

²⁶⁰ After the expiration of the mandate of Vladimir Panchevski, President of the Basic Court Skopje 1 from 2012 to 2016, two presidents *at interim* were appointed, pending the nomination of the new President by the Judicial Council: Tatjana Mihajlova (from 5 December 2016 to 7 March 2017) and Stojance Ribarev (from 13 March 2017 to 25 October 2017).

²⁶¹ Maja Ivanovska, *Sasa-Nikolovska: Judge Mihajlova's decision disrespects the standards on the independence of the judiciary!*, Civilmedia.mk, 21 February 2017, at: <https://civilmedia.mk/zaza-nikolovska-odlukata-na-sudikata-michalova-ukazhuva-na-npotchituva-na-standardit-na-nzavisnoto-sudstvo/?print=print>; Focus, *Cleaning the Criminal Court: SPO cases must not fall into the hands of "disobedient" judges*, 21 February 2017, at: <https://fokus.mk/chistka-vo-krivichniot-sud-predmetite-na-sjo-ne-smeat-da-padnat-v-ratse-kaj-neposlusni-sudii>; S. K. Delevska, *Counter-bomb in the judiciary - judges who are obstructing SPO are promoted, cleanup in the Criminal Court*, Sakam Da Kazam, 21 February 2017, at: <https://sdk.mk/index.php/makedonija/kontrabomba-vo-sudstvoto-unapredeni-sudiiite-shto-go-kochat-sjo-chistka-vo-krivichniot-sud>; Svedok, *Ribarev made a scandalous reorganization of judges in the unit of Panchevski and Mihajlova*, 29 March 2017, at: <http://svedok.org.mk/mk/record.php?id=789>; MKD.mk, *The new reshuffle of judges is again controversial*, 28 March 2017, at: <https://www.mkd.mk/makedonija/noviot-godishen-rasposed-na-sudiiite-povtorno-kontroverzen>; S. K. Delevska, *At least 17 judges dissatisfied with the new organizational chart filed objections to the Supreme Court*, Sakam Da Kazam, 5 April 2017, at: <https://sdk.mk/index.php/makedonija/najmalku-17-sudii-nezadovolni-od-noviot-rasposed-vo-krivichniot-sud-podnesoa-prigovori-vrhovniot-sud>.

²⁶² The press release is quoted in its entirety in Akademik.mk, *The criminal court issued a statement regarding the annual work schedule of the court*, 21 February 2017, <https://www.akademik.mk/krivichniot-sud-objavi-soopshtenie-vo-vrskaso-godishniot-rasposed-za-rabota-na-sudot/>.

²⁶³ The press release is quoted in its entirety in Svedok, *Ribarev made a scandalous reorganization of judges in the unit of Panchevski and Mihajlova*, 29 March 2017, at: <http://svedok.org.mk/mk/record.php?id=789>.

²⁶⁴ One media article speculated that this must be due to the fact that the acting President issued the organizational chart without requesting the opinion of the Supreme Court as prescribed by law, see Svedok, *The Supreme Court rejects Mihajlova's organizational chart: it is not an ordinary organizational chart*, 3 March 2017, at: <http://svedok.org.mk/mk/record.php?id=738>.

mostly rejected.²⁶⁵ No public information is available regarding judges' appeals of the third reshuffle of 2018, nor their reasons to appeal.

5.4. Changes to the Composition of the Trial Chamber in the Course of the Trial

Besides the change of the organizational chart of the Basic Court, during the course of 2018 the trial chamber changed in four SPO cases for other reasons. In *Transporter*, one of the lay judges was replaced on 28 September 2018 due to the expiration of her mandate; in *Target-Fortress*, the second judge was replaced on 13 September 2018 for reasons that were not made clear to the public.²⁶⁶ In *Trevnik*, one of the lay judges was replaced on 10 September 2018 for unspecified reasons. In *Titanic 3* the trial chamber changed twice. On 11 May 2018, the PJ informed the parties that, due to a decision of the President of the court, the second judge in the case had changed. On 12 October 2018, the parties were informed that the second judge in the case was changed again due to health reasons and two lay judges were also replaced.

When the trial chamber changes the trial must start from the beginning pursuant to LCP, Art. 371. This occurred in all required cases.²⁶⁷ The re-start of these trials did not cause excessive delays due to the fact that, in nearly all cases, the parties agreed to re-admit the opening statements and/or witness statements into the trial record, rather than repeating the entire procedure (i.e., re-delivering the opening statements and/or summoning witnesses again and have them re-testify).

5.5. Conclusion

This chapter revisited the process of appointment of judges by the court's President in SPO cases. As seen, Art. 39 of the Law on Courts empowers the President of the court to issue an organizational chart every year, whereby, based on the opinion of the Supreme Court, s/he appoints judges to the different departments taking into account their area of specialization. Between December 2016 and January 2018, the organizational chart of the Basic Court Skopje I changed three times, by decisions of three different court presidents. This gave rise to speculation in the media that the internal reorganization of the court had the purpose of either damaging or favoring the SPO, in compliance with a political agenda. As such, it prompted a negative public perception about the independence and impartiality of the judiciary, despite being fully within the Presidents' prerogatives.

An expert inspection of the functioning of the automated case management system (ACCMIS) of the court commissioned by the Ministry of Justice in October 2017 found that "the procedure for adopting the Annual organizational chart of the activities of the court was grossly violated. From 25.12.2015 until the time of the inspection, the Annual organizational

²⁶⁵ S. K. Delevska, *At least 17 judges dissatisfied with the new organizational chart filed objections to the Supreme Court*, Sakam Da Kazam, 5 April 2017, at: <https://sdlk.mk/index.php/makedonija/najmalku-17-sudii-nezadovolni-od-noviot-raspored-vo-krivichniot-sud-podnesoa-prigovori-vrhovniot-sud>.

²⁶⁶ However, in all likelihood this was because that judge was engaged in several other SPO and non-SPO cases.

²⁶⁷ In *Target-Fortress*, *Trevnik* and *Trajectory* the trial had not properly started before the change of the composition of the panel. Therefore, there was no need to formalize a decision pursuant to LCP, Art. 371.

chart of the activities of the court for 2016 and 2017 was changed very often and the procedure for its adoption was not respected. It is evident that certain cases were intentionally transferred from one judge to another.²⁶⁸

The ease with which judges can be transferred within the different departments of the court is concerning and not in line with international best practices/minimum standards on the irremovability of judges and case allocation. Art. 39 of the Law on Courts should not be used as a legal basis for reorganizing the posts of the judges every year at the will of the President (and even less of an acting President).²⁶⁹ In keeping with the principle of irremovability of judges enshrined in the Constitution and European best practices, the law should list the “specific circumstances” under which the President of the court may transfer judges among the departments with the annual organizational chart, as it does for the provision regulating the transfer of judges in the course of the year (see *supra*, paragraph 5.2). The sole function of the annual organizational chart issued by the President should be responding to effective needs relating to the workload and work distribution among judges. Importantly, the annual organizational chart, with the reasons justifying any changes therein, should always be publicly accessible. In this respect, this report observes that the Basic Court Skopje I did not release official information regarding the reasons behind the reshuffles and its website does not provide updated information regarding the organizational chart currently applied.

²⁶⁸ Ministry of Justice, *Report on the inspection of the functioning of the ACCMIS and the implementation of the provisions of the Court's Rules of Procedure in the Basic Court Skopje I, Appellate Court Skopje and Supreme Court*, 7 December 2017, pg.1, at: <http://justice.gov.mk/Upload/Documents/%D0%90%D0%9A%D0%9C%D0%98%D0%A1%20%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98.pdf>.

²⁶⁹ Although the law does not expressly forbid acting presidents to issue the annual organizational chart, it is advisable that they refrain from doing so due to their temporary role.

CONCLUSION

This report has analyzed selected issues arising in 20 SPO cases between November 2016 and November 2018. After the introduction, the second chapter analyzed the law and practice regarding the presence of the defendants at trial. Although the absence of defendants is not excessively high (14%), it is the first cause of postponements of the hearings. The current legal framework does not provide adequate tools to the court in circumstances where defendants willfully decide not to attend their trial. Where a defendant who was regularly notified of the hearing fails to appear in court, the law allows for the possibility to postpone the hearing indefinitely, as long as the defendant submits a justification through his/her defence counsel. Moreover, in the reporting period, three defendants fled the country and escaped justice, including the former Prime Minister Nikola Gruesvki, who is indicted in five cases and was convicted in the last instance in one. By law, a considerable amount of time may elapse between the issuance of a final conviction and the moment in which a convicted person shall report himself/herself to prison (or s/he is apprehended by the authorities) during which convicts may escape.

The third chapter of this report analyzed issues of efficiency and expeditiousness. The report notes a considerable improvement in the pace of trials between 2017 (postponement rate of 56,5% for 10 ongoing cases) and 2018 (postponement rate of 29% for 19 ongoing cases).²⁷⁰ In the reporting period, the postponement rate of SPO cases was 33% (1/3). The chapter, however, highlighted that, in all cases except one, the deadlines envisaged by the LCP for the commencement of the trial after the confirmation of the indictment²⁷¹ were not respected. The average time period between the confirmation of the indictments and the beginning of the trials in SPO cases exceeded 60 days. Moreover, the report examined other causes of delays in SPO trials, which impact on the overall efficiency of the proceedings. Such causes can be grouped into two main categories. First is the reluctance of judges to play an active role in case management. Specifically, the failure to address and solve pre-trial procedural issues (e.g., objections regarding the admissibility of certain evidence or complaints relating to the disclosure process) before the start of the trial, prompted lengthy discussions over these issues during the main hearings, delaying the commencement of the evidentiary phase. Second, the selection of witnesses and material evidence to introduce at trial was insufficiently rigorous. During the reporting period, the SPO introduced as evidence nearly 2000 audio-files, over 4000 documents and approximately 350 witnesses. The general finding is that, in many cases, the SPO did not adequately explain the relevance of the evidence in question and its connection to the indictment, nor the relation among the different types of evidence introduced (i.e., interceptions, documents, witnesses). In the absence of such explanation, OSCE monitors' impression was that the parties conceived the evidentiary phase of proceedings as the moment in which they would present "everything they have" to the court, without a thorough assessment of the linkages between pieces of evidence and facts to prove. At the same time, judges did not always exercise a thorough control over the

²⁷⁰ In 2016, only two cases were ongoing with one hearing each. The hearings were not postponed.

²⁷¹ Pursuant to LCP, Art. 345(2), "the PJ shall schedule the main hearing within 30 days from the date of the receipt of the indictment. For charges of organized crime the deadline is 60 days".

admissibility of the evidence at trial, but tended to allow the introduction of all the evidence requested by the parties without an appraisal of its relevance.

The fourth chapter of this report addressed some of the objections raised by the defence in SPO cases. The major finding relates to the national legal framework on disclosure of evidence after the closure of the investigation, which does not sufficiently guarantee substantial access to the case file to the defence. Specifically, the current legal framework leaves it up to the goodwill of the prosecution to provide the defence with copies of the evidence contained in the case file. The SPO not only complied with its duty to make the case file available to the defence after the closure of the investigation but went beyond what is strictly required by the law by providing defence counsels with 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 trial and, thus, the SPO's decision to withhold evidence was subject to judicial review, the court did not provide a well-reasoned decision for denying the defence request. In addition, the chapter addressed the complaints of defence counsels regarding the lack of adequate time to prepare the defence, due to the numerous hearings scheduled during the week.

The fifth chapter revisited the process of appointment of judges by the Court President in SPO cases. Between December 2016 and January 2018, the organizational chart of the Basic Court Skopje I changed three times, by decisions of three different court presidents (two of whom were presidents *ad interim*). This gave rise to speculation in the media that the internal reorganization of the court had the purpose of either damaging or favoring the SPO, in compliance with a political agenda. As such, it prompted a negative public perception about the independence and impartiality of the judiciary in the country. The ease with which judges can be transferred within the different departments of the court is concerning and not in line with international best practices/minimum standards on the irremovability of judges and cases allocation. Art. 39 of the Law on Courts should not be used as a legal basis for reorganizing the posts of the judges every year at the will of the Court President. The sole function of the annual organizational chart issued by the President should be responding to effective needs relating to the workload and work distribution among judges. Importantly, the annual organizational chart, with the reasons justifying any changes therein, should always be publicly accessible. In this respect, this report observed that the Basic Court Skopje I did not release official information regarding the reasons behind the reshuffles and its website does not provide updated information regarding the organizational chart currently applied.

RECOMMENDATIONS

To the SPO

Given the complexity of SPO 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 SPO should:

- **Ensure timely and broad disclosure** of both inculpatory and exculpatory evidence to the defence, providing defence counsels with copies of all kinds of 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 it seeks to introduce (i.e., its connection to the indictment), as well as the relation among the different types of evidence introduced (i.e., interceptions, documents, witnesses);

To Defense Counsels

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

To the Basic Court Skopje 1

- **Adjourn 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 the 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, having regard to the parliament's agenda and order of business, so as to avoid overlaps between hearings and parliamentary sessions;
- **Respect the deadlines envisaged by the LCP when scheduling the main hearing after the confirmation of the indictments**;
- **Take an active role in case management**:
 - Judges should make use of the trial management tool envisaged by 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 substantial access to the case file to counsels.
- The President of the court should issue the **annual organizational chart for the sole purpose of responding to effective needs relating to the workload and work distribution** among judges. The reasons justifying any changes in the annual organizational chart from one year to the other, should always be publicly accessible on the website of the court.

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;
 - it would be useful to introduce a provision in the LCP which empowers judges to order an independent medical examination whenever there is a doubt about the defendant's fitness to attend trial.
- **Align the legal framework on trials *in absentia* with international standards:** when a defendant unequivocally waives his/her right to be present at trial (for example, by fleeing), s/he should not be entitled to a re-trial in the future;
- **Amend the legal framework on the enforcement of sentences in order to minimize risks of escape after conviction:** the law should ensure that the time elapsing between the issuance of a final conviction and the apprehension of the convicted person by the authorities is not excessive, so as to minimize risks of escape;
- **Follow the example of Bosnia and Herzegovina, introducing the mechanism of "status conferences" in the LCP,** in order to lay out the progress of the case and set a timeline for the evidentiary phase during trial;
- In keeping with the principle of irremovability of judges enshrined in the Constitution and the European best practices, **the law should list the "specific circumstances" under which the President of the court may transfer judges among the departments with the annual organizational chart.**

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